EXHIBIT NO. _____

DOCKET NO.: 971663-WS -- PETITION OF FLORIDA CITIES WATER COMPANY FOR LIMITED PROCEEDING TO RECOVER ENVIRONMENTAL LITIGATION COSTS FOR NORTH AND SOUTH FT. MYERS DIVISIONS IN LEE COUNTY AND BAREFOOT BAY DIVISION IN BREVARD COUNTY.

DESCRIPTION: Staff's List of Documents for Official Recognition

PROFFERING PARTY: STAFF

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663-WS EXHIBIT NO. 1
COMPANY/ WITNESS: Staff
DATE: 8-892-98

DOCUMENT NO. DATE
14741-98 12/31/98
FPSC - COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Cities Water Company for limited proceeding to recover environmental litigation costs for North and South Ft. Myers Divisions in Lee County and Barefoot Bay Division in Brevard County.	DOCKET NO. 971663-WS FILED:

COMMISSION STAFF'S REQUEST FOR ADMINISTRATIVE NOTICE

The Commission staff files this Request for Administrative Notice of the following Commission orders and federal rules:

Florida Cities Water Company (FCWC) - Barefoot Bay

1. Order No. PSC-97-0516-FOF-WS, issued May 8, 1997, in Docket No. 951258-WS (rate case);

2. Order No. PSC-96-1147-FOF-WS, issued June 12, 1996, in Docket No. 951258-WS (rate case);

3. Order No. PSC-95-0039-FOF-WU, issued January 1, 1995, in Docket No. 940687-WU (rate case);

4. Order No. PSC-92-0563-FOF-WS, issued June 24, 1992, in Docket No. 910976-WS (rate case);

FCWC - Golden Gate

5. Order No. PSC-95-0720-FOF-WS, issued June 15, 1995, in Docket No. 941108-WS (rate case);

FCWC - North Ft. Myers

6. Order No. PSC-96-1133-FOF-SU, issued September 10, 1996, in Docket No. 950387-SU (rate case);

7. Order No. PSC-95-1360-FOF-SU, issued November 2, 1995, in Docket No. 950387-SU (rate case);

8. Order No. PSC-92-0594-FOF-SU, issued July 1, 1992, in Docket No. 910756-SU (rate case);

9. Order No. 15587, issued January 17, 1986, in Docket No. 840420-SU (rate case);

FCWC - South Fort Myers

10. Order No. PSC-92-0266-FOF-SU, issued April 18, 1992, in Docket No. 910477-SU;

11. Order No. PSC-93-1288-FOF-SU, issued September 7, 1993, in Docket No. 920808-SU;

FCWC - North & South Ft Myers

12. Order No. 16768, issued October 24, 1986, in Docket No. 851007-WU (rate case);

Florida Water Services, Inc.

13. Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495 (rate case);

Federal Rules

14. Title 40, Section 124.13, U.S. Code of Federal Regulations, 1986;

15. Title 40, Section 124.74, U.S. Code of Federal Regulations, 1986.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Cities Water Company for limited proceeding to recover environmental litigation costs for North and South Ft. Myers Divisions in Lee County and Barefoot Bay Division in Brevard County.	DOCKET NO. 971663-WS FILED:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Commission Staff's Request for Administrative Notice has been furnished to **B. Kenneth Gatlin, Esquire**, 3301 Thomasville Rd., Suite 300, Tallahassee, Florida, 32312, and **Harold McLean, Esquire**, Office of Public Counsel, c/o The Florida Legislature, 111 W. Madison Street, Room 812, Tallahassee, Florida, 32399-1400, by U.S. Mail, on this 7th day of August, 1998.

ROSANNE GERVASI, SENIOR ATTORNEY

FLORIDA PUBLIC SERVICE COMMISSION
Gerald L. Gunter Building
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
Telephone No.: (850) 413-6199
Facsimile No.: (850) 413-6250

I:\971663-N.RG

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of FLORIDA CITIES WATER COMPANY, seeking recovery of environmental litigation costs in a Limited Proceeding for its NORTH and SOUTH FT. MYERS DIVISION in Lee County and BAREFOOT BAY DIVISION in Brevard County, Florida	)	Docket No. 971663-WS

REQUEST FOR ADMINISTRATIVE NOTICE

Florida Cities Water Company (FCWC) files this its Request for Administrative Notice of the following Commission Orders:

1. Order No. 20162, Docket No. 870832-TL and Docket No. 880069, issued October 13, 1988;

2. Order No. PSC-93-0301-FOF-WS, Docket No. 911188-WS, issued February 25, 1993;

3. Order No. PSC-93-0423-FOF-WS, Docket No. 920199-WS, issued March 22, 1993;

4. Order No. PSC-93-1070-FOF-WS, Docket No. 920655-WS, issued July 23, 1993;

5. Order No. PSC-97-0618-FOF-WS, Docket No. 960451-WS, issued May 30, 1997;

6. Order No. PSC-97-1047-FOF-EI, Docket No. 970007-EI, issued September 5, 1997; and

7. Order No. PSC-97-1547-FOF-WS, Docket No. 970521-WS, issued December 10, 1997.

Dated this 20th day of July, 1998.

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663WS EXHIBIT NO. 2
COMPANY/ WITNESS: FCWC
DATE: 8-12-98

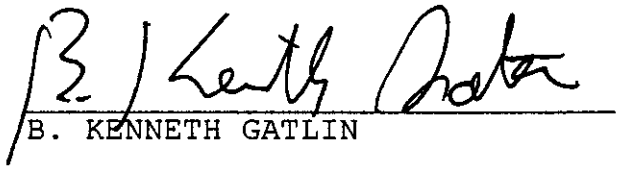
Respectfully submitted,

B. KENNETH GATLIN
Fla. Bar #0027966
Gatlin, Schiefelbein & Cowdery
3301 Thomasville Road, Suite 300
Tallahassee, Florida 32312
(850) 385-9996

Attorneys for
FLORIDA CITIES WATER COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Rosanne Gervasi, Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850 and to Harold McLean, Esq., Office of Public Counsel, c/o The Florida Legislature, 111 W. Madison Street, Room 812, Tallahassee, FL 32399-1400, on this 20th day of July, 1998.



B. KENNETH GATLIN

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of	)	**Docket No. 971663-WS**
FLORIDA CITIES WATER COMPANY	)	
Barefoot Bay and Ft. Myers Divisions,	)	
for Limited Proceeding to Recover	)	
Environmental Litigation Costs	)	
for North and South Ft. Myers Divisions	)	
in Lee County and Barefoot Bay	)	
Division in Brevard County, Florida	)	

AFFIDAVIT

STATE OF: FLORIDA

COUNTY OF: SARASOTA

BEFORE ME, the undersigned authority, duly authorized by law to administer oaths and to take acknowledgments, on this day personally appeared Michael E. Murphy, who, after being duly sworn on oath, deposes and says:

1. That the Affiant has personal knowledge of the matters set forth herein;

2. That on July 20, 1998, a copy of the Notice attached hereto was sent by regular U.S. Mail to all customers of record within the service areas of Florida Cities Water Company, Barefoot Bay and North & South Ft. Myers Divisions.

FURTHER AFFIANT SAYETH NOT.

Michael E. Murphy V.P.

Michael E. Murphy
Vice President & Chief Financial Officer
Florida Cities Water Company

SWORN TO and SUBSCRIBED BEFORE me on this 21st day of July, 1998.

ANITA J. CHUBBUCK
State of Florida
My Comm. Exp. Aug. 18, 1998
Comm. # CC 401596

☒ PERSONALLY KNOWN BY ME
☐ PRODUCED I.D. _____

NOTARY PUBLIC
State of Florida at large

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663-WS EXHIBIT NO 3
COMPANY/ WITNESS: FCWC
DATE: 8-12-98

AFFIDAV2.WK4

July 16, 1998

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of FLORIDA CITIES WATER COMPANY, seeking recovery of environmental litigation costs in a Limited Proceeding for its NORTH and SOUTH FT. MYERS DIVISIONS in Lee County and BAREFOOT BAY DIVISION in Brevard County, Florida	Docket No. 971663-WS

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the Florida Public Service Commission will hold a hearing regarding the petition of Florida Cities Water Company, (Petitioner) seeking approval of recovery of environmental litigation costs in rates for its North and South Ft. Myers Divisions in Lee County and Barefoot Bay Division in Brevard County, Florida, at the following time and place:

9:30 a.m., Tuesday, August 12, 1998
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 148, Betty Easley Conference Center
Tallahassee, Florida 32399-0850

Thursday and Friday, August 13 and 14, 1998, have also been reserved for continuation of the hearing. The starting time of the next day's session will be announced at the conclusion of the prior day. The hearing may be adjourned early if all testimony is concluded.

PURPOSE AND PROCEDURE

The purpose of this hearing is to consider the Petition of Florida Cities Water Company for increased water and wastewater rates, and any motions or other matters that may be pending at the time of the hearing. The Commission may rule on any such motions from the bench or may take the matters under advisement.

At hearing, all parties shall be given the opportunity to present testimony and other evidence on the issues identified by the parties in the

prehearing order. All witnesses shall be subject to cross-examination at the conclusion of their testimony.

Any person requiring some accommodation at this hearing, because of a physical impairment should call the Division of Records and Reporting at (850) 413-6770 at least five calendar days prior to the hearing. Any person who is hearing or speech impaired, please contact the Florida Public Service Commission using the Florida Relay Service, which can be reached at 1-800-955-8771 (TDD).

JURISDICTION

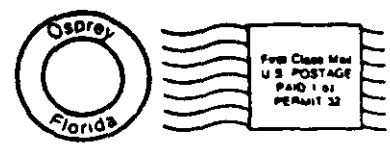
The Florida Public Service Commission is vested with jurisdiction over the subject matter by the provisions of Chapter 367, Florida Statutes. This hearing will be governed by said Chapter as well as Chapter 120, Florida Statutes and Chapters 25-9, 25-22 and 25-30, Florida Administrative Code.

APPLICABLE STATUTES AND RULES

Sections 367.081, 367.0816, 367.101, Florida Statutes, and any other relevant sections of Chapter 367, Florida Statutes, are applicable to this proceeding, as well as Chapter 120, Florida Statutes, and Rules 25-9, 25-22 and 25-30, Florida Administrative Code.

FLORIDA CITIES WATER COMPANY
North & South Ft. Myers Divisions
7401 College Parkway
Fort Myers, Florida 33907
Tel: 941/936-0247

Barefoot Bay Division
931 Barefoot Blvd., Suite 2
Barefoot Bay, Florida 32976
Tel: 561/664-5916



FIRST CLASS PRESORTED

United States Postal Service

Statement of Mailing With Permit Imprints First-Class Mail

(For Priority Mail, Use Form 3605-R)

FPWC Surcharge Case #971663-WS
– Myers & Barefoot Bay
PSC Notice of Hearing (in Tallahassee)

MAILER: Complete all items by typewriter, pen, or indelible pencil. Use Form 3606 if you need a receipt.

Mailer's Information

Post Office of Mailing: Bypass 71	Date: 7/20/98	Processing Category: ☐ Letters (DMM C050) ☐ Flats (DMM C050) ☐ Automation-Compatible Flats (DMM C820) ☐ Irregular Parcels (DMM C050)	USPS Authorized Mailing ID Code(s): Mailed 7/20/98
Permit No.: 32 / Federal Agency Cost Code	Mailing Statement Seq. No.		
Permit Holder's Name & Address (Include ZIP Code): Avatar 2140 Bay Bath Sarasota 34231 / Telephone Number: 921-5209	Receipt No.: 4483	No. Sacks / No. Trays / No. Pallets / No. Other	
CTAS Cust. Ref. ID	Weight of a Single Piece: __.____ pounds		
	Total Pieces in Mailing: 22148	Total Weight of Mailing	Barcoded Flats Sacking Based On (DMM M823): ☐ 125 pcs. ☐ 15 lbs.
Name & Address of Individual or Organization for Which Mailing Is Prepared *(If other than the permit holder)*	Name and Address of Mailing Agent *(If other than the permit holder)*		Check All That Apply: ☐ Centralized Postage Payment ☐ Plant loaded to ☐ BMAU Entry at ☐ Orig. ☐ Dest. A / O ZIP ____ ☐ Orig. ☐ Dest SCF 3D ZIP ____ ☐ Orig. ☐ Dest. ADC ____

Postage Computation

- For mailings of **automation-compatible letter-size** pieces *(see DMM C810)*, other than cards, go to **Part A** on the reverse of this form.
- For mailings of **non-automation-compatible letter-size** pieces *(see DMM C050)*, other than cards, weighing .6875 lb. *(11 ounces)* **or less**, go to **Part B** on the reverse of this form.
- For mailings of **non-letter-size** pieces *(see DMM C050)*, other than cards, or of **automation-compatible flats** *(see DMM C050)*, weighing .6875 lb. *(11 ounces)* **or less**, go to **Part C** on the reverse of this form.
- For mailings of postal cards and postcards *(see DMM E100)*, go to **Part D** on the reverse of this form.

Postage *(From Reverse Side)* →

Part A	$ 6364.49
Part B	$
Part C	$
Part D	$

☐ Additional Postage Payment *(State reasons)* ☐ Special Service *(Specify)*

No. Pieces | Rate/Fee Per Pc. $.____ = $

Total Postage → $ 6364.49

Certification

*The signature of a mailer certifies that it will be liable for and agrees to pay, subject to appeals prescribed by postal laws and regulations, any revenue deficiencies assessed on this mailing. *(If this form is signed by an agent, the agent certifies that it is authorized to sign this statement, that the certification binds the agent and the mailer, and both the mailer and the agent will be liable for and agree to pay any deficiencies.)*

The submission of a false, fictitious, or fraudulent statement may result in imprisonment of up to 5 years and a fine of up to $10,000 (18 USC 1001). In addition, a civil penalty of up to $5,000 and an additional assessment of twice the amount falsely claimed may be imposed (31 USC 3802).

I hereby certify that all information furnished on this form is accurate and truthful, that this mailing meets all applicable CASS/MASS standards for address and barcode accuracy, and that the material presented qualifies for the rates of postage claimed.

*Signature of Permit Holder or Agent *(Both principal and agent are liable for any postage deficiency incurred)*: C. Holmes Bal# 1404.81 — Telephone Number: 921-5209

USPS Use Only

Single-Piece Weight: __.____ pounds		Are the figures at left adjusted from mailer's entries? ☐ Yes ☐ No	
Total Pieces	Total Weight	If "Yes," Reason	
Total Postage			
Check One: ☐ Verification Not Scheduled ☐ Presort Verification Performed as Scheduled	Date Mailer Notified	Contact	By *(Initials)*
I CERTIFY that this mailing has been inspected concerning: (1) eligibility for the rate of postage claimed; (2) proper preparation *(and presort where required)*; (3) proper completion of the statement of mailing; and (4) payment of the required annual fee.			Round Stamp *(Required)*
Signature of Weigher		Time AM PM	

Financial Document — Forward to Finance Office

Form 3600-R — First-Class Other Than Priority Mail — Permit Imprint

Postage Computation

A * Automation-Compatible Letter (DMM C810)

Presort / Automation Discounts	Net Rate	Count (Pcs)	Charge
Barcoded (5-Digit)		x _____ pcs. = $	
Barcoded (3-Digit)		x _____ pcs. = $	
ZIP+4 Presort		x _____ pcs. = $	
Nonpresorted ZIP+4		x _____ pcs. = $	
Carrier Route		x _____ pcs. = $	
Presorted First-Class	.279	x 17631 pcs. = $	4919.05
Single-Piece Rate	.32	x 4517 pcs. = $	1445.44

Total — Part A *(Carry to front of form)* $ 6364.49

B Non–Automation-Compatible Letter .6875 lb. *(11 oz.)* or less

Presort / Automation Discounts	Net Rate	Count (Pcs)	Charge
Carrier Route		x _____ pcs. = $	
Presorted First-Class		x _____ pcs. = $	
Single-Piece Rate		x _____ pcs. = $	
Nonstandard Surcharge *(If Applicable)* Presort First-Class and Carrier Route	.05	x _____ pcs. = $	
Single-Piece Rate	.11	x _____ pcs. = $	

Total — Part B *(Carry to front of form)* $ _____

C Check One: ☐ Automation-Compatible Flat (DMM C050) ☐ Other Nonletter — .6875 lb. *(11 oz.)* or less

ZIP+4 Barcoded * (3/5-Digit)		x _____ pcs. = $	
ZIP+4 Barcoded * (Nonpresorted)		x _____ pcs. = $	
Carrier Route		x _____ pcs. = $	
Presorted First-Class		x _____ pcs. = $	
Single-Piece Rate		x _____ pcs. = $	
Nonstandard Surcharge *(If Applicable)* 3/5-Digit ZIP+4 Barcoded, Presorted First-Class, and Carrier Route	.05	x _____ pcs. = $	
Nonpresorted ZIP+4 Barcoded and Single-Piece Rate	.11	x _____ pcs. = $	

* Available only for Automation-Compatible Flats (DMM C820)

Total — Part C *(Carry to front of form)* $ _____

D Postal Cards and Postcards

ZIP+4 Barcoded * (5-Digit)	.163	x _____ pcs. = $	
ZIP+4 Barcoded * (3-Digit)	.170	x _____ pcs. = $	
ZIP+4 Barcoded * (Nonpresorted)	.186	x _____ pcs. = $	
ZIP+4 Presort *	.173	x _____ pcs. = $	
Nonpresorted ZIP+4 *	.189	x _____ pcs. = $	
Carrier Route	.160	x _____ pcs. = $	
Presorted First-Class	.179	x _____ pcs. = $	
Single-Piece Rate	.200	x _____ pcs. = $	
Nonstandard Surcharge *(If Applicable)* Presorted First-Class and Carrier Route	.05	x _____ pcs. = $	
Single-Piece Rate	.11	x _____ pcs. = $	

* Available only for Automation-Compatible Cards (DMM C820)

Total — Part D *(Carry to front of form)* $ _____

Florida Cities Water Company
Docket No._____
Rate Application for Recovery
of Legal Expenses
Exhibits____(GSA-1 thru GSA-24)
Gerald S. Allen

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663-WS EXHIBIT NO. 4
COMPANY/ WITNESS: Allen
DATE: 8-12-98

FLORIDA CITIES WATER COMPANY

RATE APPLICATION FOR RECOVERY OF LEGAL EXPENSES

EXHIBITS _____ (GSA-1 THRU GSA-24) OF

GERALD S. ALLEN

Exhibit List
Testimony of Gerald S. Allen
Florida Cities Water Company
Rate Application for Recovery of Legal Expenses

1. Professional Resume: Gerald S. Allen - (GSA-1).

2. Complaint: United States v. Florida Cities Water Company (FCWC), U.S. District Court, Middle District of Florida, Case No. 93-281-CIV-FTM-21, 10/1/93 - (GSA-2).

3. FCWC's Answer to Complaint: United States v. FCWC, U.S. District Court, Middle District of Florida, Case No. 93-281-CIV-FTM-21, 11/22/93 - (GSA-3).

4. Letter: Daniel S. Jacobs, Trial Attorney, U.S. Dept. of Justice (USDOJ), to Lee A. DeHihns, Esq., Alston & Bird, Counsel for FCWC, offering to settle litigation for $5,000,000, 12/9/92 - (GSA-4).

5. Memorandum: Gerald S. Allen to Files memorializing summary of meeting between FCWC and USDOJ/U.S. Environmental Protection Agency (USEPA), 12/11/92 - (GSA-5).

6. Letter: Lee A. DeHihns, Esq., Alston & Bird, FCWC Counsel, to Robert B. Gordon, Avatar Utilities Inc. outlining settlement issues, 12/18/92 - (GSA-6).

7. Amended Complaint: United States v. FCWC & Avatar Holdings Inc., U.S. District Court, Case No. 93-281-CIV-FTM-21, 3/30/95 - (GSA-7).

8. Letter: FCWC (French) to Florida Department of Environmental Regulation[1] (DeGrove) transmitting study report pertaining to discharges to Sweetwater Ck., 6/19/89 - (GSA-8).

9. Agreement: Professional Engineering Services, FCWC & Dyer, Riddle, Mills & Precourt, Inc. for providing services in connection with the design of a new wastewater treatment plant (WWTP) at Carrollwood, 4/11/89 - (GSA-9).

10. Administrative Order: USEPA No. 90-100(wKS) pertaining to WWTP at Carrollwood, 9/27/90 - (GSA-10).

11. Consent Agreement and Order Assessing Administrative Penalties: USEPA Docket No. 90-542, pertaining to WWTP at Carrollwood, 4/19/91 - (GSA-11).

12. Agreement: Hillsborough County/FCWC providing for the connection of the Carrollwood

[1] Now Florida Department of Environmental Protection (FDEP)

wastewater system to the County system and wastewater treatment services, 6/5/91 - (GSA-12).

13. Orders: Florida Public Service Commission (Docket No. 951258-WS), Nos.:

13A. PSC-96-1147-FOF-WS issued 9/12/96;

13B. PSC-97-0223-FOF-WS issued 2/25/97; and

13C. PSC-97-0516-FOF-WS issued 5/5/97 (GSA-13).

14. Consent Order: FDEP and FCWC, OGC Case No. 87-0153, pertaining to Barefoot Bay WWTP, 10/13/88 - (GSA-14).

15. Letter: FDEP (Garfein) to FCWC (Overton) pertaining to the National Pollution Discharge Elimination System (NPDES) permit for Barefoot Bay, 6/6/95 - (GSA-15).

16. Permit: Florida Domestic Wastewater Facility Permit for Barefoot Bay WWTP (Facility I.D. No. FL0042293), 9/5/97 - (GSA-16).

17. Letter: USEPA (Childress) to FCWC (French) acknowledging receipt of NPDES renewal application for Barefoot Bay WWTP, 3/23/90 - (GSA-17).

18. Letter: FCWC (French) to USEPA transmitting application for renewal of NPDES Permit for Barefoot Bay WWTP, 6/8/90 - (GSA-18).

19. Administrative Order: USEPA No. 90-106 pertaining to Barefoot Bay WWTP, 9/26/90 - (GSA-19).

20. Memorandum: Gerald S. Allen to Files memorializing show cause hearing with USEPA pertaining to Barefoot Bay, 8/14/91 - (GSA-20).

21. Letter: FCWC (Bradtmiller) to USEPA (Herwig) pertaining to Barefoot Bay WWTP, 8/23/91 - (GSA-21).

22. Permit: USEPA NPDES Permit No. FL004293 for Barefoot WWTP, 9/16/91 - (GSA-22).

23. Letter, Administrative Complaint & Consent Agreement & Order Assessing Administrative Penalties: USEPA (Cunningham) to FCWC (Bradtmiller) pertaining to Barefoot Bay WWTP, Docket No. CWA-IV-91-538, 9/25/91 - (GSA-23).

24. Judgement & Memorandum Order: U.S. District Court, Middle District of Florida, Case No. 93-281-Civ-FTM-21, 8/20/96 - (GSA-24).

Exhibit_____(GSA-1)

PROFESSIONAL RESUME
GERALD S. ALLEN
September 1997

BUSINESS ADDRESS: 4837 Swift Road, Suite 100, Sarasota, FL 34231

PROFESSIONAL POSITIONS:

Current: President & CEO, Avatar Utilities Inc. and all subsidiaries, including Florida Cities Water Company, Poinciana Utilities Inc., Barefoot Bay Propane Gas Company and Avatar Utility Services, Inc.

Past: Executive Vice President & COO; Executive Vice President, Engineering; and Vice President, Engineering, Avatar Utilities Inc.

Sr. Vice President, Engineering & Water Resources, Pennsylvania Gas & Water Company, Wilkes Barre, Pennsylvania

General Manager, Asst. General Manager, Chief Engineer, and Staff Engineer, Little Rock Municipal Water Works, Little Rock, Arkansas

Vice President and Partner, Hodges, Vines, Fox, Allen & Associates (Consulting Engineers & Planners), Little Rock, Arkansas

Regional Engineer, Cast Iron Pipe Research Association, Oak Brook, Illinois

EDUCATION:

Received Bachelor of Science Degree in Civil Engineering, University of Arkansas (1962).

PROFESSIONAL REGISTRATION & CERTIFICATION:

Professional Engineer - Arkansas, Florida, Indiana, Michigan, Missouri, Ohio and Pennsylvania

Diplomat (DEE) - American Academy of Environmental Engineers

PROFESSIONAL ORGANIZATIONS:

Honorary Member - American Water Works Association
Member - Water Environment Federation
National Society of Professional Engineers
American Academy of Environmental Engineers
Florida Engineering Society

GOVERNMENTAL AFFAIRS: Former Member - Arkansas Board of Health

AO 440 (Rev. 5/85) Summons in a Civil Action ●

Exhibit____(GSA-2)

United States District Court

MIDDLE DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

SUMMONS IN A CIVIL ACTION

V.

CASE NUMBER: 93-281-CIV-FtM-21

FLORIDA CITIES WATER COMPANY, INC.

TO: (Name and Address of Defendant)

Robert B. Gordon
Florida Cities Water Company, Inc.
4837 Swift Road
Sarasota, Florida 34321

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

Daniel S. Jacobs, Esq.
Department of Justice
P.O. Box 7611
Washington D.C. 20044

RECEIVED
U.S. MARSHAL
93 OCT -4 PM 1:54
MIDDLE DIST. FLORIDA
FT. MYERS

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

DAVID L. EDWARDS
CLERK

OCT - 1 1993
DATE

BY DEPUTY CLERK Janet Morrison

NOTICE OF OPPORTUNITY TO CONSENT TO THE EXERCISE OF CIVIL JURISDICTION BY A MAGISTRATE JUDGE AND APPEAL OPTION

In accordance with the provisions of 28 U.S.C. §636(c) and Fed.R.Civ.P. 73, you are hereby notified that the United States magistrate judges of this district court, in addition to their other duties, may, upon the consent of all the parties in a civil case, conduct any or all proceedings in the case, including a jury or non-jury trial, and order the entry of a final judgment.

You should be aware that your decision to consent, or not to consent, to the referral of your case to a United States magistrate judge for disposition is entirely voluntary and should be indicated by counsel endorsing the attached consent form for the plaintiff(s) and defendant(s). If the form is executed by all counsel for the parties, it should be communicated solely to the clerk of the district court. ONLY if all the parties to the case consent to the reference to a magistrate judge will either the judge or magistrate judge to whom the case has been assigned be informed of your decision.

Your opportunity to have your case disposed of by a magistrate judge is subject to the calendar requirements of the court. Accordingly, the district judge to whom your case is assigned must approve the reference of the case to a magistrate judge for disposition.

In accordance with 28 U.S.C. §636(c)(3) and Fed.R.Civ.P. 73(c), an appeal from a judgment entered by a magistrate judge may be taken directly to the United States court of appeals for this judicial circuit in the same manner as an appeal from any other judgment of a district court. Alternatively, upon consent of all parties, an appeal from a judgment entered by a magistrate judge may be taken directly to a district judge in accordance with 28 U.S.C. §636(c)(4) and Fed.R.Civ.P. 73(d). Cases in which an appeal is taken to a district judge may be reviewed by the United States court of appeals for this circuit only by way of petition for leave to appeal.

Copies of the consent form are available from the clerk of the court.

UNITED STATES DISTRICT COURT

_____ District of _____

_____
Plaintiff

V.

CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE JUDGE AND ORDER OF REFERENCE

_____ Case Number:
Defendant

CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE JUDGE

In accordance with the provisions of 28 U.S.C. 636(c) and Fed.R.Civ.P. 73, the parties in this case hereby voluntarily waive their rights to proceed before a judge of the United States district court and consent to have a United States magistrate judge conduct any and all further proceedings in the case, including the trial, and order the entry of a final judgment.

Signatures	Date
_____	_____
_____	_____
_____	_____
_____	_____

Unless otherwise indicated below, any appeal shall be taken to the United States court of appeals for this judicial court, in accordance with 28 U.S.C. 636(c) and Fed.R.Civ.P. 73(c).

ELECTION OF APPEAL TO DISTRICT JUDGE

(DO NOT EXECUTE THIS PORTION OF THE FORM IF THE PARTIES DESIRE THAT THE APPEAL LIE DIRECTLY TO THE COURT OF APPEALS.)

The parties in this case further consent, by signing below, to take any appeal to a judge of the district court, in accordance with 28 U.S.C. 636(c)(4) and Fed.R.Civ.P. 73(d).

_____	_____
_____	_____
_____	_____
_____	_____

ORDER OF REFERENCE

IT IS HEREBY ORDERED that this case be referred to the Honorable _____, United States Magistrate Judge, for all further proceedings and the entry of judgment in accordance with 28 U.S.C. 636(c), Fed.R.Civ.P. 73 and the foregoing consent of the parties.

_____ _____
Date United States District Judge

NOTE: RETURN THIS FORM TO THE CLERK OF THE COURT ONLY IF IF ALL PARTIES HAVE CONSENTED ON THIS FORM TO PROCEED BEFORE A MAGISTRATE JUDGE.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY, INC., Defendant.	)	CIVIL ACTION NO. 93-381-CIV-FTM-21

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FT MYERS

COMPLAINT

The United States of America, by authority of the Attorney General, acting at the request of the Administrator of the U.S. Environmental Protection Agency ("EPA"), alleges as follows:

NATURE OF ACTION

1. This is a civil action brought pursuant to section 309(b) of the Clean Water Act ("the Act"), 33 U.S.C. § 1319(b), for civil penalties for violations of section 301 of the Act, 33 U.S.C. § 1311, and of the conditions and limitations of a National Pollutant Discharge Elimination System ("NPDES") permit issued by EPA pursuant to section 402 of the Act, 33 U.S.C. § 1342. Notice of the commencement of the action has been provided to the State of Florida.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1345, and 1355, and section 309(b) of the Act, 33 U.S.C. § 1319(b).

3. Venue is proper in the Middle District of Florida pursuant to 28 U.S.C. §§ 1391(b) and (c) and 1392, and section 309(b) of the Act, 33 U.S.C. § 1319(b).

THE DEFENDANT

4. The defendant, Florida Cities Water Company, Inc., is a Florida corporation that resides and does business in Florida.

5. The defendant is a "person" within the meaning of section 502(5) of the Act, 33 U.S.C. § 1362(5).

GENERAL ALLEGATIONS

6. At all times relevant herein, the defendant has owned and operated a privately owned wastewater treatment plant known as the Waterway Estates Wastewater Treatment Plant, which is located in North Fort Myers, Lee County, Florida.

7. At all times relevant herein, the defendant has collected wastewater from residential and commercial sources, treated that wastewater at the Waterway Estates Wastewater Treatment Plant, and then has discharged that wastewater either directly or indirectly into the Caloosahatchee River.

8. At all times relevant herein, the defendant has caused the "discharge of pollutants" within the meaning of section 502(12) of the Act, 33 U.S.C. § 1362(12), from the Waterway Estates Wastewater Treatment Plant through a "point source" within the meaning of section 502(14) of the Act, 33 U.S.C. § 1362(14), into the Caloosahatchee River, a "navigable

water" within the meaning of section 502(7) of the Act, 33 U.S.C. § 1362(7).

9. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person except as in compliance with certain sections of the Act.

10. Subject to certain terms and conditions, the defendant was authorized under NPDES Permit Number FL0030325 ("Permit") to discharge pollutants from the Waterway Estates Wastewater Treatment Plant into the Caloosahatchee River during the periods on or about September 24, 1981 to January 8, 1987 and November 1, 1989 to September 30, 1994.

11. During the period on or about January 9, 1987 to October 31, 1989, the defendant was not authorized to discharge pollutants from the Waterway Estates Wastewater Treatment Plant into the Caloosahatchee River.

12. The Permit, as reissued on September 24, 1981, authorized the discharge of pollutants from the Waterway Estates Wastewater Treatment Plant into the Caloosahatchee River only via "outfall 001," which at that time referred to a point in a tributary canal leading to the River.

13. The Permit, as reissued on September 29, 1989, authorizes the discharge of pollutants from the Waterway Estates Wastewater Treatment Plant into the Caloosahatchee River only via "outfall 001," which at that time referred to a point in the Caloosahatchee River itself.

14. The Permit, as reissued on September 29, 1989, imposes a monthly average limitation on the amount of Total Nitrogen in the discharge from the Waterway Estates Wastewater Treatment Plant.

15. The Permit, as reissued on September 29 1989, contains a biomonitoring program under which the wastewater discharge from the Waterway Estates Treatment Plant must not exceed prescribed toxicity parameters.

16. Subsection 309(d) of the Act, 33 U.S.C. § 1319(d), provides, in part, that any person who violates, inter alia, section 301 of the Act, 33 U.S.C. § 1311, including any permit condition or limitation implementing that section, or violates any condition or limitation in a NPDES permit issued under Section 402 of the Act, 33 U.S.C. § 1342, shall be subject to a civil penalty not to exceed $25,000 per day for each such violation.

FIRST CLAIM FOR RELIEF
(Discharging Without a Permit)

17. Paragraphs 1 throughout 16 are realleged and incorporated herein by reference as if fully set forth below.

18. On each day during the period on or about October 1, 1988 to October 31, 1989, the defendant discharged pollutants from the Waterway Estates Wastewater Treatment Plant into the Caloosahatchee River without a NPDES permit.

19. Each day of discharge by the defendant without a NPDES permit constitutes a separate violation of section 301 of the Act, 33 U.S.C. § 1311.

SECOND CLAIM FOR RELIEF
(Discharging at an Unpermitted Location)

20. Paragraphs 1 throughout 16 are realleged and incorporated herein by reference as if fully set forth below.

21. On each day during the period on or about November 1, 1989 to July 14, 1991, the defendant discharged pollutants from the Waterway Estates Treatment Plant into a tributary canal leading to the Caloosahatchee River.

22. The tributary canal was not a permitted discharge location during the period referenced in paragraph 21 herein.

23. Each day of discharge by the defendant at an unpermitted location constitutes a separate violation of a permit condition or limitation implementing section 301 of the Act, 33 U.S.C. § 1311, in a permit issued pursuant to section 402 of the Act, 33 U.S.C. § 1342.

THIRD CLAIM FOR RELIEF
(NPDES Effluent Violations)

24. Paragraphs 1 throughout 16 are realleged and incorporated herein by reference as if fully set forth below.

25. During each month during the period on or about July 1991 to March 1992, the defendant discharged pollutants in excess of the Total Nitrogen limitation in the Permit.

26. On at least three occasions (February 1992, April 1992, and June 1992), the defendant discharged effluent in excess of the toxicity limitation in the Permit.

27. Each day of discharge by the defendant in excess of an effluent limitation in the Permit constitutes a separate

violation of a permit condition or limitation implementing section 301 of the Act, 33 U.S.C. § 1311, in a permit issued pursuant to section 402 of the Act, 33 U.S.C. § 1342.

RELIEF

28. Pursuant to section 309(b) and (d) of the Act, 33 U.S.C. §§ 1319(b) and (d), the defendant is liable for civil penalties up to $25,000 per day for each violation of the Act, including up to $25,000 per day in each month in which a monthly average was violated.

WHEREFORE, Plaintiff, the United States of America, respectfully requests that:

1. The defendant be ordered to pay a civil penalty up to $25,000 per day for each violation of the Act;
2. This Court grant such other relief as it deems just and appropriate.

Respectfully submitted,

~~MYLES E. FLINT~~ Lois J. Schiffer
Acting Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

DANIEL S. JACOBS
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 514-4076

DOUGLAS N. FRAZIER
United States Attorney
Middle District of Florida

By: Marc Cauley

MICHAEL A. CAULEY
Assistant United States Attorney
Middle District of Florida
500 Zack Street, Suite 400
Tampa, Florida 33602

OF COUNSEL:

Gwendolen G. Eason
Assistant Regional Counsel
U.S. Environmental Protection
Agency, Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365

Exhibit_____(GSA-3)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

FLORIDA CITIES WATER COMPANY

Defendant.

CIVIL ACTION NO.:
93-281-CIV-FM-21

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ANSWER

Defendant, Florida Cities Water Company, ("FCWC"), through undersigned counsel, files this Answer to Plaintiff's Complaint in the above-captioned action and states:

NATURE OF ACTION

1. This is a civil action brought pursuant to section 309(b) of the Clean Water Act ("the Act"), 33 U.S.C. § 1319(b), for civil penalties for violations of section 301 of the Act, 33 U.S.C. § 1311, and of the conditions and limitations of a National Pollutant Discharge Elimination System ("NPDES") permit issued by EPA pursuant to section 402 of the

Act, 33 U.S.C. § 1342. Notice of the commencement of the action has been provided to the State of Florida.

ANSWER: These allegations are conclusions of law requiring no response. To the extent a response is required, the allegations are denied except to the extent borne out by the authorities referenced, which are the best evidence of their contents. FCWC lacks knowledge or information sufficient to form a belief regarding whether notice of commencement of this action has been given to the State of Florida.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1345, and 1355 and section 309(b) of the Act, 33 U.S.C. § 1319(b).

ANSWER: FCWC neither admits nor denies that this Court has subject matter jurisdiction, in that this represents a conclusion of law requiring no response.

3. Venue is proper in the Middle District of Florida pursuant to 28 U.S.C. §§ 1391(b) and (c) and 1392, and section 309(b) of the Act, 33 U.S.C. § 1319(b).

ANSWER: FCWC neither admits nor denies that venue is proper in this district, in that this represents a conclusion of law requiring no response.

THE DEFENDANT

4. The defendant, Florida Cities Water Company, Inc., is a Florida corporation that resides and does business in Florida.

ANSWER: FCWC admits these allegations of the complaint.

5. The defendant is a "person" within the meaning of section 502(5) of the Act, 33 U.S.C. § 1362(5).

ANSWER: This allegation is a conclusion of law requiring no response.

GENERAL ALLEGATIONS

6. At all times relevant herein, the defendant has owned and operated a privately owned wastewater treatment plant known as the

Waterway Estates Wastewater Treatment Plant, which is located in North Fort Myers, Lee County, Florida.

ANSWER: FCWC is without sufficient information and knowledge to form a belief as to the truth of the statement "[a]t all times relevant herein." FCWC admits that it owns and operates a privately owned wastewater treatment plant known as The Waterway Estates Wastewater Treatment Plant, which is located in North Fort Myers, Lee County, Florida.

7. At all times relevant herein, the defendant has collected wastewater from residential and commercial sources, treated that wastewater at the Waterway Estates Wastewater Treatment Plant, and then has discharged that wastewater either directly or indirectly into the Caloosahatchee River.

ANSWER: FCWC is without sufficient information and knowledge to form a belief as to the truth of the statement "[a]t all times relevant herein." FCWC admits that it collects wastewater from residential and commercial sources, treats wastewater at the Waterway Estates Wastewater

Treatment Plant, and discharges treated wastewater into the Caloosahatchee River.

8. At all times relevant herein, the defendant has caused the "discharge of pollutants" within the meaning of section 502(12) of the Act, 33 U.S.C. § 1362(12), from the Waterway Estates Wastewater Treatment Plant through a "point source" within the meaning of section 502(14) of the Act, 33 U.S.C. § 1362(14), into the Caloosahatchee River, a "navigable water" within the meaning of section 502(7) of the Act, 33 U.S.C. § 1362(7).

ANSWER: FCWC is without sufficient information and knowledge to form a belief as to the truth of the statement "[a]t all times relevant herein." The other allegations are conclusions of law requiring no response.

9. Section 301(a) of the Act, 33 U.S.C. § 1311(a) prohibits the discharge of pollutants by any person except as in compliance with certain sections of the Act.

ANSWER: FCWC neither admits nor denies these allegations which are conclusions of law requiring no response.

10. Subject to certain terms and conditions, the defendant was authorized under NPDES Permit Number FL0030325 ("Permit") to discharge pollutants from the Waterway Estates Wastewater Treatment Plant into the Caloosahatchee River during the periods on or about September 24, 1981 to January 8, 1987 and November 1, 1989 to September 30, 1994.

ANSWER: FCWC admits it was issued National Pollutant Discharge Elimination System ("NPDES") Permit No. FL0030325 ("Permit"). The other allegations are conclusions of law requiring no response. To the extent a response is required, the allegations are denied except to the extent borne out by the Permit, which speaks for itself and is the best evidence of its contents.

11. During the period on or about January 9, 1987 to October 31, 1989, the defendant was not authorized to discharge pollutants from the Waterway Estates Wastewater Treatment Plant into the Caloosahatchee River.

ANSWER: These allegations are conclusions of law requiring no response. To the extent a response is required, the allegations are denied.

12. The Permit, as reissued on September 24, 1981, authorized the discharge of pollutants from the Waterway Estates Wastewater Treatment Plant into the Caloosahatchee River only via "outfall 001," which at that time referred to a point in a tributary canal leading to the River.

ANSWER: FCWC admits the Permit was reissued on September 24, 1981. The other allegations are conclusions of law requiring no response. To the extent a response is required, the allegations are denied except to the extent borne out by the Permit, which speaks for itself and is the best evidence of its contents.

13. The Permit, as reissued on September 29, 1989, authorizes the discharge of pollutants from the Waterway Estates Wastewater Treatment Plant into the Caloosahatchee River only via "outfall 001," which at that time referred to a point in the Caloosahatchee River itself.

ANSWER: FCWC admits the Permit on September 29, 1989. The other allegations are conclusions of law requiring no response. To the extent a response is required, the allegations are denied except to the extent borne out by the Permit, which speaks for itself and is the best evidence of its contents.

14. The Permit, as reissued on September 29, 1989, imposes a monthly average limitation on the amount of Total Nitrogen in the discharge from the Waterway Estates Wastewater Treatment Plant.

ANSWER: These allegations are conclusions of law requiring no response. The Permit speaks for itself and is the best evidence of its contents.

15. The Permit, as reissued on September 29, 1989, contains a biomonitoring program under which the wastewater discharge from the Waterway Estates Treatment Plant must not exceed prescribed toxicity parameters.

ANSWER: These allegations are conclusions of law requiring no response. The Permit speaks for itself and is the best evidence of its contents.

16. Subsection 309(d) of the Act, 33 U.S.C. § 1319(d), provides, in part, that any person who violates, inter alia, section 301 of the Act, 33 U.S.C. § 1311, including any Permit condition or limitation implementing that section, or violates any condition or limitation in a NPDES Permit issued under Section 402 of the Act, 33 U.S.C. § 1342, shall be subject to a civil penalty not to exceed $25,000 per day for each such violation.

ANSWER: These allegations are conclusions of law requiring no response.

First Claim for Relief
(Discharging Without a Permit)

17. Paragraphs 1 throughout 16 are realleged and incorporated herein by reference as if fully set forth below.

ANSWER: FCWC hereby incorporates its responses to Paragraphs 1 through 16 of the complaint.

18. On each day during the period on or about October 1, 1988 to October 31, 1989, the defendant discharged pollutants from the

Waterway Estates Wastewater Treatment Plant into the Caloosahatchee River without a NPDES Permit.

ANSWER: FCWC admits it discharged pollutants from the Waterway Estates Wastewater Treatment Plant into the Caloosahatchee River during the period on or about October 1, 1988 to October 31, 1989. The remaining allegations are conclusions of law requiring no response.

19. Each day of discharge by the defendant without a NPDES Permit constitutes a separate violation of section 301 of the Act, 33 U.S.C. § 1311.

ANSWER: These allegations are conclusions of law requiring no response.

Second Claim for Relief
(Discharging at an Unpermitted Location)

20. Paragraphs 1 throughout 16 are realleged and incorporated herein by reference as if fully set forth below.

ANSWER: FCWC hereby incorporates its responses to Paragraphs 1 through 16 of the complaint.

21. On each day during the period on or about November 1, 1989 to July 14, 1991, the defendant discharged pollutants from the Waterway Estates Treatment Plant into a tributary canal leading to the Caloosahatchee River.

ANSWER: FCWC admits that during the period on or about November 1, 1989, to July 14, 1991, it discharged pollutants from the Waterway Estates Treatment Plant into the Caloosahatchee River. Any remaining allegations are denied.

22. The tributary canal was not a permitted discharge location during the period referenced in paragraph 21 herein.

ANSWER: FCWC denies these allegations.

23. Each day of discharge by the defendant at an unpermitted location constitutes a separate violation of a permit condition or limitation implementing section 301 of the Act, 33 U.S.C. § 1311, in a permit issued pursuant to section 402 of the Act, 33 U.S.C. § 1342.

ANSWER: These allegations are conclusions of law requiring no response.

Third Claim for Relief
(NPDES Effluent Violations)

24. Paragraphs 1 throughout 16 are realleged and incorporated herein by reference as if fully set forth below.

ANSWER: FCWC hereby incorporates its responses to paragraphs 1 through 16 of the complaint.

25. During each month during the period on or about July 1991 to March 1992, the defendant discharged pollutants in excess of the Total Nitrogen limitation in the Permit.

ANSWER: FCWC denies that during July, August, and September 1991, pollutant levels in effluent discharged by FCWC were in excess of the applicable Total Nitrogen limitation. The remaining allegations are conclusions of law requiring no response.

26. On at least three occasions (February 1992, April 1992, and June 1992), the defendant discharged effluent in excess of the toxicity limitation in the Permit.

ANSWER: On three occasions (February 1992, April 1992, and June 1992) FCWC reported measurements for toxicity that were in excess of the numerical values specified in the Permit. To the extent any remaining allegations are conclusions of law, no response is required.

27. Each day of discharge by the defendant in excess of an effluent limitation in the Permit constitutes a separate violation of a permit condition or limitation implementing section 301 of the Act, 33 U.S.C. § 1311, in a permit issued pursuant to section 402 of the Act, 33 U.S.C. § 1342.

ANSWER: These allegations are conclusions of law requiring no response.

Relief

28. Pursuant to section 309(b) and (d) of the Act, 33 U.S.C. §§ 1319(b) and (d), the defendant is liable for civil penalties up to

$25,000 per day for each violation of the Act, including up to $25,000 per day in each month in which a monthly average was violated.

ANSWER: These allegations are conclusions of law requiring no response.

AFFIRMATIVE DEFENSES

Pursuant to Fed. R. Civ. P. 12(b), FCWC, having specifically answered each and every allegation, further answers:

First Defense

Plaintiff's Complaint fails to state a claim upon which relief can be granted.

Second Defense

Plaintiff's claims are barred because FCWC's application for renewal of the Permit was improperly denied by EPA in 1986.

Third Defense

Plaintiff's claims are barred because FCWC has paid penalties assessed by the state of Florida under comparable Florida law.

Fourth Defense

Plaintiff's claims are barred by the doctrine of impossibility.

Fifth Defense

Plaintiff's claims are barred by the doctrine of estoppel.

Sixth Defense

Plaintiff's claims are barred by the doctrine of waiver.

Seventh Defense

Plaintiff's claims are barred by the applicable statute of limitations.

Eighth Defense

Plaintiff's claims are barred by laches.

Ninth Defense

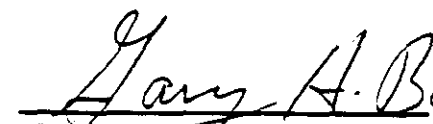
State and local governments unnecessarily delayed issuing permits and enacting zoning changes necessary before FCWC could initiate

construction of an advanced water treatment facility or relocate an outfall, thereby precluding FCWC's ability to meet compliance schedules.

Tenth Defense

FCWC has at all times acted in a proper and reasonable manner, exercised due care, acted in good faith to fulfill all requirements of the Federal Clean Water Act, the NPDES Permits, applicable Administrative Orders and applicable state laws.

Respectfully submitted,



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Of Counsel:

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Florida Cities Water Company
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Miami, FL 33152-3000
Phone: 305-442-7000
Fax: 305-448-9927

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer of Florida Cities Water Company to the United States of America's Complaint has this 22nd day of November 1993 been served upon the following persons by United States first class mail, properly addressed and postage prepaid.

Lois J. Schiffer, Esq.
Acting Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044

Daniel S. Jacobs, Esq.
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044

Douglas N. Frazier, Esq.
United States Attorney
Middle District of Florida
500 Zack Street, Suite 400
Tampa, Florida 33602

Michael A. Cauley, Esq.
Assistant United States Attorney
Middle District of Florida
500 Zack Street, Suite 400
Tampa, Florida 33602

Gwendolen G. Eason, Esq.
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365

Gary H Baise

Gary H. Baise, Esq.

DJ 90-5-1-1-3965
JCC:DSJ

Exhibit_____(GSA-4)

Washington, D.C. 20530

December 9, 1992

Lee A. DeHihns, III, Esq.
Alston & Bird
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309

re: United States v. Forida Cities Water Company
(M.D. Fla.)

Dear Mr. DeHihns:

This will confirm that the U.S. Environmental Protection Agency (EPA) has formally requested that the U.S. Department of Justice file suit against Florida Cities Water Company for violations of the Clean Water Act. I understand that you represent Florida Cities Water Company in this matter.

In several telephone conversations, I have personally provided to you information about the nature of the violations, the statutory penalty for the violations, and EPA's demand for $5,000,000 to settle the action. Based on communications I have had with Assistant Regional Counsel Gwendolyn Eason, I am also satisfied that prior to the case being referred to the Justice Department, EPA provided the Company with extensive information about the nature of EPA's claims, as well as an opportunity to settle them.

Nonetheless, before filing suit, we would like to afford the Company a final opportunity to settle these claims. To this end, we have agreed to allow the Company to meet with EPA and DOJ officials and counsel to discuss this matter. After consulting with you regarding your client's preferred date and venue for this meeting, we have agreed that it will take place on Wednesday, December 16, 1992 at 1:30 p.m., at the Company's offices at 4837 Swift Road, Suite 100, Sarasota, Florida.

We have mutually agreed that an exchange of certain information would be useful prior to the meeting. You are in the process of providing some limited information requested by the United States, and have requested that the United States share with you information regarding its economic benefit calculations.

We understand your letter of December 7, 1992 to represent that information exchanged during our settlement discussions will be inadmissible, unless otherwise discoverable. We agree. I do

want to clarify, however, that while the information we have requested from you would ordinarily be available to us through discovery, it is our position that our economic benefit calculations would be privileged and therefore not available to you through discovery. Therefore, while we are willing to share with you certain of our economic benefit calculations for the purpose of negotiations, we will only do so with the express understanding that you will not assert that we have waived any privilege by providing that information to you.

Please do not hesitate to contact me at any time if I may be of assistance.

Sincerely,

Assistant Attorney General
Environment and Natural Resources
Division

By: _____

Daniel S. Jacobs
Trial Attorney
Environmental Enforcement Section

cc: Gwendolyn Eason

AVATAR UTILITIES INC.

Exhibit_____(GSA-5)

FROM: Gerald S. Allen
TO: Files
DATE: December 22, 1992

SUBJECT: Meeting - USEPA/U.S. Department of Justice
Waterway Estates, WWTP

ENCL:

C: P. Bradtmiller
D. Getman
R. Gordon
E. Jacobson
L. Wilkov

The purpose of this memorandum is to memorialize principal issues discussed during a meeting with USEPA and U.S. Department of Justice officials in the FCWC general office (Sarasota) on December 16. Those attending were as follows:

Robert B. Gordon, AUI
Gerald S. Allen, AUI
Paul Bradtmiller, FCWC
Johnnie M. Overton, FCWC
Julie Karleskint, FCWC
Lee DeHihns, Alston & Bird (FCWC counsel)
Gwen Eason, Assistant Regional Attorney, USEPA
Kenneth Kwan, Enforcement Section, USEPA
Daniel S. Jacobs, Trial Attorney, U.S. Department of Justice

Mr. Jacobs stated that the case, which pertains to alleged violations of the Clean Water Act, was being managed by the U.S. Department of Justice under his supervision. He requested that Ms. Eason and Mr. Kwan explain the violations and basis of proposed penalties.

Ms. Eason stated that the violations were as follows:

(1) Discharge to canal without permit, June 1988/October 1991
(2) Discharge at unpermitted location, November 1, 1989/July 14, 1991
(3) Exceeding TKN limit, July 15, 1991/March 1992
(4) Toxicity violations - three days

Ms. Eason stated that penalties are based on the following factors:

(1) Seriousness of violation
(2) Economic benefit to violator during period of violation
(3) History of violations on the part of the violator
(4) Good faith efforts to comply with regulations and permits
(5) Economic impact of penalties on violator, including violator's ability to pay

She stated that the USEPA uses a model for calculating penalties for purposes of settlement and requested that Mr. Kwan explain how this model was applied to the FCWC case.

First, Mr. Kwan demonstrated the penalty calculations if the statutory limit of $25,000 per day was applied as follows:

Discharge without a permit - 660 days @ $25,000 =	$16,500,000
Discharge at unpermitted location - 614 days @ $25,000 =	15,350,000
Exceeding the TKN limit - 256 days @ $25,000 =	6,400,000
Violating the toxicity standard - 3 days @ $25,000 =	75,000
TOTAL =	$38,325,000

Then, Mr. Kwan showed the calculations pertaining to the settlement model as follows:

(1) Economic benefit -	Treatment plant	$3,089,000*
	Sewer outfall to river	226,018*
	SUB TOTAL	$3,315,018
	Gravity Component (seriousness)	$ 407,000
	Adjustment Factor (35%)**	1,302,706
	TOTAL	$5,024,724

Mr. Bradtmiller provided a brief overview of the history of the discharge in question from 1982 when Lee County rejected the construction of a wastewater treatment plant in North Fort Myers as proposed in the 201 Regional Plan through placement of the upgraded wastewater treatment plant in operation in March 1992. He explained some of the principal difficulties encountered by the company in permitting and constructing the upgraded plant facilities, as well as circumstances clearly beyond the company's control which contributed to delays in completing the project.

Mr. Gordon explained the fact that the company realized no economic benefit from delays in completing the project, illustrating the financial impact of plant investments on FCWC. He compared this illustration with the financial impact on an unregulated business, such a paper mill under similar circumstances. He also provided the attached summary of net operating income for the Waterway Estates wastewater operation, by year, for the years ended December 31, 1987 through November 30, 1992.

*See attached sheet
**Recognizes recalcitrence, ability to pay, litigation risk etc.

A discussion was held regarding the number of wastewater accounts served by the Waterway Estates system (approximately 2,400) and the very modest customer growth rate experienced during the period of the alleged violations. Mr. Jacobs seemed surprised that so few customers were served and that the growth rates were modest.

Mr. Jacobs explained his intent to bring suit in federal court demanding the statutory penalties unless a settlement agreement could be reached immediately. He also explained the legal process if a settlement agreement is reached, which essentially entails filing the suit but simultaneously recording a consent decree outlining the settlement which effectively stays the suit. After considerable discussion, it was agreed that the company would present a settlement offer through Mr. DeHihns on December 23. Mr. Jacobs indicated that the Department of Justice would consider a "good faith offer" only and should the Company not respond in good faith, a suit would be filed immediately.

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A

Exhibit_____(GSA-6)

ALSTON&BIRD

One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424

404-881-7000
Fax 404-881-7777 Telex 54-2996

RECEIVED
DEC 28 1992
GENERAL OFFICE

Lee A. DeHihns, III

Direct Dial (404) 881-7151

DJ — CASE FILE

December 18, 1992

ATTORNEY-CLIENT COMMUNICATION
PRIVILEGED AND CONFIDENTIAL

Mr. Robert B. Gordon
President
Avatar Utilities, Inc.
255 Alhambra Circle
Coral Gables, Florida 33134

Dear Bob:

The purpose of this letter is to outline the settlement issues in the potential case United States v Florida Cities Water Company (FCWC). The case would be filed by the U.S. Department of Justice (DOJ) at the request of the U.S. Environmental Protection Agency (EPA) Regional Office in Atlanta, Georgia, in the U.S. District Court for the Middle District of Florida, for alleged violations of the Clean Water Act, 33 U.S.C. §1251 et seq. by the FCWC Waterway Estates plant in North Fort Myers, Florida. A brief statement of the DOJ position is set forth in the enclosed DOJ December 9, 1992 letter.

Case Description. The essence of the DOJ case against FCWC is that FCWC failed to comply with EPA's December 1986 decision denying FCWC the right to continue discharging wastewater from the Waterway Estates plant into a canal connected to the Caloosahatchee River in a timely fashion and that FCWC's discharge during the following time period violated Clean Water Act requirements. From 1987 to 1990 EPA issued two Administrative Orders with amendments to FCWC setting schedules to design, construct and achieve compliance at an alternative discharge location. When EPA issued NPDES No. FL 0030325 to FCWC on September 29, 1989, FCWC was directed to achieve compliance with the effluent limitations in the 1989 permit. A portion of the case involves alleged violations of that permit. Simply stated, EPA believes taking from January 1987 to March 1992 to achieve operational status is unacceptable.

Alleged Violations and Penalty Calculation. The specific Clean Water Act violations that DOJ and EPA allege were committed by FCWC can be separated into four categories with a total maximum penalty of $38,325,000. This is derived by multiplying each day or occasion of violation in the four above categories by $25,000, which is the Clean Water Act maximum daily penalty allowed. A description of the alleged violations and penalty amounts follows. **1. Discharging without a permit** - 660 days (Jan. 1, 1988 - Oct. 31, 1989). This refers to the period from permit denial in December, 1986 until the 1989 permit became effective on November 1, 1989. For settlement purposes, EPA did not a calculate penalty for calendar year 1987. Penalty-$16,500,000. **2. Discharging at an unpermitted location** - 614 days (Nov. 1, 1989 - July 14, 1991). This refers to the period when FCWC was still discharging to the canal, although the 1989 permit only allowed a discharge into the Caloosahatchee River. This period ended when the outfall pipe was relocated into the River. Penalty- $15,350,000. **3. TKN violations of the 1989 permit** - 256 days (July 15, 1991 - March, 1992).This refers to FCWC's discharge of TKN at levels exceeding the TKN effluent limitation in the 1989 permit into the Caloosahatchee River. These alleged violations ended when compliance with the TKN levels began in April, 1992. Penalty- $6,400,000. **4. Toxicity violations -** 3 occurrences(Feb., April and June, 1992). This refers to three separate occasions when FCWC allegedly violated the toxicity testing requirements of the 1989 permit. The plant has been in compliance with toxicity testing requirements beginning in July, 1992. Penalty-$75,000.

Settlement. For purposes of settlement, the amount requested by EPA and DOJ during the December 16, 1992 meeting, while less than the maximum penalty case, is nevertheless quite substantial at $5,024,074. The same figure referred to in the DOJ December 9, 1992 letter. The settlement demand consists of three categories: **1. Economic benefit** gained by delay in ceasing the discharge to the canal and subsequent violations of the 1989 permit - $3,315,018.00; **2. Gravity.** This refers to a variety of factors, such as significance of violation, health and environmental impact, and number/duration of violations - $407,000.00; and **3. Adjustment factors** such as recalcitrance, ability to pay and litigation risks - $1,302,706.00 (35% x 1+2).

Settlement Offer After a full discussion and analysis of all issues, you, Gerald Allen, Paul Bradtmiller and I agreed that I would contact the DOJ attorney, Daniel S. Jacobs, on December 23, 1992 (as agreed by the parties on December 16, 1992) to offer him a FCWC settlement of $250,000 to resolve all issues raised by the potential court case against FCWC.

The rationale for the offer comes from our joint belief that it is: (1) a good faith offer in the context of the settlement meeting discussions; (2) consistent with a comparable $750,000 settlement that has recently been reached between DOJ and the City of Cape Coral, Florida for their wastewater discharge permit violations into the Caloosahatchee River. There we understand DOJ's maximum Clean Water Act penalty demand was

approximately $137,000,000. When compared to FCWC's approximate penalty amount of $38,000,000, we see that the ratio is 28%. Moreover, Cape Coral's discharge volume into the Caloosahatchee River is approximately 6 MGD compared to FCWC's approximately .8 MGD; (3) without question that FCWC believes it can support the position that it gained no economic benefit during the time periods in question; and (4) necessary for settlement to include some premium for recalcitrance as demanded by EPA and DOJ in the settlement request where they used at 35% multiplier. Simply put , 28% x $750,000 = $206,000 + an unspecified recalcitrance multiplier % for a total of $250,000.

Strength of FCWC Case. EPA and DOJ allege FCWC violated various Administrative Order and permit provisions from approximately January 1, 1987 through June, 1992. It will be difficult to convince a federal judge that in a sixty-six month period no violations occurred. We recognize that our time schedule for various events leading to operation in March, 1992 contains likely unjustified or unsupported delays. The Government's argument that it took more than five years to complete work that normally takes three-four years could be a convincing one. Moreover, our alleged permit violations of TKN and toxicity have been previously reported to EPA, such that penalties for those violations are virtually inescapable. The permit violations alone under categories 3 and 4 above carry a maximum penalty of over $6.4 million. Although we have defenses available with respect to the time periods and certain aspects of the permit violations, we are potentially vulnerable for an extremely high penalty judgment in federal court. In addition, litigation costs in a likely two year long case could reach or exceed $500,000.

Conclusion. In light of all the above information, I recommend that the Executive Committee approve a settlement offer to DOJ of $250,000.

Sincerely,

Lee A. DeHihns, III

LAD:bjt

cc: Paul Bradtmiller
Gerald Allen
[AC923520.126]

Exhibit_____(GSA-7)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	)	CIVIL ACTION NO. 93-281-CIV-FTM-21

AMENDED COMPLAINT

The United States of America, by authority of the Attorney General, acting at the request of the Administrator of the U.S. Environmental Protection Agency ("EPA"), alleges as follows:

NATURE OF ACTION

1. This is a civil action brought pursuant to section 309(b) of the Clean Water Act ("the Act"), 33 U.S.C. § 1319(b), for civil penalties for violations of section 301 of the Act, 33 U.S.C. § 1311, and of the conditions and limitations of National Pollutant Discharge Elimination System ("NPDES") permits issued by EPA pursuant to section 402 of the Act, 33 U.S.C. § 1342. Notice of the commencement of the action has been provided to the State of Florida.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1345, and 1355, and section 309(b) of the Act, 33 U.S.C. § 1319(b).

3. Venue is proper in the Middle District of Florida pursuant to 28 U.S.C. §§ 1391(b) and (c) and 1392, and section 309(b) of the Act, 33 U.S.C. § 1319(b).

THE DEFENDANTS

4. Defendant Avatar Holdings, Inc. is a Delaware corporation which resides and does business in Florida.

5. Defendant Florida Cities Water Company, Inc., is a subsidiary of Avatar Holdings, Inc., and is a Florida corporation that resides and does business in Florida.

6. As the parent company of Florida Cities Water Company, Inc., Defendant Avatar Holdings, Inc. directly controls the management of Florida Cities Water Company's environmental compliance practices, and is thereby directly responsible for the acts and omissions alleged herein. Thus, each subsequent reference to "Defendants" herein should be read to include Avatar Holdings, Inc., acting through Florida Cities Water Company.

7. Each of the defendants is a "person" within the meaning of section 502(5) of the Act, 33 U.S.C. § 1362(5).

GENERAL ALLEGATIONS

8. At times relevant herein, Defendants have owned and operated privately owned wastewater treatment plants known as the Barefoot Bay Wastewater Treatment Plant, Carrollwood Wastewater Treatment Plant, and Waterway Estates Wastewater Treatment Plant, all located in the State of Florida.

9. At times relevant herein, Defendants have collected wastewater from residential and/or commercial sources,

treated that wastewater at the various wastewater treatment plants listed in the preceding paragraph, and then discharged that wastewater either directly or indirectly into waters of the United States.

10. At times relevant herein, Defendants have caused the "discharge of pollutants" within the meaning of section 502(12) of the Act, 33 U.S.C. § 1362(12), from the treatment plants listed in paragraph 8 above through a "point source" within the meaning of section 502(14) of the Act, 33 U.S.C. § 1362(14), into a "navigable water" within the meaning of section 502(7) of the Act, 33 U.S.C. § 1362(7).

11. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person except as in compliance with certain sections of the Act, including the requirement that a person obtain a National Pollutant Discharge Elimination System (NPDES) permit for discharges to waters of the United States.

12. At times relevant herein Defendants were required by NPDES permits to submit monthly discharge monitoring reports ("DMRs") to EPA containing the results of the required sampling for each month, and reporting the actual number of any permit exceedances. On each report, the Defendants were required to certify, by the signature of a principal executive officer or authorized agent, that the submitted information is true, accurate and complete.

13. Subsection 309(d) of the Act, 33 U.S.C. § 1319(d), provides, in part, that any person who violates, inter alia, section 301 of the Act, 33 U.S.C. § 1311, including any permit condition or limitation implementing that section, violates any condition or limitation in a NPDES permit issued under section 402 of the Act, 33 U.S.C. § 1342, or violates any order issued by EPA under section 309(a) of the Act, 33 U.S.C. § 1319(a), shall be subject to a civil penalty not to exceed $25,000 per day for each such violation.

14. Each occurrence of a (1) discharge without a NPDES permit; (2) violation of an EPA Administrative Order; (3) discharge at an unpermitted location; (4) violation of an effluent limitation or other condition in a NPDES permit constitutes a separate violation of section 301 of the Act, 33 U.S.C. § 1311 punishable in accordance with section 309(d) of the Act, 33 U.S.C. § 1319(d).

FIRST CLAIM FOR RELIEF
(Barefoot Bay)

15. Paragraphs 1 through 14 are realleged and incorporated herein by reference as if fully set forth below.

16. During the period on or about April 1, 1990 to October 31, 1991, Defendants discharged pollutants from the Barefoot Bay Treatment Plant into the Sebastian River, without a NPDES permit.

17. Pursuant to section 309(a) of the Act, 33 U.S.C. § 1319(a), on September 26, 1990, EPA issued an Administrative Order (No. 90-106) to Defendant Florida Cities Water Company,

finding it in violation of the Act for discharging pollutants from its Barefoot Bay plant into waters of the United States, a drainage canal leading to the Sebastian Creek, without a valid NPDES permit and prescribing certain interim effluent limitations and monitoring requirements on pollutants discharged from the Barefoot Bay plant into the waters of the United States.

18. On repeated occasions (during the period in or about November 1990 to June 1991), Defendants violated EPA Administrative Order No. 90-106 by discharging effluent from the Barefoot Bay Treatment Plant which exceeded the Total Suspended Solids daily maximum limitation in that Order.

19. On repeated occasions (during the period in or about 1990-1991), Defendants violated EPA Administrative Order No. 90-106 by discharging effluent from the Barefoot Bay Treatment Plant which exceeded the Fecal Coliform daily maximum limitation in that Order.

20. On at least one occasion (May 1991), Defendants violated EPA Administrative Order No. 90-106 by discharging effluent from the Barefoot Bay Treatment Plant which did not meet the Dissolved Oxygen daily minimum requirement in that Order.

21. On at least one occasion (in or about October 1990), Defendants violated EPA Administrative Order No. 90-106 by discharging effluent from the Barefoot Bay Treatment Plant which exceeded the Biological Oxygen Demand (BOD) daily maximum limitation in that Order.

22. On at least one occasion (in or about October 1990), Defendants violated EPA Administrative Order No. 90-106 by discharging effluent from the Barefoot Bay Treatment Plant which exceeded the Biological Oxygen Demand (BOD) monthly average maximum limitation in that Order.

23. On at least one occasion (in or about November 1990), Defendants violated EPA Administrative Order No. 90-106 by discharging effluent from the Barefoot Bay Treatment Plant which exceeded the pH daily maximum limitation in that Order.

24. Beginning on or about November 1, 1991, Defendants were authorized by NPDES Permit Number FL0042293, subject to certain terms and conditions, to discharge pollutants from the Barefoot Bay Wastewater Treatment Plant into a drainage canal leading to the north prong of Sebastian Creek.

25. In at least seven months (in or about September 1992, October 1992, November 1992, December 1992, January 1993, February 1993, and March 1993), Defendants discharged pollutants from the Barefoot Bay Treatment Plant in excess of the Total Residual Chlorine daily maximum limitation in NPDES Permit Number FL0042293.

26. On at least three occasions (during the periods in or about September-October 1992, May 1993, and February 1994), the effluent from the Barefoot Bay Treatment Plant failed the test for chronic whole effluent toxicity in NPDES Permit Number FL0042293.

27. On a weekly basis during the period in or about November 1991 and continuing through at least June 1993, and on at least two occasions in November 1993, Defendants failed to monitor biological oxygen demand (BOD) at the Barefoot Bay Treatment Plant, as required by NPDES Permit No. FL0042293.

28. On a daily basis during the period on or about November 1, 1991 and continuing through at least June 28, 1993, Defendants failed to test for total residual chlorine (TRC) at the Barefoot Bay Treatment Plant using the method specified by Part I, Section A-2 of NPDES Permit No. FL0042293.

SECOND CLAIM FOR RELIEF
(Carrollwood)

29. Paragraphs 1 through 14 are realleged and incorporated herein by reference as if fully set forth below.

30. During the period in or about August 1990 to June 1991, Defendants discharged pollutants from the Carrollwood Treatment Plant into the Sweetwater Creek, without a NPDES permit.

31. Beginning on or about July 1, 1991, Defendants were authorized by NPDES Permit Number FL0029319, subject to certain terms and conditions, to discharge pollutants from the Carrollwood Wastewater Treatment Plant into the Sweetwater Creek.

32. In at least three months (in or about October, November, December 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Suspended Solids monthly average limitation in Permit Number FL0029319.

33. On repeated occasions (in or about October, November, December 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Suspended Solids daily maximum limitation in Permit Number FL0029319.

34. In at least five months (during the period in or about July-November 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Phosphorus monthly average limitation in Permit Number FL0029319.

35. On repeated occasions (during the period in or about July-November 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Phosphorus daily maximum limitation in Permit Number FL0029319.

36. On repeated occasions (during the period in or about July-October 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Fecal Coliform daily maximum limitation in Permit Number FL0029319.

37. In at least four months (during the period in or about July-November 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Nitrogen monthly average limitation in Permit Number FL0029319.

38. On repeated occasions (during the period in or about July-November 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Nitrogen daily maximum limitation in Permit Number FL0029319.

39. In at least one month (in or about October 1991), Defendants discharged pollutants from the Carrollwood Treatment

Plant in excess of the Carbonaceous Biochemical Oxygen Demand monthly average limitation in Permit Number FL0029319.

40. On at least two occasions (in or about July and October 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Carbonaceous Biochemical Oxygen Demand daily maximum limitation in Permit Number FL0029319.

41. On repeated occasions (during the period in or about July-December 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Residual Chlorine daily maximum limitation in Permit Number FL0029319.

THIRD CLAIM FOR RELIEF
(Waterway Estates)

42. Paragraphs 1 through 14 are realleged and incorporated herein by reference as if fully set forth below.

43. During the period on or about October 1, 1988 to October 31, 1989, Defendants discharged pollutants from the Waterway Estates Wastewater Treatment Plant into the Caloosahatchee River without a NPDES permit.

44. Beginning on or about November 1, 1989, Defendants were authorized by NPDES Permit Number FL0030325, subject to certain terms and conditions, to discharge pollutants from the Waterway Estates Wastewater Treatment Plant directly into the Caloosahatchee River via "outfall 001."

45. On each day during the period on or about November 1, 1989 to July 14, 1991, Defendants discharged pollutants from the Waterway Estates Treatment Plant indirectly into the

Caloosahatchee River via a tributary canal which was not a permitted discharge location during the referenced period.

46. In at least nine months (each month during the period in or about July 1991 to March 1992), Defendants discharged pollutants from the Waterway Estates Treatment Plant in excess of the Total Nitrogen concentration limitation in Permit Number FL0030325.

47. In at least nine months (each month during the period in or about July 1991 to March 1992), Defendants discharged pollutants from the Waterway Estates Treatment Plant in excess of the Total Nitrogen loading limitation in Permit Number FL0030325.

48. On at least three occasions (in or about February 1992, April 1992, and June 1992), the effluent from the Waterway Estates Treatment Plant failed the test for chronic whole effluent toxicity in Permit Number FL0030325.

RELIEF

49. Pursuant to section 309(b) and (d) of the Act, 33 U.S.C. §§ 1319(b) and (d), Defendants are liable for civil penalties up to $25,000 per day for each violation of the Act, including up to $25,000 per day for each month in which a monthly average was violated.

WHEREFORE, Plaintiff, the United States of America, respectfully requests that:

1. The Defendants, and each of them, be ordered to pay a civil penalty up to $25,000 per day for each violation of the Act; and

2. This Court grant such other relief as it deems just and appropriate.

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

DANIEL S. JACOBS
Trial Attorney
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MICHAEL A. CAULEY
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OF COUNSEL:

Gwendolen Fitz-Henley
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing "Amended Complaint" was served by U.S. Mail [and facsimile where noted] on the 30th day of March, 1995, to the following attorneys of record:

Gary Baise (by Fax and U.S. Mail)
Don G. Scroggin
Gabeler, Baise & Miller
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1320 Old Chain Bridge Road
McLean, VA 22101

David R. Berz
Weil, Gotshal & Manges
1615 L Street, NW
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John Noland
Russell P. Schropp
Henderson, Franklin, Starnes & Holt
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Fort Myers, FL 33902-0280

Julia Bunnell
Paralegal
U.S. Department of Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

AMENDED COMPLAINT

The United States of America, by authority of the Attorney General, acting at the request of the Administrator of the U.S. Environmental Protection Agency ("EPA"), alleges as follows:

NATURE OF ACTION

1. This is a civil action brought pursuant to section 309(b) of the Clean Water Act ("the Act"), 33 U.S.C. § 1319(b), for civil penalties for violations of section 301 of the Act, 33 U.S.C. § 1311, and of the conditions and limitations of National Pollutant Discharge Elimination System ("NPDES") permits issued by EPA pursuant to section 402 of the Act, 33 U.S.C. § 1342. Notice of the commencement of the action has been provided to the State of Florida.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1345, and 1355, and section 309(b) of the Act, 33 U.S.C. § 1319(b).

3. Venue is proper in the Middle District of Florida pursuant to 28 U.S.C. §§ 1391(b) and (c) and 1392, and section 309(b) of the Act, 33 U.S.C. § 1319(b).

THE DEFENDANTS

4. Defendant Avatar Holdings, Inc. is a Delaware corporation which resides and does business in Florida.

5. Defendant Florida Cities Water Company, Inc., is a subsidiary of Avatar Holdings, Inc., and is a Florida corporation that resides and does business in Florida.

6. As the parent company of Florida Cities Water Company, Inc., Defendant Avatar Holdings, Inc. directly controls the management of Florida Cities Water Company's environmental compliance practices, and is thereby directly responsible for the acts and omissions alleged herein. Thus, each subsequent reference to "Defendants" herein should be read to include Avatar Holdings, Inc., acting through Florida Cities Water Company.

7. Each of the defendants is a "person" within the meaning of section 502(5) of the Act, 33 U.S.C. § 1362(5).

GENERAL ALLEGATIONS

8. At times relevant herein, Defendants have owned and operated privately owned wastewater treatment plants known as the Barefoot Bay Wastewater Treatment Plant, Carrollwood Wastewater Treatment Plant, and Waterway Estates Wastewater Treatment Plant, all located in the State of Florida.

9. At times relevant herein, Defendants have collected wastewater from residential and/or commercial sources,

treated that wastewater at the various wastewater treatment plants listed in the preceding paragraph, and then discharged that wastewater either directly or indirectly into waters of the United States.

10. At times relevant herein, Defendants have caused the "discharge of pollutants" within the meaning of section 502(12) of the Act, 33 U.S.C. § 1362(12), from the treatment plants listed in paragraph 8 above through a "point source" within the meaning of section 502(14) of the Act, 33 U.S.C. § 1362(14), into a "navigable water" within the meaning of section 502(7) of the Act, 33 U.S.C. § 1362(7).

11. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person except as in compliance with certain sections of the Act, including the requirement that a person obtain a National Pollutant Discharge Elimination System (NPDES) permit for discharges to waters of the United States.

12. At times relevant herein Defendants were required by NPDES permits to submit monthly discharge monitoring reports ("DMRs") to EPA containing the results of the required sampling for each month, and reporting the actual number of any permit exceedances. On each report, the Defendants were required to certify, by the signature of a principal executive officer or authorized agent, that the submitted information is true, accurate and complete.

13. Subsection 309(d) of the Act, 33 U.S.C. § 1319(d), provides, in part, that any person who violates, inter alia, section 301 of the Act, 33 U.S.C. § 1311, including any permit condition or limitation implementing that section, violates any condition or limitation in a NPDES permit issued under section 402 of the Act, 33 U.S.C. § 1342, or violates any order issued by EPA under section 309(a) of the Act, 33 U.S.C. § 1319(a), shall be subject to a civil penalty not to exceed $25,000 per day for each such violation.

14. Each occurrence of a (1) discharge without a NPDES permit; (2) violation of an EPA Administrative Order; (3) discharge at an unpermitted location; (4) violation of an effluent limitation or other condition in a NPDES permit constitutes a separate violation of section 301 of the Act, 33 U.S.C. § 1311 punishable in accordance with section 309(d) of the Act, 33 U.S.C. § 1319(d).

FIRST CLAIM FOR RELIEF
(Barefoot Bay)

15. Paragraphs 1 through 14 are realleged and incorporated herein by reference as if fully set forth below.

16. During the period on or about April 1, 1990 to October 31, 1991, Defendants discharged pollutants from the Barefoot Bay Treatment Plant into the Sebastian River, without a NPDES permit.

17. Pursuant to section 309(a) of the Act, 33 U.S.C. § 1319(a), on September 26, 1990, EPA issued an Administrative Order (No. 90-106) to Defendant Florida Cities Water Company,

finding it in violation of the Act for discharging pollutants from its Barefoot Bay plant into waters of the United States, a drainage canal leading to the Sebastian Creek, without a valid NPDES permit and prescribing certain interim effluent limitations and monitoring requirements on pollutants discharged from the Barefoot Bay plant into the waters of the United States.

18. On repeated occasions (during the period in or about November 1990 to June 1991), Defendants violated EPA Administrative Order No. 90-106 by discharging effluent from the Barefoot Bay Treatment Plant which exceeded the Total Suspended Solids daily maximum limitation in that Order.

19. On repeated occasions (during the period in or about 1990-1991), Defendants violated EPA Administrative Order No. 90-106 by discharging effluent from the Barefoot Bay Treatment Plant which exceeded the Fecal Coliform daily maximum limitation in that Order.

20. On at least one occasion (May 1991), Defendants violated EPA Administrative Order No. 90-106 by discharging effluent from the Barefoot Bay Treatment Plant which did not meet the Dissolved Oxygen daily minimum requirement in that Order.

21. On at least one occasion (in or about October 1990), Defendants violated EPA Administrative Order No. 90-106 by discharging effluent from the Barefoot Bay Treatment Plant which exceeded the Biological Oxygen Demand (BOD) daily maximum limitation in that Order.

22. On at least one occasion (in or about October 1990), Defendants violated EPA Administrative Order No. 90-106 by discharging effluent from the Barefoot Bay Treatment Plant which exceeded the Biological Oxygen Demand (BOD) monthly average maximum limitation in that Order.

23. On at least one occasion (in or about November 1990), Defendants violated EPA Administrative Order No. 90-106 by discharging effluent from the Barefoot Bay Treatment Plant which exceeded the pH daily maximum limitation in that Order.

24. Beginning on or about November 1, 1991, Defendants were authorized by NPDES Permit Number FL0042293, subject to certain terms and conditions, to discharge pollutants from the Barefoot Bay Wastewater Treatment Plant into a drainage canal leading to the north prong of Sebastian Creek.

25. In at least seven months (in or about September 1992, October 1992, November 1992, December 1992, January 1993, February 1993, and March 1993), Defendants discharged pollutants from the Barefoot Bay Treatment Plant in excess of the Total Residual Chlorine daily maximum limitation in NPDES Permit Number FL0042293.

26. On at least three occasions (during the periods in or about September-October 1992, May 1993, and February 1994), the effluent from the Barefoot Bay Treatment Plant failed the test for chronic whole effluent toxicity in NPDES Permit Number FL0042293.

27. On a weekly basis during the period in or about November 1991 and continuing through at least June 1993, and on at least two occasions in November 1993, Defendants failed to monitor biological oxygen demand (BOD) at the Barefoot Bay Treatment Plant, as required by NPDES Permit No. FL0042293.

28. On a daily basis during the period on or about November 1, 1991 and continuing through at least June 28, 1993, Defendants failed to test for total residual chlorine (TRC) at the Barefoot Bay Treatment Plant using the method specified by Part I, Section A-2 of NPDES Permit No. FL0042293.

SECOND CLAIM FOR RELIEF
(Carrollwood)

29. Paragraphs 1 through 14 are realleged and incorporated herein by reference as if fully set forth below.

30. During the period in or about August 1990 to June 1991, Defendants discharged pollutants from the Carrollwood Treatment Plant into the Sweetwater Creek, without a NPDES permit.

31. Beginning on or about July 1, 1991, Defendants were authorized by NPDES Permit Number FL0029319, subject to certain terms and conditions, to discharge pollutants from the Carrollwood Wastewater Treatment Plant into the Sweetwater Creek.

32. In at least three months (in or about October, November, December 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Suspended Solids monthly average limitation in Permit Number FL0029319.

33. On repeated occasions (in or about October, November, December 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Suspended Solids daily maximum limitation in Permit Number FL0029319.

34. In at least five months (during the period in or about July-November 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Phosphorus monthly average limitation in Permit Number FL0029319.

35. On repeated occasions (during the period in or about July-November 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Phosphorus daily maximum limitation in Permit Number FL0029319.

36. On repeated occasions (during the period in or about July-October 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Fecal Coliform daily maximum limitation in Permit Number FL0029319.

37. In at least four months (during the period in or about July-November 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Nitrogen monthly average limitation in Permit Number FL0029319.

38. On repeated occasions (during the period in or about July-November 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Nitrogen daily maximum limitation in Permit Number FL0029319.

39. In at least one month (in or about October 1991), Defendants discharged pollutants from the Carrollwood Treatment

Plant in excess of the Carbonaceous Biochemical Oxygen Demand monthly average limitation in Permit Number FL0029319.

40. On at least two occasions (in or about July and October 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Carbonaceous Biochemical Oxygen Demand daily maximum limitation in Permit Number FL0029319.

41. On repeated occasions (during the period in or about July-December 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Residual Chlorine daily maximum limitation in Permit Number FL0029319.

THIRD CLAIM FOR RELIEF
(Waterway Estates)

42. Paragraphs 1 through 14 are realleged and incorporated herein by reference as if fully set forth below.

43. During the period on or about October 1, 1988 to October 31, 1989, Defendants discharged pollutants from the Waterway Estates Wastewater Treatment Plant into the Caloosahatchee River without a NPDES permit.

44. Beginning on or about November 1, 1989, Defendants were authorized by NPDES Permit Number FL0030325, subject to certain terms and conditions, to discharge pollutants from the Waterway Estates Wastewater Treatment Plant directly into the Caloosahatchee River via "outfall 001."

45. On each day during the period on or about November 1, 1989 to July 14, 1991, Defendants discharged pollutants from the Waterway Estates Treatment Plant indirectly into the

Caloosahatchee River via a tributary canal which was not a permitted discharge location during the referenced period.

46. In at least nine months (each month during the period in or about July 1991 to March 1992), Defendants discharged pollutants from the Waterway Estates Treatment Plant in excess of the Total Nitrogen concentration limitation in Permit Number FL0030325.

47. In at least nine months (each month during the period in or about July 1991 to March 1992), Defendants discharged pollutants from the Waterway Estates Treatment Plant in excess of the Total Nitrogen loading limitation in Permit Number FL0030325.

48. On at least three occasions (in or about February 1992, April 1992, and June 1992), the effluent from the Waterway Estates Treatment Plant failed the test for chronic whole effluent toxicity in Permit Number FL0030325.

RELIEF

49. Pursuant to section 309(b) and (d) of the Act, 33 U.S.C. §§ 1319(b) and (d), Defendants are liable for civil penalties up to $25,000 per day for each violation of the Act, including up to $25,000 per day for each month in which a monthly average was violated.

WHEREFORE, Plaintiff, the United States of America, respectfully requests that:

1. The Defendants, and each of them, be ordered to pay a civil penalty up to $25,000 per day for each violation of the Act; and

2. This Court grant such other relief as it deems just and appropriate.

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

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OF COUNSEL:

Gwendolen Fitz-Henley
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing "Amended Complaint" was served by U.S. Mail (and facsimile where noted) on the 30th day of March, 1995, to the following attorneys of record:

Gary Baise (by Fax and U.S. Mail)
Don G. Scroggin
Gabeler, Baise & Miller
Suite 200
1320 Old Chain Bridge Road
McLean, VA 22101

David R. Berz
Weil, Gotshal & Manges
1615 L Street, NW
Washington, DC 20036

John Noland
Russell P. Schropp
Henderson, Franklin, Starnes & Holt
Post Office Box 280
Fort Myers, FL 33902-0280

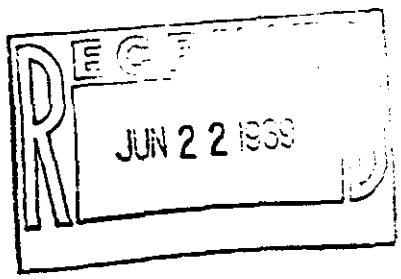
Julia Bunnell
Paralegal
U.S. Department of Justice

FLORIDA CITIES WATER COMPANY

Exhibit_____(GSA-8)

June 19, 1989

Florida Department of Environmental Regulations
Division of Environmental Programs
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, FL 32301



Attention: Mr. Bruce DeGrove
Environmental Supervisor

Dear Mr. DeGrove:

Pursuant to the Grizzle-Figg Legislation and the United States Environmental Protection Agency (USEPA) NPDES Permit requirements, Florida Cities Water Company contracted Limno-Tech, Inc. (LTI) to conduct a "Minimal Negative Impact" study of the Carrollwood Wastewater Treatment Plant discharge impact on the Sweetwater Creek quality. LTI conducted field studies to examine impacts of the current discharge of secondary treated wastewater effluent, successfully calibrated a water quality model based on this data and conducted model simulations at low flow/high temperature conditions in the stream to forecast the impacts of an upgraded level of treatment for the Carrollwood facility. LTI's modeling projections indicated Minimal Negative Impacts would occur in Sweetwater Creek assuming Advanced Waste Treatment (AWT) discharge and pollutant decay rates reflective of this level of treatment. In this regard please find enclosed for your review a copy of LTI's report documenting field and modeling activities related to the analysis of minimal negative impacts on Sweetwater Creek.

Based on the LTI report, Florida Cities Water Company respectfully requests the issuance of commitment (Waste Load Allocation) to allow the proposed Carrollwood AWT plant to discharge to Sweetwater Creek. After you have had the opportunity to review LTI's report we would be pleased to meet with you and go over any questions that may be still outstanding. Please contact me if you desire such a meeting.

Thank you in advance for your cooperation.

Very truly yours,

Robert H. French, P.E.
Senior Vice President

RHF/dd

Enclosure

cc: Mark Kaiser, Limno-Tech., Inc.

FLORIDA CITIES WATER COMPANY
2112 Gulf Gate Drive
P.O. BOX 5846
Sarasota, Florida 34277
813 924-1128

SECTION 1 - BASIC SERVICES OF ENGINEER

1.1. General

1.1.1 ENGINEER shall perform professional services as hereinafter stated which include customary civil, environmental, structural, mechanical and electrical engineering services and customary building and landscape architectural services incidental thereto.

1.1.2. Services rendered by ENGINEER for the Project shall be in accordance with generally accepted professional practices and State-of-the-Art methods for the intended use of the Project, in accordance with the laws of the State of Florida, and applicable governmental regulations.

1.2. Preliminary Design and Report Phase

After written authorization to proceed, the ENGINEER shall:

1.2.1. Meet with the OWNER, and his representatives, to establish the alternative systems to be evaluated and to define OWNER equipment and operating requirements to be considered in establishing facility design criteria.

1.2.2. ENGINEER shall prepare a preliminary design memorandum depicting the design criteria, schematic layouts, sketches and appropriate calculations clearly indicating the ENGINEER's findings, considerations involved and alternative solutions available to OWNER, and setting forth the ENGINEER's recommendations. Moreover, the ENGINEER shall provide a preliminary construction cost estimate, operating cost estimate and schedule for implementation.

1.2.3. Furnish five copies of the Report and present and review it in person with OWNER.

1.3. Final Design Phase

Following written approval of the preliminary design and report by the OWNER, ENGINEER shall:

1.3.1. Based on the information contained in the approved Preliminary Design memorandum, ENGINEER shall prepare Drawings, Technical Specifications and Contract Documents including contract agreement forms, general conditions, supplementary conditions, bid forms, invitations to bid and instructions to bidders, and assist in the preparation of other related documents. Original Drawings shall be drawn on 24-inch x 36-inch mylar sheets.

1.3.2. Drawings, Technical Specifications and Contract Documents shall be submitted to OWNER at 50 percent and 95 percent completion stages for review and written approval. For each review and approval stage, furnish five sets of above documents to OWNER. All review comments of OWNER shall be evaluated and incorporated into the final bidding documents.

1.3.3. Furnish five sets of final bidding documents and present and review them in person with OWNER.

1.3.4. Prepare and submit Design Criteria, Drawings and Contract Documents as required to the U.S. Environmnetal Protection Agency, Southwest Florida Water Management District, Florida Department of Environmental Regulation, and Hillsborough County to support the permit applications as provided for in Exhibit "A" to this Agreement. Assist in obtaining approval of the permit applications.

1.3.5. Prepare an opinion of probable construction cost for the Project and submit to OWNER with final bidding documents.

The opinion of probable construction cost of the entire Project (herein referred to as "Construction Cost") means the total cost of the entire Project to OWNER, but it will not include ENGINEER's compensation and expenses, the cost of land, rights-of-way, or compensation for or damages to properties unless this Agreement so specifies, nor

will it include OWNER's legal, accounting, insurance counseling or auditing services, or interest and financing charges incurred in connection with the Project.

Since ENGINEER has no control over the cost of labor, materials, equipment or services furnished by others, or over the Contractor(s)' methods of determining prices, or over competitive bidding or market conditions, his opinions of probable Project Cost and Construction Cost provided for herein are to be made on the basis of his experience and qualifications and represent his best judgement as an experienced and qualified professional engineer, familiar with the construction industry; but ENGINEER cannot and does not guarantee that proposals, bids or actual Project or Construction Cost will not vary from opinions of probable cost prepared by him.

1.4. Bidding Phase

After written authorization to proceed with the Bidding Phase, ENGINEER shall:

1.4.1. Release Contract Documents for bidding and assist OWNER in obtaining bids for the prime contract for construction, materials, equipment and services.

1.4.2. Consult with and advise OWNER as to the qualifications of contractors submitting bids.

1.4.3. Consult with and advise OWNER as to the acceptability of substitute materials and equipment proposed by Contractor(s) when substitution prior to the award of contracts is allowed by the bidding documents.

1.4.4. Assist OWNER in evaluating bids or proposals and in assembling and awarding contracts.

1.5. Construction Phase

During the Construction Phase ENGINEER shall:

1.5.1. Consult with and advise OWNER and act as his representative as provided in Articles 1 through 17, inclusive, of the N.S.P.E. Standard General Conditions of the Construction Contract No. 1910-8 (1978 edition). The extent and limitations of the duties, responsibilities and authority of ENGINEER as assigned in said Standard General Conditions shall not be modified, except as ENGINEER may otherwise agree in writing. All of OWNER's instructions to Contractor(s) will be issued through ENGINEER who will have authority to act on behalf of OWNER to the extent provided in said Standard General Conditions except as otherwise provided in writing.

1.5.2. Make visits to the site at intervals appropriate to the various stages of construction to observe as an experienced and qualified design professional the progress and quality of the executed work of Contractor(s) and to determine in general if such work is proceeding in accordance with the Contract Documents. ENGINEER shall not be required to make exhaustive or continuous on-site inspections to check the quality of quantity of such work. ENGINEER shall not be responsible for the means, methods, techniques, sequences or procedures of construction selected by Contractor(s) or the safety precautions and programs incident to the work of Contractor(s). ENGINEER's efforts will be directed toward providing a greater degree of confidence for OWNER that the completed work of Contractor(s) will conform to the Contract Documents, but ENGINEER shall not be responsible for the failure of Contractor(s) to perform the work in accordance with the Contract Documents. During such visits and on the basis of on-site observations ENGINEER shall keep OWNER informed of the progress of the work, shall endeavor to guard OWNER against defects and deficiencies in such work and may disapprove or reject work failing to conform to the Contract Documents.

1.5.3. Review and approve (or take other appropriate action in respect of) Shop Drawings (as that term is defined in the aforesaid Standard General Conditions) and samples, the results of tests and inspections and other data which each Contractor is required to submit, but only for conformance with the design concept of the Project and compliance with the information given in the Contract Documents (but such review and approval or other action shall not extend to means, methods, sequences, techniques or procedure of construction or to safety precautions and programs incident thereto); determine the acceptability of substitute materials and equipment proposed

by Contractor(s); and receive and review (for general content as required by the Specifications) maintenance and operating instructions, schedules, guarantees, bonds and certificates of inspection which are to be assembled by Contractor(s) in accordance with the Contract Documents.

1.5.4. Issue all instructions of OWNER to Contractor(s); issue necessary interpretations and clarifications of the Contract Documents and in connection therewith prepare change orders as required; having authority, as OWNER's representative, to require special inspection or testing of the work; act as initial interpreter of the requirements of the Contract Documents and judge of the acceptability of the work thereunder and make decisions on all claims of OWNER and Contractor(s) relating to the acceptability of the work or the interpretation of the requirements of he Contract Documents pertaining to the execution and progress of the work; but ENGINEER shall not be liable for the results of any such interpretations or decisions rendered by him in good faith.

1.5.5. Based on ENGINEER's on-site observations as an experienced and qualified design professional and on review of applications for payment and the accompanying data and schedules, determine the amounts owing to Contractor(s) and recommend in writing payments to Contractor(s) in such amounts; such recommendations of payment will constitute a representation to OWNER, based on such observations and review, that the work has progressed to the point indicated that, to the best of ENGINEER's knowledge, information and belief, the quality of such work is in accordance with the Contract Documents (subject to an evaluation of such work as a functioning Project upon Substantial Completion, to the results of any subsequent tests called for in the Contract Documents, and to any qualifications stated in his recommendation), and that payment of the amount recommended is due Contractor(s); but by recommending any payment ENGINEER will not thereby be deemed to have represented that continuous or exhaustive examinations have been made by ENGINEER to check the quality or quantity of the work or to review the means, methods, sequences, techniques or procedures of construction or safety precautions or programs incident thereto or that ENGINEER has made an examination to ascertain how or for what purposes any Contractor has used the moneys paid on account of the Contract Price, or that title to any of the work, materials or equipment has passed to OWNER free and clear of any

lien, claims, security interests or encumbrances, or that Contractor(s) have completed their work exactly in accordance with the Contract Documents.

1.5.6. Conduct an inspection to determine if the project is substantially complete and a final inspection to determine if the work has been completed in accordance with the Contract Documents and if each Contractor has fulfilled all of his obligations thereunder so the ENGINEER may recommend, in writing, final payment to each Contractor and may give written notice to OWNER and the Contractor(s) that the work is acceptable (subject to any conditions therein expressed), but any such recommendation and notice shall be subject to the limitations expressed in paragraph 1.5.5.

1.5.7. ENGINEER shall not be responsible for the acts or omissions of any Contractor, or subcontractor, or any of the Contractor(s)' or subcontractors' agents or employees or any other persons (except ENGINEER's own employees and agents) at the site or otherwise performing any of the Contractor(s)' work; however, nothing contained in paragraphs 1.5.1. thru 1.5.7. inclusive, shall be construed to release ENGINEER from liability for failure to properly perform duties undertaken by him in the Contract Documents.

1.6. Resident Services During Construction

1.6.1. A Resident Project Representative will be furnished and will act as directed by ENGINEER in order to assist ENGINEER in observing the performance of specific items of work of Contractor(s). Such services will be paid for by OWNER as indicated in Section 5.

1.6.2. The duties and responsiblities and the limitations of the authority of the Resident Project Representative and assistants for the services specified in paragraph 1.6.1. shall be in accordance with No. 1910-1-A National Society of Professional Engineers - Contract Documents (1983 Edition).

1.6.3. Through more extensive on-site observations of work in progress and field checks by the Resident Project Representative and assistants, ENGINEER shall

endeavor to provide further protection for OWNER against defects and deficiencies in the work of Contractor(s); but the furnishing of such resident project representation will not make ENGINEER responsible for construction means, methods, techniques, sequences or procedures or safety precautions or programs or Contractor(s)' failure to perform their work in accordance with the Contract Documents.

1.6.4. If OWNER designates another person to represent OWNER at the Project site who is not ENGINEER's agent or employee, the duties, responsibilities and limitations of authority of such other person and the effect thereof on the duties and responsiblities of ENGINEER under this Agreement will be set forth in an exhibit that is to be identified, attached to and made a part of this Agreement before such services begin.

1.7. Project Documents

1.7.1. Original project documents prepared by ENGINEER under this Agreement are, and shall remain, the property of OWNER, and shall be delivered to OWNER upon final completion or termination of the Project covered by this Agreement. Original project documents shall include, but not be limited to, original mylar drawings; technical specifications and Contract Documents; survey notes; engineering reports; and, design notes.

1.7.2. All documents including Drawings and Specifications prepared by ENGINEER pursuant to this Agreement are instruments of service in respect of the Project. They are not intended or represented to be suitable for reuse by OWNER or others on extensions of the project or any other project. Any reuse without written verification or adaptation by ENGINEER for the specific purpose intended will be at OWNER's sole risk and without liability or legal exposure to ENGINEER; and OWNER shall indemnify and hold harmless ENGINEER for all claims, damages, losses and expenses including attorneys' fees arising out of or resulting therefrom. Any such verification or adaptation will entitle ENGINEER to further compensation at rates to be agreed upon by OWNER and ENGINEER.

1.8. ENGINEER's Project Representative

Designate in writing a person to act as ENGINEER's representative (Project Director, Project Manager, etc.) with respect to the services to be rendered under this Agreement. OWNER shall reserve the right of requesting a change of the Project Representative if the representative is unacceptable to OWNER. Such representative shall have complete authority to transmit and receive information, interpret and define ENGINEER's policies and have overall responsibility for services provided by ENGINEER for the Project.

SECTION 2 - ADDITIONAL SERVICES OF ENGINEER

2.1. General

If authorized in writing by OWNER, ENGINEER shall furnish or obtain from others Additional Services of the following types which are not considered normal or customary Basic Services for the Project. These Additional Services will be paid for by OWNER as indicated in Section 5.

2.1.1. Service resulting from significant changes in extent of the Project or its design including, but not limited to, changes in size, complexity, OWNER's schedule, or character of construction; and revising previously accepted studies, reports, design documents or Contract Documents when such revisions are due to causes beyond ENGINEER's control.

2.1.2. Providing renderings for OWNER's use.

2.1.3. Preparing documents for alternate bids requested by OWNER for Contractor(s)' work which is not executed or documents for out-of-sequence work.

2.1.4. Services resulting from the award of more separate prime contracts for construction, materials, equipment or services for the Project than are originally anticipated, and services resulting from the arranging for performance by persons

other that the principal prime contractors of services for the OWNER and administering OWNER's contracts for such services.

2.1.5. Service in connection with change orders to reflect changes requested by OWNER if the resulting change in compensation for Basic Services is not commensurate with the additional services rendered, services after the award of each contract in evaluating substitutions proposed by Contractor(s), and in making revisions to Drawings and Specifications occasioned thereby, and services resulting from significant delays, changes or price increases occurring as a direct or indirect result of material, equipment or energy shortages.

2.1.6. Services during out-of-town travel required of ENGINEER other than visits to the site as required by Section 1.

2.1.7. Additional or extended services during construction made necessary by (1) work damaged by fire or other cause during construction, (2) a significant amount of defective or neglected work of Contractor(s), (3) prolongation of the contract time of any prime contract by more than sixty days, (4) acceleration of the progress schedule involving services beyond normal working hours, and (5) default by Contractor(s).

2.1.8. Services after completion of the Construction Phase, such as inspections during any guarantee period and reporting observed discrepancies under guarantees called for in any contract for the Project.

2.1.9. Preparing to serve or serving as a consultant or witness for OWNER in any litigation, public hearing or other legal or administrative proceeding involving the Project (except as agreed to under Basic Services).

2.1.10. Additional services in connection with Project, including services normally furnished by OWNER and services not otherwise provided for in this Agreement.

2.2. Resident Services During Construction

2.2.1. If requested by OWNER or recommended by ENGINEER and agreed to in

writing by the OWNER, a Resident Project Representative will be furnished, to supplement the resident services provided under Section I paragraph 1.6, and will act as directed by ENGINEER in order to assist ENGINEER in observing performance of the work or Contractor(s). Such services will be paid for by OWNER as indicated in Section 5.

2.2.2. The duties and responsibilities and the limitations on the authority of the Resident Project Representative and assistants will be set forth in Exhibit B which is attached to and made a part of this Agreement.

2.2.3. Through more extensive on-site observations of the work in progress and field checks of materials and equipment by the Resident Project Representative (if furnished) and assistants, ENGINEER shall endeavor to provide further protection for OWNER against defects and deficiencies in the work of Contractor(s); but the furnishing of such resident Project representation will not make ENGINEER responsible for construction means, methods, techniques, sequences or procedures or for safety precautions or programs, or for Contractor(s)' failure to perform their work in accordance with the Contract Documents.

2.2.4. If OWNER designates another person to represent OWNER at the Project site who is not ENGINEER's agent or employee, the duties, responsibilities and limitations of authority of such other person and the effect thereof on the duties and responsibilities of ENGINEER under this Agreement will be set forth in an exhibit that is to be identified, attached to and made a part of this Agreement before such services begin.

SECTION 3 - RESPONSIBILITY OF OWNER

OWNER shall:

3.1. Provide all criteria and full information as to OWNER's requirements for the Project, including design objectives and constraints, space, capacity and performance requirements, flexibility and expandability; and furnish copies of all design and

construction standards which OWNER will require to be included in the Drawings and Specifications.

3.2. Assist ENGINEER by placing at his disposal all available information pertinent to the Project including previous reports, studies, drawings, specifications, permits, applications and any other data relative to design or construction of the Project. Any previous information transmitted to ENGINEER for his use on this Project shall remain the property of OWNER and shall be returned to OWNER upon final completion or termination of the Project covered by this Agreement for the ENGINEER's services.

3.3. Furnish to ENGINEER, as required for performance of ENGINEER's services (except to the extent provided otherwise in this Agreement under "Section 1 - Services of ENGINEER"), data prepared by or services of others, including without limitation laboratory tests and inspections of equipment; appropriate professional interpretation of the foregoing; environmental assessment and impact statements; property, boundary, easement, right-of-way, topographic and utility surveys; property descriptions; zoning, deed and other land use restriction; and other special data or consultations not covered in this Agreement under Section 1; all of which ENGINEER may rely upon in performing his services.

3.4. Arrange for access to and make all provisions for ENGINEER to enter upon public and private property as required for ENGINEER to perform his services.

3.5. Examine all studies, reports, sketches, drawings, specifications, proposals and other documents presented by ENGINEER, obtain advice of an attorney, insurance counselor and other consultants as OWNER deems appropriate for such examination and render in writing decisions pertaining thereto within a reasonable time so as not to delay the services of ENGINEER.

3.6 Furnish approvals, execute and pay all fees for all necessary applications required for the Project by applicable regulatory agencies and such approvals and consents from others as may be necessary for completion of the Project.

3.7 Provide such accounting, independent cost estimating and insurance counseling services as may be required for the Project, such legal services as OWNER may require or ENGINEER may reasonably request with regard to legal issues pertaining to the Project including any that may be raised by Contractor(s) as long as such legal services are not based upon any negligence of the ENGINEER, such auditing service as OWNER may require to ascertain how or for what purpose any Contractor has used the moneys paid to him under the construction contract, and such inspection services as OWNER may require to ascertain that Contractor(s) are complying with any law, rule or regulation applicable to their performance of the work.

3.8 Designate in writing a person to act as OWNER's representative with respect to the services to be rendered under this Agreement. Such person shall have complete authority to transmit instruction, receive information, interpret and define OWNER's policies and decisions with respect to materials, equipment, elements and systems pertinent to ENGINEER's services.

3.9. Give prompt written notice to ENGINEER whenever OWNER observes or otherwise becomes aware of any development that affects the scope or timing of ENGINEER's services, or any defect in the work of Contractor(s).

3.10. Bear all costs incident to compliance with requirements of this Section 3.

SECTION 4 - PERIOD OF SERVICE

4.1. The provisions of this Section 4 and the various rates of compensation for ENGINEER's services provided for elsewhere in this Agreement have been agreed to in anticipation of the orderly and continuous progress of the Project through completion of the Construction Phase. ENGINEER's obligation to render services hereunder will extend for a period which may reasonably be required for the design, award of contracts and construction of the Project including extra work and required extensions thereto.

4.2. The services called for in the Preliminary Design and Report Phase of the

Project will be completed and the Report submitted within 30 calendar days following written authorization to proceed with that phase of services.

4.3. After acceptance and approval by OWNER of the Preliminary Design and Report Phase documents indicating any specific modifications or changes in the extent of the Project desired by OWNER, and upon written authorization from OWNER, ENGINEER shall proceed with the performance of services called for in the Final Design Phase; and shall deliver final bidding Documents and an opinion of probable Project Costs for all work of Contractor(s) on the Project within 90 calendar days following authorization to proceed with that phase of services.

4.4. ENGINEER's services under the Preliminary Design and Report Phase and the Final Design Phase shall each be considered complete at the earlier of (1) the date when the submissions for that phase have been accepted and approved by OWNER, or (2) thirty days after the date when such submissions are delivered to OWNER for final acceptance, plus such additional time as may be considered reasonable for obtaining approval of governmental authorities having jurisdiction over design criteria applicable to the Project.

4.5. After acceptance by OWNER of the ENGINEER's Drawings, Specifications and other Final Design phase documentation including the opinion of probable Project Cost and upon written authorization to proceed, ENGINEER shall proceed with performance of the services called for in the Bidding Phase. This Phase shall terminate and the services to be rendered thereunder shall be considered complete upon commencement of the Construction Phase.

4.6. The Construction Phase will commence with the execution of the first prime contract to be executed for the work of the Project or any part thereof, and will terminate upon written approval by ENGINEER of final payment on the last prime contract to be completed. It is anticipated that construction phase services will be completed within 520 calendar days after written Notice to Proceed with the preliminary design and report phase of the project.

4.7. If OWNER has requested significant modifications or changes on the extent

of the Project, the time of performance of ENGINEER's services and his various rates of compensation shall be adjusted appropriately.

4.8. If OWNER fails to give prompt written authorization to proceed with any phase of services after completion of the immediately preceding phase, or if the Construction Phase has not commenced within 120 calendar days after completion of the Final Design Phase, ENGINEER may, after giving seven days' written notice to OWNER, suspend services under this Agreement.

4.9. If ENGINEER's services for design or services during construction of the Project are delayed or suspended in whole or in part by OWNER for more than three months for reasons beyond ENGINEER's control, or if ENGINEER for any reason is required to render services more than one year after Substantial Completion, the compensation provided for elsewhere in this Agreement shall be subject to renegotiation.

SECTION 5 - PAYMENTS TO ENGINEER

5.1. Basic and Additional Services

OWNER shall pay ENGINEER for the services of personnel engaged directly on the Project, including, but not limited to, engineers, architects, surveyors, designers, drafters, specification writers, estimators, other technical personnel, stenographers, typists and clerks. Payment shall be based on the actual hours worked by each employee of ENGINEER assigned to the Project and shall be an amount equal to the Direct Labor Cost of the employee times a multiplier factor as provided for in Exhibit "A" to this Agreement. The Direct Labor Cost for each employee engaged directly on the Project shall include salaries and wages (basic and incentive) paid to employees, but does not include indirect payroll related costs or fringe benefits. The multiplier shall include the cost of customary and statutory benefits including, but not limited to: Social Security contributions; unemployment, excise and payroll taxes; worker's compensation; health and retirement benefits; sick leave, vacation, and holiday pay applicable thereto plus overhead expenses and operating margins.

5.2. Reimbursable Expenses

OWNER shall pay ENGINEER the actual costs of all Reimbursable Expenses incurred in connection with all Basic and Additional Services for the Project. Reimbursable Expenses mean the actual expenses incurred directly in connection with the Project for: materials and supplies; transportation and subsistence; toll telephone calls and telegrams; postage; reproduction of reports, drawings and specifications; aerial reconnaissance photographs; construction and other photographs; computer time; word processor time; obtaining bids from Contractor(s); the actual cost of special consultants including soils testing, surveyors, water and wastewater laboratory testing, ecological and environmental scientific consultants; and similar Project-related items in addition to those required under Section 1.

5.3. Total payment to ENGINEER for Basic Services and Reimbursable Expenses (exclusive of applicable state sales tax on professional services) associated with Basic Services for the Project, shall not exceed three hundred sixteen thousand eight hundred and eighty dollars ($316,880.00) without prior written authorization from OWNER.

5.4. OWNER shall pay ENGINEER for Additional Services Rendered under Section 2 in accordance with the provisions of paragraphs 5.1 and 5.2. Each authorization for additional services shall establish a total payment limit which shall not be exceeded without prior written authorization of the OWNER.

5.5. Times of Payments

5.5.1. ENGINEER shall submit monthly statements for Basic and Additional Services rendered and for Reimbursable Expenses incurred. The monthly statements shall be itemized indicating the hours and payroll costs for each discipline contributing to the Project (e.g., Architectural, Civil, Landscape, Structural, Environmental, Mechanical, Electrical, Instrumentation), and the amounts for each type of Reimbursable Expense for the billing cycle. The monthly statements will also indicate the total amounts billed to the date of each billing and amounts paid by OWNER to date of billing. Each monthly statement shall include computer project cost reports or

other records to substantiate actual services rendered and costs incurred for the Project.

5.5.2. OWNER shall make prompt monthly payments in response to ENGINEER's monthly statements. If OWNER fails to make any payment due ENGINEER for services and expenses within sixty days after receipt of ENGINEER's bill thereof, the amounts due ENGINEER shall include a charge at the rate of 1% per month from said sixtieth day, and in addition, ENGINEER may, after giving seven days' written notice to OWNER, suspend service under this Agreement until he has been paid in full all amounts due him for services and expenses.

5.6. All records relating to the work performed and reimbursable expenses incurred, including reports of accounts, shall be maintained by ENGINEER in accord with generally accepted accounting principles and shall be available to OWNER or its authorized representative at all reasonable times during the term of this Contract and for one (1) year after termination.

5.7. OWNER shall have the right to audit ENGINEER's books and inspect all of ENGINEER's records maintained pursuant to this Contract at any reasonable time. This right to audit and inspect shall continue for one (1) year beyond the expiration of this Contract or for one (1) year from the date of final payment, whichever occurs later in time.

SECTION 6 - GENERAL CONSIDERATIONS

6.1. Termination

6.1.1. Anything to the contrary herein notwithstanding, the OWNER in its sole discretion, may terminate this Agreement at any time by giving at least seven (7) days' prior written notice of such termination to the ENGINEER.

6.1.2. The obligation to provide further services under this Agreement may be terminated by ENGINEER upon seven (7) days' written notice in the event of

substantial failure by the OWNER to perform in accordance with the terms hereof through no fault of the ENGINEER.

6.1.3. Upon termination of this Agreement, the ENGINEER shall be entitled to payment for all unpaid services rendered and reimbursable expenses incurred, as mutually agreed to by OWNER and ENGINEER, up to the date of termination.

6.1.4. The ENGINEER, upon termination of the Agreement, shall forthwith peaceably and quietly surrender to the OWNER all project documents and data defined in Paragraphs 1.7.1 and 3.2 of this Agreement.

6.2. Controlling Law

This Agreement shall be governed by the laws of the State of Florida. All rights, remedies and powers granted to OWNER herein shall be cumulative and may be exercised singularly or concurrently.

6.3. Successors and Assigns

6.3.1. OWNER and ENGINEER each binds himself and his partners, successors, executors, administrators, assigns and legal representatives to the other party to this Agreement and to the partners, successors, executors, administrators, assigns and legal representatives of such other party, in respect to all covenants, agreements and obligations of this Agreement.

6.3.2. Neither OWNER nor ENGINEER shall assign, sublet or transfer any rights under or interest in (including, but without limitation, moneys that may become due or moneys that are due) this Agreement without the written consent of the other, except as stated in paragraph 6.3.1. and except to the extent that the effect of this limitation may be restricted by law. Unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under this Agreement. Nothing contained in this paragraph shall prevent ENGINEER from employing such independent consultants, associates and

subcontractors as he may deem appropriate to assist him in the performance of services hereunder.

6.3.3. Nothing herein shall be construed to give any rights or benefits hereunder to anyone other than OWNER and ENGINEER.

6.4. Litigation

6.4.1. Should litigation occur between the two parties relating to the provisions of this Agreement, all litigation expenses, collection expenses, witness fees, court costs and attorney's fees incurred by the prevailing party shall be paid by the nonprevailing party to the prevailing party.

6.4.2. In the event any provision of this Agreement shall be held to be invalid or unenforceable, the remaining provisions shall be valid and binding upon the parties of this Agreement.

6.5. Insurance

The ENGINEER, at its own expense, shall maintain insurance during the performance of its services under this Agreement with limits of liability not less than the following:

6.5.1. General Liability Insurance:	Limits
Comprehensive Form	$1,000,000
Premises-Operations	Combining Single Limit
Products/Completed Operations Hazard	
Contractural Insurance	
Broad Form Property Damage	
Independent Contractors	
Personal Injury	$1,000,000 Aggregate

	Limits
Automobile Liability	
Comprehensive Form	$500,000 Bodily Injury
Owned	(Each Person)
Hired	$1,000,000 Bodily Injury
Non-Owned	(Each Accident)
	$100,000 Property Damage
Worker's Compensation	Statutory
Employers' Liability	$100,000

6.5.2. Professional Liability Insurance:

Including errors and omissions	$1,000,000
	($50,000 Deductible)

6.5.3. OWNER shall be named as an additional insured on the General Liability Policy.

6.5.4. Certificates of insurance issued by the insurance carriers for the insurance required under this Agreement shall be delivered to the OWNER within seven (7) days after the date of this Agreement and, thereafter, if policy renewals occur, within thirty days prior to the expiration of the policy. Each certificate and policy shall contain a provision requiring not less than thirty days prior written notice to the OWNER before cancellation, change in perils insured, or reduction of coverage amounts.

6.6. Indemnification

6.6.1. The ENGINEER shall indemnify and hold-harmless the OWNER against all claims, damages, losses and expenses, including, but not limited to, attorney's fees, arising out of or resulting from negligent acts, errors or omissions of the ENGINEER where the claim, damage, loss or expense is attributable to bodily injury, sickness,

disease or death, or injury to or destruction of tangible property, including loss of use resulting therefrom.

6.6.2. There shall be a monetary limitation on the extent of indemnification in this Agreement in an amount of $316,880.00.

6.6.3. Notwithstanding anything to the contrary herein, each party waives all claims for recovery from the other party for any loss or damage to its property caused by fire or other insured casualty. The waiver shall apply only where insurance covering the loss or damage will not be prejudiced by reason of such waiver.

6.7. Consultants and Employees

ENGINEER agrees to bind each Consultant to every term of this Agreement so far as same is applicable to their work. Nothing contained herein, or in any statute or governmental regulation, shall obligate the OWNER to pay or see to the payment of any monies or to pay or assure the withholding of payment of any taxes, or other payroll deductions required by law to be withheld from wages of employees of the ENGINEER or any such party involved in assignment of this Agreement. The ENGINEER shall, at all times enforce strict discipline and good order among its employees and shall not employ on the work any person unfit for or not skilled in the work assigned to him. If any employee or assignee of ENGINEER causes a breach of the peace or disturbance in and around Project, or is otherwise unfit for or unskilled in the work assigned to him, OWNER may require that ENGINEER replace said employee or assignee within twenty-four (24) hours of a written notice from OWNER to ENGINEER. However, the foregoing shall not be construed or interpreted that the OWNER is in any way interfering with the ENGINEER's right to hire and fire his employees, assign duties to them, fix their working hours, wages or terms and conditions of employment, which right shall be absolute.

6.8. Custom and Use

The OWNER shall have the right to enforce all conditions and agreements herein notwithstanding any act of the OWNER in refraining from doing so. The failure

of the OWNER to enforce its rights shall not be construed as creating contrary custom, modifying or waiving conditions and agreements herein.

6.9. Liens and Claims

The ENGINEER shall promptly and properly pay for all labor employed, materials purchased and equipment hired in connection with the work; shall keep the OWNER's property free from any materialmen's or mechanic's liens and claims or notices in respect thereto arising by reason of the ENGINEERS' work by inserting waiver of lien provisions in all subcontracts it enters into in connection with the work.

6.10. Confidential Information

6.10.1. The ENGINEER will not at any time, in any fashion, form, or manner, either directly or indirectly, divulge, disclose, or communicate to any person, firm or corporation, in any manner whatsoever, any information of any kind, nature, or description concerning any matters affecting or relating to the business of OWNER, its manner of operation, or its plans, processes, or other data of any kind, nature, or description without regard to whether any or all of the foregoing matters would be deemed confidential, material or important.

6.10.2. The parties hereby stipulate that, as between them, all matters relating to this Agreement are important, material, and confidential and gravely affect the effective and successful conduct of OWNER's business and its goodwill, and that any breach of the terms of this Paragraph is a material breach of this Agreement.

6.10.3. None of the restrictions stated in this Paragraph shall apply to testimony, records, documents, information or materials which ENGINEER is required to give under any judicial proceeding or pursuant to law; disclosures to and communications with third parties which are necessary for ENGINEER to perform the work required by this Agreement, or disclosures regarding a general description of the work performed by ENGINEER for OWNER pursuant to this Agreement so long as such disclosures are approved in writing by OWNER prior to such disclosures publication in promotional or other materials or by any other means.

6.11. Independent Contractor

The ENGINEER recognizes and agrees that it is an independent contractor with no express or implied authority to act for or to obligate the OWNER, except as expressly provided in this Agreement.

6.12. Employment, Gifts or Other Considerations

Any of ENGINEER's employees shall not accept employment, gifts or other considerations from other companies, vendors or contractors. ENGINEER agrees not to employ any employee of OWNER nor grant any employee compensation, gifts or consideration. Breach of the terms of this provision shall be considered a material breach of the terms of this Agreement.

6.13. Non-Exclusive Agreement

The parties agree that this Agreement is non-exclusive and that the OWNER has the right, at its discretion, and at any time can engage other parties to perform services or work of a similar nature and to make agreements on any terms whatsoever with said other parties to perform said services.

SECTION 7 - EXHIBITS AND EXECUTION

7.1. The following Exhibits are attached and made a part of this Agreement.

7.1.1. Exhibit A "Price Proposal" for the Project consisting of 7 pages.

7.2. This Agreement (consisting of pages 1 to 23, inclusive), together with the Exhibits and Schedules identified above constitute the entire Agreement between OWNER and ENGINEER and supersedes all prior written or oral understandings. This Agreement and said Exhibits and Schedules may only be amended, supplemented, modified or cancelled by a duly executed written instrument.

IN WITNESS WHEREOF, the parties hereto have made and executed this Agreement as of the day and year first above written.

CORPORATE SEAL

Corporate Secretary

Dyer, Riddle, Mills & Precourt, Inc.

Gerald C. Hartman, P.E.
Vice President

CORPORATE SEAL

Assistant Secretary

Florida Cities Water Company

A.A. Reeves, III
Vice President

EXHIBIT "A"

PRICE PROPOSAL

March 16, 1989 DRMP 89-115.MK

Mr. Patrick J. Lehman, P.E.
Vice President, Operations
Florida Cities Water Company
P.O. Box 5846
Sarasota, FL 34277

Subject: Engineering Fee Proposal for the CarrollWood 0.5 MGD AWT Wastewater Treatment Plant

Dear Mr. Lehman:

Thank you for your invitation to our firm for submittal of a technical and price proposal to Florida Cities Water Company for the above referenced project. Dyer, Riddle, Mills & Precourt, Inc. (DRMP) is pleased to submit herewith, our price proposal for the above referenced project.

We believe that we can provide Florida Cities Water Company with a cost effective design for the proposed AWT Plant by incorporating and reusing some of the existing tankage while providing a system that meets the AWT discharge limitations and the Class I reliability requirements. We also will commit to meeting the time schedule as contained in your request for proposals. We have attached hereto a revised Scope of Services which we feel is appropriate following our visit to the plant site and taking into consideration the advanced level of treatment and the Class I reliability requirements. We have also attached hereto, a summary of compensation by project phase along with our work sheets for the final design and construction management services phase for your reference. We have also attached hereto the proposed project schedule which corresponds to the schedule contained in your request for proposals.

DRMP intends to serve Florida Cities Water Company using the multipliers stated below for this project. Our multiplier for design oriented of services is 2.52 times raw labor cost and the multiplier for construction management services is 2.60 times raw labor cost. All other direct costs will be invoiced to Florida Cities Water Company at cost.

We appreciate the opportunity to provide you with a quotation for engineering services for this project and we look forward to serving you in this manner. We would be happy to discuss the scope of services, our ideas for conversion of the plant to AWT

and use of the existing facilities, and the proposed compensation for this project after you have had a chance to review our proposal and/or to answer any questions that you may have. In the meantime if you have any questions or comments regarding the enclosed proposal, please feel free to give me a call.

Very truly yours,

Dyer, Riddle, Mills & Precourt, Inc.

James E. Christopher, P.E.
Project Manager

JC/cs

Attachments

2P/25

FLORIDA CITIES WATER COMPA.
CARROLLWOOD AWT PLANT
SCOPE OF SERVICES

A. Facility Requirements

Florida Cities Water Company intends to construct a 0.5 mgd advanced wastewater treatment plant to replace the existing secondary aeration treatment plant. The proposed facility will be designed to produce a final effluent of 5 mg/l BOD_5, 5 mg/l TSS, 3 mg/l Total Nitrogen, and 1 mg/L Total Phosphorus in accordance with the Grizzle-Figg Bill with surface water discharge to Sweetwater Creek.

It is anticipated the proposed AWT Plant will include the following in order to provide Class I reliability:

a) One mechanical bar screen, one manually cleaned bar screen (bypass), one vortex type grit removal system and bypass channel.

b) Flow equalization system using the existing tankage and providing for refurbishment of the aeration system and two new pumps rated at 1-1.5 ADF.

c) Dual oxidation ditches rated at 0.5 ADF each, single Orbal aeration system designed for Class I reliability, or dual train A^2/O process.

d) Two new 35± ft. diameter clarifiers (SOR = 400 gpd/s.f. @ 75% A.D.F. for Class I reliability) with rapid sludge removal system.

e) Return sludge pumping facilities using two horizontal centrifugal non-clog pumps rated at 1.5 A.D.F. each.

f) Waste sludge pumping facilities using two horizontal centrifugal non-clog pumps.

g) Tertiary effluent filters with a minimum of two units each designed for 75% A.D.F. Denitrification type filters to be utilized if required to meet the TN limits, otherwise most cost effective filter type which satisfies Hillsborough County design criteria.

h) New chlorination and dechlorination facilities utilizing 150 lb. cylinders, automatic vacuum switchover, manual or flow proportional control. Chlorination and dechlorination facilities to be housed within proposed operations/laboratory building or fiberglass enclosure. Chlorine contact chamber to include dual channels rated at 0.5 A.D.F. each.

i) Reaeration facilities to raise the DO limit to meet the discharge requirements for the receiving water body.

j) Provision of a final effluent flow meter consisting of a 90° V-notch or Parshall Flume located prior to the outfall with level and flow recorder, totalizer and indicator.

k) Aerobic digestion facilities to comply with 40 CFR 257 with prethickening of waste sludge via drum thickener, DAF, or gravity. Sludge pumping facilities to transfer sludge from the digester to truck loading facilities.

l) Motor control center to be housed in an air conditioned room within the operations/laboratory building. Power distribution system, emergency generator facilities and diesel fuel system with above ground fuel storage tank and containment structure.

m) Pre-engineered metal building to accommodate motor control center, air blowers, generator, ad operations/laboratory facilities. Existing building frame will be reused and refurbished, if feasible, to reduce project costs.

n) Site improvements including stabilized service road improvements, drainage and pond abandonment or refurbishment, as required, and landscaping buffer and irrigation along western property boundary.

o) Refurbishing of all existing structures to be reused in new plant. Demolition of all remaining structures not to be utilized.

B. Scope of Services

Services for the following areas are included in the fee proposal:

a) Preliminary Design Report/DER Construction Permitting
b) Construction Documents
c) Bidding
d) Construction Services
e) Start-up Services
f) Record Drawings
g) Surveys and Geotechnical Testing Services

1. Preliminary Design Report/DER Construction Permitting

Engineer shall prepare a preliminary design report depicting the design criteria, schematic layouts, sketches and appropriate calculations as required in Chapter 17.037 FAC to obtain a DER construction permit. The report shall also provide a preliminary construction cost estimate and schedule for implementation.

2. Construction Documents

Engineer shall prepare construction drawings and specifications for competitive bidding for all improvements recommended by the Engineer and approved by Florida Cities Water Company. Documents shall include drawings and specifications covering

a) Cover sheet, index, key map.

b) Civil drawings for all on and off site staking, grading, drainage, fencing and paving details, and effluent discharge structures.

c) Architectural drawings for all buildings.

d) Structural drawings for all buildings, tanks, foundations and incidental facilities.

e) Mechanical drawings for all HVAC and plumbing facilities.

f) Process and utility drawings for all treatment units, yard piping, pumping facilities, chemical feed systems and related facilities.

g) Electrical and instrumentation drawings for primary power, emergency power, lighting, lightning protection and facility monitoring and control needs. The electrical design should be complete to facilitate the construction and future troubleshooting. The Engineer should include the following in the design:

1) Panel schedule.
2) Motor control center elevations and plans.
3) Power and conduit plans.
4) Power and instrumentation wiring and conduit schedules.
5) Electrical site plan.
6) Single line diagrams.
7) Control schematics.
8) Electrical details.
9) Instrumentation loop sheets.

h) Prepare all contract agreement forms, general conditions, supplementary conditions, bid forms and related documents in accordance with the owners requirements.

i) Submit documentation and related applications for EPA, FDER, SWFWMD, Hillsborough County, and any other state and local agencies for permits related to construction of facilities.

3. Bidding

a) Release construction documents for competitive bidding.

b) Issue addenda and assist Owner in evaluation of bids.

4. Construction Services

Engineering services during construction to generally include the following:

a) Prepare final construction Contracts for execution by the Owner and Contractor.

b) Visits to the site by the Engineer's representative on approximately bi-weekly intervals to observe the general trend and quality of work. (Total construction time estimated as 12 months).

c) Review and approve shop drawings and submittals including equipment operation and maintenance manuals for conformance with the Contract Documents.

d) Issue Owner's instructions to Contractor.

e) Issue interpretations and clarifications to the documents.

f) Review and approve Contractor's pay requests.

g) Conduct substantial completion inspection.

5. Start-up Services

a) Provide the services of process, mechanical, electrical and instrumentation engineers and other personnel as appropriate during the start-up of the plant process and major mechanical equipment (one (1) week period).

b) Provide consultation and monitor operating results for a period of two (2) months after start-up.

6. Record Drawings Services

a) Prepare record drawings showing actual completed configuration of plant and related facilities and turn over original mylar record drawings to Florida Cities Water Company.

7. Surveying and Geotechnical Testing Services

The Engineer shall arrange for and pay for all Surveying and Geotechnical testing Services required for the design of this project. These fees, whether in house or outside services, are included in the fee proposal as a separate line item.

COMPENSATION SUMMARY

Preliminary Design Services	10,000.00
Final Design/Construction Documents	165,000.00
Bidding Services	4,500.00
General Construction Management Services	39,700.00
StartUp Services	7,300.00
Record Drawing Services	7,100.00
Total Basic Engineering Services	**$233,600.00**
Field Services	
Field Surveying	7,000.00
Geotechnical Services	5,000.00
Total Field Services	**$12,000.00**
Sub Total Basic Engineering and Field Services	**$245,600.00**
Resident Inspection Service at $45.00/Hr.	71,280.00
GRAND TOTAL FEE QUOTATION	**$316,880.00**

Exhibit_____(GSA-10)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV

IN THE MATTER OF: FLORIDA CITIES WATER COMPANY CARROLLWOOD SUBDIVISION SARASOTA, FLORIDA NPDES PERMIT NO. FL0029319	)	ORDER NO. 90-100(WRS)

ORDER PURSUANT TO SECTION 309
CLEAN WATER ACT

Pursuant to the authority of Section 309(a) of the Clean Water Act (hereinafter, the Act), 33 U.S.C. Section 1319(a), which has been delegated to me, I hereby make the following Findings of Fact and Violation and Order:

FINDINGS OF FACT

1. Florida Cities Water Company (hereinafter, the Respondent), is a "person" under Section 502(5) of the Act, 33 U.S.C. Section 1362(5).

2. The Respondent owns and operates the Carrollwood Wastewater Treatment Facility (hereinafter, the Facility), which discharges pollutants into Sweetwater Creek, a water of the United States. The Facility is located on Orange Grove Drive in Tampa, Florida.

3. Section 301(a) of the Act (33 U.S.C. Section 1311(a))

prohibits the discharge of pollutants into waters of the United States except as in compliance with a National Pollutant Discharge Elimination System (hereinafter, NPDES) permit issued pursuant to Section 402 of the Act (33 U.S.C. Section 1342).

4. On April 29, 1980, the Respondent submitted an application for renewal of NPDES Permit No. FL0029319. In September 1984 the NPDES Permit Application was denied. An Administrative Order was issued on November 27, 1984, requiring the facility to cease discharge not later than June 1987.

5. The Respondent has submitted to Region IV, Environmental Protection Agency (EPA), Discharge Monitoring Reports (DMRs) which indicate that the Respondent has continued to discharge pollutants into Sweetwater Creek, a water of the United States without a valid NPDES permit issued pursuant to Section 402 of the Act.

6. Inspections conducted in March 1990 and July 1990 by EPA, document the discharge of effluent into Sweetwater Creek from the Respondent's facility.

7. The Respondent submitted an NPDES application for the Facility on July 31, 1990.

VIOLATION

The Respondent has violated Section 301(a) of the Act (33 U.S.C. Section 1311(1)) by discharging pollutants into waters of the United States, without a valid NPDES permit issued pursuant to Section 402 of the Act (33 U.S.C. Section 1342).

ORDER

Based on the foregoing Findings of Fact and Violation and pursuant to the provisions of Section 309(a) of the Act (33 U.S.C. Section 1319 (a)), as amended, it is hereby ordered:

1. That effective immediately, the following monitoring requirements and effluent limitations shall be met until an NPDES permit is issued:

Parameter	Unit	Sample Type	Sample Frequency
$CBOD_5$	mg/l	8 Hr Comp.	Once/2 Weeks
Total Suspended Solids	mg/l	8 Hr Comp.	Once/2 Weeks
Total Phosphorus	mg/l	8 Hr Comp.	Once/2 Weeks
Total Nitrogen	mg/l	8 Hr Comp.	Once/2 Weeks
Ammonia Nitrogen	mg/l	8 Hr Comp.	Once/2 Weeks
Fecal Coliform	#/100 ml	Grab	Daily
Total Chlorine Residual	mg/l	Grab	Daily
Flow	mgd	Flow Meter	Daily

The pH shall not be less than 6.0 standard units nor greater

than 8.5 standard units and shall be monitored weekly by a grab sample.

The Dissolved Oxygen shall not be less than 5.0 mg/l and shall be monitored weekly by a grab sample.

There shall be no discharge of floating solids or visible foam in other than trace amount.

2. That the Respondent shall continue to maintain and operate its facilities as efficiently as possible.

3. That the Respondent shall submit a Monthly Progress Report identifying progress that has been made in the construction of an advanced wastewater treatment facility. Monthly Progress Reports will be submitted simultaneously with the monthly Discharge Monitoring Reports described in Item 4 below.

4. That monitoring results obtained during the month shall be summarized and reported on a Discharge Monitoring Report Form (EPA Form 3320-1), postmarked no later than the 28th day of the month following the end of the previous month (reporting period).

5. Information required to be submitted by this Order shall be sent by registered mail, or its equivalent, to the following

addressees:

Mr. John T. Marlar, Chief
Facilities Performance Branch
Water Management Division
U. S. Environmental Protection Agency
345 Courtland Street, NE
Atlanta, Georgia 30365

Mr. Dale Twachtmann
Secretary
Florida Department of
Environmental Regulation
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32301

Failure to comply with the requirements of this Order shall constitute a violation of this Order and may subject the Respondent to penalties as provided in Section 309 of the Act.

6. This Order does not operate as an NPDES permit and nothing contained herein shall be construed as prohibiting prosecution for the violations cited in this Order, for violations of the Order itself, or for any other violations of the Clean Water Act.

This Order is effective upon receipt.

SEP 2 7 1990
Date

John T Marlar
W. Ray Cunningham, Director
Water Management Division

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV

Exhibit_____(GSA-11)

IN THE MATTER OF:	)	Docket No. CWA-IV 90-542
Florida Cities Water Company Carrollwood Subdivision P.O. Box 5846 Sarasota, Florida 34277	)	Proceeding to Assess Class I Administrative Penalty Under Clean Water Act, Section 309(g)

CONSENT AGREEMENT AND ORDER
ASSESSING ADMINISTRATIVE PENALTIES

I. Statutory Authority

The following Findings are made and Consent Agreement issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 309(g) of the Clean Water Act, ("CWA" or the "Act"), 33 U.S.C. Section 1319(g),. The Administrator has delegated these authorities to the Regional Administrator of EPA Region IV, who has in turn delegated them to the Director of the Water Management Division of EPA Region IV, who hereby issues this Final Order.

II. Findings of Violation

Upon consent of the parties by their attorneys and authorized officials, the Director finds:

1. Florida Cities Water Company, ("Respondent"), a person within the meaning of Section 502(5) of the Act, 33 U.S.C. Section 1362(5), owns or operates the Carrollwood Wastewater Treatment Facility located at 11700 Orange Grove Drive, Tampa, Florida 33618, which is a point source and discharges pollutants to the Sweetwater Creek, a navigable water of the United States, all within the respective definitions established in Section 502 of the Act, 33 U.S.C. Section 1362.

Respondent is therefore subject to the provisions of the Act, 33 U.S.C. Section 1251 et seq.

2. On September 25, 1990, EPA Region IV issued to Respondent and notified the public of an Administrative Complaint, Docket No. CWA-IV 90-542 which included formal findings of violation, notice of a proposed assessment of a civil penalty against Respondent, and notice of Respondent's opportunity to request a hearing on the proposed administrative penalty assessment. EPA Region IV has taken into consideration any public comments timely received.

3. On September 25, 1990, the State of Florida was given an opportunity to consult with EPA regarding the assessment of an administrative penalty against Respondent. EPA Region IV has taken into consideration any comments received from the State.

4. Respondent has violated Section 301(a) of the Act, 33 U.S.C. Section 1311(a), by discharging pollutants into waters of the United States without a valid NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. Section 1342, during the period of June 1987 through July 1990.

III. Penalty Order and Consent:

Based on the foregoing stipulations and findings, and having taken into account the nature, circumstances, extent and gravity of the violations, Respondent's prior history of compliance, degree of culpability, economic benefit or savings resulting from the violations, and ability to pay, and under the authority of Section 309(g) of the Act, 33 U.S.C. Section 1319(g), EPA Region IV hereby ORDERS AND RESPONDENT HEREBY CONSENTS, that:

1. The provisions of this Consent Agreement shall be binding upon the Respondent, its officers, directors, agents, servants, authorized representatives, employees, and successors or assigns.

2. Florida Cities Water Company shall pay $15,000 for its past violations of the Clean Water Act cited above, by mailing a money order or certified check payable to "Treasurer, United States of America" by the effective date defined below, to the following address:

Regional Hearing Clerk
U.S. EPA Region IV
P.O. Box 100142
Atlanta, Georgia 30384

Respondent shall send notice of such payment, including a copy of the money order or check, to the Hearing Clerk at the following address:

Regional Hearing Clerk
U.S. EPA Region IV
Department 12
345 Courtland Street, NE
Atlanta, Georgia 30365

IV. General Provisions

1. Issuance of this Order does not constitute a waiver by EPA of its right to enforce the substantive legal requirements underlying this administrative penalty assessment, either administratively or judicially pursuant to Section 309(a),(b), and (c) of the Act, 33 U.S.C. Sections 1319(a),(b), and (c). Nor, pursuant to Section 309(g)(7) of the Act, does issuance or compliance with this Order exempt Respondent from responsibility to comply with all requirements of the Act and of any legal order or permit issued pursuant thereto.

2. Failure by Respondent to pay in full the penalty assessed in Section III, Paragraph 2 shall render the entire proposed penalty of $25,000 due and owing, and it shall be paid immediately in the manner provided in Section III, Paragraph 2 of the Consent Agreement.

Failure by Respondent to pay the penalty set forth in Section III, Paragraph 2 may subject Respondent to a civil action to collect the assessed penalty, plus interest, attorney's fees, costs and an additional quarterly nonpayment penalty equal to 20 percent of the aggregate amount of such penalty pursuant to Section 309(g)(9) of the Act, 33 U.S.C. Section 1319(g)(9). In any such collection action, the validity, amount and appropriateness of the penalty and of the Consent Agreement and Order shall not be subject to review. Interest will accrue on the penalty at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. Section 3717. A late payment handling charge of twenty ($20.00) dollars will be imposed after thirty (30) days, with an additional charge of ten ($10.00) dollars for each subsequent 30-day period over which an unpaid balance remains. In addition, a six percent (6%) per annum penalty will be applied on any principal amount not paid within ninety (90) days of the effective date of this Order.

3. Respondent knowingly and explicitly waives its rights pursuant to Sections 309(g)(2) and (8) of the Act, 33 U.S.C. Sections 1319(g)(2) and (8) of the Act, to a hearing on this penalty assessment, and to judicial review of this administrative penalty assessment.

V. Effective Date

This Consent Agreement and Order shall become effective thirty (30) days after the date of issuance noted below.

Florida Cities Water Company
A. A. Reeves, III, Executive Vice President
Carrollwood Subdivision
P.O. Box 5846
Sarasota, Florida 34277

W. Ray Cunningham, Director
Water Management Division
EPA Region IV

Issued this APR 19 1991 day of _____, 19 .

CERTIFICATE OF SERVICE

I certify that on the date noted below, I hand delivered the original of the foregoing "CONSENT AGREEMENT AND ORDER ASSESSING ADMINISTRATIVE PENALTIES" to the Regional Hearing Clerk, Region IV. Further, I certify that on the date noted below, I sent by certified mail, return receipt requested, a copy of this "CONSENT AGREEMENT AND ORDER ASSESSING ADMINISTRATIVE PENALTIES" to the following persons at the addresses listed below:

Mr. Paul H. Bradmiller
Senior Vice President
Florida Cities Water Company
Carrollwood Subdivision
P.O. Box 5846
Sarasota, Florida 34277

Ms. Carol Browner
Secretary
Florida Department of
Environmental Regulation
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32301

[redacted] 19 1991
DATE

Vanessa Felton
NAME Vanessa Felton
TITLE Clerk - Typist
ADDRESS US EPA
345 Courtland St.
Atlanta, GA 30365

Exhibit_____(GSA-12)

AGREEMENT

This AGREEMENT dated this 5th day of June, 1991, is made and entered into by and between Hillsborough County, a political subdivision of the State of Florida, (hereinafter called "the County") and Florida Cities Water Company (hereinafter called "the Company").

W I T N E S S E T H:

WHEREAS, the County is a political subdivision of the state of Florida, empowered to regulate wastewater franchises within its jurisdiction; and

WHEREAS, the Company owns and operates water and wastewater systems including, but not limited to, a wastewater treatment plant within the franchise territory shown on Exhibit "A", attached hereto and made a part hereof (hereinafter called "the Company's Service Area"), which is within the County's jurisdiction; and

WHEREAS, the Board of County Commissioners of the County establishes the water and wastewater rates and approves the tariffs applicable to the Company's customers located within the Company's Service Area; and

WHEREAS, on February 4, 1991, the Company entered into a Consent Order with the Hillsborough County Environmental Protection Commission and the State of Florida, Department of Environmental Regulation (Complainants), to bring the wastewater discharge from the Company's Wastewater treatment plant into compliance with the surfaces water effluent discharge limitations required by Section 403.086, Florida Statutes (hereinafter called "the Consent Order") which provides for the assessment of penalties at the rate of $500.00 per day for each day said limitations are not met after December 31, 1991; and

WHEREAS, the Company has prepared specifications and contract documents, obtained all applicable permits, and obtained bids for the construction of a new wastewater treatment plant which will comply with said advanced wastewater treatment standards (hereinafter called "Company's Proposed New Treatment Plant"); and

WHEREAS, the Company intends to retire its existing wastewater treatment plant (hereinafter called "the Company's Existing Treatment Plant"), upon the construction of the Company's Proposed New Treatment Plant; and

WHEREAS, it is in the interest of the public health, safety and welfare to ensure continued proper discharge of wastewater from the Company's Service Areas; and

WHEREAS, the objectives of said Consent Order can be achieved by discharging wastewater from the Company's Service Area to the County's wastewater system for treatment and disposal (hereinafter collectively called "treatment"); and

WHEREAS, the County's wastewater treatment facilities have excess capacity adequate to treat and dispose of all wastewater from the Company's Service Area now and in the future; and

WHEREAS, it is feasible to connect the Company's wastewater collection system to the County's wastewater collection system for purposes of transporting wastewater from the Company's Service Area to the County's treatment facilities which would eliminate the requirement for the construction of the Company's Proposed New Treatment Plant; and

WHEREAS, the County may establish different classes of wastewater customers by ordinance; and

WHEREAS, the County would derive benefits through the collection of treatment rates and connection fees by providing wastewater treatment service in the Company's Service Area.

NOW, THEREFORE, in consideration of the mutual covenants and provisions contained herein, the County and Company agree as follows:

1. The Company's wastewater collection system will be connected to the County's wastewater collection system as shown on Exhibit "B", attached hereto and made a part hereof. Each of the parties hereto shall completely construct, at its expense not later than December 31, 1991, the facilities designated and described on said Exhibit "B" (hereinafter collectively called "the New Facilities"). The Company shall construct and be responsible for all facilities required to connect the Company's wastewater collection system to the County's facilities at the point-of-connection designated on Exhibit B. The County shall construct and be responsible for all facilities downstream from the point-of-connection. The route indicated on Exhibit B to reach the point-of-connection is not necessarily the route that each party will utilize to install the facilities described on Exhibit B. The actual physical connection of the Company's wastewater collection system to the County's wastewater forcemain shall be accomplished in accordance with established County policies and procedures. Time is of the essence in the performance construction of the New Facilities inasmuch as failure of either party to complete construction of that portion for which it is responsible hereunder by the aforesaid date may result in the assessment of penalties by the Complainants in the Consent Order against the Company at the rate of $500.00 per day for each day that the New Facilities remain incomplete and unusable thereafter. Therefore, it is agreed that if the County does not completely construct and have available for

service that part of the New Facilities for which it is responsible by December 31, 1991, it shall pay to the Company any and all penalties imposed by said Complainants not to exceed $500.00 per day for each day that the County's part of the New Facilities remain incomplete and unusable thereafter, notwithstanding, said payments shall not apply for any period after December 31, 1991, that the Company's part of the New Facilities remain incomplete. Further, in the event the County shall be delayed or hindered in or prevented from completing the design, permitting, construction or installation of the County's part of the New Facilities by December 31, 1991, by reason or causes beyond the reasonable control of the County such as strikes, lock-outs, casualties, acts of God, failure of electrical power, governmental laws or regulations (except laws and regulations of the County, unless the County is required by state or federal law to have the applicable provision in its laws and ordinances), riots, insurrections, or acts of war, (hereinafter collectively referred to as a "force majeure"), the County shall not be liable or responsible for such delays and the doing and the performing of such act shall be excused for the period of the delay and period of performance of such acts shall be extended for a period equivalent to the period of such delay.

2. For the purpose of this Agreement, the Company will give the County the beneficial use of any plans and specifications available in its possession which pertain to the New Facilities at no cost to the County. The Company makes no representations regarding the accuracy and completeness of said plans and specifications and assumes no liability in connection with their use by the County.

3. Upon completion of the construction of the New Facilities, the County shall commence receipt and treatment of wastewater from the Company's Service Area for the benefit of the Company's customers. The Company shall continue to provide wastewater collection and water services to its customers while under a valid franchise agreement.

4. Following the commencement described in paragraph 3 above and until termination of this Agreement, the Company shall on a monthly basis render a bill to its customers for each connection to the Company's wastewater collection system which itemizes the applicable fees and charges prescribed in paragraphs 4.1, 4.2, and 5 below (hereinafter collectively called the County Charges) as well as all other charges which the Company is entitled to assess. The Company shall implement in accordance with County Ordinance 75-2 as amended (a) the rates on which the aforesaid charges will be based and any changes to such rates as may be adopted by the County and (b) the aforesaid fees.

4.1 Each such billing shall include a wastewater treatment charge whose amount shall be the product of the current wastewater treatment rate applicable to the Company as established from time

to time by the County and the number of gallons of water provided by the Company to the property being served by that wastewater connection. The foregoing computation shall exclude water consumption attributable to a service connection metered solely for purposes of irrigation. The initial wastewater treatment rate applicable to the Company hereunder is four dollars and forty-six cents ($4.46) per 1,000 gallons. Any limitation on the amount of treated wastewater that may be billed to a customer by the Company pursuant to its approved rate structure shall be similarly applied by the Company when computing the aforesaid wastewater treatment charge.

4.2 Unless reduced or sooner rescinded by the county or until paid in full as provided herein, each billing rendered pursuant to paragraph 4 above shall also include a wastewater connection fee of twelve dollars and eleven cents ($12.11) per month including simple interest at the rate of zero percent (0%) per annum for a period of thirty-six (36) months and thereafter a fee of seventeen dollars and nineteen cents ($17.19) per month including simple interest at the rate of seven and nine-tenths percent (7.9%) per annum for a period of one hundred eighty (180) months for each equivalent residential connection (ERC) to the Company's wastewater collection system existing at the time of the aforesaid commencement. An ERC represents the average number of gallons per day (gpd) of wastewater treatment service attributed to a single family detached residence as established from time to time by the County. For the purposes of this Agreement one ERC shall equal 225 gpd. The obligation of each wastewater customer of the Company to pay the aforesaid monthly connection fee and the benefit derived therefrom shall be established by law and shall run with the property served by the respective wastewater connection. Any wastewater customer of the Company which would be exempt from paying capacity fees to the County to obtain wastewater service directly from and as the customer of the County shall be similarly exempt from paying the connection fees prescribed in this paragraph. Any wastewater customer of the Company may pay in advance the total fees required at that time for full and complete ownership of wastewater treatment capacity in the County's system equal to the total ERCs for that customer's wastewater connection. The Company shall accept total payment for each such connection upon request by the customer. The amount due for such payment in full shall be the sum of the outstanding balance of the principal plus any outstanding accrued interest. The interest component of each monthly fee identified in this paragraph shall accrue as of the last day of the billing period for such fee.

5. Subsequent to the execution of this Agreement and as long as it shall remain in effect, the Company shall accept no new connections to its wastewater collection system without verification from the County that each such applicant for service has paid the applicable capacity fees for wastewater treatment to the County pursuant to applicable County ordinances and resolutions and is approved for connection to the Company's system. Each

connection made pursuant to this paragraph shall be billed by the Company in accordance with paragraph 4.1 above.

6. On or before the 20th day of each month following the commencement described in paragraph 3 above, the Company shall furnish the County with a summary of the County Charges which were billed by the Company for each wastewater connection during the preceding month as well as the amounts received during that month by the Company in payment of County Charges previously billed but uncollected by the Company. The summary shall also indicate those accounts which are more than sixty (60) days in arrears on payment. The Company shall remit to the County along with the aforesaid summary all such payments received in that month. The Company's expenses associated with performing the services described in paragraphs 4, 5 and 6 of this Agreement shall be an allowable expense for rate making purposes.

7. The Company shall observe the same diligent policy and procedures in the billing and administration of County Charges as it uses in administering and billing its own accounts.

8. The County shall provide the Company with written notice of any change in the rates or method of collection applicable to County Charges. The Company shall implement each such change with the Company's next complete billing cycle which follows the date of the aforesaid notice.

9. The Company agrees to maintain, operate and expand its wastewater collection system as is necessary to meet its obligations under its franchise agreement with the County and to retain complete responsibility therefor. The Company will endeavor, to the extent of its powers, to prohibit the discharge of substances into its wastewater collection system which are detrimental to the County's operation of its treatment and disposal system. The County shall administer and enforce its pretreatment rules and regulations within the Company's Service Area.

10. The Company shall apply to the County for a limited rate proceeding as provided by ordinance for an adjustment in its rates as a result of the interconnection to be made pursuant to this Agreement. The County agrees that it will allow the Company to recover through its wastewater rates the undepreciated cost of the Company's Existing Treatment Plant, cost of demolition of the abandoned portion of the Existing Treatment Plant, restoration of the treatment plant site and amounts expended in connection with the design, preparation of contract documents, bidding, and permitting of the Company's Proposed New Treatment Plant over a period of 15 years, all at the same rate of return as that applicable to the rate base amounts most recently approved by the County.

11. The Company shall indemnify and hold harmless the County, its agents and employees from and against all liabilities, claims, demands, or actions of law and in equity including court costs and attorney's fees, at all judicial levels, that may hereafter at any time be made or brought by anyone for the purpose of enforcing a claim on account of any injury or damage allegedly caused by the negligence or intentional wrongful act or omission of the Company, its agents or employees in the provision of wastewater collection service to its customers pursuant to this Agreement.

12. The County, to the extent allowed by Section 768.28, Florida Statutes, shall indemnify and hold harmless the Company, its agents and employees from and against all liabilities, claims, demands, or actions of law and in equity including court costs and attorney's fees, at all judicial levels, that may hereafter at any time be made or brought by anyone for the purpose of enforcing a claim on account of any injury or damage allegedly caused by the negligence or intentional wrongful act or omission of the County, its agents or employees in the treatment of wastewater pursuant to this Agreement.

13. Nothing in this Agreement will interfere with, inhibit or delay the Company in discontinuing service to the Company's Customers at any time in order that the Company may enforce its rules and regulations relating to wastewater collection service and the payments therefor. The Company shall interrupt (a) water service to any of its water customers (excluding service metered solely for purposes of irrigation) and (b) wastewater service to any of its wastewater customers which are not also its water customers, for nonpayment of the County Charges assessed pursuant to this Agreement until such time that such accounts have been made current. Each such interruption shall be accomplished in accordance with County Ordinance 75-2 as amended. The Company shall be entitled to collect its customary charge from each such delinquent customer whose service is interrupted pursuant to this paragraph.

14. This Agreement may be terminated only by mutual agreement of the parties.

15. After approval of this Agreement by the respective parties hereto and the execution thereof by their duly qualified and authorized officers, the County shall cause this Agreement to be filed with the Clerk of the Circuit Court of Hillsborough County, Florida for recording in the Public Records of Hillsborough County pertaining to land.

16. The Company shall have the right to assign any and all of its interest in this Agreement to any person, firm, partnership, corporation or other entity pursuant to its franchise agreement. The provisions hereof shall be binding upon and inure to the benefit of the parties hereto and their successors and assigns.

Notice in the manner provided in paragraph 17 below and as required by County Ordinance 75-2 as amended shall be given to the County if such an assignment is made.

17. Any notice required or permitted to be delivered hereunder shall be sent by United States certified mail, return receipt requested, and addressed as follows:

To the Company:

Executive V.P. & Chief Operating Officer
Florida Cities Water Company
P.O. Box 21119
Sarasota, FL 34276-4119

To the County:

Director
Hillsborough County Public Utilities Department
925 E. Twiggs Street
Tampa, Florida 33602

18. This Agreement shall be construed and enforced in accordance with the laws of the State of Florida.

19. The prevailing party in any legal proceeding brought to enforce rights under this Agreement shall be entitled to reimbursement of all reasonable costs and fees, including attorney's fees at all judicial levels.

20. This Agreement shall constitute an amendment of the Company's franchise agreement to the extent that the terms of the franchise agreement are inconsistent with this Agreement. This Agreement shall not become effective until and unless the County adopts ordinances establishing the authority to enter into this Agreement.

21. This Agreement is made under the authority of County ordinances and shall be controlled by the laws of the United States of America and of the State of Florida, and by any applicable ordinances, rules, and regulations of any governmental entities of competent jurisdiction. If any provision of this Agreement is found to be in conflict with any such laws, ordinances, rules or regulations, the conflicting provision of this Agreement shall be construed in such a manner as to eliminate the conflict, giving full controlling effect to the law, ordinance, rule or regulation. However, the parties are relying on the validity of this Agreement and may take action based on such reliance.

22. The foregoing constitutes the entire agreement between the parties with respect to the subject matter contained herein.

There are no other understandings, agreements, or representations expressed or implied, respecting this Agreement and the services provided for herein.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives.

ATTEST: RICHARD AKE, CLERK

By: _____
Deputy Clerk

COUNTY: HILLSBOROUGH COUNTY, FLORIDA

By: _____
Chairman, Board of County Commissioners

ATTEST:

_____
Witness

_____
Witness

COMPANY: FLORIDA CITIES WATER COMPANY

By: _____
Authorized Signature

Executive Vice President & Chief Operating Officer
Title

May 31, 1991
Date

BOARD OF COUNTY COMMISSIONERS
HILLSBOROUGH COUNTY FLORIDA
DOCUMENT NO. 91-1039

APPROVED BY COUNTY ATTORNEY
BY _____
Approved As To Form And Legal Sufficiency.

CON07AGM
053091

There are no other understandings, agreements, or representations expressed or implied, respecting this Agreement and the services provided for herein.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives.

ATTEST: RICHARD AKE, CLERK

By: _____
Deputy Clerk

COUNTY: HILLSBOROUGH COUNTY, FLORIDA

By: _____
Chairman, Board of County Commissioners

ATTEST:

_____
Witness

_____
Witness

COMPANY: FLORIDA CITIES WATER COMPANY

By: _____
Authorized Signature

_____
Title

_____
Date

BOCC STAFF	APPROVAL - DATE
A.C.A.	6/3/91
ATTORNEY	6/3/9
FISCAL/BUDGET	6/3/9
PURCH/CONTRACTS	6/3/9

KEEP FOR LEGAL SIGN-OFF

BOARD OF COUNTY COMMISSIONERS
HILLSBOROUGH COUNTY, FLORIDA
DOCUMENT NUMBER 91-1035

CON07AGM
053091

ACKNOWLEDGMENT FOR CORPORATION

STATE OF Florida)
SS
COUNTY OF Sarasota)

On this 31st day of May, 1991, before me the undersigned authority, personally appeared A. A. Reeves III, to me known to be the individual described in and who executed the foregoing instrument as Executive Vice President of Florida Cities Water Co., a Delaware corporation, and who severally and duly acknowledged the execution of such instrument as such officer aforesaid, for and on behalf of and as the act and deed of said corporation, pursuant to the powers conferred upon said officer by the corporation's Board of Directors or other appropriate authority of said corporation, and who, having knowledge of the several matters stated in said foregoing instrument, certified the same to be true in all respects.

WITNESS my hand and official seal the date aforesaid.

Carol Ann Dalldorf

(SEAL)

Notary Public, State of Florida at Large

My Commission Expires: Notary Public, State of Florida My Commission Expires May. 27, 1994

CON18STD

EXHIBIT A

AREA DESCRIPTION

FOR

FLORIDA CITIES WATER COMPANY FRANCHISE AREA

That part of the South 1/4 of Section 9, Township 28 South, Range 18 East, Hillsborough County, Florida, lying East of Dale Mabry Highway (State Road 597).

AND

The South 1/2 of the Southwest 1/4 of Section 10, Township 28 South, Range 18 East, Hillsborough County, Florida; All of BEEM'S SUBDIVISION, Plat Book 22, Page 5, Public Records of Hillsborough County, Florida; Lot 15 of LAKESIDE TERRACE, Plat Book 14, Page 21, Public Records of Hillsborough County, Florida, LESS the East 450 feet thereof; and Lot 4 and the South 85 feet of Lot 3 of LAKE RIDGE REVISED, Plat Book 30, Page 55, Public Records of Hillsborough County, Florida.

AND

The West 1/2 of Section 15, Township 28 South, Range 18 East, Hillsborough County, Florida; the North 3/4 of the West 1/2 of the East 1/2 of Section 15, Township 28 South, Range 18 East, Hillsborough County, Florida; the Northeast 1/4 of the Northeast 1/4 of Section 15, Township 28 South, Range 18 East, Hillsborough County, Florida; and the Northwest 1/4 of the Southwest 1/4 of the Southeast 1/4 of Section 15, Township 28 South, Range 18 East, Hillsborough County, Florida.

AND

That part of Section 16, Township 28 South, Range 18 East, Hillsborough County, Florida, lying East of Dale Mabry Highway (State Road 597).

AND

All of WHITE TROUT LAKE SHORES (in Section 21, Township 28 South, Range 18 East), Plat Book 47, Page 72, Public Records of Hillsborough County, Florida.

AND

The East 1/2 of the Northwest 1/4 of the Northwest 1/4 of the Northwest 1/4 of Section 22, Township 28 South, Range 18 East, Hillsborough County, Florida; and the North 1/2 of the Northeast 1/4 of the Northwest 1/4 of the Northwest 1/4 of Section 22, Township 28 South, Range 18 East, Hillsborough County, Florida.

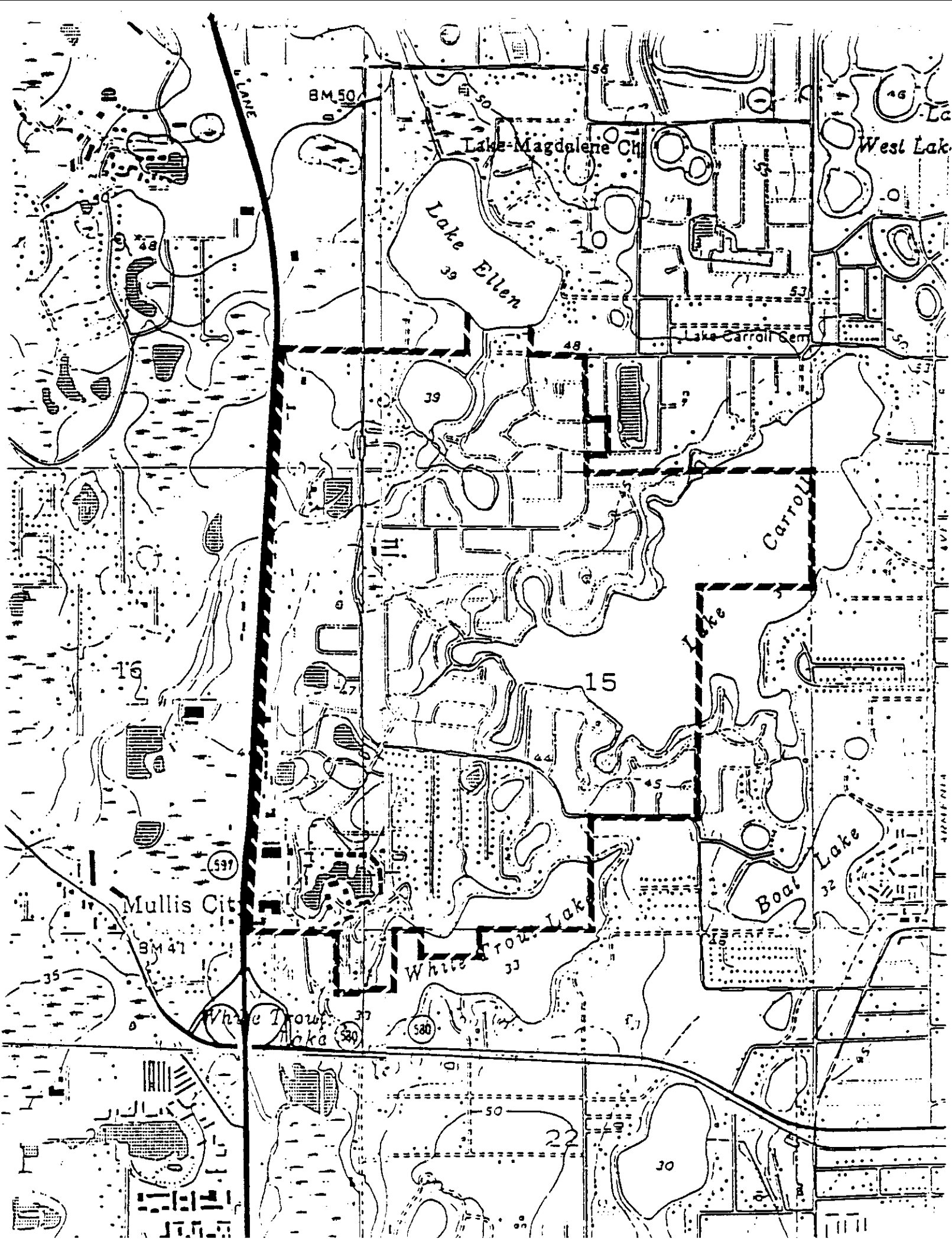
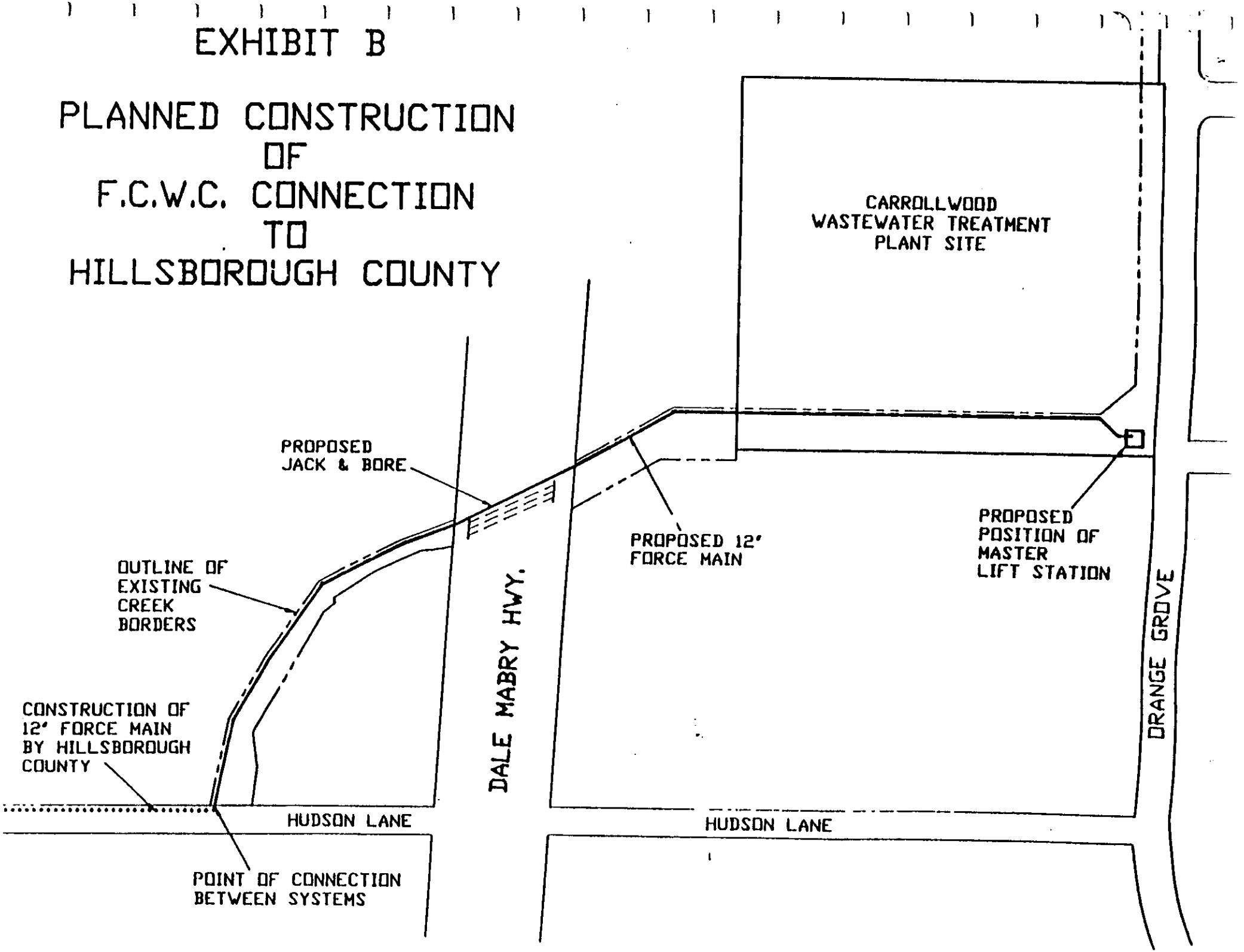

BM 50
Lake Magdalene Ch
West Lak
Lake Ellen
10
Lake Carroll Cem
Carroll
Lake
15
16
Mullis Cit
BM 47
Boat Lake
White Trout Lak
White Trout
Alaka
597
580
50
22
30

EXHIBIT B

PLANNED CONSTRUCTION OF F.C.W.C. CONNECTION TO HILLSBOROUGH COUNTY



LINE ITEM
AGENDA DETAIL

DEPARTMENT NAME: PUBLIC UTILITIES DEPARTMENT — FUNDING SOURCE: 40-040

ORGANIZATION NO: 20-06-68

Account Code	Name of Account	Current Budget	Increase	Decrease	Revised Budget
	PROJECT FUND 040001 OPERATION/MAINTENANCE ACCOUNT				
REVENUES:					
3001 0306	TRF FROM REVENUE ACCT PF 003	47,963,570	0	150,000	47,813,570
	TOTAL REVENUES	47,963,570	0	150,000	47,813,570
APPROPRIATIONS:					
3101 4600	MAINT OFFICE SPACE	480,000	0	150,000	330,000
	TOTAL APPROPRIATIONS	480,000	0	150,000	330,000
	PROJECT FUND 040003 GENERAL REVENUE ACCOUNT				
APPROPRIATIONS:					
3232 9101	TRF TO REV CAP PROJ ACCT 010	544,833	150,000	0	694,833
3196 9101	TRF TO OPER/MAINT ACCT 001	47,963,570	0	150,000	47,813,570
	TOTAL APPROPRIATIONS	48,508,403	150,000	150,000	48,508,403

This item does ( ) does not (X) have a greater impact in the next Fiscal Year.
If it does, what is the anticipted impact?_____
Does this affect revenues ( ) expenditures ( ) net of revenues/expenditures ( )?
Does this action create ( ) eliminate ( ) positions? Number of positions_____.

TO BE COMPLETED WHEN POSITIONS ARE INCREASED/DECREASED

CLASS_____ _____ADD ( ) POS (s) #_____DELETE ( )

MEETING DATE: JUNE 5, 1991 — AGENDA CODE:

FORM 101 REV. 2/91

LINE ITEM
AGENDA DETAIL

EPARTMENT NAME: PUBLIC UTILITIES DEPARTMENT — FUNDING SOURCE: 40-040

ORGANIZATION NO: 20-06-68

Account Code	Name of Account	Current Budget	Increase	Decrease	Revised Budget
	PROJECT FUND 040010 CAPITAL EXPENDITURE ACCOUNT				
REVENUES:					
8410 0306	TRF FR REVENUE ACCT 003	544,833	150,000	0	694,833
	TOTAL REVENUES	544,833	150,000	0	694,833
APPROPRIATIONS:					
0406 6500	FLA CITIES FORCE MAIN	0	150,000	0	150,000
	TOTAL APPROPRIATIONS	0	150,000	0	150,000

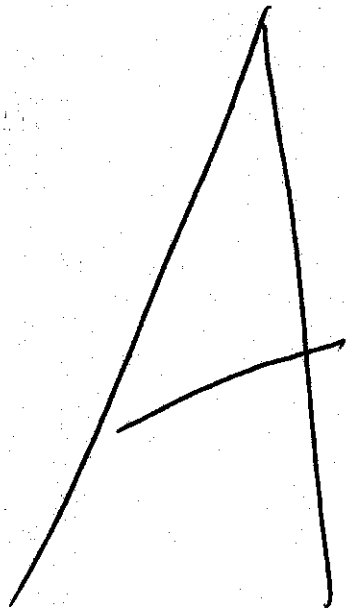
is item does ( ) does not (X) have a greater impact in the next Fiscal Year.
it does, what is the anticipted impact?_____
es this affect revenues ( ) expenditures ( ) net of revenues/expenditures ( )?
es his action create ( ) eliminate ( ) positions? Number of positions_____.

B COMPLETED WHEN POSITIONS ARE INCREASED/DECREASED

#_____ADD ( ) POS (s) #_____DELETE ( )

MEETING DATE: JUNE 5, 1991 — AGENDA CODE:

C 101 REV. 2/91



Exhibit_____(GSA-13A)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for a rate increase in Brevard County by Florida Cities Water Company (Barefoot Bay Division).	)	DOCKET NO. 951258-WS ORDER NO. PSC-96-1147-FOF-WS ISSUED: SEPTEMBER 12, 1996

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON

APPEARANCES:

B. KENNETH GATLIN, Gatlin, Woods and Carlson, The Mahan Station, 1709-D Mahan Drive, Tallahassee, Florida 32308
On behalf of Florida Cities Water Company, Barefoot Bay Division.

JACK SHREVE, Public Counsel, and Harold McLean, Office of Public Counsel, 111 West Madison Street, Room 812, Tallahassee, Florida 32399-1400,
On behalf of the Citizens of the State of Florida.

CLINTON W. DYER, 531 S. Dolphin Circle, Barefoot Bay, Florida 32976
On behalf of himself.

TIM VACCARO and RAJ AGARWAL, Florida Public Service Commission, Gerald L. Gunter Building, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399
On behalf of the Commission Staff.

FINAL ORDER ESTABLISHING INCREASED RATES
AND
NOTICE OF PROPOSED AGENCY ACTION
ORDER IMPUTING CONTRIBUTIONS-IN-AID-OF-CONSTRUCTION
FOR GRANT FROM ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

BY THE COMMISSION:

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that the action discussed herein, regarding our imputation of contributions-in-aid-of-construction for the St. Johns River Water Management District grant to Florida Cities Water Company, Barefoot Bay Division, is preliminary in nature and will

DOCUMENT NUMBER-DATE
09689 SEP 12 96
FPSC-RECORDS/REPORTING

Exhibit

become final unless a person whose interests are substantially affected files a petition for a formal proceeding, within **fourteen days** of the date of this Order, pursuant to Rule 25-22.029, Florida Administrative Code.

BACKGROUND

Florida Cities Water Company, Barefoot Bay Division, (FCWC or utility) is a Class A utility providing water and wastewater service for a predominately residential area in Barefoot Bay, Florida. The utility's Barefoot Bay division was serving 4,458 water and 4,440 wastewater customers at year end December 31, 1994. For the twelve months ended December 31, 1994, the utility recorded operating revenues of $671,582 for water service and $823,463 for wastewater service. The utility recorded a net operating loss of $73,769 for the water system and a net operating income of $77,577 for the wastewater system. The Barefoot Bay system is in an area that has been designated by the St. Johns River Water Management District (SJRWMD) as a critical water supply use caution area.

On November 6, 1995, the utility filed its application for approval of interim and permanent rate increases pursuant to Sections 367.082 and 367.081, Florida Statutes, respectively. On November 6, 1995, the utility satisfied the minimum filing requirements (MFRs) for a rate increase, and this date was established as the official filing date, pursuant to Section 367.083, Florida Statutes. The utility requested that this case be scheduled for a formal hearing and not processed pursuant to the proposed agency action (PAA) process as provided for in Section 367.081(8), Florida Statutes.

The Prehearing Conference was held on March 18, 1996, in Tallahassee, Florida. At the conference, the Prehearing Officer granted a petition to intervene filed by Clinton Dyer. Additionally, the parties identified forty-three issues to be addressed at the formal hearing. Prehearing Order No. PSC-96-0425-PHO-WS, was issued on March 26, 1996. We held the technical hearing in Barefoot Bay, Florida, on April 1 and 2, 1996. Approximately 30 customers presented testimony regarding the utility's application for a rate increase.

The utility's last rate case for only the Barefoot Bay water system was, in Docket No. 940687-WU, finalized on October 11, 1994, by Order No. PSC-94-1237-FOF-WU. The utility's last rate case for both Barefoot Bay systems, in Docket No. 910976-WS, was finalized on June 24, 1992, by Order No. PSC-92-0563-FOF-WS. The utility has received a price index rate increase every year since 1993.

The utility's application for increased final rates is based on the test year ended June 30, 1996. FCWC requested final revenues of $916,723 for water and $2,110,481 for wastewater based on a projected test year ending June 30, 1996. This represents an increase of $153,136 for water and $1,273,024 for wastewater, or 20.05 percent and 152.01 percent, respectively.

Pursuant to Rule 25-22.056 (3)(a), Florida Administrative Code, each party was required to file a post-hearing statement and to include a summary of each position. Any issue or position not included in the post hearing-statement shall be waived. On May 3, 1996, FCWC and OPC filed post-hearing briefs. Mr. Dyer provided his post-hearing brief to legal staff on June 30, 1996. Mr. Dyer failed to properly file his brief with the Division of Records and Reporting on the date established by the Prehearing Order. Upon staff's discovery of this fact, it provided Mr. Dyer's brief to the Division of Records and Reporting, which provided copies to the parties. The other parties did not move to strike Mr. Dyer's brief, and we considered his brief in making our final decisions in this docket.

On May 29, 1996, FCWC filed a motion and notice, requesting that the Commission accept its notice of the transfer of the property formerly known as H&S Groves to FCWC.

FINDING OF FACT, LAW AND POLICY

Having heard the evidence presented at the hearing in this proceeding and having reviewed the recommendation of the Commission staff, as well as the briefs of the parties, we now enter our findings and conclusions.

OPC'S MOTION TO STRIKE

Subsequent to our final decision in this docket at the June 25, 1996 Agenda Conference, but before the Order in this docket was issued, our staff determined that it had miscalculated the percentage of used and useful for the portion of FCWC's wastewater treatment plant which existed prior to improvements for advanced wastewater treatment (AWT) of effluent. This miscalculation was part of staff's original recommendation on that issue. Staff filed a revised recommendation with the appropriate used and useful calculation, for our consideration at the August 13, 1996 Agenda Conference including revised wastewater rates, which resulted from the corrected used and useful calculation. Our decision on this corrected calculation is reflected in the body of this Order.

On August 6, 1996, FCWC filed a Motion to Correct Errors in Staff Recommendation. The alleged errors pertain to our final decision in this docket, but go beyond the scope of our revised decision.

On August 7, 1996, OPC filed a Motion to Strike FCWC's motion. In it's motion, OPC alleges that Rule 25-22.0021(2), Florida Administrative Code, limits participation at agenda to the Commissioners and staff, when a recommendation is considered in a proceeding where a hearing has been held. OPC further states that FCWC has adequate opportunity to raise its concerns in a motion for reconsideration. On August 9, 1996, FCWC responded to OPC's motion, stating that the alleged errors should be corrected at the same time as the revised determination on used and useful.

Upon consideration, we agree with OPC's argument. We also note that our rules do not contemplate FCWC's motion. Rule 25-22.060(1)(a), Florida Administrative Code, provides that any party adversely affected by an Order of the Commission may file a motion for reconsideration of that order. To the extent that FCWC believes it is adversely affected by this Order, it may file a motion for reconsideration. Therefore, we find it appropriate to grant OPC's Motion to Strike.

FCWC's MOTION TO ACCEPT TRANSFER OF PROPERTY FORMERLY KNOWN AS H&S GROVES

As stated earlier, on May 29, 1996, FCWC filed a motion and notice, requesting that we accept the notice of the transfer of the property formerly known as H&S Groves to FCWC. The closing on the property occurred on May 22, 1996. We do not find that a decision is necessary since the ownership of the property is recognized by its inclusion in rate base, discussed later in this Order.

QUALITY OF SERVICE

In accordance with Rule 25-30.433(1), Florida Administrative Code, our evaluation of the quality of service provided by the utility is derived based upon three components of water and wastewater operations: the overall quality of FCWC's product; the operational conditions of FCWC's plant and facilities and the utility's efforts to address customer satisfaction.

Quality of FCWC's Product and Operational Conditions

Mr. Alvin Castro, P.E., program manager for Domestic Waste and Ms. Debra Laisure, Engineer I in the Field Compliance section of the Potable Water Program, are both employed by the Florida

Department of Environmental Protection (DEP). Witness Castro testified that the facility is currently operating in compliance with requirements of the DEP Second Amended Consent Order (SACO) requiring the upgrade to AWT of the effluent. Witness Laisure testified that the water plant and distribution system are in compliance with provisions of Chapter 62, Florida Administrative Code, and have not been the subject of any DEP enforcement action within the past two years.

Customer Satisfaction

A service hearing was held in the Barefoot Bay service area in Barefoot Bay, Florida, on April 1, 1996. Approximately 300 persons attended. Thirty-two customers testified, primarily about rates and the rate increase requested. Only one customer complained about the quality of the water provided. Mr. Robert Jackson complained about a high level of chlorine and sediment in the water.

Based upon the evidence, we find that the quality of service provided by FCWC to its customers is satisfactory.

RATE BASE

Our calculations of the appropriate rate base amounts for the purpose of this proceeding are depicted on Schedules Nos. 1-A and 1-B for water and wastewater, respectively. Our adjustments are itemized on Schedule No. 1-C. Those adjustments which are self-explanatory or which are essentially mechanical in nature are reflected on those schedules without further discussion in the body of this Order. The major adjustments are discussed below.

Year-End Rate Base

The utility requested approval of a year-end rate base value in order to reflect the full weight of additions to plant-in-service. These test year plant additions are the result of capital costs incurred to upgrade the wastewater treatment plant to advanced treatment standards and disposal of wastewater effluent through reuse, at the direction of DEP. The utility argues that the magnitude of investment in the Barefoot Bay wastewater plant, which serves the public interest, is an extraordinary condition that justifies approval of an end-of-period rate base determination.

Although OPC did not object to the utility's proposed use of a year-end rate base for its wastewater operations, OPC witness Dismukes disagreed that the same treatment should be afforded the

water operations. In her testimony, Ms. Dismukes recommended use of a 13-month average rate base for the utility's water operations. In its brief, OPC argues that we should not approve a year-end rate base for the utility's water operations based on Rule 25-30.433, Florida Administrative Code. This rule directs the applicant in a rate case proceeding to use the 13-month average method to calculate rate base, unless the applicant can demonstrate that this will result in an unreasonable burden. Under cross-examination, Utility witness Coel acknowledged the existence of the rule, and conceded that there would be no unreasonable burden imposed on the utility by using the 13-month average for the water rate base. Further, Mr. Coel admitted that there were no unusual or extenuating circumstances associated with the water plant operations, nor were there any major plant additions during the test year.

Utility witness Coel testified that although he is aware of the 13-month average rule, the utility requested use of a year-end rate base for its water operations in order to be consistent with the wastewater operations. In addition, the utility requested year-end rate base treatment to establish the rate bases on a going-forward basis. It is the utility's position that use of year-end rate base is more appropriate, particularly if a final order is issued at the end of the test year and rates are set at the same time, since the rates and rate bases will be in full synchronization and not mismatched.

The Supreme Court of Florida found that, in the absence of the most extraordinary conditions or circumstances, the Commission should apply average investment during the test year in determining rate base. Further, the court found that an average rate base can produce a distorted picture of future conditions when factors are forcing investment costs upward without a concomitant increment in revenues. Citizens of Florida v. Hawkins, 356 So. 2d 254, 257 (Fla. 1978). None of the parties dispute that extraordinary circumstances exist for the wastewater operations.

We find merit in OPC's argument that absent extraordinary circumstances, an average rate base should be used. However, FCWC filed this rate proceeding for both water and wastewater operations. Although we acknowledge that there were no extenuating circumstances or major water plant additions during the test year, we find that there will be a mismatch in rates and rate bases if we approve year-end treatment for wastewater and a 13-month average for water. Moreover, since the utility uses the same capital structure for this division, use of year-end treatment for wastewater and 13-month average for water will result in a mismatch in the determination of the overall cost of capital. Consequently,

we find that extraordinary circumstances do exist for the Barefoot Bay division, and therefore, we find it appropriate to focus upon the total company.

Although intervenor witness Dyer did not address this issue in his testimony, he does argue in his brief that we should reject accelerating recovery of costs based on the premise that the investment serves the public interest and that the increased investment is not being matched by customer growth. Mr. Dyer further contends that even though the public receives the benefit, the customers of Barefoot Bay have to pay the cost. In spite of Mr. Dyer's trepidation, we are obligated to consider this investment with respect to Section 367.081(2)(a), Florida Statutes, which states:

> The commission shall also consider the investment of the utility in land acquired or facilities constructed or to be constructed in the public interest within a reasonable time in the future, not to exceed, unless extended by the commission, 24 months from the end of the historical test period used to set final rates. (Emphasis added)

Based on the above, we find it appropriate to approve a year-end rate base determination for both water and wastewater. The wastewater plant upgrade to advanced wastewater treatment and public access reuse standards are substantial improvements that serve the public interest for the total division. Substantial completion was scheduled for November of 1995 with the addition to plant-in-service on the utility's books on December 31, 1995, which in-service date satisfies the two-year limitation prescribed by Section 367.081(2)(a), Florida Statutes. In this case, an average rate base determination will distort the revenue requirement picture, since factors which are increasing the investment in operating plant are not matched by a concomitant growth in customers. Further, we find the instant rate case consistent with Citizens v. Hawkins because the utility's circumstances are the result of the utility's endeavoring to cope with extraordinary circumstances due to DEP requirements, which the statute requires us to consider.

Utility Plant-In-Service (UPIS)

Preliminary Survey and Investigation (PS&I) Charges

In the 1996 projected test year, the utility capitalized $5,886,260 into UPIS, to include costs to upgrade the Barefoot Bay

Wastewater Treatment Plant to meet AWT and public access reuse standards. Included in the capitalized amount are PS&I charges totaling $191,880 associated with the deep injection well and $828,042 associated with the Micco Tract sprayfield. The injection well and the Micco Tract were alternatives explored in order to comply with the DEP mandate to eliminate the continuous discharge of treated wastewater from the Barefoot Bay treatment plant to surface water bodies. Due to regulatory requirements and other factors beyond FCWC's control, the process ultimately led to upgrading the wastewater treatment plant to AWT standards and reuse as the only feasible solution under the complex circumstances. As discussed below, we have found that the PS&I costs incurred for the injection well and the Micco Tract were prudent and reasonable. Later in this Order, we address the appropriate ratemaking treatment for the related costs.

Prudence of PS&I Charges

Utility witness Gerald S. Allen testified that the utility signed a consent order with the DEP (then known as the Florida Department of Environmental Regulation) on October 18, 1988, under which FCWC was ordered, among other things, to construct a deep injection well for effluent disposal. Witness Allen further testified that, at that time, deep well injection was highly ranked by the DEP as a method of choice to eliminate surface water discharges of wastewater effluent, and that many deep wells had been constructed, or were under consideration, in Florida. Witness Allen testified that the utility hired engineers to do cost estimates, provide assistance to FCWC during the bidding and permitting process and provide certain services during construction, including shop drawing review. He further testified that concerns regarding the viability of injection wells in the area arose in March, 1989, with a newspaper article in the Florida Today newspaper. That article cited leaks in the injection well in the area owned by the City of Melbourne. The Melbourne well was eventually taken out of service. FCWC was concerned, but under terms of the Consent Order, had little choice but to continue planning for the injection well process. Alternative methods of disposal were investigated simultaneously. These alternatives involved the use of reclaimed water on nearby citrus groves. The utility soon learned that the only way it could utilize reuse water was on land owned, or controlled, by it. Subsequent meetings with DEP concerning the geology of the area and concerns regarding the viability of deep wells for injection of effluent, resulted in a modification of the Consent Order to include FCWC pursuing options to purchase land for use as land application of effluent. On October 9, 1990, SJRWMD issued an order deferring action on permit activity for seven months and directed FCWC:

> to aggressively pursue, through its power of eminent domain, acquisition of portions of the Micco Grove northwest of Micco Rd., in Brevard County.

DEP was unwilling to allow FCWC to withdraw the deep well permit application at that time pending more certain outcome of the land proposal pertaining to the Micco tract. Witness Allen testified that the "principal directive" was for FCWC to effect the ultimate elimination of the surface water discharge of treated effluent.

OPC argues in its brief that FCWC's actions in pursuit of several options for disposal of wastewater were not prudent or reasonable. OPC witness Dismukes testified that the Commission should reduce plant-in-service by $1,730,921 to adjust the cost of upgrading the utility's plant to advanced treatment, because the utility pursued two alternatives to its disposal problem prior to upgrading the plant and purchasing the orange grove. OPC offered no additional support for its position.

As stated earlier, witness Allen testified that the Consent Orders required certain action by the utility and that problems occurred in FCWC's dealings with SJRWMD regarding the viability of the proposed deep injection well. Utility witness Blizzard testified that FCWC was legally required to pursue the deep injection well option as well as the sprayfield option. She also testified that, at times, DEP even required that both alternatives be pursued concurrently. We find that in its attempt to comply with regulations, the utility pursued a legitimate course of action which met with regulatory approval and encouragement. When that course became clouded by problems concerning the viability of the injection well, FCWC was required to seek alternative methods of effluent disposal while being required to stay the course on the original solution. In view of the evidence, we find that FCWC acted prudently, and the actions taken were the only reasonable ones available to it at the time.

Ratemaking Treatment For Costs Related to PS&I Charges

Staff witness Clepper testified that the utility is in non-compliance with the NARUC Uniform System of Accounts (USOA) with respect to Account 183. Account 183 - Preliminary Survey and Investigation Charges, states:

> This account shall be charged with all expenditures for preliminary survey, plans, investigations, etc., made for the purpose of

> determining the feasibility of projects under contemplation. If construction results, this account shall be credited and the appropriate utility plant account charged. If the work is abandoned, the charge shall be to account 426 - Miscellaneous Nonutility Expenses, or to the appropriate operating expense account unless otherwise authorized by the Commission (See account 775 - Miscellaneous Expenses).

Since the PS&I charges relate to uncompleted projects, the staff audit opinion recommended that the costs associated with the injection well and the Micco Tract should be removed from rate base for non-compliance with the USOA.

Subsequently, on cross-examination, Mr. Clepper clarified that the audit opinion recommended that the PS&I charges be excluded from the rate base component as filed in UPIS, although not necessarily excluded from rate base altogether. In addition, Mr. Clepper agreed that he had no basis to dispute that the PS&I charges were all at the requirement of DEP. Furthermore, Mr. Clepper recognized that, as acknowledged in Account 183, this Commission has the authority to divert from the auditor's recommendation and implement some other type of accounting treatment.

Since the PS&I charges related to the injection well and the Micco Tract were incurred for two projects that were never completed, and therefore produced no used and useful assets, OPC witness Dismukes recommended that the associated costs should be removed from the cost of the plant upgrade. Ms. Dismukes asserts that these costs are totally unrelated to the costs incurred to upgrade the plant to AWT standards. She further argued that the utility should have written-off the PS&I costs at the time the projects were abandoned.

In response to Ms. Dismukes' assertion that the PS&I costs are totally unrelated to the AWT upgrade, Utility witness Blizzard testified that some of the information gathered during the permitting for the sprayfield aided in the implementation of the AWT plant, with respect to some similar engineering issues. However, Ms. Blizzard admitted that since she is not an expert in the engineering field, she could not testify to the extent of its usefulness. Similarly, Utility witness Allen testified that FCWC would have been precluded from going forward with each alternative without the study involved in the first alternative. However, on cross-examination, Utility witness Young admitted that from an engineering perspective, a deep injection well is not necessarily

a prerequisite for consideration of a sprayfield. Likewise, a sprayfield application is not a necessary requirement to explore advanced wastewater treatment as an alternative. Nevertheless, Mr. Young maintained the utility's position that each alternative does not stand alone, and that the utility had to follow this route to ultimately implement the AWT upgrade.

In response to Ms. Dismukes' assertion that the PS&I costs should have been written off when the projects were abandoned, FCWC argued that there was only one project, and that "FCWC's set task in this instance was to comply with regulatory mandates to eliminate the continuous discharge of treated wastewater to surface water bodies." Further, Mr. Allen argued that there was never an abandonment of the project. Ms. Blizzard and Utility witness Murphy also argue this point. Mr. Allen testified that FCWC never requested a revocation or withdrawal of the construction permits for the injection well or the Micco Tract sprayfield. As testified to by Staff witness Ferraro, during the process of complying with the DEP mandate, at times the various options were being pursued concurrently with other options. Mr. Allen and Ms. Blizzard testified to this point as well.

In its brief, the utility argued that the PS&I charges associated with the injection well and the sprayfield were a necessary component of the project to eliminate the continuous discharge of treated wastewater to surface water bodies. Consequently, the utility maintained that the PS&I costs should be charged to UPIS and included in rate base, together with the balance of FCWC's expenditures on the project to upgrade the wastewater treatment plant. Mr. Murphy testified that once construction began on the Barefoot Bay AWT plant, it was consistent with Account No. 183 to charge the PS&I costs to the appropriate utility plant account, and amortize the costs over the appropriate depreciable lives. Mr. Murphy stated that it is not unusual for utilities to incur PS&I costs on construction projects, and when construction begins on a project, the normal treatment is to capitalize those costs into UPIS.

The utility interprets Account No. 183 to state that if any construction results, then all costs incurred during the process of investigating different alternatives should be capitalized to the cost of construction, regardless of whether or not those costs directly relate to the ultimate construction project. Although we find that the PS&I costs incurred for the injection well and the Micco Tract were prudent and reasonable, we do not find sufficient evidence presented in the record to verify that the PS&I costs were directly related and useful to the construction of the AWT plant upgrade. In order to determine whether or not the PS&I costs

should be included in UPIS, we must look to NARUC USOA Account No. 101 - Utility Plant-in-Service. Account No. 101 states, "This account shall include the original cost of utility plant, ... owned and used by the utility in its utility operations ..." (Emphasis added.) As Mr. Murphy testified, the utility did not construct a deep injection well at Barefoot Bay. Further, Mr. Murphy and Mr. Allen testified that FCWC does not own the Micco Tract, and likewise, did not construct a sprayfield system on that land. Thus, the related PS&I costs produced no assets which are in use or of benefit to the Barefoot Bay customers. Consequently, we find it appropriate to remove these costs from UPIS.

In its brief, the utility stated that FCWC would not object to an alternative treatment for the PS&I costs, such as deferral and amortization. Mr. Clepper testified that the PS&I charges associated with the injection well and the Micco Tract could be considered as non-recurring expenses. Further, Mr. Clepper agreed that Rule 25-30.433(8), Florida Administrative Code, could apply to the treatment of these PS&I charges. This rule states, "non-recurring expenses shall be amortized over a five-year period unless a shorter or longer period of time can be justified." Upon cross-examination, Mr. Murphy agreed that it would be reasonable to defer and amortize the costs over a 15-year period, as long as FCWC could earn a reasonable return on the expenditures, as if they were included in UPIS. When asked if it would be appropriate to include the unamortized balance in the utility's working capital calculation, Mr. Murphy stated that he had no opinion. However, he did state that the costs should be included in rate base. On the other hand, Ms. Dismukes stated that she was not willing to commit to a 15-year amortization period. On this point, Ms. Dismukes testified that she was having difficulty balancing between the issue of customers being required to pay for costs incurred on projects which never reached fruition, and customers not receiving the benefits of gains associated with the sale of utility property in other ratemaking situations.

To summarize, in determining the appropriate ratemaking treatment, we must first determine whether or not the PS&I charges incurred for the injection well and the Micco Tract were prudent. The only way these charges can be disallowed is if we make a determination that the PS&I charges were imprudently incurred. However, as discussed earlier in this Order, we found that the PS&I charges were in fact prudent and reasonable. At this point, we have the option either to capitalize the costs to UPIS, or defer and amortize the PS&I charges as a deferred debit over a reasonable time period. As discussed earlier, we found it inappropriate to capitalize the PS&I charges as UPIS, because NARUC states that this account should only include assets owned and used by the utility in

utility operations. In this case, the PS&I charges did not result in assets which are used and useful in utility service. Thus, we find that the only remaining option is to record the charges as a deferred debit and amortize it over a reasonable time period.

As stated in Rule 25-30.433(8), Florida Administrative Code, non-recurring expenses are to be amortized over 5 years, unless a shorter or longer period can be justified. We find that a 15-year amortization period would be a reasonable time over which to amortize these costs since it reflects the long-term nature of these costs had they resulted in assets being placed in service. Further, we find it appropriate to include the unamortized balance of the PS&Is in the total utility working capital calculation. This treatment is consistent with the methodology employed by FCWC in its MFRs, which reflects an allocation of all working capital components to each of the utility's divisions.

Accordingly, we find it appropriate to reduce wastewater UPIS by $1,019,922. We have made corresponding adjustments to reduce wastewater accumulated depreciation and depreciation expense by $32,271. Furthermore, we have increased total FCWC working capital by $985,925 to reflect a 13-month average unamortized balance, resulting in an allocated increase of $44,367 and $40,423 to Barefoot Bay water and wastewater, respectively. In addition, we have increased Miscellaneous Expenses - Account No. 775 by $67,995 for wastewater to reflect the amortization of the PS&I charges over a 15-year period.

H&S Property

The H&S property is an old orange grove purchased by FCWC to be used for effluent disposal. OPC witness Dismukes testified that $711,000 associated with the H&S property should be removed from rate base because the utility had not explained if the grove was productive or not. OPC reasons that if the grove produces a crop and a profit, ratepayers should not be required to provide another return on the investment.

Utility witness Bradtmiller testified that the land is an inactive citrus grove and is being purchased as a sprayfield for reclaimed water. He further testified that the orange trees present are in various stages of neglect; the grove has not been harvested for several years. Witness Bradtmiller stated that without this land, FCWC would not be able to comply with the DEP mandate to eliminate continuous discharges to surface waters.

Upon consideration, we find that FCWC presented sufficient evidence to justify the purchase of the H&S property. Therefore, we find it appropriate to include the H&S property in rate base.

Margin Reserve

OPC witness Dismukes testified that the inclusion of a margin reserve to account for future customers above and beyond the future test year level represents investment that will not be useful in serving current customers. Mr. Dyer agreed with witness Dismukes' testimony.

As discussed later in this Order, the record supports that FCWC's facilities, with the exception of the wastewater treatment plant prior to AWT upgrades, are 100 percent used and useful. Additionally, FCWC's service area is almost built out, and customer growth is extremely limited at this time. Based on the foregoing, we do not find it appropriate to grant FCWC a margin reserve.

Used and Useful Adjustments

Water Treatment Plant

Mr. Dyer had no position on this issue at prehearing and offered no testimony regarding the issue at the hearing. He stated in his post hearing brief that the used and useful percent should be 89.16 percent. Because he provided no supportive evidence, we are unable to verify the authenticity of his conclusion or his method of arriving at his position. OPC had no position on this issue.

In its MFRs, the utility reported 994,000 gallons as the maximum high daily flow. FCWC stated this was due to the filling of all storage tanks in a two day period to prepare for a planned service outage. Because this was an anomaly, we used the next highest daily flow in used and useful calculations. According to the MFRs, the next four high daily flows were all in the 680,000 gallon range. We find that this range is representative of actual usage. We calculated the plant to be 100 percent used and useful with the lower gallonage figure. See Attachment A to this Order. We found this plant to be 100 percent used and useful in the past two rate proceedings, by Orders No. PSC-92-0563-FOF-WS, issued June 24, 1992, and PSC-95-0039-FOF-WU, issued January 10, 1995, in Docket Nos. 910976-WS and 940687-WU, respectively. Accordingly, we find that the water treatment plant is 100 percent used and useful.

Wastewater Treatment Plant

The utility states in its brief that following AWT upgrades, the plant capacity will be 0.75 mgd. FCWC witnesses Young and Christopher testified that the maximum capacity would be 0.75 mgd. FCWC witness Young further testified that a capacity of 0.75 mgd is the nearest commonly used capacity that allows the use of standard equipment and meets the wastewater treatment needs of Barefoot Bay. Therefore, the utility argues that the water and wastewater treatment plant should be considered 100 percent used and useful.

However, as Utility witness Young testified, the wastewater treatment plant could be operated at 0.9 mgd, provided that FCWC makes an additional investment of only $25,000 for installation of two equalization pumps and associated pipes and wiring. Therefore, we find that the evidence supports actual wastewater treatment plant capacity of 0.9 mgd.

We do not believe that the existing Barefoot Bay customers should be made responsible for this additional, non-used and useful capacity. We recognize, however, that FCWC was required by DEP to make AWT upgrades to plant at a substantial investment. To that extent, we find that FCWC should not be penalized for this investment by a decrease in the percentage of used and useful for its water and wastewater treatment plant.

Therefore, based on the evidence, we find that the value of wastewater plant-in-service prior to AWT upgrades equals 66 percent used and useful, while the value of wastewater plant-in-service for investment in AWT equals 100 percent used and useful.

Wastewater Collection System

In the last water and wastewater rate case for this utility, we found the wastewater collection system 100 percent used and useful. Nothing has occurred to change this calculation. Therefore, we find that the water distribution system is 100 percent used and useful in this proceeding.

Water Distribution System

In the last water and wastewater rate case for this utility, we found the water distribution system 100 percent used and useful. Nothing has occurred to change this calculation. Therefore, we find that the water distribution system is 100 percent used and useful in this proceeding.

Excessive Unaccounted for Water

The record indicates that this utility has a very small percentage of unaccounted for water, 1.07 percent, which is well under accepted industry standards. The utility's MFRs indicate that total unaccounted for water is 1.941 million gallons (mg) for the year, or 1.07 percent of the total treated water. Therefore, we find no adjustment for excessive unaccounted for water necessary for this utility.

Excessive Inflow and Infiltration (I&I)

Utility witness Young testified that the standard for determining excessive I&I for Barefoot Bay, which is contained in Water Pollution Control Federation Manual of Practice No. 9 (MOP 9), provides for up to 30,000 gallons per day (gpd) per mile for the total length of main sewers, laterals and house connections. OPC witness Dismukes calculated I&I for the peak month to be over 5 million gallons which averages 184,366 gpd.

Using witness Young's standards, our calculations indicate that FCWC's resultant permissible I&I would be over 1.1 mgd. Since the wastewater treatment plant is constructed and permitted at 0.75 mgd, we found this to be an unacceptable level of I&I.

Accepted industry standards permit 80 to 90 percent of the water sold to be returned to the wastewater plant. Our calculations assume 90 percent returned water. Using the utility's flow figures for water and wastewater, I&I standards from MOP 9, and allowing for 90 percent returned water, we found that actual flows to the wastewater plant would total 446,605 gpd. Our calculation of permissible level of I&I totals 130,974 gpd. Actual flows to the wastewater plant were reported to be 697,613 gpd, which exceeds sold water by 251,568 gpd. We then subtracted the calculated permissible level of I&I (130,974) from the extra 251,568 gpd being treated, and the result is 120,568 gpd of excessive I&I. We believe that, since these numbers represent actual flows experienced by the utility, they are more realistic of the true amount of I&I in the system.

We agree with witness Dyer that excess flows cause additional power to be consumed for pumping and additional chemicals to be used for treatment. Accordingly, we have reduced expense accounts Nos. 715 and 718 by $18,380 and $4,751 respectively, to account for excessive I&I.

Plant Capacity

Capacity and Flows for Calculating Wastewater Plant Used and Useful

This issue prompted considerable discussion at the service hearing. OPC witness Dismukes testified that the capacity is 1.26 mgd. In his brief, witness Dyer made several references to differing capacities. Utility witness Christopher, a registered professional engineer, testified that the plant is constructed to a design capacity of 0.75 mgd. He also testified that the plant capacity will be equal to or less than 0.075 mgd based on the average annual flow and the waste concentration associated with this flow. Witness Christopher also testified that effluent requirements set by DEP are normally set on an annual average basis, not a daily or weekly basis.

The DEP operating permit reflects 0.75 mgd or less. The utility may not routinely operate it at flows above that amount according to the DEP permit requirements. Because this plant was designed, constructed and permitted at 0.75 mgd capacity and the utility may not routinely operate it at flows above that amount according to the DEP permit requirements; we find that the average daily flow capacity is 0.75 mgd. Our used and useful percent calculations are shown on Attachment B.

Peak Month Wastewater Capacity

During cross-examination by OPC, witness Christopher agreed that the plant could withstand flows of up to 2.7 mgd for an hour. Witness Christopher also testified that a plant must be designed to allow for peak hour flows even though these excess flows may be sent to a temporary holding pond for later treatment. This is intended to keep the plant from overtopping the units. We find that wastewater treatment plants are designed to withstand far greater temporary flows than they are able to normally treat in a given period. Peak month is not a factor in the ratemaking process. Therefore, we do not find that peak month is an appropriate design parameter for a wastewater plant.

Average Daily Flow Capacity-Wastewater Plant

OPC witness Dismukes presented three alternative plant capacities in her testimony: 1.26 mgd; 0.90 mgd and 0.75 mgd. OPC offered no professional engineering expertise to verify the testimony of witness Dismukes.

As previously stated, Utility witness Christopher, a registered professional engineer, testified that the plant is constructed to a design capacity of 0.75 mgd. He also testified that the plant capacity will be equal to or less than 0.75 mgd based on the average annual flow and the waste concentration associated with this flow.

Witness Christopher testified that, in order to operate the treatment plant at 0.90 mgd, two equalization pumps and associated piping and wiring would need to be installed at a cost of $25,000. Additionally, the plant would then need to be re-permitted by DEP. We find that the average daily flow capacity is 0.75 mgd as constructed by the utility and permitted by DEP.

Contributions-in-Aid-of-Construction (CIAC)

As discussed earlier, we have not authorized a margin reserve in this case. Therefore, no imputation of CIAC for margin reserve is needed. However, as discussed later in this Order, we have imputed $81,258 of CIAC to account for a grant awarded by SJRWMD to FCWC for funding of the utility's transmission facilities.

Working Capital

Because FCWC's Barefoot Bay operating division is a Class A utility system, the utility used the balance sheet approach to calculate working capital, in accordance with Rule 25-30.433, Florida Administrative Code. Consistent with its request for approval of year-end rate base amounts, the utility proposed use of a year-end working capital allowance. The requested provisions are $48,214 (4.5 percent) for the water system and $43,929 (4.1 percent) for the wastewater system. These amounts are allocated portions of a common $1,071,429 company-wide balance, based upon relative provisions for operation and maintenance charges.

We find that the record supports the use of the balance sheet approach to calculate working capital.

OPC witness Dismukes testified that while the utility included other deferred debits in its requested working capital allowance, however, it failed to include cost-free other deferred credits. Ms. Dismukes recommended an adjustment to include other deferred credits in the total utility working capital calculation, in the amount of $522,545. This adjustment results in a reduction of $44,940 allocated to the Barefoot Bay Division.

In response to Ms. Dismukes' inclusion of other deferred credits in the working capital calculation, Utility witness Coel

partially agreed with this adjustment. He testified that the deferred credits related to deferred metered sales and deferred pension cost should have been included in the calculation. Further, he testified that deferred gross receipts tax is directly related to carrying charges on capacity fees. As identified in the MFRs, these carrying charges were removed from the working capital calculation. Likewise, Mr. Coel stated that it is also appropriate to exclude the related gross receipts tax. According to witness Coel, the resulting amount of other deferred credits for the working capital calculation should be $171,174.

The adjustments recommended to working capital by witness Dismukes are based on the 13-month average balances for both water and wastewater. Ms. Dismukes testified that the working capital requirement based on the 13-month average is more representative of the utility's working capital needs, as opposed to the year-end approach. Based on Ms. Dismukes' proposed adjustments, OPC recommends a working capital allowance of negative $18,184 for water and negative $16,568 for wastewater.

Witness Coel testified that since the utility supports year-end rate bases in this proceeding, in order to avoid a mismatch, the utility likewise proposes using a working capital allowance based on the year-end approach. However, after review of Ms. Dismukes' adjustment schedules, Mr. Coel identified an error in the utility's 13-month average balance for intercompany payables, as filed in the MFRs. The average balance of this account was not adjusted for a $2,000,000 intercompany note as it was adjusted for the year-end balance. According to Mr. Coel, the corrected total company working capital allowance for the 13-month average, before any other adjustments, is $1,041,535. This results in an allocation to Barefoot Bay of $46,869 for water and $42,703 for wastewater. We have adjusted the 13-month average working capital to reflect the correct amount for intercompany payables.

While we agree with the utility's position that year-end rate base determinations are appropriate in this proceeding, we find it appropriate to examine the working capital accounts on the basis of average values. The averaging process tends to eliminate ebb and flow conditions, particularly with regard to tax payments, which obligations become due and payable at irregular dates. Likewise, we find the 13-month average balance is more representative of the utility's working capital needs, as opposed to the year-end approach.

In its brief, the utility concedes that the working capital allowance should be adjusted to include other deferred credits associated with deferred metered sales and deferred pension costs.

However, we have not factored other deferred credits associated with deferred gross receipts tax into the working capital calculation. Since the related carrying charges have not been included in working capital, we have excluded the gross receipts tax as well. The Utility witness stated that working capital should be adjusted by $171,174 to include other deferred credits. Based upon our calculation of the working capital allowance on the 13-month average basis, we find that the appropriate amount to include in working capital is $156,951. This results in an allocation of $7,063 and $6,435 to Barefoot Bay water and wastewater, respectively.

Based upon our adjustments, and the inclusion of the unamortized balance of PS&I charges discussed earlier, we find the appropriate working capital allowance is $84,173 for the water operations and $76,691 for the wastewater operations. This represents an increase in working capital of $35,958 and $32,763 for water and wastewater, respectively.

Unfunded Post-Retirement Benefits

In this proceeding, the utility has requested recovery of operating expenses representing post retirement benefits, resulting from the implementation of SFAS 106. SFAS 106 refers to the accounting standard that describes the practice of recognizing post retirement benefits other than pensions (OPEBs).

FCWC does not currently fund its OPEB obligation. According to Rule 25-14.012(3), Florida Administrative Code:

> Each utility's unfunded accumulated post retirement benefit obligation shall be treated as a reduction to rate base in rate proceedings. The amount that reduces rate base is limited to that portion of the liability associated with the cost methodology for post retirement benefits other than pensions.

OPC witness Dismukes testified that since the utility does not currently fund its OPEB liability, it is appropriate to include the unfunded liability account in the rate base determination. Based on the average balance of the unfunded liability from the utility's balance sheet, Ms. Dismukes recommended that rate base be reduced by $67,690 and $61,673 for water and wastewater, respectively.

Under cross-examination, Utility witness Schifano agreed that the unfunded liability associated with the post retirement benefits

should be treated as a reduction to rate base, in accordance with the rule. Mr. Schifano further testified that the appropriate amounts to be used in the rate base determination for this proceeding are $79,560 for water and $72,488 for wastewater. As indicated in the record, these amounts represent the unfunded liability balances as of year-end June 30, 1996, consistent with the utility's requested test year rate base.

We find that all parties are in agreement as to the appropriate rate base treatment for the unfunded liability. Therefore, the only remaining question is what amount should be used to reduce rate base. Although OPC did not provide a basis for using the 13-month average balances, it appears that this adjustment is consistent with its recommended treatment for working capital. Because we have included the unfunded OPEBs as a separate line item in rate base, and not as a component of working capital, we find it appropriate to make the adjustment consistent with our rate base treatment. Therefore, we have reduced rate base by $79,560 for water and $72,488 for wastewater to reflect the year-end balances associated with the unfunded liability.

Test Year Rate Base

The record indicates that FCWC applied for a grant from SJRWMD in the amount of $325,032 in order to fund transmission facilities. Mr. Bradtmiller testified that if funding is granted, the amount granted shall be treated as CIAC, thereby reducing rate base. We believe that the customers should receive the benefit of any funding granted to FCWC and that this benefit should be reflected in the customers' rates for wastewater service. Therefore, we find it appropriate to impute $81,258 CIAC to FCWC's rate base. This amount is equal to 25 percent of the utility's grant request.

We believe that this adjustment will demonstrate to the water management district that the benefits of their funding will go to the customers of the utility receiving the funding, not to the stockholders of the utility. Accordingly, we hope that the water management districts will be encouraged to provide additional funding to investor-owned utilities.

Although the record does not specify an actual award or award calculation to FCWC, we believe that our calculation is reasonable. However, given these unique circumstances, this adjustment is made as a proposed agency action and shall only become final if no timely protest is received from a substantially affected person, in the form of an appropriate petition as set forth in Rule 25-22.029, Florida Administrative Code.

This rule states that for good cause shown, the Commission may provide that the time for requesting a Section 120.57, Florida Statutes, hearing shall be **fourteen days** from issuance of the notice. If not for our adjustment, this Order would become final on its issue date. Therefore, we find it appropriate that substantially affected persons have **fourteen days** from the notice of proposed agency action in which to file a protest.

Additionally, the utility shall be granted 30 days from the date of this Order in which to provide us with the actual grant amount from SJRWMD. In the event that a material difference exists between the actual grant amount and our calculation, staff shall file a recommendation for the appropriate rate adjustment.

Based upon a year-end rate base determination and our adjustments, we find that the appropriate rate base amounts total $1,104,920 for water and $6,081,447 for wastewater.

COST OF CAPITAL

Our calculation of the appropriate cost of capital, including our adjustments, is depicted on Schedule No. 2. Those adjustments which are self-explanatory or which are essentially mechanical in nature are reflected on that schedule without further discussion in the body of this Order. The major adjustments are discussed below.

Equity Infusion

In December of 1995, the utility capitalized $2,000,000 into equity, in order to improve its debt to equity ratio and interest coverage ratio. Utility witness Schifano stated that the utility's debt level has significantly increased due to the magnitude of its construction program over the last two years. In addition, he testified that the utility's equity has also been negatively affected by a non-recurring litigation expense.

Staff witness Clepper testified with respect to Staff's Audit Disclosure No. 2, which identified the details surrounding this equity infusion. The disclosure indicated that a series of transactions led to the reclassification of $2,000,000 from an intercompany payable to additional paid-in capital. The conclusion provided in the disclosure was that the reclassification did not change the availability of the cash to the utility, however, it effectively increased the rate of return from nine percent to 11.88 percent. The resulting effect of this transaction increases the weighted average cost of capital and subsequently the revenue requirement. Under cross-examination, Mr. Clepper admitted that there was no evidence to suggest anything improper about the

transaction. On the other hand, Mr. Clepper further testified that since the cost of equity is higher than the cost of debt, during the weighting process used to calculate the overall cost of capital, the cost rates associated with the particular elements have an impact on the overall cost rate.

OPC witness Dismukes testified that since this equity transaction merely had the effect of increasing the cost rate associated with the $2,000,000, the transaction should be reversed. Further, she stated that not only does the utility not receive a benefit from this transaction, but the ratepayers are also negatively affected. She recommended removing the $2,000,000 from equity and placing it back into debt, thereby decreasing the equity component and the overall cost of capital.

Utility witness Murphy testified that Ms. Dismukes' implications that the equity infusion transaction was improper, are simply unfounded. For the past 30 years, forgiveness of a parent utility payable, which is subsequently converted into equity, has been a standard practice of Consolidated Water Company (CWC). Details of the transaction are as follow:

> In 1994 CWC advanced directly to FCWC $2,000,000 to meet cash flow demands caused by the construction of water and wastewater plants throughout the FCWC service areas. CWC is the parent company of [FCWC Holdings, Inc.] Holdings. In December 1995, FCWC issued $18,000,000 in senior notes. As a part of the proceeds of that issue, FCWC repaid the CWC advance. To improve FCWC's equity position, as discussed above, in December, 1995, Holdings made an equity contribution of $2,000,000. The funds for that investment came through CWC as an equity investment in Holdings by CWC. In summary, there was a pay down of debt and a subsequent equity infusion.

Similar transactions have occurred periodically over the past 20 years, due to significant capital improvements.

Witness Murphy testified that after two years of significant plant additions, as well as substantial legal fees incurred to defend a lawsuit by the Department of Justice, FCWC's equity ratio had declined from 35.5 percent in 1993 to 32 percent in 1995. FCWC's controlling debt agreements require a minimum 30 percent equity ratio, otherwise the utility will not be able to issue additional debt. On cross-examination, Mr. Clepper conceded that

these minimum equity requirements were not brought up as points in the staff audit disclosure. Concerned that its 32 percent equity ratio was too close to the minimum requirement, Mr. Murphy further testified that FCWC's parent utility made a $2,000,000 equity contribution, in the ordinary course of business, to improve FCWC's equity ratio. This equity infusion increased its equity ratio to 34.2 percent, as well as FCWC's total equity to debt ratio to 48 percent, closer to the target rate of 50 percent. Mr. Murphy stated, "In the eyes of the capital markets that FCWC must enter when additional debt is required the higher the equity position the lower the cost of debt. A sound financial position ultimately benefits the customers by providing a lower overall cost of capital."

Upon cross-examination by OPC, witness Murphy was asked to refer to Exhibit 43, which indicated that cash dividends had been paid on preferred stock and common stock each year from 1992 through 1994. Mr. Murphy agreed that paying dividends would have a decreasing effect on the utility's equity ratio, however, he explained that the dividends paid on the preferred stock were not elective, but required by the terms of the stock. In addition, OPC posed a question as to whether the utility also made the election to issue preferred stock, as opposed to some other means to raise capital. Mr. Murphy responded by stating that, at the time of the preferred stock issue, the utility may have been limited in what mechanisms were available to raise capital. However, since the issuance occurred in 1991, prior to his employment at FCWC, Mr. Murphy declined to speculate on the matter.

Mr. Dyer also raised concerns in his testimony regarding FCWC's equity. He asserted that a nine percent preferred stock issue was used to pay off 16.25 percent Series G First Mortgage Bonds. Mr. Murphy contradicted this assertion, testifying that the preferred stock issue was completed on June 20, 1991. Subsequently, $6,000,000 in 7.79 percent Series K First Mortgage Bonds were issued in October, 1992. Finally, $1,635,000 of the proceeds from the Series K Bonds were used to extinguish the remaining 16.25 percent Series G Bonds.

In addition, Mr. Dyer testified that FCWC bought back 2,337 shares of common stock. Mr. Murphy explained that in June 1991, FCWC actually converted 2,337 shares of outstanding common stock into 9,000 shares of nine percent preferred stock, resulting in a lower rate of return, and thus a lower revenue requirement.

In his brief, Mr. Dyer mentioned the testimony of Keith Baldwin, a customer of Barefoot Bay. Mr. Baldwin's concerns were related to the principal and amortization payments on some of

FCWC's debt issues, the lack of sinking fund provisions for Series J and K bonds, and the utility's dividend payout ratio. In response, witness Murphy testified that debt amortization does not have a significant impact upon ratemaking. Further, Mr. Murphy stated that the revenue requirement calculation does not include a component for the amortization or sinking fund requirements of debt.

Although the ultimate effect of the equity infusion resulted in an increase to the overall rate of return, we find the record devoid of any evidence to suggest the transaction was improper. We do find that the record supports the utility's argument that a sound financial position ultimately benefits the customers by providing a lower overall cost of capital. According to the utility's controlling debt agreements, if its equity ratio falls below 30 percent, the utility will be precluded from issuing any additional debt, thereby forcing the utility to raise capital by other means. Accordingly, we find it pertinent for FCWC to be concerned with its equity ratio, as well as its total equity to debt ratio. Therefore, we do not find that an adjustment to the equity component is warranted.

Return on Equity

Based upon the evidence in the record and the components of adjusted capital structure, we find that the equity ratio for FCWC is 30.62 percent. Using the current leverage formula, the appropriate rate of return on equity is 11.88 percent. Therefore, we find that the appropriate range for the return on equity is 10.88 percent to 12.88 percent.

Deferred Income Tax Credits

As shown in the MFRs, the utility's reported cost for deferred investment tax credits (ITCs) is 9.61 percent. However, the utility's calculation includes a component for customer deposits.

Although we removed the customer deposit component from the cost rate for ITCs in FCWC's last rate case, the utility included this component in this proceeding, because there is an associated cost of six percent on customer deposits. Utility witness Coel stated that it is the utility's position that there is no effect on the overall cost of capital and rate of return if the customer deposits are removed from the calculation. However, on cross-examination Mr. Coel agreed that the calculation of the weighted cost of ITCs is a fallout from the ratios and costs of capital

components. Subsequently, the utility acknowledged in its brief that it was inappropriate to include the customer deposit component in the calculation of the cost rate for deferred ITCs.

Similarly, OPC witness Dismukes recommended a revision to the utility's cost of ITCs, consistent with Commission policy. She testified that the customer deposit component should be removed from the calculation, in order to reflect the cost of capital associated with investor supplied funds only. In conjunction with Ms. Dismukes' adjustment to the equity component, OPC argues that 9.57 percent is the appropriate cost of ITCs.

We find that all parties are in agreement that the customer deposit component should be removed from the weighted cost of ITCs. We find that inclusion would be inappropriate since customer deposits should not be considered a source of investor funding for the purpose of this equation. Removal of that element necessitates a corresponding adjustment to the cost of deferred ITCs. Therefore, in accordance with the approved debt and equity components, and corresponding cost rates, we find that the appropriate cost for deferred investment tax credits is 9.65 percent, which reflects the removal of customer deposits.

Overall Cost of Capital

Based upon the approved adjustments discussed earlier, we find that an overall cost of capital of 8.75 percent, with a range of 8.44 percent to 9.05 percent, is appropriate.

NET OPERATING INCOME

Our calculations of net operating income are depicted on Schedules Nos. 3-A and 3-B for water and wastewater, respectively. Our adjustments are itemized on Schedule No. 3-C. Those adjustments which are self-explanatory or which are essentially mechanical in nature are reflected on those schedules without further discussion in the body of this Order. The major adjustments are discussed below.

Test Year Revenues

FCWC has estimated a 10 percent decline in water consumption from the historic test year ending June 30, 1995, to the projected test year ending June 30, 1996, for both its water and wastewater customers. FCWC based this estimate on historical data and its apparent declining trend. OPC witness Dismukes has stated that FCWC has not adequately considered the degree to which rainfall may have affected consumption. She testified that consumption was down

somewhat because of an above average amount of rainfall during the historic test period. Therefore, she stated that the base year used by FCWC to project a further decline in consumption may already be understated due to an above average amount of rainfall.

While it is obvious there has been a substantial decrease in water consumption at the Barefoot Bay Division from January, 1991 through December, 1995, it is not clear as to the decrease in consumption from the historical test year ending June 30, 1995 to the projected test year ending June 30, 1996. The record shows actual water consumption data collected for 9 of the 12 months of the projected test year. Thus, the only missing months of the projected test year are April, May, and June of 1996. For the last three years the average consumption for the months of January, February, and March has been higher on average than the months of April, May, and June. Therefore, based on historical consumption, we find that the consumption for the missing months of April, May, and June is at least the same as the actual average for the months of January, February, and March of 1996. If this trend in consumption continues as it has for the last three years, we find that the projected test year consumption will be within one percent of the historic test year consumption ending June 30, 1995.

We agree with OPC witness Dismukes that there is a minimum amount of water that a customer must use. If historic consumption is projected with future growth, without including the utility's proposed 10 percent reduction, then water usage will be 96 gallons per day per household. This would equate to 48 gallons per day per person assuming a two person household. Obviously, this is very low usage per customer. We find that to further reduce this number without knowing what a customer must consume would be ambiguous. Also, the record indicates there were no price elasticity studies done to determine the effect price may have on consumption.

OPC witness Dismukes states, based on data collected from the Melbourne weather station, that 1994 and 1995 were above the 30 year average in annual precipitation. She also stated that rainfall has some impact on the customer's need to irrigate and that it would tend to reduce their water consumption. We find that rainfall is only one component that can reduce irrigation. There may be more significant components that determine the effects of rainfall on consumption. One component that might reduce the effects on consumption due to rainfall is whether or not the area is in an irrigation area. In other words, customers may not need to irrigate as much due to having smaller than average yards. FCWC witness Coel stated that Barefoot Bay is not in an average or above average irrigation area. Thus, if customers tend not to irrigate as much, rainfall will have a lesser effect on their water

consumption. Other components that may effect consumption more significantly than actual rainfall is the time of day it rains, temperature, and the frequency of the participation. Therefore, we find it difficult to determine the effects of rainfall on consumption by only analyzing rainfall data.

In summary, we find that projected consumption is based on the historic consumption amount of 162,222,000 gallons for water and 144,498,000 gallons for wastewater for the primary reason that the record suggests that projected consumption will be within one percent of historic consumption. These numbers are based on the historic test year ending June 30, 1995, and do not reflect the utility's proposal of a 10 percent reduction in consumption. We find it appropriate to base wastewater usage on the historic test year for the same reasons as water usage since wastewater consumption is derived from water usage.

Imputation of Revenue for Sale of Reuse

OPC's position in its brief is that it is appropriate for us to impute reuse revenue of $30,660 for the sale of effluent on the H&S property. FCWC argues in its brief that it does not think any revenue should be imputed for the sale of effluent. Mr. Dyer argues that revenues should be imputed.

According to OPC's brief, if the utility is able to secure a lease for this property to a third party as it intends, then it would be reasonable to conclude that it would sell effluent to the third party at a rate of 21 cents per 1,000 gallons. The amount of $30,660 is derived from the utility's estimate that the grove will take 146,000,000 gallons of reused water per year. In its brief, the utility argues that although Mr. Bradtmiller agreed in principle that any revenue received from the use of land should offset against the cost of operating the treatment system, based on FCWC's investigations including prospective leases with citrus growers and sod farmers, it is highly unlikely that the land will produce any operating revenues in the foreseeable future. According to Mr. Dyer's brief, potential sales exist, and the customers should not have to finance the utility while the utility waits for new customers. Mr. Dyer states that the Commissioners should provide the utility an incentive to find a market for wastewater.

Ms. Dismukes testified that if the orange grove were spun off to an affiliate of FCWC, then it would be appropriate to charge for the use of the reclaimed water. In his rebuttal testimony, Mr. Bradtmiller, made it clear that Ms. Dismukes' hypothetical sale would not be occurring. According to Mr. Bradtmiller's testimony,

FCWC would not consider selling the land, even to an affiliate because of its critical importance in compliance with the Second Amended Consent Order (SACO).

Ms. Dismukes also testified that the utility has not explained whether the orange grove it purchased is productive. If the orange grove produces a crop, and there is a profit associated with the crop, then ratepayers should not be required to provide another return on the investment. Accordingly, the income derived from the orange grove should be included in utility income, or, the land should be removed from rate base and treated as non-utility. Ms. Dismukes chose to treat the land as non-utility.

Mr. Bradtmiller rebutted this argument, testifying that if any revenue is received from the use of the land, or from the sale of the treated effluent for irrigation, FCWC agrees that this revenue should be offset against the cost of operating the Barefoot Bay wastewater treatment system. Based on FCWC's investigations including prospective leases, however, the utility states that it is highly unlikely that the land will produce any operating revenues in the foreseeable future. If FCWC could lease the land for a use that would complement the spraying operation, then it would seriously consider doing so. FCWC states that at the present time, however, this land will not generate any revenue.

According to Ms. Dismukes, the basis of her recommendation was that the utility sent a letter to the DEP indicating that it was their intent to use the property to irrigate groves, or to use it for other agricultural purposes. Under cross-examination, Mr. Bradtmiller admitted that was the intent at the time, and the utility is continuing to seek agricultural interests. However, until then, the utility plans to use the land for slow rate application.

Mr. Dyer has suggested in his brief that potential sales exist but presented no evidence to support the suggestion. However, Mr. Bradtmiller testified that FCWC does not have, nor does it contemplate, a lease arrangement which would provide for the lessee to pay for the reclaimed water. Therefore, the only firm source of revenue is the contract with the Barefoot Bay Golf Course. Mr. Dyer has also suggested that we should provide the utility an incentive to find a market for wastewater. However, he did not provide any testimony as to how this should be done.

Based on the foregoing, we do not find it appropriate to impute reuse revenue at this time. One of the reasons Ms. Dismukes believes that it is appropriate to impute revenue now is that if the utility were to negotiate a lease six months from now, it would

be unfair to the ratepayers for the utility to be allowed to include the land in rate base and receive some kind of benefit from that land. We find merit in witness Dismukes' argument. Therefore, the utility shall file status reports every six months indicating the progress of any negotiations for leases.

Rental Income

FCWC's witness Schifano testified that rental income received during the test year from a third party for an antenna should not be included "above the line" for ratemaking purposes. Mr. Schifano testified that income should be recorded "below the line" because the land on which the antenna sits is contributed property. Furthermore, he stated that because the land has no effect on rate base and that a prorated part of the property taxes is charged back to the lessee, reducing the below-the-line property tax expense for the land, the rental income should be recorded below the line.

OPC argues in its brief that the land is included in rate base and it is essentially utility property. OPC states that land is not depreciated, therefore it will always remain in rate base. Further, if this land was contributed and the amount was included in CIAC, then it would be amortized over time with the net CIAC balance declining. OPC states, assuming this land was contributed when the utility began operations -- some 30 years ago, it is likely that there is no CIAC offset to the amount of land included in rate base. We find no evidentiary support for OPC's arguments.

Based on the record, we find it appropriate to include this rental income in operating revenues for the Barefoot Bay wastewater division. The antenna is located on the wastewater treatment plant site in Barefoot Bay. FCWC has not demonstrated that the land is not included in rate base. Since land is not depreciated and will always remain in rate base, we find it appropriate that the rental income associated with this antenna benefit the customers. Therefore, we have increased test year wastewater income by $19,900 for rental income associated with the antenna.

Operation and Maintenance (O&M) Expenses

Rate Case Expense

The projected provision for rate case expense per the MFRs was $129,420, yielding an annual expense of $13,428 for water and $18,928 for wastewater. The utility allocated 50 percent of current rate case expense to water and 50 percent to wastewater, with the exception of $22,000 for outside consulting services which is allocated only to wastewater. In his rebuttal testimony,

Utility witness Coel supplied an exhibit displaying current rate case expense, supporting documentation, and a revised estimate to complete the hearing process. The utility's current rate case expense and estimate to complete produced a revised rate case expense of $152,356, which yields an annual expense of $16,303 for water and $21,786 for wastewater. The components of these provisions are as follows:

	MFRs	EXH 45
Mail, Printing, Supplies & Miscellaneous	$3,500	$3,420
FCWC (Rate Dept.)	25,800	18,191
Avatar Utility Services	13,120	18,632
Avatar Utilities	1,000	2,440
Legal	55,000	78,744
Outside Consulting (Wastewater Only)	22,000	21,930
Filing Fee	9,000	9,000
Total	$129,420	$152,356

OPC witness Dismukes has challenged the utility's requested rate case expense. She testified that $24,000 in rate case expense from FCWC should be removed because the utility had not adequately demonstrated that these charges are not already included in its 1995 test year expenses. Since the utility uses in-house staff to prepare the MFRs and testimony, Ms. Dismukes asserted that these costs could be included in the test year operating expenses. If so, Ms. Dismukes testified that ratepayers would then be charged twice for this double counting of expenses.

In addition to the previous adjustment, witness Dismukes also recommended that an additional $52,000 be removed from the requested rate case expenses. Ms. Dismukes testified that this adjustment is to account for the additional expenses incurred for setting this rate proceeding directly for hearing. This adjustment is discussed in greater detail later in this Order.

In response to Ms. Dismukes' adjustment to remove rate case expenses charged from FCWC, Utility witness Coel testified that these expenses specifically relate to FCWC's rate department charges for time spent on the rate case filing and are deferred and charged to deferred rate case expenses. Mr. Coel further stated that there is no double counting of this expense, and that any time spent on work unrelated to the rate case is recorded as labor expense. We find that the evidence supports that these expenses are not being double counted. As such, we find it would be inappropriate to make an adjustment based on this premise.

Additionally, in response to Ms. Dismukes' adjustment to remove from rate case expense those expenses associated with the additional costs related to the rate case hearing procedure, Utility witness Bradtmiller testified that by going directly to hearing, both the customers and FCWC are guaranteed a full and complete hearing before this Commission. In addition, Mr. Bradtmiller stated the principal reason the utility did not elect the PAA process was because the magnitude of its requested revenue increase was so great that FCWC believed the application would go to full hearing regardless of what action we might have proposed. As discussed in further detail later in this Order, we find that no adjustment shall be made based on the utility not opting to file this case as a PAA proceeding.

In its brief, OPC argued that a third adjustment should be made to reduce rate case expenses by $22,000, in order to remove the professional fees estimated for Utility witness Blizzard. In support of its argument, OPC indicates that on cross-examination, Ms. Blizzard was unaware of what her fee was in this case, as well as the amount the utility had estimated in the MFRs. OPC further argues that the utility's support for its rate case expenses contains no billing from Ms. Blizzard, nor any documentation concerning how this estimate was derived. OPC also argued that there is no evidence giving assurance that these legal fees have not been recorded as an operating expense or capitalized to the wastewater treatment plant, and thus already recovered. We find that supporting invoices totalling $12,930 were, in fact, included in the record. Additional costs for completion were estimated at $9,000 for the consulting services of Ms. Blizzard, as well as Utility witness Christopher. This estimate covers the months of March and April, during which rebuttal testimony was filed and the technical hearing occurred.

Based on our review of the supporting documentation, and testimony, we find that the utility's requested rate case expense is prudent and reasonable. Therefore, we find that the appropriate provision for current rate case expense is $152,356, resulting in annual expense of $16,303 and $21,786 for water and wastewater, respectively.

In its MFRs, the utility reported total projected test year expenses of $25,091 and $27,618 as the amortization of rate case expense for water and wastewater, respectively. This consisted of the amortization amounts for current rate case expense, as well as the amortization of two prior rate cases. The rate case expense

approved in Order No. PSC-92-0563-FOF-WS, Docket No. 910976-WS, issued June 24, 1992, was fully amortized by July of 1996. Accordingly, we find it appropriate to remove all unamortized rate case expense associated with this docket from test year O&M expenses for both water and wastewater. The annual rate case expense of $10,251, approved in Order No. PSC-95-0039-FOF-WU, Docket No. 940687-WU, issued January 10, 1995, shall remain in test year water O&M expenses, since the amortization period has not yet ended. As such, we find that the appropriate amount of rate case expense amortization is $26,554 and $21,786 for water and wastewater, respectively. This results in an increase to water expenses of $1,463 and a decrease to wastewater expenses of $5,832.

Effect of PAA Process on Rate Case Expense

In its brief, FCWC lists a number of factors upon which it based its request that this case proceed directly to hearing. Those factors include: the magnitude of the requested rate increase; the complexity of the underlying issues; the level of expected controversy and the unrecoverable revenue losses associated with the potential regulatory lag accompanying any protested PAA order. Based upon these factors, FCWC argues that this case should not have been processed as a PAA.

Both OPC and intervenor Dyer maintain that by processing this case as a PAA, rate case expense would be lower, resulting in lower rates to the customer. In support of its position, OPC argues that if a PAA order had been entered, the customers could have decided to avoid the cost of hearing. As a result of FCWC avoiding the PAA process, OPC states that the customers were deprived of an opportunity to avoid a hearing.

OPC is correct that the customers could have opted to avoid a hearing following a PAA decision. However, we find that FCWC's concerns of a protest were valid, given the level of the requested rate increase of $153,136 for water and $1,273,024 for wastewater, and controversy stemming from customer interest in this matter.

Section 367.081 (8), Florida Statutes, grants a utility the option of requesting a PAA proceeding in a rate case. However, the PAA process is not mandatory. Therefore, given FCWC's concerns, we find that the utility's choice to go directly to hearing was reasonable and thus, we properly scheduled this docket to go directly to hearing.

We find that the real issue is not whether this case should have been processed as a PAA, but, rather, whether the rate case expense is reasonable. Section 367.081(7), Florida Statutes, provides that the Commission shall determine the reasonableness of rate case expenses and disallow all rate case expenses determined to be unreasonable. The statute also provides that no rate case expense determined to be unreasonable shall be paid by a consumer. As stated earlier, we find that FCWC's rate case expense request is reasonable.

Customer Growth and Commission Index

In the MFRs, the utility has requested recovery of projected O&M expenses based on customer growth and the Commission index. The projections for the utility's 1996 expenses include adjustments for customer growth factors of 1.16 percent and 1.07 percent for water and wastewater, respectively, and the 1995 index factor of 1.95 percent.

OPC witness Dismukes testified that it is unrealistic to assume that expenses will automatically increase in the test year equal to the increase in customers and inflation, regardless of the circumstances or the account. Based on a benchmark analysis and her evaluation of the utility's expenses, Ms. Dismukes identified some expense accounts that have actually declined. Based on this analysis, she then recommended to remove the proposed increased expenses where it was not evident that the expense would increase during the test year.

Ms. Dismukes' proposed adjustments to the test year water O&M expenses total $10,551, of which $6,306 are related to the growth and index adjustments. The remainder of this expense adjustment relates to the utility's projected increase in postage costs, and is addressed in detail later. Due to decreases in certain expense accounts from June 30, 1994 to June 30, 1995, Ms. Dismukes removed the utility's proposed adjustments to increase fuel expenses, contract-other, and miscellaneous expenses. Ms. Dismukes also recommended an adjustment to purchased power, which the utility has increased for customer growth. Ms. Dismukes stated that this account is more sensitive to consumption than growth. In conjunction with her recommendation that test year consumption will not increase, Ms. Dismukes stated there would be no increase in purchased power costs. Accordingly, she recommended removal of the proposed increase of $353.

Witness Dismukes also recommended adjustments to wastewater O&M expenses, which result in a total reduction of $7,237, of which $2,992 are related to the index and growth adjustments. As discussed in relation to the water expenses, the remainder of this adjustment relates to increased postage costs discussed later. Ms. Dismukes testified that although they affect different accounts, and the benchmark analysis is based on different test years, the proposed adjustments and the reasons provided are the same as for the water expense adjustments.

In response to Ms. Dismukes' proposed adjustments, Utility witness Coel testified that it is reasonable to utilize some growth and inflation factors and to make other reasonable adjustments, when a projected test year is employed. Mr. Coel stated that FCWC's utilization of the price index factor to account for anticipated inflation in the projected test year is in lieu of filing a price index application following the resolution of this rate proceeding. Further, Mr. Coel maintains that it is more prudent to incorporate this anticipated increase in expenses within this rate proceeding. In response to witness Dismukes' statement regarding her belief that it is unrealistic to assume that expenses will automatically increase, Mr. Coel stated that it is also unrealistic to assume that expenses will remain constant, or decrease.

OPC argues in its brief that if we accepted the utility's projected level of test year expenses, the utility will be placed in a position where increasing expenses are condoned. Moreover, OPC argues that FCWC should aspire to reduce its expense levels. However, FCWC argues that the requested expense adjustments are a reasonable attempt to factor in growth and inflation.

Although we agree that increasing expenses should not be encouraged, given a projected test year, we find it reasonable to assume that there will be some increase in certain expenses. Therefore, we find that the utility acted appropriately in utilizing the growth and index factors in its O&M expense projections. In addition, since Section 367.081(4)(a), Florida Statutes, gives utility companies the authority to file for an index application, we find it would be inappropriate to disallow FCWC's projected expense increases. However, because the utility has included these adjustments in its projected test year, FCWC shall be precluded from filing an index application in 1996. Therefore, we find that an adjustment is not warranted.

Postage Costs

The utility has requested projected expenses related to increased postage costs of $4,245 for both water and wastewater operations. Utility witness Sansbury testified about the implementation of a new type of billing method. The utility believes that the new laser-printed stuffed bill with return envelope enhances customer service by the improved readability of the full-sized bill. Previously, the utility used 5 X 7 inch post cards to bill its customers. Mr. Sansbury testified that these "cards were frequently misplaced by the postal service or mixed with other fourth class mail and accidently discarded." Some benefits of the new type of bill are identified by Mr. Sansbury: (1) the utility can more efficiently provide customers with service information as well as water industry communications, such as conservation and water quality; (2) without the need for separate mailings, the utility can send customers messages regarding changes in rates, service, and similar matters and (3) the enclosed return envelope provides a convenient way for the customers to make their monthly payments.

OPC witness Dismukes testified that the utility did not explain why this new billing method would necessitate an increase in postage and billing charges. Although she recognized that some increased costs would be expected, she stated that some of the benefits identified by witness Sansbury would offset the increase in costs. Ms. Dismukes stated that by eliminating the problems caused by the 5 X 7 inch post cards being misplaced or discarded, this should increase the utility's cash flow and reduce the working capital requirements. Also, Ms. Dismukes asserted that postage costs should be reduced by the fact that the utility will now be able to send messages to the customers without sending separate mailings. OPC argues that the utility's estimate for increased postage costs is overstated, since the proposed cost increase is merely the difference between the cost of sending a post card versus an envelope. Because the utility did not reflect the reduction in costs that Ms. Dismukes testified would result from the benefits identified above, OPC recommended the removal of the utility's increased costs of $4,245 from test year expenses for both water and wastewater.

Utility witness Coel rebutted Ms. Dismukes' testimony stating that the costs associated with the stuffed bill, which include the extra paper cost for the larger bill, an envelope, and a return envelope, are significantly higher than the post card bill. In

addition, since the last rate proceeding, there has been an increase in postage rates. Moreover, the new stuffed bill is mailed at a higher postage rate. Mr. Coel stated that, with pre-postal increase, the stuffed bill results in a $.144 per piece increase over the post card bill.

In response to witness Dismukes' statement that there should be a reduction of cost due to increased cash flow, witness Coel testified that Ms. Dismukes provided no evidence to support her position. Although theoretically there may be some beneficial effect on the utility's cash flow and working capital requirements, we find no evidence to suggest that a cost reduction will actually occur. Therefore, we find that the record does not support an adjustment based on this premise.

Likewise, in response to Ms. Dismukes' testimony that postage costs should decrease due to the elimination of the need to have separate mailings, Mr. Coel stated that there were no separate mailings in the past. Until FCWC changed to the stuffed bill, there were no cost effective means to communicate with its customers. Further, we find that due to the utility's billing cycles, the elimination of the need for separate mailings associated with customer notice requirements may only happen on occasion, thus diluting any benefits received.

Based on the foregoing benefits, we find that the utility acted prudently in changing the method of billing its customers. The utility has provided sufficient evidence to demonstrate that the new stuffed bill will cost more than the 5 X 7 inch post cards previously used. In addition, we note that postage rates have in fact increased since the previous test year. We find that the increase in costs associated with the implementation of the new billing method outweigh any theoretical cost savings which may be derived. Therefore, we do not find that an adjustment to the utility's proposed test year postage expense is warranted.

Affiliated Expenses

OPC witness Dismukes testified that due to the affiliation between FCWC and the companies that contribute expenses to the utility's cost of service, whether direct or indirect, we should closely scrutinize the affiliate allocation methods and techniques. In support of OPC's position, Ms. Dismukes expressed some concerns related to the utility's affiliated charges. Those concerns include lack of support concerning reasonableness and necessity of

affiliated charges; possible duplication of services among affiliates; lack of support for the allocation method regarding the equitable cost distribution among affiliates; allocation method employed by parent under-allocates costs to non-regulated business; appearance of a discrepancy between the allocation method described in the MFRs compared to how the allocations actually occur and lack of supporting documentation verifying allocations of administrative and general and customer expenses from FCWC to its various divisions. With respect to the last point, Ms. Dismukes stated that it was not possible to verify the allocation methodology described, nor to determine if the application was correct, since the supporting documentation was not provided as part of the MFRs. This matter is discussed in greater detail later in this Order.

Based on the foregoing arguments, OPC argues that 10 percent of the utility's administrative and general and customer accounting expense should be disallowed. This results in a decrease in test year expenses of $33,164 and $35,212 for water and wastewater, respectively.

Mr. Dyer testified that FCWC's method of allocation has little reality to the services performed, and that reliability of the allocated costs are further diluted by expenses that are charged directly to FCWC. Mr. Dyer testified that the only solution is to require labor and material costs charged directly to the division in which the costs are incurred. Further, Mr. Dyer argues in his brief that the Commission should review and revise the utility's allocation methods in order for expenses to more closely match the operations at Barefoot Bay.

In support of the reasonableness of the utility's allocations between and among its affiliates, Utility witness Coel presented the FPSC Staff Audit Report regarding FCWC's affiliated transactions. The opinion provided in the audit report described the utility's affiliate transactions as reasonable and appropriately allocated. However, OPC asserts that the audit report did not address most of the concerns raised by Ms. Dismukes. Further, on cross-examination, Staff witness Clepper was unable to verify that the allocated charges from Avatar Holdings, Inc. were devoid of any disallowable expenses, such as lobbying, dues, or donations. Likewise, Mr. Clepper could not verify if any legal expenses were included in the charges from Avatar Holdings, Inc., or the nature of any such charges if included. Similarly, he was

unable to substantiate the method used by the utility's administrative staff to estimate the time spent on the various affiliates of the utility.

As additional support for it's position, FCWC cites in its brief, Order No. PSC-93-1288-FOF-SU, in Docket No. 920808-SU. In that order, we determined that "it is inappropriate to make a reduction when the record does not support an argument that any specific charge is unreasonable. Therefore, we find that no adjustment shall be made to the allocation of transactions with affiliated companies." The utility further argues that the requested divisional allocated expenses, as documented in the MFRs are consistent with FCWC's allocation methodology, as previously accepted by us. In addition, Ms. Dismukes' proposed adjustment to arbitrarily disallow 10 percent of affiliate expenses opposes the Supreme Court's holding in GTE Florida Incorporated v. Deason, 642 So.2d 545 (1994), as follows:

> The mere fact that a utility is doing business with an affiliate does not mean that unfair or excess profits are being generated, without more . . . We believe the standard must be whether the transactions exceed the going market rate or are otherwise inherently unfair. (at 547-548)

Although Ms. Dismukes provided no documentation in support of her proposed disallowance of certain affiliate expenses, we find that it is the burden of the utility to prove that these charges are reasonable and necessary. We find that the documentation supplied by the utility in this case supports that the expenses are being incurred and paid. Additionally, the utility provided a portion of the Staff Audit Report, which states that FCWC's affiliated transactions are reasonable and appropriately allocated. Furthermore, we find that the record does not show that the amount of affiliated charges to this division are excessive. Therefore, we find that FCWC's affiliated transactions are reasonable and warrant no adjustment.

Salary Increases

Test year water and wastewater O&M expenses include annualizing adjustments to reflect a five percent wage increase for 1995. These annualized salary increases became effective January 1, 1995.

Intervenor witness Dyer testified that there is a discrepancy between salaries actually paid to employees and salary increases reflected in the utility's requested revenue requirement. Mr. Dyer cited a portion of the utility's MFRs, which includes a copy of the audit report from Ernst and Young, and the audited financial statements, dated December 31, 1994. Within this audit report, it is indicated that the utility paid salary increases of five percent in 1994 and six percent in 1993 and 1992. Further, Mr. Dyer stated that the MFRs indicate that the utility is annualizing salary increases of five percent for the projected test year June 30, 1996. According to Mr. Dyer, this conflicts with information on salary increases reported in a letter dated February 2, 1996, to Senator Patsy Ann Kurth by Paul H. Bradtmiller, Executive Vice President and Chief Operating Officer of FCWC. Mr. Dyer quoted from Mr. Bradtmiller's letter, that "the average wage increases, including cost of living and merit increases, for the year 1992 to 1996 have been 3.25 percent, 4.5 percent, 4.5 percent, 4.5 percent and 3.5 percent, respectively." The concern that Mr. Dyer expressed is that if we approve FCWC's requested salary increases, but some lesser amount is actually paid to the employees, the customers will be charged for an expense that the utility will never incur.

Regarding Mr. Dyer's testimony on the historical salary increases, Utility witness Mr. Coel stated that the source in the MFRs, referred to by Mr. Dyer, is a footnote to the 1994 financial statements regarding the utility's pension plan. The salary increases reported as five percent in 1994 and six percent in 1993 and 1992, were actuarial assumptions for salary and promotion increases, used to determine the annual pension expense. The percentage increases were used only for the actuarial study, as opposed to being the actual paid salary increases, as Mr. Dyer testified.

Witness Coel testified that a critical part of the Bradtmiller letter omitted from Mr. Dyer's testimony stated, "Any other increases are related to promotion, or in the case of plant operators, to higher grades based upon advancements in operator certifications." Mr. Coel testified that a five percent increase in salaries was determined to be a reasonable estimate for purposes of preparing the MFRs. Further, Mr. Coel stated that since the time of filing, the utility has determined the actual average wage increase for 1996 to be 3.5 percent; however, promotions and advancements are not included in this percentage.

Although not distinctly identified in this issue, Mr. Dyer addressed an additional concern that labor costs for FCWC had risen 70.5 percent, as opposed to an increase of 18.77 percent in the cost of living allowance (COLA) during the same time period. Mr. Dyer stated that since the service area is essentially built-out, it would seem this division's costs should have stabilized. Lastly, Mr. Dyer testified that it is unclear what benefit accrues to the customers of FCWC from the additional layer of staffing caused by the dissolution of Consolidated Water Services, Inc. (CWS). Mr. Dyer argues that the costs associated with these additional employees and officers should be disallowed until the utility can explain and demonstrate what benefits, if any, accrue from this action.

In response, Utility witness Murphy testified that he was unaware of how Mr. Dyer arrived at the 70.5 percent figure. However, Mr. Murphy offered some explanation of the two primary reasons that wastewater labor costs have increased. First, the upgrade of the wastewater plant to AWT standards required two additional employees, included in the MFRs at average annual wages of $25,000 each. Second, within the past two years, two consolidations have occurred at FCWC resulting in the reclassification of labor costs from contract services to salaries. As a result of the consolidation of CWS, labor costs associated with finance, accounting, and rate staff, previously recorded as contractual services other in the last wastewater rate proceeding are now recorded in salaries expense. Additionally, the labor costs associated with some executive and administrative positions of Avatar Utilities, Inc., previously recorded as contractual services management fees, have also been shifted to FCWC salaries.

After reviewing Mr. Dyer's testimony, as well as arguments provided in his brief, it appears that the 70.50 percent increase in labor costs was calculated as the increase from the test year in Docket No. 910976-WS to the test year in the current rate proceeding. It also appears that Mr. Dyer's comparison reflects the combined balances for both water and wastewater for the employee salary accounts, associated payroll accounts, and the contractual services accounts for engineering, accounting, legal, management fees, and other. In his brief, Mr. Dyer uses this percentage as a comparison to the COLA index to demonstrate that labor costs have increased excessively since the last rate proceeding. We find this comparison is inappropriate in that by including all of these accounts and adding together water and wastewater, the percentage calculated is distorted when comparing

to a cost of living index. Additionally, in support of the argument in his brief, Mr. Dyer cited information which was not presented as evidence in the record, and thus we will not rely on it.

Although its position on this issue is that we should not accept the utility's requested salary increase, OPC did not provide any evidence at the hearing, nor address this issue in its brief. Based on the foregoing, we find that FCWC met its burden of proof that a five percent salary increase is reasonable.

Test Year Operating Income

Based on the adjustments discussed herein, we find the appropriate test year operating income before any provision for increased revenues is $26,309 for water and negative $76,808 for wastewater.

REVENUE REQUIREMENT

Based upon our consideration of rate base, cost of capital, operating income and our adjustments discussed herein, we find that the appropriate annual revenue requirements for FCWC are $912,061 and $1,915,176 for water and wastewater, respectively.

Allocation of Wastewater Revenue Requirement

FCWC witness Allen testified that one of the most important fundamentals of rate making is that the costs of providing service are recovered from the cost causer. Recognizing that reuse is a source of water as well as a method of effluent disposal, we believe that this method of allocating the revenues is changing. Accordingly, we must determine whether it is appropriate to allocate any portion of the wastewater revenue requirement to the water customers. FCWC argues that no portion of the wastewater revenue requirement should be allocated to the water customers. OPC did not address this issue. In his brief, Mr. Dyer argues that revenue should be related to true cost, and mixing revenues will dilute the real costs without providing any savings. We will discuss these arguments further, however, we find that, first, a brief discussion regarding Section 367.0817, Florida Statutes, is warranted.

Background

In 1994, the Legislature enacted Section 367.0817, Florida Statutes. This section of Chapter 367 authorizes the Commission to allocate the costs of providing reuse among any combination of the utility's customer base. Specifically, Section 367.0817(3), Florida Statutes, states:

> All prudent costs of a reuse project shall be recovered in rates. The Legislature finds that reuse benefits water, wastewater and reuse customers. The commission shall allow a utility to recover the costs of a reuse project from the utility's water, wastewater, or reuse customers or any combination thereof as deemed appropriate by the commission.

As discussed above, this section authorizes a new method of allocating a utility's revenue requirement among its customers. Although we have addressed this issue in other proceedings, we have never applied this section of the statute.

Determining how much of the wastewater revenue requirement should be allocated to the water customers is difficult given the discretionary nature of Section 367.0817, Florida Statutes. Although the Legislature acknowledges that reuse benefits water, wastewater and reuse customers, there is no guidance in the statute as to how to measure these benefits. In addition, the Legislature does not state when it is appropriate to undertake such an allocation or how much should be allocated. These decisions are left solely to our discretion.

Mr. Dyer testified that keeping the operations separate is vital to identifying the true costs. We agree that the traditional method of allocating a revenue requirement is that the costs of providing service are recovered from the cost causer. However, as stated above, reuse is changing this method of revenue recovery and this has been recognized by the Legislature.

FCWC is strongly opposed to allocating any of the wastewater revenue requirement to the water customers. In its brief, FCWC argues that the proposal outlined by witness Chase should not be adopted in this proceeding, because there has been no demonstration that reuse benefits the water customers of Barefoot Bay. The utility states that revenue should be allocated from the wastewater

customers to the water customers only when reuse provides a specific benefit to the water customers. The utility admits that there may be some theoretical benefit to the water customers as a result of reuse, however, in this case, reuse has been shown as the only feasible and prudent means of disposal of treated wastewater effluent. Therefore, according to the utility, the reclaimed water produced is merely a byproduct of the wastewater treatment process, and any revenue derived from the disposal of this byproduct should accrue to the wastewater customers' benefit.

In its brief, the utility also argues that Section 367.0817, Florida Statutes, does not provide us with unlimited authority to allocate reuse costs among water, wastewater and reuse customers, absent a legitimate showing of a benefit to the affected customer class. We agree that there needs to be a benefit in order for the statute to be implemented. However, the Legislature has stated in Section 367.0817, Florida Statutes, that reuse benefits water customers. The benefits to Barefoot Bay's customers are described below.

Staff witness Chase testified to the implications of allocating a portion of the revenue requirement associated with reuse to the water customers. Since this is a new issue, the method of quantifying the benefits to the water customers is evolving, but it is possible to quantify the benefits. A good starting point in quantifying the benefits is determining whether there are any perceived benefits. If there are, witness Chase testified that one should attempt to quantify these benefits as accurately as possible. For instance, in cases where additional costs are incurred to implement reuse over some other environmentally acceptable means of effluent disposal, the water customers should be responsible for these additional costs. In this case, we have recognized the benefits to the water customers by allocating a portion of the revenue requirement associated with the AWT to the water customers, since there was an environmentally acceptable alternative. We will discuss this methodology later in this Order.

Benefits to Water Customers

Reuse was first implemented at Barefoot Bay in 1989. The current reuse plan consists of three reuse sites: the Barefoot Bay Golf Course; a sprayfield; and the H&S groves. The Barefoot Bay Golf Course will receive treated effluent pursuant to an agreement

dated May 25, 1994. The sprayfield is owned by FCWC. As of the hearing in this docket, closing had not occurred on the purchase of the H&S groves.

The utility's argument against shifting reuse revenue is based on the fact there has not been a demonstration that reuse benefits the water customers at Barefoot Bay. However, even though these benefits might not be observable or measurable, we find there is evidence that they exist. We find there are perceived benefits. First, as testified by Staff witness Chase, reuse provides a greater benefit to water users in areas where water quality of supply concerns have been identified. The Barefoot Bay Division is located in SJRWMD. The entire area of the district has been designated as a water conservation area in order to provide for greater availability of reclaimed water district wide and to conserve available water resources. Accordingly, the water in this area requires careful management.

As stated by Staff witness Burklew, a hydrologist employed by SJRWMD, benefits of reuse inure to the water customers of Barefoot Bay through the conservation and protection of the water resources. Resource conservation and protection are goals of SJRWMD. Reuse at FCWC meets these goals by decreasing local groundwater use, reducing fresh water flows to the Indian River Lagoon and eliminating nitrate and phosphorous loading to the Lagoon. We find that reuse also poses less of a threat to the underground sources than an injection well. In fact, Utility witness Allen testified that a leaking injection well was probably the greatest threat to underground sources of drinking water. Witness Allen acknowledged that reducing the agricultural demand on the aquifer could potentially be a benefit to the water customers, albeit a perceived benefit.

As stated earlier, in 1988, FCWC was required to pursue options which would result in the elimination of discharges to surface water bodies. The only options available were an injection well and reuse. FCWC originally chose the injection well because it was found to be the most economical method of effluent disposal and this was the method decided on in the Consent Order. Public access reuse was eventually chosen as the method of effluent disposal.

In its brief, the utility argues that the record is clear that the injection well was ultimately found not to be a viable option and this is the reason why no revenue should be shifted from the

wastewater customers to the water customers. We agree that there is evidence which shows that the injection well was not environmentally acceptable. Although the DEP approved the permit for the injection well, it expressed concerns regarding injection wells in Brevard County. The SJRWMD opposed injection wells as a method of effluent disposal because of the risks of groundwater pollution and the loss of reusable water. Accordingly, a permit was not approved by SJRWMD. Instead, the decision regarding the permit was deferred so that the utility could pursue the reuse option on the Micco Tract. FCWC's plan was to purchase the Micco Tract for use as a land application site. When the Consent Order was amended, FCWC was directed by DEP to construct and operate a land application effluent disposal site on the Micco Tract. The purchase of the site never occurred, however, because of permit challenges.

We find that disposal of treated effluent on the Micco Tract remained an environmentally acceptable alternative for the purposes of revenue allocation pursuant to Section 367.0817, Florida Statutes. Unlike the injection well alternative, SJRWMD strongly endorsed the sprayfield alternative. The administrative process prevented FCWC from implementing this option. The record is clear that the reason that the Micco Tract option did not come to fruition was because of the permit challenges. Despite these challenges, however, the permit was issued by the DEP and has not yet expired. The record shows that if the appeal of the permits by the Brevard Groves and the H&S groves had not occurred, FCWC would have continued with the acquisition of the Micco Tract. This fact was acknowledged under cross-examination of Ms. Blizzard. The appeals occurred, however, and FCWC began exploring new options for reuse while continuing the appeals process. These investigations and the concerns regarding the length of the appeal process resulted in the SACO.

The SACO was issued after the decision in the appeal. Under the terms of the SACO, FCWC was required to complete elimination of discharge to the canal and to obtain a permit to upgrade the wastewater treatment plan to advanced waste treatment. Although the decision in the appeal granted FCWC the permit to construct an effluent disposal system on the Micco Tract, the utility opted to go forward with the plant upgrades required by the SACO. What prevented FCWC from going forward with the Micco Tract option was that it would not have met the schedule set out by the Amended Consent Order.

Revenue Allocation

We find that there are benefits of reuse to the water customers of Barefoot Bay and these benefits must be recognized in the water rates. Witness Chase testified that the level of the water rates, the magnitude of the wastewater revenue increase, the average usage of the customer and the need to send a stronger price signal to achieve water conservation should be considered when determining whether and how much of the reuse costs to allocate to the customers. We agree. In this case, the wastewater revenue increase is significantly higher than the water increase. Shifting a high percentage of the wastewater revenues to the water customers will have a great impact on the water rates. In addition, the average usage of the customer is 2,909 gallons. Therefore, a conservation signal is not needed in this case.

For these reasons, we find it appropriate to allocate $16,130 of the wastewater revenue requirement to the water customers of Barefoot Bay. Therefore, we find it appropriate to allocate five percent of the difference between the wastewater revenue requirement associated with the AWT and the estimated wastewater revenue requirement associated with the Micco Tract to the water customers. This equates to approximately .8 percent of the wastewater revenue requirement. We believe this is an appropriate amount because as we have noted, usage in this area is not significant and a conservation signal is not needed. To allocate more would result in an unnecessarily high water gallonage rate that would penalize customers already conserving.

We find it appropriate to collect the portion of the revenue requirement allocated to the water customers through the water gallonage charge at a rate of $.10 per 1,000 gallons. For annual reporting purposes, the revenue collected as a result of the shift shall be recorded as a separate line item under Miscellaneous Revenue. This will allow the utility to remove the revenue from water revenue before calculating the achieved rate of return for overearnings purposes. In addition, the utility will have the ability to add the revenue to the wastewater revenue before calculating the achieved rate of return on the wastewater system. This will aid the utility in maintaining a proper balance between plant costs and revenues.

We note that the utility has suggested that an investigation into the appropriate criteria for an allocation be initiated. Although we do not believe that a docket for such an investigation

needs to be established, we do find that an informal investigation as to the method of allocation may be warranted. Until we are able to establish firm criteria, we find that it more appropriate for this issue to be handled on a case by case basis.

RATES AND RATE STRUCTURE

Revenue Allocation Between Base Facility and Gallonage Charges

Under the current rate structure, approximately 56 percent of FCWC's water revenue is collected through the base facility charge while the remaining 44 percent is collected through the gallonage charge. For wastewater, approximately 48 percent is collected from the base facility charge leaving 52 percent to be collected from the gallonage charge. The utility is proposing to collect 64 percent of the water revenue through the base facility charge and 36 percent through the gallonage charge. For wastewater, the utility is requesting to collect 78 percent of the wastewater revenue through the base facility charge and 22 percent through the gallonage charge. FCWC's witness Coel stated that the proposed shift to allocate more expenses to the base facility charge is for revenue stability. OPC's witness Dismukes stated that this shift in revenue, where more of the revenue requirement is collected though the base facility charge, places a greater risk of revenue collection on customers.

We have traditionally allocated fixed costs to the base facility charge and variable costs to the gallonage charge. We find this method most appropriate in determining the proper rate structure. Furthermore, when establishing the rate structure, we must also consider the effects on conservation and the previous allocation from prior rate cases to assure continuity in rates.

In recent years, the effects of conservation have shifted more revenue collection through the gallonage charge to allow the customer a greater incentive for conservation. This type of conservation shift in the revenue allocation allows customers more control over their water and wastewater bill. However, whenever more revenue is collected through the gallonage charge, it creates more uncertainty for the utility in collecting its revenue requirement. In other words, when more revenue is collected through the gallonage charge, everything that affects consumption will also affect the utility's amount of revenue collected. When the shift in revenue allocation goes more towards the base facility charge, which promotes revenue stability for the utility, we become

concerned that it will promote water usage. As discussed earlier, it appears that residents of Barefoot Bay have conserved a great deal over the past years. To jeopardize conservation by this type of allocation would be unfair.

In this case, the utility is proposing to allocate 100 percent of its return on rate base through the base facility charge for both water and wastewater. In theory, this would guarantee the utility a return on its rate base. We find a 50 percent split for the return on rate base between the base facility charge and gallonage charge for both the water and wastewater operations more appropriate. This will allow the utility an opportunity to earn a return on its rate base while offering an incentive to its customers to conserve water.

Based on this adjustment and the effects it could have on conservation, we find it appropriate to allocate 58 percent of the revenue to the base facility charge and 42 percent to the gallonage charge for water. This will essentially maintain the current revenue allocation for water. For wastewater, we find that allocation of 62 percent of the revenue to the base facility charge and 38 percent to the gallonage charge is appropriate.

Reuse Rate

The Barefoot Bay Golf Course is the only source of reuse revenue for Barefoot Bay. The utility believes that the appropriate rate for reuse is $.13/1,000 gallons. OPC believes that the appropriate rate is $.21/1,000 gallons. For the reasons stated below, we find that a rate of $.13/1,000 gallons is appropriate. We have not attempted to calculate a cost of service based rate because it does not appear to be reasonable in this case.

FCWC argues in its brief that the rate should be $.13/1,000 gallons, because the agreement between the golf course and the utility establishes that rate. In addition, the agreement provides a buyout clause. Further, the utility argues that there is little promise in marketing reclaimed water for FCWC. This is because SJRWMD is unwilling to withhold the renewal of groundwater withdrawal permits for agricultural irrigation unless certain conditions are met.

According to OPC's brief, FCWC's reuse feasibility study indicates that a rate of $.13/1,000 gallons was consistent with the

charge of another FCWC system. Since FCWC based the rate to the golf course on the rate charged by other systems, and we recently approved the rate of $.21/1,000 gallons for other systems, OPC argues that it is appropriate to use a higher rate.

There are three elements which we find must be considered in determining the appropriate reuse rate. The first element is that the golf course has the ability to buyout of the contract and, if it should do this, it has other options for securing its source of water.

The second element is whether FCWC could secure another customer should the golf course elect to buy out of the contract. We do not find that FCWC could secure another customer. The golf course and neighboring citrus farmers are the only potential users at present. FCWC attempted to encourage the citrus farmers to use the reclaimed water. However, it was unsuccessful.

The third element is the negotiated contract. Even though the contract clearly states that the rate is subject to the approval of this Commission, it does indicate that the golf course agreed on a rate of $.13/1,000 gallons.

As stated earlier, we find that reuse provides a beneficial source of water. Because the golf course has another source of water for irrigation, setting the rate for reuse higher than what was agreed upon could discourage the sale of reclaimed water to the golf course. Because the golf course is located within a water conservation area, we find that this would be sending an improper signal. Therefore, based on the foregoing, we find that a reuse rate of $.13/1,000 gallons is appropriate.

Rate Summary

The permanent rates requested by the utility are designed to produce annual revenues of $916,723 for the water service and $2,110,481 for the wastewater service. The requested revenues represent an increase of $153,136, or 20.05 percent, for water service and $1,273,024, or 156.21 percent, for wastewater service.

The final rates approved for the utility are designed to produce revenues of $924,076 for the water service, which is an increase of $134,188, or 16.99 percent, and $1,889,047 for the wastewater service, which is an increase of $999,827, or 112.43

percent. These approved rates exclude miscellaneous service revenues and are designed using the base facility charge rate structure.

Consistent with the utility's request, we find that a 20 percent differential between the residential and general service wastewater gallonage charges is appropriate. The purpose of the 20 percent differential is to recognize that approximately 20 percent of the water used by residential customers is used for purposes such as irrigation and is not collected by the wastewater systems.

The utility has also requested to charge $10.00 for a premise visit after business hours. This charge would be levied when a service representative visits a premises for the purpose of discontinuing service after hours for nonpayment of a due and collectible bill and does not discontinue service, because the customer pays the service representative or otherwise makes satisfactory arrangements to pay the bill. Currently, the utility collects $10.00 for a premise visit during business hours but does not have a charge for a premise visit after business hours. We find it appropriate that the utility collect this charge.

A comparison of the utility's original rates, interim rates, requested rates and our final approved rates are set forth on Schedules Nos. 4-A and 4-B for water and wastewater, respectively.

EFFECTIVE DATE

The utility shall file revised tariff sheets and a proposed customer notice to reflect the appropriate rates pursuant to Rule 25-22.0407(10), Florida Administrative Code. The approved rates shall be effective for service rendered on or after the stamped approval date on the tariff sheets pursuant to Rule 25-30.475(1), Florida Administrative Code, provided the customers have received notice. The rates shall not be implemented until proper notice has been received by the customers. The utility shall provide proof of the date notice was given within 10 days after the date of the notice.

STATUTORY FOUR-YEAR RATE REDUCTION

Section 367.0816, Florida Statutes, requires that the rates be reduced immediately following the expiration of the four year period by the amount of rate case expense previously authorized in the rates. The reduction will reflect the removal of revenues

associated with the amortization of rate case expense and the gross-up for regulatory assessment fees which is $17,071 for water and $22,813 for wastewater. The removal of rate case expense will result in the reduction of rates as reflected on Schedules Nos. 5-A and 5-B for water and wastewater, respectively.

The utility shall file revised tariffs no later than one month prior to the actual date of the required rate reduction. The utility also shall file proposed customer notices setting forth the lower rates and reason for the reductions.

If the utility files this reduction in conjunction with a price index or pass-through rate adjustment, separate data shall be filed for the price index and/or pass-through increase or decrease, and for the reduction in the rates due to the removal of amortized rate case expense.

REFUND OF INTERIM REVENUES

By Order No. PSC-96-0119-FOF-WS, issued on January 23, 1996, we suspended the utility's proposed rates and approved interim water and wastewater rates subject to refund, pursuant to Sections 367.082, Florida Statutes. According to Section 367.082, Florida Statutes, any refund should be calculated to reduce the rate of return of the utility during the pendency of the proceeding to the same level within the range of the newly authorized rate of return. Adjustments made in the rate case test period that do not relate to the period interim rates are in effect should be removed. Examples of these adjustments would be an attrition allowance or rate case expense, which are recovered only after final rates are established.

In this proceeding, the test period for establishment of interim rates was the historical twelve months ended June 30, 1995. The approved interim rates did not include any provisions for proforma consideration of increased operating expenses or increased plant. The interim increase was designed to allow recovery of actual interest costs, and the floor of the last authorized range for equity earnings.

To establish the proper refund amount, we have calculated a revised interim revenue requirement utilizing the same data used to establish final rates. Rate case expense was excluded because it was not an actual expense during the interim collection period.

Using the principles discussed above, we have calculated the revenue requirement for the interim collection period to be $896,469 for water and $1,927,962 for wastewater. These revenue levels exceed the interim revenues which were granted in Order No. PSC-96-0119-FOF-WS. Therefore, no refund of interim revenues is required.

REFUND OF WASTEWATER REVENUES

As discussed earlier, subsequent to our final decision in this docket, but before the Order had been issued, our staff submitted a revised recommendation to correct a miscalculation regarding the used and useful percentage of FCWC's wastewater treatment plant prior to AWT. The recommendation included revised wastewater rates resulting from the corrected used and useful calculation. We considered this recommendation at the August 13, 1996 Agenda Conference, and our decision is reflected in the body of this Order.

On August 6, 1996, pursuant to Section 367.081(6), Florida Statutes, the utility implemented, subject to refund, the rates we originally approved prior to the corrected used and useful percentage. The implemented wastewater rates are higher than the wastewater rates approved herein. Therefore, the utility shall refund with interest, calculated pursuant to Rule 25-30.360(4), Florida Administrative Code, the additional wastewater revenues collected from these rates until the approved rates are implemented. FCWC shall make the refund to the customers of record as of the date of this Order, pursuant to Rule 25-30.360(3), Florida Administrative Code. FCWC shall submit the proper refund reports pursuant to Rule 25-30.360(7), Florida Statutes. FCWC shall treat any unclaimed refunds as CIAC pursuant to Rule 25-30.360(8), Florida Statutes. The utility's corporate undertaking shall be released upon staff's verification that the refund has been completed.

The utility shall file revised tariff sheets and a proposed customer notice reflecting the appropriate rates and the reason for the reduction. The approved rates shall be effective for service rendered on or after the stamped approval date on the tariff sheets pursuant to Rule 25-30.475(1), Florida Administrative Code, provided the customers have received notice. The rates may not be implemented until proper notice has been received by the customers. The utility shall provide proof of the date notice was given within 10 days after the date of the notice.

PRIOR STATUTORY FOUR-YEAR RATE REDUCTION

Section 367.0816, Florida Statutes, requires that the rates be reduced immediately following the expiration of the four year period by the amount of rate case expense previously authorized in the rates. The rate reduction required by Order No. PSC-92-0563-FOF-WS was scheduled for July 26, 1996, and would reflect the removal of revenues associated with the amortization of rate case expense and the gross-up for regulatory assessment fees from Docket No. 910976-WS. The total amount of this reduction on an annual basis is $6,618 for both the water and wastewater rates.

FCWC's witness Coel testified that it would be efficient and cost effective and would reduce customer confusion if the scheduled rate reduction could be netted against the pending rate case. This would result in one set of tariff changes, one customer notice and mailing. We find that netting the rate reduction with the pending rate case creates a cost savings. Therefore, the rate reduction required by Order No. PSC-92-0563-FOF-WS, is reflected in the approved rates in this docket.

MINIMUM FILING REQUIREMENTS

FCWC is an affiliate in a group of related companies, some of which charge or allocate costs to the utility for the provision of management and administrative services. FCWC allocates administrative and general expenses and customer billing and customer accounting expenses to each of its operating divisions. Avatar Utility Services, Inc. charges for data processing services directly to the utility. Avatar Utilities, Inc. provides management services to the utility. Avatar Holdings, Inc. charges Avatar Utilities, Inc. for certain management fees, which subsequently get allocated down to the utility.

OPC witness Dismukes testified that FCWC has failed to follow Rule 25-30.436(h), Florida Administrative Code, in that the utility did not provide in the MFRs, workpapers supporting some of its allocations described above. The rule states that the following should be provided as part of a utility's application when it files for a rate increase:

> (h) Any system that has costs allocated or charged to it from a parent, affiliate or related party, in addition to those costs

> reported on Schedule B-12 ... shall file three copies of additional schedules that show the following information:
>
> 1. The total costs being allocated or charged prior to any allocation or charging as well as the name of the entity from which the costs are being allocated or charged and its relationship to the utility.
> 2. For costs allocated or charged to the utility in excess of one percent of test year revenues:
> a. A detailed description and itemization;
> b. the amount of each itemized cost.
> 3. The allocation or direct charging method used and the bases for using that method.
> 4. The workpapers used to develop the allocation method, including but not limited to the numerator and denominator of each allocation factor.
> 5. The workpapers used to develop, where applicable, the basis for the direct charging method.
> 6. An organizational chart of the relationship between the utility and its parent and affiliated companies and the relationship of any related parties.
> 7. A copy of any contracts or agreements between the utility and its parent or affiliated companies for services rendered between or among them.

Ms. Dismukes testified that the utility provided all the required information with respect to Avatar Utilities, Inc., as well as the information required in parts 6 and 7 for all other affiliates. However, Ms. Dismukes testified that the utility did not provide any of the information required in parts 1, 3, 4, or 5, with respect to the costs allocated from Avatar Holdings, Inc. Likewise, the utility did not provide the information required in parts 1, 2, 3, 5, and a portion of part 4, with respect to the allocations from FCWC. Ms. Dismukes also stated that in the MFRs, regarding the allocations from FCWC, the utility stated: "Due to the voluminous number of allocations made, schedules showing the

computation of allocation percentages for all expenses allocated are available for inspection at the utility's office in Sarasota Florida." In its brief, OPC argues that if the information was available for inspection, it could not have been part of the MFRs.

In response to Ms. Dismukes contentions, Utility witness Coel testified as follows:

> Included on page 63 of the MFRs, FCWC provided the basis for its divisional allocations. This schedule has been included in all recent FCWC rate cases and has been subject to review at FCWC's General Office in Sarasota. This allocation method has been accepted by the PSC, since the PSC has not made any adjustments in its recent FCWC rate orders to counter this methodology.

Mr. Coel further testified that the PSC confirmed that the MFRs were complete as filed, as of the filing date, November 6, 1995. On cross-examination by OPC, Mr. Coel maintained that the utility complied with the rule with respect to the utility's allocations.

In its brief, FCWC professed that since the MFRs were filed, OPC made no effort to obtain additional information on this issue. We find that Ms. Dismukes is correct in that the utility did not comply with the rule regarding affiliate allocations. The utility's argument that the MFRs have been compiled similarly in all recent FCWC rate cases does not lend any greater weight to whether the information was complete or not. Regardless of whether OPC requested the information, the burden of proof rests on the utility to demonstrate the reasonableness of its affiliate charges. Since the utility did not request a waiver of the rule, FCWC was obligated to provide the information as part of its rate case application. Strict compliance with the rule requires that the utility actually file the requisite information, as opposed to declaring that it is available at the utility's office for inspection. Therefore, the utility shall be required to comply with the rule in all future rate case proceedings.

COMMISSION DISCRETION IN SETTING HEARING

Rule 25-22.036(9)(a), Florida Administrative Code, states:

> Where an application, petition, or complaint has been filed, and Commission action has not yet been proposed, the Commission may: 1) Deny the petition if it does not adequately state a substantial interest in the Commission determination or if it is untimely. 2) Issue notice of proposed agency action where a rule or statute does not mandate a hearing as a matter of course, and after the time for responsive pleadings has passed; 3) Set the matter for hearing before the Commission, or member thereof, or request that a hearing officer from the Division of Administrative Hearings be assigned to conduct the hearing. The assignment of a matter for hearing shall be pursuant to Rule 25-22.0355. 4) Dispose of the matter as provided in §120.57(2).

Section 367.081(8), Florida Statutes, provides that a utility may specifically request the Commission to process its petition for rate relief using the Commission's PAA procedure.

We find that when read together, the rule and statute provide that the utility may request a PAA proceeding, and, in the absence of such a request, the discretion to opt between the PAA or hearing procedures resides with the Commission. FCWC did not request that this case be processed as a PAA. Therefore, it was within our discretion to opt for either PAA or proceed directly to hearing.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Office of Public Counsel's Motion to Strike is hereby granted. It is further

ORDERED that Florida Cities Water Company, Barefoot Bay Division's application for increased water and wastewater rates is approved to the extent set forth in the body of this Order. It is further

ORDERED that each of the findings made in the body of this Order is hereby approved in every respect. It is further

ORDERED that all matters contained in the schedules attached hereto are by reference incorporated herein. It is further

ORDERED that Florida Cities Water Company, Barefoot Bay Division, shall be granted thirty days from the date of this Order to file the amount of the grant from the St. Johns River Water Management District. It is further

ORDERED that the rates approved herein shall be effective for service rendered on or after the stamped approval date on the revised tariff sheets, pursuant to Rule 25-30.475, Florida Administrative Code, provided the customers have received notice. It is further

ORDERED that prior to its implementation of the rates approved herein, Florida Cities Water Company, Barefoot Bay Division shall submit and have approved a proposed customer notice to its customers of the increased rates and reasons therefore. The notice will be approved upon staff's verification that it is consistent with our decision herein. It is further

ORDERED that Florida Cities Water Company, Barefoot Bay Division shall provide proof that the customers have received notice within 10 days of the date of notice. It is further

ORDERED that prior to its implementation of the rates approved herein, Florida Cities Water Company, Barefoot Bay Division shall submit and have approved revised tariff pages. The revised tariff pages will be approved upon staff's verification that the pages are consistent with our decision herein and that the proposed customer notice is adequate. It is further

ORDERED that for annual reporting purposes, Florida Cities Water Company, Barefoot Bay Division, shall record the revenue collected as a result of the allocation of reuse revenue to water customer, as a separate line item under Miscellaneous Revenue. It is further

ORDERED that Florida Cities Water Company, Barefoot Bay Division, shall refund with interest, calculated pursuant to Rule 25-30.360(4), Florida Administrative Code, the additional

wastewater revenues collected subject to refund as set forth in the body of this Order. It is further

ORDERED that Florida Cities Water Company, Barefoot Bay Division, shall make the refund to customers of record as of the date of this Order pursuant to Rule 25-30.360(3), Florida Administrative Code. Florida Cities Water Company, Barefoot Bay Division, shall submit the proper refund report reports pursuant to Rule 25-30.360(7), Florida Administrative Code. It is further

ORDERED that Florida Cities Water Company, Barefoot Bay Division, shall treat any unclaimed refunds as contributions-in-aid-of-construction pursuant to Rule 25-30.360(8), Florida Administrative Code. It is further

ORDERED that the rates shall be reduced at the end of the four-year rate case expense amortization period, consistent with our decision herein. Florida Cities Water Company, Barefoot Bay Division shall file revised tariff sheets no later than one month prior to the actual date of the reduction and shall file a customer notice. It is further

ORDERED that Florida Cities Water Company, Barefoot Bay Division, shall comply with the filing requirements of Rule 25-30.436, Florida Administrative Code, in all future rate case proceedings. It is further

ORDERED that the provisions of this Order relating to the imputation of contributions-in-aid-of-construction for the St. Johns River Water Management District grant to Florida Cities Water Company, Barefoot Bay Division, is issued as proposed agency action, shall become final and effective unless an appropriate petition, in the form provided by Rule 25-22.036, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that this docket shall be closed if no timely protest is received from a substantially affected person, upon staff's verification the Florida Cities Water Company, Barefoot Bay Division has made the required refunds as set forth in this Order

and upon Florida Cities Water Company, Barefoot Bay Division's filing and staff's approval of revised tariff sheets and a customer notice. It is further

ORDERED that Florida Cities Water Company, Barefoot Bay Division's corporate undertaking shall be released upon staff's verification that the refund has been completed.

By ORDER of the Florida Public Service Commission, this 12th day of September, 1996.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

As identified in the body of this Order, our action regarding the imputation of contributions-in-aid-of-construction for the St. Johns River Water Management District Grant to Florida Cities Water Company, Barefoot Bay Division, is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code.

Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on September 26,1996 such a petition, this order shall become effective on the date subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If the relevant portion of this order becomes final and effective on the date described above, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

Any party adversely affected by the Commission's final action in this matter may request: (1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

FLORIDA CITIES WATER CO.-BAREFOOT BAY DIVISION
SCHEDULE OF WATER RATE BASE
TEST YEAR ENDED 06/30/96

SCHEDULE NO. 1-A
DOCKET NO. 951258-WS

	COMPONENT		TEST YEAR PER UTILITY	UTILITY ADJUSTMENTS	UTILITY ADJUSTED TEST YEAR 6/30/96	COMMISSION ADJUSTMENTS	COMMISSION ADJUSTED TEST YEAR 6/30/96
1	UTILITY PLANT IN SERVICE	$	4,475,071	46,235	$ 4,521,306	0	4,521,306
2	LAND		1,056	0	1,056	0	1,056
3	NON-USED & USEFUL COMPONENTS		0	0	0	0	0
4	CONSTRUCTION WORK IN PROGRESS		18,308	(18,308)	0	0	0
5	ACCUMULATED DEPRECIATION		(1,295,605)	(151,767)	(1,447,372)	0	(1,447,372)
6	CIAC		(2,973,936)	(12,375)	(2,986,311)	0	(2,986,311)
7	AMORTIZATION OF CIAC		952,794	113,543	1,066,337	0	1,066,337
8	ADVANCES FOR CONSTRUCTION		(79,465)	2,990	(76,475)	0	(76,475)
9	WORKING CAPITAL ALLOWANCE		64,715	(16,500)	48,215	35,958	84,173
10	OTHER: ALLOC OF GENERAL OFFICE		0	21,766	21,766	0	21,766
11	UNFUNDED SFAS 106 OBLIGATION		0	0	0	(79,560)	(79,560)
	RATE BASE	$	1,162,938	(14,417)	$ 1,148,521	(43,602)	1,104,920

FLORIDA CITIES WATER CO.-SOUTH REFOOT BAY DIVISION
SCHEDULE OF WASTEWATER RATE BASE
TEST YEAR ENDED 06/30/96

SCHEDULE NO. 1-B
DOCKET NO. 951258-WS

COMPONENT	TEST YEAR PER UTILITY	UTILITY ADJUSTMENTS	UTILITY ADJUSTED TEST YEAR 6/30/96	COMMISSION ADJUSTMENTS	COMMISSION ADJUSTED TEST YEAR 6/30/96
1 UTILITY PLANT IN SERVICE	$ 4,720,099	4,935,862	$ 9,655,961	(690,476)	8,965,485
2 LAND	363,923	1,040,446	1,404,369	(329,446)	1,074,923
3 NON-USED & USEFUL COMPONENTS	0	0	0	(332,955)	(332,955)
4 CONSTRUCTION WORK IN PROGRESS	1,421,517	(1,421,517)	0	0	0
5 ACCUMULATED DEPRECIATION	(1,399,695)	(393,232)	(1,792,927)	32,271	(1,760,656)
6 CIAC	(2,595,460)	(43,000)	(2,638,460)	(81,258)	(2,719,718)
7 AMORTIZATION OF CIAC	857,338	102,847	960,185	3,193	963,378
8 ADVANCES FOR CONSTRUCTION	(138,200)	5,200	(133,000)	0	(133,000)
9 WORKING CAPITAL ALLOWANCE	58,962	(15,034)	43,928	32,763	76,691
10 OTHER: ALLOC. OF GENERAL OFFICE	0	19,787	19,787	0	19,787
11 UNFUNDED SFAS 106 OBLIGATION	0	0	0	(72,488)	(72,488)
RATE BASE	$ 3,288,484	4,231,359	$ 7,519,843	(1,438,396)	6,081,447

FLORIDA CITIES WATER CO -BAREFOOT BAY DIVISION
ADJUSTMENTS TO RATE BASE
TEST YEAR ENDED 06/30/96

SCHEDULE NO. 1-C
DOCKET NO. 951258-WS
PAGE 1 OF 1

EXPLANATION	WATER	WASTEWATER
(1) UTILITY PLANT IN SERVICE		
To remove plant additions associated with PS&Is		$ (690,476)
(2) LAND		
To remove additions to land associated with PS&Is		$ (329,446)
(3) NON-USED & USEFUL		
a) To remove non-used & useful wastewater treatment plant balance @ 12/31/95		$ (400,534)
b) To remove accumulated depreciation on non-used and useful plant @ 12/31/95		67,579
		$ (332,955)
(4) ACCUMULATED DEPRECIATION		
To remove depreciation associated with PS&Is		$ 32,271
(5) CIAC		
To include grant funding from SJRWMD for reclaimed water facilities		$ (81,258)
(6) ACCUMULATED AMORTIZATION OF CIAC		
To include amortization of grant funding from SJRWMD		$ 3,193
(7) WORKING CAPITAL		
a) To include PS&Is as Other Deferred Debits in working capital	$ 44,367	$ 40,423
b) To include Other Deferred Credits in the working capital allowance	(7,063)	(6,435)
c) To adjust working capital to the 13-month average balance	(1,346)	(1,225)
	$ 35,958	$ 32,763
(8) UNFUNDED SFAS 106 OBLIGATION		
To allocate the unfunded liability associated with other postretirement benefits	$ (79,560)	$ (72,488)

FLORIDA CITIES WATER CO.-BAREFOOT BAY DIVISION
CAPITAL STRUCTURE - WASTEWATER
TEST YEAR ENDED 06/30/96

SCHEDULE NO. 2
DOCKET NO. 951258-WS

DESCRIPTION	TOTAL CAPITAL	SPECIFIC ADJUSTMENTS (EXPLAIN)	PRO RATA ADJUSTMENTS	CAPITAL RECONCILED TO RATE BASE	RATIO	COST RATE	WEIGHTED COST
PER UTILITY							
1 LONG TERM DEBT	36,616,667	0	(32,626,837)$	3,989,830	46.03%	8.33%	3.83%
2 SHORT-TERM DEBT	0	0	0	0	0.00%	9.00%	0.00%
3 PREFERRED STOCK	9,000,000	0	(8,019,341)	980,659	11.31%	9.00%	1.02%
4 COMMON EQUITY	24,360,915	0	(21,706,498)	2,654,417	30.62%	11.88%	3.64%
5 CUSTOMER DEPOSITS	759,458	0	(676,706)	82,752	0.95%	6.00%	0.06%
6 DEFERRED ITC'S-ZERO COST	0	0	0	0	0.00%	0.00%	0.00%
7 DEFERRED ITC'S-WTD COST	1,637,481	0	(1,459,058)	178,423	2.06%	9.61%	0.20%
8 DEFERRED INCOME TAXES	7,179,404	0	(6,397,121)	782,283	9.02%	0.00%	0.00%
9 TOTAL CAPITAL	79,553,925	0	(70,885,561)$	8,668,364	100.00%		8.75%
PER COMMISSION							
10 LONG TERM DEBT	36,616,667	0	(33,308,963)$	3,307,704	46.03%	8.33%	3.83%
11 SHORT-TERM DEBT	0	0	0	0	0.00%	0.00%	0.00%
12 PREFERRED STOCK	9,000,000	0	(8,187,001)	812,999	11.31%	9.00%	1.02%
13 COMMON EQUITY	24,360,915	0	(22,160,314)	2,200,601	30.62%	11.88%	3.64%
14 CUSTOMER DEPOSITS	759,458	0	(690,854)	68,604	0.95%	6.00%	0.06%
15 DEFERRED ITC'S-ZERO COST	0	0	0	0	0.00%	0.00%	0.00%
15 DEFERRED ITC'S-WTD COST	1,637,481	0	(1,489,562)	147,919	2.06%	9.65%	0.20%
16 DEFERRED INCOME TAXES	7,179,404	0	(6,530,865)	648,539	9.02%	0.00%	0.00%
17 TOTAL CAPITAL	79,553,925	0	(72,367,558)$	7,186,367	100.00%		8.75%

RANGE OF REASONABLENESS	LOW	HIGH
AUTHORIZED RETURN ON EQUITY	10.88%	12.88%
OVERALL RATE OF RETURN	8.44%	9.05%

FLORIDA CITIES WATER CO.-BAREFOOT BAY DIVISION
STATEMENT OF WATER OPERATIONS
TEST YEAR ENDED 06/30/96

SCHEDULE NO. 3-A
DOCKET NO. 951258-WS

	DESCRIPTION	TEST YEAR PER UTILITY	UTILITY ADJUSTMENTS	UTILITY ADJUSTED TEST YEAR 6/30/96	COMMISSION ADJUSTMENTS	COMMISSION ADJUSTED TEST YEAR 6/30/96	REVENUE INCREASE	REVENUE REQUIREMENT
1	OPERATING REVENUES	720,256	196,467	916,723	(122,720)	794,003	118,058	912,061
							14.87%	
	OPERATING EXPENSES:							
2	OPERATION AND MAINTENANCE	630,205	32,926	663,132	1,463	664,595 $		664,595
3	DEPRECIATION	55,091	3,851	58,942	0	58,942		58,942
4	AMORTIZATION	1,322	0	1,322	0	1,322		1,322
5	TAXES OTHER THAN INCOME	70,312	10,731	81,043	(5,522)	75,521	5,313	80,833
6	INCOME TAXES	11,587	203	11,789	(44,475)	(32,686)	42,426	9,741
7	TOTAL OPERATING EXPENSES	768,517	47,711	816,228	(48,534)	767,694	47,739	815,433
8	OPERATING INCOME	(48,261)	148,756	100,496	(74,186)	26,309	70,320	96,629
9	RATE BASE	1,162,938		1,148,521		1,104,920		1,104,920
	RATE OF RETURN	-4.15%		8.75%		2.38%		8.75%

FLORIDA CITIES WATER CO.-BAREFOOT BAY DIVISION
STATEMENT OF WASTEWATER OPERATIONS
TEST YEAR ENDED 06/30/96

SCHEDULE NO. 3-B
DOCKET NO. 951258-WS

	DESCRIPTION	TEST YEAR PER UTILITY	UTILITY ADJUSTMENTS	UTILITY ADJUSTED TEST YEAR 6/30/96	COMMISSION ADJUSTMENTS	COMMISSION ADJUSTED TEST YEAR 6/30/96	REVENUE INCREASE	REVENUE REQUIREMENT
1	OPERATING REVENUES	823,724	1,286,757	2,110,481	(1,217,158)	893,323	1,021,853	1,915,176
	OPERATING EXPENSES						114.39%	
2	OPERATION AND MAINTENANCE	581,627	206,405	788,032	39,032	827,064	$	827,064
3	DEPRECIATION	121,189	174,831	296,021	(50,675)	245,346		245,346
4	AMORTIZATION	1,300	0	1,300	0	1,300		1,300
5	TAXES OTHER THAN INCOME	79,324	94,283	173,608	(54,772)	118,836	45,983	164,819
6	INCOME TAXES	(1,057)	194,591	193,535	(415,950)	(222,415)	367,220	144,805
7	TOTAL OPERATING EXPENSES	782,384	670,110	1,452,495	(482,365)	970,131	413,203	1,383,334
8	OPERATING INCOME	41,340	616,647	657,986	(734,793)	(76,808)	608,650	531,842
9	RATE BASE	3,288,484		7,519,843		6,081,447		6,081,447
	RATE OF RETURN	1.26%		8.75%		-1.26%		8.75%

FLORIDA CITIES WATER CO BAREFOOT BAY DIVISION
ADJUSTMENTS TO OPERATING STATEMENTS
TEST YEAR ENDED 06/30/96

SCHEDULE NO. 3-C
DOCKET NO. 951258-WS
PAGE 1 OF 1

EXPLANATION	WATER	WASTEWATER
(1) **OPERATING REVENUES**		
a) Reverse utility's proposed revenue increase	$ (153,136)	$ (1,273,024)
b) To reflect test year growth with no decline in consumption (Issue 24)	30,416	35,966
c) To reflect rental income associated with an antenna (Issue 31)		19,900
	$ (122,720)	$ (1,217,158)
(2) **OPERATION AND MAINTENANCE EXPENSES**		
a) To adjust Account 715-purchased power for treating excessive infiltration and inflow		$ (18,380)
b) To adjust Account 718-chemicals for treating excessive infiltration and inflow		(4,751)
c) To adjust Account 775-miscellaneous expenses to include amortization of PS&Is		67,995
d) To adjust rate case expense for updated current and remove prior expenses	$ 1,463	(5,832)
	$ 1,463	$ 39,032
(3) **DEPRECIATION EXPENSE**		
a) To remove depreciation associated with PS&Is		$ (32,271)
b) To include amortization expense associated with grant funding from SJRWMD		(3,193)
c) To remove depreciation expense associated with non-used & useful plant		(15,211)
		$ (50,675)
(4) **TAXES OTHER THAN INCOME TAXES**		
To adjust regulatory assessment fees related to revenue adjustment	$ (5,522)	$ (54,772)
(5) **INCOME TAXES**		
To reflect income taxes associated with adjusted test year income	$ (44,475)	$ (415,950)
(6) **OPERATING REVENUES**		
Adjustment to reflect approved revenue requirement	$ 118,058	$ 1,021,853
(7) **TAXES OTHER THAN INCOME TAXES**		
Regulatory assessment taxes on additional revenues	$ 5,313	$ 45,983
(8) **INCOME TAXES**		
Income taxes related to approved income amount	$ 42,426	$ 367,220

UTILITY: FLORIDA CITIES WATER CO. - BAREFOOT BAY DIVISION **Schedule 4A**
COUNTY: BREVARD
DOCKET NO. 951258-WS
TEST YEAR ENDED: June 30, 1996

RATE SCHEDULE

WATER

Monthly Rates

	Rates prior to Filing	Commission Approved Interim	Utility Requested Final	Commission Approved Final
Residential, Multi-Family, and General Service				
Base Facility Charge:				
Meter Size:				
5/8"x3/4"	$7.58	$8.79	$10.48	$9.66
3/4"	$11.37	$13.19	$15.72	$14.49
1"	$18.95	$21.98	$26.20	$24.15
1-1/2"	$37.90	$43.95	$52.40	$48.30
2"	$60.63	$70.31	$83.84	$77.27
3"	$121.27	$140.64	$167.68	$154.55
4"	$189.49	$219.75	$262.00	$241.49
6"	$378.97	$439.49	$524.00	$482.96
8"	-	-	$1,048.000	$966.00
Gallonage Charge, per 1,000 Gallons	$2.12	$2.46	$2.25	$2.39

Typical Residential Bills

5/8" x 3/4" meter				
3,000 Gallons	$13.94	$16.17	$17.23	$16.83
5,000 Gallons	$18.18	$21.09	$21.73	$21.61
10,000 Gallons	$28.78	$33.39	$32.98	$33.56

UTILITY: FLORIDA CITIES WATER CO. - BAREFOOT BAY DIVISION **Schedule 4B**
COUNTY: BREVARD
DOCKET NO. 951258-WS
TEST YEAR ENDED: June 30, 1996

RATE SCHEDULE

WASTEWATER

Monthly Rates

	Rates prior to Filing	Commission Approved Interim	Utility Requested Final	Commission Approved Final
Residential and Multi-Family				
Base Facility Charge:				
5/8" x 3/4"	$7.68	$9.12	$30.78	$21.33
Gallonage Charge, per 1,000 Gallons (Sewer Cap - 6,000 Gallons)	$2.82	$3.35	$3.10	$4.93
General Service				
Base Facility Charge:				
Meter Size:				
5/8" x 3/4"	$7.68	$9.12	$30.78	$21.33
3/4"	$11.54	$13.71	$46.17	$32.00
1"	$19.23	$22.85	$76.95	$53.33
1-1/2"	$38.46	$45.69	$153.90	$106.65
2"	$61.54	$73.12	$246.24	$170.64
3"	$123.07	$146.22	$482.48	$341.28
4"	$192.31	$228.48	$769.50	$533.25
6"	$384.62	$456.97	$1,539.00	$1,066.50
8"	–	–	$3,078.00	$2,133.00
Gallonage Charge, per 1,000 Gallons	$3.39	$4.03	$3.73	$5.92

Typical Residential Bills

5/8" x 3/4" meter				
3,000 Gallons	$16.14	$19.17	$40.08	$36.12
5,000 Gallons	$21.78	$25.87	$46.28	$45.98
10,000 Gallons	$24.60	$29.22	$49.38	$50.91
(Sewer Cap - 6,000 Gallons)				

Utility: Florida Cities Water Co. - Barefoot Bay Division **Schedule No. 5-A**
County: Brevard
Docket No. 951258-WS
Test Year Ended: June 30, 1996

RATE SCHEDULE

Schedule of Rate Decrease After Expiration of Amortization Period for Rate Case Expense

Water

Monthly Rates

	Commission Approved Rates	Rate Decrease
Residential and General Service		
Base Facility Charge:		
Meter Size:		
5/8"x3/4"	$9.66	$0.18
3/4"	$14.49	$0.27
1"	$24.15	$0.45
1-1/2"	$48.30	$0.89
2"	$77.27	$1.43
3"	$154.55	$2.86
4"	$241.49	$4.46
6"	$482.96	$8.92
8"	$966.00	$17.85
Gallonage Charge, per 1,000 gallons	$2.39	$0.04

Utility: Florida Cities Water Co. - Barefoot Bay Division
County: Brevard
Docket No. 951258-WS
Test Year Ended: June 30, 1996

Schedule No. 5B

RATE SCHEDULE

Schedule of Rate Decrease After Expiration of Amortization Period for Rate Case Expense

Wastewater

Monthly Rates

	Commission Approved Rates	Rate Decrease
Residential Service		
Base Facility Charge: 5/8" x 3/4"	$21.33	$0.26
Gallonage Charge per 1,000 Gallons (Sewer Cap - 6,000 gallon cap)	$4.93	$0.06
General Service		
Base Facility Charge: Meter Size:		
5/8"x3/4"	$21.33	$0.26
3/4"	$32.00	$0.39
1"	$53.33	$0.64
1-1/2"	$106.65	$1.29
2"	$170.64	$2.06
3"	$341.28	$4.12
4"	$533.25	$6.44
6"	$1,066.50	$12.88
8"	$2,133.00	$25.76
Gallonage Charge, per 1,000 gallons	$5.92	$0.07

Attachment A

DOCKET NO. 951258-WS
DATE : JUNE 30, 1996

UTILITY NAME: FLORIDA CITIES WATER AND SEWER COMPANY-BAREFOOT BAY
TEST YEAR : 6-30-96

WATER TREATMENT PLANT USED AND USEFUL CALCULATION

FLORIDA CITIES-BAREFOOT BAY

$$\% \text{ USED AND USEFUL} = \frac{(2 + 4 + 5 - 6)}{1} = 100.00\ \%$$

(1)	Capacity of plant		1,000,000 GP
(2)	Maximum Daily Flow		688,000 GP
(3)	Average Daily Flow		495,805 GP
(4)	Fire flow capacity required		360,000 GP
	Fire flow available		360,000 GP
(5)	Margin Reserve (not to exceed 20% of present ERC's):		
	(a) Average number of unit connections	4,582	
	(b) Average yearly customer growth in unit connections for most recent 5 years	46	
	(c) Construction time for additional capacity (in months)	36	
	Margin Reserve = $5b \times \frac{5c}{12\ \text{mths}} \times \frac{2}{5a}$ =		0 GP
(6)	Excessive Unaccounted for water		0 GP
	(a) Total amount	5,929 GPD	1.20 % of Avg. Daily Flow
	(b) Reasonable amount	49,561 GPD	10.00 % of Avg. Daily Flow

DOCKET NO. 951258-WS
DATE : JUNE 30, 1996

ATTACHMENT B
(revised)

UTILITY NAME: FLORIDA CITIES WATER AND SEWER COMPANY-BAREFOOT BAY
TEST YEAR : 6-30-96

WASTEWATER TREATMENT PLANT USED AND USEFUL CALCULATION

$$\% \text{ USED AND USEFUL} = \frac{(2 + 3 - 4)}{1} = 66.22\ \%$$

(1) Capacity of plant ---------- 900,000 GP

(2) Average Daily Flow ---------- 697,600 GP

(3) Margin Reserve (not to exceed 20% of present ERC's):

(a) Average number of customers in ERCs 4,523

(b) Average yearly customer growth in ERC's for most recent 5 years 41

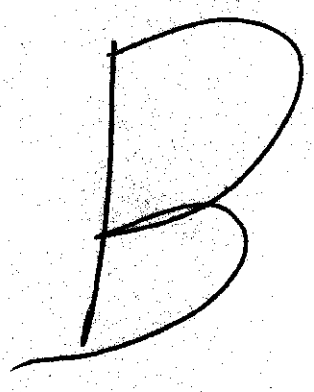
(c) Construction time for additional capacity (in months) 36

$$\text{Margin Reserve} = 3b \times \left(\frac{3c}{36\ \text{mths}}\right) \times \left(\frac{2}{3a}\right) = 18{,}971\ \text{GP}$$

(4) Excessive Infiltration---------- 120,594 GP

(a) Total amount 251,568 GPD % of Avg. Daily Flow

(b) Reasonable amount 130,974 GPD % of Avg. Daily Flow



Exhibit_____(GSA-13B)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for a rate increase in Brevard County by Florida Cities Water Company (Barefoot Bay Division).	DOCKET NO. 951258-WS ORDER NO. PSC-97-0223-FOF-WS ISSUED: FEBRUARY 25, 1997

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
JOE GARCIA

FINAL ORDER DENYING REQUEST FOR ORAL ARGUMENT AND GRANTING IN PART AND DENYING IN PART MOTIONS FOR RECONSIDERATION

BY THE COMMISSION:

BACKGROUND

Florida Cities Water Company, Barefoot Bay Division, (FCWC or utility) is a Class A utility providing water and wastewater service for a predominately residential area in Barefoot Bay, Florida. The utility was serving 4,458 water and 4,440 wastewater customers as of December 31, 1994. For the twelve months ended December 31, 1994, the utility recorded operating revenues of $671,582 for water service and $823,463 for wastewater service. The utility recorded a net operating loss of $73,769 for the water system and a net operating income of $77,577 for the wastewater system. The Barefoot Bay system is in an area that has been designated by the St. Johns River Water Management District (SJRWMD) as a critical water supply use caution area.

On November 6, 1995, the utility filed its application for approval of interim and permanent rate increases pursuant to Sections 367.082 and 367.081, Florida Statutes, respectively. The utility requested that this case be scheduled for a formal hearing and not processed pursuant to the proposed agency action (PAA) process as provided for in Section 367.081(8), Florida Statutes.

We held the technical hearing in Barefoot Bay, Florida, on April 1 and 2, 1996. By Final Order No. PSC-96-1147-FOF-WS, issued September 12, 1996, we approved increased rates for FCWC and issued a Notice of Proposed Agency Action imputing contributions-in-aid-of-construction for a grant from the St. Johns River Water Management District to FCWC.

On September 24, 1996, intervenor Clinton Dyer filed a motion for reconsideration of the final order. On September 27, 1996, the Office of Public Counsel (OPC) filed a motion for reconsideration on behalf of the Citizens of the State of Florida. On October 2, 1996, FCWC filed a Motion to Strike or Alternatively to Require Compliance with Rule Governing Motions for Reconsideration addressing Mr. Dyer's motion for reconsideration. On October 4, 1996, OPC filed a Citizen's Response to Motion to Strike. On October 9, 1996, FCWC timely filed a Response to Citizen's Motion for Reconsideration and Cross-Motion for Reconsideration, along with a request for oral argument on its response and cross-motion. On October 11, 1996, OPC filed a response to FCWC's cross-motion for reconsideration. By Order No. PSC-96-1456-FOF-WS, issued December 2, 1996, we granted FCWC's motion to strike Mr. Dyer's motion for reconsideration, based upon its failure to adhere to the requirements of Rule 25-22.060, Florida Administrative Code.

ORAL ARGUMENT

Rule 25-22.058(1), Florida Administrative Code, permits us to grant oral argument, provided, among other things, that the request states "with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it." FCWC's request for oral argument makes no such statement. Additionally, FCWC's response and cross-motion for reconsideration contain sufficient argument for us to render a fair and complete evaluation of the merits without oral argument. Therefore, FCWC's request for oral argument on its Response to Citizens' Motion for Reconsideration and Cross-Motion for Reconsideration is hereby denied.

RECONSIDERATION OF RATE BASE

The standard for determining whether reconsideration is appropriate is set forth in Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962). The purpose of a petition for rehearing is merely to bring to the attention of the trial court or the

administrative agency some point which it overlooked or failed to consider when it rendered its order in the first instance, and it is not intended as a procedure for rearguing the whole case merely because the losing party disagrees with the judgment. Id. at 891. We have applied the foregoing standard in our analysis of the parties' motions for reconsideration.

Margin Reserve

OPC argues that we erred in granting a margin reserve to the utility in calculating its wastewater treatment plant prior to advanced wastewater treatment (AWT) standards. OPC argues that at page 14 of Order No. PSC-96-1147-FOF-WS we state, " . . . , we do not find it appropriate to grant FCWC a margin reserve." However, OPC states that on Attachment B to the order, we included a margin reserve of 18,971 gallons per day (gpd). In its response to OPC, FCWC argues that the language in the text of our order did not accurately memorialize our vote to include a margin reserve. Further, in its Cross-Motion for Reconsideration, FCWC argues that if we denied margin reserve, we overlooked or failed to consider the evidence on the issue.

Staff's original recommendation was to grant 100% used and useful for the wastewater treatment plants. It is not our policy to grant a margin reserve when the plants are considered 100% used and useful. At the Agenda Conference held on June 25, 1996, we expressed concern regarding the hydraulic capacity versus permitted capacity of the plant. Due to that concern, we voted to reduce the used and useful percentage of the investment in the original wastewater treatment facility. This action resulted in the plant being considered less than 100% used and useful. Due to the reduction in the used and useful percentage, and since there is a small growth potential in the utility's certificated area, we included a margin reserve allocation.

As the utility correctly pointed out in its response to the Citizens' Motion for Reconsideration, the subject of margin reserve was never explicitly discussed. Since zero margin reserve was originally recommended, we failed to express the fact that a margin reserve had now been included, since, in the original recommendation, no margin reserve issue was included. The margin reserve calculation was, however, clearly shown on the used and useful calculation form (attachment B, revised), which was distributed to us for consideration at the agenda conference. We

adopted our staff's calculation. Therefore, we hereby clarify that we did grant FCWC a margin reserve.

Contributions In Aid of Construction (CIAC)

By Order No. PSC-96-1147-FOF-WS, we decided there should be no imputation of CIAC. However, we did, in fact, include a margin reserve in our used and useful calculation. Accordingly, we find it appropriate to reconsider our decision on whether CIAC should be imputed on the margin reserve factor.

In the utility's MFRs, CIAC has been imputed through the end of the projected test year, which is related to the customer growth rates used in its projection methodology for the current rate proceeding. FCWC did not impute CIAC associated with its margin reserve calculation. Utility Witness Young testified that the imputation of CIAC effectively undermines the utility's ability to earn a return on the necessary investment in plant required to meet its statutory responsibility of readiness to serve existing and future customers within a reasonable amount of time.

OPC Witness Dismukes testified that in order to achieve a proper matching, if a margin reserve is included in the used and useful calculations, then rate base should be adjusted to impute CIAC in an amount equivalent to the number of equivalent residential connections (ERCs) represented by the margin reserve factor.

While the utility believes that imputing CIAC on the margin reserve undermines the utility's ability to earn a fair return on plant constructed to meet statutory guidelines, the evidence does not support the utility's position that we should not impute CIAC associated with margin reserve. We agree with Ms. Dismukes' testimony that CIAC should be imputed in order to achieve proper matching of the CIAC collections made from those customers who will connect during the margin reserve period. This is consistent with our decisions in Orders Nos. 23660, 25092, and PSC-93-1113-FOF-WS, issued on October 24, 1990, September 23, 1991, and July 30, 1993, respectively. In determining the amount of CIAC to impute, we multiplied the number of ERCs included in the margin reserve by the appropriate service availability charge. The proper charge to use in this docket is the utility's proposed service availability charge of $1,400, since this represents the going forward charge that will be in effect during the margin reserve period.

However, in Orders Nos. PSC-96-1320-FOF-WS and PSC-96-1338-FOF-WS issued on October 30, 1996 and November 7, 1996, respectively, we imputed only 50% of the amount of CIAC attributed to the margin reserve. In these cases, we found that the total amount imputed would not be collected at the beginning of the margin reserve period, rather that it would be averaged over the life of such period. We find this application appropriate in the instant case, as well. However, as stated in the above-mentioned orders, the imputation shall still be limited to the amount of net plant included in the margin reserve.

Based on the foregoing, wastewater CIAC shall be increased by $22,969 to reflect the imputation of CIAC on the margin reserve. Corresponding adjustments shall also be made to increase both wastewater accumulated amortization of CIAC and test year CIAC amortization expense by $903.

Excessive Infiltration and Inflow (I&I)

Amount

At page 16 of Order No. PSC-96-1147-FOF-WS, we state that we used water sold in our calculation of excessive I&I. OPC argues, in its Motion for Reconsideration, that we incorrectly used the water pumped in lieu of water sold in the formula for I&I calculation. In its response to OPC, FCWC argues that unrefuted testimony supported the use of water pumped in calculating excessive I&I. FCWC also argues in its Cross-Motion for Reconsideration, that we incorrectly state in our order that we used water sold. Further, FCWC argues in its Cross-Motion for Reconsideration, that we incorrectly used the average daily flows, in the maximum month in place of the correct average annual daily flows, in the formula for I&I calculation, which resulted in 36.01% excess I&I.

We agree with OPC that we incorrectly used water pumped instead of water sold. We also agree with FCWC that we incorrectly used the maximum month instead of the average annual daily flows. Accordingly, we have recalculated I&I using the total water sold and average annual daily flows in place of the total water pumped and the average daily flows from the maximum month. The corrected I&I figures will result in changes to the wastewater used and useful percentages which are discussed later in this Order. Based on our calculations, I&I totals 148,013 gpd. The acceptable level

of I&I is 130,974 gpd to the plant, which results in excess I&I of 17,039 gpd.

FCWC's Method of Calculation

The utility argues, in its Cross-Motion for Reconsideration, that we should have calculated I&I by comparing the quantity of water pumped to the quantity of water treated. FCWC also argues that we applied the incorrect methodology to the calculation. FCWC basically argues that there is no "excessive" I&I. FCWC is rearguing this issue, which is inappropriate for reconsideration. See Diamond Cab at 891.

FCWC states in its motion that witness Young testified that infiltration is properly calculated on the basis of comparing the quantity of water pumped to the quantity of wastewater treated. This Commission uses one of two sources for returned flows in calculating I&I: historical flows of water sold, if available; or the number of ERCs multiplied by the appropriate industry standard (American Water Works Association) flow level per ERC if no historical flows are available.

The utility would have us accept an I&I flow total, exclusive of the flows from its customers, equal to almost two times the permitted plant flow. The wastewater plant during October, its highest flow month, was treating more than 156% of the total water sold that month. This is indicative of excessive I&I, regardless of the method of calculation. The expense for treatment of excessive flow must be factored into the rates and, ultimately, borne by the ratepayers. None of the cost of treating extra water is placed on the utility. Therefore, a utility can easily determine this to be no problem.

The utility correctly argues that the Water Pollution Control Federal Manual of Practice No. 9 (MOP 9) is an accepted industry reference for the determination of acceptable levels of I&I often used by this Commission. The utility also argues that MOP 9 states that it is common to allow 30,000 to 60,000 gpd per mile for systems below ground water, and that it is unrefuted in the record that the Barefoot Bay collection system is below groundwater. The utility also correctly argues that the Commission applied the average day, maximum month flows instead of the annual average daily flow data, which is discussed earlier in this Order.

With regard to the utility's claim that MOP 9 states that it is common to allow up to 60,000 gpd per mile I&I; MOP 9 states, on page 30 that, "Infiltration rates as high as 60,000 gpd per mile . . . have been recorded for systems below groundwater, ..." However, MOP 9 limits the 30,000 gpd allowance to small to medium sized sewers (24 inches in diameter and smaller). This utility has one length of pipe that is 18 inches in diameter. It is approximately 260 feet long. The remaining lines and diameters of the lines in the system are 12 inches (3/4 mile), 10 inches (1.35 mile), 8 inches (17.2 miles) all vitrified clay, and 8 inches polyvinyl chloride (PVC) (12.63 miles).

The method of calculating I&I propounded by the utility yields outrageously high figures relative to the size of the collection system and normally expected flows. Our acceptance of the utility's proposed I&I allowances would permit up to 1.2 million gallons per day (MGD) of I&I exclusive of the daily flows from the utility's customers, which total more than 450,000 gpd. This adds up to over 1.65 MGD of flows to the plant, which is permitted by the Department of Environmental Protection (DEP) at 0.75 MGD. The plant is hydraulically capable of passing up to 0.9 MGD. Since it is obvious, through analysis, that I&I actually exist, and since the system is rather small, we appropriately utilized a more sensible, logical and accurate approach by using the actual flows reported in FCWC's MFRs. Commonly, vitrified clay pipe (vcp) is known to leak profusely and PVC pipe is known to have little to no leak problem. We utilized MOP 9 and applied the most generous allowances permitted by that standard in calculating an acceptable level of flows from sources other than water customers. The resulting flow is within a more acceptable range of I&I for this system. Based on the foregoing, we do not find it appropriate to reconsider our decision on the method of calculation of I&I.

OPC's Method of Calculation

OPC seeks reconsideration of the Commission's method for calculation of used and useful percent versus I&I in the collection system, by stating that, since the maximum month average daily flow is used for determination of used and useful, the same month's flow should be used for I&I determination in lieu of the average annual daily flow. In its response to OPC, FCWC argues that OPC provides no record support to indicate that we made a mistake by utilizing different flows for our calculations, other than alleging that "consistency" required the use of the maximum month average daily

flow for calculating both used and useful and I&I for the wastewater system. We agree. As such, OPC's reargument is inappropriate for reconsideration.

Further, we disagree with OPC on the merits of its argument. The two calculations are unrelated as are the uses for them. The used and useful calculation must be concerned with the maximum flows the treatment plant may experience in order to allow for that event. I&I has to do with the collection system and the amount of leakage permitted from groundwater into the system. Groundwater levels and peak flows may and do occur at different times of the year.

The two calculations measure different components of plant and the results of the calculations are not related. Therefore, consistent with Commission policy, and since this utility is subject to severe seasonal fluctuations, we calculated the used and useful percent for the treatment plant using maximum month average daily flows and I&I percent using average annual daily flows, which is supported by the record. Therefore, we find it inappropriate to reconsider our decision to use average annual daily flows in the calculation of I&I in the collection system of the Barefoot Bay collection system.

Used and Useful

As discussed earlier in this Order, staff's original recommendation in this docket was to grant 100% used and useful to the wastewater treatment facilities. In considering staff's recommendation at the Agenda Conference held on June 25, 1996, we expressed concern regarding the hydraulic capacity versus permitted capacity of the facilities. Our concern was that the original plant had been permitted by the DEP for a capacity of 0.9 MGD and with the addition of the advanced wastewater treatment facility, which is a duplicate of the original, was being downsized and repermitted with a capacity of only 0.75 MGD. Additionally, it was established in the record that returning the capacity of the plant to the original 0.9 MGD required an investment of $25,000. This, when compared to the plant investment of over $4,000,000, was considered to be an insignificant amount. Due to that concern, and following discussion on the issue, we voted to reduce the used and useful percentage of the investment in the original wastewater treatment facility. Since the additional plant was required by the DEP to meet advanced treatment status, we found it 100% used and useful.

In its Cross-Motion for Reconsideration, the utility correctly argues that there is no record support for such a decision. There were only two capacity figures offered for consideration in this case, one being 0.9MG and a second of 0.75MG. Therefore, we have reconsidered our decision and find it appropriate to treat the wastewater plant as a single unit.

The original wastewater treatment plant was built to a hydraulic capacity of 1 MGD. Due to effluent disposal problems, it was permitted by DEP at 0.9 MGD. In Docket No. 910976-WS, we considered the prudence of constructing one unit to service the entire service area of Barefoot Bay, instead of several smaller units, and granted the utility 100% used and useful status.

By the utility's own action of reducing the capacity of the plant and downsizing the permitted flow level to 0.75 MGD from the original capacity of 0.9 MGD, it has become apparent that the original builders may have been overly optimistic in the original design capacity expectations for the Barefoot Bay system. Utility witness Christopher testified that it has become apparent that the actual flows were less than originally estimated. Due to a relatively small annual ERC growth factor of 0.94% per year, it

appears the original design flows may not be reached in the foreseeable future. Since FCWC has admittedly downsized the design and permitted capacity of an otherwise larger treatment plant, we find it appropriate to consider this in our evaluation of the prudence of the original design capacity. There is precedent for such a decision in previous dockets. We have held that when circumstances change sufficiently between rate cases such that a change in used and useful allotment is appropriate, we are not bound by used and useful decisions made in former dockets. See Orders Nos. PSC-96-1320-FOF-WS and PSC-96-1338-FOF-WS.

Utility witness Christopher testified that the plant could be restored to its 0.9 MGD capacity by installing two pumps and related electrical equipment at a cost of $25,000. He further testified that with flow equalization, which is in place, the plant could be stretched to the 0.9 MGD. This indicates that the plant can actually be operated at 0.9 MGD with no additional investment.

OPC argues that the Commission erred in using the maximum month average daily flow to determine the pre-AWT used and useful percentage, stating that it is inconsistent with Order No. PSC-96-1133-FOF-SU, issued September 10, 1996, in Docket No. 950387-SU. We disagree with OPC; each case stands on its own merit and is based on the evidence in the record.

Since this utility is subject to unusual seasonal flow variations and must be equipped to treat them, we have utilized the maximum month average daily flows in our calculation of the used and useful percentage for the wastewater treatment plant.

Attachment B.1, revised, shows calculations based on the plant having 0.9 MGD capacity. Since the used and useful percentage is less than 100%, this calculation includes a small margin reserve allowance. We have added the additional $25,000 to account #380.1, Treatment and Disposal Equipment, giving the treatment facilities a capacity of 0.9 MGD and rating them at 76.67% used and useful.

Rate Base Summary

Based upon our calculations, we find that the revised wastewater rate base totals $5,638,952. The schedule that depicts the wastewater rate base amount is attached as Schedule No. 1-B, and the adjustments to rate base are attached as Schedule No. 1-C.

REVENUE REQUIREMENT

Based upon our reconsideration of rate base, we find that the appropriate revised wastewater revenue requirement is $1,828,851. The operating income statement, which reflects the revenue requirement calculation, is attached as Schedule No. 3-B and the adjustments are shown on Schedule No. 3-C.

RATES AND RATE STRUCTURE

The final rates approved for the utility are designed to produce revenues of $1,802,722 for the wastewater service, which is an increase of $913,514 or 102.73%. This increase excludes miscellaneous service revenues, reclaimed water revenue and the allocation of wastewater revenue to the water operations. The rates are designed using the base facility charge rate structure.

Consistent with the utility's request, we find that a 20% differential between the residential and general service wastewater gallonage charges is appropriate. The purpose of the 20% differential in the wastewater gallonage charge between general service and residential customers recognizes that approximately 20% of the water used by residential customers is used for purposes such as irrigation and is not collected by the wastewater systems.

The utility shall file revised tariff sheets and a proposed customer notice to reflect the appropriate rates pursuant to Rule 25-22.0407(10), Florida Administrative Code. The approved rates shall be effective for service rendered on or after the stamped approval date on the tariff sheets pursuant to Rule 25-30.475(1), Florida Administrative Code, provided the customers have received notice. The rates shall not be implemented until proper notice has been received by the customers. The utility shall provide proof of the date notice was given within 10 days after the date of the notice.

A comparison of the utility's original rates, interim rates, requested rates, and our approved rates is set forth on Schedule No. 4.

STATUTORY FOUR-YEAR RATE REDUCTION

Section 367.0816, Florida Statutes, requires that the rates be reduced immediately following the expiration of the four year period by the amount of rate case expense previously authorized in the rates. The reduction will reflect the removal of revenues associated with the amortization of rate case expense and the gross-up for regulatory assessment fees which is $22,813 for wastewater. The removal of rate case expense will result in the reduction of rates set forth on Schedule No. 5.

The utility shall file revised tariffs no later than one month prior to the actual date of the required rate reduction. The utility shall also file proposed customer notices setting forth the lower rates and reason for the reductions. If the utility files this reduction in conjunction with a price index or pass-through rate adjustment, separate data shall be filed for the price index and/or pass-through increase or decrease, and for the reduction in the rates due to the removal of amortized rate case expense.

REFUND OF INTERIM WASTEWATER REVENUES

By Order No. PSC-96-0119-FOF-WS, issued on January 23, 1996, the utility's proposed rates were suspended and interim wastewater rates were approved subject to refund, pursuant to Sections 367.082, Florida Statutes. According to Section 367.082, Florida Statutes, any refund shall be calculated to reduce the rate of return of the utility during the pendency of the proceeding to the same level within the range of the newly authorized rate of return. Adjustments made in the rate case test period that do not relate to the period interim rates are in effect should be removed. Examples of these adjustments are an attrition allowance or rate case expense, which are recovered only after final rates are established.

In this proceeding, the test period for establishment of interim rates was the historical twelve months ended June 30, 1995. The approved wastewater interim rates did not include any provisions for proforma consideration of increased operating expenses or increased plant. The interim increase was designed to allow recovery of actual interest costs, and the floor of the last authorized range for equity earnings.

To establish the proper refund amount, we have calculated a revised interim wastewater revenue requirement utilizing the same data used to establish final rates. Rate case expense was excluded because it was not an actual expense during the interim collection period.

Using the principles discussed above, the wastewater revenue requirement for the interim collection period is $1,815,138. This revenue level exceeded the wastewater interim revenues which were granted in Order No. PSC-96-0119-FOF-WS. Therefore, we do not find that a refund of wastewater interim rates is necessary.

REFUND OF WASTEWATER REVENUES

On August 6, 1996, pursuant to Section 367.081(6), Florida Statutes, the utility implemented, subject to refund, the rates that were approved at the June 25, 1996, Agenda Conference. These wastewater rates which were implemented on August 6, 1996, are higher than our approved rates set forth on Schedule 4. Therefore, we find that a refund is appropriate.

The appropriate wastewater refund, with interest, shall be calculated pursuant to Rule 25-30.360, Florida Administrative Code. The refund shall be the difference between the wastewater rates that were implemented on August 6, 1996, and the wastewater rates approved herein. The utility shall submit the proper refund report reports pursuant to Rule 25-30.360(7), Florida Administrative Code. The utility shall treat any unclaimed refunds as CIAC pursuant to Rule 25-30.360(8), Florida Administrative Code. The utility's corporate undertaking shall be released upon staff's verification that the refund has been completed. This docket shall be closed after the proper refund has been made and the revised tariff sheets and customer notice have been filed by the utility and approved by staff.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Cities Water Company, Barefoot Bay Division's request for oral argument is hereby denied. It is further

ORDERED that the Office of Public Counsel's Motion for Reconsideration is hereby granted in part and denied in part, as set forth in the body of this Order. It is further

ORDERED that Florida Cities Water Company, Barefoot Bay Division's Cross-Motion for Reconsideration is hereby granted in part and denied in part, as set forth in the body of this Order. It is further

ORDERED that each of the findings made in the body of this Order is hereby approved in every respect. It is further

ORDERED that all matters contained in the schedules and attachments attached hereto are by reference incorporated herein. It is further

ORDERED that the rates approved herein shall be effective for service rendered on or after the stamped approval date on the revised tariff sheets, pursuant to Rule 25-30.475, Florida Administrative Code, provided the customers have received notice. It is further

ORDERED that prior to its implementation of the rates approved herein, Florida Cities Water Company, Barefoot Bay Division shall submit and have approved a proposed customer notice to its customers of the rates and reasons therefore. The notice will be approved upon staff's verification that it is consistent with our decision herein. It is further

ORDERED that prior to its implementation of the rates approved herein, Florida Cities Water Company, Barefoot Bay Division shall submit and have approved revised tariff pages. The revised tariff pages will be approved upon staff's verification that the pages are consistent with our decision herein and that the proposed customer notice is adequate. It is further

ORDERED that Florida Cities Water Company, Barefoot Bay Division shall provide proof that the customers have received notice within 10 days of the date of notice. It is further

ORDERED that the rates shall be reduced at the end of the four-year rate case expense amortization period, consistent with our decision herein. Florida Cities Water Company, Barefoot Bay Division shall file revised tariff sheets no later than one month prior to the actual date of the reduction and shall file a customer notice. It is further

ORDERED that Florida Cities Water Company, Barefoot Bay Division, shall refund with interest, calculated pursuant to Rule 25-30.360, Florida Administrative Code, the additional wastewater revenues collected subject to refund as set forth in the body of this Order. It is further

ORDERED that Florida Cities Water Company, Barefoot Bay Division, shall make the refund to customers of record as of the date of this Order pursuant to Rule 25-30.360, Florida Administrative Code. Florida Cities Water Company, Barefoot Bay Division, shall submit the proper refund report reports pursuant to Rule 25-30.360(7), Florida Administrative Code. It is further

ORDERED that Florida Cities Water Company, Barefoot Bay Division, shall treat any unclaimed refunds as contributions-in-aid-of-construction pursuant to Rule 25-30.360(8), Florida Administrative Code. It is further

ORDERED that this docket shall be closed upon staff's verification the Florida Cities Water Company, Barefoot Bay Division has made the required refunds as set forth in this Order and upon Florida Cities Water Company, Barefoot Bay Division's filing and staff's approval of revised tariff sheets and a customer notice.

By ORDER of the Florida Public Service Commission, this 25th day of February, 1997.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by:/s/ Kay Flynn
Chief, Bureau of Records

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-904-413-6770.

(S E A L)

SOME (OR ALL) ATTACHMENT PAGES ARE NOT ON ELECTRONIC DOCUMENT.

TV

NOTICE OF JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

FLORIDA CITIES WATER CO.-BAREFOOT BAY DIVISION
SCHEDULE OF WASTEWATER RATE BASE
TEST YEAR ENDED 06/30/96

SCHEDULE NO. 1-B
DOCKET NO. 951258-WS

	COMPONENT		TEST YEAR PER UTILITY	UTILITY ADJUSTMENTS		UTILITY ADJUSTED TEST YEAR 6/30/96	COMMISSION ADJUSTMENTS	COMMISSION ADJUSTED TEST YEAR 6/30/96
1	UTILITY PLANT IN SERVICE	$	4,720,099	4,935,862	$	9,655,961	(665,476)	8,990,485
2	LAND		363,923	1,040,446		1,404,369	(329,446)	1,074,923
3	NON-USED & USEFUL COMPONENTS		0	0		0	(776,994)	(776,994)
4	CONSTRUCTION WORK IN PROGRESS		1,421,517	(1,421,517)		0	0	0
5	ACCUMULATED DEPRECIATION		(1,399,695)	(393,232)		(1,792,927)	30,881	(1,762,046)
6	CIAC		(2,595,460)	(43,000)		(2,638,460)	(104,227)	(2,742,687)
7	AMORTIZATION OF CIAC		857,338	102,847		960,185	4,096	964,281
8	ADVANCES FOR CONSTRUCTION		(138,200)	5,200		(133,000)	0	(133,000)
9	WORKING CAPITAL ALLOWANCE		58,962	(15,034)		43,928	32,763	76,691
10	OTHER: ALLOC. OF GENERAL OFFICE		0	19,787		19,787	0	19,787
11	UNFUNDED SFAS 106 OBLIGATION		0	0		0	(72,488)	(72,488)
	RATE BASE	$	3,288,484	4,231,359	$	7,519,843	(1,880,891)	**5,638,952**

FLORIDA CITIES WATER CO.-BAREFOOT BAY DIVISION
ADJUSTMENTS TO RATE BASE
TEST YEAR ENDED 06/30/96

SCHEDULE NO. 1-C
DOCKET NO. 951258-WS
PAGE 1 OF 1

EXPLANATION	WASTEWATER
(1) UTILITY PLANT IN SERVICE	
a) To remove plant additions associated with PS&Is	$ (690,476)
b) To include additional plant costs	25,000
	$ (665,476)
(2) LAND	
To remove additions to land associated with PS&Is	$ (329,446)
(3) NON-USED & USEFUL	
a) To remove non-used & useful wastewater treatment plant	$ (837,631)
b) To remove accumulated depreciation on non-used and useful plant	60,637
	$ (776,994)
(4) ACCUMULATED DEPRECIATION	
a) To remove depreciation associated with PS&Is	$ 32,271
b) To include depreciation associated with additional plant costs	(1,390)
	$ 30,881
(5) CIAC	
a) To include grant funding from SJRWMD for reclaimed water facilities	$ (81,258)
b) To impute CIAC on the margin reserve	(22,969)
	$ (104,227)
(6) ACCUMULATED AMORTIZATION OF CIAC	
a) To include amortization of grant funding from SJRWMD	$ 3,193
b) To include amortization associated with imputed CIAC	903
	$ 4,096
(7) WORKING CAPITAL	
a) To include PS&Is as Other Deferred Debits in working capital	$ 40,423
b) To include Other Deferred Credits in the working capital allowance	(6,435)
c) To adjust working capital to the 13-month average balance	(1,225)
	$ 32,763
(8) UNFUNDED SFAS 106 OBLIGATION	
To allocate the unfunded liability associated with other postretirement benefits	$ (72,488)

FLORIDA CITIES WATER CO.-BAREFOOT BAY DIVISION
CAPITAL STRUCTURE - WASTEWATER
TEST YEAR ENDED 06/30/96

SCHEDULE NO. 2
DOCKET NO. 951258-WS

DESCRIPTION	TOTAL CAPITAL	SPECIFIC ADJUSTMENTS (EXPLAIN)	PRO RATA ADJUSTMENTS	CAPITAL RECONCILED TO RATE BASE	RATIO	COST RATE	WEIGHTED COST
PER UTILITY							
1 LONG TERM DEBT	36,616,667	0	(32,626,837)$	3,989,830	46.03%	8.33%	3.83%
2 SHORT-TERM DEBT	0	0	0	0	0.00%	9.00%	0.00%
3 PREFERRED STOCK	9,000,000	0	(8,019,341)	980,659	11.31%	9.00%	1.02%
4 COMMON EQUITY	24,360,915	0	(21,706,498)	2,654,417	30.62%	11.88%	3.64%
5 CUSTOMER DEPOSITS	759,458	0	(676,706)	82,752	0.95%	6.00%	0.06%
6 DEFERRED ITC'S-ZERO COST	0	0	0	0	0.00%	0.00%	0.00%
7 DEFERRED ITC'S-WTD COST	1,637,481	0	(1,459,058)	178,423	2.06%	9.61%	0.20%
8 DEFERRED INCOME TAXES	7,179,404	0	(6,397,121)	782,283	9.02%	0.00%	0.00%
9 TOTAL CAPITAL	79,553,925	0	(70,885,561)$	8,668,364	100.00%		8.75%
PER COMMISSION							
10 LONG TERM DEBT	36,616,667	0	(33,476,013)$	3,140,654	46.03%	8.33%	3.83%
11 SHORT-TERM DEBT	0	0	0	0	0.00%	0.00%	0.00%
12 PREFERRED STOCK	9,000,000	0	(8,228,060)	771,940	11.31%	9.00%	1.02%
13 COMMON EQUITY	24,360,915	0	(22,271,451)	2,089,464	30.62%	11.88%	3.64%
14 CUSTOMER DEPOSITS	759,458	0	(694,318)	65,140	0.95%	6.00%	0.06%
15 DEFERRED ITC'S-ZERO COST	0	0	0	0	0.00%	0.00%	0.00%
15 DEFERRED ITC'S-WTD COST	1,637,481	0	(1,497,032)	140,449	2.06%	9.65%	0.20%
16 DEFERRED INCOME TAXES	7,179,404	0	(6,563,618)	615,786	9.02%	0.00%	0.00%
17 TOTAL CAPITAL	79,553,925	0	(72,730,494)$	6,823,431	100.00%		8.75%

RANGE OF REASONABLENESS	LOW	HIGH
AUTHORIZED RETURN ON EQUITY	10.88%	12.88%
OVERALL RATE OF RETURN	8.44%	9.05%

FLORIDA CITIES WATER CO.-BAREFOOT BAY DIVISION
STATEMENT OF WASTEWATER OPERATIONS
TEST YEAR ENDED 06/30/96

SCHEDULE NO. 3-B
DOCKET NO. 951258-WS

	DESCRIPTION	TEST YEAR PER UTILITY	UTILITY ADJUSTMENTS	UTILITY ADJUSTED TEST YEAR 6/30/96	COMMISSION ADJUSTMENTS	COMMISSION ADJUSTED TEST YEAR 6/30/96	REVENUE INCREASE	REVENUE REQUIREMENT
1	OPERATING REVENUES	823,724	1,286,757	2,110,481	(1,217,158)	893,323	935,528	1,828,851
	OPERATING EXPENSES						104.72%	
2	OPERATION AND MAINTENANCE	581,627	206,405	788,032	39,032	827,064	$	827,064
3	DEPRECIATION	121,189	174,831	296,021	(81,878)	214,143		214,143
4	AMORTIZATION	1,300	0	1,300	0	1,300		1,300
5	TAXES OTHER THAN INCOME	79,324	94,283	173,608	(54,772)	118,836	42,099	160,935
6	INCOME TAXES	(1,057)	194,591	193,535	(397,467)	(203,932)	336,198	132,265
7	TOTAL OPERATING EXPENSES	782,384	670,110	1,452,495	(495,085)	957,411	378,296	1,335,707
8	OPERATING INCOME	41,340	616,647	657,986	(722,073)	(64,088)	557,232	493,144
9	RATE BASE	3,288,484		7,519,843		5,638,952		5,638,952
	RATE OF RETURN	1.26%		8.75%		-1.14%		8.75%

FLORIDA CITIES WATER CO.-BAREFOOT BAY DIVISION
ADJUSTMENTS TO OPERATING STATEMENTS
TEST YEAR ENDED 06/30/96

SCHEDULE NO. 3-C
DOCKET NO. 951258-WS
PAGE 1 OF 1

EXPLANATION	WASTEWATER
(1) OPERATING REVENUES	
a) Reverse utility's proposed revenue increase	$ (1,273,024)
b) To reflect test year growth with no decline in consumption (Issue 24)	35,966
c) To reflect rental income associated with an antenna (Issue 31)	19,900
	$ (1,217,158)
(2) OPERATION AND MAINTENANCE EXPENSES	
a) To adjust Account 715-purchased power for treating excessive infiltration and inflow	$ (18,380)
b) To adjust Account 718-chemicals for treating excessive infiltration and inflow	(4,751)
c) To adjust Account 775-miscellaneous expenses to include amortization of PS&Is	67,995
d) To adjust rate case expense for updated current and remove prior expenses	(5,832)
	$ 39,032
(3) DEPRECIATION EXPENSE	
a) To remove depreciation associated with PS&Is	$ (32,271)
b) To include amortization expense associated with grant funding from SJRWMD	(3,193)
c) To remove depreciation expense associated with non-used & useful plant	(46,901)
d) To include depreciation expense associated with additional plant costs	1,390
e) To include amortization expense associated with imputed CIAC	(903)
	$ (81,878)
(4) TAXES OTHER THAN INCOME TAXES	
To adjust regulatory assessment fees related to revenue adjustment	$ (54,772)
(5) INCOME TAXES	
To reflect income taxes associated with adjusted test year income	$ (397,467)
(6) OPERATING REVENUES	
Adjustment to reflect approved revenue requirement	$ 935,528
(7) TAXES OTHER THAN INCOME TAXES	
Regulatory assessment taxes on additional revenues	$ 42,099
(8) INCOME TAXES	
Income taxes related to approved income amount	$ 336,198

UTILITY: FLORIDA CITIES WATER COMPANY - BAREFOOT BAY DIVISION **Schedule No. 4**
COUNTY: BREVARD
DOCKET NO. 951258-WS
TEST YEAR ENDED: June 30, 1996

RATE SCHEDULE

WASTEWATER

Monthly Rates

	Rates prior to Filing	Commission Approved Interim	Utility Requested Final	Commission Approved Final Rates
Residential and Multi-Family				
Base Facility Charge:				
5/8" x 3/4"	$7.68	$9.12	$30.78	$20.36
Gallonage Charge, per 1,000 Gallons (Sewer Cap - 6,000 Gallons)	$2.82	$3.35	$3.10	$4.71
General Service				
Base Facility Charge:				
Meter Size:				
5/8" x 3/4"	$7.68	$9.12	$30.78	$20.36
3/4"	$11.54	$13.71	$46.17	$30.54
1"	$19.23	$22.85	$76.95	$50.90
1-1/2"	$38.46	$45.69	$153.90	$101.80
2"	$61.54	$73.12	$246.24	$162.88
3"	$123.07	$146.22	$482.48	$325.76
4"	$192.31	$228.48	$769.50	$509.00
6"	$384.62	$456.97	$1,539.00	$1,018.00
8"	--	--	$3,078.00	$2,036.00
Gallonage Charge, per 1,000 Gallons	$3.39	$4.03	$3.73	$5.65

Typical Residential Bills

5/8" x 3/4" meter				
3,000 Gallons	$16.14	$19.17	$40.08	$34.49
5,000 Gallons	$21.78	$25.87	$46.28	$43.90
10,000 Gallons (Sewer Cap - 6,000 Gallons)	$24.60	$29.22	$49.38	$48.61

UTILITY: FLORIDA CITIES WATER COMPANY - BAREFOOT BAY Schedule No. 5
COUNTY: BREVARD
DOCKET NO. 951258-WS
TEST YEAR ENDED: JUNE 30, 1996

RATE SCHEDULE

Schedule of Rate Decrease After Expiration of Amortization Period for Rate Case Expense

WASTEWATER

Monthly Rates

	Commission Approved Final Rates	Commission Approved Rate Decrease
Residential Service		
Base Facility Charge: 5/8" x 3/4"	$20.36	$0.26
Gallonage Charge per 1,000 Gallons (Sewer Cap - 6,000 gallon cap)	$4.71	$0.06
General Service		
Base Facility Charge: Meter Size:		
5/8"x3/4"	$20.36	$0.26
3/4"	$30.54	$0.39
1"	$50.90	$0.64
1-1/2"	$101.80	$1.29
2"	$162.88	$2.06
3"	$325.76	$4.12
4"	$509.00	$6.44
6"	$1,018.00	$12.88
8"	$2,036.00	$25.77
Gallonage Charge, per 1,000 gallons	$5.65	$0.07

DOCKET NO. 951258-WS
Year ended June 30, 1996

Attachment B.1 (revised)

UTILITY NAME: FLORIDA CITIES WATER CO.- BAREFOOT BAY DIV.

WASTEWATER TREATMENT PLANT USED AND USEFUL CALCULATION

$$\% \text{ USED AND USEFUL} = \frac{(2+3-4)}{1} = 76.67\ \%$$

(1) Capacity of plant w/lgst clarifier out ---------- 900,000 GP

(2) Average Daily Flow, max month ---------- 697,600 GP

(3) Margin Reserve (not to exceed 20% of present ERC's):

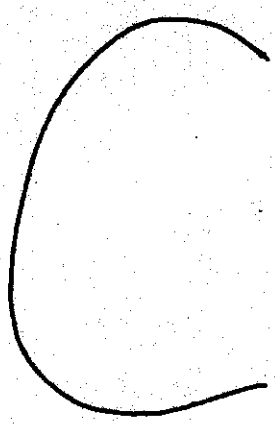
(a) Average number of customers in ERCs	4,513
(b) Average yearly customer growth in ERC's for most recent 5 years	41
(c) Construction time for additional capacity (in months)	18

Margin Reserve = 3b x (3c/12) x ((2)/3a) = 9506 GP

(4) Excessive Infiltration

(a) Total amount	148,013 GPD
(b) Reasonable amount	130,974 GPD

Excessive amount 17,039 GP



Exhibit____(GSA-3C)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for rate increase in Brevard County by Florida Cities Water Company (Barefoot Bay Division).	DOCKET NO. 951258-WS ORDER NO. PSC-97-0516-FOF-WS ISSUED: May 5, 1997

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
JOE GARCIA

ORDER ON RECONSIDERATION

BY THE COMMISSION:

BACKGROUND

Florida Cities Water Company, Barefoot Bay Division, (FCWC or utility) is a Class A utility providing water and wastewater service for a predominately residential area in Barefoot Bay, Florida. The utility's Barefoot Bay division was serving 4,458 water and 4,440 wastewater customers at year end December 31, 1994. For the twelve months ended December 31, 1994, the utility recorded operating revenues of $671,582 for water service and $823,463 for wastewater service. The utility recorded a net operating loss of $73,769 for the water system and a net operating income of $77,577 for the wastewater system. The Barefoot Bay system is in an area that has been designated by the St. Johns River Water Management District as a critical water supply use caution area.

On November 6, 1995, the utility filed its application for approval of interim and permanent rate increases pursuant to Sections 367.082 and 367.081, Florida Statutes, respectively. The utility requested that this case be scheduled for a formal hearing and not processed pursuant to the proposed agency action (PAA) process as provided for in Section 367.081(8), Florida Statutes.

We held the technical hearing in Barefoot Bay, Florida, on April 1 and 2, 1996. By Final Order No. PSC-96-1147-FOF-WS, issued September 12, 1996, we approved increased rates for FCWC and issued a Notice of Proposed Agency Action imputing contributions-in-aid-of-construction for a grant from the St. Johns River Water Management District to FCWC. On September 24, 1996, intervenor Clinton Dyer filed a motion for reconsideration of the final order. On September 27, 1996, the Office of Public Counsel (OPC) filed a motion for reconsideration on behalf of the Citizens of the State of Florida. On October 2, 1996, FCWC filed a Motion to Strike or

DOCUMENT NUMBER-DATE
04428 MAY-5
FPSC-RECORDS/REPORTING

Alternatively to Require Compliance with Rule Governing Motions for Reconsideration addressing Mr. Dyer's motion for reconsideration. On October 4, 1996, OPC filed a Citizen's Response to Motion to Strike. On October 9, 1996, FCWC timely filed a Response to Citizen's Motion for Reconsideration and Cross-Motion for Reconsideration, along with a request for oral argument on its response and cross-motion. On October 11, 1996, OPC filed a response to FCWC's cross-motion for reconsideration.

By Order No. PSC-96-1456-FOF-WS, issued December 2, 1996, we granted FCWC's motion to strike Mr. Dyer's motion for reconsideration, based upon its failure to adhere to the requirements of Rule 25-22.060, Florida Administrative Code. By Order No. PSC-97-0223-FOF-WS, issued on February 25, 1997, we denied FCWC's request for oral argument and granted in part and denied in part the motions for reconsideration filed by OPC and FCWC.

RECONSIDERATION OF UTILITY EXPENSES

By Order No. PSC-97-0223-FOF-WS, we recalculated the excessive inflow and infiltration in the Barefoot Bay collection system, resulting in a reduction to our original finding in Order No. PSC-96-1147-FOF-WS. We recalculated the actual amount of water delivered to the system from all sources, thereby reducing excessive inflow and infiltration from 120,594 gallons per day (gpd) to 17,039 gpd. However, we overlooked the need to recalculate the corresponding reduction in expenses for Account No. 715 (Purchased Power) and Account No. 718 (Chemicals) which would result from the reduction of water treated.

On our own motion, we find it appropriate to reconsider our calculation of Account No. 715 (Purchased Power) and Account No. 718 (Chemicals). Our recalculation results in an increase to FCWC's operating expenses, totaling $19,120.

REVENUE REQUIREMENT

Based upon our reconsideration of FCWC's expenses, we find that the revised wastewater revenue requirement is $1,848,872. The operating income statement, which reflects the revenue requirement calculation, is attached as Schedule No. 3-B and the adjustments are shown on Schedule No. 3-C.

RATES AND RATE STRUCTURE

The final rates approved for the utility are designed to produce revenues of $1,822,743 for its wastewater system. This increase excludes miscellaneous service revenues, reclaimed water

revenue and the allocation of wastewater revenue to the water operations. The rates are designed using the base facility charge rate structure. Consistent with our previous decisions in this docket, we find that a 20% differential between the residential and general service wastewater gallonage charges is appropriate.

The utility shall file revised tariff sheets and a proposed customer notice to reflect the appropriate rates pursuant to Rule 25-22.0407(10), Florida Administrative Code. The approved rates shall be effective for service rendered on or after the stamped approval date on the tariff sheets pursuant to Rule 25-30.475(1), Florida Administrative Code, provided the customers have received notice. The rates shall not be implemented until proper notice has been received by the customers. The utility shall provide proof of the date notice was given within 10 days after the date of the notice.

A comparison of the utility's original rates, interim rates, requested rates, and our approved final rates is set forth on Schedule No. 4.

STATUTORY FOUR-YEAR RATE REDUCTION

Section 367.0816, Florida Statutes, requires that the rates be reduced immediately following the expiration of the four year period by the amount of rate case expense previously authorized in the rates. The reduction will reflect the removal of revenues associated with the amortization of rate case expense and the gross-up for regulatory assessment fees, which is $22,813 for wastewater. The removal of rate case expense will result in the reduction of rates set forth on Schedule No. 5.

The utility shall file revised tariffs no later than one month prior to the actual date of the required rate reduction. The utility shall also file proposed customer notices setting forth the lower rates and reason for the reductions. If the utility files this reduction in conjunction with a price index or pass-through rate adjustment, separate data shall be filed for the price index and/or pass-through increase or decrease, and for the reduction in the rates due to the removal of amortized rate case expense.

REFUND OF INTERIM WASTEWATER REVENUES

By Order No. PSC-96-0119-FOF-WS, issued on January 23, 1996, the utility's proposed rates were suspended and interim wastewater rates were approved subject to refund, pursuant to Section 367.082, Florida Statutes. According to Section 367.082, Florida Statutes, any refund shall be calculated to reduce the rate of return of the utility during the pendency of the proceeding to the same level

within the range of the newly authorized rate of return. Adjustments made in the rate case test period that do not relate to the period interim rates are in effect shall be removed. Examples of these adjustments are an attrition allowance or rate case expense, which are recovered only after final rates are established.

In this proceeding, the test period for establishment of interim rates was the historical twelve months ended June 30, 1995. The approved wastewater interim rates did not include any provisions for proforma consideration of increased operating expenses or increased plant. The interim increase was designed to allow recovery of actual interest costs, and the floor of the last authorized range for equity earnings.

To establish the proper refund amount, we calculated a revised interim wastewater revenue requirement utilizing the same data used to establish final rates. Rate case expense was excluded because it was not an actual expense during the interim collection period.

Using the principles discussed above, the wastewater revenue requirement for the interim collection period is $1,835,159. This revenue level exceeded the wastewater interim revenues which were granted in Order No. PSC-96-0119-FOF-WS. Therefore, we do not find that a refund of wastewater interim rates is necessary.

REFUND OF WASTEWATER REVENUES

On August 6, 1996, pursuant to Section 367.081(6), Florida Statutes, the utility implemented, subject to refund, the rates that were approved at the June 25, 1996, Agenda Conference. By Order No. PSC-97-0223-FOF-WS, issued February 25, 1997, we ordered a refund between the rates implemented on August 6, 1996 and the rates approved therein. However, the utility has not implemented the rates approved by Order No. PSC-97-0223-FOF-WS.

The wastewater rates approved herein and shown on Schedule No. 4 are higher than the rates approved by Order No. PSC-97-0223-FOF-WS. Therefore, a refund of the difference between the wastewater rates that were implemented on August 6, 1996, and the wastewater rates approved herein is required. The appropriate wastewater refund, with interest, shall be calculated pursuant to Rule 25-30.360, Florida Administrative Code. The refund shall be the difference between the wastewater rates that were implemented on August 6, 1996, and the wastewater rates approved herein. The utility shall submit the proper refund reports pursuant to Rule 25-30.360(7), Florida Administrative Code. The utility shall treat any unclaimed refunds as CIAC pursuant to Rule 25-30.360(8), Florida Administrative Code. The utility's corporate undertaking

shall be released upon staff's verification that the refund has been completed. This docket shall be closed administratively after the proper refund has been made and the proper revised tariff sheets and customer notice have been filed by the utility and approved by staff.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that, upon reconsideration, Florida Cities Water Company, Barefoot Bay Division's operating expenses shall be recalculated as set forth in the body of this Order. It is further

ORDERED that each of the findings made in the body of this Order is hereby approved in every respect. It is further

ORDERED that all matters contained in the schedules and attachments attached hereto are by reference incorporated herein. It is further

ORDERED that the rates approved herein shall be effective for service rendered on or after the stamped approval date on the revised tariff sheets, pursuant to Rule 25-30.475, Florida Administrative Code, provided the customers have received notice. It is further

ORDERED that prior to its implementation of the rates approved herein, Florida Cities Water Company, Barefoot Bay Division shall submit and have approved a proposed customer notice to its customers of the rates and reasons therefore. The notice will be approved upon staff's verification that it is consistent with our decision herein. It is further

ORDERED that prior to its implementation of the rates approved herein, Florida Cities Water Company, Barefoot Bay Division shall submit and have approved revised tariff pages. The revised tariff pages will be approved upon staff's verification that the pages are consistent with our decision herein and that the proposed customer notice is adequate. It is further

ORDERED that Florida Cities Water Company, Barefoot Bay Division shall provide proof that the customers have received notice within 10 days of the date of notice. It is further

ORDERED that the rates shall be reduced at the end of the four-year rate case expense amortization period, consistent with our decision herein. Florida Cities Water Company, Barefoot Bay Division shall file revised tariff sheets no later than one month

prior to the actual date of the reduction and shall file a customer notice. It is further

ORDERED that Florida Cities Water Company, Barefoot Bay Division, shall refund with interest, calculated pursuant to Rule 25-30.360, Florida Administrative Code, the additional wastewater revenues collected subject to refund as set forth in the body of this Order. It is further

ORDERED that Florida Cities Water Company, Barefoot Bay Division, shall make the refund to customers of record as of the date of this Order pursuant to Rule 25-30.360, Florida Administrative Code. Florida Cities Water Company, Barefoot Bay Division, shall submit the proper refund reports pursuant to Rule 25-30.360(7), Florida Administrative Code. It is further

ORDERED that Florida Cities Water Company, Barefoot Bay Division, shall treat any unclaimed refunds as contributions-in-aid-of-construction pursuant to Rule 25-30.360(8), Florida Administrative Code. It is further

ORDERED that Florida Cities Water Company, Barefoot Bay Division's corporate undertaking shall be released upon staff's verification that the refund has been completed. It is further

ORDERED that this docket shall be closed administratively upon staff's verification that Florida Cities Water Company, Barefoot Bay Division has made the required refunds as set forth in this Order and upon Florida Cities Water Company, Barefoot Bay Division's filing and staff's approval of revised tariff sheets and a customer notice.

By ORDER of the Florida Public Service Commission, this 5th day of May, 1997.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay Flynn
Chief, Bureau of Records

(S E A L)

TV

NOTICE OF JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

FLORIDA CITIES WATER CO.-BAREFOOT BAY DIVISION
SCHEDULE OF WASTEWATER RATE BASE
TEST YEAR ENDED 06/30/96

SCHEDULE NO. 1-B
DOCKET NO. 951258-WS

	COMPONENT		TEST YEAR PER UTILITY	UTILITY ADJUSTMENTS		UTILITY ADJUSTED TEST YEAR 6/30/96	COMMISSION ADJUSTMENTS	COMMISSION ADJUSTED TEST YEAR 6/30/96
1	UTILITY PLANT IN SERVICE	$	4,720,099	4,935,862	$	9,655,961	(665,476)	8,990,485
2	LAND		363,923	1,040,446		1,404,369	(329,446)	1,074,923
3	NON-USED & USEFUL COMPONENTS		0	0		0	(776,994)	(776,994)
4	CONSTRUCTION WORK IN PROGRESS		1,421,517	(1,421,517)		0	0	0
5	ACCUMULATED DEPRECIATION		(1,399,695)	(393,232)		(1,792,927)	30,881	(1,762,046)
6	CIAC		(2,595,460)	(43,000)		(2,638,460)	(104,227)	(2,742,687)
7	AMORTIZATION OF CIAC		857,338	102,847		960,185	4,096	964,281
8	ADVANCES FOR CONSTRUCTION		(138,200)	5,200		(133,000)	0	(133,000)
9	WORKING CAPITAL ALLOWANCE		58,962	(15,034)		43,928	32,763	76,691
10	OTHER: ALLOC. OF GENERAL OFFICE		0	19,787		19,787	0	19,787
11	UNFUNDED SFAS 106 OBLIGATION		0	0		0	(72,488)	(72,488)
	RATE BASE	$	3,288,484	4,231,359	$	7,519,843	(1,880,891)	5,638,952

FLORIDA CITIES WATER CO.-BAREFOOT BAY DIVISION
ADJUSTMENTS TO RATE BASE
TEST YEAR ENDED 06/30/96

SCHEDULE NO. 1-C
DOCKET NO. 951258-WS
PAGE 1 OF 1

EXPLANATION	WASTEWATER
(1) UTILITY PLANT IN SERVICE	
a) To remove plant additions associated with PS&Is	$ (690,476)
b) To include additional plant costs	25,000
	$ (665,476)
(2) LAND	
To remove additions to land associated with PS&Is	$ (329,446)
(3) NON-USED & USEFUL	
a) To remove non-used & useful wastewater treatment plant	$ (837,631)
b) To remove accumulated depreciation on non-used and useful plant	60,637
	$ (776,994)
(4) ACCUMULATED DEPRECIATION	
a) To remove depreciation associated with PS&Is	$ 32,271
b) To include depreciation associated with additional plant costs	(1,390)
	$ 30,881
(5) CIAC	
a) To include grant funding from SJRWMD for reclaimed water facilities	$ (81,258)
b) To impute CIAC on the margin reserve	(22,969)
	$ (104,227)
(6) ACCUMULATED AMORTIZATION OF CIAC	
a) To include amortization of grant funding from SJRWMD	$ 3,193
b) To include amortization associated with imputed CIAC	903
	$ 4,096
(7) WORKING CAPITAL	
a) To include PS&Is as Other Deferred Debits in working capital	$ 40,423
b) To include Other Deferred Credits in the working capital allowance	(6,435)
c) To adjust working capital to the 13-month average balance	(1,225)
	$ 32,763
(8) UNFUNDED SFAS 106 OBLIGATION	
To allocate the unfunded liability associated with other postretirement benefits	$ (72,488)

FLORIDA CITIES WATER CO.-BAREFOOT BAY DIVISION
CAPITAL STRUCTURE - WASTEWATER
TEST YEAR ENDED 06/30/96

SCHEDULE NO. 2
DOCKET NO. 951258-WS

	DESCRIPTION	TOTAL CAPITAL	SPECIFIC ADJUSTMENTS (EXPLAIN)	PRO RATA ADJUSTMENTS	CAPITAL RECONCILED TO RATE BASE	RATIO	COST RATE	WEIGHTED COST
PER UTILITY								
1	LONG TERM DEBT	36,616,667	0	(32,626,837) $	3,989,830	46.03%	8.33%	3.83%
2	SHORT-TERM DEBT	0	0	0	0	0.00%	9.00%	0.00%
3	PREFERRED STOCK	9,000,000	0	(8,019,341)	980,659	11.31%	9.00%	1.02%
4	COMMON EQUITY	24,360,915	0	(21,706,498)	2,654,417	30.62%	11.88%	3.64%
5	CUSTOMER DEPOSITS	759,458	0	(676,706)	82,752	0.95%	6.00%	0.06%
6	DEFERRED ITC'S-ZERO COST	0	0	0	0	0.00%	0.00%	0.00%
7	DEFERRED ITC'S-WTD COST	1,637,481	0	(1,459,058)	178,423	2.06%	9.61%	0.20%
8	DEFERRED INCOME TAXES	7,179,404	0	(6,397,121)	782,283	9.02%	0.00%	0.00%
9	TOTAL CAPITAL	79,553,925	0	(70,885,561) $	8,668,364	100.00%		8.75%
PER COMMISSION								
10	LONG TERM DEBT	36,616,667	0	(33,476,013) $	3,140,654	46.03%	8.33%	3.83%
11	SHORT-TERM DEBT	0	0	0	0	0.00%	0.00%	0.00%
12	PREFERRED STOCK	9,000,000	0	(8,228,060)	771,940	11.31%	9.00%	1.02%
13	COMMON EQUITY	24,360,915	0	(22,271,451)	2,089,464	30.62%	11.88%	3.64%
14	CUSTOMER DEPOSITS	759,458	0	(694,318)	65,140	0.95%	6.00%	0.06%
15	DEFERRED ITC'S-ZERO COST	0	0	0	0	0.00%	0.00%	0.00%
15	DEFERRED ITC'S-WTD COST	1,637,481	0	(1,497,032)	140,449	2.06%	9.65%	0.20%
16	DEFERRED INCOME TAXES	7,179,404	0	(6,563,618)	615,786	9.02%	0.00%	0.00%
17	TOTAL CAPITAL	79,553,925	0	(72,730,494) $	6,823,431	100.00%		8.75%

RANGE OF REASONABLENESS	LOW	HIGH
AUTHORIZED RETURN ON EQUITY	10.88%	12.88%
OVERALL RATE OF RETURN	8.44%	9.05%

FLORIDA CITIES WATER CO.-BAREFOOT BAY DIVISION
STATEMENT OF WASTEWATER OPERATIONS
TEST YEAR ENDED 06/30/96

SCHEDULE NO. 3-B
DOCKET NO. 951258-WS

	DESCRIPTION	TEST YEAR PER UTILITY	UTILITY ADJUSTMENTS	UTILITY ADJUSTED TEST YEAR 6/30/96	COMMISSION ADJUSTMENTS	COMMISSION ADJUSTED TEST YEAR 6/30/96	REVENUE INCREASE	REVENUE REQUIREMENT
1	OPERATING REVENUES	823,724	1,286,757	2,110,481	(1,217,158)	893,323	955,549	1,848,872
	OPERATING EXPENSES						106.97%	
2	OPERATION AND MAINTENANCE	581,627	206,405	788,032	58,152	846,184 $		846,184
3	DEPRECIATION	121,189	174,831	296,021	(81,878)	214,143		214,143
4	AMORTIZATION	1,300	0	1,300	0	1,300		1,300
5	TAXES OTHER THAN INCOME	79,324	94,283	173,608	(54,772)	118,836	43,000	161,836
6	INCOME TAXES	(1,057)	194,591	193,535	(404,662)	(211,127)	343,392	132,265
7	TOTAL OPERATING EXPENSES	782,384	670,110	1,452,495	(483,160)	969,336	386,392	1,355,728
8	OPERATING INCOME	41,340	616,647	657,986	(733,998)	(76,013)	569,157	493,144
9	RATE BASE	3,288,484		7,519,843		5,638,952		5,638,952
	RATE OF RETURN	1.26%		8.75%		-1.35%		8.75%

FLORIDA CITIES WATER CO.-BAREFOOT BAY DIVISION
ADJUSTMENTS TO OPERATING STATEMENTS
TEST YEAR ENDED 06/30/96

SCHEDULE NO. 3-C
DOCKET NO. 951258-WS
PAGE 1 OF 1

EXPLANATION	WASTEWATER
(1) OPERATING REVENUES	
a) Reverse utility's proposed revenue increase	$ (1,273,024)
b) To reflect test year growth with no decline in consumption (Issue 24)	35,966
c) To reflect rental income associated with an antenna (Issue 31)	19,900
	$ (1,217,158)
(2) OPERATION AND MAINTENANCE EXPENSES	
a) To adjust Account 715-purchased power for treating excessive infiltration and inflow	$ (3,187)
b) To adjust Account 718-chemicals for treating excessive infiltration and inflow	(824)
c) To adjust Account 775-miscellaneous expenses to include amortization of PS&Is	67,995
d) To adjust rate case expense for updated current and remove prior expenses	(5,832)
	$ 58,152
(3) DEPRECIATION EXPENSE	
a) To remove depreciation associated with PS&Is	$ (32,271)
b) To include amortization expense associated with grant funding from SJRWMD	(3,193)
c) To remove depreciation expense associated with non-used & useful plant	(46,901)
d) To include depreciation expense associated with additional plant costs	1,390
e) To include amortization expense associated with imputed CIAC	(903)
	$ (81,878)
(4) TAXES OTHER THAN INCOME TAXES	
To adjust regulatory assessment fees related to revenue adjustment	$ (54,772)
(5) INCOME TAXES	
To reflect income taxes associated with adjusted test year income	$ (404,662)
(6) OPERATING REVENUES	
Adjustment to reflect approved revenue requirement	$ 955,549
(7) TAXES OTHER THAN INCOME TAXES	
Regulatory assessment taxes on additional revenues	$ 43,000
(8) INCOME TAXES	
Income taxes related to approved income amount	$ 343,392

UTILITY: FLORIDA CITIES WATER COMPANY - BAREFOOT BAY DIVISION **Schedule No. 4**
COUNTY: BREVARD
DOCKET NO. 951258-WS
TEST YEAR ENDED: June 30, 1996

RATE SCHEDULE

WASTEWATER

Monthly Rates

	Rates prior to Filing	Commission Approved Interim	Utility Requested Final	Commission Approved Final Rates
Residential and Multi-Family				
Base Facility Charge:				
5/8" x 3/4"	$7.68	$9.12	$30.78	$20.58
Gallonage Charge, per 1,000 Gallons (Sewer Cap - 6,000 Gallons)	$2.82	$3.35	$3.10	$4.76
General Service				
Base Facility Charge:				
Meter Size:				
5/8" x 3/4"	$7.68	$9.12	$30.78	$20.58
3/4"	$11.54	$13.71	$46.17	$30.87
1"	$19.23	$22.85	$76.95	$51.45
1-1/2"	$38.46	$45.69	$153.90	$102.90
2"	$61.54	$73.12	$246.24	$164.64
3"	$123.07	$146.22	$482.48	$329.28
4"	$192.31	$228.48	$769.50	$514.50
6"	$384.62	$456.97	$1,539.00	$1,029.00
8"	--	--	$3,078.00	$2,058.00
Gallonage Charge, per 1,000 Gallons	$3.39	$4.03	$3.73	$5.71

Typical Residential Bills

5/8" x 3/4" meter				
3,000 Gallons	$16.14	$19.17	$40.08	$34.85
5,000 Gallons	$21.78	$25.87	$46.28	$44.37
10,000 Gallons (Sewer Cap - 6,000 Gallons)	$24.60	$29.22	$49.38	$49.13

UTILITY: FLORIDA CITIES WATER COMPANY - BAREFOOT BAY **Schedule No. 5**
COUNTY: BREVARD
DOCKET NO. 951258-WS
TEST YEAR ENDED: JUNE 30, 1996

RATE SCHEDULE

Schedule of Rate Decrease After Expiration of Amortization Period for Rate Case Expense

WASTEWATER

Monthly Rates

Residential and Multi-Family Service	Commission Approved Final Rates	Commission Approved Rate Decrease
Base Facility Charge:		
5/8" x 3/4"	$20.58	$0.26
Gallonage Charge per 1,000 Gallons (Sewer Cap - 6,000 gallon cap)	$4.76	$0.06
General Service		
Base Facility Charge:		
Meter Size:		
5/8"x3/4"	$20.58	$0.26
3/4"	$30.87	$0.39
1"	$51.45	$0.64
1-1/2"	$102.90	$1.29
2"	$164.64	$2.06
3"	$329.28	$4.12
4"	$514.50	$6.44
6"	$1,029.00	$12.88
8"	$2,058.00	$25.76
Gallonage Charge, per 1,000 gallons	$5.71	$0.07

DER CERTIFIED MAIL NO. P-597-167-447

Exhibit_____(GSA-14)

BEFORE THE STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL REGULATION

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION Complainant, vs. FLORIDA CITIES WATER COMPANY (formerly, Avatar Utilities, Inc. of Florida - Barefoot Bay Division) Barefoot Bay Mobile Home Park Respondent.	IN THE OFFICE OF THE CENTRAL FLORIDA DISTRICT OGC CASE NO. 87-0153

CONSENT ORDER

This Consent Order is made and entered into between the State of Florida Department of Environmental Regulation ("Department") and Florida Cities Water Company - Barefoot Bay Division (formerly, Avatar Utilities, Inc. of Florida - Barefoot Bay Division) ("Respondent"). The Department finds and Respondent neither admits nor denies the following:

1. The Department is the administrative agency of the State of Florida which has the authority to administer and enforce the provisions of Chapter 403, Florida Statutes, and the rules promulgated thereunder, Florida Administrative Code Chapters 17-4 and 17-6.

2. Florida Cities Water Company is a Florida Corporation and person within the meaning of Section 403.031, Florida Statutes, doing business at 2112 Gulf Gate Drive, Post Office Box 5846, Sarasota, Florida 34277.

3. Respondent is responsible for the development of the Barefoot Bay sewage treatment plant (hereinafter referred to as "facility"). Respondent's facility is located on Micco Road, approximately two miles west of U. S. Highway 1, Micco, Brevard County, Florida. Latitude 27°53'32", Longitude 80°32'00", Section 9, Township 30 South, Range 38 East.

4. The Respondent owns and is responsible for the operation and maintenance of the Barefoot Bay sewage treatment plant which serves the Barefoot Bay Mobile Home Park. The most recent operation permit for this facility (D005-61503) was issued on November 23, 1982, and would have expired August 1, 1987 except for the application for renewal filed prior to that date. The operation permit authorizes the operation of a 0.900 MGD extended aeration STP with chlorinated effluent discharge to groundwater via two (2) percolation/evaporation ponds and with no discharge to surface waters.

5. On November 13, 1985, December 27, 1985, and January 22, 1986, site inspections of Respondent's facility were conducted by representatives of the Department to determine the status of compliance at the facility. On each of these inspections, the total flow from the treatment plant was not being completely contained within the percolation/evaporation ponds. A portion of the effluent was being discharged via the facility's emergency

overflow pipe, thence into an agricultural drainage/irrigation canal which flows into the North Prong of the Sebastian Creek, Class III waters of the State.

6. On January 29, 1986, the Department sent a Warning Notice (OWN-86-005), to the Respondent by certified mail informing Respondent of the Department's belief that Respondent's facility was being operated in violation of its operation permit, Chapter 403, Florida Statutes, and the applicable rules promulgated thereunder. Response was requested within ten (10) days of receipt of the Warning Notice. Respondent's response was received by the Department on February 5, 1986.

7. On January 24, 1986, August 25, 1986, and September 17, 1986, representatives of the Department conducted follow-up inspections to determine the status of compliance at the Respondent's facility. Again, the total flow from the plant was not being completely contained in the percolation/evaporation ponds, but was being discharged through the emergency overflow pipe into the agricultural drainage/irrigation canal adjacent to the Respondent's property.

8. On October 14, 1986, a site inspection of Respondent's facility was conducted by representatives of the Brevard County Office of Natural Resources Management to determine the status of compliance at the facility. Inspection again revealed that the existing percolation/evaporation ponds were not adequately percolating the entirety of the effluent and a portion of the plant's effluent was being discharged through the emergency overflow pipe and into the agricultural drainage/irrigation canal

which flows into the North Prong of Sebastian Creek.

9. A follow-up inspection at the Respondent's sewage treatment facility was conducted by the Department on January 16, 1987. Inspection revealed the Respondent's facility was still discharging effluent to the same agricultural drainage/irrigation canal which flows into the North Prong of Sebastian Creek.

10. Discharge of the treatment plant's effluent to surface waters, without authorization from the Department, constitutes a violation of Section 403.161(1)(b) and Section 403.088, Florida Statutes, and Florida Administrative Code Rule 17-6.180(2)(a).

11. On March 4, 1987, the Department issued a Notice of Violation and Orders for Corrective Action to the Respondent. Therein, the Department ordered the Respondent to complete hydraulic testing, implement effluent monitoring, and submit an engineering report with time schedule for corrective actions.

12. Informal conferences were held between the Department and the Respondent in the Department's District Office in Orlando on March 13 and October 23, 1987, and February 9, 1988, during which, all disputed issues were resolved.

THEREFORE, pursuant to Florida Administrative Code Rule 17-103.110(3), Respondent and the Department mutually agree and it is

ORDERED:

13. For the consideration of all costs and expenses incurred by the department prior to the effective date of this Consent Order, Respondent shall pay the amount of Five Thousand Nine Hundred Eighty Dollars ($5,980.00) in settlement of liabilities

arising from Section 403.161, Florida Statutes. Payment shall be by certified check or money order and is due within thirty (30) days from the effective date of this Consent Order; the instrument shall be made payable to the Department of Environmental Regulation and be sent to the Central Florida District Office, 3319 Maguire Boulevard, Suite 232, Orlando, Florida 32803-3767.

14. Within sixty (60) days of the effective date of this Consent Order, Respondent shall install and/or provide documentation to the Department that a flow meter to measure the quantity of effluent discharging from Respondent's facility to surface waters of the State has been installed, and begin monitoring and submitting to the Department monitoring results for flow (million gallons per day) and the following parameters:

Field pH (standard units)

Field Temperature (°C)

Specific Conductance (μmhos/cm)

Field Dissolved Oxygen (mg/l)

Carbonaceous Biochemical Oxygen Demand - 5 day (CBOD mg/l)

Ammonia - Nitrogen (mg/l NH_3-N)

Total Kjeldahl Nitrogen (mg/l NO_2 + NO_3 - N)

Total Phosphorus (mg/l P)

Monitoring of the listed parameters is to be conducted at the following sample station locations:

a. Facility's point of discharge to surface water

b. 50 yards upstream of facility's discharge

c. 100 yards downstream of facility's discharge

d. Ditch at Micco Road bridge

All required monitoring results are to be submitted monthly to the Department for the duration Respondent's facility discharges to surface waters of the State. All sampling and analyses shall be monthly grab samples from the aforesaid locations and parameters. All analyses shall be conducted in accordance with Florida Administrative Code Chapter 17-19.

15. In the event a deep injection well is not possible due to unfavorable geological conditions at the site, and a Department permit cannot be issued, the Department will then, and only then, consider a surface water discharge permit utilizing the monitoring data collected as a result of paragraph 14, above. Within sixty (60) days of Respondent's receipt of written notice from the Department that a deep injection well is not possible, the Respondent will submit a completed permit application and any additional Department requested data to the Department to modify the existing facility as needed to comply with standards established by the Department for discharge of treated effluent from the facility to Class III surface waters of the State.

16. Within sixty (60) days of the effective date of this Consent Order, Respondent shall submit to the Department an evaluation describing the levels of chemical addition and/or additional treatment needed to achieve reduced levels of Total Phosphorus in the effluent from the facility to at least one (1.0) mg/l phosphorus. The evaluation shall be prepared by a professional engineer, registered in the State of Florida.

The Department shall, as expeditiously as possible, review the Respondent's written evaluation and determine the

required level of Total Phosphorus allowed for discharge to surface waters.

Respondent shall implement chemical treatment at the facility within ninety (90) days of receipt of written notice from the Department that the desired level of Total Phosphorus can be achieved in a cost effective manner.

17. Within one hundred twenty (120) days of the effective date of this Consent Order, Respondent shall submit to the Department an engineering report setting forth a plan for the ultimate elimination of the surface water discharge of effluent from Respondent's facility by the construction and operation of a deep injection well. The engineering report shall include temporary provisions for accommodating the flow from the facility until the deep injection well is in full operation. These temporary provisions shall include: (a) the discharge of effluent by means of sprayfield irrigation on a 40 acre site owned by Respondent; and (b) the temporary surface water discharge of that volume of effluent which cannot otherwise be discharged through the sprayfield and the existing percolation/evaporation ponds.

18. Respondent's report shall contain a specific compliance schedule, incorporating Department guidelines established herein, for: (a) the preparation and submittal of applications to all appropriate regulatory agencies for the construction and operation of the deep injection well; (b) the construction and operation of the deep injection well following receipt of all necessary authorizations from the appropriate regulatory agencies; (c) the preparation and submittal of an application and ground water

monitoring plan to the Department for the construction and operation of the 40 acre site for sprayfield irrigation; (d) the construction and operation of the 40 acre site for sprayfield irrigation following receipt of the appropriate permits and the approval of a ground water monitoring plan; (e) the anticipated volume increases in temporary surface water discharge of effluent resulting from growth at the Barefoot Bay Mobile Home Park; and (f) the cleaning and scraping of the existing percolation/evaporation ponds to improve percolation once the 40 acre sprayfield irrigation site is in operation. The report shall be prepared by a professional engineer, registered in the State of Florida, and shall be sent to the Department's Orlando office, 3319 Maguire Boulevard, Suite 232, Orlando, Florida 32803-3767 with a copy to the Department's Melbourne Branch office, 13 East Melbourne Avenue, Melbourne, Florida 32901.

19. The Department shall expeditiously review the engineering report and provide Respondent with a written response as to its acceptability. Respondent shall not implement the plan proposed in the report until Respondent receives written notification from the Department that the proposed plan has been approved. Such approval by the Department shall not be unreasonably withheld.

20. Within sixty (60) days of the issuance of a construction permit from the Department, Respondent shall initiate on-site preparation of the 40 acre site to receive the discharge of the treated effluent from the facility by means of sprayfield irrigation. Respondent shall complete the preparation of the sprayfield site within one hundred fifty (150) days after the

initiation of said work and begin discharging treated effluent from the facility to the sprayfield.

21. Within thirty (30) days of completion of the 40 acre sprayfield irrigation site, Respondent shall initiate cleaning and scraping the two (2) existing percolation/evaporation ponds, taking one pond from service at a time, to improve percolation. Respondent shall complete the cleaning and scraping of the ponds within one hundred twenty (120) days after the initiation of said work and begin utilizing the two (2) percolation/evaporation ponds in conjunction with the 40 acre sprayfield irrigation site and temporary surface water discharge to dispose of the treated effluent from the facility.

22. In the interim, prior to the completion of the 40 acre sprayfield site and the cleaning and scraping of the existing percolation/evaporation ponds, there shall be no expansions made to the Barefoot Bay subdivision that will cause an increase in surface water discharge in excess of an annual ~~a maximum monthly~~ average of 0.600 million gallons per day (mgd).

23. This Consent Order authorizes the temporary surface water discharge of that portion of treated effluent from Respondent's facility not accommodated by the 40 acre sprayfield site and the cleaned and scraped existing percolation/evaporation ponds. This Consent Order will further authorize the pro-rate increases in surface water discharge not to exceed a maximum annual average of 0.600 mgd based on the following compliance schedule:

1. Respondent submits an application for a construction permit for a Class I injection well. (Release 25%)

2. The Department approves and issues the construction permit and well drilling begins. (Release 25%)

3. Respondent completes well construction and the Department approves injection of treated effluent under the construction permit. (Release 25%)

4. The Department issues an operating permit for the deep injection well. (Release additional capacity up to the design capacity of the well.)

The pro-rated increases apply to the volume of the facility's surface water discharge reduced from an annual average of 0.600 mgd through implementation of the 40 acre sprayfield and the cleaning and scraping of the percolation/evaporation ponds. (For example: If the 40 acre sprayfield and renovated ponds reduces the 0.600 mgd annual average of surface water discharge to 0.500 mgd, then the above pro-rated increases would pertain to the 0.100 mgd difference.)

24. Respondent shall pay a stipulated civil penalty of One Hundred Dollars ($100.00) per day for each failure to comply with the time schedules as required in paragraphs 13, 14, 15, 16, 17, 20, 21 and 31 of this Consent Order. The Department hereby agrees that prior to claiming the aforesaid stipulated amount, the Department shall notify Respondent of any alleged violations of this Consent Order by sending a written notice thereof to Respondent at the address set forth below (or at any other address of which Respondent may hereafter give the Department written notice).

25. If any event occurs which causes delay, or the reasonable

likelihood of delay, in the achievement of the requirements of this Consent Order, Respondent shall have the burden of proving that the delay was, or will be caused by, circumstances beyond the reasonable control of the Respondent, and could not have been, or cannot be, overcome by due diligence. Upon occurrence of the event Respondent shall promptly notify the Department orally and shall, within seven (7) calendar days of oral notification to the Department, notify the Department in writing of the anticipated length and cause of delay, the measures taken or to be taken to prevent or minimize the delay, and the timetable by which Respondent intends to implement these measures. If the parties can agree that the delay, or anticipated delay, has been or will be, caused by circumstances beyond the reasonable control of the Respondent, the time for performance hereunder shall be extended for a period equal to the delay resulting from such circumstances, with no assessment of penalties as outlined in paragraph 24, above, during such extension. Such agreement shall be confirmed by letter from the Department accepting, or if necessary, modifying the extension request. The Respondent shall adopt all reasonable measures necessary to avoid or minimize delay. Failure of the Respondent to comply with the notice requirements of this paragraph shall constitute a waiver of the Respondent's right to request an extension of the requirements of this Consent Order. Increased costs of performance of the terms of this Consent Order, or changed economic circumstances, shall not be considered circumstances beyond the control of the Respondent.

26. With regard to any determination, notice, request or

other action made or taken by the Department pursuant to this Consent Order, Respondent may request an informal conference to resolve a disputed determination. No determination will be final for the purpose of invoking the jurisdiction of Section 120.57, Florida Statutes, until such time as the informal conference has been completed as determined by written notification by the Department or Respondent. If the parties cannot resolve the disputed determination in this matter, Respondent may file a Petition for Formal or Informal Administrative Proceeding (hearing), if Respondent objects to the Department's determination, notice, request or other action, pursuant to Section 120.57, Florida Statutes, and Florida Administrative Code Chapters 17-103 and 28-5. The petition must conform with the requirements of Florida Administrative Code Rule 28-5.201, and must be received by the Department's Office of General Counsel, 2600 Blair Stone Road, Tallahassee, Florida 32301, within 14 days after receipt of notice from the Department of any determination, notice, request or other action Respondent wishes to challenge. Failure to file a Petition within this time period shall constitute a waiver by Respondent of its right to request an administrative proceeding under Section 120.57, Florida Statutes. The Department's determination, notice, request or other action, upon expiration of the 14-day time period, if no Petition is filed, or the Department's Final Order as a result of the filing of a Petition, shall be incorporated by reference into this Consent Order and made a part of it. All other aspects of the Consent Order shall remain in full force and effect at all times.

In the event Respondent seeks an administrative proceeding pursuant to this paragraph, the Department may in lieu of or in addition to holding the administrative hearing file suit to obtain judicial resolution of all the issues unresolved at the time of the request for administrative proceedings. In the event the Department files such suit to obtain judicial resolution of all the issues unresolved at the time of the request for administrative proceedings, Respondent reserves all of its rights and defenses to challenge or respond to such suit as is appropriate.

27. Respondent shall allow authorized representatives of the Department access to the property at reasonable times for purposes of determining compliance with this Order and the rules of the Department.

28. All plans, applications, and information required by this Consent Order unless otherwise noted herein, to be submitted to the Department should be sent to, the Program Administrator, Administration and Technical Services Program , Central District, 3319 Maguire Boulevard, Suite 232, Orlando, Florida 32803-3767.

29. The Department, for an in consideration of the complete and timely performance by Respondent of the obligations agreed to in this Consent Order, hereby waives its right to seek judicial imposition of damages, or civil or criminal penalties for the violations outlined in this Consent Order. Except as provided in paragraph 26, Respondent waives his right to a hearing or judicial review of the terms of this Consent Order.

30. Entry of this Consent Order does not relieve Respondent

of the need to comply with the applicable Federal, State or local laws, regulations or ordinances.

31. Respondent shall publish, at their expense, the following notice in the legal section of a newspaper of general circulation in Brevard County, Florida. The notice shall be published one time only within twenty-one (21) days after execution of the Consent Order by the Department.

State of Florida Department of Environmental Regulation

Notice of Proposed Agency Action

The Department of Environmental Regulation gives notice of agency action of entering into a Consent Order with Florida Cities Water Company - Barefoot Bay Division, pursuant to Rule 17-103.110(3), Florida Administrative Code. The Consent Order addresses the elimination of surface water discharge of effluent from Respondent's wastewater treatment plant facility by construction and operation of a deep injection well and the temporary provisions for accommodating the flow from the facility until the deep injection well is in full operation.

The Consent Order is available for public inspection during normal business hours, 8:00 a.m. to 5:00 p.m., Monday through Friday, except legal holidays, at the Department of Environmental Regulation.

Persons whose substantial interests are affected by the above proposed agency action have a right pursuant to Section 120.57, F.S., to petition for an administrative determination (hearing) on the proposed action. The Petition must conform to the requirements of Chapters 17-103 and 28-5, FAC, and must be filed (received) with the Department's Office of this notice. Failure to file a petition within the 14 days constitutes a waiver of any right such person has to an administrative determination (hearing) pursuant to Section 120.57, F.S.

If a petition is filed, the administrative hearing process is designed to formulate agency action. Accordingly, the Department's final

> action may be different from the proposed agency action. Persons whose substantial interests will be affected by any decision of the Department have the right to intervene in the proceeding. A petition for intervention must be filed pursuant to Model Rule 28-5.207, FAC, at least five days before the final hearing and be filed with the Hearing Officer if one has been assigned at the Division of Administrative Hearings, Department of Administration, 2009 Appalachee Parkway, Tallahassee, Florida 32399-2400. If no Hearing Officer has been assigned, the petition is to be filed with the Department's Office of General Counsel, 2600 Blair Stone Road, Tallahassee, Florida 32399-2400. Failure to petition to intervene within the allowed time frame constitutes a waiver of any right such person has to an administrative determination (hearing) under Section 120.57, F.S.

Respondent shall provide proof of publication to the Department within fourteen (14) days of the notice.

32. The terms and conditions set forth in the Consent Order may be enforced in a court of competent jurisdiction pursuant to Sections 120.68 and 403.121, Florida Statutes. Failure to comply with the terms of this Consent Order shall constitute a violation of Section 403.161(1)(b), Florida Statutes.

33. Respondent is fully aware a violation of the terms of this Consent Order may subject Respondent to judicial imposition of damages, civil penalties of up to $10,000.00 per offense, and criminal penalties.

34. This Consent Order shall take effect upon the date of filing and acknowledgement by the Clerk of the Department and shall constitute final agency action by the Department pursuant to Section 120.69, Florida Statutes and Florida Administrative Code Rule 17-103.110(3).

35. The provisions of this Consent Order shall apply to and be binding upon the parties, their officers, their directors, agents, servants, employees, successors, and assigns and all persons, firms and corporations acting under, through or for them and upon those persons, firms and corporations in active concert or participation with them.

36. In consideration of the terms of this Consent Order, Respondent within 15 days of the effective date of the Consent Order shall voluntarily dismiss its petition for Formal Administrative Proceeding filed in the Division of Administrative Hearings, Case No. 87-4794.

FOR THE RESPONDENT:

10-13-88
Date

A. A. REEVES, III
Vice President, General Manager
Florida Cities Water Company
2112 Gulf Gate Drive
Post Office Box 5846
Sarasota, Florida 34227

DONE AND ORDERED this 18 day of October, 1988 at Orlando, Orange County, Florida.

A. ALEXANDER, P.E.
Deputy Assistant Secretary
Central Florida District
State of Florida Department
of Environmental Regulation
3319 Maguire Boulevard
Suite 232
Orlando, Florida 32803-3767

FILING AND ACKNOWLEDGMENT

FILED, on this date, pursuant to S120.52 Florida Statutes, with the designated Department Clerk, receipt of which is hereby acknowledged.

CLERK

10/18/88
Date

Exhibit_____(GSA-15)

Department of Environmental Protection

Lawton Chiles
Governor

Central District
3319 Maguire Boulevard, Suite 232
Orlando, Florida 32803-3767

Virginia B. Wetherell
Secretary

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Z 188 599 236

OCD-C-DW-95-0552

FLORIDA CITIES WATER COMPANY
4837 SWIFT ROAD SUITE 100
SARASOTA FL 34231

ATTENTION JOHNNIE M OVERTON
SENIOR VICE PRESIDENT

Re: Brevard County - DW
Barefoot Bay Wastewater Treatment Facility
State I.D. No. 3005P03394, NPDES No. FL0042293

Dear Mr. Overton:

On May 1, 1995, the Florida Department of Environmental Protection (Department) was granted authority by the U.S. Environmental Protection Agency (EPA) to administer the National Pollutant Discharge Elimination System (NPDES) permitting program. Effective that date, the Department assumed permitting and enforcement authority for the NPDES permit(s) issued by EPA for point source discharges from your wastewater facility(ies) to waters of the United States. Also on May 1, the new wastewater permitting rule, Chapter 62-620, Florida Administrative Code, (F.A.C.), became effective. The rule applies to all state wastewater permitting and supersedes previous rule provisions.

Pursuant to Rule 62-620.105, (F.A.C.), Florida Administrative Code, the enclosed order transfers administrative authority for your EPA-issued NPDES permit to the Department. The order identifies the Department as the permitting agency, provides the address to which your monitoring reports should be sent, and assigns an expiration date, based on the expiration date of your NPDES permit, to the order. The permittee should affix the referenced individual permit to the enclosed Order. If you recently received an NPDES permit from EPA with an effective date later than May 1, 1995, you should also attach the newly issued permit.

"In accordance with Rule 62-620.105, F.A.C., this order expires on June 30, 1995 (the date of expiration of your NPDES permit). However, because you timely filed an application for renewal of the existing NPDES permit, this order administratively continues your authorization to operate under that permit. On May 17, 1995, the EPA forwarded your federal application to the Department's Central District Office in Orlando. This application will eventually have to be amended to meet the requirements of Rule 62-620. The Department will take into account all of the agreed upon conditions in the second amended consent order you have entered into with the Department when acting upon this application."

Pursuant to Chapter 403.087, Florida Statutes, and Rule 62-4.052, F.A.C., an initial pro-rated regulatory program and surveillance fee is due July 30, 1995, for the facility(ies) referenced above. Each year thereafter, the annual regulatory program and surveillance fee will be due January 15. Enclosed is a work sheet identifying the annual fee(s) applicable to your facility(ies) according to information on file at our office. If you have questions about these fees, please contact this office by June 20, 1995. Invoices for the initial annual fees will be mailed after that date.

Please note that the Department did not request authorization for the federal sewage sludge management program. The EPA will issue sludge only permits for facilities with NPDES permits containing sludge management related permit conditions.

If there are any questions about your monitoring requirements or the annual fees, please contact Al Castro, P.E., of my staff at telephone number (407) 893-3313.

Sincerely,

Vivian F. Garfein

Vivian F. Garfein
Director of District Management

Date: June 6, 1995

VFG/ac/bn

Enclosures

cc: Daryll Joyner, FDEP Tallahassee

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
NOTICE OF AGENCY ACTION

In the Matter of an Order for:

Florida Cities Water Company
4837 Swift Road, Suite 100
Sarasota, FL 34231

WASTEWATER PERMIT
NO. FL0042293

Pursuant to Rule 62-620.105(11), Florida Administrative Code (F.A.C.), this order constitutes the transfer of administrative authority for Wastewater Permit No. FL0042293 to the Florida Department of Environmental Protection (Department). This NPDES permit was previously issued by EPA to Barefoot Bay Wastewater Treatment Facility. The NPDES permit is adopted under the authority of Section 403.0885, Florida Statutes (F.S.). This agency action is limited to identifying the Department as the permitting agency, providing a new address to send monitoring reports, and providing an expiration date.

Except for the sludge related permit conditions, all permit conditions remain in effect and are unchanged. All of the conditions are enforceable by the Department under Chapter 403, F.S., and under the Federal Clean Water Act by the Environmental Protection Agency.

The permittee shall continue all monitoring required by this Order. Required monitoring shall continue to be reported on EPA form 3320-1. EPA form 3320-1 for the months of April, May and June shall be sent to the EPA. Effective with the report for the month of July 1995, the permittee shall submit EPA form 3320-1 to the Department of Environmental Protection, Mail Station 3551, 2600 Blair Stone Road, Tallahassee, Florida 32399-2400. Other than the monitoring reports for April - June, all correspondence and requests regarding this wastewater permit should be directed to this office beginning immediately.

"In accordance with Rule 62-620.105, F.A.C., this order expires on June 30, 1995 (the date of expiration of your NPDES permit). However, because you timely filed an application for renewal of the existing NPDES permit, this order administratively continues your authorization to operate under that permit. On May 17, 1995, the EPA forwarded your federal application to the Department's Central District Office in Orlando. This application will eventually have to be amended to meet the requirements of Rule 62-620. The Department will take into account all of the agreed upon conditions in the second amended consent order you have entered into with the Department when acting upon this application."

A person whose substantial interests are affected by this agency action may petition for an administrative proceeding (hearing) in accordance with Section 120.57, F.S. The petition must contain the information set forth below and must be filed (received) in the Office of General Counsel of the Department at 2600 Blair Stone Road, Tallahassee, Florida 32399-2400, within 14 days of receipt of this permit. Petitioner shall mail a copy of the petition to the permittee at the address indicated above at the time of filing. Failure to file a petition within this time period shall constitute a waiver of any right such person may have to request an administrative determination (hearing) under Section 120.57, F.S. The Petition shall contain the following information:

(a) The name, address, and telephone number of each petitioner, the permittee's name and address, the Department Permit number, and the county in which the project is located;
(b) A statement of how and when each petitioner received notice of the Department's action or proposed action;
(c) A statement of how each petitioner's substantial interests are affected by the Department's action or proposed action;
(d) A statement of the material facts disputed by Petitioner, if any;
(e) A statement of facts which petitioner contends warrant reversal or modification of the Department's action or proposed action;
(f) A statement of which rules or statutes petitioner contends require reversal or modification of the Department's action or proposed action; and
(g) A statement of the relief sought by petitioner, stating precisely the action petitioner wants the Department to take with respect to the Department's action or proposed action.

If a petition is filed, the administrative hearing process is designed to formulate agency action. Accordingly, the Department's final action may be different from the position taken by it in this agency action. Persons whose substantial interests will be affected by any decision of the Department with regard to the agency action have the right to petition to become a party to the proceeding. The petition must conform to the requirements specified above and be filed (received) within 14 days of receipt of this notice in the Office of General Counsel at the above address of the Department. Failure to petition within the allowed time frame constitutes a waiver of any right such person has to request a hearing under Section 120.57, F.S., and to participate as a party to this proceeding. Any subsequent intervention will only be at the approval of the presiding officer upon motion filed pursuant to Rule 28-5.207, F.A.C.

This Order is final and effective on the date filed with the Clerk of the Department unless a petition is filed in accordance with the above paragraphs or unless a request for extension of time in which to file a petition is filed within the time specified for filing a petition and conforms to Rule 62-103.070, F.A.C. Upon timely filing of a petition or a request for an extension of time this agency action transferring administrative authority of the permit will not be effective until further Order of the Department.

When the agency action is final, any party to the Order has the right to seek judicial review of the Order pursuant to Section 120.68, F.S., by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the Department in the Office of General Counsel, 2600 Blair Stone Road, Tallahassee, Florida 32399-2400; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date of the Final Order is filed with the Clerk of the Department.

Executed in Orlando, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Vivian F. Garfein, Director
of District Management

FILING AND ACKNOWLEDGMENT

FILED, on this date, pursuant to s. 120.52(11), Florida Statutes, with the designated Department Clerk, receipt of which is hereby acknowledged.

Clerk

6/6/95
Date

VFG/ac/bn

Copies furnished to:

Daryll Joyner, FDEP Tallahassee
FDEP Melbourne
Doug McLaughlin

CERTIFICATE OF SERVICE

This is to certify that this NOTICE OF AGENCY ACTION and all copies were mailed by certified mail before the close of business on 6/6/95 to the listed persons by Beatriz Navarro.

ANNUAL FEE WORKSHEET
Domestic Wastewater

Facility Name: Barefoot Bay, W.W.T.F.

I.D.#: FL0042293 DEP District: Central

==========

PART I. Regular Surface Water Discharge

Scenario A:

1.	Permitted Capacity of Surface Water Discharge (mgd):	0.534
2.	Permitted Reuse Capacity for which surface water discharge serves as back-up: 0.093 mgd	
3.	70% of Permitted Reuse Capacity from 2.	0.065 mgd
4.	Adjusted Surface Water Discharge Permitted Capacity (Item 1 minus Item 3).	0.469 mgd
5.	Annual Fee for the capacity in item 4.	$3,375.00

Scenario B:

1.	UIC disposal with discharge authorized during Mechanical Integrity Test only, or percolation pond disposal with discharge authorized after specified storm events only, enter $200	$ 0.00

==========

PART II. Pretreatment

	If this facility has an approved pretreatment program enter $500.	$ 0.00

==========

PART III. Stormwater-only Outfalls

	Number of Stormwater-only outfalls regulated in the NPDES permit.	0
	Enter the amount equal to the number of Stormwater-only outfalls times $200.	$ 0.00

==========

PART IV. Total Calculated Fee

	TOTAL ANNUAL FEE (Sum of PART I fee from Scenario A or B, plus Parts II and III.)	$3,375.00

Note: The annual fee will be the lesser of the amount in Part IV or the Statutory Cap of $7,500.

Exhibit_____(GSA-16)

Department of Environmental Protection

Lawton Chiles
Governor

Central District
3319 Maguire Boulevard, Suite 232
Orlando, Florida 32803-3767

Virginia B. Wetherell
Secretary

NOTICE OF PERMIT

RECEIVED
SEP 8 1997
GENERAL OFFICE

In the Matter of an
Application for Permit by:
FLORIDA CITIES WATER COMPANY
4837 SWIFT ROAD SUITE 100
SARASOTA FL 34231

ATTENTION MICHAEL ACOSTA PE
VICE-PRES ENG & OPERATIONS

Brevard County
Barefoot Bay AWTF
Wastewater Permit Application
DEP File Number: 292948

Enclosed is Permit Number FL0042293-01 to operate a domestic wastewater facility issued under Section(s) 403.087 and 403.0885 of the Florida Statutes.

Any party to this order (permit) has the right to seek judicial review of the permit under section 120.68 of the Florida Statutes, by the filing of a Notice of Appeal under rule 9.110 of the Florida Rules of Appellate Procedure, with the Clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000 and by filing a copy of the notice of appeal accompanied by the applicable filing fees with the appropriate district court of appeal. The notice of appeal must be filed within thirty days after this notice is filed with the Clerk of the Department.

Executed in Orlando, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Vivian F. Garfein
Director of District Management

3319 Maguire Boulevard, Suite 232
Orlando, FL 32803-3767
Phone: (407)894-7555

Date: September 5, 1997

FILING AND ACKNOWLEDGMENT
FILED, on this date, pursuant to §120.52(11), Florida Statutes, with the designated Department Clerk, receipt of which is hereby acknowledged.

Clerk 9/5/97 Date

VFG/hc/cs

Enclosures: Permit and DMR with computer disk

Copies furnished to:
James E. Christopher, P.E.
Robert A. Day, SJRWMD
Compliance Section
Groundwater Section
USEPA-Region IV
Jan Mandrup-Paulsen-FDEP,Tallahassee
Doug Mac Laughlin, OGC, Tallahassee

CERTIFICATE OF SERVICE

This is to certify that this NOTICE OF PERMIT and all copies were mailed before close of business on 9/5/97 to the listed persons, by S. Pittenger.

Department of Environmental Protection

Lawton Chiles
Governor

Central District
3319 Maguire Boulevard, Suite 232
Orlando, Florida 32803-3767

Virginia B. Wetherell
Secretary

STATE OF FLORIDA
DOMESTIC WASTEWATER FACILITY PERMIT

PERMITTEE:

Florida Cities Water Company
Mr. Michael Acosta, P.E.
Vice-President, Eng. & Operations
4837 Swift Road, Suite 100
Sarasota, FL 34231

PERMIT NUMBER:	FL0042293-01
ISSUANCE DATE:	4/5/97
EXPIRATION DATE:	09-03-2002
FACILITY I.D. NO:	FL0042293 (Minor)
PATS NUMBER:	292948
GMS NUMBER:	3005P03394

FACILITY:

Barefoot Bay Advanced Wastewater Treatment Facility
7773 Dottie Lane
Brevard County
Barefoot Bay, Florida
Latitude: 27° 53' 18" N Longitude: 80° 32' 12" W

This permit is issued under the provisions of Chapter 403, Florida Statutes, and applicable rules of the Florida Administrative Code and constitutes authorization to discharge to waters of the state under the National Pollutant Discharge Elimination System. The above named permittee is hereby authorized to operate the facilities shown on the application and other documents attached hereto or on file with the Department and made a part hereof and specifically described as follows:

TREATMENT FACILITIES:

An existing 0.9 mgd annual average daily flow (aadf), hereby derated to 0.75 mgd aadf permitted capacity Advanced Wastewater Treatment (AWT) facility. Major process components include influent screening, flow equalization, biological nutrient removal (two anoxic/aeration basins), secondary clarification, chemical feed, filtration, chlorination, dechlorination and aerobic stabilization of residuals with:

EFFLUENT DISPOSAL:

Surface Water Discharge: A 0.75 mgd aadf permitted Limited Wet Weather Discharge to a drainage canal leading to the North Prong of Sebastian River (Class III fresh waters) at Discharge Location D001. The wet weather discharge is limited to ninety one (91) days a year. This wet weather discharge is a reduction of the Utility's existing surface water discharge. The point of discharge for D001 is located approximately at latitude 27° 53' 13" N, longitude 80° 32' 48" W.

REUSE:

Land Application: An existing 1.04 mgd aadf reuse capacity slow-rate public access land application system (R001) consisting of a reclaimed water transmission/distribution system for public access irrigation of golf courses, sod farms and citrus groves at/or near the Barefoot Bay Mobile Home Community, with an

anticipated reuse capacity of 1.25 mgd aadf as shown in the attached Reuse Service Area Map. The permitted reuse capacity is limited to 0.75 mgd which is the wastewater treatment permitted capacity. Land application system R001 includes an existing 0.13 mgd aadf permitted capacity 40-acre sprayfield, the 0.124 mgd aadf permitted capacity 50-Acre Barefoot Bay Golf Course and the 0.787 mgd aadf permitted capacity H & S Grove Site, which will be converted to a sod farm, one (1) existing 1.8 mg on-site lined substandard water storage pond and one (1) existing 4.0 mg reclaimed water storage pond. Land application system R001 is located approximately at latitude 27° 52' 48" N, longitude 80° 32' 55" W.

IN ACCORDANCE WITH: The limitations, monitoring requirements and other conditions as set forth in Pages 1 through 24 of this permit including the enclosed Discharge Monitoring Report (DMR). This permit supersedes and replaces Permit No. DC05-241879, the temporary authorization to operate the facility contained in the Second Amended Consent Order OGC File No. 87-0153 and Federal NPDES Permit No. FL 0042293, which are now considered null and void.

I. RECLAIMED WATER AND EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

A. Surface Water Discharges

1. During the period beginning on the issuance date and lasting through the expiration date of this permit, the permittee is authorized to discharge effluent from Outfall D001 to a drainage canal leading to the North Prong of Sebastian River. This limited wet weather discharge is authorized only for ninety one days a year. Such discharge shall be limited and monitored by the permittee as specified below:

			Effluent Limitations				Monitoring Requirements			
Parameter	Units	Max/Min	Annual Average	Monthly Average	Weekly Average	Single Sample	Monitoring Frequency	Sample Type	Monitoring Location Site Number	Notes
Flow	mgd	Maximum	0.75	Report	-	-	Continuous	Recording flow meters and totalizers	EFF-1	See Cond.I.A.4.
Carbonaceous Biochemical Oxygen Demand (5 day)	mg/L	Maximum	5.0	6.25	7.5	10.0	Weekly	16-hour flow proportioned composite	EFD-1	
Total Suspended Solids	mg/L	Maximum	5.0	6.25	7.5	10.0	Weekly	16-hour flow proportioned composite	EFD-1	
pH	std. units	Range	-	-	-	6.0 to 8.5	5 Days/Week	Grab	EFD-2	
Fecal Coliform Bacteria	See Permit Condition I.A.5.						Weekly	Grab	EFA-2	
Total Residual Chlorine (For Disinfection)	mg/L	Minimum	-	-	-	1.0	Continuous	Analyzer	EFA-2	See Cond.I.A.3., 6.
Total Residual Chlorine (For Dechlorination)	mg/L	Maximum	-	-	-	0.01	Weekly	Grab	EFD-2	
Nitrogen, Total as N	mg/L as N	Maximum	3.0	3.75	4.5	6.0	Weekly	16-hour flow proportioned composite	EFD-1	
Ammonia, Total as N	mg/L as N	Maximum	-	Report	-	-	Weekly	16-hour flow proportioned composite	EFD-1	
Phosphorous, Total as P	mg/L as P	Maximum	1.0	1.25	1.5	2.0	Weekly	16-hour flow proportioned composite	EFD-1	
Dissolved Oxygen (DO)	mg/L	Minimum	-	-	-	5.0	Weekly	Grab	EFD-2	
Whole Effluent Toxicity	% effluent	Minimum	See Permit Condition I.A.7.				-	Grab	EFD-2	

2. Effluent samples shall be taken at the monitoring site locations listed in Permit Condition I. A. 1. and as described below:

Monitoring Location Site Number	Description of Monitoring Location
EFA-2	Sampling point at the end of chlorine contact chamber.
EFD-1	Automatic sampler at the end of dechlorination chamber.
EFD-2	Sampling point at the end of the dechlorination chamber.
EFF-1	90° v-notch weir and flow recorder downstream of dechlorination chamber.

3. Hourly measurement of total residual chlorine for disinfection during the period of required operator attendance may be substituted for continuous measurement. *[Chapter 62-601, Figure 2, Footnotes 1 and 2, 5-31-93]*

4. Recording flow meters and totalizers shall be utilized to measure flow and calibrated at least annually. *[62-601.200(17) and .500(6), 5-31-93]*

5. The arithmetic mean of the monthly fecal coliform values collected during an annual period shall not exceed 14 per 100 mL of effluent sample. The median value of the fecal coliform values for a minimum number of 10 samples of effluent each collected on a separate day during a period of 30 consecutive days (monthly), shall not exceed 14 per 100 mL of sample. No more than 10 percent of the samples collected (the 90th percentile value) during a period of 30 consecutive days shall exceed 43 fecal coliform values per 100 mL of sample. Any one sample shall not exceed 86 fecal coliform values per 100 mL of sample. Note: To report the 90th percentile value, list the fecal coliform values obtained during the month in ascending order. Report the value of the sample that corresponds to the 90th percentile (multiply the number of samples by 0.9). For example, for 30 samples, report the corresponding fecal coliform number for the 27th value of ascending order. *[62-600.440(6)(c), 6-8-93]*

6. A minimum of 1.0 mg/L total residual chlorine must be maintained for a minimum contact time of 15 minutes based on peak hourly flow. *[62-600.440(5)(b) and (6)(b), 6-8-93]*

7. The permittee shall initiate the series of tests described below beginning with the first discharge event from the date of issuance of this permit to evaluate whole effluent toxicity of the discharge from outfall D001. All test species, procedures and quality assurance criteria used shall be in accordance with Methods for Measuring Acute Toxicity of Effluents to Freshwater and Marine Organisms, EPA/600/4-90/027F, or the most current edition. The control water and dilution water used will be moderately hard water as described in EPA/600/4-90/027F, Table 6, or the most current edition. A standard reference toxicant quality assurance (QA) acute toxicity test shall be conducted concurrently or no greater than 30 days before the date of the "routine" test, with each species used in the toxicity tests. The results of all QA toxicity tests shall be submitted with the discharge monitoring report (DMR). Any deviation of the bioassay procedures outlined herein shall be submitted in writing to the Department for review and approval prior to use.

   i. a. The permittee shall conduct 96-hour acute static renewal, multi-concentration (definitive) toxicity tests using the daphnid, Ceriodaphnia dubia, and the bannerfin shiner, Cyprinella leedsi. All tests will be conducted on single grab samples collected at evenly-spaced (6-hr) intervals not to exceed four (4) grab samples over a 24-hour discharge period. Each sample is to be used in a separate test in order to catch any peaks of toxicity and to account for daily variations in effluent quality.

b. If control mortality exceeds 10% for either species in any test, the test(s) for that species (including the control) shall be repeated. A test will be considered valid only if control mortality does not exceed 10% for either species. If, in any separate grab sample test, 100% mortality occurs prior to the end of the test, and control mortality is less than 10% at that time, that test (including the control) shall be terminated with the conclusion that the sample demonstrates unacceptable acute toxicity.

c. All "routine" tests shall be conducted using a control (0% effluent) and the following test concentrations: 100%, 50%, 25%, 12.5% and 6.25% effluent.

d. Mortalities of greater than 50% in a 100% effluent or a calculated LC50 < 100% effluent in any sample will constitute a violation of these permit conditions, and Rule 62-302.200(1), Rule 62-302.500(1)(d), and Rule 62-4.244(3)(a), F. A. C.

ii. a. The toxicity tests specified above shall be conducted once per discharge, in any twelve month period during which the facility discharges with no greater than one (1) routine test per consecutive twelve month period. Should the facility not discharge in a twelve month period, the permittee must notify the Department in writing that no discharge occurred during that twelve month period.

b. Results from "routine" tests shall include the LC50 values with 95% confidence intervals and be reported according to EPA/600/4-90/027F, Section 12, Report Preparation (or the most current edition), and shall be submitted to:

Florida Department of Environmental Protection
Central District Office
3319 Maguire Boulevard Suite 232
Orlando FL 32802-3767

iii. a. If an acute toxicity violation (mortalities of greater than 50% in a 100% effluent or a calculated LC50 < 100% effluent in any sample) is found in a "routine" test, the permittee shall conduct an additional multi-concentration test on each species indicating an acute toxicity violation. The additional test will include grab samples taken as described in 1.a. and run as separate definitive analyses. Results for each additional test will include the determination of LC50 values with 95% confidence limits. Additionally, a sample of sufficient size for chemistry analyses shall be taken concurrently with each bioassay sample. If the follow-up bioassay indicates the presence of toxicity, the chemistry samples shall be run. If the follow-up samples do not indicate the presence of toxicity, the chemistry samples shall not be run. Chemistry analyses shall include: metals, pesticides, herbicides and unionized ammonia. If the discharge ceases before additional, follow-up test samples can be collected, the follow-up test and companion chemistries shall be collected during the next discharge event(s) until two (2) valid tests are run.

b. Results from additional tests, required due to unacceptable acute toxicity in the "routine" tests, shall be submitted in a report prepared according to EPA/600/4-90/027F, Section 12, or the most current edition and submitted within 45 days of completion of each additional, valid tests. If the additional test(s) demonstrate unacceptable acute toxicity, the permittee will meet with the Department within 30 days of the report following the second follow-up test to identify corrective actions necessary to remedy the observed acute toxicity violations.

8. Dissolved oxygen shall not average less than 5.0 mg/L in a 24-hour period and shall never be less than 4.0 mg/L. *[62-302.530(31)]*

9. The permittee shall report the following information to the Department in the monthly Discharge Monitoring Report (DMR):

   (a) A list of days on which limited wet weather discharge to the surface receiving water body occurred;
   (b) The flow rate of the limited wet weather discharge on the days of discharge;
   (c) The concentrations of the parameters listed in Permit Condition I.A.1. of the effluent being discharged;
   (d) An explanation of any factors contributing to the limited wet weather discharge;
   (e) The cumulative number of days during the calendar year during which the limited wet weather discharge was activated; and
   (f) The month's rainfall and the cumulative rainfall during the calendar year during which the limited wet weather discharge was activated.

   [62-610.860(9), 1-9-96]

B. Reuse and Land Application Systems

1. During the period beginning on the issuance date and lasting through the expiration date of this permit, the permittee is authorized to direct reclaimed water to Reuse System(s) R001. Such reclaimed water shall be limited and monitored by the permittee as specified below:

			Reclaimed Water Limitations				Monitoring Requirements			
Parameter	Units	Max/Min	Annual Average	Monthly Average	Weekly Average	Single Sample	Monitoring Frequency	Sample Type	Monitoring Location Site Number	Notes
Flow	mgd	Maximum	0.75	Report	-	-	Continuous	Recording flow meters and totalizers	EFF-2	See Cond.I.B.3.
Carbonaceous Biochemical Oxygen Demand (5 day)	mg/L	Maximum	20.0	30.0	45.0	60.0	Weekly	16-hour flow proportioned composite	EFA-1	
Total Suspended Solids	mg/L	Maximum	-	-	-	5.0	Daily	Grab	EFB-1	
pH	std. units	Range	-	-	-	6.0 to 8.5	5 Days/Week	Grab	EFA-2	
Fecal Coliform Bacteria	See Permit Condition I.B.4.						Daily	Grab	EFA-2	
Total Residual Chlorine (For Disinfection)	mg/L	Minimum	-	-	-	1.0	Continuous	Analyzer	EFA-2	See Cond.I.B.5.
Turbidity	NTU	Maximum	See Permit Condition I.B.6.				Continuous	Analyzer	EFB-1	

2. Reclaimed water samples shall be taken at the monitoring site locations listed in Permit Condition I. B. 1. and as described below:

Monitoring Location Site Number	Description of Monitoring Location
EFA-1	Automatic sampler at end of the chlorine contact chamber.
EFA-2	Sampling point at the end of the chlorine contact chamber.
EFB-1	Sampling point after filtration and prior to chlorination.
EFF-2	Propeller meter at downstream of the effluent transfer pumps.

3. Recording flow meters and totalizers shall be utilized to measure flow and calibrated at least annually. *[62-601.200(17) and .500(6), 5-31-93]*

4. Over a 30 day period, 75 percent of the fecal coliform values (the 75th percentile value) shall be below the detection limits. Any one sample shall not exceed 25 fecal coliform values per 100 mL of sample. Any one sample shall not exceed 5.0 milligrams per liter of total suspended solids (TSS) at a point before application of the disinfectant. Note: To report the 75th percentile value, list the fecal coliform values obtained during that month in ascending order. Report the value of the sample that corresponds to the 75th percentile (multiply the number of samples by 0.75). For example, for 30 samples, report the corresponding fecal coliform value for the 23rd value of ascending order. *[62-600.440(5)(f), 6-8-93]*

5. The minimum total chlorine residual shall be limited as described in the approved operating protocol, such that the permit limitation for fecal coliform bacteria will be achieved. In no case shall the total chlorine residual be less than 1.0 mg/L. *[62-600.440(5)(b) and (6)(b), 6-8-93]*

6. The maximum turbidity shall be limited as described in the approved operating protocol, such that the permit limitations for total suspended solids and fecal coliforms will be achieved. *[62-610.463, 1-9-96]*

C. Other Limitations and Monitoring and Reporting Requirements

1. During the period beginning on the issuance date and lasting through the expiration date of this permit, the treatment facility shall be limited and monitored by the permittee as specified below:

			Limitations				Monitoring Requirements			
Parameter	Units	Max/Min	Annual Average	Monthly Average	Weekly Average	Single Sample	Monitoring Frequency	Sample Type	Monitoring Location Site Number	Notes
Flow	mgd	Maximum	0.75	Report	-	-	Continuous	Recording flow meters and totalizers	INF-1	See Cond.I.C.3, 4
Carbonaceous Biochemical Oxygen Demand (5 day)	mg/L	Report	-	Report	-	-	Weekly	16-hour flow proportioned composite	INF-2	See Cond.I.C.3
Total Suspended Solids	mg/L	Report	-	Report	-	-	Weekly	16-hour flow proportioned composite	INF-2	See Cond.I.C.3

2. Samples shall be taken at the monitoring site locations listed in Permit Condition I. C. 1 and as described below:

Monitoring Location Site Number	Description of Monitoring Location
INF-1	Parshall flume at headworks.
INF-2	Automatic sampler located prior to the parshall flume.

3. Influent samples shall be collected so that they do not contain digester supernatant or return activated sludge, or any other plant process recycled waters. *[62-601.500(4), 5-31-93]*

4. Recording flow meters and totalizers shall be utilized to measure flow and calibrated at least annually. *[62-601.200(17) and .500(6), 5-31-93]*

5. Parameters which must be monitored as a result of a surface water discharge shall be analyzed using a sufficiently sensitive method in accordance with 40 CFR Part 136. Parameters which must be monitored as a result of a ground water discharge (i.e., underground injection or land application system) shall be analyzed in accordance with Chapter 62-601, F.A.C. *[62-620.610(18), 11-29-94]*

6. The permittee shall provide safe access points for obtaining representative influent, reclaimed water, and effluent samples which are required by this permit. *[62-601.500(5), 5-31-93]*

7. During the period of operation authorized by this permit, the permittee shall complete and submit to the Department on a monthly basis Discharge Monitoring Report(s) (DMR), Form 62-620.910(10), as attached to this permit. The permittee shall make copies of the attached DMR form(s) and shall submit the completed DMR form(s) to the Department by the twenty-eighth (28th) of the month following the month of operation at the address specified below:

   Florida Department of Environmental Protection
   Wastewater Facilities Regulation Section, Mail Station 3551
   Twin Towers Office Building
   2600 Blair Stone Road
   Tallahassee, Florida 32399-2400

   [62-620.610(18), 11-29-94][62-601.300(1),(2), and (3), 5-31-93]

   Note: Enclosed for your use is a complementary computer diskette containing a copy of all DMRs and Ground Water Monitoring Reports (GWMRs) created using Microsoft Word 6. As required above, the permittee must still submit hard copies of these reports in lieu of a loaded diskette.

8. During the period of operation authorized by this permit, reclaimed water or effluent shall be monitored annually for the primary and secondary drinking water standards contained in Chapter 62-550, F.A.C., (except for turbidity, total coliforms, color, and corrosivity). Twenty-four hour composite samples shall be used to analyze reclaimed water or effluent for the primary and secondary drinking water standards. These monitoring results shall be reported to the Department annually on the Reclaimed Water or Effluent Analysis Report, Form 62-601.900(4), or in another format if requested by the permittee and if approved by the Department as being compatible with data entry into the Department's computer system.

During years when a permit is not renewed, a certification stating that no new non-domestic wastewater dischargers have been added to the collection system since the last reclaimed water or effluent analysis was conducted may be submitted in lieu of the report. The annual reclaimed water or effluent analysis report or the certification shall be completed and submitted in a timely manner so as to be received by the Department's Central District Office by January 1 of each year. *[62-601.300(4), 5-31-93][62-601.300(3), 5-31-93]*

9. The permittee shall submit an annual report of reclaimed water utilization using Form 62-610.300(4)(a)2. by January 1 of each year. *[62-610.870(3), 1-9-96]*

10. Unless specified otherwise in this permit, all reports and notifications required by this permit, including 24-hour notifications, shall be submitted to or reported to, as appropriate, the Department's Central District Office at the address specified below:

Florida Department of Environmental Protection
Central District Office
3319 Maguire Boulevard Suite 232
Orlando, Florida 32803-3767

Phone Number - (407) 894-7555
FAX Number - (407) 897-2966 All FAX copies shall be followed by original copies.

II. RESIDUALS MANAGEMENT REQUIREMENTS

1. The method of residuals use or disposal by this facility is land application.

2. Land application of residuals shall be in accordance with the conditions of this permit and the requirements of Chapter 62-640, F.A.C. *[62-640, 3-1-91]*

3. The domestic wastewater residuals for this facility are classified as Class B.

4. The wastewater treatment facility permittee shall be responsible for proper handling, use, and disposal of its residuals and will be held responsible for any disposal violations that occur unless the permittee can demonstrate that it has delivered residuals that meet the chemical criteria and appropriate stabilization requirements of this permit and that the disposer (e.g. hauler, contractor, or disposal/land application site owner) has legally agreed in writing to accept responsibility for proper disposal. *[62-640.300(3), 3-1-91]*

5. The permittee shall sample and analyze the residuals at least once every 3 months. All samples shall be representative and shall be taken after final treatment of the residuals but before use or disposal. Sampling and analysis shall be in accordance with the U.S. Environmental Protection Agency publication - POTW Sludge Sampling and Analysis Guidance Document, 1989. The following parameters shall be sampled and analyzed:

Parameter	Maximum Concentration	Maximum Cumulative Loading
Total Nitrogen	(Report only) % dry weight	Not applicable
Total Phosphorus	(Report only) % dry weight	Not applicable
Total Potassium	(Report only) % dry weight	Not applicable
Cadmium	100 mg/kg dry weight	4.4 pounds /acre *
Copper	3000 mg/kg dry weight	125 pounds/acre
Lead	1500 mg/kg dry weight	500 pounds/acre
Nickel	500 mg/kg dry weight	125 pounds/acre
Zinc	10,000 mg/kg dry weight	250 pounds/acre
pH	(Report only) standard units	Not applicable
Total Solids	(Report only) %	Not applicable

* The annual application rate for cadmium shall not exceed 0.5 pounds/acre/year.

6. Class B residuals shall not be used on unrestricted access areas. *[62-640.600(6)(b), 3-1-91]*

7. Class B residuals application shall be in accordance with the Agricultural Use Plan(s) approved by the Department for this facility. *[62-640.300(1), 3-1-91]*

8. Root crops, and fruits and vegetables which touch the soil and which are to be consumed raw shall not be grown on the application site for 18 months after the last application of Class B residuals. *[62-640.600(6)(c), 3-1-91]*

9. Fruits and vegetables which do not touch the soil and which are to be consumed raw shall not be harvested from the application site for 30 days following the last application of Class B residuals. Orchard tree crops, which do not come in contact with the residuals due to the application method, are exempted. This exemption does not apply to orchard tree crops which have fallen to the ground before harvesting. *[62-640.600(6)(d), 3-1-91]*

10. Pasture vegetation on the application site shall not be cut or used for grazing by livestock for 30 days following the last application of Class B residuals. *[62-640.600(6)(e), 3-1-91*

11. The public shall be restricted from the application area for 12 months after the last application of Class B residuals. *[62-640.600(6)(f), 3-1-91]*

12. The wastewater treatment facility permittee shall apply for a minor permit revision on DEP Form 62-620.910(9) for new, modified, or expanded residuals land application sites. The facilities permit shall be revised to include the new or revised Agricultural Use Plan(s) prior to application of residuals to the new, modified, or expanded sites. Current Agricultural Use Plan(s) identify residuals landspreading on the following sites: *[62-620.330, 11-29-94]*

		Site Location	
Site Name	Application Area (Acres)	City	County
Clay Whaley Ranch	800.0	St. Cloud	Osceola
Fortson Ranch Site #1	175.0	Fellsmere	Brevard
Fortson Ranch Site #2	371.0	Fellsmere	Brevard
Rolling MeadowRanch	270.0	Palm Bay	Brevard
Hayman's 711 Ranch	6,119.0	-	Osceola
Sun City, Inc.	938.0	Fellsmere	Indian River

13. Annual residuals application rates shall not exceed the agronomic rates based on the nitrogen requirements of the site vegetation in accordance with the approved Agricultural Use Plan(s). *[62-640.700(3)(d), 3-1-91]*

14. Residuals shall be applied with techniques and equipment to assure uniform application over the site. *[62-640.700(3)(n), 3-1-91]*

15. The pH of the domestic wastewater residuals soil mixture shall be 6.5 or greater at the time domestic wastewater residuals are applied. At a minimum, testing shall be done annually. *[62-640.700(3)(h), 3-1-91]*

16. The permittee shall maintain records of application areas and application rates on DEP Form 62-640.900(3) and shall have these records available for inspection upon request by the Department or the appropriate Local Environmental Program. These records shall include:

    a. Date of application of the residuals,
    b. Location of the residuals application site,
    c. Amount of residuals applied or delivered,

d. Identification of specific areas of the site where residuals were applied and acreage of that area,
e. Method of incorporation of residuals (if any),
f. Water table level at time of application, and
g. Concentration of nitrogen and heavy metals in the residuals, percent solids, and date of last analysis.

The permittee shall provide: annual updates to the Agricultural Use Plan(s) to reflect any changes in domestic wastewater residuals characteristics or agricultural practices; summaries of the total residuals, nitrogen, and heavy metals applied on an annual basis; and annual summaries of the cumulative metals applied. Updates to the Agricultural Use Plan(s) and annual summaries, including copies of applicable analytical laboratory reports for the wastewater residuals analysis for that period, shall be submitted to the Department's Central District Office by November 15 of each year. *[62-640.700(3)(e) and (p), 3-1-91]*

III. GROUND WATER MONITORING REQUIREMENTS

1. During the period of operation authorized by this permit, the permittee shall sample ground water in accordance with this permit and the approved ground water monitoring plan prepared in accordance with Rule 62-522.600, F.A.C. *[62-522.600, 4/14/94]*

2. The following monitoring wells shall be sampled quarterly for Land Application System R001:

Monitoring Location Site Number	Depth (Feet)	Aquifer Monitored	Well Type	New or Existing
MW-1	24	Surficial	Intermediate	Existing
MW-2	13	Surficial	Compliance	Existing
MW-3	24	Surficial	Background	Existing

[62-522.600, 4-14-94][62-610.463,1-9-96]

3. The following parameters shall be analyzed for each of the monitoring wells identified in the Permit Condition III.1:

Water level(field measurement)
Nitrate (as N)
Total dissolved solids
Fecal Coliform

[62-522.500 (11) (b), 4-1-94] [62-601.300(3), 62-601.700, and Figure 3 of 62-601, 5-31-93]

4. Ground water monitoring parameters shall be analyzed in accordance with Chapter 62-601, F.A.C. *[62-620.610(18), 11-29-94]*

5. Ground water monitoring test results shall be submitted on Part D of Form 62-620.910(10). Results shall be submitted with the DMR for each year during the period of operation allowed by this permit in accordance with Permit Condition I. C.7. *[62-522.600(10) and (11) (b), 4-14-94] [62-601.300(3), 62-601.700, and Figure 3 of 62-601, 5-31-93] [62-620.610(18), 11-29-94]*

6. Ground water monitoring wells shall be purged prior to sampling to obtain representative samples. *[62-601.700(5), 5-31-93]*

7. In accordance with Part D of Form 62-620.910(10), water levels shall be recorded before evacuating wells for sample collection. Elevation references shall include the top of the well casing and land surface at each well site (NGVD allowable) at a precision of plus or minus 0.1 foot. *[62-610.424(3), 4-2-94]*

IV. ADDITIONAL REUSE AND LAND APPLICATION REQUIREMENTS

Part III Public Access System(s)

1. Use of reclaimed water is authorized within the general service area identified in the attached map. The following uses of reclaimed water are authorized within this general service area: Golf Course Irrigation, Edible Crop Irrigation, Agricultural Irrigation (Other than edible crops). *[62-620.630(10)(d), 11-29-94]*

2. This reuse system includes the following major users (i.e., using 0.1 mgd or more of reclaimed water):

User Name	User Type	Anticipated Capacity (MGD)	Acreage
Barefoot Bay Golf Course	Golf Courses	0.12	50.0
Sprayfield	Sod Farms	0.13	40.0
H & S Grove Site	Farms and Other Agricultural Activities	0.79	294.0
Wheeler Farms Grove Site	Farms and Other Agricultural Activities	0.21	77.0
Total		1.25	461

[62-610.800(5), 1-9-96][62-620.630(10)(b), 11-29-94]

3. The permittee shall maintain an inventory of commercial agricultural operations using reclaimed water to irrigate edible crops. An updated inventory shall be submitted to the Central District Office at least 30 days prior to addition of an agricultural operation and with the annual reclaimed water utilization report required by Permit Condition I.D.9. *[62-610.475(5) and 62-610.870(3), 4-2-90]*

4. All ground water quality criteria specified in Chapter 62-520, F.A.C., shall be met at the edge of the zone of discharge. For major users of reclaimed water (i.e., using 0.1 mgd or more), the zone of discharge shall extend horizontally 100 feet from the application site or to the user's property line, whichever is less, and vertically to the base of the surficial aquifer. For other users, the zone of discharge shall extend horizontally to the boundary of the general service area identified in the attached map and vertically to the base of the surficial aquifer. *[62-520.200(23), 4-14-94] [62-522.400 and 62-522.410, 4-14-94]*

5. New major users of reclaimed water (i.e., using 0.1 mgd or more) may be added to the reuse system using the general permit described in Rule 62-610.890, F.A.C., if the requirements in this rule are complied with. Application for use of this general permit shall be made using Form 62-610.300(4)(a)1. *[62-610.890, 4-2-94]*

6. The treatment facilities shall be operated in accordance with the approved operating protocol. Only reclaimed water that meets the criteria established in the approved operating protocol may be released to system storage or to the reuse system. Reclaimed water that fails to meet the criteria in the approved operating protocol shall be directed to the substandard water storage pond. The operating protocol shall be reviewed and updated periodically (at least once each year) to ensure continuous compliance with the minimum treatment and disinfection requirements. Updated operating protocols shall be submitted to the Department's Central District Office for review and approval. *[62-610.320(6) and 62-610.463(2), 1-9-96]*

7. Cross-connections to the potable water system are prohibited. *[62-610.469(7), 1-9-96]*

8. A cross-connection control program shall be implemented and/or remain in effect within the areas where reclaimed water will be provided for use. *[62-610.469(7), 1-9-96]*

9. Maximum obtainable separation of reclaimed water lines and potable water lines shall be provided and the minimum separation distances specified in Rule 62-610.469(7), F.A.C., shall be provided. Reuse facilities shall be color coded or marked. Underground piping which is not manufactured of metal or concrete shall be color coded using Pantone Purple 522C using light stable colorants. Underground metal and concrete pipe shall be color coded or marked using purple as the predominant color. *[62-610.469(7), 1-9-96]*

10. In constructing reclaimed water distribution piping, the permittee shall maintain a 75-foot setback distance from a reclaimed water transmission facility to public water supply wells. No setback distances are required to other potable water supply wells or to any nonpotable water supply wells. *[62-610.471(3), 1-9-96]*

11. A setback distance of 75 feet shall be maintained between the edge of the wetted area and potable water supply wells, unless the utility adopts and enforces an ordinance prohibiting potable water supply wells within the reuse service area. No setback distances are required to any nonpotable water supply well, to any surface water, to any developed areas, or to any private swimming pools, hot tubs, spas, saunas, picnic tables, barbecue pits, or barbecue grills. *[62-610.471(1), (2), (5), and (7), 1-9-96]*

12. Reclaimed water shall not be used to fill swimming pools, hot tubs, or wading pools. *[62-610.469(4), 1-9-96]*

13. Low trajectory nozzles, or other means to minimize aerosol formation shall be used within 100 feet from outdoor public eating, drinking, or bathing facilities. *[62-610.471(6), 1-9-96]*

14. A setback distance of 100 feet shall be maintained from indoor aesthetic features using reclaimed water to adjacent indoor public eating and drinking facilities. *[62-610.471(8), 1-9-96]*

15. The public shall be notified of the use of reclaimed water. This shall be accomplished by posting of advisory signs in areas where reuse is practiced, notes on scorecards, or other methods. *[62-610.468(2), 1-9-96]*

16. Routine aquatic weed control and regular maintenance of storage pond embankments and access areas are required. *[62-610.414 and 62-610.464, 1-9-96]*

17. Overflows from emergency discharge facilities on storage ponds shall be reported as an abnormal event to the Department's Central District Office within 24 hours of an occurrence

as an abnormal event. The provisions of Rule 62-610.880(9), F.A.C., shall be met. *[62-610.800(9), 1-9-96]*

V. OPERATION AND MAINTENANCE REQUIREMENTS

1. During the period of operation authorized by this permit, the wastewater facilities shall be operated under the supervision of a(n) operator(s) certified in accordance with Chapter 61E12-41, F.A.C. In accordance with Chapter 62-699, F.A.C., this facility is a Category I, Class B facility and, at a minimum, operators with appropriate certification must be on the site as follows:

   A Class C or higher operator 8 hours/day for 7 days/week. The lead operator must be a Class B minimum, and must be on duty for eight (8) hours per day for five (5) days per week, provided that a lead/chief operator, or a backup Class B lead operator, is available by phone or pager during weekends and/or holidays, must be capable of immediately responding to any emergency situation that may occur at the plant and the automatic computer controls, monitoring and diversion equipment shall be in operation and fuctional at all times including weekends.

   [62-699, 5-20-94] [62-620.630(3), 11-29-94] [62-699.310, 5-20-92] [62-610.462, 1-9-96]

2. A certified operator shall be on-site and in charge of each required shift and for periods of required staffing time when the lead operator is not on-site. A certified operator shall be on call during periods the plant is unattended. *[62-699.311(10), (5), and (1), 5-20-92]*

3. The application to renew this permit shall include an updated capacity analysis report prepared in accordance with Rule 62-600.405, F.A.C. *[62-600.405(5), 6-8-93]*

4. The application to renew this permit shall include a detailed operation and maintenance performance report prepared in accordance with Rule 62-600.735, F.A.C. *[62-600.735(1), 6-8-93]*

5. The permittee shall maintain the following records and make them available for inspection on the site of the permitted facility:

   a. Records of all compliance monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation and a copy of the laboratory certification showing the certification number of the laboratory, for at least three years from the date the sample or measurement was taken;

   b. Copies of all reports required by the permit for at least three years from the date the report was prepared;

   c. Records of all data, including reports and documents, used to complete the application for the permit for at least three years from the date the application was filed;

   d. Monitoring information, including a copy of the laboratory certification showing the laboratory certification number, related to the residuals use and disposal activities for the time period set forth in Chapter 62-640, F.A.C., for at least three years from the date of sampling or measurement;

   e. A copy of the current permit;

f. A copy of the current operation and maintenance manual as required by Chapter 62-600, F.A.C.;

g. A copy of the facility record drawings;

h. Copies of the licenses of the current certified operators; and

i. Copies of the logs and schedules showing plant operations and equipment maintenance for three years from the date of the logs or schedules. The logs shall, at a minimum, include identification of the plant; the signature and certification number of the operator(s) and the signature of the person(s) making any entries; date and time in and out; specific operation and maintenance activities; tests performed and samples taken; and major repairs made. The logs shall be maintained on-site in a location accessible to 24-hour inspection, protected from weather damage, and current to the last operation and maintenance performed.

[62-620.350,11-29-94][61E12-41.010(1)(e), 11-02-93]

VI. SCHEDULES

Section VI is not applicable to this facility.

VII. INDUSTRIAL PRETREATMENT PROGRAM REQUIREMENTS

This facility is not required to have a pretreatment program at this time. *[62-625.500, 11-29-94]*

VIII. OTHER SPECIFIC CONDITIONS

1. If the permittee wishes to continue operation of this wastewater facility after the expiration date of this permit, the permittee shall submit an application for renewal, using Department Forms 62-620.910(1) and (2), no later than one-hundred and eighty days (180) prior to the expiration date of this permit. *[62-620.410(5), 11-26-94]*

2. Florida water quality criteria and standards shall not be violated as a result of any discharge or land application of reclaimed water or residuals from this facility. *[62-600.320(9), 11-29-94 and 62-302.510(5), 2-27-95][62-610.850(1)(a) and (2)(a),1-9-96][62-640.700(3)(c), 3-1-91]*

3. In the event that the treatment facilities or equipment no longer function as intended, are no longer safe in terms of public health and safety, or odor, noise, aerosol drift, or lighting adversely affects neighboring developed areas at the levels prohibited by Rule 62-600.400(2)(a), F.A.C., corrective action (which may include additional maintenance or modifications of the permitted facilities) shall be taken by the permittee. Other corrective action may be required to ensure compliance with rules of the Department. *[62-600.410(8), 6-8-93]*

4. The deliberate introduction of stormwater in any amount into collection/transmission systems designed solely for the introduction (and conveyance) of domestic/industrial wastewater; or the deliberate introduction of stormwater into collection/transmission systems designed for the introduction or conveyance of combinations of storm and domestic/industrial wastewater in amounts which may reduce the efficiency of pollutant removal by the treatment plant is prohibited. *[62-604.130(3), 5-31-93]*

5. Collection/transmission system overflows shall be reported to the Department in accordance with Permit Condition IX. 20. *[62-604.550, 5-31-93] [62-620.610(20), 11-29-94]*

6. The operating authority of a collection/transmission system and the permittee of a treatment plant are prohibited from accepting connections of wastewater discharges which have not received necessary pretreatment or which contain materials or pollutants (other than normal domestic wastewater constituents):

   a. Which may cause fire or explosion hazards; or

   b. Which may cause excessive corrosion or other deterioration of wastewater facilities due to chemical action or pH levels; or

   c. Which are solid or viscous and obstruct flow or otherwise interfere with wastewater facility operations or treatment; or

   d. Which result in treatment plant discharges having temperatures above 40°C.

   [62-604.130(4), 5-31-93]

7. The treatment facility, storage ponds, rapid infiltration basins, and/or infiltration trenches shall be enclosed with a fence or otherwise provided with features to discourage the entry of animals and unauthorized persons. *[62-610.464(4), 1-9-96] [and 62-600.410, 6-8-93]*

8. Screenings and grit removed from the wastewater facilities shall be collected in suitable containers and hauled to a Department approved Class I landfill or to a landfill approved by the Department for receipt/disposal of screenings and grit. *[62-7.540, 12-10-85]*

9. The permittee shall provide adequate notice to the Department of the following:

   a. Any new introduction of pollutants into the facility from an industrial discharger which would be subject to Chapter 403, F.S., and the requirements of Chapter 62-620, F.A.C. if it were directly discharging those pollutants; and

   b. Any substantial change in the volume or character of pollutants being introduced into that facility by a source which was identified in the permit application and known to be discharging at the time the permit was issued.

   Adequate notice shall include information on the quality and quantity of effluent introduced into the facility and any anticipated impact of the change on the quantity or quality of effluent or reclaimed water to be discharged from the facility.

   [62-620.625(2), 11-29-94]

IX. GENERAL CONDITIONS

1. The terms, conditions, requirements, limitations and restrictions set forth in this permit are binding and enforceable pursuant to Chapter 403, Florida Statutes. Any permit noncompliance constitutes a violation of Chapter 403, Florida Statutes, and is grounds for enforcement action, permit termination, permit revocation and reissuance, or permit revision. *[62-620.610(1), 11-29-94]*

2. This permit is valid only for the specific processes and operations applied for and indicated in the approved drawings or exhibits. Any unauthorized deviations from the approved

drawings, exhibits, specifications or conditions of this permit constitutes grounds for revocation and enforcement action by the Department. *[62-620.610(2), 11-29-94]*

3. As provided in Subsection 403.087(6), F.S., the issuance of this permit does not convey any vested rights or any exclusive privileges. Neither does it authorize any injury to public or private property or any invasion of personal rights, nor authorize any infringement of federal, state, or local laws or regulations. This permit is not a waiver of or approval of any other Department permit or authorization that may be required for other aspects of the total project which are not addressed in this permit. *[62-620.610(3), 11-29-94]*

4. This permit conveys no title to land or water, does not constitute state recognition or acknowledgment of title, and does not constitute authority for the use of submerged lands unless herein provided and the necessary title or leasehold interests have been obtained from the State. Only the Trustees of the Internal Improvement Trust Fund may express State opinion as to title. *[62-620.610(4), 11-29-94]*

5. This permit does not relieve the permittee from liability and penalties for harm or injury to human health or welfare, animal or plant life, or property caused by the construction or operation of this permitted source; nor does it allow the permittee to cause pollution in contravention of Florida Statutes and Department rules, unless specifically authorized by an order from the Department. The permittee shall take all reasonable steps to minimize or prevent any discharge, reuse of reclaimed water, or residuals use or disposal in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit. *[62-620.610(5), 11-29-94]*

6. If the permittee wishes to continue an activity regulated by this permit after its expiration date, the permittee shall apply for and obtain a new permit. *[62-620.610(6), 11-29-94]*

7. The permittee shall at all times properly operate and maintain the facility and systems of treatment and control, and related appurtenances, that are installed and used by the permittee to achieve compliance with the conditions of this permit. This provision includes the operation of backup or auxiliary facilities or similar systems when necessary to maintain or achieve compliance with the conditions of the permit. *[62-620.610(7), 11-29-94]*

8. This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit revision, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any permit condition. *[62-620.610(8), 11-29-94]*

9. The permittee, by accepting this permit, specifically agrees to allow authorized Department personnel, including an authorized representative of the Department and authorized EPA personnel, when applicable, upon presentation of credentials or other documents as may be required by law, and at reasonable times, depending upon the nature of the concern being investigated, to:

   a. Enter upon the permittee's premises where a regulated facility, system, or activity is located or conducted, or where records shall be kept under the conditions of this permit;

   b. Have access to and copy any records that shall be kept under the conditions of this permit;

c. Inspect the facilities, equipment, practices, or operations regulated or required under this permit; and

d. Sample or monitor any substances or parameters at any location necessary to assure compliance with this permit or Department rules.

[62-620.610(9), 11-29-94]

10. In accepting this permit, the permittee understands and agrees that all records, notes, monitoring data, and other information relating to the construction or operation of this permitted source which are submitted to the Department may be used by the Department as evidence in any enforcement case involving the permitted source arising under the Florida Statutes or Department rules, except as such use is proscribed by Section 403.111, Florida Statutes, or Rule 62-620.302, Florida Administrative Code. Such evidence shall only be used to the extent that it is consistent with the Florida Rules of Civil Procedure and applicable evidentiary rules. *[62-620.610(10), 11-29-94]*

11. When requested by the Department, the permittee shall within a reasonable time provide any information required by law which is needed to determine whether there is cause for revising, revoking and reissuing, or terminating this permit, or to determine compliance with the permit. The permittee shall also provide to the Department upon request copies of records required by this permit to be kept. If the permittee becomes aware of relevant facts that were not submitted or were incorrect in the permit application or in any report to the Department, such facts or information shall be promptly submitted or corrections promptly reported to the Department. *[62-620.610(11), 11-29-94]*

12. Unless specifically stated otherwise in Department rules, the permittee, in accepting this permit, agrees to comply with changes in Department rules and Florida Statutes after a reasonable time for compliance; provided, however, the permittee does not waive any other rights granted by Florida Statutes or Department rules. A reasonable time for compliance with a new or amended surface water quality standard, other than those standards addressed in Rule 62-302.500, F.A.C., shall include a reasonable time to obtain or be denied a mixing zone for the new or amended standard. *[62-620.610(12), 11-29-94]*

13. The permittee, in accepting this permit, agrees to pay the applicable regulatory program and surveillance fee in accordance with Rule 62-4.052, F.A.C. *[62-620.610(13), 11-29-94]*

14. This permit is transferable only upon Department approval in accordance with Rule 62-620.340, F.A.C. The permittee shall be liable for any noncompliance of the permitted activity until the transfer is approved by the Department. *[62-620.610(14), 11-29-94]*

15. The permittee shall give the Department written notice at least 60 days before inactivation or abandonment of a wastewater facility and shall specify what steps will be taken to safeguard public health and safety during and following inactivation or abandonment. *[62-620.610(15), 11-29-94]*

16. The permittee shall apply for a revision to the Department permit in accordance with Rules 62-620.300, 62-620.420 or 62-620.450, F.A.C., as applicable, at least 90 days before construction of any planned substantial modifications to the permitted facility is to commence or with Rule 62-620.300 for minor modifications to the permitted facility. A revised permit shall be obtained before construction begins except as provided in Rule 62-620.300, F.A.C. *[62-620.610(16), 11-29-94]*

17. The permittee shall give advance notice to the Department of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements. The permittee shall be responsible for any and all damages which may result from the changes and may be subject to enforcement action by the Department for penalties or revocation of this permit. The notice shall include the following information:

    a. A description of the anticipated noncompliance;

    b. The period of the anticipated noncompliance, including dates and times; and

    c. Steps being taken to prevent future occurrence of the noncompliance.

    [62-620.610(17), 11-29-94]

18. Sampling and monitoring data shall be collected and analyzed in accordance with Rule 62-4.246, Chapters 62-160 and 62-601, F.A.C., and 40 CFR 136, as appropriate.

    a. Monitoring results shall be reported at the intervals specified elsewhere in this permit and shall be reported on a Discharge Monitoring Report (DMR), DEP Form 62-620.910(10).

    b. If the permittee monitors any contaminant more frequently than required by the permit, using Department approved test procedures, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the DMR.

    c. Calculations for all limitations which require averaging of measurements shall use an arithmetic mean unless otherwise specified in this permit.

    d. Any laboratory test required by this permit for domestic wastewater facilities shall be performed by a laboratory that has been certified by the Department of Health and Rehabilitative Services (DHRS) under Chapter 10D41, F.A.C., to perform the test. On-site tests for dissolved oxygen, pH, and total chlorine residual shall be performed by a laboratory certified to test for those parameters or under the direction of an operator certified under Chapter 61E12-41, F.A.C.

    e. Under Chapter 62-160, F.A.C., sample collection shall be performed by following the protocols outlined in "DER Standard Operating Procedures for Laboratory Operations and Sample Collection Activities" (DER-QA-001/92). Alternatively, sample collection may be performed by an organization who has an approved Comprehensive Quality Assurance Plan (CompQAP) on file with the Department. The CompQAP shall be approved for collection of samples from the required matrices and for the required tests.

    [62-620.610(18), 11-29-94]

19. Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule detailed elsewhere in this permit shall be submitted no later than 14 days following each schedule date. *[62-620.610(19), 11-29-94]*

20. The permittee shall report to the Department any noncompliance which may endanger health or the environment. Any information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A written submission shall also be provided within five days of the time the permittee becomes aware of the circumstances. The written submission shall contain: a description of the noncompliance and its cause; the period of noncompliance including exact dates and time, and if the noncompliance has not

been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance.

a. The following shall be included as information which must be reported within 24 hours under this condition:

1. Any unanticipated bypass which causes any reclaimed water or effluent to exceed any permit limitation or results in an unpermitted discharge,

2. Any upset which causes any reclaimed water or the effluent to exceed any limitation in the permit,

3. Violation of a maximum daily discharge limitation for any of the pollutants specifically listed in the permit for such notice, and

4. Any unauthorized discharge to surface or ground waters.

b. If the oral report has been received within 24 hours, the noncompliance has been corrected, and the noncompliance did not endanger health or the environment, the Department shall waive the written report.

[62-620.610(20), 11-29-94]

21. The permittee shall report all instances of noncompliance not reported under Permit Conditions IX. 18. and 19. of this permit at the time monitoring reports are submitted. This report shall contain the same information required by Permit Condition IX. 20 of this permit. *[62-620.610(21), 11-29-94]*

22. Bypass Provisions.

a. Bypass is prohibited, and the Department may take enforcement action against a permittee for bypass, unless the permittee affirmatively demonstrates that:

1. Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage; and

2. There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and

3. The permittee submitted notices as required under Permit Condition IX. 22. b. of this permit.

b. If the permittee knows in advance of the need for a bypass, it shall submit prior notice to the Department, if possible at least 10 days before the date of the bypass. The permittee shall submit notice of an unanticipated bypass within 24 hours of learning about the bypass as required in Permit Condition IX. 20. of this permit. A notice shall include a description of the bypass and its cause; the period of the bypass, including exact dates and times; if the bypass has not been corrected, the anticipated time it is expected to continue; and the steps taken or planned to reduce, eliminate, and prevent recurrence of the bypass.

c. The Department shall approve an anticipated bypass, after considering its adverse effect, if the permittee demonstrates that it will meet the three conditions listed in Permit Condition IX. 22. a. 1. through 3. of this permit.

d. A permittee may allow any bypass to occur which does not cause reclaimed water or effluent limitations to be exceeded if it is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of Permit Condition IX. 22. a. through c. of this permit.

[62-620.610(22), 11-29-94]

23. Upset Provisions

a. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed contemporaneous operating logs, or other relevant evidence that:

1. An upset occurred and that the permittee can identify the cause(s) of the upset;

2. The permitted facility was at the time being properly operated;

3. The permittee submitted notice of the upset as required in Permit Condition IX. 20. of this permit; and

4. The permittee complied with any remedial measures required under Permit Condition IX. 5. of this permit.

b. In any enforcement proceeding, the permittee seeking to establish the occurrence of an upset has the burden of proof.

c. Before an enforcement proceeding is instituted, no representation made during the Department review of a claim that noncompliance was caused by an upset is final agency action subject to judicial review.

[62-620.610(23), 11-29-94]

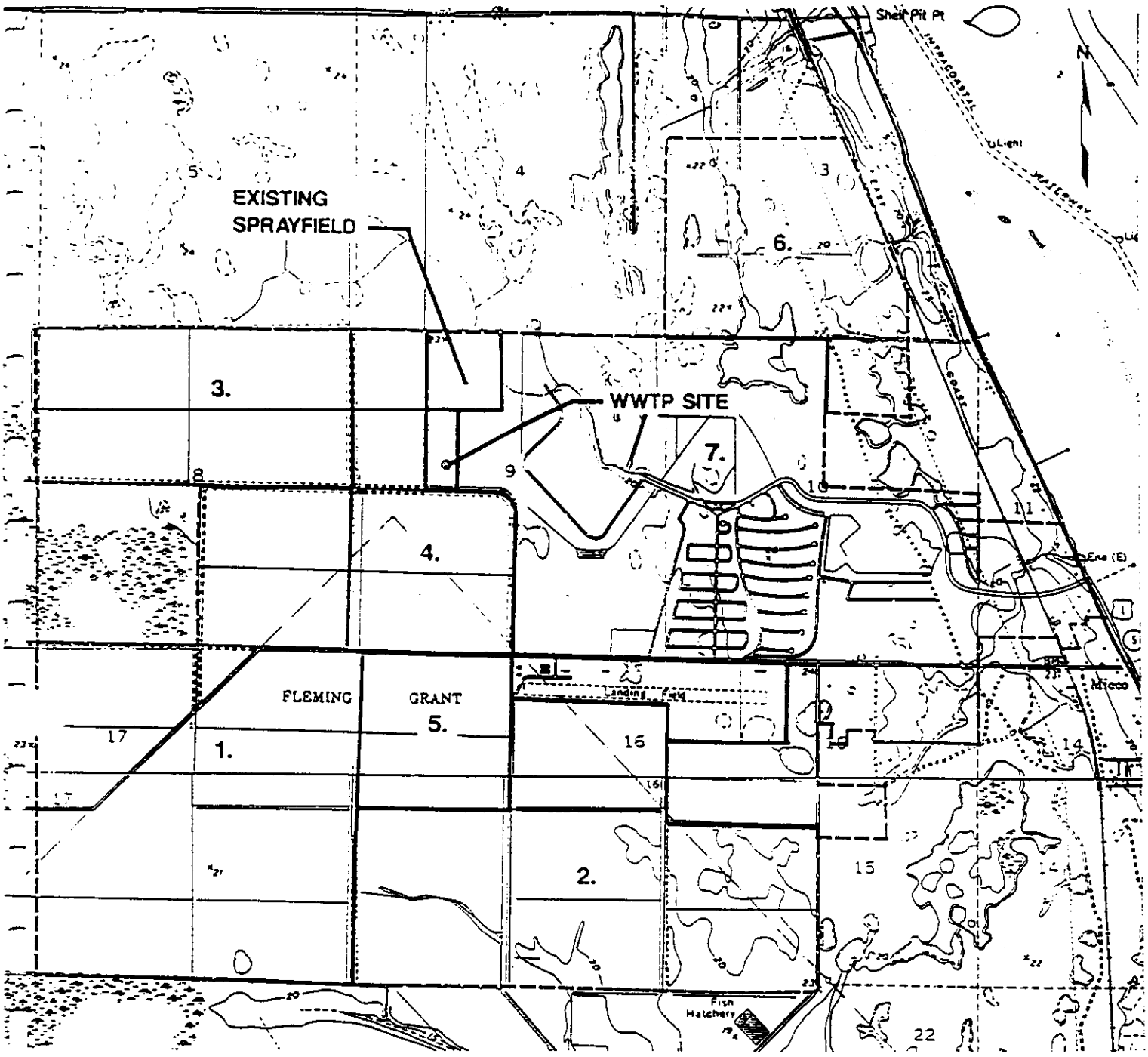
Executed in Orlando, Florida.

STATE OF FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION

Vivian F. Garfein

Vivian F. Garfein
Director of District Mnagement

DATE: September 5, 1997



LEGEND

1. MICCO GROVES
2. PARRISH (FORMERLY) CAVILIER GROVES
3. H & S GROVES
4. BREVARD GROVES (FORMERLY ESW)
5. ADICO C/O PARRISH GROVES
6. HERNDON TRACT
7. FLORIDA CITIES WATER COMPANY CERTIFICATED TERRITORY

SOURCE: 1970 USGS QUADRANGLE MAPS: GRANT, FELLSMERE AND SEBASTIAN

HARTMAN & ASSOCIATES, INC.
engineers, hydrogeologists, surveyors & management consultants
201 EAST PINE STREET - SUITE 1000 - ORLANDO, FL 32801
TELEPHONE (407) 839-3955 - FAX (407) 839-3790

PROJECT BOUNDARIES
AND POTENTIAL REUSE SITES

FIGURE
3-1

Exhibit_____(GSA-17)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

RECEIVED
MAR 26 1990
SARASOTA OFFICE

MAR 23 1990
REF: 4WM-FP

Mr. Robert H. French, P. E.
Senior Vice President
Barefoot Bay WWTP
P. O. Box 5846
Sarasota, Florida 34277

RE: Barefoot Bay WWTP

Dear Mr. French:

Acknowledgment is made of receipt of your application on March 6, 1990, for a National Pollutant Discharge Elimination System (NPDES) permit.

ur application is considered complete and has been assigned NPDES No. FL0042293, which should be referred to in future correspondence concerning this facility. Issuance of this NPDES permit has been assigned to Bridget Crawford. If you wish to inquire about the issuance schedule or have questions, please call her at (404) 347-3012.

Sincerely yours,

Roosevelt Childress

Roosevelt Childress, Chief
South Area Permits Unit
Facilities Performance Branch
Water Management Division

cc: FDER

FLORIDA CITIES WATER COMPANY

Exhibit_____(GSA-18)

June 8, 1990

United States Environmental Protection Agency
South Area Permits Unit
Facilities Performance Branch
Water Management Division
345 Courtland Street, NE
Atlanta, Georgia 30365

RE: NPDES Permit Application
Barefoot Bay WWTP

Gentlemen:

Enclosed please find our application Forms 1 and 2E for an NPDES Permit for the above referenced facility. If you have any questions with regard to this application, please don't hesitate to contact me.

Sincerely,

Robert H. French, P.E.
Senior Vice President

RHF/dj

Enclosure

FLORIDA CITIES WATER COMPANY
2112 Gulf Gate Drive
P.O. BOX 5846
Sarasota, Florida 34277
813 924-1128

rhf\epa2

(Fill—in areas are spaced for elite type, i.e., 12 characters/inch).

FORM 1 GENERAL

U.S. ENVIRONMENTAL PROTECTION AGENCY

GENERAL INFORMATION

Consolidated Permits Program

(Read the "General Instructions" before starting.)

I. EPA I.D. NUMBER

F

CASE ITEMS

I. EPA I.D. NUMBER

III. FACILITY NAME

V. FACILITY MAILING ADDRESS

VI. FACILITY LOCATION

PLEASE PLACE LABEL IN THIS SPACE

GENERAL INSTRUCTIONS

If a preprinted label has been provided, affix it in the designated space. Review the information carefully; if any of it is incorrect, cross through it and enter the correct data in the appropriate fill—in area below. Also, if any of the preprinted data is absent *(the area to the left of the label space lists the information that should appear)*, please provide it in the proper fill—in area(s) below. If the label is complete and correct, you need not complete Items I, III, V, and VI *(except VI-B which must be completed regardless)*. Complete all items if no label has been provided. Refer to the instructions for detailed item descriptions and for the legal authorizations under which this data is collected.

II. POLLUTANT CHARACTERISTICS

INSTRUCTIONS: Complete A through J to determine whether you need to submit any permit application forms to the EPA. If you answer "yes" to any questions, you must submit this form and the supplemental form listed in the parenthesis following the question. Mark "X" in the box in the third column if the supplemental form is attached. If you answer "no" to each question, you need not submit any of these forms. You may answer "no" if your activity is excluded from permit requirements; see Section C of the instructions. See also, Section D of the instructions for definitions of bold—faced terms.

SPECIFIC QUESTIONS	MARK 'X' YES	NO	FORM ATTACHED
A. Is this facility a publicly owned treatment works which results in a discharge to waters of the U.S.? (FORM 2A)		X	
B. Does or will this facility *(either existing or proposed)* include a concentrated animal feeding operation or aquatic animal production facility which results in a discharge to waters of the U.S.? (FORM 2B)		X	
C. Is this a facility which currently results in discharges to waters of the U.S. other than those described in A or B above? (FORM 2C)	X		X
D. Is this a proposed facility *(other than those described in A or B above)* which will result in a discharge to waters of the U.S.? (FORM 2D)		X	
E. Does or will this facility treat, store, or dispose of hazardous wastes? (FORM 3)		X	
F. Do you or will you inject at this facility industrial or municipal effluent below the lowermost stratum containing, within one quarter mile of the well bore, underground sources of drinking water? (FORM 4)		X	
G. Do you or will you inject at this facility any produced water or other fluids which are brought to the surface in connection with conventional oil or natural gas production, inject fluids used for enhanced recovery of oil or natural gas, or inject fluids for storage of liquid hydrocarbons? (FORM 4)		X	
H. Do you or will you inject at this facility fluids for special processes such as mining of sulfur by the Frasch process, solution mining of minerals, in situ combustion of fossil fuel, or recovery of geothermal energy? (FORM 4)		X	
I. Is this facility a proposed stationary source which is one of the 28 industrial categories listed in the instructions and which will potentially emit 100 tons per year of any air pollutant regulated under the Clean Air Act and may affect or be located in an attainment area? (FORM 5)		X	
J. Is this facility a proposed stationary source which is NOT one of the 28 industrial categories listed in the instructions and which will potentially emit 250 tons per year of any air pollutant regulated under the Clean Air Act and may affect or be located in an attainment area? (FORM 5)		X	

III. NAME OF FACILITY

1 SKIP: Barefoot Bay Wastewater Treatment Plant

IV. FACILITY CONTACT

A. NAME & TITLE (last, first, & title)	B. PHONE (area code & no.)
French, Robert, Sr. Vice Pres.	813 924 1128

V. FACILITY MAILING ADDRESS

A. STREET OR P.O. BOX: PO Box 5845

B. CITY OR TOWN	C. STATE	D. ZIP CODE
Sarasota	FL	34277

VI. FACILITY LOCATION

A. STREET, ROUTE NO. OR OTHER SPECIFIC IDENTIFIER: 500 Egret Circle

B. COUNTY NAME: evard

C. CITY OR TOWN	D. STATE	E. ZIP CODE	F. COUNTY CODE (if known)
Barefoot Bay	FL	32976	

CONTINUE ON REVERSE

TI JED FROM THE FRONT

SI CODES (4-digit, in order of priority)

A. FIRST	B. SECOND
5 2 (specify) Sanitary Services, Sewage System	7 (specify)
C. THIRD	**D. FOURTH**
(specify)	7 (specify)

. OPERATOR INFORMATION

A. NAME

= orida Cities Water Company

B. Is the name listed in Item VIII-A also the owner? [X] YES [ ] NO

C. STATUS OF OPERATOR (Enter the appropriate letter into the answer box; if "Other", specify.)

= EDERAL M = PUBLIC (other than federal or state)
= TATE O = OTHER (specify)
= PRIVATE

P (specify)

D. PHONE (area code & no.)

A 813 924 1128

E. STREET OR P.O. BOX

O Box 5846

F. CITY OR TOWN

S rasota

G. STATE FL **H. ZIP CODE** 34277

IX. INDIAN LAND

Is the facility located on Indian lands? [ ] YES [X] NO

EXISTING ENVIRONMENTAL PERMITS

A. NPDES (Discharges to Surface Water)	D. PSD (Air Emissions from Proposed Sources)
N	9 P
B. UIC (Underground Injection of Fluids)	**E. OTHER (specify)**
U	9 0SJUIC85005 9 (specify) DER Ground Water Monitor Permit
C. RCRA (Hazardous Wastes)	**E. OTHER (specify)**
R	9 0GC 87-0153 (specify) DER Operating Permit

. MAP

tt n to this application a topographic map of the area extending to at least one mile beyond property bounderies. The map must show e outline of the facility, the location of each of its existing and proposed intake and discharge structures, each of its hazardous waste eatment, storage, or disposal facilities, and each well where it injects fluids underground. Include all springs, rivers and other surface wat bodies in the map area. See instructions for precise requirements.

I. ATURE OF BUSINESS (provide a brief description)

Barefoot Bay WWTP is an activated sludge facility using the extended aeration mode. Effluent from the plant is spray irrigated on private land, discharged to percolation ponds and also discharged by consent order from DER, to a surface water canal. Sludge from the plant is hauled away and land applied in compliance with regulations.

XIII CERTIFICATION (see instructions)

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this application and all attachments and that, based on my inquiry of those persons immediately responsible for obtaining the information contained in the application, I believe that the information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

A. NAME & OFFICIAL TITLE (type or print)	B. SIGNATURE	C. DATE SIGNED
rt H. French, P.E. enior Vice President		6-8-90

COMMENTS FOR OFFICIAL USE ONLY

PA Form 3510-1 (Rev. 10-80) Reverse

lease type or print in the unshaded areas only | EPA ID Number (copy from Item 1 of Form 1): NA | Form Approved OMB No. 2040-0086 Approval expires 7-31-88

Form 2E NPDES

EPA Facilities Which Do Not Discharge Process Wastewater

eiving Waters

For this outfall, list the latitude and longitude, and name of the receiving water(s).

Outfall Number (list)	Latitude			Longitude			Receiving Water (name)
	Deg	Min	Sec	Deg	Min	Sec	
1	27	53	0	80	32	15	Drainage canal leading to north prong of Sebastian Creek.

II. Discharge Date (If a new discharger, the date you expect to begin discharging)

I. Type of Waste

A. Check the box(es) indicating the general type(s) of wastes discharged.

[X] Sanitary Wastes [ ] Restaurant or Cafeteria Wastes [ ] Noncontact Cooling Water [ ] Other Nonprocess Wastewater (Identify)

. If any cooling water additives are used, list them here. Briefly describe their composition if this information is available.

IV. Effluent Characteristics

A. Existing Sources — Provide measurements for the parameters listed in the left-hand column below, unless waived by the permitting authority (see instructions).

B. New Dischargers — Provide estimates for the parameters listed in the left-hand column below, unless waived by the permitting authority. Instead of the number of measurements taken, provide the source of estimated values (see instructions).

Pollutant or Parameter	(1) Maximum Daily Value (include units)		(2) Average Daily Value (last year) (include units)		(3) Number of Measurements Taken (last year)	(or) (4) Source of Estimate (if new discharger)
	Mass	Concentration	Mass	Concentration		
Biochemical Oxygen Demand (BOD)	28.4 kg	12.0 mg/l	8.0 kg	6.1 mg/l	52	
Total Suspended Solids (TSS)	61.8 kg	26.1 mg/l	12.3 kg	9.3 mg/l	260	
Fecal Coliform (if believed present or if sanitary waste is discharged)		936 #/100 ml		121 #/100 ml	52	
Total Residual Chlorine (if chlorine is used)	7.3 kg	3.1 mg/l	2.9 kg	2.2 mg/l	365	
Oil and Grease		NA		NA		
*Chemical oxygen demand (COD)		NA		NA		
*Total organic carbon (TOC)		NA		NA		
Ammonia (as N)	39.5 kg	16.7 mg/l	4.3 kg	3.3 mg/l	52	
Discharge Flow	Value 625,000 gal		349,000 gal		365	
pH (give range)	Value 7.6		6.7		365	
Temperature (Winter)		°C		19.4 °C	365	
...perature (Summer)		°C		22.8 °C	365	

*If noncontact cooling water is discharged

Except for leaks or spills, will the discharge described in this form be intermittent or seasonal?
If yes, briefly describe the frequency of flow and duration. ☐ Yes ☒ No

C. Treatment System *(Describe briefly any treatment system(s) used or to be used)*

Barefoot Bay WWTP uses activated sludge with extended aeration and chlorination to treat municipal sewage.

D. Other Information *(Optional)*

Use the space below to expand upon any of the above questions or to bring to the attention of the reviewer any other information you feel should be considered in establishing permit limitations. Attach additional sheets, if necessary.

VIII. Certification

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

A. Name & Official Title	B. Phone No. *(area code & no.)*
Robert H. French, P.E. Senior Vice President	(813) 924-1128
C. Signature	D. Date Signed
Robert H. French	6-5-90

Exhibit_____(GSA-19)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV

IN THE MATTER OF:	)	
	)	
Florida Cities Water Company	)	
2112 Gulf Gate Drive	)	Administrative Order No. 90-106
PO Box 5846	)	
Sarasota, Florida	)	
Barefoot Bay Mobile Home Park	)	
Brevard County, Florida	)	

ORDER PURSUANT TO SECTION 309
CLEAN WATER ACT

Pursuant to the authority of Section 309 of the Clean Water Act (hereinafter, the Act), 33 U.S.C. Section 1319(a), which has been delegated to me, I hereby make the following Findings of Fact and Violation and Order:

FINDINGS OF FACT

1. Florida Cities Water Company (hereinafter, the Respondent) is a corporation and as such is a "person" under Section 502 of the Act, 33 U.S.C. Section 1362.

2. The Respondent owns and operates a wastewater treatment facility located at 500 Egret Circle, Barefoot Bay, Brevard County, Florida which discharges pollutants to a drainage canal leading to Sebastian Creek, a water of the United States.

3. Section 301(a) of the Act, 33 U.S.C. Section 1319(a), prohibits the discharge of pollutants into waters of the United States except as in compliance with a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to Section 402 of the Act, 33 U.S.C. Section 1342.

4. On September 14, 1989, Florida Department of Environmental Regulation and Environmental Protection Agency (EPA) inspectors witnessed a discharge at the Respondent's location. Respondent had not applied for nor did it possess an NPDES permit at the time of the September, 1989 discharge.

5. On February 28, 1990, the Respondent submitted an NPDES application to EPA for the Barefoot Bay wastewater treatment plant. EPA acknowledged the receipt of the NPDES application as complete on March 23, 1990.

VIOLATION

The Respondent has violated Section 301(a) of the Act, 33 U.S.C. Section 1311(a), by discharging pollutants into waters of the United States without a valid NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. Section 1342.

ORDER

Based upon the foregoing Findings of Fact and Violation, and pursuant to the provisions of Section 309(a)(5) of the Act, as amended, 33 U.S.C. Section 1319(a)(5), it is hereby ordered that:

1. The Respondent shall within twenty (20) days of receipt of this Order, identify all surface water discharge points from the Barefoot Bay wastewater treatment facility into waters of the United States including the flow amount, date(s) of discharge, and discharge location.

2. That effective immediately, the following interim effluent limitations and monitoring requirements shall be met until an NPDES permit is issued:

PARAMETER	DISCHARGE LIMITATIONS		MONITORING REQUIREMENTS		
	Monthly Average	Daily Maximum	Measurement Frequency	Sample Type	Sampling Point
Flow, MGD	Report		Daily	Continuous	Effluent
BOD, mg/l	20	30	5/Week	Composite	Effluent
TSS, mg/l	20	30	5/Week	Composite	Effluent
Fecal Coliform MPN/100 ml	200	400	5/Week	Grab	Effluent
Ammonia as N mg/l	Report		5/Week	1/Week	Effluent

The pH shall not be less than 6.0 Standard Units nor greater than 8.5 Standard Units and shall be monitored daily by a grab sample.

The Dissolved Oxygen shall not be less than 5.0 mg/l and shall be monitored daily by a grab sample.

There shall be no discharge of floating solids or visible foam in other than in trace amounts.

3. The monitoring results obtained during the month shall be summarized and reported on a Discharge Monitoring Report Form (EPA Form 3320-1), postmarked no later than the 28th day of the month following the end of the previous month (reporting period).

4. That Respondent shall continue to maintain and operate its facility as efficiently as possible.

5. The Respondent shall within twenty (20) days of receipt of this Order, submit a schematic of the wastewater treatment facility process units as existing, proposed and under construction.

6. The Respondent shall within twenty (20) days of receipt of this Order, submit the annual cost of operations and maintenance (O&M) to operate the Barefoot Bay wastewater treatment facility, the capital cost of the current upgrade or expansion, and the estimated O&M cost of the completed facility.

7. Information required to be submitted by this Order shall be sent by registered mail, or its equivalent, to the following addressees:

Mr. John T. Marlar, Chief
Facilities Performance Branch
Water Management Division
U.S. Environmental Protection Agency
345 Courtland Street, N.E.
Atlanta, Georgia 30365

Mr. Alex Alexander, Deputy Assistant Secretary
Florida Department of Environmental Regulation
3319 Maguire Boulevard
Suite 232
Orlando, Florida 32803

8. Failure to comply with the requirements of this Order shall constitute a violation of this Order and may subject the Respondent to penalties as provided in Section 309 of the Act.

9. This Order does not operate an NPDES permit and nothing contained herein shall be construed as preventing prosecution for

the violations cited in this Order, for violations of the Order itself, or for any other violations of the Act.

SEP 26 1990

Date

John S Maclaren for

W. Ray Cunningham, Director
Water Management Division

AVATAR UTILITIES INC.

Exhibit_____(GSA-20)

PRIVILEGED AND CONFIDENTIAL

From: Gerald S. Allen
To: File
Subject: Barefoot Bay - USEPA Show Cause Hearing
Date: August 14, 1991

Encl:

Ref: (1) Letter - Pfaff (USEPA) to Tompkins, 7/16/91
(2) Letter - Bradtmiller to Pfaff, 8/5/91

CC: K. Blizzard, P. Bradtmiller, D. Getman, R. Gordon, A. A. Reeves

The subject hearing was held in the offices of the USEPA (Region IV) in Atlanta on August 9, 1991. Those attending were as follows:

Roy Herwig, USEPA, Water Enforcement
Tori George, Esq., USEPA - ORC
Ron Phelps, USEPA
Brigette Crawford, USEPA
Kathleen Blizzard, Esq., Hopping, Boyd, Green and Sams
A. A. Reeves, FCWC
Paul Bradtmiller, FCWC
Gerald S. Allen, AUI

R. Herwig opened the meeting by explaining the purpose of the show cause hearing and invited FCWC to provide additional response pertaining to the allegations in the order. P. Bradtmiller pointed out that the date FCWC undertook eminent domain proceedings was September 24, 1990 rather than as stated in reference (2) and that cleaning and scraping of the ponds was completed on February 25, 1990. A. Reeves and G. Allen explained the history of the deep injection well proposal and the reasons the Company chose to pursue land application as an alternative. G. Allen explained the efforts by the Company in seeking users of reclaimed water and the negative responses of the citrus growers in the area. A brief summary of the actions taken to date by the Company to acquire a suitable land application site was presented. K. Blizzard described the FDER and Water Management District permitting processes and explained the impact of the interveners on the FDER permitting process. She also described the hearing proceedings necessary to deal with the allegations of the interveners indicating that the final decision will probably not be forthcoming before late in the first quarter of 1992.

Mr. Herwig seemed to be satisfied that the Company had acted prudently and timely since September, 1989 in its efforts to eliminate the discharge, and noted that it had

eliminated a portion of the discharge through land application of reclaimed water on the 40 ac. tract. He then proceeded to inquire about when the discharge first commenced and the action taken immediately thereafter but prior to September, 1989. He pointed out that the FDER consent order mentioned earlier discharges. He also mentioned that he first became aware of the discharge by accompanying the FDER, at their invitation, on an inspection of the facility in 1989. A. Reeves indicated that the earliest date which discharges occurred was unknown, that the ponds at the site were intended to be "polishing ponds" rather than percolation ponds and that the facility was originally permitted by the Florida HRS. R. Herwig implied that FCWC would not be held responsible for discharges after notifying the FDER of same.

The proposed change to the draft NPDES Permit based on input from the U. S. Fish and Wildlife Service was discussed. R. Herwig acknowledged that it would probably not be possible to comply with the chlorine residual limits within the schedule requested by the Fish and Wildlife Service. P. Bradtmiller pointed out that in fact FCWC would be in noncompliance upon issuance of the permit if these changes were made. A discussion was held regarding the time required to complete installation of dechlorination facilities. FCWC maintained that at least six months would be required under the best timetable assuming expedited permitting by the FDER. Finally it was concluded that the only realistic solution was a compromise regarding the Fish and Wildlife Service request or the issuance of an administrative order concurrent with the NPDES Permit which will allow more time for the installation of dechlorination facilities. A discussion was held regarding the cost of such facilities and the very limited use thereof if the land application project proceeded as anticipated. Mr. Herwig seemed to be sensitive to the expense and very limited time such facilities would be useful. K. Blizzard offered to contact a representative of the Fish and Wildlife Service directly in an effort to achieve a compromise. Not only did Mr. Herwig not object to this proposal but seemed to encourage same.

R. Herwig expressed the opinion that FCWC had been responsive since 1989 in its efforts to eliminate the discharge. He indicted that there were several enforcement action options from which the USEPA could choose, as follows:

(1) No action.
(2) Class I Administrative Action - 0 to $25,000 fine.
(3) Class II Administrative Action - $25,001 to $125,000 fine.
(4) Civil Suit - seeking over $25,000 fine.

He indicated that in no way did this case indicate criminal proceedings as an option and that he was leaning toward Class I Administrative Action. He requested that FCWC provide the following additional information:

(1) Realistic schedules for the installation of dechlorination facilities and elimination of the discharge.

(2) All transactions or communications pertaining to reporting the discharge between FCWC and the FDER prior to September, 1989.

FCWC agreed to furnish this information by August 26, 1991.

R. Herwig indicated that any enforcement action by the USEPA must be finalized not later than September 30, 1991. He requested that FCWC officials be available for a telephone conference call on September 4 to discuss proposed enforcement action. He also requested that if possible, one of the parties representing FCWC have the authority to negotiate regarding the penalty amount, if the USEPA's proposed action includes a penalty.

GSA/pf

FLORIDA CITIES WATER COMPANY

Exhibit_____(GSA-21)

gust 23, 1991

FEDERAL EXPRESS

RECEIVED

AUG 28 1991

Hopping, Boyd Green & Sams

Roy A. Herwig, P. E.
Compliance Section
Facilities Performance Branch
Water Management Division
United States Environmental Protection Agency
345 Courtland Street, N. E.
Atlanta, Georgia 30365

Re: Barefoot Bay Wastewater Treatment Plant
NPDES Permit Application No. FL0042293

Dear Mr. Herwig:

This letter responds to your request for additional information made at our meeting on August 9, 1991 and supplements our submission of August 5, 1991.

Chronology of FCWC Activities 1969-1989

Pursuant to your request, Florida Cities Water Company (FCWC) ereby provides the following detailed chronology of the nteraction between the Florida Department of Environmental Regulation (FDER) and FCWC regarding the surface water discharge at the Barefoot Bay Wastewater Treatment Plant (WWTP) prior to the EPA's first involvement in September 1989.

This chronology shows that FCWC had obtained necessary permits and constructed the WWTP with an emergency discharge pipe in late 1969/early 1970. Because capacity continued to exceed flow, FCWC did not seek permitting of a discharge in its various FDER operating permits, including the 1982 renewal, which expired in 1987. A surface water discharge was noted by FDER in late 1985. After exploring a variety of solutions, in 1986 FCWC constructed an additional pond system on an adjacent 40-acre tract, which proved technically infeasible after approximately $600,000 had been expended by FCWC in this endeavor. FCWC later expended $100,000 to construct a sprayfield on the 40-acre tract. Following a FDER Notice of Violation on March 3, 1987, FCWC met on a number of occasions with FDER, kept them fully informed, and entered into a Consent Order which provided for deep well injection as the ultimate solution for the discharge. Although deep well injection also later proved impracticable due to Water Management District resistance and technical questions, FCWC expended approximately $166,000 on these efforts. FCWC is pursuing ultimate disposal of the effluent on a 300-acre spray field and has expended $208,000 to date to that end.

The following is a detailed summary of FCWC actions prior to September 1989:

FLORIDA CITIES WATER COMPANY
4837 Swift Road, Suite 100
Sarasota, Florida 34231
P O Box 21119 (34276-1119)

1. On September 24 and 29, 1969, the Florida State Board of Health and the Central and Southern Florida Flood Control District issued their respective approvals of the construction application for the Barefoot Bay WWTP for Gulf American Corporation, the predecessor of Avatar Utilities Inc. of Florida,which is the predecessor of FCWC (Enclosures A and B). These approvals were based on a plan which included holding effluent in golf course irrigation lagoons which ultimately discharged to surface waters. The approved plan also included the existing ponds with the emergency discharge pipe which is the source of the present discharge. Infrastructure was constructed for the golf course disposal system; but due to low levels of effluent during the 1970's and changes in regulations in later years, it was never put into operation.

2. FCWC records indicate that in 1972 and 1975 FDER issued an operating permit and a renewal of that permit for the WTTP as constructed. FCWC has been unable to locate copies of these permits. Because effluent levels were well within existing capacity, the 1978 operating permit (No. D005-8349) was issued for "totally confined effluent disposal" (Enclosure C). However, it should be noted that Condition 6 of the permit indicated that a discharge was authorized. In 1982 effluent levels remained within capacity, and FDER issued operating permit No. D005-61503 for a system with no discharge to surface waters (Enclosure D). The WWTP continued to operate with the emergency discharge pipe in place under the 1982 operating permit, which contained an expiration date of August 1, 1987.

3. During 1984 and 1985, FCWC investigated various solutions for expanding capacity of effluent disposal at the WWTP. During this period FCWC purchased a 40-acre tract, constructed rapid rate infiltration pond test cells and commenced load testing on the site in order to provide rapid rate infiltration pond capacity. On April 19, 1985 FCWC provided FDER with an update on these activities and requested a conditional letter of approval for the 40-acre project. On August 8, 1985, FCWC submitted an application to FDER for permitting of the construction of a test cell at the 40-acre site and on January 14, 1986 FDER issued Construction Permit No. DC05-108926 for the test cell (Enclosure E).

4. In late 1985 site inspections by FDER reflected that the total flow from the WWTP was not being completely contained in the percolation/evaporation ponds and effluent was being discharged via the emergency discharge pipe. A Warning Notice was issued by FDER on January 29, 1986. FCWC responded to the Warning Notice on February 3, 1986, and on March 4, 1986 FDER

application for construction of the deep injection well system on May 9, 1989. The application was being processed in September, 1989 when EPA took cognizance of the surface discharge. As explained in our letter of August 5, 1991, deep well injection was eventually abandoned due to concerns over well failure and the environmentally-preferred option of spray irrigation which FCWC was ordered to investigate by St. Johns River Water Management District. Nonetheless, FCWC had expended approximately $166,000 on engineering and permitting of the deep injection well. In addition, costs associated with the 300-acre sprayfield are estimated to be $5 million; thus, this facility will cost $2 million more to construct than the deep injection well, still estimated at $3 million. FCWC has since expended $108,000 on engineering, permitting and legal costs to date for the sprayfield.

Compliance Schedule for Meeting Chlorine Limitations in NPDES Permit

At our meeting on August 9, 1991, we also discussed the time required to comply with the chlorine limitations requested by the Fish and Wildlife Service in draft NPDES Permit No. FL0042293 dated August 9, 1991. However, since our meeting, FCWC has been able to reach agreement with Roosevelt Childress of EPA Permits Section to revise the monitoring of fecal coliform in the NPDES permit so that FCWC will be able to comply with the requested chlorine limitations when the permit is issued. Therefore, it will not be necessary to seek a compliance schedule for meeting the chlorine limitations in the NPDES permit.

Time Required to Eliminate the Discharge

In addition, you asked that we consider the time required to complete the 300-acre sprayfield and thereby eliminate the discharge permitted in draft NPDES Permit No. FL0042293. FCWC has estimated that the acquisition of the sprayfield site will require 45 days; awarding of the contract for construction, 15 days; construction of the sprayfield, 220 days; for a total of 280 days. However, FCWC will not be able to commence these activities until the pending administrative proceedings regarding the two FDER permits for the sprayfield are concluded. The hearing for FDER Permit No. DC05-194008 has been set for November 12 through 14, 1991. FCWC has requested that the challenge to Permit No. DC05-194894, filed six weeks later, be consolidated with the challenge to Permit DC05-194008 and that the November hearing be extended by one day. The Hearing Officer has not yet ruled on this motion. If the two cases are consolidated, FCWC estimates that a final order can be expected from FDER six months after the hearing. If the cases are not consolidated, several additional months will have to be added to this time estimate. Finally, if the cases are appealed

accepted the FCWC's proposed schedule for completion of capacity load tests to determine the feasibility of use of the 40-acre site. FCWC continued testing of the site.

5. On September 19, 1986, FCWC submitted an application for a construction permit for renovation of the existing percolation ponds and completion of the rapid rate infiltration ponds on the 40-acre site pending additional load testing (Enclosure F). On October 22, 1986 and December 18, 1986 FDER requested further information on the application; FCWC responded to all requests. On January 22, 1987, FDER advised FCWC that sufficient testing had been conducted on the 40-acre site for FDER to conclude that the site was unsatisfactory and that the request to extend Construction Permit No. DC05-108926 for further testing was denied.

6. On March 4, 1987, FDER issued a Notice of Violation concerning the discharge and a meeting was held between FDER and FCWC regarding this notice on March 13, 1987. FDER agreed to continued load-testing to determine the capacity of the proposed pond at the 40-acre site. Other disposal options for ultimate buildout at Barefoot Bay were discussed, including deep well injection, irrigation of existing groves, and permitting of a surface water discharge. FCWC continued load testing and ultimately concluded that proposed ponds on the 40-acre site would not comply with FDER regulations or accommodate ultimate flows of the WWTP. Nonetheless, FCWC had expended approximately $250,000 for engineering, testing and infrastructure to the 40-acre site, as well as $350,000 for purchase of the site. FCWC continued to undertake technical investigation of other disposal options during 1987, including use of the 40-acre tract as a spray field (which was put into operation late in 1989 at a cost of approximately $100,000).

7. Further meetings between FDER and FCWC were held on October 23, 1987 and February 9, 1988 and numerous correspondence was exchanged between the parties during this period regarding the most feasible solution for ultimate elimination of the discharge, including FCWC's submission of an application to FDER for a renewal of the WWTP's operating permit with a surface water discharge on July 30, 1987. On September 29, 1987, FDER issued its Intent to Deny this renewal of the operating permit. Ultimately, a Consent Order was entered into between FDER and FCWC on October 18, 1988. (Provided in Exhibit L to our August 5, 1991 submission). The Order provided for continued surface water discharge until elimination of the discharge by deep well injection. Following completion of engineering, FCWC submitted its

to the Florida District Court of Appeal, we are unable to estimate final resolution.

FDER recently tolled the compliance schedule in the FDER/FCWC Amended Consent Order; but, because of the contingencies involved in the pending administrative proceedings, FDER deferred consideration of a revised compliance schedule until after the permit challenges are resolved (Enclosure G). Thus, because the time estimate is uncertain and could potentially reach several years, FCWC suggests that the date for final elimination of the discharge of June 30, 1995, provided in the draft NPDES Permit, is appropriate.

Conclusion

FCWC believes that this submission responds fully to your request for information about this period, and demonstrates FCWC's continuous contacts with FDER and good faith in making repeated and costly efforts ($1,174,000) to eliminate this discharge in an area of the State of Florida with unfavorable geological conditions.

Please telephone me if you have any questions. FCWC would be happy to provide further information or documentation if needed.

As agreed at the close of our meeting on August 9, 1991, we are planning on a teleconference on September 4, 1991. We suggest 2:00 p.m. on that date.

Sincerely,

Paul H. Bradtmiller
Senior Vice President

PHB/cad

Enclosures

cc: (w/encls.)
Alex Alexander
Gerald Allen
Kathleen Blizzard
Roosevelt Childress
Tori George
Dennis Getman
Michael Hom
Roger O. Pfaff

Exhibit_____(GSA-22)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

SEP 16 1991

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

RECEIVED

SEP 20 1991

GENERAL OFFICE

REF: 4WM-FP

Mr. Paul H. Bradtmiller
Senior Vice President
Florida Cities Water Company
P.O. Box 21119
Sarasota, Florida 34276

RE: Final Issuance of NPDES Permit No. FL0042293
Barefoot Bay WWTP

Dear Mr. Bradtmiller:

Enclosed is the National Pollutant Discharge Elimination System (NPDES) permit for the above-referenced facility. This action constitutes the Environmental Protection Agency's final permit decision in accordance with Title 40, Code of Federal Regulations (C.F.R.) Section 124.15(a). The permit will become effective as specified, provided that no timely request for an evidentiary hearing is received by the Agency.

Any interested person may contest this decision by submitting a timely request for an evidentiary hearing (hearing) pursuant to the procedures at 40 C.F.R. § 124.74. If a request for a hearing is received by the Agency, following review, a determination will be made and the requester advised of the Agency's decision on the request. Until that time, please be advised that any request will render the permit ineffective pursuant to 40 C.F.R. § 124.15(b). For a new source, a new discharger, a recommencing discharger, or a facility for which an untimely permit renewal application was submitted, a hearing request renders the facility without an NPDES permit and the facility may not discharge (unless relief is granted by the Presiding Officer under 40 C.F.R. § 124.60(a)).

If the evidentiary hearing request is granted, in whole or part, to an existing source, the effect of the contested provision(s), and any other conditions not severable from those conditions, will be stayed and not subject to judicial review pending final Agency action. In this case, all provisions of the prior permit, as well as, all uncontested provisions of the reissued permit shall continue fully enforceable and effective pending final Agency action on the permit appeal. See 40 C.F.R. § 124.60.

Printed on Recycled Paper

To request an evidentiary hearing under 40 C.F.R. § 124.74, you must submit an original and two copies of the request to the Regional Hearing Clerk at the letterhead address within thirty (30) days from service of this notice. A copy of the procedures and requirements for evidentiary hearing requests and appeals to the Administrator is enclosed.

For purposes of judicial review under the Clean Water Act, 33 U.S.C. § 1251 et seq., final Agency action on a permit does not occur unless and until a party has exhausted its administrative remedies as required by 40 C.F.R. Part 124.

Further information on procedures pertaining to the filing of an evidentiary hearing request or other legal matters may be obtained by contacting Kevin B. Smith, Assistant Regional Counsel, at (404) 347-3777.

Sincerely yours,

W. Ray Cunningham, Director
Water Management Division

Enclosures (4): Evidentiary Hearing Procedures
Final NPDES Permit
Amendment to Fact Sheet or Statement of Basis
Discharge Monitoring Report Form and Instructions

cc: Florida DER (with all enclosures, except Evid. Hearing Procedures)

of literature or other material in a foreign language shall be accompanied by copies of the original publication.

(3) Where relevant data or information is contained in a document also containing irrelevant matter, either the irrelevant matter shall be deleted or the relevant portions shall be indicated.

(4) Failure to comply with the requirements of this section or any other requirement in this subpart may result in the noncomplying portions of the submission being excluded from consideration. If the Regional Administrator or the Presiding Officer, on motion by any party or *sua sponte*, determines that a submission fails to meet any requirement of this Subpart, the Regional Administrator or Presiding Officer shall direct the Regional Hearing Clerk to return the submission, together with a reference to the applicable regulations. A party whose materials have been rejected has 14 days to correct the errors and resubmit, unless the Regional Administrator or the Presiding Officer finds good cause to allow a longer time.

(d) The filing of a submission shall not mean or imply that it in fact meets all applicable requirements or that it contains reasonable grounds for the action requested or that the action requested is in accordance with law.

(e) The original of all statements and documents containing factual material, data, or other information shall be signed in ink and shall state the name, address, and the representative capacity of the person making the submission.

§ 124.74 Requests for evidentiary hearing.

(a) Within 30 days following the service of notice of the Regional Administrator's final permit decision under § 124.15, any interested person may submit a request to the Regional Administrator under paragraph (b) of this section for an evidentiary hearing to reconsider or contest that decision. If such a request is submitted by a person other than the permittee, the person shall simultaneously serve a copy of the request on the permittee.

(b)(1) In accordance with § 124.76, such requests shall state each legal or factual question alleged to be at issue, and their relevance to the permit decision, together with a designation of the specific factual areas to be adjudicated and the hearing time estimated to be necessary for adjudication. Information supporting the request or other written documents relied upon to support the request shall be submitted as required by § 124.73 unless they are already part of the administrative record required by § 124.18.

Note: This paragraph allows the submission of requests for evidentiary hearings even though both legal and factual issues may be raised, or only legal issues may be raised. In the latter case, because no factual issues were raised, the Regional Administrator would be required to deny the request. However, on review of the denial the Administrator is authorized by § 124.91(a)(1) to review policy or legal conclusions of the Regional Administrator. EPA is requiring an appeal to the Administrator even of purely legal issues involved in a permit decision to ensure that the Administrator will have an opportunity to review any permit before it will be final and subject to judicial review.

(2) Persons requesting an evidentiary hearing on an NPDES permit under this section may also request an evidentiary hearing on a RCRA or UIC permit. PSD permits may never be made part of an evidentiary hearing under Subpart E. This request is subject to all the requirements of paragraph (b)(1) of this section and in addition will be granted only if:

(i) Processing of the RCRA or UIC permit at issue was consolidated with the processing of the NPDES permit as provided in § 124.4;

(ii) The standards for granting a hearing on the NPDES permit are met;

(iii) The resolution of the NPDES permit issues is likely to make necessary or appropriate modification of the RCRA or UIC permit; and

(iv) If a PSD permit is involved, a permittee who is eligible for an evidentiary hearing under Subpart E on his or her NPDES permit requests that the formal hearing be conducted under the procedures of Subpart F and the Regional Administrator finds that consolidation is unlikly to delay final permit issuance beyond the PSD one-year statutory deadline.

(c) These requests shall also contain:

(1) The name, mailing address, and telephone number of the person making such request;

(2) A clear and concise factual statement of the nature and scope of the interest of the requester;

(3) The names and addresses of all persons whom the requester represents; and

(4) A statement by the requester that, upon motion of any party granted by the Presiding Officer, or upon order of the Presiding Officer *sua sponte* without cost or expense to any other party, the requester shall make available to appear and testify, the following:

(i) The requester;

(ii) All persons represented by the requester; and

(iii) All officers, directors, employees, consultants, and agents of the requester and the persons represented by the requester.

(5) Specific references to the contested permit conditions, as well as suggested revised or alternative permit conditions (including permit denials) which, in the judgment of the requester, would be required to implement the purposes and policies of the CWA.

(6) In the case of challenges to the application of control or treatment technologies identified in the statement of basis or fact sheet, identification of the basis for the objection, and the alternative technologies or combination of technologies which the requester believes are necessary to meet the requirements of the CWA.

(7) Identification of the permit obligations that are contested or are inseverable from contested conditions and should be stayed if the request is granted by reference to the particular contested conditions warranting the stay.

(8) Hearing requests also may ask that a formal hearing be held under the procedures set forth in Subpart F. An applicant may make such a request even if the proceeding does not constitute "initial licensing" as defined in § 124.111.

(d) If the Regional Administrator grants an evidentiary hearing request, in whole or in part, the Regional Administrator shall identify the permit conditions which have been contested by the requester and for which the evidentiary hearing has been granted. Permit conditions which are not contested or for which the Regional Administrator has denied the hearing request shall not be affected by, or considered at, the evidentiary hearing. The Regional Administrator shall specify these conditions in writing in accordance with § 124.60(c).

(e) The Regional Administrator must grant or deny all requests for an evidentiary hearing on a particular permit. All requests that are granted for a particular permit shall be combined in a single evidentiary hearing.

(f) The Regional Administrator (upon notice to all persons who have already submitted hearing requests) may extend the time allowed for submitting hearing requests under this section for good cause.

§ 124.75 Decision on request for a hearing.

(a)(1) Within 30 days following the expiration of the time allowed by § 124.74 for submitting an evidentiary hearing request, the Regional Administrator shall decide the extent to which, if at all, the request shall be granted, provided that the request conforms to the requirements of § 124.74, and sets forth material issues of fact relevant to the issuance of the permit.

(2) When an NPDES permit for which a hearing request has been granted constitutes "initial licensing" under § 124.111, the Regional Administrator may elect to hold a formal hearing under the procedures of Subpart F rather than under the procedures of this subpart even if no person has requested that Subpart F be applied. If the Regional Administrator makes such a decision, he or she shall issue a notice of hearing under § 124.116. All subsequent proceedings shall then be governed by §§ 124.117 through 124.121, except that any reference to a draft permit shall mean the final permit.

(3) Whenever the Regional Administrator grants a request made under § 124.74(c)(8) for a formal hearing under Subpart F on an NPDES permit that does not constitute an initial li-

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Subpart E—Evidentiary Hearings for EPA-Issued NPDES Permits and EPA-Terminated RCRA Permits

§ 124.71 Applicability.

(a) The regulations in this subpart govern all formal hearings conducted by EPA under CWA sections 402 and 405(f), except those conducted under Subpart F. They also govern all evidentiary hearings conducted under RCRA section 3008 in connection with the termination of a RCRA permit. This includes termination of interim status for failure to furnish information needed to make a final decision. A formal hearing is available to challenge any NPDES permit issued under § 124.15 except for a general permit. Persons affected by a general permit may not challenge the conditions of a general permit as of right in further agency proceedings. They may instead either challenge the general permit in court, or apply for an individual NPDES permit under § 122.21 as authorized in § 122.28 and then request a formal hearing on the issuance or denial of an individual permit. (The Regional Administrator also has the discretion to use the procedures of Subpart F for general permits. See § 124.111).

(b) In certain cases, evidentiary hearings under this subpart may also be held on the conditions of UIC permits, or of RCRA permits which are being issued, modified, or revoked and reissued, rather than terminated or suspended. This will occur when the conditions of the UIC or RCRA permit in question are closely linked with the conditions of an NPDES permit as to

which an evidentiary hearing has been granted. See § 124.74(b)(2). Any interested person may challenge the Regional Administrator's initial new source determination by requesting an evidentiary hearing under this part. See § 122.29.

(c) PSD permits may never be subject to an evidentiary hearing under this subpart. Section 124.74(b)(2)(iv) provides only for consolidation of PSD permits with other permits subject to a panel hearing under Subpart F.

[48 FR 14264, Apr. 1, 1983, as amended at 54 FR 18786, May 2, 1989]

§ 124.72 Definitions.

For the purpose of this subpart, the following definitions are applicable:

"Hearing Clerk" means The Hearing Clerk, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC, 20460.

"Judicial Officer" means a permanent or temporary employee of the Agency appointed as a Judicial Officer by the Administrator under these regulations and subject to the following conditions:

(a) A Judicial Officer shall be a licensed attorney. A Judicial Officer shall not be employed in the Office of Enforcement or the Office of Water and Waste Management, and shall not participate in the consideration or decision of any case in which he or she performed investigative or prosecutorial functions, or which is factually related to such a case.

(b) The Administrator may delegate any authority to act in an appeal of a given case under this subpart to a Judicial Officer who, in addition, may perform other duties for EPA, provided that the delegation shall not preclude a Judicial Officer from referring any motion or case to the Administrator when the Judicial Officer decides such action would be appropriate. The Administrator, in deciding a case, may consult with and assign the drafting of preliminary findings of fact and conclusions and/or a preliminary decision to any Judicial Officer.

"Party" means the EPA trial staff under § 124.78 and any person whose request for a hearing under § 124.74 or whose request to be admitted as a party or to intervene under § 124.79 or § 124.117 has been granted.

"Presiding Officer" for the purposes of this subpart means an Administrative Law Judge appointed under 5 U.S.C. 3105 and designated to preside at the hearing. Under Subpart F other persons may also serve as hearing officers. See § 124.119.

"Regional Hearing Clerk" means an employee of the Agency designated by a Regional Administrator to establish a repository for all books, records, documents, and other materials relating to hearings under this subpart.

§ 124.73 Filing and submission of documents.

(a) All submissions authorized or required to be filed with the Agency under this subpart shall be filed with the Regional Hearing Clerk, unless otherwise provided by regulation. Submissions shall be considered filed on the date on which they are mailed or delivered in person to the Regional Hearing Clerk.

(b) All submissions shall be signed by the person making the submission, or by an attorney or other authorized agent or representative.

(c)(1) All data and information referred to or in any way relied upon in any submission shall be included in full and may not be incorporated by reference, unless previously submitted as part of the administrative record in the same proceeding. This requirement does not apply to State or Federal statutes and regulations, judicial decisions published in a national reporter system, officially issued EPA documents of general applicability, and any other generally available reference material which may be incorporated by reference. Any party incorporating materials by reference shall provide copies upon request by the Regional Administrator or the Presiding Officer.

(2) If any part of the material submitted is in a foreign language, it shall be accompanied by an English translation verified under oath to be complete and accurate, together with the name, address, and a brief statement of the qualifications of the person making the translation. Translation...

cense under § 124.111, the Regional Administrator shall issue a notice of hearing under § 124.116 including a statement that the permit will be processed under the procedures of Subpart F unless a written objection is received within 30 days. If no valid objection is received, the application shall be processed in accordance with §§ 124.117 through 124.121, except that any reference to a draft permit shall mean the final permit. If a valid objection is received, this subpart shall be applied instead.

(b) If a request for a hearing is denied in whole or in part, the Regional Administrator shall briefly state the reasons. That denial is subject to review by the Administrator under § 124.91.

§ 124.76 Obligation to submit evidence and raise issues before a final permit is issued.

In any case where the Regional Administrator elected to apply the requirements of § 124.14(a), no evidence shall be submitted by any party to a hearing under this Subpart that was not submitted to the administrative record required by § 124.18 as part of the preparation of and comment on a draft permit, unless good cause is shown for the failure to submit it. No issues shall be raised by any party that were not submitted to the administrative record required by § 124.18 as part of the preparation of and comment on a draft permit unless good cause is shown for the failure to submit them. Good cause includes the case where the party seeking to raise the new issues or introduce new information shows that it could not reasonably have ascertained the issues or made the information available within the time required by § 124.15; or that it could not have reasonably anticipated the relevance or materiality of the information sought to be introduced. Good cause exists for the introduction of data available on operation authorized under § 124.60(a)(2).

[49 FR 38051, Sept. 26, 1984]

§ 124.77 Notice of hearing.

Public notice of the grant of an evidentiary hearing regarding a permit shall be given as provided in § 124.57(b) and by mailing a copy to all persons who commented on the draft permit, testified at the public hearing, or submitted a request for a hearing. Before the issuance of the notice, the Regional Administrator shall designate the Agency trial staff and the members of the decisional body (as defined in § 124.78).

§ 124.78 Ex parte communications.

(a) For purposes of this section, the following definitions shall apply:

(1) "Agency trial staff" means those Agency employees, whether temporary or permanent, who have been designated by the Agency under § 124.77 or § 124.116 as available to investigate, litigate, and present the evidence, arguments, and position of the Agency in the evidentiary hearing or nonadversary panel hearing. Any EPA employee, consultant, or contractor who is called as a witness by EPA trial staff, or who assisted in the formulation of the draft permit which is the subject of the hearing, shall be designated as a member of the Agency trial staff;

(2) "Decisional body" means any Agency employee who is or may reasonably be expected to be involved in the decisional process of the proceeding including the Administrator, Judicial Officer, Presiding Officer, the Regional Administrator (if he or she does not designate himself or herself as a member of the Agency trial staff), and any of their staff participating in the decisional process. In the case of a nonadversary panel hearing, the decisional body shall also include the panel members, whether or not permanently employed by the Agency;

(3) "*Ex parte* communication" means any communication, written or oral, relating to the merits of the proceeding between the decisional body and an interested person outside the Agency or the Agency trial staff which was not originally filed or stated in the administrative record or in the hearing. *Ex parte* communications do not include:

(i) Communications between Agency employees other than between the Agency trial staff and the members of the decisional body;

(ii) Discussions between the decisional body and either:

(A) Interested persons outside the Agency, or

(B) The Agency trial staff, if all parties have received prior written notice of the proposed communications and have been given the opportunity to be present and participate therein.

(4) "Interested person outside the Agency" includes the permit applicant, any person who filed written comments in the proceeding, any person who requested the hearing, any person who requested to participate or intervene in the hearing, any participant in the hearing and any other interested person not employed by the Agency at the time of the communications, and any attorney of record for those persons.

(b)(1) No interested person outside the Agency or member of the Agency trial staff shall make or knowingly cause to be made to any members of the decisional body, an *ex parte* communication on the merits of the proceedings.

(2) No member of the decisional body shall make or knowingly cause to be made to any interested person outside the Agency or member of the Agency trial staff, an *ex parte* communication on the merits of the proceedings.

(3) A member of the decisional body who receives or who makes or who knowingly causes to be made a communication prohibited by this subsection shall file with the Regional Hearing Clerk all written communications or memoranda stating the substance of all oral communications together with all written responses and memoranda stating the substance of all oral responses.

(c) Whenever any member of the decisionmaking body receives an *ex parte* communication knowingly made or knowingly caused to be made by a party or representative of a party in violation of this section, the person presiding at the stage of the hearing then in progress may, to the extent consistent with justice and the policy of the CWA, require the party to show cause why its claim or interest in the proceedings should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(d) The prohibitions of this section begin to apply upon issuance of the notice of the grant of a hearing under § 124.77 or § 124.116. This prohibition terminates at the date of final agency action.

[48 FR 14264, Apr. 1, 1983, as amended at 49 FR 38052, Sept. 26, 1984]

§ 124.79 Additional parties and issues.

(a) Any person may submit a request to be admitted as a party within 15 days after the date of mailing, publication, or posting of notice of the grant of an evidentiary hearing, whichever occurs last. The Presiding Officer shall grant requests that meet the requirements of §§ 124.74 and 124.76.

(b) After the expiration of the time prescribed in paragraph (a) of this section any person may file a motion for leave to intervene as a party. This motion must meet the requirements of §§ 124.74 and 124.76 and set forth the grounds for the proposed intervention. No factual or legal issues, besides those raised by timely hearing requests, may be proposed except for good cause. A motion for leave to intervene must also contain a verified statement showing good cause for the failure to file a timely request to be admitted as a party. The Presiding Officer shall grant the motion only upon an express finding on the record that:

(1) Extraordinary circumstances justify granting the motion;

(2) The intervener has consented to be bound by:

(i) Prior written agreements and stipulations by and between the existing parties; and

(ii) All orders previously entered in the proceedings; and

(3) Intervention will not cause undue delay or prejudice the rights of the existing parties.

§ 124.80 Filing and service.

(a) An original and one (1) copy of all written submissions relating to an evidentiary hearing filed after the notice is published shall be filed with the Regional Hearing Clerk.

(b) The party filing any submission shall also serve a copy of each submis-

sion upon the Presiding Officer and each party of record. Service shall be by mail or personal delivery.

(c) Every submission shall be accompanied by an acknowledgment of service by the person served or a certificate of service citing the date, place, time, and manner of service and the names of the persons served.

(d) The Regional Hearing Clerk shall maintain and furnish a list containing the name, service address, and telephone number of all parties and their attorneys or duly authorized representatives to any person upon request.

§ 124.81 Assignment of Administrative Law Judge.

No later than the date of mailing, publication, or posting of the notice of a grant of an evidentiary hearing, whichever occurs last, the Regional Administrator shall refer the proceeding to the Chief Administrative Law Judge who shall assign an Administrative Law Judge to serve as Presiding Officer for the hearing.

§ 124.82 Consolidation and severance.

(a) The Administrator, Regional Administrator, or Presiding Officer has the discretion to consolidate, in whole or in part, two or more proceedings to be held under this subpart, whenever it appears that a joint hearing on any or all of the matters in issue would expedite or simplify consideration of the issues and that no party would be prejudiced thereby. Consolidation shall not affect the right of any party to raise issues that might have been raised had there been no consolidation.

(b) If the Presiding Officer determines consolidation is not conducive to an expeditious, full, and fair hearing, any party or issues may be severed and heard in a separate proceeding.

§ 124.83 Prehearing conferences.

(a) The Presiding Officer, *sua sponte*, or at the request of any party, may direct the parties or their attorneys or duly authorized representatives to appear at a specified time and place for one or more conferences before or during a hearing, or to submit written proposals or correspond for the purpose of considering any of the matters set forth in paragraph (c) of this section.

(b) The Presiding Officer shall allow a reasonable period before the hearing begins for the orderly completion of all prehearing procedures and for the submission and disposition of all prehearing motions. Where the circumstances warrant, the Presiding Officer may call a prehearing conference to inquire into the use of available procedures contemplated by the parties and the time required for their completion, to establish a schedule for their completion, and to set a tentative date for beginning the hearing.

(c) In conferences held, or in suggestions submitted, under paragraph (a) of this section, the following matter may be considered:

(1) Simplification, clarification, amplification, or limitation of the issues.

(2) Admission of facts and of the genuineness of documents, and stipulations of facts.

(3) Objections to the introduction into evidence at the hearing of any written testimony, documents, papers, exhibits, or other submissions proposed by a party, except that the administrative record required by § 124.19 shall be received in evidence subject to the provisions of § 124.85(d)(2). At any time before the end of the hearing any party may make, and the Presiding Officer shall consider and rule upon, motions to strike testimony or other evidence other than the administrative record on the grounds of relevance, competency, or materiality.

(4) Matters subject to official notice may be taken.

(5) Scheduling as many of the following as are deemed necessary and proper by the Presiding Officer:

(i) Submission of narrative statements of position on each factual issue in controversy;

(ii) Submission of written testimony and documentary evidence (e.g., affidavits, data, studies, reports, and any other type of written material) in support of those statements; or

(iii) Requests by any party for the production of additional documentation, data, or other information relevant and material to the facts in issue.

(6) Grouping participants with substantially similar interests to eliminate redundant evidence, motions, and objections.

(7) Such other matters that may expedite the hearing or aid in the disposition of the matter.

(d) At a prehearing conference or at some other reasonable time set by the Presiding Officer, each party shall make available to all other parties the names of the expert and other witnesses it expects to call. At its discretion or at the request of the Presiding Officer, a party may include a brief narrative summary of any witness's anticipated testimony. Copies of any written testimony, documents, papers, exhibits, or materials which a party expects to introduce into evidence, and the administrative record required by § 124.18 shall be marked for identification as ordered by the Presiding Officer. Witnesses, proposed written testimony, and other evidence may be added or amended upon order of the Presiding Officer for good cause shown. Agency employees and consultants shall be made available as witnesses by the Agency to the same extent that production of such witnesses is required of other parties under § 124.74(c)(4). (See also § 124.85(b)(16).)

(e) The Presiding Officer shall prepare a written prehearing order reciting the actions taken at each prehearing conference and setting forth the schedule for the hearing, unless a transcript has been taken and accurately reflects these matters. The order shall include a written statement of the areas of factual agreement and disagreement and of the methods and procedures to be used in developing the evidence and the respective duties of the parties in connection therewith. This order shall control the subsequent course of the hearing unless modified by the Presiding Officer for good cause shown.

§ 124.84 Summary determination.

(a) Any party to an evidentiary hearing may move with or without supporting affidavits and briefs for a summary determination in its favor upon any of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination. This motion shall be filed at least 45 days before the date set for the hearing, except that upon good cause shown the motion may be filed at any time before the close of the hearing.

(b) Any other party may, within 30 days after service of the motion, file and serve a response to it or a counter motion for summary determination. When a motion for summary determination is made and supported, a party opposing the motion may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the Presiding Officer, that there is a genuine issue of material fact for determination at the hearing.

(c) Affidavits shall be made on personal knowledge, shall set forth facts that would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

(d) The Presiding Officer may set the matter for oral argument and call for the submission of proposed findings, conclusions, briefs, or memoranda of law. The Presiding Officer shall rule on the motion not more than 30 days after the date responses to the motion are filed under paragraph (b) of this section.

(e) If all factual issues are decided by summary determination, no hearing will be held and the Presiding Officer shall prepare an initial decision under § 124.89. If summary determination is denied or if partial summary determination is granted, the Presiding Officer shall issue a memorandum opinion and order, interlocutory in character, and the hearing will proceed on the remaining issues. Appeals from interlocutory rulings are governed by § 124.90.

(f) Should it appear from the affidavits of a party opposing a motion for summary determination that he or she cannot for reasons stated present, by affidavit or otherwise, facts essential to justify his or her opposition, the Presiding Officer may deny the motion or order a continuance to allow additional affidavits or other information to be obtained or may make such other order as is just and proper.

§ 124.86 Hearing procedure.

(a)(1) The permit applicant always bears the burden of persuading the Agency that a permit authorizing pollutants to be discharged should be issued and not denied. This burden does not shift.

NOTE: In many cases the documents contained in the administrative record, in particular the fact sheet or statement of basis and the response to comments, should adequately discharge this burden.

(2) The Agency has the burden of going forward to present an affirmative case in support of any challenged condition of a final permit.

(3) Any hearing participant who, by raising material issues of fact, contends:

(i) That particular conditions or requirements in the permit are improper or invalid, and who desires either:

(A) The inclusion of new or different conditions or requirements; or

(B) The deletion of those conditions or requirements; or

(ii) That the denial or issuance of a permit is otherwise improper or invalid, shall have the burden of going forward to present an affirmative case at the conclusion of the Agency case on the challenged requirement.

(b) The Presiding Officer shall conduct a fair and impartial hearing, take action to avoid unnecessary delay in the disposition of the proceedings, and maintain order. For these purposes, the Presiding Officer may:

(1) Arrange and issue notice of the date, time, and place of hearings and conferences;

(2) Establish the methods and procedures to be used in the development of the evidence;

(3) Prepare, after considering the views of the participants, written statements of areas of factual disagreement among the participants;

(4) Hold conferences to settle, simplify, determine, or strike any of the issues in a hearing, or to consider other matters that may facilitate the expeditious disposition of the hearing;

(5) Administer oaths and affirmations;

(6) Regulate the course of the hearing and govern the conduct of participants;

(7) Examine witnesses;

(8) Identify and refer issues for interlocutory decision under § 124.90;

(9) Rule on, admit, exclude, or limit evidence;

(10) Establish the time for filing motions, testimony, and other written evidence, briefs, findings, and other submissions;

(11) Rule on motions and other procedural matters pending before him, including but not limited to motions for summary determination in accordance with § 124.84;

(12) Order that the hearing be conducted in stages whenever the number of parties is large or the issues are numerous and complex;

(13) Take any action not inconsistent with the provisions of this subpart for the maintenance of order at the hearing and for the expeditious, fair, and impartial conduct of the proceeding;

(14) Provide for the testimony of opposing witnesses to be heard simultaneously or for such witnesses to meet outside the hearing to resolve or isolate issues or conflicts;

(15) Order that trade secrets be treated as confidential business information in accordance with §§ 122.7 (NPDES) and 270.12 (RCRA) and 40 CFR Part 2; and

(16) Allow such cross-examination as may be required for a full and true disclosure of the facts. No cross-examination shall be allowed on questions of policy except to the extent required to disclose the factual basis for permit requirements, or on questions of law, or regarding matters (such as the validity of effluent limitations guidelines) that are not subject to challenge in an evidentiary hearing. No Agency witnesses shall be required to testify or be made available for cross-examination on such matters. In deciding whether or not to allow cross-examination, the Presiding Officer shall consider the likelihood of clarifying or resolving a disputed issue of material fact compared to other available methods. The party seeking cross-examination has the burden of demonstrating that this standard has been met.

(c) All direct and rebuttal evidence at an evidentiary hearing shall be submitted in written form, unless, upon motion and good cause shown, the

Presiding Officer determines that oral presentation of the evidence on any particular fact will materially assist in the efficient identification and clarification of the issues. Written testimony shall be prepared in narrative form.

(d)(1) The Presiding Officer shall admit all relevant, competent, and material evidence, except evidence that is unduly repetitious. Evidence may be received at any hearing even though inadmissible under the rules of evidence applicable to judicial proceedings. The weight to be given evidence shall be determined by its reliability and probative value.

(2) The administrative record required by § 124.18 shall be admitted and received in evidence. Upon motion by any party the Presiding Officer may direct that a witness be provided to sponsor a portion or portions of the administrative record. The Presiding Officer, upon finding that the standards in § 124.85(b)(3) have been met, shall direct the appropriate party to produce the witness for cross-examination. If a sponsoring witness cannot be provided, the Presiding Officer may reduce the weight accorded the appropriate portion of the record.

NOTE: Receiving the administrative record into evidence automatically serves several purposes: (1) It documents the prior course of the proceedings; (2) it provides a record of the views of affected persons for consideration by the agency decisionmaker, and (3) it provides factual material for use by the decisionmaker.

(3) Whenever any evidence or testimony is excluded by the Presiding Officer as inadmissible, all such evidence or testimony existing in written form shall remain a part of the record as an offer of proof. The party seeking the admission of oral testimony may make an offer of proof, by means of a brief statement on the record describing the testimony excluded.

(4) When two or more parties have substantially similar interests and positions, the Presiding Officer may limit the number of attorneys or other party representatives who will be permitted to cross-examine and to make and argue motions and objections on behalf of those parties. Attorneys may, however, engage in cross-examination relevant to matters not adequately covered by previous cross-examination.

(5) Rulings of the Presiding Officer on the admissibility of evidence or testimony, the propriety of cross-examination, and other procedural matters shall appear in the record and shall control further proceedings, unless reversed as a result of an interlocutory appeal taken under § 124.90.

(6) All objections shall be made promptly or be deemed waived. Parties shall be presumed to have taken exception to an adverse ruling. No objection shall be deemed waived by further participation in the hearing.

(e) *Admission of evidence on environmental impacts.* If a hearing is granted under this subpart for a new source subject to NEPA, the Presiding Officer may admit evidence relevant to any environmental impacts of the permitted facility if the evidence would be relevant to the Agency's obligation under § 122.29(c)(3). If the source holds a final EPA-issued RCRA, PSD, or UIC permit, or an ocean dumping permit under the Marine Protection, Research, and Sanctuaries Act (MPRSA), no such evidence shall be admitted nor shall cross-examination be allowed relating to:

(1) Effects on air quality, (2) effects attributable to underground injection or hazardous waste management practices, or (3) effects of ocean dumping subject to the MPRSA, which were considered or could have been considered in the PSD, RCRA, UIC, or MPRSA permit issuance proceedings. However, the presiding officer may admit without cross-examination or any supporting witness relevant portions of the record of PSD, RCRA, UIC, or MPRSA permit issuance proceedings.

[48 FR 14264, Apr. 1, 1983, as amended at 49 FR 38052, Sept. 26, 1984]

§ 124.86 Motions.

(a) Any party may file a motion including a motion to dismiss a particular claim on a contested issue with the Presiding Officer on any matter relating to the proceeding. All motions shall be in writing and served as provided in § 124.80 except those made on

the record during an oral hearing before the Presiding Officer.

(b) Within 10 days after service of any written motion, any part to the proceeding may file a response to the motion. The time for response may be shortened to 3 days or extended for an additional 10 days by the Presiding Officer for good cause shown.

(c) Notwithstanding § 122.4, any party may file with the Presiding Officer a motion seeking to apply to the permit any regulatory or statutory provision issued or made available after the issuance of the permit under § 124.15. The Presiding Officer shall grant any motion to apply a new statutory provision unless he or she finds it contrary to legislative intent. The Presiding Officer may grant a motion to apply a new regulatory requirement when appropriate to carry out the purpose of CWA, and when no party would be unduly prejudiced thereby.

§ 124.87 Record of hearings.

(a) All orders issued by the Presiding Officer, transcripts of oral hearings or arguments, written statements of position, written direct and rebuttal testimony, and any other data, studies, reports, documentation, information and other written material of any kind submitted in the proceeding shall be a part of the hearing record and shall be available to the public except as provided in §§ 122.7 (NPDES) and 270.12 (RCRA), in the Office of the Regional Hearing Clerk, as soon as it is received in that office.

(b) Evidentiary hearings shall be either stenographically reported verbatim or tape recorded, and thereupon transcribed. After the hearing, the reporter shall certify and file with the Regional Hearing Clerk:

(1) The original of the transcript, and

(2) The exhibits received or offered into evidence at the hearing.

(c) The Regional Hearing Clerk shall promptly notify each of the parties of the filing of the certified transcript of proceedings. Any party who desires a copy of the transcript of the hearing may obtain a copy of the hearing transcript from the Regional Hearing Clerk upon payment of costs.

(d) The Presiding Officer shall allow witnesses, parties, and their counsel an opportunity to submit such written proposed corrections of the transcript of any oral testimony taken at the hearing, pointing out errors that may have been made in transcribing the testimony, as are required to make the transcript conform to the testimony. Except in unusual cases, no more than 30 days shall be allowed for submitting such corrections from the day a complete transcript of the hearing becomes available.

§ 124.88 Proposed findings of fact and conclusions; brief.

Within 45 days after the certified transcript is filed, any party may file with the Regional Hearing Clerk proposed findings of fact and conclusions of law and a brief in support thereof. Briefs shall contain appropriate references to the record. A copy of these findings, conclusions, and brief shall be served upon all the other parties and the Presiding Officer. The Presiding Officer, for good cause shown, may extend the time for filing the proposed findings and conclusions and/or the brief. The Presiding Officer may allow reply briefs.

§ 124.89 Decisions.

(a) The Presiding Officer shall review and evaluate the record, including the proposed findings and conclusions, any briefs filed by the parties, and any interlocutory decisions under § 124.90 and shall issue and file his initial decision with the Regional Hearing Clerk. The Regional Hearing Clerk shall immediately serve copies of the initial decision upon all parties (or their counsel of record) and the Administrator.

(b) The initial decision of the Presiding Officer shall automatically become the final decision 30 days after its service unless within that time:

(1) A party files a petition for review by the Administrator pursuant to § 124.91; or

(2) The Administrator *sua sponte* files a notice that he or she will review the decision pursuant to § 124.91.

§ 124.90 Interlocutory appeal.

(a) Except as provided in this section, appeals to the Administrator may be taken only under § 124.91. Appeals from orders or rulings may be taken under this section only if the Presiding Officer, upon motion of a party, certifies those orders or rulings to the Administrator for appeal on the record. Requests to the Presiding Officer for certification must be filed in writing within 10 days of service of notice of the order, ruling, or decision and shall state briefly the grounds relied on.

(b) The Presiding Officer may certify an order or ruling for appeal to the Administrator if:

(1) The order or ruling involves an important question on which there is substantial ground for difference of opinion, and

(2) *Either:* (i) An immediate appeal of the order or ruling will materially advance the ultimate completion of the proceeding; or

(ii) A review after the final order is issued will be inadequate or ineffective.

(c) If the Administrator decides that certification was improperly granted, he or she shall decline to hear the appeal. The Administrator shall accept or decline all interlocutory appeals within 30 days of their submission; if the Administrator takes no action within that time, the appeal shall be automatically dismissed. When the Presiding Officer declines to certify an order or ruling to the Administrator for an interlocutory appeal, it may be reviewed by the Administrator only upon appeal from the initial decision of the Presiding Officer, except when the Administrator determines, upon motion of a party and in exceptional circumstances, that to delay review would not be in the public interest. Such motion shall be made within 5 days after receipt of notification that the Presiding Officer has refused to certify an order or ruling for interlocutory appeal to the Administrator. Ordinarily, the interlocutory appeal will be decided on the basis of the submissions made to the Presiding Officer. The Administrator may, however, allow briefs and oral argument.

(d) In exceptional circumstances, the Presiding Officer may stay the proceeding pending a decision by the Administrator upon an order or ruling certified by the Presiding Officer for an interlocutory appeal, or upon the denial of such certification by the Presiding Officer.

(e) The failure to request an interlocutory appeal shall not prevent taking exception to an order or ruling in an appeal under § 124.91.

§ 124.91 Appeal to the Administrator.

(a)(1) Within 30 days after service of an initial decision, or a denial in whole or in part of a request for an evidentiary hearing, any party or requester, as the case may be, may appeal any matter set forth in the initial decision or denial, or any adverse order or ruling to which the party objected during the hearing, by filing with the Administrator notice of appeal and petition for review. The petition shall include a statement of the supporting reasons and, when appropriate, a showing that the initial decision contains:

(i) A finding of fact or conclusion of law which is clearly erroneous, or

(ii) An exercise of discretion or policy which is important and which the Administrator should review.

(2) Within 15 days after service of a petition for review under paragraph (a)(1) of this section, any other party to the proceeding may file a responsive petition.

(3) Policy decisions made or legal conclusions drawn in the course of denying a request for an evidentiary hearing may be reviewed and changed by the Administrator in an appeal under this section.

(b) Within 30 days of an initial decision or denial or a request for an evidentiary hearing the Administrator may, *sua sponte*, review such decision. Within 7 days after the Administrator has decided under this section to review an initial decision or the denial of a request for an evidentiary hearing, notice of that decision shall be served by mail upon all affected parties and the Regional Administrator.

(c)(1) Within a reasonable time following the filing of the petition for

review, the Administrator shall issue an order either granting or denying the petition for review. When the Administrator grants a petition for review or determines under paragraph (b) of this section to review a decision, the Administrator may notify the parties that only certain issues shall be briefed.

(2) Upon granting a petition for review, the Regional Hearing Clerk shall promptly forward a copy of the record to the Judicial Officer and shall retain a complete duplicate copy of the record in the Regional Office.

(d) Notwithstanding the grant of a petition for review or a determination under paragraph (b) of this section to review a decision, the Administrator may summarily affirm without opinion and initial decision or the denial of a request for an evidentiary hearing.

(e) A petition to the Administrator under paragraph (a) of this section for review of any initial decision or the denial of an evidentiary hearing is, under 5 U.S.C. 704, a prerequisite to the seeking of judicial review of the final decision of the Agency.

(f) If a party timely files a petition for review or if the Administrator *sua sponte* orders review, then, for purposes of judicial review, final Agency action on an issue occurs as follows:

(1) If the Administrator denies review or summarily affirms without opinion as provided in § 124.91(d), then the initial decision or denial becomes the final Agency action and occurs upon the service of notice of the Administrator's action.

(2) If the Administrator issues a decision without remanding the proceeding then the *final permit, redrafted* as required by the Administrator's original decision, shall be reissued and served upon all parties to the appeal.

(3) If the Administrator issues a decision remanding the proceeding, then final Agency action occurs upon completion of the remanded proceeding, including any appeals to the Administrator from the results of the remanded proceeding.

(g) The petitioner may file a brief in support of the petition within 21 days after the Administrator has granted a petition for review. Any other party may file a responsive brief within 21 days of service of the petitioner's brief. The petitioner then may file a reply brief within 14 days of service of the responsive brief. Any person may file an *amicus brief* for the consideration of the Administrator within the same time periods that govern reply briefs. If the Administrator determines, *sua sponte*, to review an initial Regional Administrator's decision or the denial of a request for an evidentiary hearing, the Administrator shall notify the parties of the schedule for filing briefs.

(h) Review by the Administrator of an initial decision or the denial of an evidentiary hearing shall be limited to the issues specified under paragraph (a) of this section, except that after notice to all parties, the Administrator may raise and decide other matters which he or she considers material on the basis of the record.

PERMIT NO. FL0042293
Minor - Non POTW

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV

AUTHORIZATION TO DISCHARGE UNDER THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the Clean Water Act, as amended (33 U.S.C. 1251 et seq.; the "Act"),

Barefoot Bay WWTP
c/o Florida Cities Water Company
P.O. Box 21119
Sarasota, Florida 34276-4119

is authorized to discharge from a facility located at

North end of Dottie Lane
Brevard County
Barefoot Bay, FL 32976

to receiving waters named

Drainage canal leading to
north prong of Sebastian Creek

in accordance with effluent limitations, monitoring requirements and other conditions set forth herein. The permit consists of this cover sheet, Part I 5 pages, Part II 16 pages, Part III 1 page, and Part IV 3 pages.

This permit shall become effective on November 1, 1991.

This permit and the authorization to discharge shall expire at midnight, June 30, 1995.

SEP 16 1991
Date Issued

W. Ray Cunningham
W. Ray Cunningham, Director
Water Management Division

PART I

A. EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS - Final

1. During the period beginning on the effective date and lasting through June 30, 1995, the permittee is authorized to discharge from outfall(s) 001, sanitary wastewater.

Such discharges shall be limited and monitored by the permittee as specified below:

PARAMETERS	DISCHARGE LIMITATIONS			MONITORING REQUIREMENTS		
	Annual Average	Monthly Average	Daily Maximum	Measurement Frequency	Sample Type	Sampling Point •
Flow, MGD	Report	Report	Report	5/Week	Representative	Effluent
BOD - 5 Day, mg/l	20.0	30.0	60.0	1/Week	8-hr. Composite	Effluent
Total Suspended Solids, mg/l	20.0	30.0	60.0	1/Week	8-hr. Composite	Effluent
Fecal Coliform Bacteria, N/100 ml	(See Item 6, page I-3)			1/Month	Grab	Effluent
Total Residual Chlorine, mg/l	(See Part I.A.2. for effluent limit and approved testing procedures. See Part I.B.1 for compliance schedule and compliance dates.)			7/Week	Grab	Effluent
pH shall not be less than 6.0 nor greater than 8.5 standard units.				5/Week	Grab	Effluent
Chronic Whole Effluent Toxicity	(See Item 9, Page I-3)			See Part IV	24-hr. Composite	Effluent

• See Item 7, Page I-3.

PART I (CONTINUATION)
EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

2. INTERIM TOTAL RESIDUAL CHLORINE (TRC) LIMIT: The daily maximum concentration of TRC in the final effluent shall not exceed 0.2 mg/l beginning the effective date of this permit through the operational level of the final TRC limit.

FINAL TRC LIMIT: The daily maximum concentration of total residual chlorine (TRC) in the final effluent shall not exceed 0.01 mg/l and shall be achieved no later than three months from the effective date of the permit. This limit is included to prevent toxic effects from chlorine in the receiving waters. This compliance schedule allows the permittee time to apply for a mixing zone for TRC from the Florida Department of Environmental Regulation (FDER), if the permittee determines such to be a benefit. If a mixing zone for TRC is granted by FDER and concurred with by EPA, the permittee may apply for a modification of the above TRC limit from EPA.

Testing for total residual chlorine (TRC) shall be conducted according to either the amperometric titration method, the low-level amperometric titration method (if compliance with a permit limitation of 0.20 mg/l or less is to be demonstrated), or the DPD colorimetric method as specified in Section 4500-Cl D., 4500-Cl E., or 4500-Cl G., respectively, Standard Methods for the Examination of Water and Wastewater, 17th Edition. If chlorine is not detected using one of these methods, the permittee shall report on the discharge monitoring report form, the analytical results for chlorine as being measured at less than the detection level for the test method selected; the test method shall also be reported. The permittee shall then be considered to be in compliance with the above daily maximum effluent limit for TRC.

3. There shall be no discharge of floating solids or visible foam in other than trace amounts.

4. The effluent shall not cause a visible sheen on the receiving water.

5. Any bypass of the treatment facility, which is not included in the effluent monitored above, is to be monitored for flow and all other parameters (except whole effluent toxicity testing). For parameters other than flow, at least one grab sample per day shall be monitored. Daily flow shall be monitored or estimated, as appropriate, to obtain reportable data. All monitoring results shall be reported on a Discharge Monitoring Report (DMR) Form (3320-1).

6. The arithmetic average of the monthly fecal coliform values (calculated as a geometric mean) collected during an annual period shall not exceed 200/100 ml of effluent sample. Any one sample shall not exceed 800 fecal coliform colonies per 100 ml of effluent sample.

7. Samples taken in compliance with the monitoring requirements specified in this permit for all parameters except fecal coliform shall be taken at the nearest accessible point after final treatment but prior to the actual discharge or mixing with the receiving waters. Samples for fecal coliform shall be taken after treatment at the chlorine contact chamber but prior to entering the polishing/percolation ponds.

8. For the parameters, BOD, TSS, and Fecal Coliform, no violations for annual average will be deemed to have occurred until data have been compiled for the first 12 months after the effective date of the permit.

9. The effluent shall not be chronically toxic to, or produce adverse physiological or behavioral responses in, aquatic animals. An effluent no observable effect concentration (NOEC) of less than 100% for any test species will constitute a violation of Florida Administrative Code (FAC) Section 17-302.510(3)(p), May 29, 1990, and the terms of this permit. The testing for this requirement shall conform with Part IV of this permit.

10. If the results for a given sample analysis are such that any parameter (other than fecal coliform) is not detected at or above the minimum level for the test method used, a value of zero will be used for that sample in calculating an arithmetic effluent mean value for the parameter. In the case of fecal coliform, a value of 1.0 shall be used in calculating the geometric mean.

B. SCHEDULE OF COMPLIANCE

1. The permittee shall achieve compliance with the effluent limitations specified for discharges in accordance with the following schedule:

Discharge 001:

Operational level attained. . . Effective Date of Permit

Discharge 001 Cease Discharge Schedule:

First Report of Progress . . .December 31, 1991

Second Report of Progress. . .December 31, 1992

Third Report of Progress . . .December 31, 1993

Fourth Report of Progress. . .December 31, 1994

Cease Discharge. . . . . .June 30, 1995

Total Residual Chlorine Final Limit:

Operational Level Attained. . No later than three months from the effective date of the permit.

2. No later than 14 calendar days following a date identified in the above schedule of compliance, the permittee shall submit either a report of progress or, in the case of specific actions being required by identified dates, a written notice of compliance or noncompliance. In the latter case, the notice shall include the cause of noncompliance, any remedial actions taken, and the probability of meeting the next scheduled requirement.

C. SLUDGE MANAGEMENT PRACTICES

1. The permittee must sample and analyze the sludge and report to EPA the quantitative data for the 125 priority pollutants listed in 40 CFR 122, Appendix D, Tables II and III. Qualitative data for 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD) must also be submitted if the permittee knows or has reason to believe that TCDD is or may be present in the sludge.

   a. The permittee must submit the above data within 1 year of the effective date of this permit.

2. The permittee must submit within 30 days of the effective date of this permit the sludge production volume (specify if daily or annual; if actual volume is not known, estimate the quantity of sludge being handled and so indicate) and the sludge disposal practice.

3. The permittee shall provide sludge inventory data to the State and EPA, as part of EPA's inventory updates as requested. The data should include, but not be limited to, sludge quantity and characteristics.

4. Reopener. If an applicable "acceptable management practice" or numerical limitation for pollutants in sewage sludge promulgated under Section 405(d)(2) of the Clean Water Act, as amended by the Water Quality Act of 1987, is more stringent than the sludge pollutant limit or acceptable management practice in this permit, or controls a pollutant not limited in this permit, this permit shall be promptly modified or revoked and reissued to conform to the requirements promulgated under Section 405(d)(2). The permittee shall comply with the limitations by no later than the compliance deadline specified in the applicable regulations as required by Section 405(d)(2)(D) of the Clean Water Act.

5. Notice of change in sludge disposal practice. The permittee shall give prior notice to the Regional Administrator of any change planned in the permittee's sludge disposal practice.

6. Cause for modification. 40 CFR 122.62(a)(1) provides that the following is a cause for modification but not revocation and reissuance of permits except when the permittee requests or agrees. (a) Alterations. There are material and substantial changes or additions to the permitted facility or activity which occurred after permit issuance which justify the application of permit conditions that are different or absent in the existing permit.

7. Upon review of information provided by the permittee as required by the above items, or results from an on-site inspection, the permit shall be subject to modification to incorporate appropriate requirements.

Part II

STANDARD CONDITIONS FOR NPDES PERMITS

SECTION A. GENERAL CONDITIONS

1. Duty to Comply

The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.

2. Penalties for Violations of Permit Conditions

Any person who violates a permit condition is subject to a civil penalty not to exceed $25,000 per day for each violation. Any person who negligently violates any permit condition is subject to criminal penalties of $2,500 to $25,000 per day of violation, or imprisonment for not more than 1 year, or both. Any person who knowingly violates permit conditions is subject to criminal penalties of $5,000 to $50,000 per day of violation, or imprisonment for not more than 3 years, or both. Also, any person who violates a permit condition may be assessed an administrative penalty not to exceed $10,000 per violation with the maximum amount not to exceed $125,000. [Ref: 40 CFR 122.41(a)]

3. Duty to Mitigate

The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

4. Permit Modification

After notice and opportunity for a hearing, this permit may be modified, terminated, or revoked for cause including, but not limited to, the following:

a. Violation of any terms or conditions of this permit;

b. Obtaining this permit by misrepresentation or failure to disclose fully all relevant facts;

c. A change in any conditions that requires either temporary interruption or elimination of the permitted discharge; or

d. Information newly acquired by the Agency indicating the discharge poses a threat to human health or the environment.

f the permittee believes that any past or planned activity would be cause for modification or revocation and reissuance under 40 CFR 122.62, he permittee must report such information to the Permit Issuing uthority. The submittal of a new application may be required of the permittee. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a otification of planned changes or anticipated noncompliance, does not tay any permit condition.

. Toxic Pollutants

Notwithstanding Paragraph A-4, above, if a toxic effluent standard or rohibition (including any schedule of compliance specified in such ffluent standard or prohibition) is established under Section 307(a) of the Act for a toxic pollutant which is present in the discharge and such standard or prohibition is more stringent than any limitation of ich pollutant in this permit, this permit shall be modified or revoked nd reissued to conform to the toxic effluent standard or prohibition and the permittee so notified.

. Civil and Criminal Liability

Except as provided in permit conditions on "Bypassing" Section B, graph B-3, and "Upsets" Section b, Paragraph B-4, nothing in this mit shall be construed to relieve the permittee from civil or criminal penalties for noncompliance.

. Oil and Hazardous Substance Liability

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 or the Act.

8. State Laws

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State law or regulation under authority preserved by Section 510 of the Act.

9. Property Rights

The issuance of this permit does not convey any property rights of any sort, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of Federal, State, or local laws or regulations.

10. Onshore or Offshore Construction

This permit does not authorize or approve the construction of any onshore or offshore physical structures or facilities or the undertaking of any work in any waters of the United States.

11. Severability

The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

12. Duty to Provide Information

The permittee shall furnish to the Permit Issuing Authority, within a reasonable time, any information which the Permit Issuing Authority may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit or to determine compliance with this permit. The permittee shall also furnish to the Permit Issuing Authority upon request, copies of records required to be kept by this permit.

SECTION B. OPERATION AND MAINTENANCE OF POLLUTION CONTROLS

1. Proper Operation and Maintenance

The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

2. Need to Halt or Reduce not a Defense

It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the condition of this permit.

3. Bypass of Treatment Facilities

a. Definitions

(1) "Bypass means the intentional diversion of waste streams from any portion of a treatment facility, which is not a designed or established operating mode for the facility.

(2) "Severe property damage" means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

b. Bypass not exceeding limitations.

The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of Paragraphs c. and d. of this section.

. Notice

(1) Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least ten days before the date of the bypass; including an evaluation of the anticipated quality and effect of the bypass.

(2) Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required in Section D, Paragraph D-8 (24-hour notice).

. Prohibition of bypass

(1) Bypass is prohibited and the Permit Issuing Authority may take enforcement action against a permittee for bypass, unless:

(a) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(b) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate backup equipment should have been installed in the exercise of reasonable engineering judgement to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and

(c) The permittee submitted notices as required under Paragraph c. of this section.

(2) The permit Issuing Authority may approve an anticipated bypass, after considering its adverse effects, if the Permit Issuing Authority determines that it will meet the three conditions listed above in Paragraph d.(1) of this section.

4. Upsets

"Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, lack of preventive maintenance, or careless or improper operation. An upset constitutes an affirmative defense to an action brought for non-compliance with such technology based permit limitation if the requirements of 40 CFR 122.41(n)(3) are met.

. Removed Substances

This permit does not authorize discharge of solids, sludge, filter backwash, or other pollutants removed in the course of treatment of control of wastewaters of the United States unless specifically limited in Part 1.

SECTION C. MONITORING AND RECORDS

Representative Sampling

Samples and measurements taken as required herein shall be representative of the volume and nature of the monitored discharge. All samples shall be taken at the monitoring points specified in this permit and, unless otherwise specified, before the effluent joins or is diluted by any other wastestream, body of water, or substance. Monitoring points shall not be changed without notification to and the approval of the Permit Issuing Authority.

. Flow Measurements

Appropriate flow measurements devices and methods consistent with accepted scientific practices shall be selected and used to insure the accuracy and reliability of measurements of the volume of monitored discharges. The devices shall be installed, calibrated and maintained to insure that the accuracy of the measurements are consistent with the accepted capability of that type of device. Devices selected shall be capable of measuring flows with a maximum deviation of less than ±10% from the true discharge rates throughout the range of expected discharge volumes. Once-through condenser cooling water flow which is monitored by pump logs, or pump hour meters as specified in Part I of this permit and based on the manufacture's pump curves shall not be subject to this requirement. Guidance in selection, installation, calibration, and operation of acceptable flow measurement devices can be obtained from the following references:

(1) "A Guide of Methods and Standards for the Measurement of Water Flow", U.S. Department of Commerce, National Bureau of Standards, NBS Special Publication 421, May 1975, 97 pp. (Available from the U.S. Government Printing Office, Washington, D.C. 20402. Order by SD catalog No. C13.10:421.)

(2) "Water Measurement Manual", U.S. Department of Interior, Bureau of Reclamation, Second Edition, Revised Reprint, 1974, 327 pp. (Available from the U.S. Government Printing Office, Washington, D.C. 20402. Order by catalog No. 127.19/2:W29/2, Stock No. S/N 24003-0027.)

(3) "Flow Measurement in Open Channels and Closed Conduits", U.S. Department of Commerce, National Bureau of Standards, NBS Special Publication 484, October 1977, 982 pp. (Available in paper copy or microfiche from National Technical Information Service (NTIS), Springfield, VA 22151. Order by NTIS No. PB-273 535/5ST.)

(4) "NPDES Compliance Flow Measurement Manual", U.S. Environmental Protection Agency, Office of Water Enforcement, Publication MCD-77, September 1981, 135 pp. (Available from the General Service Administration (8BRC), Centralized Mailing Lists Services, Building 41, Denver Federal Center, Denver, CO. 80255.)

3. Monitoring Procedures

Monitoring must be conducted according to test procedures approved under 40 CFR Part 136, unless other test procedures have been specified in this permit.

4. Penalties for Tampering

The Clean Water Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate, any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or imprisonment for not more than 2 years, or both.

5. Retention of Records

The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least 3 years from the date of the sample, measurement, report, or application. This period may be extended by the Permit Issuing Authority at any time.

. Record Contents

Records of monitoring information shall include:

a. The date, exact place, and time of sampling or measurements;

b. The individual(s) who performed the sampling of measurements;

c. The date(s) analyses were performed;

d. The individual(s) who performed the analyses;

e. The analytical techniques or methods used; and

f. The results of such analysis.

. Inspection and Entry

The permittee shall allow the permit Issuing Authority, or a authorized representative, upon the presentation of credentials and other documents as may be required by law, to;

a. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

b. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit.

c. Inspect at reasonable time any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and

d. Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the Clean Water Act, any substances or parameters at any location.

SECTION D. REPORTING REQUIREMENTS

1 Change in Discharge

The permittee shall give notice to the Permit Issuing Authority as soon as possible of any planned physical alterations or additions to the permitted Facility. Notice is required only when:

a. The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source; or

b. The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants which are subject neither to effluent limitations in the permit, nor to notification requirements under Section D, Paragraph D-10(a).

. Anticipated Noncompliance

The permittee shall give advance notice to the Permit Issuing Authority f any planned change in the permitted facility or activity which may esult in noncompliance with permit requirements. Any maintenance or facilities, which might necessitate unavoidable interruption of peration and degradation of effluent quality, shall be scheduled during oncritical water quality periods and carried out in a manner approved by the Permit Issuing Authority.

. Transfer of Ownership or Control

A permit may be automatically transferred to another if:

a. The permittee notifies the Permit Issuing Authority of the proposed transfer at least 30 days in advance of the proposed transfer date;

b. The notice includes a written agreement between the existing and new permittees containing a specific date for transfer of permit responsibility, coverage, and liability between them; and

c. The Permit Issuing Authority does not notify the existing permittee of his or her intent to modify or revoke and reissue the permit. If this notice is not received, the transfer is effective on the date specified in the agreement mentioned in paragraph b.

4. Monitoring Reports

ee Part III of this permit.

5. Additional Monitoring by the Permittee

If the permittee monitors any pollutant more frequently than required by this permit, using test procedures approved under 40 CFR 136 or as pecified in this permit, the results of this monitoring shall be ncluded in the calculation and reporting of the data submitted in the Discharge Monitoring Report (DMR). Such increased frequency shall also e indicated.

6 Averaging of Measurements

culations for limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified by the Permit Issuing Authority in the permit.

7. Compliance Schedules

Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than 14 days following each schedule date. Any reports of noncompliance shall include the cause of noncompliance, any remedial actions taken, and the probability of meeting the next scheduled requirement.

. Twenty-Four Hour Reporting

The permittee shall orally report any noncompliance which may endanger health or the environment, within 24 hours from the time the permittee becomes aware of the circumstances. A written submission shall also be provided within 5 days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause, the period of noncompliance, including the exact dates and times; and if the noncompliance has not been corrected, the anticipated time it is expected to continue, and steps taken or planned to reduce, eliminate and prevent reoccurrence of the noncompliance. The Permit Issuing Authority may verbally waive the written report, on a case-by-case basis, when the oral report is made.

following violations shall be included in the 24 hour report when they might endanger health or the environment:

a. An unanticipated bypass which exceeds any effluent limitation in the permit.

b. Any upset which exceeds any effluent limitation in the permit.

. Other Noncompliance

The permittee shall report in narrative form, all instances of noncompliance not previously reported under Section D, Paragraphs D-2, -4, D-7, and D-8 at the time monitoring reports are submitted. The reports shall contain the information listed in Paragraph D-8.

). Changes in Discharges of Toxic Substances

The permittee shall notify the Permit Issuing Authority as soon as it knows or has reason to believe:

a. That any activity has occurred or will occur which would result in the discharge, on a routine or frequent basis, of any toxic substance(s) (listed at 40 CFR 122, Appendix D, Table II and III) which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":

(1) One hundred micrograms per liter (100 ug/l);

(2) Two hundred micrograms per liter (200 ug/l) for acrolein and acrylonitrile; five hundred micrograms per liter (500 ug) for 2,4-dinitrophenol and for 2-methyl-4,6-dinitrophenol; and one milligram per liter (1 mg/l) for antimony; or

(3) Five (5) times the maximum concentration value reported for that pollutant(s) in the application.

b. That any activity has occurred or will occur which would result in any discharge, on a non-routine or infrequent basis, of a toxic pollutant (listed at 40 CFR 122, Appendix D. Table II and III) which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":

(1) Five hundred Micrograms per liter (500 ug/l);

(2) One milligram per liter (1 mg/l) for antimony; or

(3) Ten (10) times the maximum concentration value reported for that pollutant(s) in the permit application.

11. Duty to Reapply

If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and obtain a new permit. The application should be submitted at least 180 days before the expiration date of this permit. The Permit Issuing Authority may grant permission to submit an application less than 180 days in advance but not later than the permit expiration date.

Where EPA is the Permit Issuing Authority, the terms and conditions of this permit are automatically continued in accordance with 40 CFR 122.6, only where the permittee has submitted a timely and complete application for a renewal permit and the Permit Issuing Authority is unable through no fault of the permittee to issue a new permit before expiration date.

12. Signatory Requirements

All applications, reports, or information submitted to the Permit Issuing Authority shall be signed and certified.

a. All permit applications shall be signed as follows:

(1) For a corporation: by a responsible corporate officer. For the purpose of this Section, a responsible corporate officer means: (1) a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or (2) the manager of one or more manufacturing production facilities employing more than 250 persons or having gross annual sales or expenditures exceeding 25 million (in second quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

(2) For a partnership or sole proprietorship: by a general partner or the proprietor, respectively; or

(3) For a municipality, State, Federal, or other public agencies by either a principal executive officer or ranking elected official.

b. All reports required by the permit and other information requested by the Permit Issuing Authority shall be signed by a person described above or by a duly authorized representative only if:

(1) The authorization is made in writing by person described above;

(2) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the company. (A duly authorized representative may this be either a named individual or any individual occupying a named position.); and

(3) The written authorization is submitted to the Permit Issuing Authority.

c. Certification. Any person signing a document under paragraphs (a) or (b) of this section shall make the following certification:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

.3. Availability of Reports

Except for data determined to be confidential under 40 CFR Part 2, all reports prepared in accordance with the terms of this permit shall be available for public inspection at the offices of the Permit Issuing Authority. As required by the Act, permit applications, permits and effluent data shall not be considered confidential.

14. Penalties for Falsification of Reports

Clean Water Act provides that any person who knowingly makes any false material statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance, or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under the Clean Water Act, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than 2 years, or both.

SECTION E. DEFINITIONS

.. Permit Issuing Authority

The Regional Administrator of EPA Region IV or his designee, unless at some time in the future the State receives authority to administer the NPDES program and assumes jurisdiction over the permit; at which time, the Director of the State program receiving the authorization becomes the issuing authority.

2. Act

"Act" means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act) Public Law 92-500, as amended by Public Laws 95-217, 95-576, 96-483, 97-117, and 100-4, 33 U.S.C. 1251 et seq.

Mass/Day Measurements

a. The "average monthly discharges" is defined and the total mass of all daily discharges sampled and/or measured during a calendar month on which daily discharges are sampled and measured, divided by the number of daily discharges sampled and/or measured during such month. It is therefore, and arithmetic mean found by adding the weights of the pollutant found each day of the month and then dividing this sum by the number of days the tests were reported. The limitation is identified as "Daily Average" or "Monthly Average" in Part I of the permit and the average monthly discharge value is reported in the "Average" column under "Quantity" on the Discharge Monitoring Report (DMR).

b. The "average weekly discharge" is defined as the total mass of all daily discharges sampled and/or measured during the calendar week on which daily discharges are sampled and measured, divided by the number of daily discharges sampled and/or measured during such week. It is, therefore, an arithmetic mean found by adding the weights of pollutants found each day of the week and then dividing this sum by the number of days the tests were reported. This limitation is identified as "Weekly Average" in Part I of the permit. Enter the highest weekly average of sample measurements obtained during the reporting period in the "Maximum" column under "Quantity" on the DMR.

c. The "maximum daily discharge" is the total mass (weight) of a pollutant discharged during a calendar day. If only one sample is taken during any calendar day the weight of pollutant calculated from it is the "maximum daily discharge". This limitation is identified as "Daily Maximum", in Part I of the permit and the highest such value recorded during the reporting period is reported in the "Maximum" column under "Quantity" on the DMR.

d. The "average annual discharge" is a rolling average equal to the arithmetic mean of the mass measured in all discharges sampled and/or measured during consecutive reporting periods which comprise one year. For parameters that are measured at least once per month, the annual average shall be computed at the end of each month and is equal to the arithmetic mean of the monthly average of the month being reported and the monthly average of each of the previous eleven months. This limitation is defined as "Annual Average" in Part I of the permit and the average annual discharge value is reported in the "Average" column under "Quantity" on the DMR.

4. Concentration Measurements

a. The "average monthly concentration", other than for fecal coliform bacteria, is the sum of the concentrations of all daily discharges sampled and/or measured during a calendar month on which daily discharges are sampled and measured, divided by the number of daily discharges sampled and/or measured during such month (arithmetic mean of the daily concentration values). The daily concentration value is equal to the concentration of a composite sample or in the case of grab samples is the arithmetic mean (weighted by flow value) of all the samples collected during that calendar day. This limitation is identified as "Monthly Average" or "Daily Average" under "Other Limits" in Part I of the permit and the average monthly concentration value is reported under the "Average" column under "Quality" of the DMR.

b. The "average weekly concentration", other than for fecal coliform bacteria, is the sum of the concentrations of all daily discharges sampled and/or measured during a calendar week on which daily discharges are sampled and measured divided by the number of daily discharges sampled and/or measured during such week (arithmetic mean of the daily concentration values). The daily concentration value is equal to the concentration of a composite sample or in the case of grab samples is the arithmetic mean (weighted by flow value) of all the samples collected during that calendar day. This limitation is identified as "Weekly Average" under "Other Limits" in Part I of the permit. Enter the highest weekly average of sample measurements obtained during the reporting period in the "Maximum" column under "Quality" on the DMR.

c. The "maximum daily concentration" is the concentration of a pollutant discharged during a calendar day. It is identified as "Daily Maximum" under "Other Units" in Part I of the permit and the highest such value recorded during the reporting period is reported under the "Maximum" column under "Quality" on the DMR.

d. The "average annual concentration", other than fecal coliform bacteria, is the rolling average equal to the arithmetic mean of the effluent or influent samples collected during consecutive reporting periods which comprise one year. For parameters that are measured at least once per month, the annual average shall be computed at the end of each month and is equal to the arithmetic mean of the monthly average of the month being reported and the monthly average of each of the previous eleven months. This limitation is identified as "Annual Average" under "Other Limits" in Part I of the permit and the average annual concentration value is reported under the "Average" column under "Quality" on the DMR.

5. Other Measurements

a. The effluent flow expressed as million gallons per day (MGD) is the 24 hour average flow averaged monthly. It is the arithmetic mean of the total daily flows recorded during the calendar month. Where monitoring requirements for flow are specified in Part I of the permit the flow rate values are reported in the "Average" column under "Quantity" on the DMR.

b. An "instantaneous flow measurement" is a measure of flow taken at the time of sampling, when both the sample and flow will be representative of the total discharge.

c. Where monitoring requirements for pH, dissolved oxygen or fecal coliform bacteria are specified in Part I of the permit, the values are generally reported in the "Quality or Concentration" column on the DMR.

d. The "average annual discharge" for fecal coliform bacteria shall be calculated in the same manner as that for mass limitations (see item II.E.3.d.).

6. Types of Samples

a. Composite Samples: A "composite sample" is a combination of not less than 8 influent or effluent portions, of at least 100 ml, collected over the full time period specified in Part I.A. The composite sample must be flow proportioned by either time interval between each aliquot or by volume as it relates to effluent flow at the time of sampling or total flow since collection of the previous aliquot. Aliquots may be collected manually or automatically.

b. Grab Samples: A "grab sample" is a single influent or effluent portion which is not a composite sample. The sample(s) shall be collected at the period(s) most representative of the total discharge.

7. Calculation of Means

a. Arithmetic Mean: The "arithmetic mean" of any set of values is the summation of the individual values divided by the number of individual values.

b. Geometric Mean: The "geometric mean" of any set of values is the N^{th} root of the product of the individual values where N is equal to the number of individual values. The geometric mean is equivalent to the antilog of the arithmetic mean of the logarithms of the individual values. For purposes of calculating the geometric mean, values of zero (0) shall be considered to be one (1).

c. Weighted by Flow Value: "Weighted by flow value" means the summation of each concentration times its respective flow divided by the summation of the respective flows.

8. Calendar Day

A "calendar day" is defined as the period from midnight of one day until midnight of the next day. However, for purposes of this permit, any consecutive 24-hour period that reasonably represents the calendar day may be used for sampling.

9. Hazardous Substance

A "hazardous substance" means any substance designated under 40 CFR Part 116 pursuant to Section 311 of the Clean Water Act.

10. Toxic Pollutants

A "toxic pollutant" is any pollutant listed as toxic under Section 307(a)(1) of the Clean Water Act.

Part III

ıer Requirements

A. Reporting of Monitoring Results

Monitoring results obtained for each calendar month shall be summarized and reported on a Discharge Monitoring Report Form (DMR) (EPA No. 3320-1). These forms shall be submitted after each calendar quarter and postmarked no later than the 28th day of the month following the completed calendar quarter. (For example, data for January-March shall be submitted by April 28.) Calendar quarters are January-March, April-June, July-September, and October-December. Signed copies of these, and all other reports required by Section D of Part II, Reporting Requirements, shall be submitted to the Permit Issuing Authority at the following address:

Environmental Protection Agency
Region IV
Compliance Section
Facilities Performance Branch
Water Management Division
345 Courtland Street, N.E.
Atlanta, GA 30365

If no discharge occurs during the reporting period, sampling requirements of this permit do not apply. The statement "No scharge" shall be written on the DMR form. If, during the term of .is permit, the facility ceases discharge to surface waters, the Permit Issuing Authority and the State shall be notified immediately upon cessation of discharge. This notification shall be in writing.

B. Reopener Clause

This permit shall be modified, or alternatively, revoked and reissued to comply with any applicable effluent standard or limitation issued or approved under Sections 301(b)(2)(C) and (D), 304(b)(2), 307(a)(2), and 405(d)(2)(D) of the Clean Water Act (the Act), as amended, if the effluent standard, limitation, or sludge disposal requirement so issued or approved:

1. Contains different conditions or is otherwise more stringent than any condition in the permit; or

2. Controls any pollutant or disposal method not addressed in the permit.

The permit as modified or reissued under this paragraph shall also contain any other requirements of the Act then applicable.

CHRONIC FRESHWATER LANGUAGE

PART IV
Whole Effluent Toxicity Testing Program

As required by Part I of this permit, the permittee shall initiate the series of tests described below beginning in November 1991 to evaluate whole effluent toxicity of the discharge from outfall 001. All test species, procedures and quality assurance criteria used shall be in accordance with Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms, EPA/600/4-89/001, or the most current edition(s). The dilution/control water used will be a moderately hard water as described in EPA/600/4-89/001, Section 7 (or the most current edition). A standard reference toxicant quality assurance test shall be conducted concurrently with each species used in the toxicity tests and the results submitted with the discharge monitoring report (DMR). Alternatively, if monthly QA/QC reference toxicant tests are conducted, these results must be submitted with the DMR.

1. a. The permittee shall conduct a daphnid (Ceriodaphnia dubia) Survival and Reproduction Test and a Fathead Minnow (Pimephales promelas) Larval Survival and Growth Test. These tests shall be conducted using a control (0% effluent) and one test concentration consisting of 100% effluent (equivalent to the Receiving Water Concentration (RWC) of the effluent in the receiving water at critical conditions). Unacceptable chronic toxicity will be demonstrated if either test results in a no observable effect concentration (NOEC) less than 100% effluent. All test results shall be statistically analyzed according to Appendix H, EPA/600/4-89/001, or the most current edition.

   b. For each set of tests conducted, a minimum of three different 24-hour composite samples of final effluent shall be collected and used per the sampling schedule of Section 8.1.4.2, EPA/600/4-89/001 (or the most current edition). All test solutions shall be renewed daily. If test results do not meet the acceptability criteria of either Section 12, paragraph 12.10 or Section 10, paragraph 11.11, EPA/600/4-89/001 (or the most current edition), that test shall be repeated. A chronic test will be considered valid only if the acceptability criteria referenced above are met.

   c. If 100% mortality occurs in the RWC test concentration prior to the end of the test and control mortality is acceptable at that time, that test (including the control) shall be terminated with the conclusion that the sample demonstrates unacceptable chronic toxicity.

2. a. The toxicity tests specified above shall be conducted once every two months until 6 valid bimonthly tests have been completed, and once every 6 months thereafter for the duration of the permit, unless notified otherwise by EPA. These tests are referred to as "routine" tests.

b. Results from "routine" tests shall be reported according to EPA/600/4-89/001, Section 9, Report Preparation (or the most current edition), and shall be submitted as an attachment to the DMR. Such results are to be entered on the DMR in the following manner:

If the NOEC of a test species is less than 100% effluent, '<100%' should be entered on the DMR for that species. If the NOEC of a test species is greater than or equal to 100% effluent, '>100%' should be entered.

3. a. If unacceptable chronic toxicity (a NOEC less than 100% effluent in either test) is found in a "routine" test, the permittee shall conduct two additional toxicity tests, on the specie(s) indicating unacceptable toxicity. For each additional test, the sample collection requirements and test acceptability criteria specified in Section 1(b) above, must be met for the test to be considered valid. The first test shall begin within two weeks of the end of the "routine" test and the second test shall be conducted two weeks later. If either or both of these tests are invalid, additional test(s) are to be conducted every two weeks until two valid tests are completed (e.g., if the first test is valid and the second test is not, the permittee shall continue to conduct tests until one more test is valid). The additional tests will be used to determine if the toxicity found in the "routine" test is still present.

For "routine" tests with unacceptable chronic toxicity, the permittee shall conduct additional daphnid (Ceriodaphnia dubia) Survival and Reproduction and/or fathead minnow (Pimephales promelas) Survival and Growth multi-concentration tests, as appropriate. The tests will be conducted on a control, 100% effluent, and the following % effluent concentrations: 0.125 x the RWC, 0.25 x the RWC, 0.5 x the RWC, and 0.75 x the RWC. The sample collection requirements specified in Section 1(b) above shall be met.

b. Results from additional tests, required due to unacceptable chronic toxicity in the "routine" test, shall be submitted in a single report prepared according to EPA/600/4-89/001, and submitted within 45 days of completion of the second additional, valid test.

DISCHARGE MONITORING REPORT
GENERAL INSTRUCTIONS FOR COMPLETION

1. Monitoring Period - Fill in the monitoring period as provided for on the DMR. The monitoring period begins on the first day of the month and ends on the last.

2. Completion of Reported Values - For each parameter limited or monitored, the computed values must be entered.

3. Quantity or Loading (lbs/day or kg/day) - The "average monthly discharge" is the total of the daily loads (in pounds) as derived from each day's calculated measurement divided by the number of days during the month the measurements were made. In completing calculations for these averages, quantities or loadings are to be reported in lbs/day or kg/day using the following equations:

   Quantity (lbs/day) = Flow (MGD) x concentration (mg/l) x 8.34
   Quantity (kg/day) = Flow (MGD) x concentration (mg/l) x 3.79

4. Frequency of Analysis - Enter frequency of analysis which is the actual frequency of sampling and analysis used during the monitoring period; the minimum is as specified in the permit and on the DMR.

   All monitoring frequency requirements of the permit are minimum requirements. The results of any additional monitoring of parameters at the location(s) designated in the permit, using the approved analytical methods, must be included on the DMR. Such increased frequency should also be indicated on the DMR.

5. Sample Type - Enter the sample type as Sample Measurement (actual sample type used during the monitoring period.

6. No. Ex. (Number of Exceptions) - Enter the number of sample measurements as calculated values for the monitoring period that exceed (maximum and/or minimum, 7-day average, etc.) the permit requirements for each parameter. The number should be the total of all exceptions during the reporting period, including quantity and quality limits. If none occurred, then enter "0".

7. If no discharge occurs during the month, a report must still be submitted. Simply enter "No Discharge" across the face of the DMR for that reporting month.

8. When violations of permit conditions are reported, attach a brief explanation describing the cause of the violation and any corrective actions taken. Reference each violation by date.

9. Complete the bottom of the DMR with the name and title of the principal executive officers, the date, and the telephone number, along with the signature of the principal officer or authorized agent. Each sheet must be signed.

10. Mail a copy to the appropriate EPA office and keep one copy on file at the permittee's lab or office.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

AMENDMENT TO THE STATEMENT OF BASIS AT THE TIME OF FINAL PERMIT ISSUANCE

DATE: SEP 16 1991

APPLICATION NO: FL0042293

NAME OF APPLICANT: Barefoot Bay WWTP

1. Changes to Permit from Draft Permit to Final Permit Stage:

Page I-1: Reference to the sampling point for each parameter was added.

Page I-2, Item 2: An interim total residual chlorine (TRC) limit of 0.2 mg/l (daily maximum) was added to the permit with a requirement to meet the final TRC limit of 0.01 mg/l no later than three months from the effective date of the permit. These requirements are based on comments from the U.S. Fish and Wildlife Service by letters dated June 7, 1991, and August 8, 1991. Their comments state that in the case of TRC, there should be no significant adverse impacts as long as the effluent is discharged upon a spray field. However, if there should be direct discharges into the drainage canal (as is the case with Barefoot Bay WWTP at this time), severe impacts to the fishery in the canal and Sebastian Creek could result, thus adversely impacting the wood stork which is classified as an endangered species. Therefore, the Fish and Wildlife Service recommends that no direct discharges to the canal be permitted, or that a 0.2 mg/l interim TRC limit be applied to the permit.

Page I-3, Item 7: The final permit requires that sampling for fecal coliform will be taken after treatment at the chlorine contact chamber but prior to entering the polishing/percolation ponds. The draft permit required that sampling for fecal coliform be taken at the nearest accessible point after final treatment but prior to the actual discharge or mixing with the receiving water.

Page I-4: The compliance schedule for Total Residual Chlorine (TRC) was revised to require meeting the final limit of 0.01 mg/l no later than three months from the effective date of the permit.

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2. Public Comment:

Comments were received from the U.S. Fish and Wildlife Service (FWS) by letter dated June 7, 1991. An additional letter dated August 8, 1991, was received from the FWS to confirm verbal recommendations concerning final permit issuance. These comments were incorporated into the final NPDES permit. No other comments were received during the public comment period.

3. State Certification:

Certification for final issuance of this permit was requested by the Environmental Protection Agency on May 9, 1991. The Florida Department of Environmental Regulation waived certification per 40 C.F.R. 124.53(c). (Certification was waived by telephone conversation.)

Exhibit____(GSA-23)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

RECEIVED
SEP 27 1991
SARASOTA OFFICE

REF: 4WM-FP

SEP 25 1991

Mr. Paul H. Bradtmiller, Senior Vice President
Florida Cities Water Company
4837 Swift Road, Suite 100
Sarasota, Florida 34231

RE: Notice of Proposed Assessment of a Civil Penalty;
Tentative Consent Agreement and Order;
Docket No. CWA-IV 91-538

Dear Mr. Bradtmiller:

Enclosed is a document entitled "Administrative Complaint". We have filed this Complaint against Florida Cities Water Company under the authority of Section 309(g) of the Clean Water Act ("Act"), 33 U.S.C. Section 1319(g). In the Complaint, the U. S. Environmental Protection Agency ("EPA") alleges that Florida Cities Water Company has violated various provisions of the Act, and its implementing regulations. The violations EPA is alleging are specifically set out in Section II of the Complaint.

By law, you have a right to request a Hearing regarding the violations alleged in the Complaint, and the proposed administrative civil penalty. Any request for a Hearing must be in writing and must specify the factual and legal issues which are in dispute and the specific factual and legal grounds for your defense, pursuant to Section 126.104 of the enclosed "Guidance on Class I Clean Water Act Administrative Penalty Procedures". Please pay particular attention to Complaint Section IV entitled "Notice of Opportunity to Request a Hearing". Note that should you fail to request a Hearing within thirty days of your receipt of the Complaint, you will waive your right to such a Hearing and the proposed civil penalty may be assessed against you without further proceedings. You have the right to be represented by an attorney, or to represent yourself at any stage of these proceedings.

It is EPA's policy to encourage all parties against whom it files a complaint to pursue the possibility of settlement, and EPA recognizes that, pursuant to this policy, an informal conference was held between you and EPA regarding the matters set forth in the above referenced Complaint. As a result of this informal settlement conference, a tentative Consent Agreement and Order was negotiated and is enclosed for your convenience. If after review you find this tentative Consent Agreement and Order accurate, please sign and return to Mr. Michael Hom, Water Management Division, at the above address.

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Notwithstanding the enclosed tentative Consent Agreement and Order, the law requires EPA to file the above referenced Complaint and provide the public with thirty days in which to comment. Upon expiration of the thirty-day public comment period, EPA must consider any and all public comments received before executing the enclosed Consent Agreement and Order. Assuming the Consent Agreement and Order is signed by both parties, an executed copy will be sent to you. The issuance of this Consent Agreement and Order shall constitute a waiver by you of your right to a hearing on, and to judicial appeal of, the agreed upon civil penalty.

Please note that the informal conference and the enclosed tentative Consent Agreement and Order do not extend the thirty days by which you must request or waive a Hearing on the matters raised in the Complaint; and the two procedures can be pursued simultaneously. If you have any questions regarding these matters, please contact Mr. Hom.

We urge your prompt attention to this matter.

Sincerely yours,

W. Ray Cunningham, Director
Water Management Division

Enclosure

cc: Florida Department of
Environmental Regulation

Regional Hearing Clerk

Office of Regional Counsel

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV

IN THE MATTER OF:	)	Docket No. CWA-IV 91-538
Florida Cities Water Company 4837 Swift Road, Suite 100 Sarasota, Florida 34231	)	Proceeding to Assess Class I Administrative Penalty Under Clean Water Act, Section 309(g)

ADMINISTRATIVE COMPLAINT

I. Statutory Authority

The following Findings are made, and Notices given under the authority vested in the Administrator of the U. S. Environmental Protection Agency ("EPA") by Section 309(g) of the Clean Water Act ("Act"), 33 U.S.C. Section 1319(g). The Administrator has delegated these authorities to the Regional Administrator of EPA Region IV, who has in turn delegated them to the Director of the Water Management Division of EPA Region IV, who hereby issues this Complaint.

II. Findings of Violation:

1. Florida Cities Water Company, ("Respondent"), a person within the meaning of Section 502(5) of the Act, 33 U.S.C. Section 1362(5), owns or operates a facility located at Barefoot Bay, Brevard County, Florida, which is a point source and discharges pollutants to the drainage canal to Sebastian River, a navigable water of the United States, all within the respective definitions established in Section 502 of the Act, 33 U.S.C. Section 1362. Respondent is therefore subject to the provisions of the Act, 33 U.S.C. Section 1251 et seq.

2. Respondent has violated Section 301(a) of the Act, 33 U.S.C. Section 1311(a), by discharging pollutants into waters of the United States without a valid NPDES permit issued pursuant to Section 402 of the Act (33 U.S.C. 1342), on September 14, 1989 from its

Barefoot Bay WWTP into a drainage canal leading to the Sebastian River.

3. EPA has consulted with the State of Florida regarding this proposed action by mailing a copy of this document to the appropriate State official, and offering an opportunity for the State to consult with EPA on this proposed penalty assessment.

III. Notice of Proposed Order Assessing A Civil Penalty

Based on the foregoing findings of violation, and pursuant to the authority of Section 309(g) of the Act, 33 U.S.C. Section 1319(g), EPA Region IV hereby proposes to issue a Final Order Assessing Administrative Penalties to Florida Cities Water Company, assessing a penalty in the amount of $6,000.00.

The proposed penalty amount was determined by EPA after taking into account the nature, circumstances, extent and gravity of the violation or violations, and Respondent's prior compliance history, degree of culpability for the cited violations, any economic benefit or savings accruing to Respondent by virtue of the violations, and Respondent's ability to pay the proposed penalty, all factors identified at Section 309(g)(3) of the Act, 33 U.S.C. Section 1319(g)(3). EPA may issue the Final Order Assessing Administrative Penalties thirty days after Respondent's receipt of this Notice, unless Respondent, within that time, requests a hearing on this Notice pursuant to the following section.

IV. Notice of Opportunity to Request A Hearing

1. Respondent may, pursuant to Section 309(g) of the Act, 33 U.S.C. Section 1319(g), request within thirty days of receipt of this Notice a hearing on the proposed civil penalty assessment, and at the hearing may contest any material fact contained in the Findings of Violation at Section II above, and the appropriateness of any penalty

amount. The request for a hearing must specify the factual and legal issues which are in dispute and the specific factual and legal grounds for Respondent's defense. Any and all specific allegations not responded to by Respondent shall be deemed admitted. The procedures for the hearing, if one is requested, are set out in "Guidance on Class I Clean Water Act Administrative Penalty Procedures", a copy of which is enclosed.

2. Respondent must send any request for a hearing to:

Regional Hearing Clerk
U. S. EPA Region IV
345 Courtland Street
Atlanta, Georgia 30365

3. Be aware that should you request a hearing on this proposed penalty assessment, members of the public, to whom EPA is obligated to give notice of this proposed action, will have a right under Section 309(g)(4)(B) of the Act, 33 U.S.C. Section 1319(g)(4)(B), to be heard and to present evidence on the appropriateness of the penalty assessment. Should you not request a hearing, EPA will issue a Final Order Assessing Administrative Penalties, and only members of the public who submit timely comment on this proposal will have an additional 30 days to petition EPA to set aside the Final Order Assessing Administrative Penalties and to hold a hearing thereon. EPA will grant the petition and will hold a hearing only if the petitioner's evidence is material and was not considered by EPA in the issuance of the Final Order Assessing Administrative Penalties.

4. Neither assessment nor payment of an administrative civil penalty pursuant to this section of the Act shall affect your continuing obligation to comply with the Clean Water Act and with any separate Compliance Order issued under Section 309(a) of the Act, 33 U.S.C. Section 1319(a), for the violations alleged herein.

SEP 25 1991

DATE

W. Ray Cunningham, Director
Water Management Division

CERTIFICATE OF SERVICE

I certify that on the date noted below, I hand delivered the original of the foregoing "Administrative Complaint" to the Regional Hearing Clerk, Region IV. Further, I certify that on the date noted below, I sent by certified mail, return receipt requested, a copy of this "Administrative Complaint" and a copy of the enclosed Guidance on Class I Clean Water Act Administrative Penalty Procedures, to the following person at the address listed below:

Mr. Paul H. Bradtmiller
Florida Cities Water Company
4837 Swift Road, Suite 100
Sarasota, Florida 34231

I further certify that on the same date below I sent by certified mail, return receipt requested, a copy of this document to the following person at the address listed below:

Ms. Carol Browner
Secretary
Florida Department of
Environmental Regulation
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

SEP 25 1991

DATE

Susan J. Pope

NAME Susan J. Pope
TITLE Compliance Analyst
ADDRESS US EPA, Region IV
345 Courtland Street, NE
Atlanta, GA 30365

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV

IN THE MATTER OF:	)	Docket No. CWA-IV 91-538
	)	
Florida Cities Water Company	)	Proceeding to Assess Class I
4837 Swift Road, Suite 100	)	Administrative Penalty Under
Sarasota, Florida 34231	)	Clean Water Act, Section 309(g)

CONSENT AGREEMENT AND ORDER
ASSESSING ADMINISTRATIVE PENALTIES

I. Statutory Authority

The following Findings are made and Consent Agreement issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 309(g) of the Clean Water Act ("Act"), 33 U.S.C. Section 1319(g). The Administrator has delegated these authorities to the Regional Administrator of EPA Region IV, who has in turn delegated them to the Director of the Water Management Division of EPA Region IV, who hereby issues this Final Order.

II. Findings of Violation

Upon consent of the parties by their attorneys and authorized officials, the parties stipulate and the Director finds:

1. Florida Cities Water Company, ("Respondent"), a person within the meaning of Section 502(5) of the Act, 33 U.S.C. Section 1362(5), owns or operates a facility located at Barefoot Bay, Brevard County, Florida, which is a point source and discharges pollutants to the drainage canal to Sebastian River, a navigable water of the United States, all within the respective definitions established in Section 502 of the Act, 33 U.S.C. Section 1362. Respondent is therefore subject to the provisions of the Act, 33 U.S.C. Section 1251 et seq.

2. EPA Region IV issued to Respondent and notified the public of an Administrative Complaint, Docket No. CWA-IV 91-538 which included formal findings of violation, notice of a proposed assessment of a civil penalty against Respondent, and notice of Respondent's opportunity to request a hearing on the proposed administrative penalty assessment. EPA Region IV has taken into consideration any public comments timely received.

3. The State of Florida was given an opportunity to consult with EPA regarding the assessment of an administrative penalty against Respondent. EPA Region IV has taken into consideration any comments received from the State.

4. Respondent has violated Section 301(a) of the Act, 33 U.S.C. Section 1311(a), by discharging pollutants into waters of the United States without a valid NPDES permit issued pursuant to Section 402 of the Act (33 U.S.C. 1342), on September 14, 1989 from its Barefoot Bay WWTP into a drainage canal leading to the Sebastian River.

III. Penalty Order and Consent:

Based on the foregoing stipulations and findings, and having taken into account the nature, circumstances, extent and gravity of the violations, Respondent's prior history of compliance, degree of culpability, economic benefit or savings resulting from the violations, and ability to pay, and under the authority of Section 309(g) of the Act, 33 U.S.C. Section 1319(g), EPA Region IV hereby ORDERS AND RESPONDENT HEREBY CONSENTS, that:

1. The provisions of this Consent Agreement shall be binding upon the Respondent, its officers, directors, agents, servants, authorized representatives, employees, and successors or assigns.

2. Florida Cities Water Company shall pay $6,000.00 for its past violations of the Clean Water Act cited above, by mailing a

money order or certified check payable to "Treasurer, United States of America" by the effective date defined below, to the following address:

U.S. EPA Region IV
P.O. Box 100142
Atlanta, Georgia 30384

Respondent shall send notice of such payment, including a copy of the money order or check, to the Hearing Clerk at the following address:

Regional Hearing Clerk
U.S. EPA Region IV
345 Courtland Street, NE
Atlanta, Georgia 30365

IV. General Provisions

1. This Consent Agreement and Order represents full monetary settlement of the proposed administrative penalties sought by EPA for the underlying violations as alleged in the Complaint. However, issuance of this Consent Agreement and Order does not constitute a waiver by EPA of its right to issue an administrative order pursuant to Section 309(a) of the Act, 33 U.S.C. Section 1319(a), to require any remedial actions necessary (other than penalty assessment) to address the cause of the underlying violations. In addition, issuance of this Consent Agreement and Order does not constitute a waiver by EPA of its right to seek injunctive relief pursuant to Section 309(b) of the Act, 33 U.S.C. Section 1319(b), or to seek criminal penalties for the underlying violations pursuant to Section 309(c) of the Act, 33 U.S.C. Section 1319(c). Nor, pursuant to Section 309(g)(7) of the Act, 33 U.S.C. Section 1319(g)(7) of the Act, does issuance or compliance with this Consent Agreement and

Order exempt Respondent from responsibility to comply with all requirements of the Act and of any legal order or permit issued pursuant thereto.

2. Failure by Respondent to pay in full the penalty assessed in Section III, Paragraph 2 shall render the entire proposed penalty of $6,000.00 due and owing, and it shall be paid immediately in the manner provided in Section III, Paragraph 2 of the Consent Agreement.

Failure by Respondent to pay the penalty set forth in Section III, Paragraph 2 may subject Respondent to a civil action to collect the assessed penalty, plus interest, attorney's fees, costs and an additional quarterly nonpayment penalty equal to 20 percent of the aggregate amount of such penalty pursuant to Section 309(g)(9) of the Act, 33 U.S.C. Section 1319(g)(9). In any such collection action, the validity, amount and appropriateness of the penalty and of the Consent Agreement and Order shall not be subject to review. Interest will accrue on the penalty at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. Section 3717. A late payment handling charge of twenty ($20.00) dollars will be imposed after thirty (30) days, with an additional charge of ten ($10.00) dollars for each subsequent 30-day period over which an unpaid balance remains. In addition, a six percent (6%) per annum penalty will be applied on any principal amount not paid within ninety (90) days of the effective date of this Order.

3. For purposes of federal income taxation, Respondent shall not be entitled to, and agrees not to, claim a deduction for any penalty payment made pursuant to this Consent Agreement and Order.

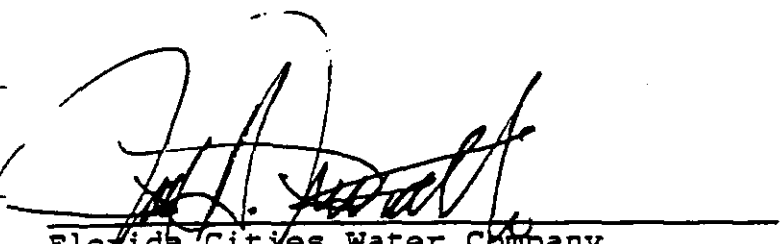
4. Respondent knowingly and explicitly waives its rights pursuant to Sections 309(g)(2) and (8), 33 U.S.C. Section 1319(g)(2)

and (8), to a hearing on this penalty assessment, and to judicial review of this administrative penalty assessment.

5. Each party to this Consent Agreement shall bear its own attorneys' fees, costs and expenses in this action. Should Respondent subsequently be determined to have violated the terms and conditions of this Consent Agreement, then the United States Environmental Protection Agency reserves its rights to seek payment of all attorneys' fees, costs and expenses it incurs in any actions against Respondent for noncompliance with this Consent Agreement.

V. Effective Date

This Consent Agreement and Order shall become effective thirty (30) days after the date of issuance noted below.



Florida Cities Water Company
Paul H. Bradtmiller, Senior Vice President
4837 Swift Road, Suite 100
Sarasota, Florida 34231

_____

W. Ray Cunningham, Director
Water Management Division
EPA Region IV

Issued this _____ day of _____, 19 .

AO 450 (Rev. 5/85) Judgment in a Civil Case ●

Exhibit_____(GSA-24)

United States District Court

MIDDLE DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

V.

AVATAR HOLDINGS, INC., and
FLORIDA CITIES WATER COMPANY

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 93-281-Civ-FTM-21

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came ~~to trial or hearing before the Court~~. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of plaintiff United States of America and against defendant Florida Cities Water Company for the violations at the three wastewater treatment plants as follows:

Barefoot Bay	$5,610.00
Carrollwood	$14,675.00
Waterway Estates	$289,425.00
TOTAL	**$309,710.00**

Judgment is entered in favor of defendant Avatar Holdings, Inc. and against plaintiff United States of America on plaintiff's claims against it.

AUG 2 0 1996

Date

RICHARD D. SLETTEN

Clerk

Ginger K McClurk

(By) Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

Plaintiff,

V. CASE NO. 93-281-CIV-FTM-21

AVATAR HOLDINGS, INC., and
FLORIDA CITIES WATER COMPANY,

Defendants.
_____/

MEMORANDUM ORDER

This is an action by the United States of America ("Plaintiff") against Florida Cities Water Company ("Florida Cities"), a private utility company, and its parent company, Avatar Holdings, Inc. ("Avatar Holdings"), brought pursuant to the civil penalty provisions of the Clean Water Act (CWA), 33 U.S.C. § 1319 (b). The action was tried to the Court sitting without a jury. Upon due consideration of the testimony and evidence presented herein, the arguments of counsel, and the proposed findings submitted by the parties, the Court issues the following opinion as its findings of fact and conclusions of law in accordance with Rule 52, Federal Rules of Civil Procedure.

PROCEDURAL BACKGROUND

Prior to trial, the Court decided summary judgment motions of all three parties. The Court granted Plaintiff summary judgment on liability against Florida Cities on the Plaintiff's claims for National Pollutant Discharge System (NPDES) permit violations at Barefoot Bay and

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Carrollwood and claims for unpermitted discharges, discharges to an unpermitted location and NPDES permit violations at Waterway Estates. The Court granted Florida Cities summary judgment on the allegations in paragraphs 16-23 and 30 of the Second Amended Complaint, which consisted of a claim for discharge from Barefoot Bay without an NPDES permit, claims for violations of Administrative Order (AO) 90-106 for discharging without a permit from Barefoot Bay, and a claim for discharge without an NPDES permit from Carrollwood. The Court also granted Avatar Holdings partial judgment on the pleadings as to all allegations against Avatar Holdings that date back more than five years due to the five year statute of limitations, 28 U.S.C. § 2462. The remaining issues at trial were the amount of civil penalty to be assessed against Florida Cities[1], the liability of Avatar Holdings as Florida Cities' parent company, and the amount of civil penalty to be assessed against Avatar Holdings if it is found to be liable. The parties have filed their proposed findings of fact and conclusions of law and post-trial briefs, and Avatar Holdings has additionally filed a memorandum of law in support of judgment as a matter of law and Plaintiff has filed a memorandum in opposition thereto.

FINDINGS OF FACT — FLORIDA CITIES[2]

Florida Cities is a utility company, which owns and operates the three wastewater treatment plants that are involved in this case: Barefoot Bay, Carrollwood, which is no longer

[1]In accordance with the Pretrial Order (Dkt. 248), the trial of this case proceeded upon the Revised Joint Pretrial Statement (Dkt. 264), and said pretrial statement is controlling. In the pretrial statement, the parties indicated that the only issue to be tried with respect to Florida Cities was the amount of the civil penalty to be assessed. Therefore, the Court will base the amount of penalties on the number of violations determined in the Court's prior Orders in this case.

[2]Additional findings of fact are incorporated into the Court's discussion of the six factors to consider in assessing the amount of the civil penalty, as is required by the Eleventh Circuit in Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1142 (11th Cir. 1990)(stating that in determining the amount of penalty, the district court must indicate the weight it gives to factors in the applicable statute and the factual findings that support its conclusions).

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in operation, and Waterway Estates. In order for a company to discharge to surface waters of the United States, it must obtain an NPDES permit issued from the Environmental Protection Agency (EPA) or by a state to which the EPA has delegated NPDES permitting authority. Prior to May 1, 1995, Florida was a "non-delegated" state under the CWA such that dischargers in Florida were required to be permitted by both the EPA and the Florida Department of Environmental Protection (FDEP)[3].

I. Barefoot Bay

The Barefoot Bay plant is located in Brevard County, Florida, and it discharges treated effluent into an agricultural drainage canal which leads to the Sebastian River. Barefoot Bay utilizes two percolation ponds. Barefoot Bay provides secondary wastewater treatment to a residential community and is currently undergoing a plant modification to provide advanced wastewater treatment. On November 1, 1991, NPDES permit FL0042293 became effective. The permit required Florida Cities to report to EPA total residual chlorine (TRC) levels, toxicity test results, and biochemical oxygen demand (BOD) levels. The 269 Clean Water Act violations pertaining to Barefoot Bay in this case are the following exceedances of NPDES permit FL0042293: 182 violations of the TRC limitation between September 1992 and March 1993; 3 chronic toxicity test failures in September-October 1992, May 1993, and February 1994; and 79 violations for failure to report BOD on a weekly basis between November 1991 and June 1993 and twice in November 1993.

[3]The Florida Department of Environmental Protection (FDEP) was formerly known as the Florida Department of Environmental Regulation (FDER). Throughout this Memorandum Order, FDEP should be read to mean either FDEP or its predecessor agency, FDER, depending on the relevant time period.

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In September 1992, Barefoot Bay purchased and put into use a new Hach DPD DR-100 chlorine tester, which is an EPA approved method for testing chlorine limits of 0.01 milligrams per liter. However, the EPA guidance materials acknowledge that the DPD DR-100 colorimeter is inaccurate below levels of 0.1 milligrams per liter. Thus, the EPA guidance materials allow dischargers who test for TRC with the DPD DR-100 colorimeter to report measurements below 0.1 milligrams per liter as non-detectable. Between September 1992 and March 1993, Florida Cities reported chlorine residuals at or below 0.1 milligrams per liter. Had Florida Cities reported the chlorine as non-detectable rather than as an actual number, Florida Cities would have been deemed to be in compliance with chlorine limits under the Clean Water Act. In any event, after reporting the chlorine residuals at Barefoot Bay, Florida Cities constructed, permitted and placed into service by March 3, 1993 an amperometric titrator and a sulfur dioxide feed, which eliminates chlorine through the combination of sulfur dioxide with the chlorine residual.

With respect to the chronic toxicity test violations, the testimony presented at trial established that the most common cause of chronic toxicity failures is the presence of ammonia in the effluent. Ammonia is made of nitrogen and hydrogen (NH_3). Although advanced wastewater treatment provides for nutrient removal from effluent, secondary treatment does not provide for removal of nutrients such as nitrogen or phosphorus. Thus, Barefoot Bay, a secondary treatment plant, was not designed to remove the nitrogen which resulted in the chronic toxicity test violations.

With respect to the BOD violations, Florida Cities had been reporting carbonaceous biochemical oxygen demand (CBOD) rather than BOD as required in the permit. The BOD test measures the oxygen demand exerted by treated effluent on the receiving system. In October

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1993, Barefoot Bay applied to EPA for a modification of NPDES permit FL0042293 to allow monitoring for CBOD instead of BOD, and EPA granted the modification request with no change in the actual limit. The testimony at trial showed that BOD levels can be extrapolated with a reasonable degree of accuracy from CBOD levels. Thus, even though Barefoot Bay improperly reported CBOD levels, the effluent would have complied with the applicable permit limits.

II. Carrollwood

Until it was closed on January 6, 1992, the Carrollwood plant was located in Hillsborough County, Florida, and provided secondary wastewater treatment to a residential community. Between 1975 and January 1992, Carrollwood discharged secondarily treated effluent into the Sweetwater Creek pursuant to a series of FDEP permits and consent orders. In May 1991, the EPA issued NPDES permit FL0029319, which imposed advanced wastewater treatment standards. The 234 Clean Water Act violations pertaining to Carrollwood in this case are exceedances of the NPDES permit limitations for phosphorus, CBOD, nitrogen, TRC, Total Suspended Solids (TSS), and fecal coliform between July 1991 and January 1992.

In 1979, the FDEP determined that there should be no discharge into Sweetwater Creek, which leads to Tampa Bay, in order to reduce the amount of pollution going to Tampa Bay. In 1984, the EPA denied Florida Cities' NPDES renewal application to discharge into the Sweetwater Creek. In April 1988, FDEP issued Carrollwood an operating permit to the Carrollwood facility requiring Florida Cities to connect to the Hillsborough County system or to construct an advanced wastewater treatment facility by October 1, 1990. In the summer of 1990, Florida Cities applied to the FDEP for another operation permit and the permit application was denied. However, Florida Cities and FDEP entered into a consent order in January 1991

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reincorporating the effluent limitations of the April 1988 operating permit and extending until April 1992 the construction deadline for interconnection to Hillsborough County or completion of advanced wastewater treatment. The consent order also required Florida Cities to continue to operate the wastewater treatment plant in accordance with the 1988 effluent limitations.

Since late 1990, Carrollwood also operated under EPA AO 90-100, which imposed secondary treatment limits. No violations of secondary treatments were recorded between July 1, 1991 and January 6, 1992, and Florida Cities met the effluent limitations and monitoring requirements of the active administrative orders. In May 1991, the EPA issued the NPDES permit with advanced wastewater treatment limits. The level of treatment required by the NPDES permit reflected increased treatment requirements for phosphorous and nitrogen which were unattainable by the secondary treatment plant.

In 1991, Florida Cities simultaneously pursued two remedial options: connection to the Hillsborough County system and construction of an advanced wastewater treatment. Hillsborough County did not have capacity to accept effluent until the second quarter of 1991. After Hillsborough County agreed to waive a $5.5 million capacity fee, an agreement was signed on June 5, 1991 to interconnect the two facilities by January 1992. Florida Cities then abandoned plans to construct an advanced wastewater facility. Both before and after the agreement with Hillsborough County, Florida Cities requested that the EPA allow secondary interim limits and relief from the advanced wastewater treatment requirements. The EPA never revoked AO 90-100, which authorized secondary treatment, until March 1992, two months after the interconnection with Hillsborough County was completed. In 1991, the EPA assessed a

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$15,000 penalty ($13.51/day) under the CWA for discharges without an NPDES permit between June 1987 and July 1990 at Carrollwood.

III. Waterway Estates

The Waterway Estates plant is located in Lee County, Florida. Since April 1992, Waterway Estates has provided advanced wastewater treatment, and prior to that time, it provided secondary wastewater treatment. Waterway Estates has discharged treated effluent into the Caloosahatchee River since July 14, 1991, and prior to July 14, 1991, it discharged treated effluent into a canal which led to the Caloosahatchee River. The Waterway Estates plant exceeded NPDES permit FL0030325, which imposed advanced wastewater treatment standards, for a total of 1038 Clean Water Act violations consisting of: 396 violations for discharge without an NPDES permit between October 1, 1988 and October 31, 1989; 621 violations for discharging into a canal, instead of to the 6-foot contour line of the Caloosahatchee River between November 1, 1989 and July 14, 1991; 18 violations of total nitrogen loading and concentration; and 3 toxicity test violations.

In 1975, Florida Cities received a wasteload allocation and an NPDES permit which authorized Waterway Estates to discharge secondarily treated effluent to a canal leading to the Caloosahatchee River. The EPA renewed the permit in 1981 and 1983, and on May 9, 1986, Florida Cities applied to EPA Region IV for a routine renewal of its NPDES permit. At that time, permit writer Connie Kagey denied the application. Ms. Kagey based her denial on her review of the cover page and page 17 of the January 1981 Caloosahatchee River Wasteload Allocation Documentation, which is a preliminary planning document drafted as guidance by FDEP regional offices making permitting decisions. Based on her review of the planning

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document, Ms. Kagey determined that Waterway Estates had no wasteload allocation. However, Florida Cities was given opportunities to bring any errors to the EPA's attention at several occasions: after receiving the letter indicating that there would be a public notice period, during the public notice period, and after the issuance of the permit decision when Florida Cities could have requested a hearing under 40 C.F.R. §§ 124.74 or 124.114.

Once the existing NPDES permit expired in 1987, the EPA issued AO 87-085, whereby the EPA authorized Waterway Estates to continue discharging effluent under the terms of the 1981 NPDES permit and directed that the facility cease its discharges by September 30, 1988. Florida Cities then decided to construct an advanced wastewater treatment facility and hired Source, Inc. in early 1988 to design the upgrade. In August 1988, the EPA amended its 1987 administrative order to require Waterway Estates to complete construction and meet final effluent requirements by November 1, 1990. The FDEP also issued a temporary operating permit requiring compliance with effluent limitations by November 1, 1990. The temporary permit allowed secondary discharges to the canal until November 1, 1990, and the EPA did not challenge or comment on the issuance of this permit.

On September 26, 1989, the EPA issued AO 89-109, which contained a construction schedule for the advanced wastewater treatment upgrade, a construction schedule for the relocation of the outfall to the 6-foot contour line of the Caloosahatchee River, and interim secondary treatment effluent limitations from the 1981 NPDES permit until the advanced wastewater treatment construction was completed. Additionally, on September 29, 1989, the EPA issued NPDES permit No. FL0030325, which contained effluent limitations for an advanced wastewater treatment facility. The FDEP also issued a construction permit which

provided an extension of time for the advanced wastewater treatment upgrade and relocation of the outfall to September 1992. Florida Cities requested that the EPA extend AO 89-109 to match the September 1992 construction deadline set by the FDEP, but the EPA did not respond to the request. Florida Cities then completed the advanced wastewater treatment upgrade in April 1992, ahead of the FDEP's schedule, but failed to meet the deadline set in AO 89-109 for October 1, 1991. The outfall to the six-foot contour line of the Caloosahatchee River was operational on July 14, 1991, ahead of the deadlines established in the state construction permit and EPA AO 89-109.

CONCLUSIONS OF LAW — FLORIDA CITIES

The penalty provisions of the Clean Water Act are set forth in 33 U.S.C. § 1319 (d), which provides in pertinent part:

> Any person who violates [specified sections of the Act] shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

The Clean Water Act was intended "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. 49, 52 (1987)(quoting Section 101(a) of the Act). In Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc., the Eleventh Circuit stated that in determining penalties under the Clean Water Act, "the point of departure for the district court should be the maximum fines for such violations permitted by the Clean Water Act." 897 F.2d 1128, 1137 (11th Cir. 1990). The Court further stated that if the district court chooses not to impose the maximum

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fine, "it must reduce the fine in accordance with the factors spelled out in section 1319(d), clearly indicating the weight it gives to each of the factors in the statute and the factual findings that support its conclusions." Id. at 1142. The Court also noted that in Tull v. United States, 481 U.S. 412, 422-425 (1987), "the Supreme Court made clear that economic gain and restoration of the status quo is not the only basis on which penalties should be awarded under the Clean Water Act. In addition, the penalties are designed to punish violators for their non-compliance and to serve the goal of retribution." Id. at 1141.

The statutory maximum for the violations at issue is calculated by multiplying daily violations by $25,000. In order to calculate the statutory maximum for monthly violations, the number of monthly violations is multiplied by the number of days in the month they occurred and that number is multiplied by $25,000. Thus, the Court's computation of the statutory maximum is as follows: $6,600,000 (264 x 25,000) for the Barefoot Bay violations, $14,675,000 (587[4] x 25,000) for the Carrollwood violations, and $32,025,000 (1281[5] x 25,000) for the Waterway Estates violations. The total is $53,300,000. In accordance with Tyson Foods, this statutory maximum is the Court's departure point, and the Court will consider Defendants' arguments to reduce the penalty in accordance with the factors in § 1319 (d). The Plaintiff argues that the penalty should only be reduced to $4,861,500.

---

[4]The Carrollwood violations consist of violations of the following parameters, several of which are monthly violations: (1) Phosphorus from July-November 1991, the equivalent of 153 days of violations; (2) Carbonaceous Biological Oxygen Demand (CBOD) in October 1991, the equivalent of 31 days of violations; (3) Nitrogen in July 1991 and from September-November 1991, the equivalent of 122 days of violations; (4) Total Residual Chlorine, amounting to 184 violations; (5) Total Suspended Solids from October-December 1991, the equivalent of 92 days of violations; and (6) Fecal Coliform, amounting to 5 violations. The sum of these violations is 587.

[5]The Waterway Estates violations consist of the following: 396 days of unpermitted discharges; 621 days of discharges to an unpermitted location; Nitrogen violations between July 1991 - March 1992, the equivalent of 261 separate days of violations; and 3 chronic toxicity test violations. The sum of these violations is 1281.

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Florida Cities maintains that the penalty should be de minimis — no more than $48,000. Florida Cities points out that trial courts have broad discretion when deciding the appropriate civil penalty amount in Clean Water Act enforcement actions, citing Hawaii's Thousand Friends v. City and County of Honolulu, 821 F.Supp. 1368, 1395 (D.Haw. 1993). Florida Cities points out that in Hawaii's Thousand Friends, the court found that mitigation in the amount of 99.71% of the maximum statutory penalty was within its "sound discretion," even though the discharges failed to meet secondary treatment standards, discharges of raw sewage were numerous and unreported, and the court found a lack of good faith efforts to comply with the NPDES permit or avoid other violations. The courts' determination of the penalty under the Clean Water Act has been characterized as "highly discretionary." Tull v. United States, 481 U.S. 412, 413 (1987), Sierra Club v. Cedar Point Oil Co., 73 F.2d 546, 575 (5th Cir. 1996).

Florida Cities asserts that the Court should use its discretion to find that a penalty of up to $1,000 per violation is appropriate for the following violations in which mitigation is less: 18 nitrogen violations and 3 toxicity violations at Waterway Estates and 3 toxicity violations at Barefoot Bay (a total of 24 violations), which amounts to a penalty of $24,000. For the remaining 1512 violations, Florida Cities says that the EPA's own valuation of discharge without a permit violations at Carrollwood is instructive in setting a standard for the remaining violations. In AO 90-100 for Carrollwood, the EPA found that 37 months of discharge without a permit between June 1987 and July 1990 was worth $15,000 or $13.51 per day. Thus, Florida Cities suggests that, for the remaining 1512 violations, the Court should assess a penalty of no more than $20,428 (1512 x 13.51) for all remaining violations.

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I. Seriousness of the Violations

In evaluating the seriousness of the violations at issue in this case, the Court considers the number, duration and degree of the violations as well as the actual or potential harm to human health and environment. United States v. Dean Dairy Products Co., CV-94-0621, p. 16 (M.D. Penn., July 10, 1996), Hawaii's Thousand Friends v. City and County of Honolulu, 821 F.Supp. 1368, 1383 (D. Hawaii 1993). A substantial reduction in the maximum statutory penalty is warranted where the violations caused minimal environmental damage. Id. at 1397. Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co., Inc., 786 F.Supp. 743, 753 (N.D. Ind. 1992). In the instant case, the Court finds that most of the violations of total residual chlorine (TRC), toxicity violations and BOD at Barefoot Bay are not serious. First, although Plaintiff concedes no harm, it asserts that a "particularized showing of harm" is not required and that proof of overall risk of pollutants is sufficient, relying upon Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminal, Inc., 913 F.2d 64, 79 (3rd Cir. 1990), cert. denied, 111 S.Ct. 1018 (1990); Chesapeake Bay Foundation v. Gwaltney of Smithfield, 611 F.Supp. 1542, 1560 (E.D. Va. 1985), aff'd, 791 F.2d 304 (4th Cir. 1986), cert. denied, 479 U.S. 1029 (1987); Dean Dairy, supra at p. 16. Plaintiff's expert Mark Klingenstein, pointed out that a potential risk of harm exists, as the discharge from Barefoot Bay proceeds to the Sebastian River and the Indian River Lagoon, which water bodies have been identified as a habitat for fish, wildlife, and the wood stork, an endangered species. Klingenstein also pointed out that those water bodies have been identified as "threatened water bodies that were being negatively impacted by nutrient load" in the Surface Water Improvement and

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Management Act. The Court notes, however, that, with respect to all of the violations, Plaintiff has not in any way quantified the risk of environmental harm.

Further, although the number of violations is relatively high (182 TRC, 3 chronic toxicity, 79 BOD) and the duration of the violations is considerable,[6] the degree of the violations lessens the seriousness of the violations. The TRC violations occurred because Florida Cities was unaware that the test method approved by the EPA did not provide precise results and that the levels measured could have been reported as "not detectable," such that Florida Cities would have been deemed to be in compliance with the NPDES permit. Further, the Plaintiff has acknowledged that the BOD violations are not serious, as they occurred simply because Florida Cities mistakenly reported CBOD instead of BOD. Douglas Smith's testimony established that a conversion of the CBOD test results was possible, and that such conversion showed that none of the CBOD data would have been a violation of BOD effluent limitations. With respect to the chronic toxicity test failures, which occur as a result of nitrogen present in the effluent, the Court notes that Barefoot Bay's secondary treatment facility was not designed to remove nitrogen, and the EPA did not include nitrogen limits in the NPDES permit for Barefoot Bay. Thus, there appears to be an inconsistency between allowing nitrogen in the effluent while limiting the consequent toxicity. Upon consideration of the foregoing evidence, the Court finds that the TRC and BOD violations at Barefoot Bay are not serious, and that the toxicity test violations are somewhat serious.

[6]The 182 total residual chlorine violations occurred between September 1992 and March 1993; the 3 chronic toxicity test failures occurred in September-October 1992, May 1993, and February 1994; and the 79 violations for failure to report biochemical oxygen demand occurred on a weekly basis between November 1991 and June 1993, and twice in November 1993.

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Second, the Court finds that the NPDES violations at Carrollwood are not serious. First, the Plaintiff admits that it has no evidence of environmental damage from these violations. Although Klingenstein testified that there is a potential risk of harm to the Sweetwater Creek and Tampa Bay due to the nature of the water bodies, the evidence does not demonstrate a quantifiable risk of environmental harm. Further, Smith testified that the Carrollwood plant was providing better than secondary treatment during the period in question and that the environmental impact of BOD and TSS was very small or essentially not measurable. The Court also notes that it is appropriate for the Court to consider the toxic/conventional pollutant distinction when weighing the seriousness of a violation and for the Court to consider that conventional pollutants such as TSS and BOD are not among the most egregious pollutants. Dean Dairy, supra, p. 17, citing PIRG v. Powell Duffryn Terminals, Inc., 720 F.Supp. 1158. 1161 (D.N.J. 1989). Additionally, although the total number of NPDES violations is high (234), the duration was not extended (between July 1991 and January 1992). The Court also finds that the degree of the violations was not substantial because the EPA kept AO 90-100 in effect, thereby authorizing Carrollwood to discharge secondarily treated effluent into Sweetwater Creek. The violations at Carrollwood are violations of the advanced wastewater treatment standards in the July 1991 NPDES permit, not violations of the secondary standards in AO 90-100. The FDEP also permitted Carrollwood to discharge secondarily treated effluent to Sweetwater Creek, which further demonstrates that the degree of the violations was not substantial.

Third, the Court finds that most of the violations at Waterway Estates are not serious. Plaintiff has conceded that there is no evidence of environmental damage as a result of discharges

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from Waterway Estates. However, Klingenstein testified that to avoid localized impacts of pollutant discharges, the Caloosahatchee River was best protected if such discharges were at the six-foot contour line of the River itself. Klingenstein further testified that the permit violations had the potential to cause environmental harm due to the nature of the water bodies. The Court notes, however, that Plaintiff has not demonstrated a quantifiable risk of environmental harm. Rather, as Klingenstein acknowledged on cross-examination, his opinion that the discharges from Waterway Estates had a negative impact upon the canal and the Caloosahatchee River was based upon two studies consisting of computer models of assumed scenarios. Further, Klingenstein admitted that he had not reviewed in detail the actual data concerning the canal and the Caloosahatchee River but indicated that he believed that certain characteristics indicated by the model were useful. Next, the Court notes that the number of violations at Waterway Estates (1038) is sizable and the duration of the violations is somewhat extended.[7] However, the Court finds that the degree of most of the violations is not substantial. The EPA issued two administrative orders that authorized Florida Cities to continue to discharge secondarily treated effluent from Waterway Estates and to meet the effluent limitations in the 1981 NPDES permit between January 1987 and October 1991. Thus, the secondary discharge from Waterway Estates was continuously authorized at all relevant times by both EPA administrative orders and by FDEP permits and consent orders. Further, the EPA did not require Waterway Estates to reduce the volume of its discharge. Additionally, the discharges to an unpermitted location violations are somewhat mitigated by the fact that the canal was a previously approved discharge location.

[7]The 396 violations for discharge without an NPDES permit occurred between October 1, 1988 and October 31, 1989, and the 621 violations for discharging into a canal, instead of to the 6-foot contour line of the Caloosahatchee River, occurred between November 1, 1989 and July 14, 1991.

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II. Economic Benefit

The Court finds that the consideration of whether Florida Cities enjoyed an economic benefit as a result of the violations does not weigh in favor of mitigation of the penalties. Florida Cities argues that when a capital improvement, such as an upgrade in a wastewater treatment plant, is approved by the Florida Public Service Commission (PSC) as "used and useful," the utility can include the cost of the capital improvement in the rate base and thereby benefit economically, such that Florida Cities can realize an economic benefit only from investing, not from deferring investment. Mr. Keith Cardey testified, based on the assumption that the Florida PSC's rate increase is in effect as soon as the advanced wastewater treatment plants begin service, that Florida Cities did not enjoy an economic benefit as a result of its violations at any of the three facilities at issue in this case.[8] However, as Plaintiff points out, any investment that was subsequently not approved by the PSC could not have been recouped. Further, Florida Cities has not established that the cost of the capital improvement would be immediately approved and included in the rate base. Thus, the Court disagrees with Florida Cities' contention that it can only realize an economic benefit from investing, not deferring investment.

[8]With respect to Barefoot Bay, Cardey testified that if Florida Cities had constructed the advanced wastewater treatment plant and had it in service by April 1, 1990, Florida Cities would have generated $803,000 more than they actually experienced. With respect to Carrollwood, Cardey testified that if Florida Cities had constructed the advanced wastewater treatment plant and had it in service by November 1, 1984, the operation would have generated $1,827,000 more than they actually experienced. With respect to Waterway Estates, Cardey testified that, if Florida Cities had constructed the advanced wastewater treatment plant and had it in service by October 1, 1988, the operation would have generated $1,997,000 more than they actually experienced.

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III. History of Violations

The Court has considered the history of violations at the three facilities at issue and finds that this factor supports some mitigation of the penalties. With respect to Barefoot Bay, Florida Cities admits that prior to November 1, 1991, it did not have an NPDES permit to discharge effluent from Barefoot Bay and that it has paid penalties for discharge without a permit. Further, the Court notes that Barefoot Bay exceeded AO 90-106 from September 26, 1990 to October 31, 1991. However, Florida Cities points out that it entered into a Consent Order with the FDEP which permitted discharges until a feasible alternative could be found. Additionally, the Court notes that there is no history of violations for TRC, toxicity, or misreporting of BOD measurements at Barefoot Bay. At Carrollwood, Florida Cities discharged without a permit from November 1, 1984 to June 30, 1991. However, the FDEP issued permits effective June 1980 through May 1985 and April 1988 through October 1990 for Carrollwood. In September 1990, the EPA issued AO 90-100, which provided effluent guidelines and limitations. Further, the Court notes that there is no history of violations of advanced wastewater treatment standards at Carrollwood prior to the issuance of the NPDES permit containing advanced wastewater treatment standards in 1991. At Waterway Estates, the Court again finds no history of violations which support imposition of maximum penalties. Although Waterway Estates discharged without a permit from January 1987, after the EPA's denial of the NPDES permit took effect, until October 1, 1988, Waterway Estates consistently met its secondary wastewater treatment requirements during all relevant periods.

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IV. Good Faith Efforts to Comply with Requirements

The Court has considered Florida Cities' efforts to comply with its various requirements and finds that the efforts to comply in some instances support a small mitigation of the penalties. First, with respect to Barefoot Bay, Plaintiff points out that it is located in a rural area of Brevard County, where there are approximately 3,000 acres of orange groves within 1.5 miles which could have been used to build additional percolation ponds, spray irrigation, or a deep well. Although the evidence at trial shows that these options were considered since the mid-1980s, and that Florida Cities purchased a 40 acre site in December 1985, the alternatives were rejected due to cost and effectiveness concerns. Klingenstein gave his opinion that these alternatives were feasible and would have eliminated the violations at Barefoot Bay. Further, Plaintiff maintains that Florida Cities could have invested earlier in a sulfur dioxide unit and an advanced wastewater treatment plant in order to meet permit limits for toxicity and TRC. The Court agrees that Florida Cities' efforts to comply with the applicable requirements of the Clean Water Act were prolonged, and decisions were made slowly over the course of several years due to much concern regarding the cost of the options, such that Florida Cities did not purchase the 316 acres of the H&S groves for spray irrigation until July 1995. Nevertheless, the Court gives due weight to Florida Cities' efforts in investigating means to comply with the requirements, and the Court notes that some delays were caused by third parties outside of Florida Cities' control, such as delays caused by challengers to the construction permit for a spray field system on a 300-acre spray field site, which led to administrative proceedings and hearings. Further, the Court notes that Florida Cities acted promptly to solve the TRC exceedances and misreporting of CBOD.

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With respect to Carrollwood, Plaintiff points out that Florida Cities could have connected with the City of Tampa's plant, which had available capacity, or could have built an advanced wastewater treatment plant after the Grizzle-Figg legislation took effect in 1987, in order to prevent unpermitted discharges in the years 1984 through 1991 and permit violations after July 1991.[9] Rather, Florida Cities waited until the Hillsborough County system had capacity to treat the Carrollwood wastewater in 1992 due to the perceived high costs of connecting to the Tampa wastewater treatment plant, which involved the construction of a force main of between 10,000 and 15,000 feet. The Court agrees that Florida Cities was dilatory in proceeding in its efforts and making its decisions to correct the violations at Carrollwood. However, the Court also gives due weight to Florida Cities' efforts to comply with the requirements of the EPA. Florida Cities complied at all times with the requirements of AO 90-100, which the EPA kept active during the time in which the secondary treatment facility could not meet the NPDES permit's advanced wastewater treatment limits.

With respect to Waterway Estates, Plaintiff points out that Defendants knew or should have known that they needed to consider alternative arrangements for Waterway Estates due to the 1981 study which indicated that the discharge to the canal could not continue. Plaintiff also points out that Florida Cities had interconnection and advanced wastewater treatment upgrade options which would have prevented the violations. From February 1987 through February 1990, North Fort Myers Utilities discussed the possibility of providing wastewater treatment service to Waterway Estates, but Florida Cities rejected this option for reasons of cost and concern that the PSC may not approve such connection. Plaintiff asserts that this option was a

[9]Klingenstein's report also indicates the opinion that spray irrigation, percolation ponds, and deep well injection were other options.

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particularly attractive one from an environmental standpoint because the North Fort Myers plant uses deep well injection and spray irrigation to dispose of its treated effluent without any surface water discharge. In 1986 Florida Cities applied for a renewal of its NPDES permit, which was denied in January 1987. In December 1987, having decided to upgrade its plant and move the outfall, Florida Cities applied for a wasteload allocation. In November 1989, Florida Cities' new NPDES permit became effective. Due to contractor disputes and delays, the design and construction process for the upgrade was delayed, and Defendants failed to comply with its NPDES permit until 1992. Additionally, in its efforts to prevent discharges to an unpermitted location, Florida Cities did not begin the construction of the outfall extension until December 1990, and the new outfall was not completed until July 1991. The Court again finds that Florida Cities' efforts and decisions proceeded slowly such that the violations were not eliminated expeditiously. However, the Court gives due weight to the efforts of Florida Cities to construct its advanced wastewater treatment plant within a reasonable time despite the delays caused by third parties. The Court also notes that Florida Cities had explored alternatives to surface water discharge, including public access spray irrigation, restricted access irrigation, percolation ponds, and deep well injection.

V. Economic Impact of the Penalty

The Court finds that Florida Cities does not have the ability to pay the statutory maximum penalty and that the economic impact of the penalty on Florida Cities constitutes a mitigating factor. The Court notes that Eileen Zimmer testified for the Plaintiff that Florida Cities can afford to pay a penalty up to of $7.5 million (if the penalty is paid over the course of five years) without a material adverse affect on the company. Ms. Zimmer indicated that she analyzed

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publicly available materials, SEC filings, and financial statements of Florida Cities, and in her report she stated that she considered "the stable nature of the business the company is in, its historical ability to generate income and its dividend payment history." Ms. Zimmer suggested that Florida Cities could borrow the $7.5 million to pay for the penalty; however, she acknowledged that the only source likely for a loan would be Avatar Holdings, who Zimmer conceded lost money in each of the last five years. Further, Zimmer conceded that Florida Cities' liquidity as represented by its current equity to debt ratio and working capital is poor and that long term debt has increased somewhat and remains at moderate levels. At trial, she also stated that short term liabilities increased between 1993 an 1994 by about $4.3 million. Further, the record shows that Florida Cities is obligated to pay Allstate Insurance Company preferred stock redemption obligations every year between 1997 and 2001. Additionally, the Court finds significant the testimony of Charles McNairy[10] that Florida Cities and Avatar Utilities, Inc. have approximately $17 million of planned capital expenditures for enhancements, improvements, and expansions to the existing water treatment plants which will exhaust the available lines of credit. Finally, as a utility being regulated by the PSC, Florida Cities cannot simply raise its rates to cover a penalty, and the payment of the penalty is not tax deductible.

VI. Other Matters as Justice May Require

Florida Cities argues that the Court should consider several facts pertaining to each of the facilities at issue in this case. The Court finds that the facts noted by Florida Cities, such as Barefoot Bay's compliance with the directives and authorizations of the FDEP, Carrollwood's inability to meet the NPDES requirements which were beyond the physical capacity of the plant,

[10]Charles McNairy testified that he is currently the Executive Vice-President, treasurer, and Chief Financial Officer of Avatar Holdings, Inc.

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and Waterway Estates' possession of a wasteload allocation to discharge secondarily treated effluent when Kagey denied the permit renewal based upon her review of a planning document have already been considered by this Court in connection with the above five factors. Florida Cities does raise a new argument, however, that the Plaintiff raised the violations pertaining to Carrollwood for the first time when it amended the Complaint in 1995 and should not be allowed to recover millions of dollars in penalties by including those violations. Nevertheless, the Court finds the above five factors to be determinative of the mitigation of the penalty to be assessed.

VII. Penalties

Having considered the factors discussed above, the Court finds that the statutory maximum should be mitigated as set forth herein. First, the 79 violations of BOD at Barefoot Bay will be penalized in the amount of $10 per day of each violation. The 182 TRC violations will be penalized at $10 per day of each violation. The three (3) chronic toxicity test violations will be penalized in the amount of $1,000 per day of each violation. With respect to the 234 Carrollwood NPDES permit violations, the penalty will be in the amount of $25 per day of each violation. The 18 nitrogen and three (3) chronic toxicity test violations at Waterway Estates will be penalized in the amount of $1,000 per day. The 621 days of discharges to an unpermitted location will be penalized in the amount of $25 per day. Finally, the 396 days of unpermitted discharges from Waterway Estates will be penalized in the amount of $25 per day.

FINDINGS OF FACT — AVATAR HOLDINGS

Avatar Holdings is a diversified company which has more than 60 direct and indirect subsidiaries engaged in a variety of business operations including home construction, vacation ownership, resort operations, retail land sales, property management, commercial and industrial

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development, and water and wastewater utilities operations. Avatar Holdings places its principal emphasis on the real estate operations. Avatar Utilities, Inc. ("Avatar Utilities") is a subsidiary of Avatar Holdings and is the parent for all of Avatar Holdings' utility subsidiaries. Until 1993, Avatar Utilities was the parent of numerous utility companies which operated approximately 37 water supply companies and 13 wastewater plants. In late 1993, Avatar Utilities downsized through the sale of 29 plants.

The formal relationship between Avatar Holdings and Florida Cities is as follows: Avatar Holdings is the parent of Avatar Utilities; Avatar Utilities is the parent of Consolidated Water Company; Consolidated Water Company is the parent of Florida Cities Water Company Holdings, Inc.; and Florida Cities Water Company Holdings, Inc. is the parent of Florida Cities. However, the evidence in this case has shown the involvement of employees of only three of these entities: Avatar Holdings, Avatar Utilities, and Florida Cities. Further, the evidence established that Avatar Holdings does not control any of Florida Cities' individual plants on a daily basis. The utilities subsidiaries make decisions concerning plant operation, not Avatar Holdings. When Florida Cities chooses a contractor for a particular project involving a capital expenditure exceeding $75,000, it seeks contract award ("conward") approval form Avatar Holdings. Avatar Holdings has never rejected a conward request from Florida Cities or Avatar Utilities relating to the operation of plant facilities or environmental compliance.

Further, Avatar Holdings officers and directors generally held utility operations review meetings once a year to discuss financial matters, budget performance, and future budget plans. With respect to the three facilities at issue in this case, Avatar Holdings officers and directors discussed and sent memoranda concerning planning matters. As for Barefoot Bay, the Plaintiff

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introduced evidence at trial showing that in 1983, "Avatar" management meetings included discussion of land areas needed "for future construction to accommodate the complete build-out of Barefoot Bay." Further, in February 1984, Lawrence Wilkov, former President of Avatar Holdings, wrote a file memorandum which noted the cost to acquire and build ponds, stated that a way should be found to have the utility fund the entire amount, and stated that the situation requires immediate action as increased capacity should be "on line" by November 1984. In June 1984, Peter Sharp, former Chief Executive Officer of Avatar Holdings, wrote to Wilkov, John Sladkus,[11] and Robert Gordon[12] that they "must be sure that the cost of the percolation pond and related construction end up 100% as part of Barefoot Bay's rate base on which rates can be charged to customers from day one." Further, in 1985 Gordon informed Wilkov of cost estimates of percolation ponds for Barefoot Bay and Sharp gave his opinions to Gordon regarding Gordon's efforts in acquiring land for percolation ponds. In 1986, Gordon sent Sladkus status reports on the Barefoot Bay plant. In January 1987, Sladkus informed Sharp and Wilkov by memorandum that the ponds were not functioning and suggested the possibility of spray irrigation. In 1988, Sladkus gave Sharp another report on Barefoot Bay attaching a file memorandum written by Gordon concerning Gordon's meeting with the FDEP, and Sladkus also sent Sharp a memorandum recommending the retention of a particular engineering company. The Plaintiff also points to memoranda between Sladkus, Wilkov, Dennis Getman[13] and Sharp

[11]John Sladkus was Avatar Holdings' Executive Vice President.

[12]Robert Gordon is President of Avatar Utilities.

[13]Dennis Getman is Avatar Holdings' Executive Vice-President, and he is also General Counsel for Avatar Holdings. Avatar Utilities and Florida Cities.

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indicating their awareness of or involvement in the deep well project or alternatives to deep well injection, such as spray irrigation, at Barefoot Bay.

With respect to Carrollwood, Sladkus was informed by two memos in December 1988 and by participation in a meeting at Avatar Utilities in January 1989 of the status and schedules pertaining to Carrollwood projects. Further, Sharp was concerned with cost, flow, recovery of costs through the rate base, and construction completion time. However, Paul Bradtmiller, Executive Vice-President of Florida Cites, who was involved in the advanced wastewater treatment construction process and was the principal negotiator on behalf of Florida Cities with respect to connection to Hillsborough County, testified that he never discussed the advanced wastewater treatment process or the negotiations with Hillsborough County with any officials of Avatar Holdings. Further, the testimony of William Shafer, Head of Planning for the Sanitary Sewer Department of the City of Tampa, who was involved in negotiations with Florida Cities regarding possible connection to Tampa in the 1980s, did not show any involvement by Avatar Holdings in the negotiation process.

With respect to Waterway Estates, in January 1987, Sladkus reported to Sharp and Wilkov that the plant either needed to apply for a wasteload allocation and upgrade to advanced wastewater treatment or connect to North Fort Myers Utilities. In June 1987, Gordon forwarded to Sladkus a copy of the EPA's compliance order for Waterway Estates. In August 1987, Gordon forwarded to Sladkus a copy of an engineering report on the feasibility of disposing of the Waterway Estates wastewater, noting that due to the recommended cost of treatment and disposal, additional work would be necessary. In November 1987, Gordon again wrote to Sladkus attaching a memorandum outlining various options regarding upgrading Waterway

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Estates. On October 3, 1988, Gordon wrote Sharp and Wilkov a memorandum stating that County Commissioner Bigelow indicated that he wanted the County Commission to get out of the water and wastewater day-to-day operations and felt that could only be accomplished through privatization or establishment of a water/sewer authority which would take over the direction and operation of the utility systems. On October 7, 1988, Sharp wrote to Gordon that Florida Cities' "long term objective should be to own the entire Lee County system--that is, the County's facilities as well as the City's."

Further, Sladkus was informed by two memos in December 1988 and by participation in a meeting at Avatar Utilities in January 1989 of the status and schedules pertaining to Waterway Estates projects. Sladkus also informed Sharp of the budgeted items for Waterway Estates. In October 1989, Sharp wrote Sladkus that "[w]e must have assurance from Bob Gordon that the entire cost of the upgrade and expansion of this plant will be included as used and useful." In July 1991, when it became clear that the Waterway Estates advanced wastewater treatment improvements were behind schedule, Gerald Allen, President of Florida Cities and formerly Vice-President of Avatar Utilities, wrote a memorandum to Sharp with copies to Getman, Gordon, and Wilkov updating them on the status of the project.

However, Allen and Patrick Lehman[14], who were involved in the selection of discharge alternatives at Waterway Estates, stated at trial that it was not Avatar Holdings, but rather Florida Cities and Avatar Utilities, that made the decisions regarding the alternatives. Further, Lehman testified that the alternatives were not discussed with Avatar Holdings. Additionally, in a memorandum to Sladkus on June 5, 1990, Allen requested approval of a conward to upgrade

[14]Patrick Lehman was employed at Florida Cities between June 1984 and April 1989, initially as an Operations Manager and later as Vice-President of Operations.

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the Waterway Estates facility. When Sladkus responded with a recommendation that the project be rebid because the price appeared high, Allen informed him of the disadvantages of rebidding the project. Sladkus then did not seek to have Florida Cities rebid the contract, and the contract was approved with the original bidder.

In the fall of 1988, Avatar Utilities developed an Environmental Assurance Program. This was not an Avatar Holdings' program. Allen did not make any reports to the full Avatar Holdings Board of Directors regarding audits performed under the Environmental Assurance Program, but did report to the Avatar Holdings Audit Committee. Allen's reports provided the progressive status as to whether a field audit, draft audit, or final audit report had been completed. Allen did not provide the reports of field audits themselves or describe the findings of the field audit reports to the Avatar Holdings Audit Committee. Allen did not describe for the Avatar Holdings Audit Committee the alleged violations at Barefoot Bay, Carrollwood, or Waterway Estates.

CONCLUSIONS OF LAW — AVATAR HOLDINGS

This Court previously determined in its November 22, 1995 Order that, in determining whether Avatar Holdings is liable as a parent corporation under the Clean Water Act, the standard of liability in § 107 of the Comprehensive Environmental Response and Liability Act (CERCLA) does not apply. Under that standard, a parent corporation is liable as an "operator" under CERCLA if it "directly and pervasively controlled" the actions of the subsidiary "to the extent of actually involving itself in the daily operations of the subsidiary." Jacksonville Electric Authority v. Bernuth Corp., 996 F.2d 1107, 1110 (11th Cir. 1993). This Court stated in its Order that, under the Clean Water Act, "the mere fact of being a parent exercising control over

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a violating subsidiary does not properly subject the parent company to liability." Although the Court indicated that it would consider evidence showing "actual and pervasive control of Florida Cities to the extent of actually being involved in the daily operations of Florida Cities," the various portions of the Court's opinion show that the Court intended the standard for Avatar Holdings' liability as a parent corporation to be based on a stricter standard of "directing or causing" the violations in such a way that it may be considered a "person who violates" under § 309 (d) of the Clean Water Act. To the extent the Court's language in the November 22, 1995 Order broadened this intended standard, the Court recedes from that portion of its November 22, 1995 opinion.

The Court finds that the evidence adduced at trial does not establish that Avatar Holdings directed or caused any of the violations of the Clean Water Act at issue in this case. Thus, the Court finds that Avatar Holdings is not a "person who violates" under section 309 (d) of the Clean Water Act. The evidence as a whole shows that Avatar Holdings' role in the operations of the three Florida Cities' facilities was limited to overall financial review and long term strategic planning, as Avatar Holdings' officers were concerned with large costs and budgetary planning. The fact that Avatar Holdings officials were informed of environmental compliance issues and discussed the costs of large projects that would eventually eliminate violations does not amount to the type of action or direction for which liability arises under the Clean Water Act. Further, the evidence shows that Avatar Holdings did not make the type of operational decisions that amount to directing or causing the violations in this case. Additionally, there is no legal basis under the Clean Water Act for holding Avatar Holdings liable for any failure to

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act because it was not the entity responsible for decisions regarding operations and environmental compliance.

With respect to Barefoot Bay, the evidence does not establish that Avatar Holdings caused or directed the violations of TRC, toxicity test failures, and failure to monitor BOD. First, there is no evidence that Avatar Holdings' officials were aware of these violations or that they ever discussed these violations. Further, there is no evidence that Avatar Holdings had any involvement in the measurements of these tests or knowledge or control regarding how the measurements of these tests are conducted or how such measurements are reported to the EPA. Although the Plaintiff argues that Avatar Holdings caused the Barefoot Bay violations because of an alleged profit motive in having its indirect subsidiary, Barefoot Bay Development Corporation, develop a mobile home community at Barefoot Bay, the evidence does not establish any link between the development of the mobile home community and the Barefoot Bay NPDES violations. Further, the evidence regarding Avatar Holdings' concern for costs and long-term planning of large projects such as percolation ponds or alternative discharge options does not establish that Avatar Holdings controlled the discharge options at Barefoot Bay such that it could have directed or caused the Barefoot Bay violations.

With respect to Carrollwood, the evidence again does not establish that Avatar Holdings caused or directed the violations of TSS, phosphorus, nitrogen, CBOD, TRC, or fecal coliform. Although the Plaintiff argued that Avatar Holdings caused the violations because it was not willing to connect to Hillsborough County sooner or build an advanced wastewater treatment plant sooner, the evidence does not establish any link between Avatar Holdings' actions and statements and the Carrollwood violations. Rather, the evidence shows that the utilities

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subsidiaries devised and considered the alternatives and made the decision to proceed with the Hillsborough County connection. Additionally, there is no evidence that Avatar Holdings' officials were aware of the Carrollwood NPDES violations or that they ever discussed these violations. There is also no evidence that Avatar Holdings had any involvement in the measurements of these tests or knowledge or control regarding how the measurements of these tests are conducted or how such measurements are reported to the EPA. Moreover, the evidence regarding Avatar Holdings' concern for costs and long-term planning of large projects does not establish that Avatar Holdings controlled the discharge options at Carrollwood such that it could have directed or caused the Carrollwood violations.

With respect to Waterway Estates, the evidence again does not establish that Avatar Holdings caused or directed the violations of alleged discharges into an unpermitted location during the period of May 5, 1990 through July 14, 1991 or the NPDES permit violations relating to nitrogen levels and toxicity test failures.[15] First, although the Plaintiff argues that Avatar Holdings caused the delays in upgrading Waterway Estates to an advanced wastewater facility, the evidence does not show that Avatar Holdings was involved in the selection of alternatives or the construction of the advanced wastewater treatment plant. Further, the fact that Sharp expressed his opinion that the long term objective should be to own the entire Lee County system does not amount to a strategy on the part of Sharp to do so, and there is no evidence that Avatar Holdings took steps to acquire the entire Lee County system. Moreover, both Allen and Lehman testified at trial that they were unaware of any plan by Avatar Holdings to acquire the Lee

[15]The Court's November 22, 1995 Order barred certain claims against Avatar Holdings based on the statute of limitations, 28 U.S.C. § 2462. Thus, with respect to Waterway Estates, Avatar Holdings is potentially subject to liability only for the violations of discharges to an unpermitted location during the period of May 5, 1990 through July 14, 1991 and the NPDES violations at Waterway Estates.

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County system. Additionally, the evidence shows that the delays in the construction of the advanced wastewater treatment plant involved difficulties in the permitting process, and the evidence shows that Avatar Holdings was not involved in the permitting process. The evidence does not establish that Avatar Holdings delayed construction; rather, it shows that Avatar Holdings approved a conward to upgrade the Waterway Estates facility without a rebidding for the project. Finally, the evidence regarding Avatar Holdings' concern for costs and knowledge of the alternatives and the status and schedules of the projects does not amount to an exercise of control, decision-making or other activity that caused or directed the violations at Waterway Estates.

CONCLUSION

Upon consideration of the foregoing, it is hereby **ORDERED and ADJUDGED** that:

1. The Clerk is **DIRECTED** to enter judgment in favor of Plaintiff and against Florida Cities. The amount of civil penalties to be assessed against Florida Cities for the violations at the three wastewater treatment plants are as follows:

Barefoot Bay	$ 5,610.00
Carrollwood	$14,675.00
Waterway Estates	$289,425.00
TOTAL	**$309,710.00**

2. The Clerk is **DIRECTED** to enter judgment in favor of Defendant Avatar Holdings and against Plaintiff on Plaintiff's claims against it.

3. Avatar Holding's Rule 52 (c) Motion for Judgment as a Matter of Law is **DENIED as moot.**

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DONE AND ORDERED, at Tampa, Florida, this 20th day of August, 1996.

RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of record

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EXHIBIT NO. _____

DOCKET NO.: 971663-WS -- PETITION OF FLORIDA CITIES WATER COMPANY FOR LIMITED PROCEEDING TO RECOVER ENVIRONMENTAL LITIGATION COSTS FOR NORTH AND SOUTH FT. MYERS DIVISIONS IN LEE COUNTY AND BAREFOOT BAY DIVISION IN BREVARD COUNTY.

WITNESS: Gerald Allen
DIRECT

ON BEHALF OF: Florida Cities Water Company

DESCRIPTION: Transcript of Deposition of Mr. Gerald Allen taken on May 6, 1998

PROFFERING PARTY: STAFF

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663-WS EXHIBIT NO. 5
COMPANY/ WITNESS: Staff
DATE: 8-12-98

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Cities Water Company for limited proceeding to recover environmental litigation costs for North and South Ft. Myers Divisions in Lee County and Barefoot Bay division in Brevard County.

DOCKET No. 971663-WS
DATED: April 29, 1998

/ ORIGINAL

DEPOSITION OF: **Gerald S. Allen**

PURSUANT To: Notice of Taking Deposition by Counsel for Florida Public Service Commission

DATE: Wednesday, May 6, 1998

TIME: 9:55 a.m. to 2:24 p.m.

PLACE: 4837 Swift Road
Suite 100
Sarasota, Florida 34231

BEFORE: GAYL HARDEMAN, RPR, RMR, RDR
NOTARY PUBLIC, STATE OF FLORIDA

(Pages 1 - 106)

BUREAU OF REPORTING
RECEIVED 5-11-98

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ALSO PRESENT:
MICHAEL ACOSTA, FLORIDA CITIES WATER COMPANY

I N D E X:

TESTIMONY OF GERALD S. ALLEN

	DIRECT	CROSS	REDIRECT	RECROSS
BY MS. GERVASI	4			
BY MR. McLEAN		30		
BY MR. GATLIN			101	
CERTIFICATE OF OATH 104				
ERRATA SHEET 106				

EXHIBITS

Late-Filed 1 6
(Copy of 1994 Carrollwood Permit Denial)

Late-filed 2 7
(Carrollwood plant EPA order, November 27, 1984)

Late-filed 3 8
(Administrative consent order assessing penalties for Carrollwood)

Late-filed 4 9
(1985 MPDES compliance inspection report)

Late-filed 5 10
(1981 to '84 compliance inspection reports)

Late-filed 6 11
(DER Waterway operating permit from 1981)

Late-filed 7 13
(1981 MPDES certification worksheet)

Late-filed 8 13
(Waterway MPDES permit, September 1981)

Late-filed 9 20
(Communications between Florida Cities and the EPA from December of '86 to May of '87)

Late-filed 10 23
(Gatlin Woods law firm summarizing 1988 EPA show-cause meeting)

P R O C E E D I N G S

THEREUPON:

GERALD S. ALLEN,

having been previously duly sworn, testified as follows:

MS. GERVASI: Before we start, may we agree on the record to the usual stipulations? Is that okay with you?

MR. GATLIN: Which stipulations? The reading?

MS. GERVASI: Well, the ones that we generally put in there are that the deposition was taken pursuant to notice in accordance with the civil procedure rules.

MR. GATLIN: Sure, that's fine.

MS. GERVASI: We are stipulating that the witness is indeed the person he has identified himself as, that objections are reserved except as to the form of the question, and then reading and signing is up to you, whether you want to waive that.

MR. GATLIN: We will put that off until later.

MS. GERVASI: Sure.

DIRECT EXAMINATION

BY MS. GERVASI:

Q. Mr. Allen, could you please state your full name and business address for the record?

A. Gerald S. Allen, President of Florida Cities Water, Suite 300, 4837 Swift Road, Sarasota, Florida.

Q. I will be asking you some questions today on behalf of the Commission staff concerning the suit you filed in docket number 97-1663-WS. Please let me know if anything is unclear. I will try to rephrase the question. And if you need a break any time during the deposition, let us know and we can certainly accommodate that.

Could you tell us what your current responsibilities are as president of Florida Cities Water Company?

A. Well, as president, I'm responsible for virtually everything that happens within the company, for the overall management of the company.

Q. Okay. Concerning the MPDES permit denial for Carrollwood, the 1994 permit denial, is it correct that in September of 1984, the MPDES permit application for the utility's Carrollwood plant was denied?

A. Yes, that is correct.

Q. Why was it denied? Do you know?

A. No waste load allocation to Sweetwater Creek, which was the receiving stream for the treated effluent.

Q. Do you have a copy of that permit denial? If so, could you provide us with a copy of it?

A. Yes. I thought that was --

Q. The 1984 one?

A. Certainly, we can provide a copy.

MS. GERVASI: I want to go ahead and label that as a late-filed deposition Exhibit No. 1.

MR. GATLIN: Copy of permit of Carrollwood denial?

MS. GERVASI: Right. Carrollwood 1984 permit denial.

MR. GATLIN: Are you going to have several of these?

MS. GERVASI: A few.

MR. GATLIN: Okay.

MS. GERVASI: Maybe six or so.

MR. GATLIN: What I would like for you to do, if you would, is give us a list, when you are finished, or tomorrow, sometime.

MS. GERVASI: Sure, be glad to.

MR. GATLIN: To make sure we have taken the correct notes on it.

MS. GERVASI: Be glad to.

BY MS. GERVASI:

Q. Do you know if the EPA issued an administrative order requiring the Carrollwood plant to cease discharge no later than June of 1987? Is that

correct?

A. I'm not certain of the dates. There was an administrative order issued, but I'm not certain of the dates and exactly the content of the order.

Q. Do you have a copy of that administrative order that you could provide to us?

A. My best guess is that we do have a copy.

MS. GERVASI: Let's go ahead, then, please, and label that as Late-filed Exhibit 2, administrative order concerning the Carrollwood plant.

MR. GATLIN: That's EPA order?

MS. GERVASI: Yes. EPA order.

MR. GATLIN: Any other identification?

MS. GERVASI: The date of the order. How about that? November 27th, 1984.

MR. GATLIN: Okay.

BY MS. GERVASI:

Q. Mr. Allen, do you know if the EPA ever issued an order assessing administrative penalties due to non-compliance of that order, of that 1984 order?

A. I know the EPA issued an administrative and consent order assessing penalties. I could refer to my testimony regarding the date.

Q. Okay. Can we get a copy of that order, as

well?

A. Yes.

MS. GERVASI: That would be Late-filed No. 3, administrative consent order assessing penalties for Carrollwood.

BY MS. GERVASI:

Q. What is your understanding of how the MPDES permitting process worked prior to 1995, in terms of who had responsibility, EPA's role versus the DER's role at that time?

A. Well, the EPA had jurisdiction at that time for issuing and administering the MPDES permit program. However, the EPA consulted with the state through the DEP, and DEP was asked to certify any new permit or the renewal of permits. So the DEP had an opportunity to comment on all of its permits. So there was close consultation between the EPA and the DEP.

Q. Is it correct that a utility who discharges pollutants into waters of the United States without an MPDES permit is in violation of the Clean Water Act?

A. I believe that's -- that's probably a legal question, but that is my understanding, that that is correct.

Q. Do you know if the EPA, or either the EPA and DER together, performed an MPDES compliance inspection

in 1985 for compliance of Florida Cities?

A. I don't know.

Q. Do you know who might know here?

A. We could check our files to see if we have a record of such inspection.

MS. GERVASI: Let me label this as Late-filed Exhibit No. 4, if it exists. We'd like a copy of the 1985 MPDES compliance inspection report.

MR. GATLIN: 1985 MPDES compliance report?

MS. GERVASI: Right.

MR. GATLIN: Okay.

BY MS. GERVASI:

Q. Okay. Do you know if the EPA recognized a waste load allocation for Waterway?

A. Yes. The EPA certainly recognized a waste load allocation at one point in time, because they issued MPDES permits.

Q. Did the EPA consider Waterway's discharge to be discharged at the proper location? Do you know?

A. Well, I can say this. There were a number of inspections of the facility by the EPA, and any question regarding the discharge location never came up. Later -- I'm not sure; the EPA claimed this -- but later, the U.S. Department of Justice alleged that it was not the correct location, but to my knowledge no one else

alleged that. The DEP never alleged that it was the wrong location, and I think it came out in the trial that probably the only party alleging that it was the wrong location was the U.S. DOJ.

Q. Do you know how often EPA performs these compliance inspections; you said "frequently"?

A. I'm not sure I said "frequently," but there were a number of inspections performed during that time, but I don't know the specific interval.

Q. Okay. Do you know if any of those inspections were performed from 1981 to 1984?

A. I'm not certain.

MS. GERVASI: Let me go ahead and ask for -- if, again, they exist -- the compliance inspection reports for the years 1981 to 1984, if you have that information, 1981 to '84 compliance inspection reports.

BY MS. GERVASI:

Q. Do you know if the DER issued Waterway a permit in 1981?

MR. GATLIN: Did you want that to be an exhibit?

MS. GERVASI: Yes. Late-filed Exhibit No. 5.

MR. GATLIN: Excuse me.

MS. GERVASI: Sure.

THE WITNESS: I'm not certain of the date. The DER issued operating permits, and I believe that the plant was operating on a permit during that date, but I'm not sure when the permit was issued.

MS. GERVASI: Could you provide us with a copy of that permit? I believe it was issued April 6th of 1981. That's Late-filed 6, the DER Waterway operating permit from 1981, .

BY MS. GERVASI:

Q. You don't know when that permit expired, offhand. Do you?

A. I'm not sure when that permit expired. I do recall one of the permits expired in 1988, but I'm not certain that it would have been the renewal of 1981.

Q. Do you know what the stated waste load allocation was for Waterway, in that permit?

A. No, I do not.

Q. Is it correct that in 1986, the utility's Waterway plant had a valid DER permit to discharge 1.08 million gallons a day of effluent into the Caloosahatchie River via a canal?

A. I believe that is correct. Are you speaking of MPDES permit or an operating permit?

Q. That would be 1986 DER operating permit.

A. I believe that's correct. I believe that's a permit that probably expired in '88.

Q. Okay. Do you know if this is the same type of permit that was issued for the Waterway plant in 1983? There was one permit issued in 1981. We wondered if it was the same type of operating permit that the DER issued for Waterway in 1983.

A. I believe that would be correct, because during that time period, the DEP issued operating permits which included the operation of the plant and included the discharge. And the EPA also issued an MPDES permit, which was applicable to the discharge only.

Q. Did the 1981 MPDES permit for Waterway authorize the utility to discharge 1.08 million gallons a day of effluent into the Caloosahatchie River?

A. I believe that's correct. To be absolutely certain, I need to look at the permit, but I believe that's correct.

Q. Is it correct that the DER issued a certification to the EPA for the 1981 MPDES permit?

A. I'm not certain about that.

Q. Do you have a copy of the 1981 MPDES certification worksheet?

A. I'm not certain.

MS. GERVASI: Let's go ahead and identify that. And if you do have it, if it does exist, I would like to request it as Late-filed Exhibit 7, the 1981 MPDES certification worksheet, please.

Could you provide us a copy of the Waterway MPDES permit that was issued in September of 1981?

THE WITNESS: Assuming we have it, we will certainly provide it.

MS. GERVASI: All right. As Late-filed Exhibit 8, the Waterway MPDES permit, September 1981.

MR. GATLIN: All right.

BY MS. GERVASI:

Q. Is it correct that the EPA denied Waterway's 1986 and MPDES permit renewal based on a no-discharge waste load allocation developed by DER?

A. Well, that was what was indicated on the denial worksheet, yes.

Q. Was the EPA's assertion that a no-discharge waste load allocation developed by DER, was that an issue, or was that addressed in 1981 when the EPA issued Waterway an MPDES permit?

A. I don't know. All I can say is I presume that in 1981, when the permit was renewed, that the EPA believed there was a waste load allocation.

Q. From '81 to '86, did the EPA recommend that the utility relocate Waterways outfall or upgrade Waterway to advanced water treatment standards?

A. I believe that came later in an administrative order that was probably issued in early 1987, but I'm not certain of that. But -- or perhaps even later than that. Because I believe initially, the EPA's position was to eliminate the discharge. I don't believe that an option was offered initially upon the denial of the permit renewal in 1986.

Q. Okay.

A. But later, the EPA did agree to relocating the discharge further out into the river, and upgrading the treatment process to meet advanced wastewater treatment standards. And that was a position that was consistent with the DEP's position.

Q. Okay. Thank you. Given that Waterway had a valid DER permit and that Waterway's MPDES permit issued in 1981 authorized Waterway to discharge 1.08 million gallons a day of effluent into the Caloosahatchie River, why didn't Florida Cities comment or object to the EPA's July 22nd, 1986 tentative denial?

A. Well, I've covered that in my pre-filed testimony, and I can refer to that or just summarize. The regulatory environment during that period was a lot

different than it is today. The Clean Water Act -- or at least the MPDES permitting program, had only been in existence for 15 years, and clearly, the company believed the master, so to speak, -owned permitting issues was the DER.

Q. Even for the MPDES permitting issues?

A. Well, obviously, the DER did not have authority to issue MPDES permits. That had not been delegated to that agency at the time; but the DER had a dual permitting system. They had, in essence, a duplicate permitting system which went even further than the December permits because their permits covered not only the discharge and established the point of discharge, the water quality of the discharge, but it also covered the operation of the plant and many other aspects that the MPDES permits did not cover. So the DER had a more comprehensive permitting system. They had a more aggressive enforcement. They took enforcement action. They were closer to the situation. There was a lot more contact with the DER than the EPA, so it was the company's view that, really, if the DER was satisfied, if the company met their requirements, then the EPA would go along, because the EPA, again, to best of my knowledge, relied heavily on the DER on local issues, as the Clean Water Act was set up to do, is to

give a lot of authority to the states as far as waste load allocations and a lot of other aspects of the Clean Water Act.

But even at that time, the State of Florida ranked very high, I think, nationally, as far as administering water quality programs. They were pretty aggressive and probably were -- if not the leading state -- was close to the leader, as far as environmental issues, in particular as far as the Clean Water Act was concerned.

Q. Do you think it was prudent of Florida Cities' management to not comment or object to the EPA's tentative denial letter in 1986?

A. Based on all the circumstances that existed at that time, I see no reason to fault the company's decisions. And again, primarily the fact that the company felt that if it could comply with the wishes of the DER, then the EPA would not object. Furthermore, the EPA had indicated, I believe, at the time the permit was denied, that there would be an administrative order forthcoming which would allow the company time to deal with the situation, because the DER had really given the company two options. They could either -- when the DER permit expired in '88, the company could either eliminate the discharge to convert to a total re-use

system or wastewater disposal through some other means other than the discharge, or the company could upgrade the plant to meet AWT standards and relocate the outfall.

So those two options were on the plate at the time, and in view of those options, and the fact that the EPA said, well, we're going to issue an administrator order, which will give you time to deal with this situation, I can't fault the company with the decision, because even if the company satisfied EPA but that did not satisfy the DER, the company would still have taken the action that it ultimately took.

Q. Don't you think that the later legal expenses incurred defending yourselves could have been avoided if you had challenged the permit denial up front?

A. No. I don't think anyone could conclude that.

Q. Okay. Now, from our information that we received in response to a staff interrogatory, evidently there was a meeting in July of 1986 with the DER. We're wondering why the company didn't ask DER during that meeting to inform the EPA that EPA's assertion of a no-discharge waste load allocation was inaccurate and that Waterway had a waste load allocation of 1.08 million gallons a day?

A. Well, I don't know specifically. Again, it

goes back to the conclusions drawn earlier, which were if the company could satisfy the requirements of the DER, then the EPA would go along with whatever those requirements were. And I think the company had -- later, that year, the company undertook an engineering report to evaluate options, but I think the company had concluded at that time that it had to meet the DER's wishes to either eliminate the discharge through re-use or some other means, or upgrade the process and relocate the outfall.

Q. Given that Waterway had a valid DER permit and that Waterway's MPDES permit authorized it to discharge 1.08 million gallons a day of effluent, why didn't Florida Water ask for a hearing after receiving the final denial in 1986?

A. I think for the same reasons.

MR. GATLIN: May I suggest that it is Florida Cities Water.

MS. GERVASI: I'm sorry. What was I saying? Florida Water?

MR. GATLIN: Florida Water.

MS. GERVASI: Excuse me. Florida Cities Water.

BY MS. GERVASI:

Q. So again, do you think it was prudent of

Florida Cities Water management to not ask for a hearing after receiving the final denial?

A. Again, based on the regulatory environment that existed at the time, the relationships between the company and the two regulatory agencies involved, I would have seen no real reason to have taken that step.

Q. So Florida Cities basically ignored EPA's tentative and final denial of the permit. Is that right?

A. I don't think you could characterize it as ignoring the denial. Again, the EPA had represented that an administrative order would be forthcoming that would allow the company ample time to deal with the situation, and notwithstanding a challenge, the outcome of which no one could predict, I believe it was the company's position that it still had to meet the requirements of the DER.

Q. Okay. Going through the information that you've provided us, it appears that Florida Cities didn't communicate in writing with the EPA from December of '86 until May of '87, and we're wondering, since you didn't request a hearing to challenge that permit denial, and Waterway was discharging without an MPDES permit effective September of 1986, why the company didn't communicate in writing with EPA during that

period of time?

A. I don't know that the company did not communicate in writing during that period. I don't know the basis of the information that it did not communicate, so I couldn't say that there were not communications. I really couldn't say one way or the other.

Q. Okay. We don't have any information that would indicate that you did. If communications exist during that period, could you provide them to us as Late-filed Exhibit 9?

A. Sure.

MS. GERVASI: Communications between Florida Cities and the EPA from December of '86 to May of '87, please, sir.

THE WITNESS: (Nodding affirmatively.)

BY MS. GERVASI:

Q. Evidently Patrick Lehman submitted a proposed compliance schedule in 1986 to the EPA. Do you remember that?

A. I do recall seeing a compliance schedule. I'm not certain of the date, but that seems to be the appropriate time frame that that schedule was submitted.

Q. When submitting proposed compliance schedules to the regulatory agencies such as the EPA or DER, is it

standard procedure to have the vice president of engineering and/or operations approve such schedules?

A. At that time, I don't know.

Q. Do you know whether Mr. Lehman had the schedule approved by Mr. Tony Reeves before submitting it?

A. I don't know.

Q. Do you know why the utility submitted a proposed compliance schedule which Mr. Lehman described at the trial as being extremely optimistic?

A. I could only -- I really don't know. I could say that it's not unusual, when there's a lot of pressure brought to bear for those who are preparing schedules, to perhaps be a little overall optimistic, and it's difficult to always recognize in a process like this all of the potential obstacles. It's almost impossible to even perceive of all the potential obstacles to getting a project from the very planning stages to completion.

Q. From your response to Interrogatory No. 1, evidently in 1988 the EPA held a show-cause meeting/hearing concerning four of the utility's divisions, including Gulf Gate, South Gate, Carrollwood and Waterway. Are you familiar with that?

A. What was the date?

Q. June 9th of 1988.

MR. GATLIN: That was Interrogatory 1?

MS. GERVASI: It's in Interrogatory No. 1, in the appendix, page 57 of the appendix, and look at the date entry of June 22nd of '88.

MR. GATLIN: What was the page number?

MS. GERVASI: 57.

THE WITNESS: I'm not familiar with the specifics of the meeting. I have read some correspondence, perhaps the letter that's referred to in the interrogatory.

BY MS. GERVASI:

Q. Do you know what EPA's concerns were at that time regarding Waterway?

A. No.

Q. Do you know who would? Anybody here at the utility that would be familiar with that meeting?

A. I didn't attend, and I don't think that -- my guess is that there's no one here with the company now who was with the company at that time who attended the meeting, but that's a guess.

Q. Okay. Do you know whether, at that meeting, the EPA asserted that civil penalties would be forthcoming with respect to Waterway?

A. No.

Q. Do you know whether the meeting was transcribed, whether there were any notes taken of the meeting?

A. No. I think the response to interrogatory refers to a letter.

Q. Is that the letter from the Gatlin Woods law firm summarizing the meeting?

A. Yes, I have seen that letter.

Q. Could we get a copy of that letter? Do you have a copy of that?

A. (Nodding affirmatively.)

MS. GERVASI: We will make that Late-filed Exhibit 10, Gatlin Woods law firm summarizing 1988 show-cause meeting, EPA show-cause meeting.

BY MS. GERVASI:

Q. At what point in time, Mr. Allen, did the EPA become adamant about Florida Cities being liable for a civil penalty?

A. I'm not certain. I'd have to refer to correspondence and other records in the file.

Q. Do you know what precipitated EPA's decision to seek the civil penalty? In other words, what was the straw that broke the camel's back, if there was one?

A. I'm not certain I would characterize it as a straw that broke the camel's back, but my perception is

that the EPA felt compelled to take much stronger action with regard to this facility than in the case of Carrollwood or Barefoot Bay, because of similar action which had been taken with respect to the City of Cape Coral, which is located in the close proximity of this facility.

Q. Okay.

A. But that's a perception. I have no basis of fact, other than that's my belief.

Q. Okay. Now, concerning your testimony, where you discussed what Florida Cities' burden should be of the litigation costs, you apparently developed two different methods for determining Florida Cities' share of the litigation costs. Is that right?

A. Well, in my testimony, I did compare the method that I proposed to another method that might be reasonable.

Q. Okay. The method that you proposed, is that where you took the 309,000 civil penalty and divided it by the DOJ's original 5 million, producing the resulting ratio of 6.19 percent?

A. Yes, that's correct. I believe that's in my pre-filed testimony.

Q. And then you multiplied -- well, let's see what page we are -- towards the end of the testimony, I

believe.

A. It's on page 42 of my testimony.

Q. Okay. Then you multiplied the total litigation costs, the 3-million-8-plus, by this 6.19 percent, to come up with the burden of 286,842 for the company. Correct?

A. That's correct.

Q. Then the other method you used -- you used that one just for comparison purposes. Is that correct?

A. That's right.

Q. By that other method, you took Florida Cities' $500,000 settlement offer and subtracted the 309,000 civil penalty to come up with a burden of 190,290 for the company. Right?

A. Well, I'm reading on page 42 of the testimony, beginning at line six, where I compared this method to another method that would simply take the settlement offer that the company made in January 1993, and then if I added the legal expenses that the company had sustained at that point, it was about $125,000. I didn't mention that in my testimony, but at that point in time, the company had sustained legal expenses, I believe, of about $23,000.

Q. Can you explain how the ratio of the civil penalty to the DOJ's original offer is relevant in

determining what the company's burden of the litigation costs should be?

A. Well, I think that it's a way to establish a relationship between what the company offered to settle for, before it had sustained any significant legal expenses, and the offer that the DOJ had made to settle, taking into account the final outcome of the Court. To me, the three are -- it's a rational relationship case where the company offered to settle before the litigation was brought, for an amount that was greater, by almost $200,000, than what the Court found in judgment after the trial.

Q. How is it -- the residual of the civil penalty from the $500,000 settlement offer -- relevant in determining the company's burden of the litigation costs?

A. Restate the question, please?

Q. Sure. How is the residual of the civil penalty from the $500,000 settlement offer relevant in determining the company's burden of litigation costs?

A. Well, had the company -- had the DOJ accepted the company's offer of $500,000, the company would never have attempted to recover that settlement. So when the Court rendered its judgment, it assessed a penalty of $309,000, which the company never -- has not attempted

to recover, and would not attempt to recover. And so the difference between that judgment and the offer compares very closely to the $236,000 that results from the ratio, the 6.19 percent.

Q. [redacted]

A. [redacted]

Q. Why does Florida Cities believe that its shareholders are responsible for some of the litigation costs?

A. Well, because the Court did assess penalties. Also, the company had made the offer to settle for $500,000, which would have been a burden of the shareholders.

Q. Did you consider the level of legal fees incurred at the time of settlement, to the total amount of legal fees incurred?

A. Legal fees at time of settlement? There never was really a settlement.

Q. The settlement offer.

A. Oh, the settlement offer?

Q. Yes. Excuse me.

A. Incur legal fees at the time of the settlement offer to total legal fees? No. I don't understand the rationale. We didn't, because to me there is no

rationale to support that.

Q. Okay. If the Commission finds that the company's management decision to not respond to or challenge the EPA permit denial -- if the Commission finds that that magnified or increased the company's risk of being in non-compliance with the Clean Water Act, should this be a determinant in assessing the company's shareholders' burden of the litigation costs?

A. I don't know how, because I think that you would have to conclude that a challenge would have been successful. I don't know how you could conclude that, but that would have to be the conclusion.

Q. Are you saying that because of the way the Court came down, because of the court's decision, you are saying that's why the challenge would have been successful?

A. No. I'm saying that to have that to go any place, you would have to conclude that a challenge would have been successful and everything would have gone away.

Q. Okay, I see. Thank you.

If the Commission finds that the company's management decisions since the mid-1980s caused delays in meeting the EPA's requirements of the Clean Water Act, should that be a determinant in assessing what the

shareholders' burden of the litigation costs should be?

A. With respect to all three facilities?

Q. Yes.

A. I don't know. I don't -- again, I don't know how that would have impacted the final outcome.

Q. Okay. What measures did the company take to mitigate or control the amount of legal fees that were incurred?

A. It's covered in my pretrial testimony, and if I could refer you to page 41, starting at actually line one.

Q. Okay.

A. I have nothing to add to that testimony.

Q. Okay. In what way are these litigation costs considered reasonable and prudent in connection with fulfilling the utility's obligations pertaining to the provision of service to its customers?

A. Well, as I've stated, again in the pre-filed testimony, I do not view these expenses as being different from any other expenses that a utility company faces. I think that this case is an example of an overzealous trial attorney with the DOJ.

I think that, had someone with objectively taken a look at the facts early on, I don't think that this litigation would have ever occurred. I think it

would have been settled before the complaint was filed.

So I view that as somewhat like a peril, where the federal government has tremendous power. So I think it's part of doing business. You only have to turn the TV on and watch the news and read the newspaper every day to see examples of this, and utility companies are exposed to those same perils.

Q. Okay. Evidently the utility extensively litigated the DOJ's attempt to contact former employees?

A. That is correct.

Q. Why did the company do that?

A. Because it was illegal for the DOJ to make these kinds of contacts. It was against the law.

MS. GERVASI: Thank you, sir. I have no further questions.

MR. McLEAN: I have a few. Could we break for about five, ten?

(Recessed from 10:50 to 10:55 a.m.)

CROSS EXAMINATION

BY MR. McLEAN:

Q. Mr. Allen, my name is Harold McLean. I represent the citizens of the State of Florida. As you know, I have intervened in the docket. You have tendered a resume next with your testimony, with the pre-filed direct testimony in this case. I am not going

to ask you any specific questions about it. I take it you are going to be tendered as an expert witness?

A. I don't know.

Q. Will you be stating opinion testimony?

A. I can't make that judgment. I'll have to defer to legal counsel regarding that.

Q. Okay. Let's move into the substance of your testimony a bit. Let's go first to page six, line 21.

MR. GATLIN: Page six?

MR. McLEAN: Page six, line 21.

BY MR. McLEAN:

Q. At line 21, you say the original complaint alleged that FCWC discharged pollutants from Waterway into the Caloosahatchie River during the period October 1, 1988, through October 31, 1989, without a national pollution discharge elimination system permit. And then you can see the second allegation there, too -- is that right -- on page seven?

A. Yes.

Q. Did those allegations turn out to be true or false?

A. I would have to refer to the Court's ruling, which I believe is Exhibit 24.

Q. All right. That would be fine. Can you identify the order so I can make sure I am looking at

the same document?

A. That is United States District Court, Middle District of Florida, Case No. 93-281-CIV-FTM-21.

Q. All right, sir.

A. Judgment in civil case.

Q. Down at the bottom where it says date, you have a date stamped left-hand side?

A. It's dated August 20, 1996.

Q. All right, sir. It might help to mention findings of facts on Carrollwood that are on page five, I believe, Mr. Allen, if that would help. At least that's what I have.

A. Right. Waterway Estates is page seven.

Q. All right, sir.

A. I believe that the findings of fact with respect to the discharge starts about the upper third of that page.

Q. Page seven?

A. Page seven.

Q. Yes, sir. It is fair to say, isn't it, that the allegations in that original complaint by the government were sustained by the Court? Isn't it?

A. Well, I'm not sure that all the allegations were sustained pertaining to time period.

Q. Okay.

A. But the findings of fact, that there was a discharge without an MPDES permit between October 1, 1988, and October 31, 1998.

Q. And that was Waterway. Right?

A. That is correct.

Q. Let me ask you generally about the other two.

With respect to Carrollwood, isn't it also fair to say that the allegations of, I believe, the amended complaint, were ultimately found to be true by the Court? And by "allegations," I mean allegations of the specific violations.

A. I don't believe the Court found, in any case, that all of the allegations made were correct.

Q. Maybe it would help if you could tell me in a general sense -- or in specific, if you prefer -- with respect to then Waterway, which I asked you about before, there was an allegation that there was a discharge without the MPDES permit. Correct?

A. Correct.

Q. And that was -- can I characterize it accurately as -- the principal allegation in the original complaint?

A. I don't know that I would characterize it as the principal. Principal in what respect?

Q. Well, there was an allegation that there was

such discharge without a permit over a period of time. Taking that allegation as a whole, isn't that the principal allegation of the initial complaint?

A. I'm not sure in a legal sense. I'm not sure I know how to characterize it.

Q. I'm asking for your characterization, certainly not a legal. I want to have a feeling for the extent of the government's case which they took against you for Waterway Estates. Isn't it true that the Court ultimately sustained those allegations and found those violations to be a fact?

A. No.

Q. Which aspect did they find not to be so?

A. The Court did not find for all of the allegations set forth in the complaint.

Q. Well, with respect to Waterway Estates, which did they find to be not sustained?

A. Well, we'd have to take the complaint and then the Court order and go through one by one, but not all of them were sustained.

Q. But you can't tell me which ones were not? You have to lay them down side by side to make that determination?

A. Without a study, that is correct.

Q. If the Commission had a notion to compare, to

somehow quantify the extent to which the government proved up its allegations as opposed to where the government failed to do so, that's the operation you are engaged in. Is that correct? And you are not prepared to do that. Is that correct?

A. Well, I haven't done that, no, you know, side by side; not that kind of comparison.

Q. But to return to at least one specific, you have admitted personally -- and it is also true that the Court found -- that there was discharge without a permit at the Waterway Estates site. Is that correct?

A. That is correct.

Q. Same is true of Carrollwood?

A. I have to check the findings of the Court in that regard, and Carrollwood, I believe, is on page five. I don't believe the Court sustained a discharge without an MPDES permit in the case of Carrollwood.

Q. But you admitted in that deposition, didn't you, that that in fact did occur?

A. I don't recall. In the deposition in the federal case --

Q. In the federal case, yes, sir.

A. -- probably. I think I pointed out that the company was operating under administrative order during that time.

Q. Yes, sir.

A. But technically it did not have an MPDES, for part of that period of discharge.

Q. That is your present testimony, that it did not during that time, during any time. Is that confusing?

A. Well, not during any time. Maybe I can state it this way. There was a period of time when, in the case of Carrollwood, the MPDES permit had expired and the EPA had issued administrative orders which covered the -- it was not an MPDES permit, but authorized the continuation of the discharge.

Q. Okay. You were deposed by Mr. Jacobs; were you not?

A. That is correct.

Q. I want to read you the question and answer, and tell me if it sounds familiar and if it seems to be your testimony.

"Question: Okay, I'm going to ask you the question again. Could you listen carefully? Did it come to your attention that the Carrollwood Wastewater Treatment Plant was discharging without an MPDES permit?

"Answer: Yes.

"Question: When did that come to your

attention?

"Answer: Probably in '98, but I'm not certain."

Does that sound correct? '98?

A. Yes, sir, that sounds correct.

Q. Okay. We have dealt with Carrollwood and Waterway. Same questions with respect to Barefoot Bay. First of all, let me ask you if it is true in that same deposition that you suggested or answered Mr. Jacobs' question -- well, I will read it to you.

A. I'm confused. I thought we were comparing the allegations in the complaint to the findings of the Court. Now we seem to be going back. Because the Court ruled in summary judgment --

Q. Yes.

A. -- that the allegations that occurred prior to the consent orders, which settled all of the issues related to Carrollwood and Barefoot Bay, were history and were not going to be considered by this Court.

Q. Okay. Let me ask you this. And I appreciate your confusion there. Page two of the Court's order, there's a footnote down there that I have been confused with. Perhaps you can shed some light on it. Do you see footnote number one?

A. Yes.

Q. Now, that footnote indicates to me that there has either been a finding or there has been a stipulation with respect to violations, in this trial, which went to the issue of the violative liability of Avatar, finding more importantly the extent to which penalties would be assessed against Florida Cities' Water. Is that correct?

A. That is correct.

Q. Is it fair to say that this order settles the issue of the penalty to be assessed against Florida Cities' Water and the violative liability of Avatar?

A. That's correct. That is correct, but the same Court, also, previous to the trial, had settled the issue of the violations.

Q. Whether there had been violations?

A. That is correct.

Q. Is it your testimony that that order absolved Florida Cities of some of the violations?

A. It absolved Florida Cities -- the summary judgment orders absolved Florida Cities of a substantial number of the allegations made in the complaint, yes.

Q. Could you suggest a methodology by which one might compare the extent to which they were absolved and the extent to which they were found to be violative?

A. I think a comparison could be made. I have

not made such a comparison. Again, one would have to take the summary judgments, compare them to the allegations, and --

Q. Okay. Let's turn from that subject, then, and go back to the subject I was exploring there. You admitted in deposition -- you said in deposition, pardon me -- that in fact there was discharge at all three of those sites -- is that correct -- discharge without the appropriate permit?

A. I believe that's what I said, yes. Again, in most of those cases, I think -- certainly in the case of Waterway and Carrollwood -- there was always an EPA administrative order covering the discharge; granted, not an MPDES permit.

Q. Sure. But the Court in its orders, as long as we are on the topic, did in fact find -- or assess a penalty, rather -- against Florida Cities Water Company for those discharges -- did they not -- on page 31?

A. I don't believe that's the case with respect to Carrollwood. But --

Q. Refer to page 31 and see what it says.

A. Okay.

Q. Now, there is a fine assessed there against Carrollwood, or a penalty. I don't mean anything by that distinction, but there's $14,000.

A. That is correct.

Q. Now, is it fair to say, then, that this trial really addressed two items -- aside from Avatar -- and I mean Avatar Holdings and their liability, because that was resolved prior to the trial, wasn't it?

A. That was my understanding, yes.

Q. So this trial was really about the severity of the violations and Florida Cities Water Company's ability to pay any penalty. Isn't that pretty much what the trial was about?

A. I am not sure the trial was limited -- I haven't given it enough thought to say the trial was limited to those issues, but certainly those issues were a big part of the trial.

Q. Okay. And Florida Cities was no doubt -- first of all, Avatar was happy they were absolved of any wrongdoing. Right? It is true they were absolved of any wrongdoing?

A. That is correct.

Q. Probably happy about it, too. But going into the trial, you were exposed to considerable liability and emerged with a $309,000 penalty -- is that correct -- and change?

A. Yes.

Q. Now, if I read the Court's order fairly, I

think that was based upon, mostly upon severity of the violations -- which the Court found in most instances to be simply not that severe -- and Florida Cities Water Company's ability to pay. Right?

A. Those were two big issues as far as the trial was concerned, yes. Again, I can't say that those were the only issues, without giving a lot more thought to it and reviewing the trial transcript.

Q. Sure, okay. Going back to your direct testimony, pre-filed direct testimony, page seven, line 18, there is a discussion which you offered the Commission which goes, I think -- the intent of the testimony is to show the Commission the extent to which you were exposed to civil penalties at that point. Is that correct?

A. Certainly one of the purposes, yes.

Q. Sure. And isn't it true -- you say your total civil penalty requested was 32 million. Would it be more accurate to say that the total civil penalty which might have been requested -- aren't those penalty clauses written in, quote, up-to language, close quote?

A. I believe if you will examine the complaint, that's the civil penalty requested. I had the same question, and I read the complaint, and I believe it is characterized in that fashion.

Q. Tab two -- I better see what it says, before I ask you a question about it. Turn to page six of your tab two. I think it is your Exhibit 2 at the back of your -- do you have paragraph 28 on that page?

A. Yes.

Q. I read that says the defendant is liable for civil penalties up to $25,000 a day, including up to $25,000 a day. And finally, in the prayer for relief, it says, the defendant be ordered to pay a civil penalty up to $25,000 a day. Is that correct? Did I read it correctly?

A. That is correct, and it says the plaintiff is requesting that the defendant be ordered to pay a civil penalty up to $25,000, and the way I read it is if someone is ordering me to pay a penalty up to $25,000, I'm going to assume it's $25,000.

Q. Oh, so that is an assumption you make based upon that language. Right?

A. Well, I think the language is pretty clear.

Q. Okay.

A. Obviously, it could be from I guess one dollar to 25, but I think you would be pretty foolish to assume it was the one dollar.

Q. In fact, when this case went to trial, the maximum demand by the government was 5 million -- wasn't

it -- in that neighborhood?

A. I believe it was 53 million.

Q. Okay. Taken by the maximum exposure, 52 million?

A. We are getting into a legal area that is -- as far as what the plaintiff was demanding at trial, that's probably above my expertise.

Q. Okay.

A. But my interpretation, going into trial, is that the plaintiff was demanding, at the onset of the trial, something on the order of 53 million or 58 million, because at that point in time the Court, through summary judgment, had eliminated many of the allegations.

Q. Have you revised the joint pretrial statement that is referred to in that footnote that we read sometime back?

A. No, I have not.

Q. In your testimony to Ms. Gervasi, if I have it correctly, you said that Florida Cities relied somehow on the permitting authority of the DEP, the Florida DER. Did the company at that time believe that that would be adequate and they didn't need to get the MPDES permit? Or did they simply believe that EPA would just follow suit and do what the Florida DER did?

A. Well, I never believed that the company didn't think that it was necessary to have an MPDES permit, but on the other hand, I believe that during that time, during that era, and continuing on to today -- and of course now the EPA has jurisdiction for MPDES permits, so they are responsible for all permits -- but it is my belief after having been involved in permitting issues, been involved with regulatory agencies with respect to the Clean Water Act, that the DER was clearly the agency, the lead agency, although they did not have authority to issue MPDES permits.

Q. Okay. So that theory is advanced -- well, let me ask you. Was that theory that you just described, was that advanced before the federal court at any point in time? Was that part of your company's theory of defense before the federal court?

A. I possibly can't answer that. I don't think it was necessarily, you know, a major thrust of the defense, but there was testimony to that effect during the trial, and there was a DEP witness at trial. But notwithstanding, it was clear that the DEP -- the DER at that time -- was really the master that had the ultimate say as to what you would be required to do.

Q. So that was advanced by your company more or less in mitigation, more or less as kind of a good faith

defense to the government's thrust?

A. I'm not sure what you mean by "advanced." It was covered at trial. I think that it probably was covered in some of the motions that were filed and other documents filed with the court. I couldn't say that it was necessarily the number one defense.

Q. No, I wouldn't suggest that. But the DER witness was your witness. Right?

A. That is correct.

Q. You all put him on. Correct? The simple way to put it is, wasn't that part of your saying to the Court, we behaved in good faith, we did as well as we could?

A. I think that was a part of it.

Q. Was there some part that I'm missing, in that characterization?

A. Well, one of the -- if I remember, one of the purposes for the DEP witness was also to deal with the issue of the discharge to the canal versus the river -- in this situation, the river and the canal are one and the same --

Q. Sure.

A. But that became a big issue with the DOJ. I don't think it was ever a big issue with the EPA. And the DER witness testified that they were one and the

same, that although it had become a policy of the DER, for the sake of uniformity, to help people to extend their discharge pipes out into the river.

Q. Are you finished?

A. Yes.

Q. The notion that the company relied -- to some extent, anyway -- on the DEP's authority, that's included in your testimony in this case; and I am wondering what relevance it has here. Why do you advance that theory in this case? What is it intended to have the Commission do?

A. I don't know that it's intended to have the Commission do anything in particular. It's just part of the story.

Q. Well, what part of the story is it, is what I'm asking?

A. Well, it's a part -- I think it indicates what was driving the company's decisions, you know, to the extent that -- what was driving -- what was the environment that influenced the company's decisions, is a better way to put it.

Q. Is that also true -- look at page 12 of your testimony, on line 15.

You are asked: In your opinion, why did the US DOJ bring suit against the FCWC in this case?

You provide a fairly lengthy answer there.

Why is it relevant in this case? What does it have to do with this case?

A. I think it's relevant in trying to explain why the EPA and the DOJ took on a case that, relative to environmental cases and relative to environmental damage, is not a big case at all. It's sort of a no-case, within that definition. And this followed on the heels of the EPA settling Carrollwood, which was very similar to Waterway Estates. It went on for a long period of time. Had some similarity with Barefoot Bay.

They settled those cases, those combined, for $21,000. And why the EPA and the DOJ wanted to take on a very similar case -- I guess from the standpoint of numbers of violations, technical violations, probably it was less, if you counted up the total number. And I thought it appropriate to gather some insight as to why they took this case, which I've heard some of the regulators characterize as nothing -- some of the people who have been in enforcement their entire careers.

Why did they take this case? And I think I have explained why they took this case.

Q. Which, I gather from your testimony, is not the greatest of motives. It is a lesser motive than some other serious violation, I should think. Here is

what I am confused about.

Let me ask the question this way. Two scenarios, both hypothetical, one in which the EPA moves with good motives, one in which they move with bad motives. Express, if you will, the difference that should make to the Commission, if any.

A. Well, I think that some of the things that were bothersome to me, related to this case, would be bothersome to anyone who looked at it, such as why did they take a case that had no environmental significance whatsoever and refuse settlement on a reasonable basis?

Throughout all of this litigation, the DOJ did everything they could to drive up legal expense -- everything. They would take things back to the Court three and four times, until the Court said, don't bring it back again; we're not going to listen to it again.

Throughout this process, every effort was made to drive up legal expense. Legal expenses were higher than I think anyone anticipated, because of some of those tactics, and I just think it needs some explanation.

Q. But my question is, does it suggest in your mind that the Commission should behave differently, given those two extreme scenarios -- one where they acted badly, one where they acted with the highest

intention? The issue before the Commission is whether the customers pay or whether the stockholders pay. Does either of those two scenarios suggest to you any change in the answer?

A. I think so.

Q. In what respect?

A. Because I think a case like this is no different from any other peril. It is a peril that a utility company or a business faces.

Q. Let me re-ask the question.

A. It is really no different from a natural disaster.

Q. I see. Two scenarios, one in which the EPA acts with high motives, one in which they act with corrupt motives. You incur a great deal of expense as a regulated utility in fighting off the EPA. The question before the Commission will be, do customers pay or do stockholders pay? Is there anything that provides an answer to that question in those two scenarios?

In other words, contrast between the two scenarios. It's getting to be a pretty long question, isn't it? The point is, who cares what the motives of the ERA were. Express to me who pays, if you can, by what the different EPA's motives were.

MR. GATLIN: I don't think Mr. Allen is

suggesting that EPA's motives were corrupt.

MR. McLEAN: Certainly not. That is my hypothetical.

THE WITNESS: I'm not sure that I can answer a hypothetical, as I have stated before. The purpose of attempting -- and certainly I have given a lot of thought to why they brought this case and why it was pursued the way it was pursued, which resulted in tremendous legal expenses. I thought it was worth, in telling this story -- it was worth setting forth my opinion in that regard. Now --

BY MR. McLEAN:

Q. And I appreciate that, and I'm glad you did. But what I'm trying to find -- and I don't think you have answered the question yet, in all due respect -- is what difference that makes in this case. If Florida Cities Water was victimized by an overly zealous EPA, does that suggest the customers should be more likely to have to pay than if they had been less victimized by a well-meaning EPA?

A. I'm not sure I can answer the question. I can only say that I have just never seen a case that had the enormity that this one took on. And you know, I'm not sure that I can set forth to the Commission that, well, you should act in this fashion, in this case, but if

this had been different, then you should act in another fashion -- I'm not sure I can respond to those hypotheticals, because there are so many other factors involved that I think would influence not only the Commission's reaction but others' reaction. I don't think we could list them all.

Q. Is it fair to say the degree to which Florida Cities Water Company was victimized by the federal government is absolutely irrelevant to the question of whether the customers pay or the stockholders pay?

A. I'm not sure I can answer that. I could use the -- you know, I view this case as like any other peril -- not any other, but many other perils.

Q. With respect to -- you refer to some tactics of the EPA. And I think the inference I got was that the tactics were designed to increase legal expense. Do they rise to the level of bad faith, do you think?

A. I wouldn't characterize -- I couldn't characterize it as that. I think it was certainly extremely zealous pursuit of the case, based on my observations, and I can't say that driving the legal expense up was the only motivator. I certainly couldn't say that. But it was my perception that that was one of the motivators for some of the tactics that were used.

Q. Did you recover either cost or fees from the

government?

A. No.

Q. Did you request them?

A. Yes.

Q. Did Avatar request theirs?

A. Well, back up. I learned that the process of recovering legal expenses from the federal government is very, very complex. And I'm not sure I thoroughly understand it today. But the way it was explained to me is there are two -- and maybe more -- scenarios. One is where the government gives you permission to sue them.

There's one set of rules that apply to recovery of legal expenses under those circumstances, and then there's a totally different set of rules that apply whenever the government does not give you permission to sue them. And it was my understanding from our legal counsel that we fell into the second category, where the government would not give us permission to sue them for legal expenses. And based on that advice, or based on that situation, and based on the advice of the counsel, it was concluded that probably the cost would exceed the expenses recovered.

Q. You did in fact -- Florida Cities Water Company did in fact -- seek recovery of both legal fees, attorneys' fees, and costs. Did they not?

A. I believe that's correct. And I believe the Court stated -- begrudgingly, I think, is the word they used, or something like that -- that the Court did not have authority to deal with that issue.

Q. Is that because Florida Cities Water was not a prevailing party and because the government didn't litigate in bad faith?

A. I don't know.

Q. Okay. If the order -- on page 35 of your testimony, line seven, you said that Florida Cities Water Company is satisfied with the outcome of the litigation. Correct?

A. Yes.

Q. Well, does that include -- I believe you said it was true that you sought those costs and fees but did not recover them. Does your satisfaction with the judgments include that aspect as well?

A. Well, obviously, I would have liked for the Court to have found judgment of zero.

Q. Sure.

A. And to allow Florida Cities to recover all of its legal expenses.

Q. Do you see a connection between those two things, by the way, a judgment of zero and a recovery of legal expenses?

A. Again, that's a legal question. I really can't answer it.

Q. Okay. Move to page 37, line 22. Let's see. Where are we here? You are dealing with your perceived consequences of this litigation; possible consequences of this litigation. Is that a fair statement?

MR. GATLIN: Page 37 line 22?

MR. McLEAN: Yes.

BY MR. McLEAN:

Q. Certainly you are dealing with your selection of lawyers.

A. Certainly the company viewed the consequences as potentially being devastating.

Q. Sure. $53 million, if recovered, or if sought against Florida Cities Water, would have been the end of the company, I believe. Is that correct?

A. That's correct.

Q. The future of FCWC was at stake. I would like for you to define that. I'm not sure what you mean. Tell me what -- would the customers have stopped receiving water and sewer service?

A. Had the company been faced with a penalty of this magnitude, obviously it would have ultimately ceased to do business.

Q. Yes.

A. Now, how that would come about, that is a hypothetical. But guessing, there would have been bankruptcy, and what would happen from there, I don't know.

Q. Okay. I want to ask you about that. Do you have any expertise in the area of bankruptcy, liquidation, judgment satisfaction, anything like that?

A. Any expertise?

Q. Yes, sir.

A. I'm familiar. But being an expert? No.

Q. Okay. You are not going to be tendered, so far as you know, as an expert in how bankruptcies go about liquidating things like utilities or anything like that?

A. I hope not.

Q. I notice that if you recover this money from the customers, water customers will pay as well as wastewater customers. Is that correct?

A. That is correct.

Q. In a logical sense, how do you get to the water -- all these violations were associated with wastewater activities. How do you get to the water customers, if you understand my question?

A. Well, I believe, for -- and this covered, I believe, in Mr. Murphy's testimony, this rationale, but

this situation was viewed as a company-wide situation that really potentially would impact all customers uniformly. And that was the rationale for applying it, number one. And number two -- and this is a secondary reason -- it was impossible to somehow go through and allocate these expenses to, you know, Carrollwood Waterway. And I think fundamentally it is very difficult to separate water and wastewater. They're both the same, really, except one is treated to one standard, and the other is treated to another standard.

Q. There are some customers who receive one sort of service without receiving the other?

A. That is correct. And those customers who only receive one service, under our proposal, will be billed half as much of a surcharge as those customers who receive both services. So there's equity from that standpoint.

Q. So the reason that the water customers may be liable for this, according to your testimony and your explanation, is because it's too difficult to allocate.

A. I said that was a secondary. Part of the rationale but not primary.

Q. What is the primary?

A. Primary is, it is an umbrella issue that affects all of the customers of the company, both water

and wastewater.

Q. You say here, consequently, the future of FCWC was at stake. Is that why you say that?

A. That would be part of it, but I wouldn't say that that would be more important than other considerations at all.

Q. Well, can you take me down this road? Y'all were faced with a possibility of a $54 million judgment against FCWC.

A. Well, at one time it was $104 million.

Q. Let's go with 104. If the judge came back and said $104 million, what happens next? There are a number of references in your company's testimony, in yours and other witnesses', which say service would have deteriorated, or something bad would have happened to the customers. Tell me what it is and how it would have occurred, if you can, please.

A. Well, again, I can't say exactly what would have happened, had the government demanded $104 million and we'd said, we don't have $104 million. Obviously, we couldn't pay it. So some action would have been taken, I presume. I don't think the government would have forgiven the debt.

Q. Would the government have shut down the service?

A. I don't know. Mr. Jacobs proposed that at one time.

Q. But you don't know. He wasn't speaking on behalf of the government as creditor, was he?

A. Well, I would hope that government would have better judgment than that.

Q. And if they had better judgment, isn't it true that continuity of service would have been maintained through the whole process?

A. I would have hoped that would have been the case, and I presume that the state would not have permitted that to have occurred. I think during that whole process, probably what would have happened -- again, this is one thing that could have happened -- the company's assets would have been liquidated. The company would have been sold, and -- but I don't know that.

Q. Of course not.

A. And I think that any time there's that kind of turmoil, service always suffers.

Q. Sure.

A. Without exception.

Q. Now, when you say here on page 37, "and consequently the future of FCWC was at stake," I want to know exactly what you mean there. Do you mean that

customers-receiving-service was at risk, or do you mean FCWC as an ongoing economic institution was at stake?

A. I think both of those things.

Q. Both of those are true. Can you quantify? I don't think you can quantify, to any extent -- can you quantify the extent to which customers' service was at risk?

A. I can't quantify it. I can say that in the proceedings that would have followed that kind of situation, where the government demanded $50 million or whatever the case may be and the company could not satisfy that demand, there would have been a period of time -- or there would have had to have been some successor entity to assume ownership and operation assistance. During that interim period, it would be my guess that service would have deteriorated, for a number of reasons. One is there would then probably have been an exodus of employees.

Q. Upon what do you base that? Would the rates have changed?

A. Well, just based on my experience in life, when a company is about to go under, people forget about a long-term career at that company, if they're wise.

Q. With FCWC?

A. Yes.

Q. What if the successor were Florida Water Corporation or any entity like that?

A. Well, I think at any time where there's a situation where the employees see the unknown in the future, instability, they don't know what's going to happen, and if they have an opportunity to place themselves in a more stable employment situation, they'll do it. I don't care whether it's a situation like that or it's a situation where Florida Cities decided to sell their utility to Florida Water Corporation or whomever. That always -- that type of situation -- creates instability in the workforce, without exception.

Q. Was there general knowledge in the company that the government was demanding $104 million from Florida Cities Water Company?

A. No, I don't think there was general knowledge of that, no.

Q. Was there any exit of any employee that was associated with that demand?

A. Never made a study of it, so I don't know.

Q. Have you ever made a study that employees leave a company when it is about to be taken over by some other company or liquidated or something of that nature?

A. Can I provide you statistical studies?

Q. Yes.

A. No. I could probably provide you some experts in that area that could. But I know, from living life, that it does happen.

Q. Do you know whether it is also sometimes very good news to the employees that management is about to change?

A. I imagine there are situations similar to that.

Q. But what we're trying to do here is quantify the extent to which service would have deteriorated as a result of whatever comes after the 54 --

A. And I have stated in my opinion that there would have been -- a situation like that creates uncertainty on the part of the employees. Some employees will leave. Some of the key employees this company has -- at last count, 61 licensed operators that are required by law to be licensed in order to operate our facilities -- it's very critical that we keep those people, that we have stability there.

I think, beyond that, the capital improvements program would have stopped in its tracks.

Q. How do you know that to be the case?

A. I think that's a pretty safe assumption, when

a company -- and I am assuming you go into bankruptcy -- when a company goes into bankruptcy, normally they don't go out and build a lot of things; they don't make investments in plants. Normally, creditors are pounding at the door, and they stop all such investments. They don't even pay their bills, much less do things like expand a plant or do things necessary to assure service to the customers.

Q. Essentially, any entity or known governmental entity which took over these facilities would still have to remain within the good graces of the Public Service Commission, wouldn't it?

A. Any governmental entity?

Q. Any known governmental entity.

A. Oh, yes, I would think so.

Q. Sure. And very frequently, according to a great deal of testimony you folks have presented in rural cases, requires you to build ahead and plan ahead. Doesn't it?

A. Well --

Q. Is there any reason you have to assume that a successor in interest would behave with respect to this utility any differently than you do?

A. I have no reason to believe that that entity would not, but you will not place that entity in that

position overnight. In many cases, these things drag on for years, as we both know, and to believe that in the event that a $100 million demand was placed on Florida Cities and it says we can't pay it, we don't have the money -- to believe that that issue would finally be resolved in a short period of time is foolish.

Q. Oh, sure.

A. I mean it would take years.

Q. But there's nothing in your testimony that suggests to the Commission that if this scenario went down, that someone would send a backhoe out, dig up stuff and haul it off in a truck, is there?

A. No, there is nothing to suggest that.

Q. It is probably true that any creditor, including the government, would be interested in maintaining these facilities as a going concern, in an economic sense. Isn't that true?

A. Well, I can't say that any entity would. I think that certainly the government would be interested. I know the DEP would be very interested.

Q. They're interested?

A. And I believe the Commission would be very interested.

Q. And North Ft. Myers might be interested with respect to your Waterway Estates. Right?

A. And the citizens there, the customers would be interested there, yes.

Q. How about North Ft. Myers Utilities, the utility which is your northwesterly neighbor down in Waterway Estates?

A. I'm not sure they are northwesterly, but --

Q. Wherever they are.

A. Northerly, anyway.

Q. Sure. He testified in a federal lawsuit, didn't he, to that effect, the owner of that utility?

A. Yes.

Q. Have there been stated interests by any governmental entities in the neighborhood of -- well, Carrollwood obviously had a government suitor, didn't they? Or did they?

A. I don't know what you mean. I'm sorry.

Q. I'm sorry. Had any governmental entities expressed interest in acquisition of any of your facilities that are the subject of this case?

A. When?

Q. Any time.

A. Carrollwood, not since I have been with the company. I don't know of anyone that's expressed an interest in acquiring Carrollwood. It depends on what you mean by "interest." If you mean when you have a

rate hearing and someone says -- which invariably they say -- well, we're ready to take over Florida Cities, I don't consider that as responsive to your question as those who are expressing interest.

Q. Sure. I mean a serious interest.

A. A serious interest? I don't hardly know how to characterize "serious." After the rate case in Carrollwood, I have no knowledge of anyone coming to Hillsborough County or the City of Tampa or Florida Water Services Corporation, coming to Florida Cities and saying, hey, we want to buy Carrollwood. I know of no instance.

In the case of Barefoot Bay, following our last rate case, there I had some contacts from the Brevard County city attorney, and they asked the question, was Florida Cities interested in selling the facilities at Barefoot Bay. That went on for two or three months, I would guess, and I haven't heard. That's been -- well, it was right after the rate case. So it was two or three years ago.

As far as Waterway Estates, North Ft. Myers system is concerned, I have no knowledge of anyone expressing interest in acquiring that system.

Q. Okay. There was testimony in that federal case about interconnection with the North Ft. Myers

system. Wasn't there?

A. Yes, as was the case in our -- our rate case there of -- not the last one, but the one before that.

Q. Sure, the one before that. The reason y'all resisted that is because -- well, let's don't get into that. That's something else.

The future of FCWC was at stake. I take it that that statement certainly includes the stockholders' equity interest in the corporation. Didn't it?

A. It meant the company, which would include the shareholders, yes.

Q. Sure. Is it fair to say that you have a personal stake in the survival, the financial survival, of Florida Cities Water Company?

A. As long as I am working here, yes.

Q. Sure. Do you have any reason to believe that you wouldn't be as attractive to a successor operator, if you will -- owner of these facilities -- as you are to the current owners?

A. I can't respond to that, because there are so many variables in who the successor corporation might be or the successor entity.

Q. That is why I was careful to ask. You have no reason to believe that you would not be as attractive to them, do you?

A. To --

Q. To any successor.

A. I think it would have to depend on which successor. If Florida Cities were liquidating bits and pieces, that would be one response. If the successor was an investor-owned utility that acquired all of the assets or all of the stock of Florida Cities, then there would be a different answer.

Q. Let me change the focus considerably, just a couple of questions about Avatar. You were presented -- when this case went to trial, Avatar's liability was still very much at issue. Wasn't it?

A. Yes, because that issue had not totally been resolved in summary judgment. That's correct.

Q. Let me ask you a question which is unabashedly a legal question. Maybe you have the answer. I certainly understand if you don't. Was there a discussion about whether Avatar and Florida Cities Water Company were jointly and severally liable, or was the notion that they could collect from one or the other -- let me strike all that.

Was there any discussion that you understood about whether Avatar and Florida Cities Water Company were jointly and severally liable on any judgment that might --

A. I can't answer that.

Q. Okay. You were Avatar's lead witness -- let me strike that.

You were presented as a direct witness by Avatar on the issue of whether Avatar was liable for any of the discharges and so forth. Were you not?

A. I'm not sure how it was presented. I was asked and answered a lot of questions in that regard.

Q. You were sponsored by Avatar and by Florida Cities Water Company. Right?

A. That's getting into a legal area. I did testify on issues that related to the relationship between Avatar Holdings and Avatar Utilities and Florida Cities Water Company. I was examined by Avatar's attorney, Avatar Holdings' attorney.

Q. And that would be Mr. Hird?

A. Mr. Hird, yes.

Q. Okay.

A. And simultaneously, while sitting on the same stand, I answered questions totally unrelated to that, that related to the other issues.

Q. Sure.

A. So I was examined by both attorneys.

Q. Okay. There is --

A. I'm not trying to evade your question, but I'm

not sure I understand the legal term about sponsoring.

Q. It was perfectly responsive. In fact, you were put on by both Avatar and Florida Cities Water. You were asked direct questions by Mr. Hird -- is that H-u-r-t? -- as Avatar's attorney?

A. Yes. And it's H-i-r-d.

Q. Oh, yeah? Have you read your deposition? Anyway, I'll take your word for it.

Was there any point at which the federal court was apprised that Florida Cities Water Company might pass on either the penalty or the cost incurred in resisting the penalty to the ratepayers?

A. I'm not certain about that. I know there was testimony before the Court regarding rate-making, but really, I'm not certain.

Q. There was in your deposition, however, by Mr. Jacobs, wasn't there?

A. Yes.

Q. And didn't you at that time tell them -- Mr. Jacobs -- that it was highly doubtful that you would include any of the -- let me strike that and start over.

You testified to Mr. Jacobs that the company set aside $2 million up front.

A. Right.

Q. Mr. Jacobs asked you, somewhat inartfully, if

that $2 million was in rate base. And you said no. And then he asked you whether Florida Cities had any plans to include that in the rate base, and you said that was highly doubtful. Is that correct?

A. Well, I said that, and I think if you read further in my deposition, you know, I said I really don't know.

Q. Sure.

A. Because, you know, at that point in time I didn't know what the legal expenses were going to be. I didn't know what the outcome of the trial was going to be. Frankly, I didn't know where this thing was going. It just seems to me that it kept getting bigger by the day. And I think if you will read on, you will see that finally, I said, well, I really don't know, because there were just too many things unknown at that point in time to really make a judgment regarding what the company might do with respect to rates and how the Commission might react to it.

MR. GATLIN: Mr. McLean, it might be a good time if we would break, if it's all right?

MR. McLEAN: Sure.

MR. GATLIN: I kind of thought you might be at a point to take a break.

MR. McLEAN: Sure, you can talk the government

man into taking lunch. It's like giving a doughnut to a cop.

(Lunch recess taken from 12:00 - 1:35 p.m.)

BY MR. McLEAN:

Q. Mr. Allen, continuing on page 35 and in pages thereafter, you list a number of lawyers who were involved in the litigation. And those would include -- should they include the lawyers who were involved in your deposition as well?

A. The lawyers when my deposition was taken?

Q. You sat for two depositions.

A. That's correct.

Q. At the first deposition, they were on your behalf. Mr. Battochi?

A. That's correct.

Q. There was another gentleman representing your interest and also that of Florida Cities Water Company. Is that correct?

A. Yes. The other attorney was representing primarily the interest of Florida Cities Water Company, Mr. Scroggin.

Q. Mr. Scroggin, right. Now, Mr. Battochi was representing you, primarily?

A. He was representing both me and the company. I'm not sure how he characterized his representation in

the deposition. Perhaps we should check that. But he was there primarily because of this Whitesenhoff (phonetic) case that had recently been decided by the Supreme Court.

Q. That is what prompted you to take the Fifth on several occasions in your first deposition?

A. Yes. On my first deposition I exercised my Fifth Amendment rights because of that case.

Q. That was a concern of personal criminal liability?

A. Yes.

Q. Later, you were deposed again, and this time you didn't take the Fifth. You dealt with the substance of the questions.

A. That's correct.

Q. And on that occasion, there was present a lawyer by the name of Mayan Albritton, wasn't there?

A. Yes.

Q. Was he representing you or the interest of Florida Cities Water Company?

A. He was representing me.

Q. He sat with you through the deposition. Is that correct?

A. Yes.

Q. And he also was present, at least, when you

testified at the trial. Is that correct?

A. I believe that's correct. I'm not sure he was there the entire time, but he was there at least part of my testimony.

Q. Yes, on your testimony?

A. I'm not sure he was there for all of my testimony, because my testimony went into two days, and I'm not sure if he was there the morning of the second day or not. He was there the first day.

Q. Okay. And that was, again, because of concern about personal criminal liability?

A. He was representing me personally, and no, I don't think there was necessarily -- I didn't have any real concerns at that point in time, but he was there and felt that he should be there, and he was there.

Q. Did he attend at any time -- strike that.

Let me ask, were you there during the entire trial?

A. I was there with the exception of about a day and a half, if I recall. I missed one entire day of the trial, and I believe I missed a part of another day.

Q. Mr. Albritton is either a partner or associate of Holland & Knight. Is that correct?

A. Yes.

Q. And I take it Mr. Albritton was not there at

any time when you were not testifying. Did I get that right? You sat as a spectator, an interested spectator, at the trial for some time anyway?

A. I was a representative of the company.

Q. You were in front of the bar with the lawyers, then?

A. We.

Q. Was Mr. Albritton there with you when you were not testifying?

A. No. I don't believe he was there any time, you know, when I wasn't to be called as a witness. But keep in mind that, you know, witnesses were scheduled, thinking you'd be on at 2:00 o'clock.

Q. Of course.

A. And it might be 4:00 o'clock. So he may have been there for some period of time when I wasn't physically on the stand.

Q. Now, Mr. Albritton represented neither the interest of Florida Cities Water Company nor Avatar -- is that correct -- Avatar Holdings?

A. That is correct.

Q. Are Mr. Albritton's fees sought to be recovered in this proceeding?

A. No.

Q. They are excluded, are they?

A. They are excluded. There's no billings for Mr. Albritton, or there's not supposed to be, and that's our intent, that we are not attempting to recover any of those fees through this proceeding.

Q. Right. Now, with respect to some testimony you gave Ms. Gervasi on former employees and the government's compelling them to testify, did you incur legal fees in that endeavor?

A. Well, yes. Our -- Mr. Scroggin and Mr. Baise devoted some time to seeking relief through the courts to stop this.

Q. Okay. Were you contractually obliged to provide representation to the former employees?

A. No.

Q. Fees were incurred in their endeavor, no doubt. Is that correct?

A. Well, fees were incurred principally -- and I won't say exclusively, but near exclusively -- by the legal proceedings before the Court --

Q. Okay.

A. -- to get the the DOJ trial attorney to stop violating the law.

Q. Is there any separate accounting? Can the Commission identify in any way the amount of money that was spent for fees relating to the protection, if you

will, of the former employees?

A. I don't know that I would characterize it as protecting the former employees.

Q. Resisting their --

A. We were -- the interest was to keep the trial attorney -- stop him from violating the law. Our attorney said the law is very clear, and the Court agreed with him.

Q. But you wouldn't have defended me from breaking the law if I were up in Tallahassee. What I am trying to get at is --

A. If you were a former employee, we would have gone to court, as we did, to keep the trial counsel from meeting with you without Florida Cities' attorney being present.

Q. Were you contractually obliged to provide any legal representation for former employees?

A. I know of no contractual obligation in that regard, no.

Q. Okay. Shifting the focus, Avatar could have been found, given different behavior, liable in this lawsuit, couldn't they?

A. Gee, I don't know. I guess circumstances -- it's like --

Q. Well, let me ask the question differently. It

was certainly at issue. I think you answered me before that the liability of Avatar was to be decided by this proceeding, by this.

A. That is correct. That is correct.

Q. Now, had Avatar been found liable, do you know of any entity to whom Avatar could have passed along either the penalty or the fees incurred in avoiding the penalty or lessening the penalty? Is there any entity to whom they could have passed that along to?

A. I don't know.

Q. You are reasonably familiar with Avatar, are you not, Avatar Holdings?

A. Yes.

Q. Could have have priced it out the door in any way, had they been found liable?

A. If the question is did they have customers, utility customers, that they could have gotten these expenses into rates, somehow or other, the answer is no.

Q. They are in the development business. Is that correct?

A. That is correct.

Q. Do you think, in an economic sense, they could have passed along either the penalty or the expenses to the purchaser of Holdings?

A. If you stay in business -- whether you are

selling houses, cars, whatever -- if you stay in business, you have to pass all your costs on through your business. If you can't, then you are not going to stay in business.

Q. Certainly. Are prices in that market price determined by what the other guys are charging or what your expenses are?

A. My perception is that that selling real estate is -- I'm not an expert in the area, but it's principally market-driven -- maybe not exclusively, but I think generally that's the case.

Q. This is not a market-driven scenario we are playing in here, or we are doing business in here, is it? The Commission offers the influence of a free marketplace, presumably, doesn't it?

A. Well, it's a monopoly, or at least a form of monopoly, yes.

Q. Yes. Did you participate in any way in the selection of Avatar counsel?

A. No.

Q. You testified on behalf of Avatar -- I asked you this before and I think you agreed with me, that you were presented as a witness in Avatar's direct case to avoid liability. Is that right?

A. I'm not sure that's the legal

characterization, but as I stated before, I was examined by both the Florida Cities' attorney on issues related to the Florida Cities' case, and I was examined by Mr. Hird or his associate on issues pertaining to the relationship between all of the affiliated companies. That would be between Avatar Utilities and Avatar Holdings, the relationship between Avatar Utilities and Florida Cities Water Company, and the relationship -- I think even Consolidated Water Company got involved -- all the relationships between those affiliated companies. And some of that examination related to decisions, you know -- how decisions were made. You have read the transcript, so you know.

Q. Yes, sir.

A. So there was some intermingling, but I was examined by both attorneys from that standpoint. I presume legally I could be characterized as a witness for both parties.

Q. Do you believe that the interest of Florida Cities Water Company and those of Avatar Holdings was identical, or was there the risk that they might be substantially different?

A. Are you asking my opinion as to the relative risk of Florida Cities being fined versus Avatar Holdings being fined?

Q. Yes, yes.

A. Well, it was -- again, a layman's opinion was that the risk to Florida Cities was greater, because the way I understood the law, the kind of relationships that had to exist in order for the parent company to be held liabile, I view those risks as less than the case of Florida Cities.

Q. What was, if any -- was there any difference in their opportunity to pass the costs along to their customers, between Avatar and Florida Cities Water Company?

A. Well, as I stated before, I think, obviously, Avatar Holdings or -- the only subsidiary that Avatar Holdings has that is a monopoly -- I guess is as close as you can get -- is, you know, a couple generations removed, but Poinciana Utilities and Florida Cities Water Company. So in that sense, you know, that was the only situation where there was a monopoly.

So in order for other subsidiaries of Avatar Holdings, whether it be Avatar Properties or whichever subsidiary, the only opportunity for them to recover their cost for anything, any expense they have, is through the pricing of the commodities services that they sell.

Q. On page 40 of your testimony, line 16, you

were talking about the expansion of the government's case, I think, from the original complaint, to the amended complaint, including all FCWC facilities. It would be more accurate to say all wastewater facilities, wouldn't it?

A. That is correct. It relates to wastewater facilities.

Q. Turning to page 46, line one, and you have to look back to page 45 to see what the answer was, there was a conclusion -- let me ask it this way.

At the top of page 46: Had FCWC not acted responsibly in this regard, customer rates would have undoubtedly been higher.

I wonder if you could run through the scenario and tell me how it would be that the rates would have been higher.

A. Well, I think, as I explained in the first part of the response -- going back to page 45 -- in dealing in regulatory issues, we were dealing with the the DEP, the EPA. And even when we're dealing with the Florida Department of Transportation and other -- not necessarily all regulatory agencies, but other governmental agencies -- we are really the only advocate for our customers, for a lot of reasons. Most of those decision-makers in those agencies, at least down at the

level where we deal with them, do not understand rate-making. They do not understand that if Florida Cities or Poinciana Utilities is required to build more facilities or a different type of facility or required to extend an outfall from the edge of the river to the center of the river simply for standardization, they don't understand that this all flows back to the rate-payers.

Now, it would be unfair for me to say that none of them were interested in that. It would be fair for me to say, however, that many of them are not interested in that, because if you bring that issue up during the deliberations on the different alternatives for solving a problem, and you bring up cost, generally the reaction is, well, too bad.

We do argue on behalf of options or alternatives that will have a lesser impact on rate-payers. If we didn't, there's no doubt in my mind, whatsoever, that our rates would be a lot higher. I firmly believe that.

So when we go before many of the regulatory agencies -- the DEP, EPA, which we don't deal much with the EPA at all -- we're the only advocate for our customers. I think that if a utility always did, without question, everything that was demanded or

suggested or requested, our rates would be a lot higher -- presuming that we were allowed to recover those costs, again.

Q. Sure.

A. So Mr. Jacobs suggested -- to give you an example, Mr. Jacobs, who is a trial attorney in this case -- suggested that in order to eliminate this discharge, we could have shut the system down and we could have moved all the customers out of Waterway Estates, all 2600 customers, which represents a population of probably six or seven thousand people. He said that was really simple; just shut it off and move everybody out.

So, you know, I think if Florida Cities, as well as other utilities, you know, don't take issue with some of the demands, our rates would be higher.

Q. Can you tell where Mr. Jacobs said that? Did it occur during the trial?

A. No. It occurred during a meeting, and I think there's a document that quotes that someplace, but he said that in a meeting sometime when I was present. Now, I don't remember specifically which meeting.

Q. But the gist of this testimony is, if you just knock down every time they want you to do something in environmental sales, customers' rates will be higher.

Right?

A. (Nodding affirmatively.)

Q. Is that the tack you took on the challenge to the marginal reserve rule?

A. I don't see any relationship between this issue and the margin reserve. How is that connected?

Q. Well, Florida Water -- what is the name of the trade association?

MR. GATLIN: Florida Waterworks Association.

BY MR. McLEAN:

Q. Florida Waterworks Association. Are you a member of that?

A. I am not. My company is.

Q. Didn't they sponsor some witnesses from these companies that don't know anything about economic regulation and so forth?

A. Sponsor witnesses? I think some of the proceedings, there were representatives of the DEP that spoke there on prudent planning, yes.

Q. And they were sponsored by your trade association. Correct?

A. I wouldn't say "sponsored." I'm not sure I understand what you mean by "sponsored." Sponsoring sounds like, I think, something different from -- the appeared and spoke on issues related to planning, wh

goes back to margin reserve. I mean the two are the same, or partly the same, at least.

Q. Look at page 47, line four. You deal generally with the notion here of the question of whether the Commission historically deems prudent passing on expenses in recovering the rates, and so forth. I want to test your understanding of that a little bit. What has been your experience with the Commission, if any, with their passing along this sort of legal fees, legal expenses?

A. I believe the Commission allowed the recovery in past cases of legal expenses associated with trials similar to this. Not on the same order of magnitude, of course.

Q. What cases similar to this?

A. I would have to defer to Mr. Gatlin. I have seen references to the case. I don't recall.

Q. This is your representation that it's historically been true. Right?

A. Yes, and it has, because I have read the cases that Mr. Gatlin has provided.

Q. How many cases did he provide?

A. I want to say two, but I'm not sure that's correct.

Q. One would be Lehigh, perhaps?

A. I just don't remember. It seems like Florida Water Services may have been one, I guess, which would be Lehigh, yes.

Q. You don't remember how much was at stake?

A. It was small.

Q. But you do remember a different magnitude from this one?

A. Yes.

Q. Do you remember whether the Commission made any inquiry into whether you were winners or losers? And I mean that in the sense of the number of claims versus number of claims on which you prevailed, and also in terms of the size of the fine asked for versus what was actually collected and paid.

A. I don't remember, you know, particular details regarding the deliberations that went into that. I remember reading the excerpt from the order, the rate orders.

Q. I see. But you can't say whether there were two or more than two?

A. I don't believe. But I'm not certain.

Q. The basis for this statement is, then, the two cases that Mr. Gatlin provided you?

A. Yes. Well --

MR. GATLIN: I think he said he thought there

was two, there might have been more, is what he said.

BY MR. McLEAN:

Q. However many, is this statement based on any experience with any cases outside those Mr. Gatlin provided to you, irrespective of how many there might have been?

A. In the State of Florida?

Q. Yes, sir.

A. No, I relied on Mr. Gatlin to render an opinion --

Q. Okay.

A. -- regarding the recovery of these legal expenses being consistent with the law, and consistent with Commission practice, and that's the basis for my statement.

Q. Sure. Now, back when you gave your deposition -- we talked about this briefly earlier, your deposition given November 13, 1995, and I think it was continued to a December date -- during the first day of that deposition, you mentioned that you thought it was highly doubtful -- let me be sure of your statement.

You were asked whether you had plans to include any plans in the rate base, and you said highly doubtful. You went on to explain. One of the things

you said in your explanation was, based on your past experience with the Commission, it would be unlikely to grant you some recovery of that. Is that fair?

A. Well, I rambled on there. I think if you read the last part of that, I think you will see I said I really didn't know. I was just speculating without knowing. Number one, I had not gotten Mr. Gatlin's opinion.

Q. Uh-hmm.

A. I had not consulted with him. And quite frankly, at that point in time, no one would give a lot of thought to recovery. That was in the -- that was about a year before the trial, I believe. It may have been before or after the amended complaint was filed and I don't recollect.

So there were a lot of circumstances that were uncertain, and I believe if you will read at the conclusion of my rambling response, I finally said, well, I really didn't know.

Q. You didn't know when were you were going to ask for it?

A. I didn't know when we were going to ask for it. I really didn't know -- I really had no basis for even responding to the question, quite frankly, because I hadn't really consulted with Mr. Gatlin, and I hadn't

really given it much thought.

Q. You said, just based upon my past experience with the Commission. What I would like to get at a little bit is what experience were you referring to?

A. I think I was referring to -- you know, I have had experience in nine states with regulatory Commissions, and all of them take a little different view of things. And I think that was the basis, you know -- relative to other Commissions.

Q. Okay. Do you see a conceptual difference between the penalty, on the one hand -- for which you do not seek recovery -- and the expenses incurred in fighting, if you will -- I hate to use that word because you are going to take exception to it -- but resisting the thrust of the government with respect to this whole thing? What is the conceptual difference between the penalty, on the one hand, and the expenses incurred in lessening the penalty, on the other?

A. Well, I think there's a significant difference. It's just like if someone filed a claim, whether it be in the form of a civil suit, claiming that we had damaged them or their property somehow. The easy way not to sustain legal expense is to give them whatever they want. But if they're wrong, if you're within your rights, I think you are obligated -- to your

customers, to your shareholders, to everyone else who has an interest -- to defend yourself regarding unreasonable claims -- however, whatever the form they may take.

Q. Why does that obligation run to the customers?

A. I think it is part of doing business. It's like a lot of other things that relate to doing business. I think it would be, number one -- I don't think there would be investor-owned utilities very long if, every time you were presented with a claim, you just paid off. If you didn't hire a lawyer, you didn't take into account what your rights are, you just simply paid off, there wouldn't be any of us around.

So I think that a utility company has a right to defend itself. I think that's a legitimate business expense. I think it's an expense that has to be sustained to stay in business, in particular in the environment we operate in today. We have claims all the time from claimants.

Sometimes we settle -- in particular, small claims -- because it's, you know, it's more reasonable to settle than it is to litigate. It would be more costly to litigate. So I think it's a matter of what your rights are and applying judgment, but certainly, I think it would be ridiculous to imply that simply

because you are a regulated business that you should not defend yourself, and that the expense of defending yourself against unreasonable claims is not a legitimate expense.

Q. Why did you not ask for the penalty? Why did you not ask to recover the penalty from the rate payers?

A. Well, I view the penalty -- and this is merely my view -- as -- and perhaps you could make a case for recovering it as a part of the cost of doing business -- but I think that would be a stretch.

Q. My question is, why did you not ask for it?

A. Because we felt it would be a stretch.

Q. You mentioned briefly -- when I asked about those cases that Mr. Gatlin mentioned to you, you mentioned briefly about your experiences in other states. Did you bring any specific case from those other states to the attention of the Commission in this case?

A. I correct myself, too. I said nine. It's seven.

Q. Okay.

A. I have no particular experience in recovery of legal expenses in a case like this. I do know I have had experience in other states where proven legal expenses are treated like any other expense, no

different than paying for the alum that is used to treat the water. I do not know of a challenge for legal expenses, recovery of legal expenses, in any rate case.

Q. Can you name any case in which they were sought, as they are in this case, adjunct to enforcement action by an agency with enforcement authority? For example, NRC, EPA. Is there any case you might testify about at hearing that is not shown in the case thus far?

A. Well, if you are asking me if I have known of a case of this order of magnitude, no, I have not. If you are asking me if I have known of cases where legal expenses have been recovered as a normal course of business expense because you had a lawyer to help you deal with the regulatory agency, I can say it happens all the time.

Q. Well, I want to know. I want to test that experience that you have, and this is my opportunity to learn about those things. So I'm asking you to tell me about those now with some measure of specificity so I can go read them and see if they say the same thing as you say they say. That is what discovery is for, I think.

So my question is, if you are going to rely on some other cases, would you tell me about those now, with enough specificity so I can go look at them?

A. I have no other cases that I can bring to you that says that Utility A was allowed to recover legal expenses because it got a notice of violation or a threat of violation from a regulatory agency and it took its lawyer up to the office of the regulator and you had a conference regarding this alleged violation and you recovered the legal expenses. To me, those legal expenses are the normal course of doing business.

I can't cite a case where Florida Cities or any company, other than those mentioned by Mr. Gatlin, where that's taken place. I think in all the utilities I have ever worked for, that was a cost of doing business. Just like if somebody files suit against us -- we hired a lawyer recently because a party had filed suit against us. To me, that's the normal course of doing business. The plaintiff was claiming that the company made an adjustment in a bill and that the adjustment was not adequate. And I don't see that -- I can't really see the difference.

Q. Did you win that case?

A. Well, I don't know. I mean it hasn't -- we hope to be able to settle it. We hope that it doesn't have to be litigated.

Q. And you are not suggesting it is anything even similar to this case in terms of materiality?

A. In terms of materiality, no, but in terms of principle, I think there are a lot of similarities.

Q. Sure. And some cases have a nuisance value, don't they, small claims against the company?

A. Absolutely.

Q. Costs you more to defend it?

A. As I mentioned earlier, in many cases of small claims, someone is -- if there is any legitimacy at all to the claim, and they are claiming $750 for some damage -- you don't just issue checks, but if it appears that their claim has legitimacy -- you settle with them, although you may think it is worth $300. But it's not prudent to hire a lawyer and go to court over those kinds of claims.

Q. With respect to the Hillsborough County matter, any particular reason why you decided to seek -- deal with the Commission aspects of this case before you went to Hillsborough County?

A. The only reason is because Hillsborough County has 1400 customers, or something like that, and I don't think it would have made much sense to go to Hillsborough County first.

Q. Do you more or less expect Hillsborough County to follow whatever the Commission does?

A. I don't know what to expect from them. I

can't speculate.

Q. During your testimony, live testimony in the federal case, there is mention by Mr. Baise of Chuck Hill. Do you know what Chuck Hill that is? Is that the one we are all familiar with, from the Public Service Commission?

A. Yes.

Q. What was the subject of his testimony?

A. He didn't testify.

Q. Was he deposed by the other side? Well, pardon me. Let me ask first. By whom was he sponsored, if you will forgive the term?

A. He was asked to testify on behalf of Florida Cities.

Q. Florida Cities?

A. Yes.

Q. But you don't know whether he was deposed by the other side?

A. Gee, I'm not sure. I don't think so, but I'm not sure.

Q. Do you recall what his anticipated topic of discussion was going to be?

A. Well, it was my understanding that he was to explain the rate-making process to the Court because the Department of Justice was viewing Florida Cities in the

same light that it would view a paper company from, you know, the financial benefits of deferring investments. You know, a paper company -- if Florida Cities were a paper company -- paper company owned Waterway Estates, then there would be significant economic benefits of delaying investing $5 million in a new plant facility. And there would be, you know, significant economic gain from doing that. And the Department of Justice would never accept the fact that a regulated utility doesn't -- there is no economic gain from deferring an investment, assuming you have the ability to make the investment. That's where your return comes, is from investments.

So our attorneys felt that if we had someone, you know, from the Commission who could explain that to the Court, that it would be beneficial in dispelling the misconception that the Department of Justice was presenting.

Q. Did the Court agree with you on that theory?

A. No, the Court really didn't totally agree. I believe, if you read the order, that it really didn't agree in that case. Now, Mr. Hill never testified.

Q. No, I understand.

A. I tried to do that myself, and I didn't -- apparently didn't have as compelling a story.

Q. The Court in fact was persuaded that deferring investment could be of economic benefit to the company as well.

A. I'm not sure we should characterize it that way. We could look at the order.

Q. It says what it says.

A. Well, yeah.

Q. So as far as you know, is this the first time that Florida Cities has made a request for legal fees which arise from resisting a regulatory authority?

A. From resisting a regulatory authority?

Q. Yes. I don't want to get caught up too much on the specific words. I could ask it about every regulatory agency there is, if you prefer. But what I'm looking for is, has Florida Cities ever requested fees such as this before?

A. Well, the expenses have been included in test year revenue requirements.

Q. Legal fees?

A. For legal fees, sure.

Q. Let me withdraw the question and ask it differently. Has EPA ever sought to fine Florida Cities Water on any occasion?

A. Yes.

Q. On what occasions have those been?

A. There have been, as I mentioned earlier today, there was a penalty assessment in the case of Carrollwood to settle the issues long before this litigation. Not long before, but a few years before. I believe it was $15,000.

Q. Okay. Did Florida Cities Water incur legal fees in association with that activity?

A. Yes.

Q. Were those recovered?

A. I can't say they were recovered. As far as I know, if they occurred during a test year, they would have been included, yes.

Q. You can't refer to any line item where that was the case?

A. No, I can't.

A. Our accounting people might, but I couldn't.

Q. Who would be the accounting people? Would that be Mr. Murphy?

A. Yes, but I know of no other case where we have asked, you know, on a stand-alone basis, like this case, to recover legal expenses.

Q. With respect to that Carrollwood case you just referred to, I take it that a penalty was assessed, a $15,000 penalty was assessed?

A. This was a negotiated -- there was some

negotiation involved, yes.

Q. A consent decree of sorts?

A. Yes, it was a consent agreement.

Q. Do you know whether Mr. Hill made any -- this case was tried in Tampa. Is that right?

A. Yes.

Q. Did Mr. Hill have to go to the hearing or to the trial itself?

A. Mr. Hill was -- there was some circumstance, I think an illness, and he never appeared.

Q. But he didn't have to come down -- he didn't see any part of the trial, so far as you know?

A. No, not to my knowledge. I never saw him there.

Q. Have you prepared a summary of your testimony as yet?

A. Of this testimony?

Q. Yes, sir.

A. No.

Q. It is customary for witnesses to give a summary of their testimony to the Commission.

A. Well, there is a summary at the beginning of the testimony. It's very brief, but on page three, it really characterizes the purpose of the testimony, at line 11.

Q. Do you plan to offer any summary to the Commission beyond what you have written here?

A. If Mr. Gatlin says I need to prepare one, I will follow his directions.

Q. Will you prepare one in writing?

A. If Mr. Gatlin says I need to prepare one in writing, I will do it.

Q. Will you give one to me, or what do I need to do to get one?

A. Speak to Mr. Gatlin.

MR. McLEAN: I get burned by these summaries sometimes. Thank you; that concludes my questions.

MS. GERVASI: Can we establish on the record a deadline for furnishing the Late-filed exhibits? How does a week from Monday sound, the 18th?

THE WITNESS: I don't think there is anything you have mentioned here that we can tell --

MR. GATLIN: We ought to have it all.

THE WITNESS: I think most of it we will have, because we have been through this a lot of times in the last few years. Sometimes some of it has gotten shuffled, but, Mike, I don't think there is any problem with anything that's been requested, is there?

MR. ACOSTA: No.

THE WITNESS: There is a question on a couple of documents, whether they exist.

MS. GERVASI: So just list it on your response as that. So the 18th would work?

THE WITNESS: I don't think there would be any problems.

MR. GATLIN: If there is any problem, we will let you know.

MS. GERVASI: And Mr. Gatlin, did you want to read and sign or waive that?

MR. GATLIN: We want to read and sign. And I have a question to ask, too.

MS. GERVASI: Okay.

MR. GATLIN: Are you finished?

MS. GERVASI: Go ahead, yes.

CROSS EXAMINATION

BY MR. GATLIN:

Q. Mr. Allen, there were some questions and testimony during the deposition relative to a possible protest to the EPA's intent to deny the permit. Do you recall that?

A. Yes.

Q. What would have changed or have been different, in your opinion, if Florida Cities had indeed filed such a protest?

A. Speculation to some extent on my part, but I believe that there wouldn't have been much difference at all. I don't think there would have been any difference in the outcome, because I believe had the company challenged the denial of the permit, that the EPA would have done basically the same thing they did. I think they would have acquiesced to the DER, which wanted the outfall moved out of the canal into the river and wanted the plant upgraded to meet AWT standards.

I don't believe that -- at least at the first stage of a challenge that would have been at the EPA administrative level -- I don't believe that anything would have changed that would have affected the outcome.

Now, what might have changed is the first administrative order that the EPA issued, which was in early 1987 after the permit was denied in December of '86. That first administrative order really just gave the company one option, and it said cease the discharge. Whereas the DEP offered -- and suggested an option in their recommendation to the EPA -- that either the discharge be terminated, or that the outfall be relocated to the six-foot contour line of the river, and the plant upgraded.

So I think the only change would have been that the administrative order would have laid out both

of those options on the front end. The EPA later issued the second administrative order, which did include upgrading the plant and relocating the outfall, but as far as the overall outcome is concerned, as to when things were completed and when the MPDES permit was issued, I don't think it would have made any difference at all.

Q. Would the facts still have been present -- regardless of whether the protest had been filed or not -- that were the basis for the DOJ's enforcement action?

A. Yes.

MR. GATLIN: That's all.

MS. GERVASI: That concludes this deposition.

(Whereupon, the deposition ended at 2:24 p.m.)

* * * * *

CERTIFICATE OF OATH

STATE OF FLORIDA)

COUNTY OF SARASOTA)

I, the undersigned authority, certify that GERALD S. ALLEN personally appeared before me and was duly sworn.

Witness my hand and official seal this 8th day of May, 1998.

Gayl Hardeman

Gayl Hardeman, RPR, RMR, RDR
Notary Public - State of Florida
My Commission No. CC459875
Expires: May 4, 1999

DEPOSITION CERTIFICATE

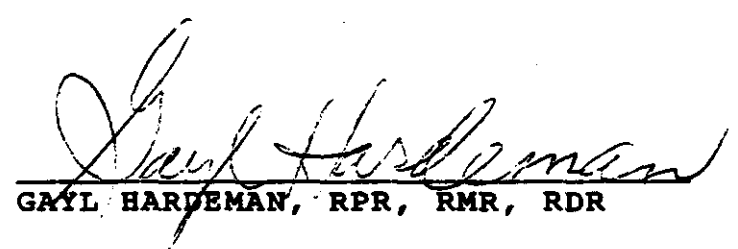
STATE OF FLORIDA

COUNTY OF SARASOTA

I, GAYL HARDEMAN, being a Registered Professional Reporter, certify that I was authorized to and did stenographically report the foregoing deposition; and that the transcript is a true record of the testimony given by the witness.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 8th day of May, 1998.



GAYL HARDEMAN, RPR, RMR, RDR

ERRATA SHEET

TO BE ATTACHED TO DEPOSITION OF WITNESS: GERALD E. ALLEN IN DOCKET NO. 971663-WS, FLORIDA PUBLIC SERVICE COMMISSION, DATED APRIL 29, 1998

Instructions: Please read the transcript of your deposition and make note of any errors in transcription on this page. **Do Not** mark on the transcript itself. Sign and date this sheet. Then return both this sheet and the transcript to the court reporter. Thank you. (Counsel: Please attach to your copy of transcript.)

PAGE	LINE	ERROR OR AMENDMENT

I have read the original transcript and, except for the corrections noted above, I hereby subscribe to the transcript as an accurate record of the statements made by me.

Date_____ _____Deponent

STATE OF FLORIDA)
COUNTY OF SARASOTA)

Subscribed before me this _____day of _____, 1998.

_____
Notary Public

My Commission Expires:_____

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PAGE	LINE	ERROR OR AMENDMENT
5	16	"MPDES" should be "NPDES" here and throughout the transcript
15	4	"owned" should be "over"
15	12	"December" should be "NPDES"
21	14	"overall" should be "overly"
25	5	"286,842"should be "236,842"
25	20	"$125,000" should be "$25,000"
37	2	"'98" should be "'89"

Continued on next page

I have read the original transcript and, except for the corrections noted above, I hereby subscribe to the transcript as an accurate record of the statements made by me.

Date 5/14/98 _____ Deponent

STATE OF FLORIDA)
COUNTY OF SARASOTA)

Subscribed before me this 14th day of May, 1998.

ANITA J. CHUBBUCK
State of Florida
My Comm. Exp. Aug. 18, 1998
Comm. # CC 451589
PERSONALLY KNOWN BY ME
PRODUCED I.D. _____

_____
Notary Public

My Commission Expires: 8-18-98

ERRATA SHEET (Continued)
TO BE ATTACHED TO DEPOSITION OF WITNESS: GERALD S. ALLEN
IN DOCKET NO. 971663-WS, FLORIDA PUBLIC SERVICE
COMMISSION, DATED APRIL 29, 1998

PAGE	LINE	ERROR OR AMENDMENT
43	15	"revised" should be "reviewed"
44	5	"EPA" should be "DEP"
71	14	"Battochi" should be "Battocchi"
72	17	"Mayan" should be "Brian"
80	6	"liabile" should be "liable"
80	16	Strike "but"
80	23	Insert "or" after "commodities"

Florida Cities Water Company
Docket No._____
Rate Application for Recovery
of Legal Expenses
Exhibits____(GHB-1 thru GHB-33)
Gary H. Baise
Volume 1 of 7

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663-WS EXHIBIT NO. 6-Vol. 1
COMPANY/ WITNESS: Baise
DATE: 8-12-98

FLORIDA CITIES WATER COMPANY

RATE APPLICATION FOR RECOVERY OF LEGAL EXPENSES

EXHIBITS____(GHB-1 THRU GHB-110) OF

GARY H. BAISE

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50	United States' Opposition to Defendant Florida Cities Water Company's Motion for Partial Summary Judgment
51	Order Denying FCWC's Motion for Partial Summary Judgment
52	United States' Motion for Partial Summary Judgment (exhibits omitted)
53	United States' Second Set of Interrogatories and First Request for Admissions

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57	Deposition Summaries
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59	United States' Fifth Request for Production of Documents
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95	Defendants' Joint Response to Memorandum Seeking Reinstatement of Res Judicata
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FCWC List of Players

Attorneys

Gary H. Baise: Lead Trial Counsel for FCWC; Baise & Miller, P.C.

David Berz: Lead Attorney for Avatar Holdings, Inc.; Weil, Gotshal & Manges

Alexander M. Bullock: Attorney with the law firm of Baise & Miller, P.C.

Lance W. High: Attorney with the law firm of Baise & Miller, P.C.

David B. Hird: Lead Trial Counsel for Avatar Holdings, Weil, Gotshal & Manges

Daniel Jacobs: U.S. Department of Justice Environmental Enforcement Section Attorney

John A. Noland: Attorney with the law firm of Henderson, Franklin, Starnes and Holt, local counsel for FCWC and Avatar Holdings, Inc.

Elizabeth S. Poliner: Attorney with the law firm of Baise & Miller

Don G. Scroggin: Attorney for FCWC

Joanne Tsotsos: Co-Counsel for Avatar Holdings, Weil, Gotshal & Manges

Deponents and Witnesses

Mike Acosta: FCWC Vice President of Engineering and Operations

Dr. Abdul Ahmadi: Professional Engineer and Administrator of FDEP

Gerald Allen: President of FCWC

Randall Armstrong: FCWC's Expert Witness; Executive Vice President of the Phoenix Environmental Group

Bruce Barrett: Director of Water Management Division for EPA's Region IV from April 1985 to September 1989

Ronald P. Blackburn: Environmental Administrator for FDEP, Fort Myers Division

Paul Bradtmiller: FCWC Senior Vice President

Keith Cardey: FCWC Expert Witness re: Florida Public Service Commission regulations

Roosevelt Childress: EPA Representative

James Elder: Former FCWC Employee

Dennis Getman: General Counsel of FCWC and Executive Vice President and General Counsel of Avatar Holdings

Larry Good: Regional Manager at FCWC

Robert Gordon: Former FCWC Employee

James Greenfield: EPA Region IV Wasteload Allocation TMDL Coordinator

Roger Hartung: FCWC Expert Witness, former Deputy Water Division Director, EPA Region VI

Roy Herwig: Environmental Engineer in the NPDES Enforcement Section for EPA Region IV

Michael Hom: EPA Region IV Supervising Environmental Engineer

Edwin Jacobson: President, Avatar Holdings, Inc.

Connie Kagey: EPA staff member; she signed the document which revoked the Waterway permit

Julie Karleskint: FCWC's Manager of Operations

Mark Klingenstein: DOJ's Expert Witness re: environmental impact and FCWC's ability to achieve compliance

Kenneth Kwan: EPA Region IV Environmental Engineer

Patrick Lehman: Former FCWC Vice President for Operations

Leon Levy: Chairman of the Board, Avatar Holdings, Inc.

John Marlar: Branch Chief for EPA's Environmental Compliance Branch

Georgia Metcalf: President, Barefoot Bay Development Corporation

James A. Miller: Auditor and Public Accountan; Managing Partner, Ernst & Young Kenneth Leventhal

Peter McGarry: Chief of the Region IV Enforcement Unit from 1982 - 1992

Charles L. McNairy: Accountant for Avatar

Michael W. McWeeny: Director, Hillsborough County Utilities Department

Michael Murphy: FCWC Vice President & Chief Financial Officer

Priscilla Oliver: EPA Staff Member Region IV

Johnnie Overton: Executive Vice President of Avatar Utilities Services, Inc.

Roger Pfaff: Acting Branch Chief for the Water Permits and Enforcement Branch for EPA Region IV

Thomas Plouff: EPA Region IV Environmental Engineer

Antone Reeves: FCWC Manager when FCWC NPDES permit was denied in 1986

William Sansbury: Division Manager of the Barefoot Bay Division of FCWC

William Schafer: Director of Planning for the Sanitary Sewer Department for the City of Tampa

Jack Schenkman: Chairman of the Board of the North Fort Myers Utility

Bennie Shoemaker: FDEP Staff Member

Glen Siler: Wastewater Operator at FCWC's Barefoot Bay plant

John Sladkus: Executive Vice President, FCWC

Douglas G. Smith: FCWC Expert Witness; Senior Partner & Regional Environmental Manager for Black & Veatch, Engineering Consulting Firm

Jack Tompkins: Operations Manager at FCWC

Fritz Wagener: Chief of the Water Quality Standards Section for EPA Region IV

Larry Wilkov: Former President, Avatar Holdings, Inc.

Eileen Zimmer: DOJ Expert Witness re: BEN Model

TIME LINE: *U.S. v. Florida Cities Water Company*

Case Preparation: June 9, 1993--Travel to FC offices in Sarasota for meeting with client, tour facilities and review documents

Case Preparation: Ongoing, July - September, 1993--Re potential compliance action for Waterway Estates, review of administrative record re compliance history and wasteload allocation issues, EPA regulatory guidance, and other file documents

Case Preparation: September 1, 1993--Meeting with DOJ re legal issues for potential complaint

Case Preparation: September 17, 1993--Meeting with M. Acosta of FCWC in Sarasota, traveled to Waterway Estates, toured facility, and reviewed materials provided by client

Case Preparation: Ongoing, October 1993--Review of administrative record documents and correspondence between FDER and EPA re Waterway Estates

Pleading: October 1, 1993--Complaint filed by US

Case Preparation: Ongoing, November 1993--Drafting FCWC's Answer to Complaint

Case Preparation: November 12, 1993--Meeting in Fort Meyers with DEP staff, and review of documents there

Case Preparation: November 19, 1993--Meeting in Tallahassee with staff member of FDEP, review documents

Case Preparation: November 19 - December 3, 1993--Review of documents obtained in Florida from FDEP

Pleading: November 22, 1993--FCWC's Answer to Complaint

Pleading: November 30, 1993--FCWC's Written Designation and Consent-to-Act

Discovery: Ongoing, December 1993--Drafting initial document request

Case Preparation: December 10, 1993--Meeting in Tallahassee with FDEP re waste load allocation and water certification issues; further review of documents in FDEP files

Discovery: Ongoing, December 1993--Review of documents from FDEP

Pleading: December 15, 1993--US's Motion for Extension of Time in which to File

Motion to Strike Affirmative Defenses

Case Preparation: December 17, 1993--Meeting in Tallahassee with FDEP re same issues

Pleading: December 27, 1993--US's Motion for Extension of Time to Answer (the court's standard interrogatories)

Order: December 28, 1993--Court Grants US's Motion for Extension of Time to Answer the Court's Standard Interrogatories

Discovery: Ongoing, January 1994--Review of documents brought back from Florida

Case Preparation: January 6-7, 1994--Meeting in Tampa, Florida, with DEP re waste load allocation issues, and review of records in Ft. Meyers

Case Preparation: January 11, 1994--Meeting with DOJ and co-counsel re discovery schedule

Pleading: January 26, 1994--US's Answers to Court's Standard Interrogatories

Discovery: Ongoing, February 1994--Review documents in response to DOJ's document request

Pleading: January 27, 1994--Notification of Parties' Rule 26(f) Meeting

Case Preparation: February 4, 1994--Rule 26(f) Meeting between parties to discuss discovery schedule and related matters

Pleading: February 4, 1994--US's Motion to Strike Affirmative Defenses

Pleading: February 9, 1994--FCWC's Motion for Extension of Time (to respond to U.S.'s Motion to Strike Affirmative Defenses)

Order: February 11, 1994--Court grants FCWC's Motion for Extension of Time to Respond to US's Motion to Strike Affirmative Defenses

Discovery: February 14, 1994--US's First Request for Production of Documents

Pleading: February 14, 1994--Parties' Answer to Court's Joint Standard Interrogatories and Joint Report of Parties' Planning Meeting Pursuant to FRCP 26(f)

Discovery: February 27-28, 1994--Travel of Sarasota for document review and retrieval for response to DOJ's document request

Discovery: Ongoing, March 1994--Review documents for upcoming production and prepare

them for attorney review at production (organizing, bates stamping, etc.)

Discovery: March 1, 1994--Document review continues in Ft. Meyers office, Waterway Estates facility, and Fiesta Village

Discovery: March 2, 1994--Document review continues at Miami office

Pleading: February 28, 1994--FCWC's Answers to Court's Standard Interrogatories

Pleading: February 28, 1994--FCWC's Memorandum in Opposition to Plaintiff's Motion to Strike Affirmative Defenses

Case Preparation: March 11, 1994--FOIA Requests to EPA Regional Offices

Discovery: Ongoing, April 1994--Preparation for document production

Discovery: April 4, 1994--FCWC Responds to US's First Document Production Request

Discovery: April 5, 1994--FOIA letter sent to EPA Regional Offices re EPA NPDES permit renewal denials

Discovery: April 6, 1994--FCWC Produces Remaining Documents to US's First Document Production Request

Discovery: April 6, 1994--FCWC's Response to US's First Request for Production of Documents

Discovery: April 7-11, 1994--Document production for DOJ in J&B Washington office

Case Preparation: Ongoing, April 1994--In preparation for J. Karleskint's deposition, review and compile documents

Discovery: April 12, 1994--Defendant's First Request for Production of Documents to US

Order: April 15, 1994--Protective Order against DOJ contacts with FCWC Employees

Case Preparation: April 18-20, 1994--In Tampa, prepare for J. Karleskint's deposition

Deposition: April 21, 1994--of Julie L. Karleskint (by DOJ)

Discovery: April 22, 1994--Travel to Ft. Meyers in preparation for DOJ tour of Waterway Estates facility

Pleading: April 18, 1994--FCWC's Motion for a Protective Order (limiting discovery to evidence relating to CWA compliance by Waterway Estates) and Memorandum in Support

Order: April 18, 1994--Court grants FCWC's Motion for a Protective Order

Case Preparation: May 3-5, 1994--Preparation for Marlar Deposition (review documents, draft questions, etc.)

Deposition: May 5, 1994--of John Marlar (by FCWC)

Case Preparation: May 12-16, 1994--Prepare for McGarry deposition, including traveling to Atlanta

Deposition: May 17, 1994--of Peter McGarry (by FCWC)

Discovery: Ongoing, June 1994--Preparation for document production in Atlanta

Discovery: June 1, 1994--Review incoming FOIA materials from EPA's regional offices

Discovery: June 7, 1994--Review FOIA materials from additional EPA regional offices

Discovery: June 13, 1994--US's Response to Defendant's First Request for Production of Documents

Discovery: June 14, 1994--Review of FOIA materials from additional EPA regional offices

Discovery: June 16, 1994--US's Second Request for Production of Documents

Discovery: June 21, 1994--Travel to Atlanta for document production

Pleading: June 23, 1994--US's Motion for an Order Allowing Ex-Parte Contacts with Former Employees

Discovery: June 24, 1994--In Atlanta, review documents produced by DOJ

Discovery: Ongoing, July 1994--Preparation of documents in response to document request, with special emphasis on determining which are privileged, and ongoing review of materials from EPA's document production

Discovery: July 8, 1994--FCWC Responds to US's Second Document Request

Pleading: July 15, 1994--FCWC's Memorandum in Opposition to Plaintiff's Motion for an Order Allowing Ex Parte Contacts with Former Employees

Discovery: Ongoing, August 1994--Continue preparation for document production (inspecting, bate-stamping, organizing, etc.)

Discovery: Week of August 3, 1994--Review of documents at FC's offices in Sarasota, Gulf Gate, South Gate, Carollwood, and Barefoot Bay

Pleading: August 5, 1994--US's Motion for Permission to File Reply Memorandum in Support of US's Motion for an Order Allowing Ex-parte Contacts with Former Employees

Discovery: August 10, 1994--Document production in Ft. Meyers--Fiesta Village, WaterWay Estates, and Lee County Division Office

Discovery: August 10, 1994--Document production at Sarasota headquarters

Pleading: August 17, 1994--FCWC's Memorandum in Opposition to Plaintiff's Motion and Memorandum Regarding Ex Parte Contacts

Discovery: August 26, 1994--Last Segment of Documents Produced by FCWC in Response to US's Second Document Request

Discovery: Ongoing, September 1994--Continue preparation of documents for production and organization of incoming documents

Discovery: September 20-22, 1994--Travel to Florida for document review at Cape Coral FDEP offices and Orlando FDEP offices

Case Preparation: October 5-6, 1994--Travel to Florida to meet with Good, Sansbury, and Siler re preparation for upcoming depositions

Deposition: October 10, 1994--of Larry L. Good (by DOJ)

Deposition: October 11, 1994--of Bill Sansbury (by DOJ)

Deposition: October 12, 1994--of Glen Siler (by DOJ)

Case Preparation: Ongoing during mid-October 1994--Preparation for Kagey and Barrett depositions and preparation of documents for same

Deposition: October 24, 1994--of Connie A. Kagey (by FCWC)

Deposition: October 25, 1994--of Bruce Barrett (by FCWC)

Discovery: October 26, 1994--Travel to Atlanta in preparation of Oliver deposition and review of documents for same

Pleading: October 25, 1994--FCWC's Motion to Disqualify Counsel

Deposition: October 31, 1994--of Priscilla Oliver (by FCWC)

Pleading: November 9, 1994--FCWC's Notice of Filing Amended Affirmation of Gerald S. Allen

Case Preparation: November 8, 1994--Travel to Sarasota to prepare for Bradtmiller and Overton depositions

Case Preparation: November 16-17, 1994--Travel to Tampa for Overton deposition and meet with J. Overton in preparation for deposition

Pleading: November 4, 1994--US's Memorandum in Opposition to FCWC's Motion to Disqualify Counsel

Deposition: November 17, 1994--of Johnnie Overton (by DOJ)

Case Preparation: November 18, 1994--Meet with P. Bradtmiller in preparation of deposition

Deposition: November 18 & 21, 1994--of Paul H. Bradtmiller (by DOJ)

Case Preparation: November 23, 1994--New Settlement Counsel hired by FCWC to settle case (Leon Levy)

Case Preparation: December 12, 1994--Travel to Nashville, TN for meeting with J. Tompkins

Case Preparation: December 9, 13, 14--Disqualification of counsel research continues

Discovery: December 19, 1994--Travel to Tampa, Florida for DOJ site inspections

Discovery: December 20-22, 1994--Inspections by DOJ of Carollwood, Southgate and Barefoot Bay

Case Preparation: Ongoing January 1995--Weitzenhoff case issue starts developing

Discovery: Ongoing, January 1995--Review of documents from DOJ document production

Discovery: Ongoing, January 1995--Indexing of depositions

Case Preparation: January 1-9, 1995--Preparation for J. Tompkins deposition

Pleading: January 19, 1995--FCWC's Notice of Change of Address (of counsel)

Deposition: January 9, 1995--of Jack William Tompkin (by DOJ), travel to Nashville for same

Pleading: January 26, 1995--FCWC's Request for Oral Argument in Connection with Defendant's Motion to Disqualify Counsel

Case preparation: Ongoing, February, 1995--Drafting of Partial Summary Judgment Motion

Pleading: February 2, 1995--US's Notice to the Court Regarding Scheduling of Interviews with Former Employees

Pleading: February 3, 1995--FCWC's Emergency Motion for a Temporary Protective Order

Pleading: February 9, 1995--US's Reply to Defendant's Emergency Motion for a Temporary Protective Order and Defendant's Request for an Oral Argument

Pleading: February 13, 1995--FCWC's Motion for a Protective Order (to postpone the depositions of Wilcov and Elders, giving them time to obtain separate counsel)

Order: February 13, 1995--Court grants FCWC's Temporary Protective Order barring ex parte contact until the hearing is held

Proceeding: February 15, 1995--Proceedings before Judge Shwartz (preliminary pre-trial conference, motions re ex parte contacts, motion to disqualify, motion for protective order)

Order: February 27, 1995--Court limits the time for completion of discovery and schedules final pretrial conference and trial

Discovery: March 1, 1995--US's First Set of Interrogatories to FCWC

Discovery: Ongoing, March 1995--Preparing responses to US's interrogatories

Discovery: Ongoing, March 1995--Review of documents for upcoming production to US

Deposition: March 6, 1995--of James Elder (by DOJ)

Deposition: March 7, 1995--of Lawrence Wilkov (by DOJ)

Pleading: March 10, 1995--US's Notice of Filing Proposed Order (re ex parte contacts)

Pleading: March 14, 1995--FCWC's Submission of Proposed Order and Memorandum in Support Thereof

Settlement Offer: March 14, 1995--FCWC's Offer of Settlement (filed with court)

Order: March 16, 1995--Court order denying plaintiff's motion to allow ex parte contacts with FCWC's employees, denying FCWC's motion to disqualify counsel, granting FCWC's motion to continue depositions of Elders and Wilcov

Discovery: March 18, 1995--US's Third Request for Production of Documents

Discovery: March 22, 1995--FCWC's First Interrogatories to US

Discovery: March 22, 1995--FCWC's Second Request for Production of Documents to US

Case Preparation: March 23-24--Preparation for upcoming Allen and Reeves depositions

Settlement Offer: March 24, 1995--Offer by FCWC to US via letter

Deposition: March 27, 1995--of Gerald S. Allen (by DOJ)

Deposition: March 28, 1995--of Antone A. Reeves (by DOJ)

Pleading: March 30, 1995--US's Motion for Leave to Add Party (Avatar Holdings, Inc.)

Pleading: March 30, 1995--US's Amended Complaint

Discovery: March 30, 1995--FCWC's Answers to US's First Set of Interrogatories

Case Preparation: Ongoing, April 1995--Preparation for responding to Amended Complaint, including preparation of Motion in Opposition for Leave to Amend, Answer, and affirmative defenses

Discovery: Ongoing, April 1995--Preparations for upcoming document production

Case Preparation: Ongoing, April 1995--Drafting of Motion for Partial Summary Judgment

Pleading: April 3, 1995--US's Objections to the Magistrate Judge's Order on the US's Motion for an Order Allowing Ex-parte Contacts with Former Employees

Pleading: April 4, 1995--FCWC's Notice of Intention to Oppose Constructive Motion by United

States for Leave to File Amended Complaint

Pleading: April 6, 1995--FCWC's Motion for Extension of Time to File Objections to Magistrate's Order (denying Defendant's Motion to Disqualify Counsel)

Pleading: April 14, 1995--FCWC's Memorandum in Partial Opposition to Plaintiff's Motion for Leave to Amend Complaint

Pleading: April 14, 1995--FCWC's Answer to Amended Complaint

Pleading: April 14, 1995--US's Memorandum in Opposition to FCWC's Motion for an Extension of Time to File Objections to Magistrate's Order and Request for Reconsideration of Court's Order Granting that Motion

Pleading: April 17, 1995--US' Motion for Enlargement of Time (to respond to Defendant's First Interrogatories and Second Request for Production of Documents)

Pleading: April 18, 1995--FCWC's Response to US's Motion and Memorandum in Support for Enlargement of Time

Discovery: April 18, 1995--FCWC's [Written] Response to US's Third Document Request

Pleading: April 19, 1995--FCWC's Opposition to the US's Objections to the Magistrate Judge's Order on the US's Motion to Allow Ex Parte Contacts with Former Employees

Case Preparation: April 22, 1995-end of month--Preparation for 30(b)(6) depositions

Pleading: April 26, 1995--FCWC's Motion for Partial Summary Judgment

Orders: April 26, 1995--Court denies US's Motion to Allow Ex Parte Contacts with Defendant's Employees, denies FCWC's Objections to the Magistrate's Denial of the Motion to Disqualify Counsel; grants US's Motion to add Avatar and File Revised Amended Complaint; denies US's Leave to Amend Complaint to Include Claims against Barefoot Bay and Carrollwood

Discovery: April 27, 1995--US's Response to FCWC's First Interrogatories

Discovery: April 28, 1995--US's Response to FCWC's Second Request for Production of Documents

Discovery: Ongoing, May 1995--Prepare for document production to US

Case Preparation: Ongoing, May 1995--Prepare for upcoming 30(b)(6) depositions

Case Preparation: Ongoing, May 1995--Develop Motion to Strike US's Amended Complaint

Case Preparation: Ongoing, May 1995--Preparations for filing separate lawsuit against DOJ under FOIA

Deposition: May 1, 1995--of Dennis Getman (by DOJ)

Deposition: May 1, 1995--of Robert B. Gorden (by DOJ)

Pleading: May 1, 1995--Errata to US's Memorandum in Support of its Motion for Reconsideration of Court's Order on Amendment of Complaint

Discovery: May 3-5, 1995--Document Production by US in Atlanta, GA

Pleading: May 4, 1995--US's Revised Amended Complaint

Deposition: May 5, 1995--of John Thomas Marlar (by FCWC)

Discovery: Ongoing, from May 5, 1995--Review of EPA documents from first and second productions

Pleading: May 9, 1995--FCWC's Motion to Strike (the first and second claims for relief in the Revised Amended Complaint)

Discovery: May 9, 1995--Review of documents in Atlanta offices of EPA Region IV

Discovery: May 10, 1995--US's Second Set of Interrogatories to FCWC, and US's First Request for Admission to FCWC

Discovery: May 11, 1995--FOIA Request made re D. Jacobs travels in Australia

Pleading: May 12, 1995--US's Notice of Opposition to FCWC's Motion for Partial Summary Judgment

Pleading: May 12, 1995--US's Motion for Leave to Enlarge the Number of Depositions

Pleading: May 12, 1995--US's Motion for Reconsideration of Court's Order on Amendment of Complaint (for portion disallowing claims relating to Barefoot Bay and Carollwood)

Case Preparation: May 16, 1995--Travel to Atlanta for depositions and continue deposition preparation

Pleading: May 17, 1995--FCWC's Motion for Partial Summary Judgment

Pleading: May 17, 1995--Errata to US's Memorandum in Support of Its Motion for Reconsideration of Court's Order on Amendment of Complaint

Deposition: May 18-19, 1995--of James Greenfield (by FCWC)

Deposition: May 19, 1995--of Roosevelt Childress (by FCWC)

Pleading: May 19, 1995--US's Motion to Compel (FCWC to respond to interrogatories and to produce documents)

Pleading: May 20, 1995--FCWC's Answer to Revised Amended Complaint

Pleading: May 24, 1995--FCWC's Motion for Leave to Amend FCWC's Answer to Revised Amended Complaint

Pleading: May 24, 1995--FCWC's Amended Answer to Revised Amended Complaint

Discovery: May 25, 1995--US's Designation of Witnesses

Pleading: May 25, 1995--US's Motion to Shorten Time in which Defendants Must Respond to Discovery

Pleading: May 25, 1995--US's Opposition to FCWC's Motion to Strike (the first and second claims for relief in the Revised Amended Complaint)

Pleading: May 26, 1995--FCWC's Memorandum in Opposition to Motion for Reconsideration

Pleading: May 26, 1995--Complaint: FOIA Action (*Baise v. US*)

Pleading: May 26, 1995--FCWC's Response to Plaintiff's Motion to Enlarge the Number of Depositions

Case Preparation: May 29, 1995--Travel to Sarasota for meeting with expert witnesses and fact witnesses to be deposed

Case Preparation: May 30, 1995--In Sarasota, meet with G. Allen, D. Smith re expert analysis; meet with G. Allen and P. Bradtmiller re expert witnesses; meet with M. Acosta re deposition requests and 5th Amendment issues; in Fort Meyers meet with R. Ytterberg, D. Wittenmyer, L. Griggs

Case Preparation: May 31, 1995--Meetings in Florida continue with L. Griggs, T. Quinn of DOJ, D. Brown, and A. Ward

Discovery: Ongoing, June 1995--Development of responses to Request for Admissions and Second Set of Interrogatories

Discovery: Ongoing, June 1995--Development of Opposition to Motion to Compel

Case Preparation: June 1, 1995--Meetings in Florida continue with J. Karleskint, A. Westfield; with T. Quinn of DOJ, inspection of Waterway Estates and inspection of documents at Barefoot Bay and site visit there

Pleading: June 7, 1995--FCWC's Memorandum in Opposition to Plaintiff's Motion to Compel (production of documents)

Pleading: June 7, 1995--US's Opposition to FCWC's Motion for Partial Summary Judgment

Discovery: June 8, 1995--FCWC's Answers to Plaintiff's Second Set of Interrogatories and Answers to US's First Request for Admissions

Pleading: June 9, 1995--FCWC's Response to US's Motion to Shorten Time in which Defendants must Respond to Discovery

Pleading: June 9, 1995--FCWC's Notice of Intent to File Motion for Summary Judgment and Memorandum in Support Thereof

Discovery: June 13, 1995--FCWC's Second Interrogatories to US

Pleading: June 15, 1995--Defendants' Joint Motion to Alter Discovery Schedule Order, Joint Motion to Expedite Court's Consideration, and Memorandum in Support

Discovery: June 15, 1995--US's Second Request for Admissions to FCWC and US's Third Set of Interrogatories to FCWC

Orders: June 21, 1995--Court allows claims for unpermitted discharge at Barefoot Bay and Carollwood; court denies FCWC's Motion for Partial Summary Judgment

Case Preparation: June 21, 1995--Meeting in Ft. Meyers with Dr. Ahmadi

Case Preparation: June 22, 1995--Meeting in Florida with K. Gatlin and C. Hill re expert testimony; J. Landers re role as witness; review documents at Lander's office

Pleading: June 22, 1995--US's Motion and Memorandum to Exceed Page Limit and Request for Oral Argument

Pleading: June 23, 1995--US's Motion for Partial Summary Judgment

Case Preparation: June 23, 1995--Travel to Chicago for meeting with E. Jacobson re his deposition

Deposition: June 26, 1995--Of Edwin Jacobson (by DOJ)

Pleading: June 26, 1995--US's Second Amended Complaint

Pleading: June 29, 1995--US's Answer in *Baise v. US*

Pleading: June 30, 1995--FCWC's Answer to Second Amended Complaint

Case Preparation: Ongoing, July 1995--Review draft expert witness reports

Discovery: Ongoing, July 1995--Preparation of answers to Second Request for Admissions, Third Set of Interrogatories, and Fourth Request for Production of Documents

Pleading: July 6, 1995--Defendants' Joint Motion for a Revised Discovery and Trial Schedule, for an Extension of Time to Respond to Plaintiff's Motion for Summary Judgment, for Leave to Exceed the Page Limitation, and for Expedited Consideration

Pleading: July 12, 1995--US's Reply to Defendants' Joint Motion for a Revised Discovery and Trial Schedule

Discovery: July 13, 1995--FCWC's Request for Immunity from Criminal Prosecution (via letter to DOJ)

Discovery: July 14, 1995--FCWC's Response to US's Fourth Request for Production of Documents

Discovery: July 14, 1995--FCWC's Answers to US's Second Request for Admissions

Discovery: July 16, 1995--Travel to Atlanta for document production by EPA

Discovery: Ongoing, mid-July, 1995--Review of documents produced by EPA in Atlanta

Case Preparation: Ongoing, mid-July, 1995--Preparation for upcoming 30(b)(6) depositions

Order: July 17, 1995--Court grants US's request for more time to respond to FCWC's Second Interrogatories

Order: July 18, 1995--Court denies US's Motion to Exceed Page Limit; denies Request for Oral Argument; grants Defendants' Joint Motion for a Revised Discovery and Trial Schedule

Discovery: July 17-19, 1995--FCWC Inspects US's Documents at Atlanta, GA

Case Preparation: July 23, 1995--Travel to Atlanta for 30(b)(6) depositions

Deposition: July 24, 1995--of Fritz Wagener (by FCWC)

Deposition: July 25-27, 1995--of Kenneth Kwan (by FCWC)

Deposition: July 28, 1995--of Roger Pfaff (by FCWC)

Case Preparation: Ongoing, August 1995--Review of expert witness reports

Case Preparation: Ongoing, August 1995--Review of material re expert testimony for privilege log

Case Preparation: Ongoing, August 1995--Prepare Motion for Partial Summary Judgment

Case Preparation: Ongoing, August 1995--Preparations for upcoming 30(b)(6) depositions

Case Preparation: August 13, 1995--Travel to Atlanta for 30(b)(6) depositions

Deposition: August 14, 1995--of Roosevelt Childress (by FCWC)

Pleading: August 14, 1995--US's Memorandum in Support of its Motion for Partial Summary Judgment

Pleading: August 15, 1995--US's Motion for Protective Order (re deposition of Kenneth Kwan)

Pleading: August 15, 1995--FCWC's Motion to Compel Kenneth Kwan to Appear at Deposition and Answer Deposition Questions, To Compel Plaintiff's Counsel to Comply with Proper Deposition Procedures, For Costs and Attorneys' Fees and for Expedited Consideration

Order: August 16, 1995--Court grants US's Motion for Protective Order only insofar as August 7 deposition is canceled; Motion to Compel Kwan to Appear at [other scheduled] Deposition granted

Deposition: August 15-16, 1995--of Roy Herwig (by FCWC)

Deposition: August 17, 1995--of Roger Pfaff (by FCWC)

Case Preparation: August 23, 1995--Travel to New York for depositions

Deposition: August 24, 1995--of John Sladkus (by DOJ)

Deposition: August 24, 1995--of Leon Levy (by DOJ)

Pleading: August 25, 1995--Stipulation of Dismissal of *Baise v. US*

Case Preparation: August 27, 1995--Travel to Atlanta for depositions

Deposition: August 28, 1995--of Thomas Plouff (by FCWC)

Deposition: August 29-30, 1995--of Kenneth Kwan (by FCWC)

Deposition: August 31, 1995--of Michael Hom (by FCWC)

Case Preparation: September 1-11, 1995--Drafting Summary Judgment Motion and memorandum

Pleading: September 11, 1995--FCWC's Motion for Partial Summary Judgment and Request for Oral Argument

Order: September 13, 1995--Court denies Motion for Leave to Enlarge the Number of Depositions and Shorten Time

Discovery: September 15, 1995--FCWC's Third Interrogatories to US

Discovery: September 15, 1995--FCWC's Fourth Request for Production of Documents

Pleading: September 15, 1995--US's Motion and Memorandum for Order Setting Procedures for Expert Witness Discovery

Discovery: September 18, 1995--US's Fifth Request for Production of Documents to FCWC

Case Preparation: September 19, 1995--Travel to Sarasota for meetings with G. Allen, P. Bradtmiller, and J. Karleskint re 5th Amendment issues and status of litigation

Case Preparation: September 20, 1995--In Florida, interview potential witnesses: A. Ahmadi, H. Hume, J. Schenkman

Case Preparation: September 21, 1995--In Florida, meetings continue with L. Grigss, P. Lehman, J. Karleskint, C. Ferraro, A. Castro

Case Preparation: September 22, 1995--In Florida, meeting with regulatory staff of Hillsborough County Environmental Protection Commission re history of Carollwood plant; meeting with Dr. Thabaraj and Snipes of Tampa FDEP office

Pleading: September 25, 1995--US's Opposition to FCWC's Second Motion for Partial Summary Judgment

Pleading: September 27, 1995--Defendants' Joint Memorandum in Opposition to Plaintiff's Motion for Order Setting Procedures for Expert Witness Discovery

Case Preparation: Ongoing, October 1995--Prepare expert reports

Case Preparation: Ongoing, October 1995--Prepare for upcoming depositions

Case Preparation: Ongoing, October 1995--Prepare for upcoming document production (US's Fifth Request)

Deposition: October 2, 1995--of Julie Karleskint (by DOJ)

Deposition: October 3, 1995--of Paul Bradtmiller (by DOJ)

Deposition: October 3, 1995--of Patrick Lehman (by DOJ)

Pleading: October 5, 1995--US's Motion and Memorandum to Exceed Limit of Number of Depositions

Deposition: October 11, 1995--of William Sansburg (by DOJ)

Deposition: October 16, 1995--of Julie Karleskint (by DOJ)

Discovery: October 16, 1995--US's Response to FCWC's Third Interrogatories

Discovery: October 16, 1995--US's Response to Defendant's Fourth Request for the Production of Documents

Discovery: October 16, 1995--FCWC's Response to US's Fifth Request for Production of Documents

Deposition: October 17, 1995--of Patrick Lehman (by DOJ)

Deposition: October 18, 1995--of Charles McNary (by DOJ)

Deposition: October 19, 1995--of Michael E. Murphy (by DOJ)

Deposition: October 20, 1995--of Abdul B Ahmadi (by DOJ)

Deposition: October 23, 1995--of Mark Klingenstein (by FCWC)

Pleading: October 24, 1995--FCWC files Notice of Rescheduling of Hearing Before Judge Schwartz

Deposition: October 24, 1995--of Randall L. Armstrong (by DOJ)

Deposition: October 25, 1995--of Bruce R. Barrett (by FCWC)

Deposition: October 26, 1995--of Eileen Zimmer (by FCWC)

Pleading: October 30, 1995--FCWC's Notice of Dispositive Authority (Borough of Ridgeway)

Pleading: October 31, 1995--FCWC's Notice Regarding Borough of Ridgeway

Case Preparation: Ongoing, November, 1995--Review of US's expert reports and preparation of FCWC's expert reports

Case Preparation: Ongoing, November, 1995--Deposition preparation

Deposition: November 1, 1995--of James Miller (by DOJ)

Deposition: November 2, 1995--of John Marlar (by FCWC)

Case Preparation: November 3, 1995--Prepare for depositions of Allen and Bradtmiller including meetings with them and conducting mock depositions

Hearing: November 3, 1995--on Avatar Holding's Motion to Compel, and on US's Motion to Compel and Motion for Order Setting Procedures for Expert Witness Discovery

Pleading: November 6, 1995--US's Notice of Filing Of Proposed Order (re discovery matters discussed at the November 3 hearing)

Pleading: November 8, 1995: Defendants' Joint Comments to Plaintiff's Proposed Order Memorializing the Court's Rulings at the November 3 Motions Hearing

Deposition: November 8, 1995--of Bennie Shoemaker (by FCWC)

Deposition: November 13, 1995--of Gerald S. Allen (by DOJ)

Order: November 13, 1995--Court grants US's Motion to Compel Discovery and sets deadlines for responses to interrogatories and document production; grants order setting procedures for expert witness discovery, and related matters

Case Preparation: November 14, 1995--In Florida, meetings with potential witnesses for trial: B. Bartlett, M. McWeeny, W. Schafer

Case Preparation: Mid-November-end of month, 1995--Complete examination of all documents for potential exhibits at trial

Discovery: Mid-November--Respond to final interrogatories and requests for documents

Pleading: November 15, 1995--US's Response to FCWC's Notice of Dispositive Authority

Discovery: November 20, 1995--US's Supplemental Response to FCWC's First Interrogatories

Discovery: November 22, 1995--FCWC's Amended Revised Response to US's First and Second Interrogatories

Order: November 22, 1995--on Motions for Partial Summary Judgment by all parties Court 1) grants in part and denies in part US's motion (all NPDES permit violations at each facility granted); 2) grants Avatar Holdings' motion; and 3) grants in part and denies in part FCWC's motion (granted for paragraphs 16-23 and 30 of Second Amended Complaint)

Deposition: November 25, 1995--of Keith Cardey (by DOJ)

Case Preparation: Ongoing, December 1995--Prepare documents for trial and compile exhibits and exhibit list

Case Preparation: Ongoing, December 1995--Review depositions to make page and line designations for trial

Case Preparation: Ongoing, December 1995--Coordinate documents to time line for each site

Discovery: December 1, 1995--US's Proposed Stipulations of Fact and Law

Pleading: November 29, 1995--US's Memorandum in Support of Motion for an Order Permitting Discovery of Defendants' Late-Named Witnesses and for Expedited Consideration

Pleading: November 30, 1995--US's Memorandum in Support of Affirmation of Magistrate Judge's Order

Discovery: December 4, 1995--FCWC's Response to Proposed Stipulations of Law and Fact

Discovery: December 4, 1995--FCWC's Exhibit List, Deposition Designations, Counter-

Proposals re US's Proposed Stipulations

Pleading: December 6, 1995--Joint Pre-trial Statement

Deposition: December 6, 1995--of Leon Levy (by DOJ)

Order: December 6, 1995--Court overrules objections to the Magistrate Judge's November 13 Order

Pleading: December 7, 1995--FCWC's Memorandum in Opposition to Plaintiff's Motion for an Order Permitting Discovery of Defendants' Late-Named Witnesses and for Expedited Consideration

Order: December 8, 1995--Court grants US's Motion to Permit Discovery of Defendants' Late-Named Witnesses

Case Preparation: December 11, 1995--Meeting in Florida re witness preparation (D. Smith, G. Allen, J. Karleskint)

Pretrial Conference: December 12, 1995

Case Preparation: December 12, 1995--Meetings in Florida with R. Blackburn, A. Ahmadi, J. Karleskint

Case Preparation: December 13, 1995--Trial preparation in Florida continues; meetings with J. Karleskint

Deposition: December 13, 1995--of Michael McWeeny (by DOJ)

Deposition: December 15, 1995--of Gerald S. Allen (by DOJ)

Case Preparation: Ongoing, mid-December 1995--Begin drafting trial brief and proposed findings of fact and law

Case Preparation: Ongoing, mid-December 1995--Prepare Motion in Opposition to Motion for Reconsideration

Case Preparation: December 18, 1995--In Florida, witness preparation of G. Allen and document review

Pleading: December 18, 1995--FCWC's Response to Avatar Holdings' Motion for Clarification (of the Court's November 22, 1995 Order)

Pleading: December 18, 1995--US's Motion for Expedited Reconsideration of the Court's Ruling on Res Judicata and in Reply to Avatar Holdings' Motion for Clarification of the Court's Order

Case Preparation: December 19, 1995--In Florida, witness preparation of P. Bradtmiller

Pleading: December 19, 1995--Defendants' Joint Response to Plaintiff's Motion for Continuance of Trial in Light of Lapse in Appropriations

Case Preparation: December 20, 1995--Witness preparation continues (Bradtmiller, Acosta, Karleskint)

Case Preparation: December 21, 1995--Witness preparation of Lehman

Order: December 21, 1995--Court denies US's Motion for Reconsideration of Res Judicata Issue; clarifies that claims barred by res judicata apply to Avatar as well as FCWC; denies US's Motion for Continuance of Trial

Pleading: December 26, 1995--US's Motion to Enforce Discovery Order

Pleading: December 27, 1995--Defendants' Joint Motion and Memorandum in Support for Extension of Time to File Trial Memoranda and Proposed Findings of Fact and Conclusions of Law

Pleading: December 28, 1995--FCWC's Proposed Findings of Fact and Conclusions of Law

Pleading: December 28, 1995--US's Trial Memorandum; US's Proposed Findings of Fact and Conclusions of Law

Order: December 28, 1995--Court order involving preparing for trial (how many days, etc.)

Pretrial Conference and Outstanding Discovery Motions--December 28, 1995

Pleading: January 2, 1996--FCWC's Pretrial Brief

Case Preparation: Ongoing, January 1996--Prepare Motions in Limine and responses to US's Motions in Limine re expert testimony

Case Preparation: Ongoing, January 1996--Witness preparation for trial--review depositions and expert reports

Case Preparation: Ongoing, January 1996--Preparation of Joint Pretrial Statement

Pleading: January 2, 1996--FCWC's Notice of Change of Address (of counsel)

Pleading: January 3, 1996--FCWC's Notice Regarding Illness of Gerald S. Allen

Order: January 3, 1996--Order regarding handling of information about former employees of FCWC

Order: January 4, 1996--Court grants Motion to Continue Trial in Light of Illness of Gerald Allen; case set for no earlier than March 18, 1996

Pleading: January 4, 1996--US's Motion in Support of its Motion in Limine (for limitation on trial length and limitation on evidence and witnesses)

Pleading: January 5, 1996--Defendants' Joint Motion in Limine to Exclude the Testimony and Report of Mark J. Klingenstein

Pleading: January 4, 1996--Defendants' Unopposed Emergency Joint Motion for a Continuance of Trial Date Because of Sudden and Serious Illness of Defendants' Key Witness and Memorandum in Support and Request for Expedited Consideration

Discovery: January 16, 1996--US's Preliminary Objections to Defendants' Trial Exhibits

Pleading: January 16, 1996--Parties' Joint Request for Extension of Time to File Revised Joint Pre-trial Statement (in light of massive blizzard in D.C.)

Pleading: January __ 1996--Defendants' Joint Motion in Limine to Exclude the Testimony and Report of Eileen Zimmer

Pleading: January 25, 1996--US's Memorandum in Opposition to Defendants' Motions in Limine

Pleading: January 26, 1996--Defendants' Joint Memorandum in Opposition to Plaintiff's Motion in Limine (to limit length of trial, to limit evidence and witnesses, to disqualify expert witnesses Douglas Smith and Roger Hartung)

Case Preparation: Ongoing, February 1996--Review of documents and depositions for witness preparation

Case Preparation: Ongoing, February 1996--Preparation of trial exhibits

Pleading: February 2, 1996--Notice of Change of Address to 815 Conn. Ave.

Case Preparation: Ongoing, mid-February 1996--Settlement discussions

Discovery: February 19, 1996--FCWC's Revised Exhibit List

Case Preparation: Ongoing, late-February 1996--Development of site-specific chronologies of events for trial

Case Preparation: Ongoing, March 1996--Preparation of direct and cross examination questions for witnesses at trial

Case Preparation: Ongoing, March 1996--Continue preparation of trial documents and list of same

Case Preparation: March 3-8, 1996--In Fort Meyers for meetings with witnesses

Discovery: March 4, 1996--List of Proposed Joint Exhibits

Pleading: March 5, 1996--FCWC's Notice of Filing of Certification of License of Douglas G. Smith

Settlement Offer: March 7, 1996--via letter to US from D. Berz on behalf of defendants

Discovery: March 13, 1996--FCWC's Exhibit List with new trial numbers and a list of objections

Case Preparation: March 14, 1996--Litigation team travels to Tampa for trial

Discovery: March 14, 1996--US's Exhibit List

Discovery: March 15, 1996--FCWC's List of Witnesses for Direct Examination

Case Preparation: March 15, 1996--Moot court of Florida Cities' direct case

Pleading: March 25, 1996--FCWC's Witness List

Order: March 25, 1996--Court grants in part and denies in part Defendants' Motion to Exclude Eileen Zimmer's Testimony; denies Motion to Exclude Mark Klingenstein's Testimony

Pleading: March 25, 1996: US's Offer of Proof in Lieu of the Testimony of Witnesses who Plead the Fifth Amendment

AT TRIAL: March 25, 1996-April 5, 1996

Pleading: April 5, 1996--Defendants' Joint Memorandum Addressing the Invocation of the Fifth Amendment by Certain Witnesses

Pleading: April 8, 1996--US's Remaining Designation from the Deposition of Jack Tompkins to be Offered in Evidence

Pleading: April 10, 1996--US's Memorandum of Law in Support of its Request that the Court Draw Adverse Inferences from the Refusal to Testify by Defendants' Present and Former Officers and Managers

Case Preparation: Ongoing, mid-April 1996 to end of month--review of trial transcript for findings of fact and conclusions of law

Pleading: April 16, 1996--FCWC's Motion to Strike the Deposition Testimony of Jack William Tompkins, Objections and Counter-Designations

Pleading: April 18, 1996--Parties' Proposals for Post-trial Submissions

Pleading: April 25, 1996--US's Opposition to Defendants' Motions to Strike the Deposition Testimony of Jack Tompkins

Case Preparation: Ongoing, May 1996--Review of trial transcripts for findings of fact and conclusions of law

Case Preparation: Ongoing, May 1996--Preparation of Post-trial brief

Order: May 8, 1996--Court denies Defendants' Motion to Strike the Testimony of J. Tompkins

Order: May 8, 1996--Court denies US's Motion Requesting Court to Draw Adverse Inferences from Defendants' Present and Former Employees, and rules that the depositions of Wilkov, Gorden, Sladkus, Getman, Elder, and Reeves are inadmissable.

Pleading: May 16, 1996--US's Motion for Reconsideration of the Court's Ruling on Adverse Inferences and for Extension of Page Limits for Post-trial Submissions

Pleading: May 21, 1996--FCWC's Memorandum in Opposition to Plaintiff's Motion for Reconsideration (of Court's May 8, 1996 Orders)

Case Preparation: Ongoing, June 1996--Preparation of Post-trial brief

Order: June 3, 1996--Court denies US's Motion to Reconsider

Pleading: June 5, 1996--US's Post-trial Memorandum

Pleading: June 6, 1996--FCWC's Proposed Findings of Fact and Conclusions of Law

Case Preparation: Ongoing, July 1996--Draft response res judicata brief

Pleading: July 17, 1996--US' Citation of Additional Authority (re res judicata)

Pleading: July 19, 1996--Defendants' Joint Response to Plaintiff's Citation of Additional Authority

Order: July 23, 1996--Court orders parties to brief res judicata issue (Ridgeway and Manning)

Pleading: August 2, 1996--Defendants' Joint Memorandum in Response to the Court's Order of July 23, 1996 (requesting they address the effects of Ridgway and Manning)

Pleading: August 1, 1996--US's Memorandum in Support of Reinstatement of the Claims Excluded by the Court on Res Judicata Grounds

Pleading: August 8, 1996--US's Reply Memorandum in Support of Reinstatement of the Claims Excluded by the Court on Res Judicata Grounds

Pleading: August 9, 1996--Defendants' Joint Response to Plaintiff's Memorandum Seeking Reinstatement of Claims Previously Dismissed on the Grounds of Res Judicata

Order: August 16, 1996--Court reaffirms its November 22, 1995 order granting res judicata effect to claims in paragraphs 16, 17-23 and 30 of the Second Amended Complaint

Judgment Received: August 20, 1996, Court's Memorandum Order

Case Preparation: Ongoing, late-August, 1996--Preparation of cost application

Pleading: August 27, 1996--FCWC's Filing of Offer of Judgment

Pleading: August 27, 1996--Defendants' Joint Motion to Extend the Time in Which to Apply for Costs and Attorneys' Fees for Expedited Consideration

Pleading: September 3, 1996--FCWC's Motion for Bill of Costs

Pleading: September 3, 1996--FCWC's Verified Motion for Attorneys' Fees

Pleading: September 23, 1996--US's Memorandum in Opposition to Defendants' Motions for Costs and Attorney's Fees

Pleading: September 30, 1996--US's Memorandum in Opposition to Defendant FCWC's Motion for Permission to File Reply Memorandum

Pleading: October 18, 1996--US's Notice of Appeal

Pleading: November 1, 1996--FCWC's Notice of Cross-Appeal

Pleading: November 19, 1996--FCWC's Citation of Additional Authority (regarding its Petition for Costs and Attorneys' Fees)

Pleading: November 19, 1996--FCWC's Citation of Additional Authority (Trident Seafoods Corporation)

Pleading: December 31, 1996--US files Certificate of Interested Persons, Motion for Leave to File Civil Appeal Statement Form Out of Time, Civil Appeal Statement Form, Civil Appeal Information Sheet

Order: January 29, 1997--Court grants Motion to File Civil Appeal Out of Time

Order: February 3, 1997--Court denies Defendants' Joint Motion to Extend Time in Which to Apply for Costs and Attorney's Fees and for Expedited Consideration; denies FCWC's Verified Motion for Attorneys' Fees; denies Avatar Holding's Application for Attorneys' Fees; denies FCWC's Motion for Bill of Costs; grants in part Avatar Holding's Motion for Judgment of Costs; grants FCWC's Motion to File a Reply Memorandum

Mediation Statement: March 14, 1997--filed on behalf of both defendants

Telephone Mediation Conference: March 19, 1997

Case Preparation: Ongoing, April 1997--Prepare cross-appeal on costs

Pleading: April 4, 1997--FCWC's Cross Appeal of Court's Order Denying its Motions for Costs and Attorneys' Fees

Telephone Mediation Conference: April 9, 1997

Telephone Mediation Conference: April 25, 1997

Telephone Mediation Conference: May 9, 1997

Pleading: May 21, 1997--Court grants extension of time to file appellant's brief

Pleading: June 16, 1997--Joint Motion to Dismiss All Related Appeals

Pleading: June 18, 1997--Court notifies parties that appeal will be dismissed

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Professional Experience:

1995- **Partner, Baise & Miller, P.C.**

1992-1994 **Partner, Jenner & Block - Washington, D.C. Office**

1989-1991 **Corporate Officer and Vice President, External Affairs, Browning-Ferris Industries, Houston, Texas**
One of seven senior Corporate Officers assisting the Chief Executive Officer in running a 26,000-employee, Fortune 200 company engaged in solid and hazardous waste disposal and treatment; responsible for addressing the Corporation's potential criminal liabilities.

1974-1989 **Founder and Partner, Beveridge & Diamond, P.C.**
Founded law firm specializing in environmental matters with William D. Ruckelshaus, former Administrator of the U.S. Environmental Protection Agency; responsible for developing and representing a major share of the firm's industrial, commercial, municipal clients in civil and regulatory counseling and litigation, including municipal port authorities, housing and commercial developers, shipbuilders, and the pulp and paper, pharmaceutical, steel, farm and construction equipment, and chemical industries.

1973-1974 **Acting Deputy Attorney General, United States Department of Justice**
Succeeded William D. Ruckelshaus after his resignation from Richard M. Nixon's Administration in 1973; responsible for budgetary issues, judicial selection process for U.S. federal district and appellate courts, and supervising the Offices of the U.S. Marshals and the Immigration and Naturalization Service.

1973 **Associate Deputy Attorney General, United States Department of Justice**
Worked with Deputy Attorney General William D. Ruckelshaus.

1973 **Executive Assistant to the Acting Director of the Federal Bureau of Investigation**
Worked directly under William D. Ruckelshaus, Acting Director of the Federal Bureau of Investigation.

1972-1973 **Director of the Office of Legislation, U.S. Environmental Protection Agency**
Worked on obtaining passage of the Administration's major legislative initiatives resulting in new laws for regulating water pollution, noise pollution, and pesticides.

1970-1972 **Assistant to the Administrator, U.S. Environmental Protection Agency**
First Chief of Staff to the first EPA Administrator; responsible for helping set up and establish the operations of the Office of the EPA Administrator and the new EPA.

1969-1970 **Trial Attorney and Special Assistant in the Civil Division, United States Department of Justice**
Conducted trials for the U.S. Department of Agriculture, U.S. Army Corps of Engineers, and the Department of Health, Education, and Welfare.

Education:

1968 Indiana University, J.D.
1963 Western Illinois University, B.S.

Professional Honors:

1966-1967 **Ford Foundation Grantee-Indiana Legislature**
One of five graduate school candidates selected from state-wide competition.

1972 **Arthur S. Fleming Award**
Designated as one of the ten outstanding young Americans in Federal Service.

Memberships:

Admitted: Indiana
District of Columbia
U.S. Supreme Court
Various U.S. District and Circuit Courts

Memberships:

District of Columbia Bar Association
Indiana State Bar Association
American Bar Association
Metropolitan Club
Chicago Club

Fairfax County Citizens Advisory Committee for Solid Waste Disposal Matters
Fairfax County Republican Committee-Dranesville Magisterial District Chairman

Board Memberships:

Farm Foundation-Trustee
Indiana University-Chairman of the Board of Visitors-School of Public Policy and Environmental Affairs

Publications:

Finding Our Roots, Facing Our Future, numerous authors including Gary H. Baise, Marshall Lee Miller, Steven Hirsch, Sen. Robert Dole, Steve Forbes, Bill Archer, and Edwin Meese; edited by Robert E. Freer, Jr., 1997

"The Problem of Detection Limits Used in Environmental Compliance Standards for the Regulation of PCBs and Other Toxic Pollutants," by: Gary H. Baise, Don G. Scroggin, Mary Rose Kornreich, 1993

"The Politics of Waste," published by University of Houston Institute for Business, Ethics, and Public Issues, in 1990

"EPA Regulatory Developments: Clean Air Act, Regulation of Toxic Substances," published by Government Institutes, Inc., December 8, 1977

Regionalism in EPA: Moving Beyond Programs to Policy, published by John Wiley & Sons, Inc. in 1973

Survey of the 1972 Environmental Legislation, published by the University of Louisville Speed Scientific School in 1973

"The Eighteen-Year Old Vote in Indiana," published by the Indiana Legislative Council in 1968

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1. Novecon Ltd. v. Bulgarian-American Enterprise Fund, --- F.Supp. ----, 1997 WL 583193 (D.D.C., Sep 16, 1997) (NO. CIV. A. 95-01178-LFO)

2. Novecon, Ltd. v. Bulgarian-American Enterprise Fund, 967 F.Supp. 1382 (D.D.C., Jun 26, 1997) (NO. CIV. A. 95-1178-LFO)

3. U.S. v. Avatar Holdings, Inc., 1996 WL 479533, 43 ERC 1262 (M.D.Fla., Aug 20, 1996) (NO. 93-281-CIV-FTM-21)

4. Engine Mfrs. Ass'n v. U.S. E.P.A., 88 F.3d 1075, 65 USLW 2103, 42 ERC 1993, 319 U.S.App.D.C. 12, 26 Envtl. L. Rep. 21,477 (D.C.Cir., Jul 12, 1996) (NO. 94-1558, 95-1561, 94-1567, 94-1559, 94-1564, 94-1568, 94-1560, 94-1566, 94-1569)

5. U.S. v. Avatar Holdings, Inc., 1995 WL 871260, 42 ERC 1902 (M.D.Fla., Nov 22, 1995) (NO. 93-281-CIV-FTM-21)

6. U.S. v. Florida Cities Water Co., 1995 WL 340980, 41 ERC 1541 (M.D.Fla., Apr 26, 1995) (NO. 93-281-CIV-FTM-21)

7. Shell Oil Co. v. E.P.A., 950 F.2d 741, 34 ERC 1049, 292 U.S.App.D.C. 332, 22 Envtl. L. Rep. 20,305 (D.C.Cir., Dec 06, 1991) (NO. 80-1532, 80-1570, 80-1572, 80-1869, 80-1881A, 80-1888, 80-1890, 80-1909A, 80-1938)

8. Natural Resources Defense Council, Inc. v. U.S. E.P.A., 907 F.2d 1146, 31 ERC 1697, 285 U.S.App.D.C. 140, 20 Envtl. L. Rep. 21,274 (D.C.Cir., Jun 29, 1990) (NO. 88-1657, 88-1734, 88-1746, 88-1754, 88-1758)

9. American Petroleum Institute v. U.S. E.P.A., 906 F.2d 729, 31 ERC 1667, 285 U.S.App.D.C. 35, 20 Envtl. L. Rep. 21,091 (D.C.Cir., Jun 26, 1990) (NO. 88-1606, 89-1055-89-1059, 89-1061-89-1064, 88-1654, 89-1053, 89-1054, 88-1763, 88-1781, 88-1801)

10. American Iron and Steel Institute v. U.S. E.P.A., 886 F.2d 390, 30 ERC 1393, 280 U.S.App.D.C. 373, 20 Envtl. L. Rep. 20,027 (D.C.Cir., Sep 22, 1989) (NO. 88-1155, 88-1165, 88-1156, 88-1168, 88-1158, 88-1169)

11. Mobil Oil Corp. v. E.P.A., 871 F.2d 149, 57 USLW 2643, 29 ERC 1385, 276 U.S.App.D.C. 352, 19 Envtl. L. Rep. 20,847 (D.C.Cir., Apr 04, 1989) (NO. 88-1788)

12. Chemical Waste Management, Inc. v. U.S.E.P.A., 869 F.2d 1526, 57 USLW 2579, 29 ERC 1185, 276 U.S.App.D.C. 207, 19 Envtl. L. Rep. 20,641 (D.C.Cir., Mar 14, 1989) (NO. 88-1581, 88-1578, 88-1591, 88-1592, 88-1600, 88-1604, 88-1615, 88-1643)

13. Bersani v. U.S. E.P.A., 850 F.2d 36, 56 USLW 2724, 27 ERC 2133, 18 Envtl. L. Rep. 20,874 (2nd Cir.(N.Y.), Jun 08, 1988) (NO. 852, 902, 87-6275, 87-6295)

14. Bersani v. U.S. E.P.A., 674 F.Supp. 405, 26 ERC 1678, 18 Envtl. L. Rep. 20,001 (N.D.N.Y., Oct 06, 1987) (NO. 86-CV-772)

15. Natural Resources Defense Council, Inc. v. U.S.E.P.A., 824 F.2d 1146, 26 ERC 1263,

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263 U.S.App.D.C. 166, 17 Envtl. L. Rep. 21,032 (D.C.Cir., Jul 28, 1987) (NO. 85-1150)

16. United Technologies Corp. v. U.S. E.P.A., 821 F.2d 714, 26 ERC 1110, 261 U.S.App.D.C. 226, 17 Envtl. L. Rep. 21,015 (D.C.Cir., Jun 23, 1987) (NO. 85-1654, 85-1659, 85-1655, 85-1660, 85-1658, 85-1662)

17. Natural Resources Defense Council, Inc. v. U.S. E.P.A., 804 F.2d 710, 55 USLW 2299, 25 ERC 1105, 256 U.S.App.D.C. 165, 17 Envtl. L. Rep. 20,188 (D.C.Cir., Nov 04, 1986) (NO. 85-1150)

18. U.S. v. Ethyl Corp., 761 F.2d 1153, 22 ERC 1913, 15 Envtl. L. Rep. 20,589 (5th Cir.(La.), Jun 03, 1985) (NO. 83-3537, 83-3656)

19. Sierra Club v. Ruckelshaus, 602 F.Supp. 892, 21 ERC 1823, 21 ERC 2153, 15 Envtl. L. Rep. 20,080 (N.D.Cal., Jul 24, 1984) (NO. C-84-0656 WHO)

20. Sierra Club v. U.S. Army Corps of Engineers, 701 F.2d 1011, 18 ERC 1748, 13 Envtl. L. Rep. 20,326 (2nd Cir.(N.Y.), Feb 25, 1983) (NO. 82-6125, 82-6145, 82-6149, 82-6183, 82-6193, 82-6195, 473, 475, 476)

21. Action for Rational Transit v. West Side Highway Project by Bridwell, 699 F.2d 614, 18 ERC 1745, 13 Envtl. L. Rep. 20,347 (2nd Cir.(N.Y.), Feb 01, 1983) (NO. 82-6197, 611)

22. Duquesne Light Co. v. E.P.A., 698 F.2d 456, 18 ERC 1489, 225 U.S.App.D.C. 290, 13 Envtl. L. Rep. 20,251 (D.C.Cir., Jan 07, 1983) (NO. 80-2103, 80-2123, 80-2160, 80-2161, 80-2162, 80-2163, 80-2165, 80-2166, 80-2176 TO 80-2181)

23. Sierra Club v. Hennessy, 695 F.2d 643, 18 ERC 1297, 13 Envtl. L. Rep. 20,170 (2nd Cir.(N.Y.), Dec 06, 1982) (NO. 82-6175, 82-6183, 82-6193, 82-6199, 513, 522, 523, 525)

24. Sierra Club v. U. S. Army Corps of Engineers, 541 F.Supp. 1367, 17 ERC 1949, 12 Envtl. L. Rep. 20,742 (S.D.N.Y., Jun 30, 1982) (NO. 81 CIV. 3000)

25. Action for Rational Transit v. West Side Highway Project By Bridwell, 536 F.Supp. 1225, 17 ERC 1249, 12 Envtl. L. Rep. 20,519 (S.D.N.Y., Mar 31, 1982) (NO. 74 CIV. 5572, 81 CIV. 3000)

26. Com. of Ky. ex rel. Beshear v. Alexander, 655 F.2d 714, 16 ERC 1353, 11 Envtl. L. Rep. 20,787 (6th Cir.(Ky.), Jul 21, 1981) (NO. 80-3452, 80-3503, 80-3610)

27. Action for Rational Transit v. West Side Highway Project, 517 F.Supp. 1342, 16 ERC 1263 (S.D.N.Y., Jul 17, 1981) (NO. 74 CIV. 5572)

28. U.S. v. Hollis, 424 F.2d 188, 1970 A.M.C. 539 (4th Cir.(S.C.), Mar 30, 1970) (NO. 13254)

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1. People ex rel. Van de Kamp v. Marsh, 687 F.Supp. 495, 19 Envtl. L. Rep. 20,165 (N.D.Cal., May 11, 1988) (NO. C-86-5817 RHS, C-86-6023 RHS)

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Exhibit_____(GHB-5)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA
Plaintiff(s)

V.

CASE NO. 93-281-CIV-FTM-21(D)

FLORIDA CITIES WATER COMPANY, INC.

Defendant(s)

STATUS ORDER AND DIRECTING ANSWERS TO STANDARD INTERROGATORIES AND PLAINTIFF TO REPORT

It is the practice and policy of the Court, at an early date after an action is filed, pursuant to Fed.R.Civ.P. 16(b), to establish periods of time to: (1) complete discovery; (2) join other parties and amend pleadings; (3) file motions; and (4) schedule a preliminary and/or final pretrial conference and trial. Accordingly, it is ORDERED that:

1. The plaintiff(s) -- or, in removal cases, the defendant(s) -- shall serve a copy of this Order upon all other parties within seven (7) days from the date of the filing of an appearance by the defendant(s) -- or, in removal cases, within seven (7) days from the filing of the notice of removal -- and shall immediately thereupon file herein a certificate of service that such parties have been served with a copy of this Order.

2. Not later than thirty (30) days from the date of filing of the complaint -- or, in removal cases, not later than thirty (30) days from the filing of the notice of removal -- each plaintiff or his attorney shall fully answer, in writing, the following standard interrogatories[1] -- file the original with the Clerk of the Court and serve a copy of such answers upon the defendant(s) within five (5) days after the defendant's appearance in the case -- or, in removal cases, simultaneous with the filing of the answers:

> Plaintiff's Interrogatory #1: Set forth in one paragraph a brief statement of the nature of the case. The type of statement sought is one which could be used in preliminarily explaining the case to prospective jurors. (NOTE: This statement shall be completed regardless of whether the case is to be ultimately tried to a jury or to the Court.)
>
> Plaintiff's Interrogatory #2: Describe the basis of federal jurisdiction. In addition, describe all laws, acts having the force and effect of law, codes, regulations and legal principles, standards and customs or usages which plaintiff contends are applicable to the instant action.
>
> Plaintiff's Interrogatory #3: State the full name, address and telephone number of all persons or legal entities who have a subrogation interest in the instant action, and state the basis and extent of each subrogation interest.
>
> Plaintiff's Interrogatory #4: Outline in detail the discovery anticipated by the plaintiff(s), including the number and type of depositions anticipated to be taken by the plaintiff.

---

[1] In a removal action, once the plaintiff(s) is/are served with a copy of this Order by defendant(s) pursuant to ¶ 1 hereof, the case reverts to the original format for compliance with this Order -- specifically, original plaintiff(s) shall comply with the timetable set forth in ¶ 2 for the filing of plaintiff's answers to interrogatories and the defendant(s) shall then comply with ¶ 3 for such answers to interrogatories, with the plaintiff(s) filing responses to the joint interrogatories required by ¶ 4.

Plaintiff's Interrogatory #5: Describe the nature of any dispositive motion(s) which the plaintiff anticipates filing.

3. Within thirty (30) days after service of plaintiff(s)'s answers to the above interrogatories, or within thirty (30) days after the defendant's appearance in the case (by filing an answer, motion or otherwise), whichever is later, each defendant or his attorney shall fully answer, in writing, the following standard interrogatories, and shall serve a copy of the answers upon every other party and file the original with the Clerk of the Court.

Defendant's Interrogatory #1: State whether you agree with the plaintiff's statement of the nature of the case as set forth in response to Plaintiff's Interrogatory #1. If not, the defendant shall separately state a brief statement of the nature of the case as required in Plaintiff's Interrogatory #1.

Defendant's Interrogatory #2: State whether defendant is properly identified; if not, give the proper identification and state whether you will accept service of an amended complaint reflecting proper identification.

Defendant's Interrogatory #3: Describe all laws, acts having the force and effect of law, codes, regulations and legal principles, standards and customs or usages which defendant contends are applicable to this action.

Defendant's Interrogatory #4: State, to the best of your knowledge, whether all parties whom you contend should be joined have been joined or, if you contend that some other person or legal entity is, in whole or in part, liable to the plaintiff or defendant in this matter, state their names, addresses and telephone numbers, and describe the basis of their alleged liability.

Defendant's Interrogatory #5: Outline in detail the discovery anticipated by the defendant(s), including the number and type of depositions anticipated to be taken by the defendant(s).

Defendant's Interrogatory #6: Describe the nature of any dispositive motion(s) which the defendant anticipates filing.

4. Within ten (10) days from the filing of defendant(s)'s answers to the above interrogatories, the attorneys for all parties, and any unrepresented party, are directed to confer (plaintiff being responsible for initiating such conference), and plaintiff shall fully answer, in writing, the following joint standard interrogatories, shall serve a copy of the answers upon every other party and file the original with the Clerk of the Court:

Joint Interrogatory #1: Estimate the time required to complete all discovery.

Joint Interrogatory #2: Estimate the time required for trial (including jury selection if trial by jury). Specify whether trial is to be by jury or non-jury.

Joint Interrogatory #3: Have the parties engaged in settlement negotiations? Do the parties intend to engage in further settlement negotiations? What is the probability of settlement?

Joint Interrogatory #4: Possibility of parties consenting to trial presided over by the United States Magistrate Judge pursuant to Rule 6.05, M.D.Fla. Rules. (See attachment). The Magistrate Judge assigned to this case is Honorable George T. Swartz.

Joint Interrogatory #5: Possibility of parties consenting to binding arbitration pursuant to Rules 8.02(a)(3) and 8.05(b), M.D.Fla. Rules.

Joint Interrogatory #6: State whether the parties desire a Rule 16 preliminary pretrial conference. If so, state the reasons why you believe such is necessary or desirable and set forth the specific agenda items you believe should be included. (NOTE: If the Court determines that a preliminary pretrial conference is not necessary, it is the Court's intention to enter a scheduling order which will include, among other things, the scheduling of trial and a final pretrial conference under Fed.R.Civ.P. 16(d). Such scheduling order will be based upon the answers to the above interrogatories. The parties must fully and completely answer all of the above interrogatories, regardless of whether the Court determines to schedule a preliminary pretrial conference.)

5. The parties are directed to comply with the requirements of this Order regardless of whether this case has been, or will be, referred for arbitration and regardless of whether motions are filed and outstanding (e.g., motion to dismiss, etc.).

6. In accordance with Fed.R.Civ.P. 16(f), plaintiff's failure to comply with the requirements of this Order may result in the dismissal of the instant action; defendant's failure to so comply may result in a default judgment for the plaintiff.[3]

DONE AND ORDERED, at Ft. Myers, Florida, this 1st day of October 1993.

RALPH W. NIMMONS, JR.

RALPH W. NIMMONS, JR.
United States District Judge

Copies to: Counsel of record
Pro se party, if applicable
John Gay, Courtroom Deputy Clerk
Judy Wauford, Courtroom Deputy Clerk

[3] This Order affords counsel and the parties the opportunity to furnish to the Court information relevant to the scheduling of an appropriate trial date. However, if the answers to the foregoing interrogatories are not filed in a timely manner, this case may be scheduled for trial as the Court deems appropriate, and a party subsequently moving for relief from the deadlines established by the Court in its Scheduling Order will carry a heavy burden.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. FLORIDA CITIES WATER COMPANY, Defendant	)	CIVIL ACTION NO. 93-281-CIV-FTM-21

CERTIFICATE OF SERVICE

I certify that a copy of the Court's October 1, 1993 "Status Order And Directing Answers to Standard Interrogatories and Plaintiff To Report" was served by U.S. Mail on the 27th day of December, 1993, as follows:

Gary Baise
Don G. Scroggin
Jenner & Block
Suite 1200
601 13th Street
Washington, DC 20005

David R. Berz
Weil, Gotshal & Manges
1615 L Street, NW
Washington, DC 20036

John Noland
Russell P. Schropp
Henderson, Franklin, Starnes & Holt
Post Office Box 280
Fort Myers, FL 33902-0280

Julia Bunnell
Paralegal
U.S. Department of Justice

Exhibit_____(GHB-6)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

RECEIVED
JAN 26 1994
DGS

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY, INC., Defendant.	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' ANSWERS TO COURT'S STANDARD INTERROGATORIES

Plaintiff's Interrogatory #1: Set forth in one paragraph a brief statement of the nature of the case. The type of statement sought is one which could be used in preliminarily explaining the case to prospective jurors.

ANSWER:

Florida Cities Water Company, Inc. ("Defendant") owns and operates a privately-owned wastewater treatment plant located in North Fort Myers, Lee County, Florida. The plant collects and treats wastewater from residential and commercial sources and then discharges those wastewaters into the Caloosahatchee River. The wastewater discharges contain pollutants which may not be discharged into the River except in compliance with the limitations and conditions of a National Pollutant Discharge Elimination System (NPDES) permit issued by the Environmental Protection Agency (EPA). Defendant violated the Clean Water Act by: (1) discharging pollutants into the River without a NPDES permit from October 1, 1988 to October 31, 1989; (2) discharging pollutants into a tributary canal, an unpermitted discharge

point, from November 1, 1989 to July 14, 1991; and (3) discharging pollutants in excess of permit limits from July 1991 to June 1992.

Plaintiff's Interrogatory #2. Describe the basis of federal jurisdiction. In addition, describe the laws, acts having the force and effect of law, codes, regulations and legal principles, standards and customs or usages which plaintiff contends are applicable to the instant action.

ANSWER:

This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1345, and 1355, and section 309(b) of the Act, 33 U.S.C. § 1319(b). The central law applicable to this action is the Clean Water Act, 33 U.S.C. § 1251 et seq. Of particular significance are the following sections of the Act: 301, 309(b), 309(d), 402, 502(5), 502(7), 502(12), and 502(14); 33 U.S.C. §§ 1311, 1319(b) and (d), 1342, 1362(5), (7), (12), and (14). Also applicable is 40 C.F.R. Part 122.

Plaintiff's Interrogatory #3. State the full name, address and telephone number of all persons or legal entities who have a subrogation interest in the instant action, and state the basis and extent of each subrogation interest.

ANSWER:

None.

Plaintiff's Interrogatory #4. Outline in detail the discovery anticipated by the plaintiff(s), including the number and type of depositions anticipated to be taken by the plaintiff.

ANSWER:

The United States is presently engaged in "informal" discovery with the defendant, and has agreed to endeavor to make available certain documents at the earliest practicable time without the necessity of a formal document request. The United States has also proposed an exchange of "core information." Core information will include disclosure of the names and addresses of people having information that is relevant to the proffered claims and defenses, and the location of documents most relevant to the case.

The United States anticipates that following an initial period of informal discovery, it will commence formal discovery, to include interrogatories, document requests, oral depositions, and admission requests. The number of depositions has yet to be determined, but will likely be a function in part of the nature of the core information disclosed.

Plaintiff's Interrogatory #5. Describe the nature of any dispositive motion(s) which the plaintiff anticipates filing.

ANSWER:

Plaintiff anticipates filing a Motion for Summary Judgment.

Respectfully submitted,

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Division
U.S. Department of Justice

By: _____

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing "United States' Answers to Court's Standard Interrogatories" were served by United States Mail on the 26th day of January, 1994, to the following counsel of record:

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Exhibit_____(GHB-7)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY Defendant.	)	CIVIL ACTION NO.: 93-281-CIV-FM-21

RECEIVED
MAR 8 1994
DGS

DEFENDANT FLORIDA CITIES WATER COMPANY'S ANSWERS TO COURT'S STANDARD INTERROGATORIES

Pursuant to the Court's October 1, 1993 Status Order directing answers to standard interrogatories, Defendant Florida Cities Water Company ("FCWC") hereby submits its answers.

Defendant's Interrogatory #1: State whether you agree with the plaintiff's statement of the nature of the case as set forth in response to Plaintiff's Interrogatory #1. If not, the defendant shall separately state a brief statement of the nature of the case as required in Plaintiff's Interrogatory #1.

ANSWER:

FCWC agrees with the United States' ("Plaintiff's") factual statements about the nature of its operations.

FCWC does not agree that it has committed any violations of the Clean Water Act, 33 U.S.C. § 1251 et seq., as alleged by Plaintiff. The crux of this litigation is the U.S. Environmental Protection Agency's improper denial on December 8, 1986 of FCWC's application to renew its NPDES permit. FCWC

believes that this case involves complex legal and factual matters, some arising more than a decade ago, including, but not limited to, Clean Water Act permitting, permitting pursuant to state law, the interplay between Federal and state regulation under the Clean Water Act, and analogous state laws, and the enforcement of such laws. As a result, FCWC intends to defend each of Plaintiffs' allegations vigorously. FCWC intends to rely heavily on discovery to support its defenses in this action.

Defendant's Interrogatory #2: State whether defendant is properly identified; if not, give the proper identification and state whether you will accept service of an amended complaint reflecting proper identification.

ANSWER:

Florida Cities Water Company is incorrectly identified in Plaintiff's complaint as "Florida Cities Water Company, Inc." Defendant waives service of an amended complaint for the purposes of properly identifying FCWC, but would request that all future captions reflect FCWC's correct name.

Defendant's Interrogatory #3: Describe all laws, acts having the force and effect of law, codes, regulations and legal principles, standards and customs or usages which defendant contends are applicable to this action.

ANSWER:

The central law applicable to this action is the Clean Water Act, 33 U.S.C. § 1251 et seq., and the regulations promulgated pursuant thereto, in particular 40 C.F.R. § 122 ff. Also applicable are state water laws and corresponding regulations. With respect to legal principles, standards and customs or usages, FCWC hereby incorporates its answer to the Plaintiff's complaint, which sets forth, inter alia, affirmative defenses to Plaintiff's claim.

Defendant's Interrogatory #4: State, to the best of your knowledge, whether all parties whom you contend should be joined have been joined or, if you contend that some other person or legal entity is, in whole or in part, liable to the plaintiff in this matter, state their names, addresses and telephone numbers, and describe the basis of their alleged liability.

ANSWER:

None.

Defendant's Interrogatory #5: Outline in detail the discovery anticipated by the defendant(s), including the number and type of depositions anticipated to be taken by the defendant(s).

ANSWER:

FCWC anticipates a two-pronged initial phase of discovery, consisting of (1) mutual disclosure of (a) the names and addresses of people having information that is relevant to the proffered claims and defenses, and (b) the location of documents most relevant to the case, and (2) exchange of documents pursuant to document requests. The first prong of this initial phase of discovery has already occurred, and the second prong is underway. Upon completion of this initial phase of discovery, FCWC will be in a position to identify with greater specificity the number and type of depositions it will need to take.

Presently, FCWC anticipates the need to take 15 depositions because of the number of individuals who have been involved in the regulation of and enforcement against the FCWC facility, including personnel at the U.S. Environmental Protection Agency, the Florida Department of Environmental Protection, and local jurisdictions, and former employees of FCWC. In

addition, while neither FCWC nor Plaintiff has identified any experts in this matter, FCWC anticipates the need to depose any experts Plaintiff identifies in the future.

FCWC also anticipates the need to conduct additional written discovery, including interrogatories and requests for admissions.

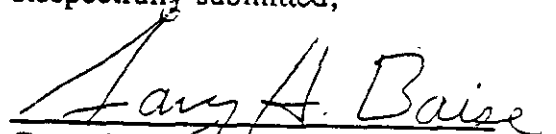
FCWC's preferences for scheduling of discovery matters were set forth in the Parties' Answers to Court's Joint Standard Interrogatories and Joint Report of Parties' Planning Meeting Pursuant to Fed. R. Civ. P. 26(f).

Defendant's Interrogatory #6: Describe the nature of any dispositive motion(s) which the defendant anticipates filing.

ANSWER:

FCWC anticipates filing a Motion for Summary Judgment with respect to one or more issues raised in Plaintiff's complaint.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the "Defendant Florida Cities Water Company's Answers to Court's Standard Interrogatories" has this 28th day of February 1994 been served upon the following persons by United States first class mail, properly addressed and postage prepaid.

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Gary H Baise

Gary H. Baise, Esq.

Exhibit_____(GHB-8)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 93-281-CIV-FTM-21
FLORIDA CITIES WATER COMPANY, INC., Defendant.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR EXTENSION OF TIME IN WHICH TO FILE MOTION TO STRIKE AFFIRMATIVE DEFENSES

This action was filed on October 1, 1993. With the consent of the United States to an extension of time, the defendant served its Answer to the Complaint on November 22, 1993, asserting some ten affirmative defenses to the instant action. Pursuant to Federal Rules of Civil Procedure 6(a) and (e) and 12(f), any Motion to Strike these affirmative defenses must be filed on or before December 16, 1993, which time has not passed.

The undersigned is lead counsel for the United States in this action. He is also lead counsel for the United States in another matter in the United States District Court for the Southern District of Florida, which matter was set for trial during the trial period beginning December 13, 1993. Final judgment was entered in that matter on December 10, 1993. The undersigned is also on leave on 40% of the business days in January 1994 to teach a course. Due to the aforementioned conflicting obligations, the United States requests an extension of time until February 4, 1994, for the purposes of filing any

Motion to Strike Affirmative Defenses in the above-captioned matter.

Respectfully submitted,

LOIS J. SCHIFFER
Acting Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

By: _____

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OF COUNSEL:

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing United States' Motion for Extension of Time in Which to File Motion to Strike Affirmative Defenses (with proposed order attached) and Memorandum in Support thereof were served by United States Mail on the 15th day of December, 1993, to the following counsel of record:

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Darlene F. Lyons

Exhibit_____(GHB-9)

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FEB 4 1994
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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY, INC., Defendant.	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' MOTION TO STRIKE AFFIRMATIVE DEFENSES

Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, the United States moves to strike all of the affirmative defenses asserted by defendant in its Answer, filed November 22, 1993. As demonstrated in the accompanying memorandum of law filed herewith, these defenses should be stricken as a matter of law.

Respectfully submitted,

LOIS J. SCHIFFER
Acting Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice

By: _____

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OF COUNSEL:

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing "United States' Motion to Strike Affirmative Defenses" and Memorandum in Support thereof were served by United States Mail on the 3rd day of February, 1994, to the following counsel of record:

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Darlene F. Lyons

Exhibit_____(GHB-10)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

RECEIVED
FEB . 4 1994
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UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY, INC., Defendant.	)	CIVIL ACTION NO. 93-281-CIV-FTM-21

MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION TO STRIKE AFFIRMATIVE DEFENSES

I. Introduction and Background

This is a civil action brought pursuant to section 309(b) of the Clean Water Act ("the Act"), 33 U.S.C. § 1319(b), for civil penalties for violations of section 301 of the Act, 33 U.S.C. § 1311, and of the conditions and limitations of a National Pollutant Discharge Elimination System ("NPDES") permit issued by EPA pursuant to section 402 of the Act, 33 U.S.C. § 1342. Suit was filed on October 1, 1993. Florida Cities Water Company, Inc. ("Defendant" or "FCWC") owns and operates the Waterway Estates Wastewater Treatment Plant located in North Fort Myers, Lee County, Florida. The plant collects and treats wastewater from residential and commercial sources and then discharges those wastewaters into the Caloosahatchee River. The wastewater discharges contain pollutants which may not be discharged into the River except in compliance with the limitations and conditions of a National Pollutant Discharge Elimination System (NPDES) permit issued by the U.S. Environmental Protection Agency

(EPA). The United States alleges that defendant violated the Act by: (1) discharging pollutants into the River without a NPDES permit from October 1, 1988 to October 31, 1989; (2) discharging pollutants into a tributary canal, an unpermitted discharge point, from November 1, 1989 to July 14, 1991; and (3) discharging pollutants in excess of permit limits from July 1991 to June 1992.

Defendant filed an Answer on November 22, 1993 in which it asserted ten affirmative defenses.[1] In order to narrow the issues in this litigation and avoid unnecessary expenditures of time and resources, pursuant to Rule 12(f), Fed. R. Civ. P., the United States moves to strike all of these defenses.[2] As demonstrated below, these defenses should be stricken as a matter of law.

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[1] Defendant has failed to give even the slightest hint of a factual or legal predicate for most of its affirmative defenses. Particularly in view of the case law discussed below, query whether all of the defenses were asserted after reasonable inquiry as to whether they were well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. See Rule 11, Fed. R. Civ. P. In accordance with Local Rule 3.01(g), the United States requested that the defendant reconsider its affirmative defenses. The defendant has declined to withdraw any of them.

[2] Pursuant to the Court's Order of December 22, 1993, the time for filing the instant motion was extended until February 4, 1994.

II. All of Defendant's Affirmative Defenses Should Be Stricken As a Matter of Law

A. Standard of Review

Under Rule 12(f) of the Federal Rules of Civil Procedure, a court may order stricken from the pleading "any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." "An affirmative defense is not valid if it appears to a certainty that the plaintiff would succeed despite any set of facts which could be proved in support of the defense....What constitutes an insufficient defense depends upon the nature of the claim for relief and the defense in question." EEOC v. First National Bank of Jackson, 614 F.2d 1004, 1008 (5th Cir. 1980) [citations omitted].

The standard applicable to motions to strike affirmative defenses was clearly set out by this court in Anchor Hocking Corp. v. Jacksonville Electric Authority, 419 F. Supp. 992 (M.D. Fla. 1976):

> While the Court has broad discretion in disposing of motions to strike, they are granted only where clearly warranted. The standard that must be met is undisputed: only if a defense is insufficient as a matter of law will it be stricken. A defense is insufficient as a matter of law if, on the face of the pleadings, it is patently frivolous, or if it is clearly invalid as a matter of law; in such cases, the determination should be made, and the defenses stricken, in order to avoid unnecessary time and money in litigating invalid, spurious issues.

Id. at 1000 [citations omitted].[3]

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[3] But see Royal Palm Savings Ass'n v. Pine Trace Corp., 716 F. Supp. 1416, 1420 (M.D. Fla. 1989) ("An affirmative defense should not be stricken where the defense presents a bona fide question of fact.")

A Rule 12(f) motion to strike defenses is particularly appropriate in this case. Defendant unnecessarily muddles an already potentially complex case by raising frivolous and invalid defenses. Striking these will allow the Court and the parties to "avoid unnecessary time and money in litigating invalid, spurious issues." Id.

B. Defendant's Affirmative Defenses

1. Failure to State a Claim

Defendant asserts in its first affirmative defense that the complaint fails to state a claim upon which relief can be granted. This defense is insufficient as a matter of law.

Rule 8(a) of the Federal Rules of Civil Procedure "merely requires that a complaint contain 'a short and plain statement of the claim showing that the pleader is entitled to relief,...'" Hercules, Inc. v. Pages, 814 F. Supp. 79, 80 (M.D. Fla. 1993). A claim for relief meets this requirement if the claim "give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957). Thus, the defense of failure to state a claim cannot succeed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. at 45-46.

In its Complaint, the United States has alleged all the requisite elements for liability under the Act for the violations alleged. The United States has alleged that defendant is a "person" within the meaning of the Act; that it has been

"discharging" "pollutants" into a "navigable water" from a "point source," as those terms are defined in the Act; and that these discharges were in violation of the Act and/or the terms and conditions of defendant's NPDES permit. Thus, the United States clearly has stated a claim under the Act upon which relief can be granted, and defendant's first affirmative defense must be stricken.

2. Denial of Permit in 1986

Defendant asserts in its second affirmative defense that the United States' claims are barred because "FCWC's application for renewal of the Permit was improperly denied by EPA in 1986." Answer at 14.

This affirmative defense would appear to relate to the United States' First Claim for Relief -- discharging without a permit. Presumably, under this affirmative defense, defendant would show that it would have had a valid permit during the period referenced in the First Claim were its application not "improperly denied" in 1986.

Assuming, arguendo, that the application in question had been improperly denied in 1986, however, defendant seeks relief in the wrong court at the wrong time. At the time, under section 509(b)(1) of the Act, 33 U.S.C. § 1369(b)(1) (1986), defendant had ninety (90) days from the date of the EPA Administrator's action to challenge the denial of the permit in the United States

Court of Appeals.[4] Having failed to challenge the denial, defendant is now precluded from doing so by section 509(b)(2) of the Act, 33 U.S.C. § 1369(b)(2).[5] See Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 14 (1981) ("Where review could have been obtained under this provision, the action at issue may not be challenged in any subsequent civil or criminal proceeding for enforcement. § 1369(b)(2)."); Champion International v. U.S. Environmental Protection Agency, 850 F.2d 182, 188 (4th Cir. 1988); Connecticut Fund for the Environment v. Job Plating Co., 623 F. Supp. 207,

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[4] Section 509(b)(1) at the time provided in pertinent part as follows:

> Review of the Administrator's action...in issuing or denying any permit under section 1342 of this title... may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business is upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

33 U.S.C. § 1369(b)(1) (1986). The present statute allows 120 days for appeal.

[5] Section 509(b)(2) provides as follows:

> Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

33 U.S.C. § 1369(b)(2).

216-17 (D. Conn. 1985); United States v. Velsicol Chemical Corp., 438 F. Supp. 945, 949 (W.D. Tenn. 1976).

Defendant failed to avail itself of the opportunity to seek judicial review of EPA's permit denial. It cannot now be allowed to circumvent the law by challenging the denial in the context of a civil enforcement proceeding, directly contrary to section 509(b)(2) and the case law construing it. Accordingly, defendant's second affirmative defense is clearly invalid as a matter of law and must be stricken.

3. Payment of penalties to the State of Florida

Defendant's third affirmative defense is premised on the notion that it has already paid penalties assessed by the State of Florida "under comparable Florida law." Answer at 14.

While the Answer is silent both as to the legal and factual basis for this defense, the United States assumes that defendant intends it to arise under section 309(g)(6) of the Act, 33 U.S.C. § 1319(g)(6), which provides, inter alia, that violations which have been the subject of a final administrative State order and penalty under comparable State law shall not be the subject of a federal civil judicial penalty action. The United States understands that this defendant has indeed been cited numerous times by state and local officials for state and local environmental violations at its Waterway Estates and other of its Florida plants.[6] The particular violations of federal law

[6] An administrative Consent Order before the Florida Department of Environmental Regulation ("FDER") (now the Florida Department of Environmental Protection ("FDEP")), OGC Case No.

alleged in the United States' Complaint in this action, however, have never been the subject of a state administrative order or penalties. Nor could they have been, since, during the periods of time during which the federal violations are alleged to have occurred (1988-1992) Florida was not even authorized to administer the Clean Water Act.[7] Accordingly, this affirmative defense is frivolous and must be stricken.

4. Impossibility

Defendant's fourth affirmative defense is impossibility. Impossibility, however, simply is not a defense to a Clean Water Act action. In United States v. City of Hoboken, 675 F. Supp. 189 (D.N.J. 1987), the Court held as follows:

> First, I find that impossibility is not, as a matter of law, a valid defense to Clean Water Act liability. As the Natus case[8] points out, impossibility is a defense recognized in the law of contracts, where obligations are grounded on a party's prior expressions of intent to be obligated. The Clean Water Act does not, however, deal in contractual obligations. The Act imposes duties unilaterally, as in the law of torts, and without regard for parties' intention. Specifically, the Act creates a scheme of strict liability for exceeding effluent limitations. Thus, it is simply the case that if a party is a permit holder, the Act makes that party liable whenever the party

---

88-0384, settled the State's allegations regarding a major upset of the facility in 1987 which resulted in a number of state permit violations. A subsequent FDER Consent Order, OGC Case No. 90-1747, settled violations of the earlier Order's requirements relating to the construction and certification, under Florida rules and statutes, of its wastewater treatment plant.

[7] Moreover, at no relevant time and in no relevant way were the Florida laws enforced by the State "comparable" to the federal Clean Water Act.

[8] Natus Corp. v. United States, 178 Ct.Cl. 1, 371 F.2d 450 (1967).

> discharges effluent that violates its permit. Excuses are irrelevant; under the Act the party must either achieve the discharge levels it has been allowed, or pay the consequences of its discharge, or stop discharging.

Id. at 198 [citations omitted]. Accordingly, this affirmative defense is also invalid and must be stricken.

5. Estoppel

Defendant's fifth affirmative defense is estoppel. However, estoppel can neither be applied against the United States when acting in its sovereign capacity, Alacare Home Health Services, Inc. v. Sullivan, 891 F.2d 850, 855 (11th Cir. 1990), nor serve as the "means of successfully avoiding the requirements of legislation enacted for the protection of a public interest." Scott Paper Co. v. Marcalus Manufacturing Co., Inc., 326 U.S. 249, 257 (1945). While, as the Eleventh Circuit recently observed, the Supreme Court has not resolved the issue of whether estoppel may ever be applied against the United States, Ferry v. Hayden, 954 F.2d 658, 661 (11th Cir. 1992), citing Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 61 (1984), the Supreme Court itself noted in Office of Personnel Management v. Richmond, 496 U.S. 414, 422 (1990), that it has "reversed every finding of estoppel [against the federal government] that we have reviewed." See Ferry v. Hayden, 954 F.2d at 661 n.5.

Moreover, there is Eleventh Circuit law directly on point. In Deltona Corp. v. Alexander, 682 F.2d 888 (11th Cir. 1982), appellant challenged the Army Corp of Engineers' denial of a

permit under the Clean Water Act. The Eleventh Circuit upheld this Court's grant of summary judgment to the United States, relying on earlier binding Fifth Circuit precedents to the effect that estoppel cannot be asserted against the United States in actions arising out of the exercise of its sovereign powers. The Eleventh Circuit held that the act of granting a permit under the Act "is unquestionably an exercise of the government's sovereign power to protect the public interest. In fact, the entire rationale behind the § 404 permit is to insure that the public interest in environmental safety and quality is preserved." Id. at 892. See also United States v. City of Menominee, 727 F. Supp. 1110, 1121 (W.D. Mich. 1989) ("No doubt exists that USEPA exercises sovereign rather than proprietary powers when enforcing the CWA.") Thus, since estoppel is an invalid defense to this action, defendant's fifth affirmative defense must be stricken.

6. Waiver

Defendant's fourth affirmative defense is waiver. Waiver, however, also is not a defense to a Clean Water Act action. In United States v. City of Menominee, 727 F. Supp. 1110 (W.D. Mich. 1989), as here, a Clean Water Act civil enforcement action brought under section 309, 33 U.S.C. § 1319, the court held that "the CWA's enforcement provisions do not mention waiver, 33 U.S.C. § 1319, and this court will not recognize waiver by implication." Id. at 1121. Similarly, in United States v. Amoco Oil Co., 580 F. Supp. 1042 (W.D. Mo. 1984), the court held that in the context of a civil enforcement action brought under

section 309(d), the defense of waiver could not be asserted against the government "since generally speaking public officers have no power or authority to waive the enforcement of the law on behalf of the public." Id. at 1050. Accordingly, this affirmative defense is also invalid and must be stricken.

7. Statute of limitations

Defendant asserts in its seventh affirmative defense that the United States' claims "are barred by the applicable statute of limitations." The Answer is silent as to which statute defendant considers "applicable," and the Clean Water Act does not actually contain a statute of limitations. While the United States is unprepared to concede that **any** statute of limitations necessarily applies in section 309 actions, see SPIRG v. New Jersey Central Power and Lights, Inc., 642 F. Supp. 103, 107-08 (D.N.J. 1986), arguably the applicable statute would be the five-year statute of limitation found in 28 U.S.C. § 2462.[9] Because the United States only seeks penalties for violations for a five-year period preceding the date on which its Complaint was filed, none of its claims could possibly be barred by this statute of

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[9] 28 U.S.C. § 2462 provides as follows:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five (5) years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

limitations, assuming it were applicable. Hence, defendant's seventh affirmative defense is frivolous and should be stricken.

8. Laches

Defendant's eighth affirmative defense is laches. The United States will show that under prevailing and applicable case law, it is not subject to laches.

The rule that the government is exempt from the consequences of its laches -- nullum tempus occurrit regi[10] -- evolved from English common law[11] and continues to have a solid foundation in this country, this Circuit, and this Court. The Supreme Court has consistently held that laches is no defense to a suit to enforce a public right or protect a public interest. United States v. Summerlin, 310 U.S. 414, 416; United States v. California, 332 U.S. 19, 39-40, (1947); Utah Power and Light Co. v. United States, 243 U.S. 389, 409 (1917). Relying on Supreme Court precedent, the Fifth Circuit Court of Appeals, in reversing the Northern District of Alabama in a "textbook case of laches," held "that defense cannot be asserted against the United States in its sovereign capacity to enforce a public right or to protest

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[10] "Time does not run against the King."

[11] "The rule that the government is exempt from the consequences of its laches and from the operation of statutes of limitations -- nullum tempus occurrit regi -- had its genesis in English common law notions of prerogative of the Crown. The principle is well established in this country, but based upon the important public policy of preserving public rights and revenues from the negligence of public officers. Guaranty Trust Co. v. United States, 304 U.S. 125, 132-33, 58 S.Ct 785, 82 L.Ed. 1224 (1938)." United States v. Weintraub, 613 F.2d 612, 618 (6th Cir. 1979).

the public interest." United States v. Arrow Transportation Co., 658 F.2d 392, 394 (5th Cir. 1981). And, this Court has held that "the United States is not subject to the defense of laches." United States v. Spurlin, 763 F. Supp. 563, 566 (M.D. Fla. 1990).

Furthermore, in both the Menominee and Amoco cases cited above, the courts expressly rejected laches defenses in Clean Water Act actions to enforce NPDES permits. United States v. City of Menominee, 727 F. Supp. at 1122 (no exceptions to the rule that laches cannot defeat the government); United States v. Amoco Oil Co., 580 F. Supp. at 1050 ("It is clear that the defense of laches does not apply to the United States when it acts in its sovereign capacity, as of course it does here."); Accord, Student Public Interest Research Group v. P.D. Oil & Chemical, 627 F. Supp. 1074, 1085 (D.N.J 1986) ("The law is established that the defense of laches may not be asserted against the government.")

In short, defendant's eighth affirmative defense must be stricken.

9. Delay by third parties

In its ninth affirmative defense, defendant asserts that "State and local governments unnecessarily delayed issuing permits and enacting zoning changes necessary before FCWC could initiate construction of an advanced water treatment facility or relocate an outfall, thereby precluding FCWC's ability to meet compliance schedules." Answer at 15-16.

To the extent that defendant claims that it was somehow precluded from complying, this defense would appear to be a variation of defendant's fourth defense of impossibility, discussed above. To the extent that defendant attributes responsibility for the supposed preclusion to third parties, the defense could also be characterized as a "third party defense."

In any event, the case law is replete with pronouncements to the effect that the Clean Water Act is a strict liability statute. See e.g., Connecticut Fund for Environment, Inc. v. Upjohn Co., 660 F. Supp. 1397, 1409 (D. Conn. 1987); United States v. Town of Lowell, 637 F. Supp. 254, 258 (M.D. Pa. 1986); United States v. Amoco Oil Co., 580 F. Supp. 1042, 1050 (W.D. Mo. 1984); United States v. CF Industries, 542 F. Supp. 952, 955 (D. Minn. 1982); United States v. Bradshaw, 541 F. Supp. 884, 886 (D. Md. 1982). Moreover, "[n]o right exists to pollute our nation's waters" and "[t]he burden in on the polluter to comply with the CWA," not on EPA (or some other party). United States v. City of Menominee, 727 F. Supp. 1110, 1122 (W.D. Mich. 1989). Thus, even assuming some third party actually had caused defendant delay, this defense is simply invalid and must be stricken.[12]

10. Due care and good faith

Defendant submits in its tenth affirmative defense that it

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[12] As noted above, the instant action is brought under section 309(b) of the Clean Water Act, 33 U.S.C. § 1319(b). That section, unlike section 311, does not provide a third-party defense. Presumably, if Congress had intended to allow a third-party defense under section 309, it would have specifically provided for one as it did in section 311.

"has at all times acted in a proper and reasonable manner, exercised due care, acted in good faith...." Answer at 16. As noted immediately above, however, the Clean Water Act is based on strict liability. Therefore, "a defendant's intention to comply or good faith attempt to do so does not excuse a violation." Connecticut Fund for Environment, Inc. v. Upjohn Co., 660 F. Supp. 1397, 1409 (D. Conn. 1987). Likewise, defendant's "intent and good faith are irrelevant to the issues of statutory violations and the defendant[s] liability." SPIRG v. P.D. Oil & Chemical Storage, 627 F. Supp. 1074, 1090 (D.N.J. 1986). Accordingly, defendant's tenth affirmative defense must also be stricken.[13]

CONCLUSION

Defendant has cavalierly asserted affirmative defenses which, as a matter of law, have no place in a Clean Water Act action. For the reasons set out above, the United States

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[13] Although irrelevant to the question of liability, and therefore not validly asserted as an affirmative defense, defendant's good faith -- or lack thereof -- can and should be considered by the court, along with other factors, in assessing penalties. 33 U.S.C. § 1319(d). See Atlantic States Legal Foundation v. Tyson Foods, 897 F.2d 1128, 1141 (11th Cir. 1990).

respectfully requests that all of defendant's affirmative defenses be stricken.[14]

Respectfully submitted,

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U.S. Department of Justice

By: _____

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[14] Pursuant to Local Rule 3.01(d), the United States respectfully requests that the Court allow oral argument on the United States' Motion. The time estimated for argument is one hour (one-half hour for the United States and one-half hour for defendant).

Exhibit_____(GHB-11)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

RECEIVED
FEB 14 1994
DGS

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY, INC., Defendant.	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Plaintiff, the United States of America, pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, requests Defendant Florida Cities Water Company to produce and permit the United States to inspect and copy each of the following documents in defendant's possession, custody or control. These documents shall be produced on March 14, 1994, unless such time is modified by order of the Court or by counsel by the United States, at the offices of the U.S. Department of Justice, Environment and Natural Resources Division, 1425 New York Avenue, N.W., Washington, D.C., or at such other location as agreed upon by counsel for the United States.

INSTRUCTIONS

1. Unless otherwise stated, these requests apply to documents written, produced, drafted, or generated on or after October 1, 1988, and ending at the trial of this matter.

2. Unless otherwise specified, these document requests pertain to Florida Cities Water Company, Inc. ("defendant") and

mean the designated entity and its parent companies, departments, divisions, officers, employees, agents, servants, assigns and, unless privileged, its attorneys.

3. For each document produced, indicate on the document or in some other reasonable manner, the numbered request(s) to which it responds.

4. If anything is deleted from a document produced, state:

(a) the reason for the deletion; and

(b) the subject matter of the deletion.

5. This request covers all documents in the possession, control or custody of defendant, its parent companies, officers, employees, agents, servants, consultants, attorneys and assigns.

6. Words used in the plural shall also be taken to mean and include the singular. Words used in the singular shall also be taken to mean and include the plural. "Or" and "and" shall be construed either conjunctively or disjunctively to bring within the scope of these interrogatories any information that might otherwise be construed to be outside their scope. The past tense includes the present tense where the clear meaning is not distorted by change of tense.

7. If any document was, but is no longer, in the defendant's possession, custody or control, state:

(a) the disposition of the document;

(b) the date such disposition was made;

(c) the identity and address of the present custodian of the document or, if it no longer exists, so state;

(d) the person(s) who made the decision to dispose of the document;

(e) the reason(s) for the disposition; and

(f) a description of the document and description of the contents of the document.

8. If any document is withheld under any claim of privilege or exemption furnish a list identifying each document for which the privilege or exemption is claimed, together with the following information:

(a) its title, or if it has no title, its subject matter;

(b) the date of origin;

(c) the author or addressor;

(d) the recipient(s) of all copies;

(f) basis upon which privilege or exemption is claimed; and

(g) name, address and telephone number of the custodian of the document and/or copies thereof.

9. Please produce the complete original exact copy of each document and, unless otherwise stated, each non-identical copy (whether different from the original because of notes made on the copy or otherwise), including drafts, of each writing of every kind and description (together with all worksheets, support documents, and other relevant materials), whether inscribed by hand or mechanical, electronic, microfilm, photographic, or other means (such as by recording, film, tape or other medium) from

which such information may be obtained.

DEFINITIONS

Unless otherwise indicated, the terms used in these Requests shall have the same meaning ascribed to them under the Clean Water Act.

In addition, unless otherwise stated, the following definitions shall apply to these discovery requests:

A. The terms "biological monitoring," "discharge," "discharge of a pollutant," "discharge of pollutants," "effluent limitation," and "pollutant" shall have the meanings ascribed to those terms in Section 502 of the Clean Water Act, 33 U.S.C. § 1362.

B. "Contractor" or "consultant" means any person who acts as agent for, or on behalf of, any other person, whether or not for consideration, and includes subcontractors.

C. The terms "bypass" and "upset" shall have the meaning ascribed to those terms by 40 C.F.R. § 122.41.

D. "Clean Water Act" means the Federal Water Pollution Control Act, as amended by the Water Quality Act of 1987, 33 U.S.C. §§ 1251-1387, including all regulations promulgated thereunder.

E. "Defendant," "Florida Cities Water Company," "FCWC," "you," and "your," unless otherwise indicated, all mean Defendant Florida Cities Water Company, Inc., each merged, consolidated, and acquired predecessor or successor, parent, subsidiary,

division, and affiliate, each past and present officer, director, employee, agent, servant, consultant and representative of each such entity or individual, and each past and present attorney of each such entity or individual.

F. "Document" means any and all material that is written, printed, typed, photographed, recorded (electronically, magnetically, graphically or otherwise) or which is capable of being recorded in any form. It includes, but is not limited to, any logs of materials received, other logs, invoices, purchase orders, receipts, bills of lading, loading tickets, receiving tickets, shipping orders, inventories, letters and other correspondence, offers, contracts, agreements, bids, proposals, applications, licenses, permits, reports to government agencies, other reports, minutes of meetings, sales estimates, sales reports, memoranda, handwritten or other notes, calendar or diary entries, agendas, bulletins, graphs, charts, maps, photographs, drawings, data, price lists, lists of accounts, summaries, telegraphs, teletypes, computer printouts, magnetic tapes, discs, microfilm, and microfiche.

G. "DMR" means Discharge Monitoring Report as defined in 40 C.F.R. § 122.2.

H. "EPA" shall refer to the United States Environmental Protection Agency.

I. The "Facility" shall refer to the Florida Cities Water Company's wastewater treatment plant located at 1667 Inlet Drive, in North Fort Myers, Florida and its related sewerage system.

J. "Inspection" means the physical observation of any tangible matter.

K. "Navigable waters" is defined in Section 502(7) of the Clean Water Act, 33 U.S.C. § 1362(7).

L. "Non-Compliance Report" means any report of non-compliance with any term or condition of your NPDES permit pursuant to the requirements of 40 C.F.R. §§ 122.41(1) and (4)-(7) or of NPDES Permit No. FL0030325.

M. "NPDES" shall refer to the National Pollutant Discharge Elimination System of Section 402 of the Clean Water Act, 33 U.S.C. § 1342.

N. "NPDES Permit" means NPDES Permit No. FL0030325, as amended, extended, renewed, reissued or modified.

O. "NPDES Permit Limit(s)" means any discharge limitation, term or condition contained in NPDES Permit No. FL0030325, as amended, extended, renewed, reissued or modified.

P. "Person" or "persons" means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body, together with their predecessors, successors and assigns, their agents servants, consultants, contractors, subcontractors, employees, and representatives, and all agents and representatives thereof.

Q. "Point source" is defined in Section 502(14) of the Clean Water Act, 33 U.S.C. § 1362(14).

R. "Relate(s)" or "relating to" means constituting, defining, containing, embodying, reflecting, identifying, stating, referring to, dealing with or in any way pertaining to.

S. "Refer to" or "refers to" means mentioning, discussing, making reference to or relating to in any way.

T. "State" means the State of Florida including, any department, agency or individual representing the State of Florida, and includes the Florida Department of Environmental Protection ("FDEP") and its predecessor-agency, the Florida Department of Environmental Regulation ("FDER").

REQUESTS

1. All DMRs reporting the discharge of pollutants from the Facility.

2. All Non-Compliance Reports submitted by the defendant to EPA or the State of Florida relating to the discharge of pollutants from the Facility.

3. All permit requests and applications, permit renewal requests and applications, and permit modification requests and applications, including all such documents whether they relate to NPDES or non-NPDES permit requests and applications filed by the defendant with federal, state or local authorities that pertain to the discharge of pollutants from the Facility.

4. All organizational charts showing overall organizational structure of the defendant in detail, to include documents identifying all persons employed by the defendant with

responsibility for, or authority over, the operation, maintenance and/or management of the Facility, including lines of authority and reporting relationships.

5. All maps, charts and diagrams, that identify and/or depict the geographic service area of the Facility.

6. All maps (including USGS maps) that identify or depict the discharge location of the Facility.

7. All financial reports, statements, balance sheets, budgets and audits prepared by or on behalf of the defendant since January 1, 1980, including any breakdowns of financial data for operation of the Facility.

8. All documents relating to contacts, discussions, meetings and correspondence, between the defendant and its contractors (including subcontractors), to the extent that those documents relate to the operation of the Facility, including, but not limited to, such documents relating to the following persons:

(a) Environmental Science and Engineering, Inc. (ESE)

(b) Source, Inc.

(c) Barth Tech

(d) Tetra Technologies, Inc. (Tetra Engineered System)

(e) Stone and Webster

9. All audits, evaluations, advice, Facilities Plans, reports, sampling results, surveys, tests, evaluations, analyses or studies, of any kind, prepared by the defendant or its contractors (including subcontractors), to the extent that those documents relate to the operation of the facility, to include,

but not be limited to, documents prepared by the persons listed in the preceding interrogatory.

10. All documents that relate to consideration by FCWC of the proposed improvements to the Facility as stated in Mr. Robert French's memorandum dated October 27, 1987.

11. All documents including, but not limited to, correspondence, memoranda, reports and studies relating to meetings, discussions, or oral communications regarding the compliance schedule for the Facility as submitted on March 1, 1988 by FCWC to the State of Florida.

12. All documents including, but not limited to, correspondence, memoranda, reports and studies, relating to the contents of the April 24, 1989 letter from A. A. Reeves III to Bruce R. Barrett of EPA.

13. All documents including, but not limited to, all correspondence, memoranda, monthly reports and studies relating to the contents of the May 17, 1990 letter from James A. Elder to John T. Marlar of EPA.

14. All documents including, but not limited to, all correspondence, memoranda, monthly reports and studies relating to the contents of the July 3, 1990, letter from Mr. James A. Elder to Kenneth Kwan of EPA.

15. All documents including, but not limited to, all progress reports, correspondence, memoranda, and studies relating to meetings, discussions or oral or written communications relating to the contents of the May 11, 1987 EPA Administrative

Order issued to FCWC (Docket No. 87-085), and its Amendment on August 31, 1988.

16. All documents including, but not limited to, all monthly progress reports, correspondence, memoranda, monthly reports, and studies, relating to meetings, discussions or oral or written communications regarding the September 26, 1989 EPA Administrative Order issued to FCWC (Docket No. 89-109), and its Amendment on July 24, 1990.

17. All documents relating to any test results, laboratory analyses, flow measurements or concentration analyses of any pollutants discharged from the Facility.

18. All documents which refer or relate to the effects of the discharge of pollutants from the Facility on the water quality of Caloosahatchee River and the tributary canal to which the Facility has discharged.

19. All documents which refer or relate to whether or not discharges from the Facility are and have been in compliance with applicable water pollution control laws, including the applicable NPDES Permit.

20. All designs, including any plans and specifications, and modifications thereof, for the treatment elements and processes at the Facility.

21. All documents that identify, describe or explain the treatment processes and operations at the Facility.

22. All maps, charts, photographs and diagrams depicting any of the treatment elements and processes at the

Facility.

21. All documents, including maps, charts, photographs, and diagrams indicating the sampling location(s) for wastewater discharged from the Facility.

23. All documents relating to process or equipment changes at the Facility which were designed to, or had the effect of, evaluating, preventing, increasing, reducing or otherwise affecting discharges of pollutants from the Facility.

24. All documents relating to all operating, maintenance and inspection procedures at the Facility, and any and all changes in these procedures, which were designed to, or had the effect of, preventing, increasing, reducing, or otherwise affecting discharges of pollutants from the Facility.

25. All documents relating to procedures used or prescribed for use by FCWC to report to the EPA or the State, any water pollution discharges, violations of water pollution laws, regulations, or violations of your NPDES Permit.

26. All documents relating to any and all difficulties or problems FCWC encountered in meeting applicable water pollution control effluent limitations or the NPDES Permit Limits regarding pollutants discharged from the Facility.

27. All documents relating to planning and/or consideration by the defendant of whether or not to install or to defer installation of any water pollution control equipment at the Facility.

28. All documents relating to consideration by the

defendant of whether or not to implement or defer implementation of process changes or facility procedures that would in any way affect water and/or pollutant discharges from the Facility.

29. All documents relating to the advantages, disadvantages or potential implications to the defendant of delaying installation of water pollution equipment at the Facility.

30. All documents relating to the capital, operating or maintenance costs of water pollution control equipment installed, or considered for installation, at the Facility to achieve or contribute to the achievement of applicable water pollution control standards and/or NPDES Permit Limits.

31. All documents including, but not limited to, bid solicitations, bid requests, bids, engineering estimates and other cost documents, contracts or staff memoranda, which relate to any water pollution control equipment installed or considered for installation at the Facility.

32. All documents including, but not limited to, bid requests, bids, estimates and other documents, that relate to costs of operation and maintenance, construction and equipment, of any and all plans, whether implemented or proposed, to either increase the treatment efficiency of the Facility or expand the capacity of the Facility.

33. All documents relating to meetings, discussions or other written or oral communications regarding technology, personnel training, inspection, maintenance or any other means to

eliminate or reduce water pollutant discharges or achieve compliance with water pollution control standards or your NPDES Permit.

34. All documents including training manuals, relating to operation, testing or maintenance procedures with respect to water pollution control equipment at the Facility.

35. All documents relating to complaints received by the defendant from any person regarding the operation of the Facility or the discharge of pollutants from the Facility.

36. All documents including, but not limited to, minutes, notes and memoranda, relating to meetings held by defendant at which the facility's compliance with the Clean Water Act and NPDES Permit Limits was discussed.

37. All documents relating to inquiries made by FCWC into the causes of discharges of pollutants at the Facility which were not authorized under applicable water pollution control laws or the terms and limitations of NPDES Permit limits.

38. All documents that refer or relate to contacts, discussions, meeting, or correspondence of any kind between representatives of EPA, the State and/or any other governmental agency, and FCWC or any person representing or acting on its behalf, which relate in any way to the discharge of pollutants from the Facility.

39. All daily Facility operation and maintenance logs.

40. All records relating to the operation, maintenance and calibration of flow meters at the facility.

41. All documents reviewed by any expert retained by Defendant for the purpose of testifying in this case.

42. All documents relating to Defendant's document retention policies.

43. All treatability studies, wastewater characterization studies, industrial waste surveys, evaluations, tests, reports or other documents prepared by you or any consultant or contractor of FCWC or by any other person, relating to monitoring, sampling or analyses of wastewater discharged from the Facility into navigable waters.

44. All documents Defendant intends to rely upon or introduce into evidence at trial.

45. All documents relating to the discharge of pollutants from the Facility not otherwise subsumed by another request herein.

Respectfully submitted,

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Environment and Natural Resources Division
U.S. Department of Justice

By: _____

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing "United States' First Request for Production of Documents" was served by hand on the 11th day of February, 1994, to the following counsel of record:

Gary H. Baise
Don G. Scroggin
Jenner & Block
Suite 1200
601 13th Street, NW
Washington, DC 20005

Daniel S. Jacobs
U.S. Department of Justice

Tuesday, October 21, 1997 KARLESKI

Volume	Page	Designation	Counter-Attack
1.00	5.00	Julie's name and business address	
1.00	62.00	Julie has been an evnironmental engineer with Avatar Utilities for 3 years; 50-60% of her time was spent auditing environmental compliance at the Avatar facilitites	
1.00	68.00	she has been operations manager since January 1992	
1.00	69.00	she has oversight responsibility for operations and maintenance; part of her job is to ensure regulatory compliance	
1.00	73.00	she goes through the DMRs and makes sure that they are timely; they have a tracking system to review the DMRs and exceedances	
1.00	81.00	FCWC owns and operates six WWTPs in Florida; she lists them as well as provides the location	
1.00	140.00	All the FCWC plants are capable of meeting their current NPDES limits	
2.00	5.00	Mike Acosta is V.P. Engineering and Operations; Acosta reports to Bradtmiller	
2.00	7.00	Gerald is President of FCWC	
2.00	10.00	She is still the Operations manager	
2.00	15.00	Everyone knows about the comment at Tompkins deposition; that comment is not her personal opinion, but she called him an asshole	
2.00	19.00	BB discharge without a permit is true	
2.00	21.00	[This must be a screwed up designation because it is Jacobs stating that he's interested in what Julie might know about mitigating evidence]	

Volume	Page	Designation	Counter-Attack
2.00	23.00	Audit report for BB showed no permit; BB was operating under consent order from Florida	
2.00	33.00	Three plants were operating without permits in 1989	
2.00	54.00	Paragraph 18--there were exceedences Paragraph 19-true Paragraph 20--true Paragraph 21--true	
2.00	65.00	Paragraph 25--true Paragraph 26--true Paragraph 27--true	
2.00	75.00	Paragraph 30--true Paragraph 32--true Paragraph 33--true Paragraph 34--true Paragraph 35--true Paragraph 36--true Paragraph 37--true Paragraph 38--true Paragraph 39--true Paragraph 40--true Paragraph 41--true	
2.00	91.00	Paragraph 43--true	
3.00	14.00	Exhibit C to government's motion for summary judgment is accurrate	
3.00	22.00	Exhibit F to government's motion for summary judgment is accurrate; October '91 should have more exceedences; August '91 should have more exceedences	

Page	Notes	Topic	Volume
9.00	Reviewed Exhibits to DOJ's memorandum in support of its summary judgment motion- ie, the summary of violations.	identification of exhibits	
13.00	Does not agree to penalty days summarized in exhibit C (BB), but will testify as to parameter, monthly averages, daily maximums, reported exceedances, actual exceedances, and agent.		
14.00	DMRs are accurate as to what is summarized as violations of the NPDES permit.	violation summary, BB	
17.00	Violation summary accurate as to all items except penalty days.		
21.00	Carrollwood violation summary is accurate except for exceedances not shown for 10/91, 8/91, 7/91.	violation summary, CW	
23.00	Reported exceedances should be one not zero for: TS 12/91, 11/91; 11/91 TP and TN; 10/91 for TSS, CBOD, TP, TN; 9/91 for TN, TP; 8/91 for TP; 7/91 for TP.		
25.00	Violation summary for WWE does not mirror DMR.	violation summary, WWE	
25.00	Recalls that a toxicity violation was reported by FCWC in error, an error that was caught by EPA, and was rectified in a corrected DMR.		
27.00	Was a toxicity failure in September-October 1991 or November-December 1991, a pass in January-February 1992, then two failures (March-April & May-June).		
28.00	Exceedances were not reported in July through August 1991, because the monthly averages were within the limits of the AO, although above those set in the NPDES permit that became effective in October 1991.		
30.00	BB was granted an extension by state of Florida beyond expiration date (6/30/95) of NPDES permit to continue discharge.	continuing BB discharge	
31.00	Florida has assumed delegation from EPA, and authorized discharge until 1997.		
32.00	BB has had recent toxicity failures, as the AWT construction continues.	recent violations, BB	

Page	Notes	Topic	Volume
32.00	Most recent violation at WWE was June 1992.	recent violations, WWE	
33.00	Does not recall telephone 6/20/91 conversation with Allen regarding BB audit. Algae bypass was built, but never used after NPDES permit was granted "which raised the limits."	BB violations	
38.00	TRC testing spot changed from ponds to plant at FCWC request (because of concern about fecal coliform from animals). There were slight TRC violations thereafter.		
39.00	TRC violations ceased after addition of dechlorinization system, and change in testing system.		
40.00	Continuous nitrification of the plant succeeded in reducing toxicity failures.		
43.00	Concern with failure to meet fecal coliform limits related to poor testing protocols.		
43.00	In August 1991, recommended increased chlorine feed rate to ensure disinfection; does not recall whether reduction was recommended when permit with TRC limits took effect.		
48.00	In December 1992, expected to be able to cease discharge by June 30, 1995.		
49.00	Failure to cease by 6/30/95 was because of 8-9 month period to obtain state permit for AWT construction; CO process included appeal by grove owners near the 300 acre spray site.		
53.00	Use of reclaimed water on Parrish property did not occur because grower did not want to pay for water, a long term contract, or bear any risk that he might have crop marketing problems (related to use of reclaimed water in his groves).		
56.00	Currently, no water is used in any groves because, since the AWT construction is not complete, the effluent does not meet public access reuse standards.		
57.00	Current plans to purchase H & S Groves (300 acres) will provide spray irrigation capacity of 600,000 gallons per day, an amount that will allow BB to cease all but wet weather discharge.		
60.00	In December 1993, expected to begin AWT construction in mid-1994, and complete it with 300 days.		

Page	Notes	Topic	Volume
61.00	Construction begun in early 1995; upon completion by end of 1995 secondary effluent discharge will cease (AWT discharge will continue to the canal, the 40 acre spray site, and the golf course under extended permit).		
69.00	Does not think that negotiations with growers for reuse would have progressed even if reclaimed water had been offered for nothing.		
74.00	Understands that FCWC uses AHI Policies and Procedures Manual.	Connection with Avatar	
78.00	Visited Carrollwood for an audit, a follow up on 12/16/90, and a second follow-up on 12/28/90. Uncertain about purpose of titrator mentioned in report of 12/28 visit.	visits to CW	
79.00	Elder, Bradtmiller, and Reeves were FCWC officials most involved with the CW-Hillsborough connection.	Hillsborough connection	
80.00	Letter to Kwan (exhibit 823) explained reasons for delay during dewatering at WWE.	WWE	
85.00	Currently, no reuse at WWE; cannot provide reclaimed water to Lochmoor Golf Course until AWT construction complete.		
87.00	There is no PSC approved rate for the Lochmoor water; FCWC was planning to charge 13 cents per 1000 gallons. PSC has said a 21 cent rate is more equitable. Water will be given to Lochmoor until PSC approves a rate.		
91.00	Connection with NFMU was not possible at the time the CW permit was denied.	NFMU hook-up	
96.00	As of July 1993 meeting with EPA in Atlanta, did not know how long BB had discharged without a permit, and considered the matter closed by the administrative order.		
99.00	Has personal knowledge of BB's effluent quality dating to 1989 through review of monthly operating reports and DMRs.		
100.00	Has personal knowledge of CW and WWE effluent quality dating to 1989, because of work on environmental audits.		
107.00	Believes that, contrary to memo to Allen in fall of 1992, was a toxicity pass at WWE. At that time FCWC was trying to purchase Micco groves.		

Exhibit_____(GHB-13)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY, Defendant.	)	CIVIL ACTION NO.: 93-281-CIV-FM-21

DEFENDANT'S MOTION FOR A PROTECTIVE ORDER

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, defendant Florida Cities Water Company moves for entry of a protective order limiting discovery to evidence relating to Clean Water Act compliance by the Waterway Estates Wastewater Treatment Plant.

RECEIVED
APR 25 1994
DGS

Respectfully submitted,

Don G. Scroggin

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Of Counsel:

Dennis J. Getman, Esq.
General Counsel
Florida Cities Water Company
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Phone: 305-442-7000
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April 18, 1994

RECEIVED

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MAR 19 AM 10:30

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.:
	)	93-281-CIV-FM-21
FLORIDA CITIES WATER COMPANY,	)	
	)	
Defendant.	)	
	)	

Memorandum In Support Of Motion For A Protective Order

Pursuant to Fed. R. Civ. P. 26(c), defendant Florida Cities Water Company ("Florida Cities") seeks a protective order limiting discovery in this case to evidence relating to Clean Water Act compliance by the Waterway Estates Wastewater Treatment Plant located in North Fort Myers, Florida.

I. BACKGROUND

The government filed this action on October 1, 1993. The Complaint alleged that from October 1, 1988 until March 1992, Florida Cities, through operation of the Waterway Estates Wastewater Treatment Plant, violated section 301(a) of the Clean Water Act (CWA), 33 U.S.C. § 1311(a). The Complaint

states three separate claims, all of which allege violations of the CWA only by the Waterway Estates facility, and for specific time periods delineated in the Complaint. Count 1 alleges that, from October 1, 1988 to October 31, 1989, Waterway Estates discharged pollutants into the Caloosahatchee River without a NPDES permit. Count 2 alleges that, from November 1, 1989 to July 14, 1991, Waterway Estates discharged at an unpermitted location. Count 3 alleges that, from July 1991 to March 1992, Waterway Estates discharged effluents in violation of the limitations contained in its NPDES permit. Defendant filed an answer asserting numerous defenses to liability.[1/]

On February 11, 1994, the government served its First Request for Production of Documents pursuant to Fed. R. Civ. P. 34. The request focused solely on documents relating to the operation, management, and ownership of the Waterway Estates facility and its related sewerage system.[2/] In response to plaintiff's document request, the defendant produced for inspection and copying more than 100,000 pages of documents within the time frame set by the court. In connection with this production, defendant expended considerable effort to cull and produce only those documents or portions of documents that relate only

---

1/ The government's Motion to Strike Affirmative Defenses is pending.

2/ There was one exception. The government requested documents pertaining to the financial condition of the defendant and its corporate affiliates. Defendant has objected to this request as overly broad.

to the Waterway Estates facility, in conformance with the scope of the pleadings and the government's document request. The government reviewed some of these documents in Miami on March 14-15 and the balance of the documents in Washington, D.C. during the week of April 4-8, 1994.

Concurrently with its document review in Washington, the government indicated its desire to depose Julie L. Karleskint, the Operation Manager of Florida Cities, on April 20-21. These dates were informally confirmed between counsel, and on April 14 a notice of deposition was served fixing April 20-21 as the dates for the deposition. On April 13, the government for the first time announced its intention to inquire about waste water treatment facilities operated by defendant other than the Waterway Estates plant during its deposition of Ms. Karleskint. Furthermore, the government demanded production of all redacted documents in their entireties -- including documents which related to other Florida Cities facilities -- "no later than Friday, April 15, 1994," two days after the date of the government's new demand. Counsel for the government has indicated orally that he relies on section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), to support this request for unredacted documents. Florida Cities has received no formal document request pertaining to facilities other than the Waterway Estates treatment plant.

II. ARGUMENT

This court has substantial discretion to determine the appropriate scope of discovery in light of the issues raised by the case, the legitimate needs of the parties, and other circumstances. See generally Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1505 (11th Cir. 1985), cert. denied, 475 U.S. 1107 (1986). Rule 26(c), in particular, "emphasizes the complete control that the court has over the discovery process." Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2036, at 267 (1970).

The government's announced intention to depose Ms. Karleskint with respect to waste water treatment plants that are not the subject of the pleadings in this case, and its effort generally to broaden the scope of discovery, is unsupportable and inappropriate, and should be foreclosed. On virtually the eve of deposition, the government has suddenly sprung this request on Florida Cities and demanded immediate compliance. The government's demands go well beyond the scope of the complaint, whose allegations are directed only to the Waterway Estates facility. They are also outside the government's First (and only) Request for Production of Documents, which also involved only the Waterway Estates facility. Counsel for the government has indicated that plaintiff may amend the Complaint to cover other Florida Cities treatment facilities. However, the Complaint has not been amended. If and when the

Complaint is amended, the United States may depose witnesses and request documents consistent with the scope of those pleadings. However, it is improper for the government to use discovery in this case as a fishing expedition to assist it in gaining information for the drafting of an action involving other, yet-unnamed plants.

Furthermore, counsel's reference to § 309(d) of the Clean Water Act is unavailing. Section 309(d) does not set out the parameters of disclosure in this case; indeed, it is not a provision that relates to discovery at all. Hence, it does not support the government's demand for documents.

III. CONCLUSION

For the foregoing reasons, defendant Florida Cities respectfully requests entry of a protective order limiting discovery to evidence relating to Clean Water Act compliance by the Waterway Estates Wastewater Treatment Plant.

Respectfully submitted,

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Of Counsel:

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April 18, 1994

RECEIVED

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

94 APR 18 AM 10:31

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY, Defendant.	)	CIVIL ACTION NO.: 93-281-CIV-FM-21

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF CIVIL PROCEDURE 26(C)

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, counsel for defendant Florida Cities Water Company hereby certifies that he has met with counsel for the government by telephone in a good faith effort to resolve the issues raised in the accompanying Motion For A Protective Order and that the parties have not been able to reach an amicable resolution of these issues.

Don G. Scroggin

Gary H. Baise, Esq. (Trial Counsel)
Don G. Scroggin, Esq.
Jenner & Block
Suite 1200
601 13th Street, N.W.
Washington, DC 20005
Phone: 202-639-6076
Fax: 202-639-6066

Dated: April 18, 1994

CERTIFICATE OF SERVICE

I hereby certify that a copy of the "Memorandum In Support Of Motion For A Protective Order," "Order," "Defendant's Motion For A Protective Order," and "Certificate Of Compliance With Federal Rule Of Civil Procedure 26(C)" has this 18th day of April 1994 been sent to the following persons by United States first class mail, properly addressed and postage prepaid.

Daniel S. Jacobs, Esq.
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044

Lois J. Schiffer, Esq.
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Environment and Natural Resources Division
U.S. Department of Justice
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Gary H. Baise, Esq.

Exhibit_____(GHB-14)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

RECEIVED
APR 25 1994
DGS

UNITED STATES OF AMERICA,

Plaintiff,

vs. CASE NO. 93-281-CIV-FTM-21D

FLORIDA CITIES WATER COMPANY,

Defendant.
_____/

MIDDLE DISTRICT OF FLORIDA
FT. MYERS, FLORIDA
94 APR 18 PM 4:05
FILED

ORDER

This Cause is before the Court on the defendant, FLORIDA CITIES WATER COMPANY's Motion for Protective Order. The Court has carefully reviewed the motion and memorandum in support. The defendant is requesting that the deposition of Julie L. Karleskint, Operation Manager of Florida Cities be limited in scope to the Waterway Estates only and that the government's new demand of production of all redacted documents in their entirety which relate to other Florida Cities facilities be denied. The Court finds that scope of the deposition of Ms. Karleskint should not be limited, however, the defendant is permitted to object to any question but shall not instruct the deponent not to answer any questions. Regarding the documents, the defendant does not have to produce all redacted documents in their entirety by April 15, 1994, however the defendant shall produce all redacted documents in their entirety within twenty (20) days from the date of this Order subject to any assertion of confidentiality and privilege.

23

It is hereby ORDERED:

That the Motion for a Protective Order is hereby GRANTED in part and DENIED in part. It is GRANTED to the extent that the defendant does not have to produce all redacted documents in their entirety immediately, but must produce them within twenty days from the date of this Order subject to confidentiality and privilege. This Motion is DENIED as to limiting the scope of Julie L. Karleskint's deposition and in all other respects.

DONE and ORDERED in Chambers, Fort Myers, Florida, this 12th day of April, 1994.

GEORGE T. SWARTZ
UNITED STATES MAGISTRATE JUDGE

Exhibit_____(GHB-15)

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April 19, 1994

Daniel S. Jacobs, Esq.
Trial Attorney
Environment and Natural Resources Division
U.S Department of Justice
P.O. Box 7611
Washington, DC 20044

BY FAX

Re: Ex Parte Meetings with Florida Cities' Former Employees and Consultants (U.S. v. Florida Cities Water Company, No. 93-281-CIV-FTM-21D)

Dear Mr. Jacobs:

We have recently learned that the Department of Justice has on several occasions contacted and sought to meet with selected former employees and consultants of Florida Cities regarding the substance of this litigation without notifying opposing counsel. At least one such meeting has already occurred. We believe that such contacts are improper under applicable law, and we request that the Department of Justice immediately cease contacting and setting up meetings with former employees and consultants of Florida Cities regarding this case without first notifying Florida Cities and giving us the opportunity to be present at the meeting.

Exhibit 13

Several of these potential witnesses are former executive-level employees of Florida Cities who were both decision makers and persons privy to attorney-client privileged and other confidential information. Others are former consultants who worked closely with Florida Cities during the time of events at issue in this litigation. We fully expected the Department of Justice to notice the depositions of these and other potential witnesses, and we have already expressed our continuing willingness to cooperate fully with you in scheduling and conducting such depositions. However, we are dismayed by these attempts by the Department of Justice to circumvent this process by contacting these persons and seeking to conduct meetings on the substance of this case without notifying Florida Cities or giving us the opportunity to be present.

More disturbing, we are informed by more than one of these persons that they were made to feel pressured by the Department of Justice to have such meetings and that DOJ urged at least one such person contacted not to allow Florida Cities' counsel to attend a meeting, even though this person requested that we attend. (We understand that this person was told that the Department of Justice would cancel the meeting if Florida Cities' counsel were present.) We believe that it is improper for the Department to attempt to exert pressure on such an individual to meet alone with you under these circumstances.

As I am sure you are aware, the Middle District of Florida has held that, with respect to ex parte contact with former employees of an organization represented by counsel:

> Privileged communications present a distinct problem with respect to contact with former employees, thus ex parte contact should be barred to prevent disclosure of any inadvertent confidential communications.
>
> . . .
>
> [C]ourt authorization or opposing counsel's consent to ex parte contact should be required if the former employee was highly-placed in the company (such as a former officer or director) or if the former employee's actions are precisely those sought to be imputed to the corporation.

Rentclub, Inc. v. Transamerica Rental Finance Corp., 811 F.Supp 651 (M.D.Fla, 1992) at 657-658. In light of this authority and our open willingness to cooperate fully in your deposing these persons or other witnesses, pursuant to our joint agreement on discovery, we request that you notify us before making further contacts or before conducting any further meetings, so that we may be present.

Again, pursuant to our informal agreement that we would give each other notice of intended motions, we intend to file a Motion for a Protective Order regarding these contacts unless we can reach a mutually agreeable resolution before 2:00 pm Eastern Time tomorrow, Wednesday, April 20, 1994. We look forward to your full cooperation in this matter. Please contact me as soon as you receive this letter to communicate your intents.

Yours sincerely,

Don G. Scroggin

Don G. Scroggin

U.S. Department of Justice

Exhibit_____(GHB-16)

JCC:DSJ
90-5-1-1-3965

Washington, D.C. 20530

April 20, 1994
BY FAX AND U.S. MAIL

Don G. Scroggin
Jenner & Block
Suite 1200
601 13th Street, NW
Washington, DC 20005

Re: United States v. Florida Cities Water
No. 93-281-CIV-FTM-21 (M.D. Fla.)

Dear Mr. Scroggin:

I am in receipt this morning of your fax sent on April 19, 1994 (at 9:13 p.m.). Kindly consider this an initial reply designed not to fully examine the issues you raise, but simply to meet the 2:00 p.m. deadline today you unilaterally saw fit to impose.

First, please be advised that the United States take serious exception both to your representation of certain facts and the state of the law on the issue in question.

Second, please be advised that the conduct of the Department of Justice in this matter has been fully in accord with the Department's guidelines for its attorneys in such matters. See 59 Fed. Reg. 10086 (March 3, 1994).

We do recognize, however, that the Department's guidelines arguably may conflict with the Court's decision in Rentclub v. Tansamerica Rental Finance Corp., 811 F. Supp. 651 (M.D. Fla. 1992). In light of this potential conflict, as you can well imagine, we will need to carefully study the issue you raise. In the meantime, however, in due deference to the Court's decision in Rentclub, and in acquiescence to your request, until further notice, the United States will not contact any former employees of Florida Cities Water Company without first contacting an attorney of record for the Company in this matter. Moreover, if, after further study, we determine that we can no longer honor that commitment, we will give you ample opportunity to bring your motion before making any such contacts.

I trust that this reply will satisfactorily address your concerns at least for the time being, but please do not hesitate

to contact me to discuss this matter at any time.

Sincerely,

Assistant Attorney General
Environment and Natural Resources
Division

By: _____

Daniel S. Jacobs
Trial Attorney
Environmental Enforcement Section

cc: Mac Cauley
AUSA, M.D. Fla.

Gwen Eason
Assistant Regional Counsel
EPA Region IV

Exhibit_____(GHB-17)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

RECEIVED
JUN 23 1994
DGS

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY, INC., Defendant.	CIVIL ACTION NO. 93-281-CIV-FTM-21

MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION FOR AN ORDER ALLOWING EX-PARTE CONTACTS WITH FORMER EMPLOYEES

INTRODUCTION

This is a civil action brought on behalf of the Administrator of the U.S. Environmental Protection Agency ("EPA") pursuant to section 309(b) of the Clean Water Act ("the Act"), 33 U.S.C. § 1319(b), for civil penalties for violations of section 301 of the Act, 33 U.S.C. § 1311, and of the conditions and limitations of a National Pollutant Discharge Elimination System ("NPDES") permit issued by EPA pursuant to section 402 of the Act, 33 U.S.C. § 1342. Suit was filed on October 1, 1993.

Florida Cities Water Company, Inc. ("Defendant" or "FCWC") owns and operates the Waterway Estates Wastewater Treatment Plant located in North Fort Myers, Lee County, Florida, as well as other wastewater treatment plants in Florida. The Waterway Estates Plant collects and treats wastewater from residential and commercial sources and then discharges those wastewaters into the Caloosahatchee River. The wastewater discharges contain pollutants which may not be discharged into the River except in

compliance with a NPDES permit. The United States alleges that Defendant violated the Act by: (1) discharging pollutants into the River without a NPDES permit from October 1, 1988 to October 31, 1989; (2) discharging pollutants into a tributary canal, an unpermitted discharge point, from November 1, 1989 to July 14, 1991; and (3) discharging pollutants in excess of permit limits from July 1991 to June 1992.

The parties are presently engaging in informal and formal discovery. During the course of discovery, Defendant demanded that the United States not contact and meet with former employees and consultants of the Defendant corporation without first notifying Defendant and giving it the opportunity to be present at the meeting. Because the United States considers Defendant's demand to go well beyond the United States' legal and ethical obligations, it seeks an order from the Court expressly permitting it to have such contact and meetings.[1]

ARGUMENT

The Local Rules of the United States District Court for the Middle District of Florida specify that the professional conduct of all members of the bar of this Court, including those specially admitted, "shall be governed by the Model Rules of Professional Conduct of the American Bar Association as modified and adopted by the Supreme Court of Florida to govern the

[1] In accordance with Local Rule 3.01(g), counsel for the United States has conferred with counsel for Defendant regarding the issue raised herein, but counsel have been unable to agree on the resolution of the issue.

professional behavior of the members of the Florida Bar." Local Rule 2.04(c). The Supreme Court of Florida has adopted the "Rules Regulating the Florida Bar," which includes Chapter 4 entitled "Rules of Professional Conduct." The only rule arguably applicable to the issue sub judice is Rule 4-4.2 of the Florida Rules of Professional Conduct. Modelled largely on Rule 4.2 of the ABA Model Rules of Professional Conduct, Florida Rule 4-4.2 reads in pertinent part as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.[2]

Rule 4-4.2 and its official comment, like American Bar Association Model Rule 4.2 and its official comment, are silent as to whether ex-employees are to be deemed a "party" for the purposes of ex-parte communications. On the basis of an exhaustive analysis of the Florida and ABA rules, prevailing case law, and commentary, the United States respectfully submits that the rule simply is not applicable to ex-employees.

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[2] The Florida Rules also adopts the following pertinent official Comment to ABA Rule 4.2:

> In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization and with any other person whose act or mission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

The Board of Governors of the Florida Bar addressed this very issue in Opinion 88-14 (March 7, 1989), reprinted in Professional Ethics of the Florida Bar at 1299 (attached hereto as Exhibit A). Their opinion, in brief, was as follows: "A plaintiff's attorney may communicate with former managers and former employees of a defendant corporation without seeking and obtaining consent of corporation's attorney."[3]

Because Rule 4-4.2 follows ABA Model Rule 4.2 in all pertinent respects, the ABA's own interpretation of its rule is also instructive.[4] Significantly, a 1991 formal ABA opinion expressly held that Rule 4.2 does not apply to former corporate employees, even ones who held high ranking or managerial positions, based on the plain language of the rule and the fact that such an interpretation would inhibit the acquisition of

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[3] The Board of Governors reasoned as follows:

> The issue is whether Rule 4-4.2, Rules Regulating the Florida Bar, proscribes the plaintiffs' attorneys from contacting former managers and other former employees of the defendant corporation except with the permission of the corporation's attorneys. As regards former managers and other former employees who have not maintained any ties with the corporation -- who are no longer part of the corporate entity -- and who have not sought or consented to be represented in the matter by the corporation's attorneys, the answer must be in the negative.

Id.

[4] "Since question of ethics in federal cases are ultimately questions of federal law, the Court is guided by federal case law, as well as the American Bar Associations comments to its Model Rules of Professional Conduct and the policies underlying the particular ethical rule at issue." Kitchen v. Aristech Chemical, 769 F. Supp. 254, 258 (S.D. Ohio 1991).

information. ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion No. 91-359 (March 22, 1991) reprinted in ABA/BNA Lawyers' Manual on Professional Conduct at 1001:101 (attached hereto as Exhibit B). The opinion states as follows:

> [A] lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer.

Id. at 1001:104. Accord, G. Hazard & W. Hodes, The Law of Lawyering, §4.2:107 (2d ed. 1993 Supp.) ("The no-contact regime...does not address communications with former agents and employees, and technically there should be no bar, since former employees cannot bind the organization, and their statements cannot be introduced as admissions of the organization.") (emphasis original); Susan J. Becker, "Conducting Informal Discovery of a Party's Former Employees: Legal and Ethical Concerns and Constraints," 51 Maryland Law Rev. 239, 286-87 (1992) ("Perhaps the most persuasive reasons for allowing ex parte contact of an opposing party's former employees is that neither Model Rule 4.2 nor its Comment truly applies to the

former employee situation.")[5]

The ABA Formal Opinion has greatly influenced this area of the law. As one court observed, "every decision after the promulgation of the ABA's Formal Opinion in March 1991 has adopted the majority position [that Rule 4.2 does not apply to any former employee]." Valassis v. Samelson, 143 F.R.D. 118, 121 n.2 (E.D. Mich. 1992). See In re Domestic Air Transportation Antitrust Litigation, 141 F.R.D. 556, 561-62 (N.D. Ga. 1992) ("court will not require plaintiffs to notify defendants of their intention to interview former employees, nor will it mandate that plaintiffs allow counsel for defendants to be present during the interview."); Goff v. Wheaton Industries, 145 F.R.D. 351, 354 (D.N.J. 1992) ("neither the goal of the Rule nor its underlying rationale support extending the protections of this ethical rule to include former employees"); DuBois v. Gradco Systems, Inc., 136 F.R.D. 341 (D. Conn. 1991) (no ethical rule bars ex parte communications with former employees of an adversary corporate defendant); Action Air Freight, Inc. v. Pilot Air Freight Corp., 769 F. Supp. 899, 904 (E.D. Pa. 1991) (permitted defense counsel to make ex parte contacts with the former employees currently

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[5] Professor Becker elaborates as follows:

> A former employee is not a represented party or managerial member of an organization; furthermore, the termination of an individual's employment relationship with a party negates the possibility that the individual's statement could constitute a binding admission.

Id.

working for the plaintiff); Shearson Lehman Bros., Inc. v. Wasatch Bank, 139 F.R.D. 412, 417 (D. Utah 1991) ("In light of recent developments in the law and commentary addressing the issue of the scope of Rule 4.2 [the contention] that former employees are within the scope of the rule is rejected.").[6]

While a small minority of courts have restricted contacts with ex-employees, nearly all such decisions predate the ABA Formal Opinion. See Public Service Electric and Gas Co. v. Associated Electric & Gas Ins. Services, Ltd., 745 F. Supp. 1037, 1042 (D.N.J. 1990); Chancellor v. Boeing, 678 F. Supp. 250 (D. Kan. 1988); Porter v. Arco Metals Co., Div. of Atlantic Richfield Corp., 642 F. Supp. 1116, 1118 (D. Mont. 1986). Indeed, judges of the United States District Court for the District of New Jersey openly criticized their colleague who restricted such contacts. Hanntz v. Shiley, Inc., 766 F. Supp. 258, 270 (D.N.J. 1991) ("The holding in PSE & G ... strikes an unreasonable balance between protecting a relationship that does not exist and unduly restricting the need for litigants to have access to all relevant factual information pertinent to the case."); Goff v. Wheaton Industries, 145 F.R.D. at 355 ("the approach taken in PSE & G is unduly harsh and an unnecessary extension of the Rule.").

The United States recognizes that Judge Kovachevich of this

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[6] Even before the ABA Formal Opinion, the majority view was that there are no ethical prohibitions to contacting any former employee of a defendant corporation. See Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 628 (S.D.N.Y. 1990); University Patents, Inc. v. Kligman, 737 F. Supp. 325 (E.D. Pa. 1990).

Court has twice addressed the issue at bar in recent published opinions holding that under certain circumstances ex-employees may not be contacted. That position, however, is not only in the vast minority in terms of the published federal court precedent, but is also inconsistent with the Florida Bar and ABA ethics opinions. Under a unique and extraordinary set of facts, Judge Kovachevich held broadly as follows in Rentclub v. Tansamerica Rental Finance Corp., 811 F. Supp. 651 (M.D. Fla. 1992): "Privileged communications present a distinct problem with respect to contact with former employees, thus ex parte contact should be barred to prevent disclosure of inadvertent confidential communications. The focus in on whether the former employee's statements could be admissions against the corporation or whether their actions could be imputed to the corporation." Id. at 657.[7] Judge Kovachevich subsequently held somewhat more narrowly as follows in Browning v. AT & T Paradyne, 838 F. Supp. 1564 (M.D. Fla. 1993): "In reliance on Rule 4-4.2 and its corresponding comments, this Court has and continues to hold that a 'party' for purposes of this rule includes former managerial employees, if their statements 'could be admissions against the

[7] In Rentclub, the plaintiff actually hired defendant's ex-employee as a "trial consultant." Although no appeal was timely taken of the Rentclub decision, the party whose attorney was disqualified later moved for an amendment of the order to certify questions of law for interlocutory review pursuant to 28 U.S.C. § 1292(b). The Court denied the motion on the basis that the disqualification order was immediately appealable under 28 U.S.C. § 1291 and could not be certified for interlocutory appeal after the time periods for filing notice of appeal and for filing a motion for extension of time have lapsed. 806 F. Supp. 259.

corporation or ... their actions could be imputed to the corporation.'" Id. at 1567. In the first case, Judge Kovachevich granted the moving party's motion to disqualify counsel; in the second case, she denied such a motion.

As noted in Curley v. Cumberland Farms, Inc., 134 F.R.D. 77, 79-80 (D.N.J. 1991), another New Jersey case finding Rule 4.2 inapplicable to former employees, the decision of one judge is not binding upon another judge of the same court in a different law suit. Based on the prevailing law, and with due deference to Judge Kovachevich, the United States respectfully submits that the extension of "party" under Rule 4-4.2 to ex-employees is erroneous. Indeed, the application of the rule to former employees, could have numerous unintended anomalous, impractical, and illogical results. By limiting an important avenue of informal discovery, it would necessarily increase the use of formal discovery, a result clearly antithetical to the Supreme Court's intentions in amending the discovery rules in the Federal Rules of Civil Procedure in December 1993. Moreover, a former employee is potentially a valuable witness for the party adverse to his/her former employer: the former employee may be very knowledgeable of facts relevant to the litigation yet not be as reticent as he might be if still employed. Assuming the adverse party wanted to call a former employee as a witness, it would be precluded from interviewing and preparing the witness for trial. If the former employer's attorney were entitled to be present at meetings between the adverse party and the employee, the adverse

party's attorney work product would necessarily be shared. Indeed, the facts in Browning serve as an example of an absurd -- yet conceivable -- extension of Judge Kovachevitch's interpretation: the moving party moved for the disqualification of plaintiffs' counsel on the grounds that counsel had spoken to their own client, a former employee of the defendant corporation!

Limitations such as might result from as broad an interpretation as Judge Kovachevitch's would be particularly serious insofar as the United States is concerned. In carrying out their law enforcement functions, attorneys for the United States in particular require -- and must have access to -- a variety of informal means of acquiring information. To ensure that they have such access under appropriate, yet controlled circumstances, the U.S. Department of Justice has promulgated extensive guidelines governing its attorneys' communications with represented persons. See 42 Fed. Reg. 10086 et seq. (March 3, 1994). By their own terms, the rules are expressly inapplicable to communications with former employees. Id. at 10101.

The United States acknowledges that Florida Cities has a legitimate ongoing interest in ensuring that information protected by the attorney-client privilege not be jeopardized by virtue of an employee having left the Company. On the other hand, the United States has an equally strong interest in gathering evidence in this matter through all appropriate means, as well as in having ongoing contacts with potential Government witnesses without sharing its work product with the Defendant's

attorneys. The United States fully intends to avoid eliciting attorney-client privileged information from former employees. To the extent that Florida Cities has doubts about the United States' intentions in this regard, it is certainly free to solicit its own interviews of its former employees, before and/or after the United States' contacts with them.

CONCLUSION

Florida Rule 4-4.2 should not and does not preclude the United States from having ex parte contacts with Defendant's former employees. Accordingly, this Court should enter an order expressly allowing such contacts.[8]

Respectfully submitted,

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[8] Pursuant to Local Rule 3.01(d), the United States respectfully requests that the Court allow oral argument on the United States' Motion. The time estimated for argument is one hour (one-half hour for the United States and one-half hour for defendant).

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OPINION 88-14
(March 7, 1989)

A plaintiff's attorney may communicate with former managers and former employees of a defendant corporation without seeking and obtaining consent of corporation's attorney.

Note: This opinion was approved by the Board of Governors at its March 1989 meeting.

RPC:	4-4.2; ABA Model 4.2
CPR:	DR 7-104(A)(1)
Opinions:	Alaska 88-3, Colorado 69, Illinois 85-12, Los Angeles Co. 369, Maryland 86-13, Massachusetts 82-7, Michigan CI-597, N.Y. City 80-46, N.Y. County 528, Virginia 533, Wisconsin E-82-10
Case:	*Wright v. Group Health Hospital*, 691 P.2d 564 (Wash. 1984)
Statutes:	*F.S.* 90.803(18)(e); Florida Evidence Code
Misc:	Fed.R.Evid. 801(d)(2)(D)

The inquiring attorney's law firm represents the plaintiffs in a civil action against a corporation. The attorneys wish to have ex parte interviews with former employees of the defendant corporation who were employed by the corporation during the period when the actions or decisions on which the suit is based occurred. The former employees may include some who had managerial responsibilities and some whose acts or omissions during their employment might be imputed to the corporation for purposes of civil liability. As is usually the case, the defendant corporation objects to ex parte contacts with its former employees.

The issue is whether Rule 4-4.2, Rules Regulating The Florida Bar, proscribes the plaintiffs' attorneys from contacting former managers and other former employees of the defendant corporation except with the permission of the corporation's attorneys. As regards former managers and other former employees who have not maintained any ties with the corporation—who are no longer part of the corporate entity — and who have not sought or consented to be represented in the matter by the corporation's attorneys, the answer must be in the negative.

Rule 4-4.2 is substantially the same as its predecessors in the Code of Professional Responsibility (DR 7-104(A)(1)) and the earlier Canons of Professional Ethics (Canon 9). (The American Bar Association's "code comparison" for Model Rule 4.2 states that the rule is "substantially identical" to DR 7-104(A)(1).)

The rule forbids a lawyer to communicate about the subject of the representation with a person the lawyer knows to be represented in the matter unless the lawyer obtains the permission of the person's counsel. The comment to the rule

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states that in the case of organizations (including corporations), the rule prohibits ex parte communications with "persons having a managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." The comment further states that if an agent or employee of the organization is represented by his or her own counsel in the matter, then it is the consent of that lawyer—not the organization's lawyer—that must be obtained.

Nothing in Rule 4-4.2 or the comment states whether the rule applies to communications with former managers and other former employees. To the extent that the comment implies that the rule does apply to these individuals, it is contrary to ethics committees' interpretation of the rule.

Rule 4-4.2 cannot reasonably be construed as requiring a lawyer to obtain permission of a corporate party's attorney in order to communicate with former managers or other former employees of the corporation unless such individuals have in fact consented to or requested representation by the corporation's attorney. A former manager or other employee who has not maintained ties to the corporation (as a litigation consultant, for example) is no longer part of the corporate entity and therefore is not subject to the control or authority of the corporation's attorney. In many cases it may be true that the interests of the former manager or employee are not allied with the interests of the corporation. In such cases the conflict of interests would preclude the corporation's attorney from actually representing the individual and therefore would preclude the corporation's attorney from controlling access to the individual. As the comment indicates with regard to current employees, if a former manager or former employee is represented in the matter by his personal attorney, permission of that attorney must be obtained for ex parte contacts, including contacts by the corporation's attorney.

A former manager or employee is no longer in a position to speak for the corporation. Further, under both the federal and the Florida rules of evidence, statements that might be made by a former manager or other former employee during an ex parte interview would not be admissible against the corporation. Both Rule 801(d)(2)(D), Federal Rules of Evidence, and Section 90.803(18)(c), Florida Evidence Code, provide that a statement by an agent or servant of a party is admissible against the party if it concerns a matter within the scope of the agency or employment and is *made during the existence of the agency or employment relationship.*

This Committee has not previously had occasion to issue an opinion on the question of communicating with former managers and employees but, as indicated above, bar ethics committees in a number of states have done so. The clear consensus is that former managers and other former employees are not within the

scope of the rule against ex parte contacts. Alaska Bar Opinion 88-3 (6/7/88) (Former employees are no longer part of corporate entity and no longer can act or speak on behalf of corporation; opposing lawyer therefore may contact former employees, including former members of corporation's control group who dealt with subject matter of litigation, but may not inquire into privileged communications); Colorado Bar Opinion 69 (Revised) (6/20/87) (Former employee cannot bind corporation as matter of law; lawyer may interview opposing party's former employees with regard to all matters except communications within corporation's attorney-client privilege); Illinois Bar Opinion 85-12 (4/4/86) (Former employees, including those who were part of corporation's control group, may be contacted without permission of corporate counsel; direct communications with former control group employees may elicit information adverse to corporation, but that direct contact no more deprives corporation of benefit of counsel than does direct communication with any potential witness); Los Angeles County, Calif., Bar Opinion 369 (11/23/77) (Although ethical dangers may be posed if rule prohibiting ex parte contacts is not extended to former controlling employees, no authority is found to support such extension); Maryland Bar Opinion 86-13 (8/30/85) (Lawyer may communicate with former employee of adverse corporate party if former employee is not represented by counsel).

Also, Massachusetts Bar Opinion 82-7 (6/23/82) (Lawyer may communicate with former employees of corporate defendant regarding matters within scope of their employment; former employees enjoy no current agency relationship that is being served by corporate counsel's representation); Michigan Bar Opinion CI-597 (12/22/80) (Plaintiff's attorney may communicate with prospective witness, who is former employee of corporate defendant, on subject matter of representation if employee is unrepresented); New York City Bar Opinion 80-46 (Former employees are no longer part of corporate entity and may be contacted ex parte); New York County Bar Opinion 528 (1965) (Although direct communication with any current manager or employee of defendant corporation is improper, restriction does not apply to communications with former employees); Virginia Bar Opinion 533 (12/16/83) (Lawyer may communicate directly with former officers, directors and employees of adversary corporation on subject of pending litigation unless lawyer has reason to know those witnesses are represented by counsel); Wisconsin Bar Opinion E-82-10 (12/82) (Lawyer may contact former employee of opposing party to obtain material information even though former employee was managing agent, if former employee has severed all ties with corporation and therefore is not in position to commit corporation).

See *Wright v. Group Health Hospital*, 691 P.2d 564 (Wash. 1984). In *Wright*, the Washington Supreme Court ruled that because former employees cannot possibly speak for a defendant corporation, the rule against communicating with adverse parties does not apply. The court found no reason to distinguish between former employees who witnessed an event and those whose act or omission caused

the event. The court said the purpose of the communication rule is not to protect a corporate party from revelation of prejudicial facts, but rather to preclude interviewing of employees who have authority to bind the corporation.

As stated above, it is ethically permissible for the inquiring attorney to contact former managers and other former employees of the opposing party without obtaining permission from the corporation's attorney unless those former employees are in fact represented by the corporation's attorney. But as indicated by some of the ethics committees cited above, the attorney should not inquire into matters that are within the corporation's attorney-client privilege (e.g., asking a former manager to relate what he had told the corporation's attorney concerning the subject matter of the representation).

ABA Formal Opinions

The ABA Standing Committee on Ethics and Professional Responsibility issues both formal and informal opinions. Formal opinions are on subjects determined by the committee to be of widespread interest or of unusual importance. They appear her in full text and are copyrighted by the ABA.

Formal Opinion 91-359
March 22, 1991

Contact With Former Employee Of Adverse Corporate Party

The prohibition of Rule 4.2 with respect to contacts by a lawyer with employees of an opposing corporate party does not extend to former employees of that party.

The Committee has been asked for its opinion whether a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without the consent of the corporation's lawyer, communicate about the subject of the representation with an unrepresented former employee of the corporate party.

The starting point of our inquiry is Model Rule of Professional Conduct 4.2, which states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The rule is, for purposes of the issue under discussion, substantially identical to DR 7-104(A)(1), which states as follows:

> (A) During the course of his representation of a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

The comment to Rule 4.2 makes clear that corporate parties are included within the meaning of "party" in that Rule, and is helpful in defining the contours of that rule as it applies to *present* employees of corporate parties:

> [1] This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with non lawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.
>
> [2] In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to

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> the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for the purposes of this Rule. Compare Rule 3.4(f).
>
> [3] This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

The rationale on which Rule 4.2 was formulated was identified in *Wright v. Group Health Hospital*, 103 Wash.2d 192, 691 P.2d 564, 576 (1984).

> The purposes of the rule against ex parte communications with represented parties are "preserving the proper functioning of the legal system and shielding the adverse party from improper approaches." (Citing ABA Formal Opinion 108 (1934)).

The profession has traditionally considered that the presumptively superior skills of the trained advocate should not be matched against those of one not trained in the law. As discussed at Law. Man. Prof. Conduct 71:302,

> ... The rule against communicating with the opposing party without the consent of that party's lawyer does not admit of any exceptions for communications with "sophisticated" parties. Maru, 10861 (Fla. Bar Op. 76-21 (4/19/77)). See also *Waller v. Kotzen*, 567 F. Supp. 424 (E.D. Pa. 1983) (plaintiff's counsel contacted insurance company directly, after insurer was represented by counsel); *Estate of Vañades v. Sheppard Bus Service*, 469 A.2d 971 (N.J. Super. 1983) (negotiations were conducted with insurance company for defendants).

cf. Meat Price Investigators Assn. v. Iowa Beef Processors, 448 F.Supp. 1, 3 (S.D. Iowa 1977) (while leaving question of culpability of counsel's conduct to disciplinary authorities, court declined to disqualify counsel for interviewing an officer of an opposing party who was a "sophisticated businessman who was openly willing to share his knowledge of the beef industry with attorneys he knew to be plaintiff's counsel.") *See also* Code of Professional Responsibility EC 7-18:

> The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person....

The comment to Rule 4.2 limits those *present* corporate employees covered by this rule to:

> persons having a managerial responsibility on behalf of the organization, and ... any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

The inquiry as to present employees thus becomes whether the employee (a) has "a managerial responsibility" on behalf of the employer-corporation, or (b) is one whose act or admission in connection with the matter that is the subject of the potential communicating lawyer's representation may be *imputed* to the corporation, or (c) is one whose "statement may constitute an admission" by the corporation.

Whether an employee falls into any of these three categories is inevitably an is-

sue affected by a host of factors, the exploration of none of which need detain us. These include at least the terms of the relevant statutory and common law of the state of the corporation's incorporation; applicable rules of evidence in the relevant jurisdiction; and relevant corporate documents affecting employees' duties and responsibilities.

At least insofar as the test of imputable act or omission is concerned all of these factors, in turn, would have to be applied within the context of "the matter in representation" to determine whether the acts or omissions of the employee can be imputed to the corporation with respect to that particular matter. That requires a determination of the scope of the subject matter of the potentially-communicating lawyer's representation.

The comment—by defining three categories of unrepresented corporate employees with whom communication "concerning the matter in representation" is prohibited absent the consent of the corporation's counsel or authorization of law—clearly implies that communication with all *other* employees on "the matter in representation" is permissible without consent, subject only to such other rules and other law as may be applicable. (*E.g.*, Rule 4.1, requiring truthfulness in statements to others and Rule 4.3, addressing a lawyer's dealings with unrepresented persons.)

Neither the Rule nor its comment purports to deal with *former* employees of a corporate party. Because an organizational party (as contrasted to an individual party) necessarily acts through others, however, the concerns reflected in the Comment to Rule 4.2 may survive the termination of the employment relationship.

(It is appropriate to note here that those addressed by the Comment are not denominated "employees" but "persons." The Rule presumably covers independent contractors whose relationship with the organization may have placed them in the factual position contemplated by the Comment. Because the issue this Opinion addresses deals expressly with former *employees*, we need not explore the ramifications of this expansive terminology.)

While Rule 4.2 does not purport by its terms to apply to former employees, courts confronting the issue have interpreted Rule 4.2 (as illuminated by its comment) and DR 7-1-4(A)(1) (which does not have such a comment or comparable discussion in any Ethical Consideration) in various ways.

Most recently, in an aside in a case dealing with current employees under DR 7-104(A)(1), the New York Court of Appeals noted its agreement with the Appellate Division that the rule applies "only to current employees, not to former employees." *Niesig v. Team I et al*, 76 N.Y.2d 363, 558 N.E.2d 1030 (1990). *See also Wright by Wright v. Group Health Hosp.*, 103 Wash. 2d 192, 691 P.2d 564 (1984) (reasoning that former employees could not possibly speak for or bind the corporation, and therefore interpreting DR 7-104(A)(1) as not applying to them); and *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621 (S.D.N.Y. 1990) (holding that DR 7-104 does not bar contacts with former corporate employees, at least in absence of a showing that the employee possessed privileged information).

On the other hand, other courts have held that former employees *are* covered (it is usually phrased that they will be considered "parties" for *ex parte* contact purposes) under certain circumstances. Thus, Rule 4.2 has been held to bar *ex parte* contacts with former employees who, while employed, had "managerial responsibilities concerning the matter in litigation." *Porter v. Arco Metals*, 642 F.Supp. 1116, 1118 (D. Mont. 1988). In *Amarin Plastics v. Maryland Cup Corp.*, 116 F.R.D. 36 (D. Mass. 1987) the Court, while recognizing the possible applicability of Rule 4.2 to former employees, declined to apply it on the facts of that case. It noted, however, the additional

possibility that communications between a former employee and his former corporate employer's counsel may be privileged. *Id.*, at 41. *See also In re Coordinated Pre-Trial Proceedings in Petroleum Products Antitrust Litigation*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981), *cert. denied*, 455 U.S. 99 (1982) (noting that the rationale of *Upjohn v. United States*, 449 U.S. 383 (1981), with respect to corporate attorney-client privilege applies to former as well as current corporate employees). In *Public Service Electric and Gas Company v. Associated Electric and Gas Ins. Services, Ltd.*, 745 F. Supp. 1037 (D. N.J. 1990) the court interpreted Rule 4.2 to cover all former employees.

Commentators on the subject of *ex parte* contacts with former employees have likewise urged application of the prohibition on contacts to at least some former corporate employees. *See, e.g.*, Stahl, *Ex Parte Interviews with Enterprise Employees: A Post-Upjohn Analysis*, 44 Wash. & Lee L. Rev. 1181 at 1227 (1987), recommending a functional approach deeming

> any present or former employee who is identified with an enterprise, either for purposes of resolving disputed issues or effective representation of the enterprise, to be a party representative for discovery purposes. Any other rule would put enterprises at a distinct and unfair disadvantage and may effectively deny enterprises the full benefit of representation by counsel....

See also Miller and Calfo, *Ex Parte Contact with Employees and Former Employees of a Corporate Adversary: Is It Ethical?*, 42 Bus. Law. 1053 at 1072-73 (1987):

> [C]ourt authorization or opposing counsel's consent to ex parte contact should be required if the former employee was highly-placed in the company (such as a former officer or director) or if the former employee's actions are precisely those sought to be imputed to the corporation.

While the Committee recognizes that persuasive policy arguments can be and have been made for extending the ambit of Model Rule 4.2 to cover some former corporate employers, the fact remains that the text of the Rule does not do so and the comment gives no basis for concluding that such coverage was intended. Especially where, as here, the effect of the Rule is to inhibit the acquisition of information about one's case, the Committee is loath, given the text of Model Rule 4.2 and its Comment, to expand its coverage to former employees by means of liberal interpretation.

Accordingly, it is the opinion of the Committee that a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer.

With respect to *any* unrepresented former employee, of course, the potentially-communicating adversary attorney must be careful not to seek to induce the former employee to violate the privilege attaching to attorney-client communications to the extent his or her communications as a former employee with his or her former employer's counsel are protected by the privilege (a privilege not belonging to or for the benefit of the former employee, by the former employer). Such an attempt could violate Rule 4.4 (requiring respect for the rights of third persons).

The lawyer should also punctiliously comply with the requirements of Rule 4.3, which addresses a lawyer's dealings with unrepresented persons. That rule, insofar as pertinent here, requires that the lawyer contacting a former employee of an opposing corporate party make clear the nature of the lawyer's role in the matter, giving occasion for the con-

tact, including the identity of the lawyer's client and the fact that the witness's former employer is an adverse party. *See, e.g., Brown v. Peninsula Hospital Centers*, 64 A.D.2d 685, 407 N.Y.S.2d 586 (App. Div. 1978) (attorneys for defendant hospital should have disclosed potential conflict of interest before talking to treating physician and producing him for deposition as hospital's representative); ABA Informal Opinion 908 (1966).

Formal Opinion 91-360
July 11, 1991

Prohibition of Partnerships with Nonlawyers: Extrajurisdictional Effect

A lawyer who is licensed both in a jurisdiction that prohibits partnerships with nonlawyers, as in Model Rule 5.4(b), and in a jurisdiction that permits lawyers to form partnerships with nonlawyers, but who practices only in the latter jurisdiction, should not be subject to the prohibition of the jurisdiction where the lawyer does not practice. On the other hand, if a lawyer licensed in two such jurisdictions is engaged in practice in the jurisdiction that prohibits such partnerships, the lawyer must adhere to the restrictions of that jurisdiction.

The ethical prohibition on a lawyer practicing law in partnership with a nonlawyer that is embodied in Rule 5.4(b) of the ABA Model Rules of Professional Conduct has until very recently been in force in every American jurisdiction.[1] This unanimity, however, was broken at the beginning of 1991 when a different version of Rule 5.4(b), allowing lawyers to practice in partnership with nonlawyers in certain circumstances, came into effect in the District of Columbia.[2] In this Opinion we address the question of what ethical rule should govern when lawyers are partners in a law firm that, as permitted by the D.C. rule, includes nonlawyer partners, but are also members of the bar of another juris-

[1]The ABA's formal prohibitions against lawyer partnerships with non-lawyers date back to 1928, when Canon 33 was added to the Canons of Ethics. Canon 33 provided in pertinent part that "[p]artnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law." Canon 34 prohibited fee splitting with nonlawyers. Canon 35 warned against lawyers being "controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer."

In 1969, the Model Code of Professional Responsibility replaced the Canons of Ethics. DR 3-103 carried over Canon 33's prohibition against lawyers forming partnerships with nonlawyers but phrased the prohibition in mandatory rather than merely precatory language. DR 3-102 continued Canon 34's prohibition against fee-splitting with nonlawyers, with certain limited exceptions. DR 5-107(C) prohibited lawyers from practicing law with or in the form of a professional corporation if "(1) a non-lawyer owns any interest therein. . . ; (2) a non-lawyer is a corporate director or officer thereof; or (3) a non-lawyer has the right to direct and control the professional judgment of a lawyer."

In 1983, the ABA Model Rules of Professional Conduct supplanted the Model Code. Model Rule 5.4 incorporated traditional restrictions against lawyer and nonlawyer associations. Rule 5.4(b) reproduced verbatim DR 3-103(A)'s prohibition of lawyer partnerships with nonlawyers. The Model Rule as originally proposed by the Commission on Evaluation of Professional Standards (commonly known as the Kutak Commission) included a proposed Rule 5.4 that would have allowed nonlawyer partners in law firms on somewhat broader terms than those contemplated by the District of Columbia version of Rule 5.4(b); but that proposal was rejected by the ABA House of Delegates in 1983. *See The Legislative History of the Model Rules of Professional Conduct. Their Development in the ABA House of Delegates* 160 (ABA Center for Professional Responsibility 1987). Rule 5.4(a) continued the Code's prohibition against fee-splitting with nonlawyers. Rule 5.4(d) is substantially identical to DR 5-107(C).

For a detailed treatment of the history of the ABA restriction on lawyer collaboration with nonlawyers as well as a close consideration of the various arguments for and against such collaborations, *see* Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rule?*, 40 Hastings L.J. 577 (1989).

[2]The history of the D.C. version of Rule 5.4(b) is described in S. Gilbert and L. Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 Georgetown J. Legal Ethics 383 (1988). The D.C. Rules of Professional Conduct, including the variant version of Rule 5.4(b), were adopted by order of the District of Columbia Court of Appeals March 1, 1990, effective January 1, 1991.)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY, INC., Defendant.	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' MOTION FOR AN ORDER ALLOWING EX-PARTE CONTACTS WITH FORMER EMPLOYEES

Pursuant to Rule 7(b) of the Federal Rules of Civil Procedure and Local Rule 3.01(a), and for the reasons more fully set forth in the accompanying memorandum of law, the United States moves this Court for an Order, in the form attached hereto, expressly permitting the United States to have ex parte contacts with former employees of the Defendant corporation.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY, INC., Defendant.	)	CIVIL ACTION NO. 93-281-CIV-FTM-21

ORDER

The United States having filed a Motion For an Order Allowing Ex-Parte Contacts with Former Employees, and the Court finding good cause for such an Order to issue, it is hereby ORDERED that the United States may have ex-parte contacts with Defendant's former employees.

DONE AND ORDERED at Tampa, Florida, this ___ day of _____, 1994.

_____
United States District Judge

CERTIFICATE OF SERVICE

I certify that copies of the foregoing "United States' Motion for An Order Allowing Ex-Parte Contacts with Former Employees (with proposed order attached)" and accompanying memorandum of law were served by United States Mail (unless otherwise indicated) on the 23rd day of June, 1994, to the following counsel of record:

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Exhibit_____(GHB-18)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.:
	)	93-281-CIV-FTM-21
FLORIDA CITIES WATER COMPANY,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S
MOTION FOR AN ORDER ALLOWING
EX PARTE CONTACTS WITH FORMER EMPLOYEES

Defendant Florida Cities Water Company ("Florida Cities") hereby opposes Plaintiff United States' Motion for an Order Allowing Ex Parte Contacts with Former Employees ("Motion"). For the reasons that follow, unless advance notification has been given to Defendant of any intended contacts with former employees, and unless counsel for Defendant has the opportunity to be present during such contacts, Plaintiff's contacts with former employees should not be allowed. Plaintiff's Motion should therefore be denied.

I. BACKGROUND

In April 1994, counsel for Defendant learned from former Florida Cities employees that, on several occasions beginning about February 1994, counsel for the Plaintiff engaged in ex parte contacts with several former employees of Florida Cities and was in the process of scheduling and attempting to engage in further ex parte contacts with former employees regarding the substance of the instant litigation. Defendant and Defendant's counsel had no notice that the Plaintiff had any intention of making such contacts outside the context of depositions.[1/] Defendant also learned of ex parte contacts made by counsel for the Plaintiff with consultants who where hired by Defendant to work on projects that are at issue in this litigation.

In April of 1994, Defendant learned that at least one ex parte meeting between a Department of Justice attorney and a former Florida Cities' employee had already been held. Specifically, in approximately early March 1994, counsel for the Plaintiff travelled to Australia and met with Robert H. French, former Senior Vice President of Defendant Florida Cities (employed by Defendant from

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[1/] Counsel for both parties had discussed on several occasions the expectation that former employees, including Mr. Robert French, a former Florida Cities' employee currently residing in Australia, would be voluntarily deposed with the full cooperation of Florida Cities. During these discussions, Department of Justice attorneys failed to disclose to Defendant that contact with Mr. French had already occurred and that a Department of Justice attorney had travelled to Australia to meet with him. If, as the United States now maintains, such contacts were proper and routine, it is puzzling why the United States took steps to conceal these contacts from Florida Cities.

1987 to 1990), at his permanent residence in Wahroonga, N.S.W., Australia. Counsel for Defendant was subsequently informed by Mr. French that the Department of Justice attorney had met with him and had sought information relating directly to the central legal and factual issues in this litigation. Had Defendant Florida Cities known of Plaintiff's intent to meet with Mr. French, Florida Cities would have strenuously objected to the Department of Justice's conducting such a meeting secretly and without notice and would have asked for the opportunity to be present.

Defendant also subsequently learned that counsel for the Plaintiff had scheduled several additional meetings with former Florida Cities' employees to take place late in the week of April 18, 1994. Specifically, Defendant learned that interviews were either scheduled or attempted to be scheduled with (1) Antone A. Reeves, former Executive Vice-President and Chief Operating Officer of Defendant Florida Cities (employed by Defendant from approximately 1968 to 1991); and (2) James Elder, former Manager of Engineering and Construction for Defendant Florida Cities (employed by Defendant from 1989 to 1992). In addition, counsel for Florida Cities learned that the Plaintiff had scheduled an interview with William D. Harrop, President of Source, Inc., who was the Director of Engineering for the design of the waste water treatment facility at issue here, Florida Cities' Waterway Estates.

In an effort to speed up discovery, upon learning of the above contacts, Florida Cities did not oppose Plaintiff counsel's having these meetings, but did

ask the former employees that Florida Cities counsel be allowed to attend any future meetings, which the Department of Justice attorneys had represented as "informal interviews" to the former employees. All the contacted persons readily agreed to invite Florida Cities' counsel to attend any future meetings with the Plaintiff.

Notwithstanding the desire of the contacted former employees that Florida Cities' counsel attend the meetings, Florida Cities' counsel learned that Plaintiff continued to pursue scheduling meetings excluding Florida Cities' counsel, even when at least one such contacted person stated that he felt "pressured" by the "demanding tone" of Plaintiff counsel's repeated requests. See attached Affirmation of James A. Elder.

An example of such "pressure" was the Department of Justice's informing one such person, Mr. James A. Elder, during the course of the meeting requests from the Department of Justice, that the United States had acquired personal information on him that revealed that he had left his former position of employment under "negative circumstances" and that the United States Department of Justice would subpoena him and depose him if he would not agree to meet with Plaintiff's counsel alone. See attached Affirmation of James A. Elder.

Upon learning of these contacts and the refusal of Plaintiff to allow Florida Cities counsel to attend the meetings, Florida Cities immediately requested the Plaintiff in writing to immediately stop scheduling and engaging in

ex parte contacts with former employees of Florida Cities regarding the subject matter of this case without first notifying Defendant and giving Defendant an opportunity to be present at any such meetings. See Defendant's letter of April 19, 1994, at 1, attached hereto as Exhibit A. Counsel for Defendant apprised the Plaintiff that the individuals Plaintiff sought to interview included former executive-level employees of Florida Cities who were both decision makers and persons privy to attorney-client privileged and other confidential information. Id. at 2. Counsel for Defendant advised the Plaintiff that Defendant clearly anticipated that these individuals would be deposed by Plaintiff, and would cooperate fully in the scheduling and conducting of such depositions. Id. at 2-3.

Defendant also apprised the Plaintiff that some of the persons they contacted and sought to interview informed Defendant that "they were made to feel pressured by the Department of Justice to have such meetings and that DOJ urged at least one such person contacted not to allow Florida Cities' counsel to attend a meeting, even though this person requested that [Florida Cities' counsel] attend." Id. at 2. Defendant further alerted counsel for Plaintiff that Florida Cities was informed that one person "was told that the Department of Justice would cancel the meeting if Florida Cities' counsel were present." Id. In light of this pressure being exerted by Plaintiff's counsel upon the former employees to hold the planned meetings promptly, Florida Cities feared that other meetings might occur before it could move this court for a Protective Order prohibiting

such contacts. Consequently, Defendant's counsel requested a prompt reply from the Department of Justice.

Counsel for Plaintiff shortly thereafter agreed to cease contacting former employees of Defendant without first contacting counsel for Florida Cities. See Plaintiff's letter of April 20, 1994, at 1, attached hereto as Exhibit B. Since Defendant's receipt of Plaintiff's April 20, 1994, letter, counsel for the Plaintiff has not contacted counsel for Defendant to advise of any intended contacts with former Florida Cities employees. To the best of Defendant's knowledge, there have been no further contacts between Plaintiff's counsel and former Florida Cities employees since April 20, 1994.

On June 23, 1994, however, Defendant received a letter from Plaintiff indicating that the Plaintiff, upon further consideration, had concluded it would no longer refrain from engaging in ex parte contacts with former Florida Cities employees, and requesting Defendant's agreement to a stipulation

> in which the United States is expressly granted the unencumbered right to unrestricted ex parte contacts with former employees and consultants of Florida Cities, but is prohibited from inquiring into communications between employees and Florida Cities attorneys which took place during the employees' employment with Florida Cities.

Plaintiff's letter of June 23, 1994, at 2, attached hereto as Exhibit C. Counsel for Plaintiff stated that unless Defendant agreed to the stipulation, Plaintiff would move the Court to allow the "unencumbered right to unrestricted ex parte contacts" sought by Plaintiff. Counsel for the Plaintiff agreed to honor its earlier commitment of refraining from contacting former employees without first

contacting an attorney of record for Defendant until Defendant signed the stipulation or the Court ruled on the matter, whichever came first. Defendant refused to sign Plaintiff's proposed stipulation, and on June 23, 1994, Plaintiff served Defendant with a copy of the instant Motion.

Subsequent to the filing of this Motion, Defendant requested Plaintiff's consent to an extension to respond to the Motion. See Defendant's letter of June 29, 1994, at 1, attached hereto as Exhibit D. In its letter responding to Defendant's request, counsel for the Plaintiff made the following additional demands and observations:

> [A]s a matter of equities in trial preparation, we also ask you to voluntarily refrain from contacting former employees of Florida Cities Water Company without first contacting the United States and giving it the opportunity to participate in the contact.
>
> Furthermore, as an illustrative matter, we would point out that under the arguments you have made to us to date on this issue, you should refrain from contacting Julie Karleskint, a current Florida Cities employee who is a former EPA contractor.

Plaintiff's letter of June 30, 1994, at 2, attached hereto as Exhibit E.

Unlike the Plaintiff, Defendant Florida Cities has a vital ongoing interest in protecting Defendant's former employees' knowledge of privileged or confidential information and avoiding its potential release, inadvertent or otherwise, to opposing counsel in litigation after the employees leave Defendant's employ. Indeed, the release of any such privileged or confidential information, whether inadvertent or otherwise, would cause great harm to Defendant's interests, and would prejudice Defendant in this litigation.

II. ARGUMENT

The professional conduct of attorneys in this Court "is governed by the model rules of professional conduct of the American Bar Association as modified and adopted by the Supreme Court of Florida." Browning v. AT&T Paradyne, 838 F.Supp. 1564, 1566 (M.D.Fla. 1993), citing U.S.Dist.Ct., M.D.Fla.Loc.R. 2.04(c). Under Rule 4.2 of the American Bar Association Model Rules of Professional Conduct ("ABA Model Rules" or "Rules"),

> [i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The comment to Rule 4.2 explains that

> [i]n the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

In Rentclub, Inc. v. Transamerica Rental Finance Corp., 811 F.Supp. 651, 657 (M.D.Fla. 1992), this Court pointed out that "[i]t has been determined that a former employee may be considered a 'party' for purposes of Model Rule 4.2." Citing Public Service Electric & Gas Co. v. Associated Electric and Gas Insurance Services, Ltd., 745 F.Supp. 1037 (D.N.J. 1990), and Cronin v. Eighth Judicial Circuit, 781 P.2d 1150 (Nev. 1989). In particular, this Court explained

that a former employee is considered a "party" under Rule 4.2 "because of his position and knowledge," id. at 658:

> "[C]ourt authorization or opposing counsel's consent to ex parte contact should be required if the former employee was highly-placed in the company (such as a former officer or director) or if the former employee's actions are precisely those sought to be imputed to the corporation."

Id. at 657-58, quoting Miller and Calfo, Ex Parte Contact with Employees and Former Employees of a Corporate Adversary: Is It Ethical?, 42 Bus.Law. 1053 at 1072-73 (1987). Indeed, as this Court recently held in Browning, supra,

> [i]n reliance on Rule 4-4.2 and its corresponding comments, this Court has and continues to hold that a "party" for purposes of this rule includes former managerial employees, if their statements ". . . could be admissions against the corporation or . . . their actions could be imputed to the corporation."

838 F.Supp. at 1567, quoting Rentclub, 811 F.Supp. at 657. Cf. Manor Care of Dunedin, Inc. v. Keiser, 611 So.2d 1305, 1308 (Fla.Dist.Ct.App. 1992) (denying motion for protective order but citing Rentclub and acknowledging possibility of different outcome had movant sought protective order prohibiting contacts with former employees who "might fall within this privileged 'managerial class' identified by Judge Kovachevich").

In both Rentclub and Browning, this Court distinguished ABA Model Rule 4.2 from its precursor, Disciplinary Rule (DR) 7-104(a)(1), "which was not meant to include former employees under the definition of the corporate 'party'," and the cases applying DR 7-104(a)(1), which "do not involve the situation where . . . a former employee had access to privileged information while

employed." Rentclub, 811 F.Supp. at 657. Consequently, this Court held in Rentclub that

> [p]rivileged communications present a distinct problem with respect to contact with former employees, thus ex parte contact should be barred to prevent disclosure of any inadvertent confidential communications.

Id. This Court further stated that "[t]he interest of the corporation in protecting privileged information acquired by an employee during the course of employment from disclosure to an opponent in litigation remains after the employee leaves the corporation." Id. at 658. This Court also noted that even if a former employee lacked the necessary agency relationship necessary to bind the corporation through an admission made after his employ, "the relation or connection of the employee to the corporation's potential civil liability may be so close as to require, in all fairness, that the adversary's ex parte contacts be prohibited." Id., quoting Sperber v. Mental Health Center, No. 82 C7428 (S.D.N.Y. Nov. 21, 1983); cf. In re: Home Shopping Network, Inc., Securities Litigation, No. 87-248-CIV-T-13A, 1989 WL 201085, at *1 (M.D.Fla. 1989) (pre-Rentclub/Browning decision allowing ex parte contacts with former employees because of no concerns regarding "elicitation of statements binding on the corporate party").

Federal district courts in other jurisdictions considering this question have similarly held that a former employee is to be considered a party for purposes of Rule 4.2, and have held improper ex parte communications with former employees. See, e.g., Public Service Electric & Gas Co., supra, 745 F.Supp. at

1039-43 (holding that Rule 4.2 proscribes any ex parte contact with former employees of an adverse corporation); Sperber v. Mental Health Center, supra, No. 82 C7428 (S.D.N.Y. Nov. 21, 1983) (proscribing ex parte contact with former employees whose acts were the subject of the litigation). This rule is also consistent with general principles underlying the broad judicial concern regarding protection of corporate parties' privileged or confidential information that may be disclosed through their employees, former employees, or agents. Indeed, a recently issued decision by the Eighth Circuit held that communications between an independent consultant retained directly by a party and outside counsel for that party were covered by the attorney-client privilege, since the consultant was "for purposes of the privilege, the functional equivalent of [the party's] employee . . . ." In re: Bieter Company, No. 94-1037, 1994 WL 43562, at *11 (8th Cir. 1994).

In the instant case, the former Florida Cities employees whom Defendant is aware were sought to be interviewed by the Plaintiff are "parties" under Rule 4.2, as defined by this Court in Rentclub and Browning. Messrs. French, Reeves and Elder are all former "managerial employees" who "because of [their] position and knowledge" would reasonably be expected to be privy to attorney-client privileged and other confidential information. The "relation or connection" of Florida Cities' former employees to Florida Cities' potential civil liability is "so close as to require, in all fairness, that the [United States'] ex parte contacts be prohibited." Defendant continues to have "a vital interest in the

employee's knowledge of privileged information and its potential release to opposing counsel after the employee leaves."

Plaintiff urges this Court to reverse the holding of Rentclub, arguing that this Court's decision in Rentclub was "erroneous." Plaintiff's Memorandum in Support of Motion (Pl.'s Mem. Supp.) at 9. Plaintiff asserts that the Rentclub decision leads to "anomalous, impractical, and illogical results." Id. In particular, Plaintiff claims the Rentclub/Browning line of cases "necessarily increase the use of formal discovery," which Plaintiff argues is "a result clearly antithetical to the Supreme Court's intentions in amending the discovery rules . . . in December 1993." Id. Plaintiff concedes that "Florida Cities has a legitimate ongoing interest in ensuring that information protected by the attorney-client privilege not be jeopardized by virtue of an employee having left the company," but asserts that the Government "has an equally strong interest in gathering evidence . . . as well as in having ongoing contacts with potential Government witnesses without sharing its work product with the Defendant's attorneys." Id. at 10-11. Finally, the Government commits itself to "avoid eliciting attorney client privileged information from former employees." Id. at 11.

The 1993 revisions to the discovery rules were intended, inter alia, "to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information . . . ." Fed. R. Civ. P. 26 advisory committee's notes, 1993 Amendment. They were not intended to

abrogate or diminish the protection afforded attorney-client privileged and other confidential information. Whatever the value of speed and informality in discovery, it is secondary to the strong policy shielding privileged information from disclosure. No matter how efficient Plaintiff's discovery tactics may be, if they result in the disclosure of privileged information, they should not be allowed.

Plaintiff claims that it will "avoid" eliciting attorney-client privileged information. Without seeking to cast into doubt the ethical conduct of the Department of Justice in this case, Defendant has strong reservations about entrusting the protection of its privileged information to the best efforts of counsel for the Plaintiff and the self-censorship of former employees who are unlikely to understand the scope of privilege.

Despite the Government's insistence that it understands Defendant's "legitimate ongoing interest" in protecting privileged information, counsel for the Plaintiff have already demonstrated that they will not act with an overabundance of caution when it comes to "avoid[ing]" the disclosure of such information. In the face of this Court's clearly enunciated law under Rentclub and Browning, counsel for Plaintiff nevertheless determined to engage in ex parte contacts with former Florida Cities employees without first notifying Defendant of its intended course of conduct or seeking permission from the Court to do so. Indeed, not only did counsel for the United States exhibit a lack of concern for protecting Florida Cities' privileged information, it in fact made some former employees

feel "pressured" to meet with Department of Justice lawyers and threatened to call off interviews when advised by the former employees that they wished counsel for Defendant to be present. It is not difficult to understand how an individual might come to feel "pressured" to agree to meet with the Government when, for example, an attorney from the United States Department of Justice appears in Australia to interview that person.

It was precisely these types of concerns that prompted the District of New Jersey to conclude that ex parte contacts with former employees should be prohibited, and that depositions should be used instead.

> It is . . . unworkable to allow ex parte contact on the condition that the investigator or attorney cease questioning if it appears that imputable information is being divulged. Such a procedure . . . threatens to spawn needless litigation concerning breaches of this undefinable restriction. It also places great ethical faith in the ability of the interviewer to cease questioning the moment the very information sought is revealed. Moreover, even if zealously adhered to, such a restriction would merely delay the institution of the deposition process. It is more logical to hold that such individuals are off limits except for formal discovery because they "may" make statements which can be imputed.
>
> . . . .
>
> It is also true that the deposition process is the best method of developing clear factual records and protecting the rights of all parties without unduly favoring or prejudicing either side. It is a far more reliable and ethically sound procedure . . . .

Public Service Electric & Gas Co., 745 F.Supp. at 1042-43.

Plaintiff's demand in its June 30, 1994, letter that Defendant refrain from contacting its own former employees -- as well as its suggestion that Defendant not speak with its current Operations Manager because she once worked as a

contractor for EPA -- best exemplifies its misunderstanding of the rationale underlying Public Service Electric & Gas Co., Rentclub and Browning. The dispute here is not whether any former employee of a party may be contacted ex parte by that party's opponent. Rather, the issue here is whether a party may engage in "unencumbered" and "unrestricted" contacts with an opposing party's former employee who had access to attorney-client privileged and other confidential information, without the opposing party being notified in advance and allowed to be present to protect this information. Such attorney-client privileged and other confidential information remains the property of the former employer even after the employee departs, and defendant has an ongoing interest in the protection of this information from disclosure. See Rentclub, 838 F.Supp. at 658.

In this case, unless Florida Cities is notified in advance of Plaintiff's intended contact and given an opportunity to be present, it is certain that no one at such a meeting will have the same motivation to protect Defendant's privileged and confidential information as would Florida Cities itself. Defendant is in no way suggesting that either the United States or Defendant's former employees would intentionally elicit or release privileged or confidential information; however, without Defendant's counsel present to vigilantly and carefully protect this information, it is quite possible that such privileged information may be inadvertently disclosed. The strong policies underlying the protection of attorney-client privileged and other confidential information, as reaffirmed by

this Court in Rentclub and Browning, together with the unfair prejudice that would result from the release, inadvertent or otherwise, of such information, compel that Plaintiff's Motion be denied.

Finally, it is important to note that a central concern in Rentclub was this Court's admonition that "[w]hile the Code of Professional Conduct does not contain an express provision prohibiting the appearance of impropriety, Florida law clearly retains this provision." Id. at 654. See also, Contant v. Kawasaki Motors Corp., U.S.A., Inc., 826 F.Supp 427, 429 (M.D.Fla. 1993) (quoting Rentclub: "'even an appearance of impropriety may, under the appropriate circumstances, require prompt remedial action from the court . . . .'"). Defendant respectfully submits that Plaintiff's Motion should especially be denied in this instance to avoid any appearance of impropriety on the part of the United States.[2/]

III. CONCLUSION

For all the above-stated reasons, Defendant respectfully requests that this Court deny Plaintiff's Motion and prohibit contact by counsel for the United States with former employees of Florida Cities, unless notification has been

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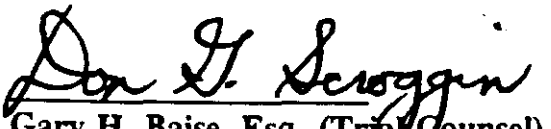
[2/] In Rentclub, this Court granted a motion to disqualify counsel in a situation such as the one presented in this motion, stating that "[w]here the question [of disqualification] arises any doubt should be resolved in favor of disqualification." 811 F.Supp. at 654 (emphasis in original). Consequently, the Defendant specifically reserves any rights it may have to move for disqualification of counsel for the United States, should conditions warrant such action.

given to Defendant and counsel for Defendant has the opportunity to be present during such contacts.

Respectfully submitted,



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July 15, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY, Defendant.	CIVIL ACTION NO.: 93-281-CIV-FTM-21

Affirmation of James A. Elder

1. My name is James A. Elder. My home address is 6625 Mauna Loa Boulevard, Sarasota, FL 34241.

2. I am currently the Administrator at Englewood Water District, P.O. Box 1399, Englewood, FL 34295-1399. I have been employed there since May 26, 1992.

3. I was formerly employed as Manager of Engineering and Construction at Florida Cities Water Company from August 4, 1989 to May 20, 1992.

4. I have personal knowledge of the facts recited in this Affirmation.

5. During the week of April 11, 1994, I was called on the telephone by Ms. Dianne Spellberg, who identified herself as being an attorney with the United States Department of Justice.

6. During the approximate two-week period between this first conversation and the requested meeting of April 21 or 22, 1994, I had three to four conversations with Ms. Spellberg regarding the desire of the United States Department of Justice to meet with me concerning this case.

7. In the first conversation of about April 11, 1994, Ms. Spellberg said that she was calling me regarding the lawsuit filed against Florida Cities Water Company in relation to the Waterway Estates Wastewater Treatment Facility. She explained that the Department of Justice was contacting former employees of Florida Cities Water Company. After a short discussion regarding some of my duties at FCWC and my departure from there, she said she was surprised, since her information was that I had left under "negative circumstances." I did not know to what she might be referring, since I had left my old job at Florida Cities for a higher paying job and since my departure was on good terms with Florida Cities. As far as I am aware, there were no "negative circumstances" associated with my departure from Florida Cities.

8. In this conversation Ms. Spellberg stated that the purpose of her contact was to arrange an informal meeting to discuss the pending lawsuit. She said that she would rather not involve outside attorneys at this stage. She implied, and I understood, in this conversation that the requested meeting would be between just myself and her. She stated that she would be in the area on April 21 and 22, 1994 and would like to meet with me then. I tentatively agreed to meet with her then.

9. After some thought, I called another former employee of FCWC to see if he had also been contacted. When I found out that this other employee had also been contacted and that the meeting with him was to be in the same week as my own meeting, we mutually agreed that in order to save time for both us and Ms. Spellberg, we could meet at the same time. We believed that this would be appropriate, based on Ms. Spellberg's telling us that the meetings were only informal.

10. After speaking with this other former employee, I had another conversation with Ms. Spellberg and informed her of my desire to meet with her together with the other employee. Her response was less than enthusiastic, to say the least. She told me that the Department of Justice preferred to talk to people alone in such informal meetings. I also asked

her if the tentative date of our meeting could be changed, but she replied that she was going to meet with another Department of Justice attorney, who I gathered was her supervisor, on that date and that a change in the meeting did not fit with their schedule. Nevertheless, she said that she would discuss with others my desire to change the date of the meeting. She also told me for the first time that this other attorney would also plan on attending her meeting with me. In this conversation Ms. Spellberg stated that she could take my deposition, but that she would prefer not to get other attorneys involved this early in the suit. I was puzzled at her response, since I could not understand why she would object to others attending what she had told me was only an informal meeting. I was also surprised to learn in this conversation that now the requested meeting would be with two attorneys, not just her alone.

11. During the week of April 18, 1994, I also had conversations with Don G. Scroggin, counsel for Florida Cities Water Company, regarding the Department of Justice's request to meet with me. Mr. Don G. Scroggin, counsel to Florida Cities, asked me if he could sit in on the informal meeting to listen to the Department of Justice attorneys interview. I readily agreed to his attendance.

12. I had a final conversation with Ms. Spellberg during the week of April 18, 1994, regarding the requested meeting. She responded that the Department of Justice wanted to meet with me alone. She also informed me for the first time that now there would be not only herself and her supervisor, but that she was only part of a team of attorneys from the Department of Justice who would be in the area. Ms. Spellberg's tone during this last conversation was very demanding, and she restated the fact that the United States Department of Justice would subpoena me and/or take my deposition if this meeting did not occur.

13. Based on her demanding tone during this conversation and the new information that a team of attorneys from the Department of Justice had now been set up for this work, I concluded that this requested meeting was no longer going to be an informal information-gathering meeting, but something much more involved.

14. During all contacts with Ms. Spellberg, there was a significant amount of pressure to not only meet with her but to do so alone. This pressure had caused me not only to speak with Mr. Scroggin, but to also seek additional advice from an independent counsel.

15. I told Ms. Spellberg in this last conversation that I would not meet with her or others at all without my attorney being present and that if she needed to subpoena me or take my deposition, to do so.

I declare under penalty of perjury that the foregoing is, to the best of my knowledge, true and correct.

7/14/94
Date

James A. Elder

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April 19, 1994

Daniel S. Jacobs, Esq.
Trial Attorney
Environment and Natural Resources Division
U.S Department of Justice
P.O. Box 7611
Washington, DC 20044

BY FAX

Re: Ex Parte Meetings with Florida Cities' Former Employees and Consultants (U.S. v. Florida Cities Water Company, No. 93-281-CIV-FTM-21D)

Dear Mr. Jacobs:

We have recently learned that the Department of Justice has on several occasions contacted and sought to meet with selected former employees and consultants of Florida Cities regarding the substance of this litigation without notifying opposing counsel. At least one such meeting has already occurred. We believe that such contacts are improper under applicable law, and we request that the Department of Justice immediately cease contacting and setting up meetings with former employees and consultants of Florida Cities regarding this case without first notifying Florida Cities and giving us the opportunity to be present at the meeting.

Several of these potential witnesses are former executive-level employees of Florida Cities who were both decision makers and persons privy to attorney-client privileged and other confidential information. Others are former consultants who worked closely with Florida Cities during the time of events at issue in this litigation. We fully expected the Department of Justice to notice the depositions of these and other potential witnesses, and we have already expressed our continuing willingness to cooperate fully with you in scheduling and conducting such depositions. However, we are dismayed by these attempts by the Department of Justice to circumvent this process by contacting these persons and seeking to conduct meetings on the substance of this case without notifying Florida Cities or giving us the opportunity to be present.

More disturbing, we are informed by more than one of these persons that they were made to feel pressured by the Department of Justice to have such meetings and that DOJ urged at least one such person contacted not to allow Florida Cities' counsel to attend a meeting, even though this person requested that we attend. (We understand that this person was told that the Department of Justice would cancel the meeting if Florida Cities' counsel were present.) We believe that it is improper for the Department to attempt to exert pressure on such an individual to meet alone with you under these circumstances.

As I am sure you are aware, the Middle District of Florida has held that, with respect to ex parte contact with former employees of an organization represented by counsel:

> Privileged communications present a distinct problem with respect to contact with former employees, thus ex parte contact should be barred to prevent disclosure of any inadvertent confidential communications.
>
> . . .
>
> [C]ourt authorization or opposing counsel's consent to ex parte contact should be required if the former employee was highly-placed in the company (such as a former officer or director) or if the former employee's actions are precisely those sought to be imputed to the corporation.

Rentclub, Inc. v. Transamerica Rental Finance Corp., 811 F.Supp 651 (M.D.Fla, 1992) at 657-658. In light of this authority and our open willingness to cooperate fully in your deposing these persons or other witnesses, pursuant to our joint agreement on discovery, we request that you notify us before making further contacts or before conducting any further meetings, so that we may be present.

Again, pursuant to our informal agreement that we would give each other notice of intended motions, we intend to file a Motion for a Protective Order regarding these contacts unless we can reach a mutually agreeable resolution before 2:00 pm Eastern Time tomorrow, Wednesday, April 20, 1994. We look forward to your full cooperation in this matter. Please contact me as soon as you receive this letter to communicate your intents.

Yours sincerely,

Don G. Scroggin

Don G. Scroggin

U.S. Department of Justice

JCC:DSJ
90-5-1-1-3965

Washington, D.C. 20530

April 20, 1994
BY FAX AND U.S. MAIL

Don G. Scroggin
Jenner & Block
Suite 1200
601 13th Street, NW
Washington, DC 20005

Re: United States v. Florida Cities Water
No. 93-281-CIV-FTM-21 (M.D. Fla.)

Dear Mr. Scroggin:

I am in receipt this morning of your fax sent on April 19, 1994 (at 9:13 p.m.). Kindly consider this an initial reply designed not to fully examine the issues you raise, but simply to meet the 2:00 p.m. deadline today you unilaterally saw fit to impose.

First, please be advised that the United States take serious exception both to your representation of certain facts and the state of the law on the issue in question.

Second, please be advised that the conduct of the Department of Justice in this matter has been fully in accord with the Department's guidelines for its attorneys in such matters. See 59 Fed. Reg. 10086 (March 3, 1994).

We do recognize, however, that the Department's guidelines arguably may conflict with the Court's decision in Rentclub v. Tansamerica Rental Finance Corp., 811 F. Supp. 651 (M.D. Fla. 1992). In light of this potential conflict, as you can well imagine, we will need to carefully study the issue you raise. In the meantime, however, in due deference to the Court's decision in Rentclub, and in acquiescence to your request, until further notice, the United States will not contact any former employees of Florida Cities Water Company without first contacting an attorney of record for the Company in this matter. Moreover, if, after further study, we determine that we can no longer honor that commitment, we will give you ample opportunity to bring your motion before making any such contacts.

I trust that this reply will satisfactorily address your concerns at least for the time being, but please do not hesitate

to contact me to discuss this matter at any time.

Sincerely,

Assistant Attorney General
Environment and Natural Resources
Division

By: _____

Daniel S. Jacobs
Trial Attorney
Environmental Enforcement Section

cc: Mac Cauley
AUSA, M.D. Fla.

Gwen Eason
Assistant Regional Counsel
EPA Region IV

U.S. Department of Justice

JCC:DSJ
90-5-1-1-3965

Washington, D.C. 20530

June 23, 1994
BY FAX AND U.S. MAIL

Don G. Scroggin
Jenner & Block
Suite 1200
601 13th Street, NW
Washington, DC 20005

RECEIVED
JUN 27 1994
DGS

Re: United States v. Florida Cities Water
No. 93-281-CIV-FTM-21 (M.D. Fla.)

Dear Mr. Scroggin:

This letter is in further reply to your letter of April 19, 1994 (faxed at 9:13 p.m. on that date) on the subject of the United States' right to have ex parte contacts with Florida Cities' former employees.

No doubt, you will recall that in your letter of April 19, you demanded that the United States "immediately cease contacting and setting up meetings with former employees and consultants of Florida Cities without first notifying Florida Cities and giving us the opportunity to be present at the meeting." Unless that demand was met by 2:00 p.m. the following day, you threatened to move for a protective order. The United States responded by your 2:00 p.m. deadline, tentatively agreeing to acquiesce in your demand, while reserving the right to readdress the issue after further study.

After thorough study, the United States has concluded that under any analysis of the law, your demand was overreaching and should no longer be met. We do, intend, however, to honor our earlier commitment not to contact any former employees of Florida Cities Water Company without first contacting an attorney of record for the Company in this matter, until such time as the parties have come to a mutually satisfactory resolution of the issue, or the court has ruled on it, whichever, comes first.

Our study of the issue has led us to believe that Florida Cities has a legitimate ongoing interest in ensuring that information protected by the attorney-client privilege not be jeopardized by virtue of an employee having left the Company. On

the other hand, we hope you can recognize that the United States has an equally strong interest in gathering evidence in this matter through all appropriate means, as well as in having ongoing contacts with potential Government witnesses without sharing its work product with the Defendant's attorneys.

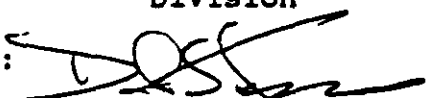
We believe that a satisfactory resolution of the issue must take account of the interest of both parties. Our earlier tentative resolution only addressed Florida Cities' interests. Accordingly, we propose to enter into a stipulation, to be submitted to the Court for approval, in which the United States is expressly granted the unencumbered right to unrestricted ex parte contacts with former employees and consultants of Florida Cities, but is prohibited from inquiring into communications between employees and Florida Cities attorneys which took place during the employees' employment with Florida Cities. Such a stipulation is attached for your signature.

Two additional points should be made at this point. First and foremost, as I noted in my April 20, 1994 letter initially replying to your's dated April 19, 1994, and wish to reiterate herein, the United States takes serious exception both to your representation of certain facts and the state of the law on the issue in question. We have since had informal full and frank discussions with you on the subject. Second, our position and proposed compromise relies in part on the published legal-ethical analysis espoused by one of the premier authorities on the subject, Professor Geoffrey Hazard of the Yale Law School, who we understand serves on the Board of Florida Cities' parent company. Since your position to date has been so clearly antithetical to prevailing case law as well as Professor Hazard's analysis, we find your earlier demand to be somewhat disingenuous, if not hypocritical.

We do hope that you find the attached stipulation to be satisfactory. In keeping with the precedent that you sent in April, however, if you do not sign and transmit it to us by 5:00 p.m. today, we intend to file an appropriate motion with the Court.

Sincerely,

Assistant Attorney General
Environment and Natural Resources
Division

By: 

Daniel S. Jacobs
Trial Attorney
Environmental Enforcement Section

Enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY, INC., Defendant.	)	CIVIL ACTION NO. 93-281-CIV-FTM-21

STIPULATION AND ORDER

The parties stipulate, and it is hereby ORDERED, that the United States may have ex-parte contacts with Defendant's former employees, provided that in the course of such contacts the United States may not inquire into matters protected by the attorney-client privilege.

DONE AND ORDERED at Tampa, Florida, this ___ day of _____, 1994.

_____
United States District Judge

For Plaintiff, the United States

LOIS J. SCHIFFER
Acting Assistant Attorney General

By:

_____
DANIEL S. JACOBS
Trial Attorney
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 514-4076

For Defendant,
Florida Cities Water Company

_____
DON G. SCROGGIN
Jenner & Block
601 Thirteenth Street, N.W.
Washington, D.C. 20006
(202) 639-6076

U.S. Department of Justice

JCC:DSJ
90-5-1-1-3965

Washington, D.C. 20530

June 30, 1994
BY FAX AND U.S. MAIL

Don G. Scroggin
Jenner & Block
Suite 1200
601 13th Street, NW
Washington, DC 20005

Re: United States v. Florida Cities Water
No. 93-281-CIV-FTM-21 (M.D. Fla.)

Dear Mr. Scroggin:

This responds to your letter of June 29, 1994, requesting an extension of twenty-one days in which to respond to the United States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees.

We regret that for the following reasons we are unable to concur in such a lengthy extension. First, we find your suggested cause for the extension to be pretextual. Second, we presume that before you sent your letter of April 19, 1994 (faxed at 9:13 p.m. on that date, demanding that the United States "immediately cease contacting and setting up meetings with former employees and consultants of Florida Cities without first notifying Florida Cities and giving us the opportunity to be present at the meeting," and threatening to file a motion unless we acquiesced in your demand by 2:00 p.m. on April 20, 1994), you thoroughly researched the issue in question. Thus, you are hardly addressing the issue anew. Third, and most importantly, as you know, we have agreed to refrain from contacting any former employees of Florida Cities Water Company without first contacting an attorney of record for the Company in this matter, until such time as the parties have come to a mutually satisfactory resolution of the issue, or the court has ruled on it, whichever comes first. That commitment detracts from our trial preparation. Accordingly, we do not wish there to be any undue delay in the adjudication of the issue.

Notwithstanding these concerns, we are prepared to concur in an unconditional ten (10) day extension in the filing of your reply to our motion. You may represent to the court that we have

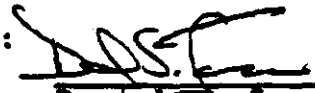
concurred in such an extension. If you choose to move for a more lengthy extension, kindly attach a copy of this letter to your motion so that the court will be duly and timely apprised of our opposition and can rule without awaiting a formal opposition.

In any event, as a matter of equities in trial preparation, we also ask you to voluntarily refrain from contacting former employees of Florida Cities Water Company without first contacting the United States and giving it the opportunity to participate in the contact.

Furthermore, as an illustrative matter, we would point out that under the arguments you have made to us to date on this issue, you should refrain from contacting Julie Karleskint, a current Florida Cities employee who is a former EPA contractor.

Sincerely,

Assistant Attorney General
Environment and Natural Resources
Division

By: 

Daniel S. Jacobs
Trial Attorney
Environmental Enforcement Section

cc: Andrew Harrison
Mac Cauley
Gwen Eason

CERTIFICATE OF SERVICE

I hereby certify that a copy of Defendant's Memorandum in Opposition to Plaintiff's Motion for an Order Allowing Ex Parte Contacts With Former Employees has this 15th day of July, 1994 been sent to the following persons by United States first class mail, properly addressed and postage prepaid.

Daniel S. Jacobs, Esq.
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044

Lois J. Schiffer, Esq.
Acting Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044

Douglas N. Frazier, Esq.
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Middle District of Florida
500 Zack Street, Suite 400
Tampa, Florida 33602

Michael A. Cauley, Esq.
Assistant United States Attorney
Middle District of Florida
500 Zack Street, Suite 400
Tampa, Florida 33602

Gwendolen G. Eason, Esq.
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365

Don G. Scroggin

Don G. Scroggin, Esq.

Exhibit_____(GHB-19)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

RECEIVED
AUG 5 1994
DGS

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY, INC., Defendant.	CIVIL ACTION NO. 93-281-CIV-FTM-21

MOTION AND MEMORANDUM FOR PERMISSION TO FILE REPLY MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION FOR AN ORDER ALLOWING EX-PARTE CONTACTS WITH FORMER EMPLOYEES

In accordance with Local Rule 3.01(b), the United States moves the Court for permission to file its Reply Memorandum in Support of United States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees.

In its opposition to the United States' Motion, Defendant has introduced a number of factual issues which, while perhaps not material insofar as the legal issue at bar is concerned, warrant a reply, particularly because the United States takes serious exception to Defendant's representation of the salient facts. The United States believes that a reply brief is necessary for the Court to be fully apprised of the salient facts, particularly in the event that it decides not to hold oral argument.

Accordingly, the United States respectfully requests that the Court order that the reply brief be filed. A proposed order

is attached.

Respectfully submitted,

LOIS J. SCHIFFER
Acting Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice

By: _____

DANIEL S. JACOBS
Trial Attorney
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 514-4076

LARRY H. COLLETON
United States Attorney
Middle District of Florida

MICHAEL A. CAULEY
Assistant United States Attorney
Middle District of Florida
500 Zack Street, Suite 400
Tampa, Florida 33602

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY, INC., Defendant.	CIVIL ACTION NO. 93-281-CIV-FTM-21

ORDER

Upon due consideration of the United States' Motion and Memorandum for Permission to File Reply Memorandum in Support of United States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees, it is thereon ORDERED AND ADJUDGED that the above-referenced Motion is GRANTED; the United States may file its reply brief.

DONE AND ORDERED, at Tampa, Florida, this ___ day of August, 1994.

Ralph W. Nimmons, Jr.
United States District Judge

Copies to: Counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY, INC., Defendant.	)	CIVIL ACTION NO. 93-281-CIV-FTM-21

REPLY MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION FOR AN ORDER ALLOWING EX-PARTE CONTACTS WITH FORMER EMPLOYEES

The Defendant has filed a memorandum in opposition to the United States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees. The United States files the instant memorandum for the limited purpose of responding to certain portions of Defendant's brief.[1]

The United States acknowledges that it has had ex parte contacts with Defendant's former employees and a former consultant, and stands by its position in its initial brief that such contacts are both entirely proper as well as entirely necessary to professional and efficient trial preparation.[2] It

[1] As a limited reply, this brief does not address immaterial arguments or statements of facts by Defendant, even when inaccurate or misleading.

[2] Defendant's representation in its brief that there were contacts with more than one consultant is simply incorrect, and its statement that the contacts took place "with consultants who where [sic] hired by Defendant to work on projects that are at issue in this litigation," Defendant's brief at 2, is poorly drafted and/or misleading to the extent that it suggests that the United States contacted consultants hired by Defendant for the purposes of this litigation. William Harrop, the sole consultant

bears noting that not only did Defendant not object to such contacts until April 19, 1994, it actually facilitated the contacts by voluntarily providing to the United States, inter alia, the names and addresses of former employees and consultants having information relevant to the proffered claims and defenses.[3] At no time prior to April 19, 1994, did Defendant either advise the United States that any of these individuals had been privy to attorney-client privileged information, give the slightest hint that it objected to the United States contacting those individuals, or indicate that it wished to be present at any meetings with the individuals.[4] Once the Defendant did object on April 19, 1994, the United States agreed to voluntarily cease such contacts without first notifying Defendant until such

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contacted to date by the United States, was associated with Defendant long ago, and is not presently a consultant to it. Further, in referring to Harrop as the "Director of Engineering for the design of the waste water treatment facility at issue here," id. at 3, Defendant obscures the fact that Harrop was a consultant, not an actual employee of Defendant. Moreover, both Harrop and one of the former employees, A.A. Reeves, are separately represented by counsel. Under Rule 4-4.2, if the United States wishes to communicate with Harrop or Reeves, it is obliged to obtain the consent of their respective attorneys, not Defendant's attorney.

[3] On February 4, 1994, the parties voluntarily and mutually disclosed "core information" relating to the case, including the "names and address of people having information that is relevant to the proffered claims and defenses." See 56 Fed. Reg. 55195, 55196 (October 25, 1991). The core information provided by Defendant is attached hereto as Exhibit A.

[4] In its February 4, 1994 core information disclosure, Defendant gave no information about the potential witnesses other than their names and addresses. In its April 19, 1994 letter, Defendant vaguely contends that "several of the potential witnesses" allegedly were privy to attorney-client privileged information, but fails to identify such individuals by name.

time as the parties reach an agreement or the Court has had the opportunity to rule on the issue. And, the United States stands by that commitment. The suggestion by Defendant that the United States has been anything less than fully candid in the process is simply disingenuous.

While the prevailing case law and commentary clearly support the United States' position on the issue at bar, it is also clear that reasonable attorneys and judges may differ as to whether Rule 4-4.2 should govern contacts with ex-employees.[5] There can and should be no doubt, however, that the United States takes its ethical obligations very seriously, and has taken pains to ensure that no privileged information was elicited from the ex-employees it contacted. Defendant must be well aware of the United States' efforts in this regard because Defendant has clearly gone to some trouble to ascertain what information Robert French provided to the United States. Its Operations Manager, Julie Karleskint, testified that she spoke to French for approximately one hour, and that at the time he had already spoken to Gerald Allen, (Executive Vice-President of one of Defendant's parent companies), as well as Bob Gordon (President of Defendant company and three of its parent companies). Deposition of Julie

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[5] See the United States' initial brief. Also, compare Rentclub v. Transamerica Rental Finance Corp., 811 F. Supp. 651 (M.D. Fla. 1992) (ex parte contact with former employees generally prohibited) with In re Home Shopping Network, Inc. Securities Litigation, No. 87-248-CIV-T-13A (M.D. Fla., June 22, 1989) (order issued allowing plaintiffs' counsel to have ex parte contacts with defendant's former employees without its prior approval or notice) (copy attached).

Karleskint, April 21, 1994 at 18.[6] Notwithstanding blatant interruptions bordering on coaching by Defendant's counsel; see e.g., id. at 8, lines 19-11; id. at 19, lines 13-23; Karleskint testified that French indicated that he had been treated fairly by the Government. Id. at 26. Indeed, Karleskint's testimony revealed that French told her that the Government had been "very pleasant," and that he had not been pressured in any way into speaking to the Government. Id. at 26-27. And, French gave no indication of having been asked to divulge attorney-client privileged material. Id. at 27.

Surely, Defendant's extensive debriefing of Mr. French by no fewer than three of its high-level managers served to reassure Defendant that the United States was scrupulous in ensuring that no privileges were violated. Indeed, there is not a shred of evidence to the contrary. And, in the face of Ms. Karleskint's testimony, Defendant's cavalier statements in its brief to the effect that the United States was anything less than scrupulous themselves border on reckless.

The inequities that would prevail were Rule 4-4.2 construed to prohibit the United States from contacting Defendant's former employees and contractors are exemplified well simply by events to date. Having voluntarily refrained from making such contacts since the date of Defendant's objection to them, the United

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[6] Ironically, if one were to strictly apply Defendant's reading of Rule 4-4.2, Defendant would be precluded from having discussions with Ms. Karleskint, who testified that she was formerly associated with EPA as a contractor. See id. at 49-55. (The original deposition transcript is filed herewith.)

States has been precluded from contacting the witnesses in question to obtain declarations from them. Defendant, on the other hand, has had the opportunity to solicit and file an "Affirmation" from James A. Elder.[7]

In short, Defendant's opposition fails to make out a sufficient legal or factual case to rebut the United States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees. Accordingly, the Motion should be granted.

Respectfully submitted,

LOIS J. SCHIFFER
Acting Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

By: _____

DANIEL S. JACOBS
Trial Attorney
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 514-4076

LARRY H. COLLETON
United States Attorney
Middle District of Florida

[7] In so doing, Defendant ignored the United States' request that, as a matter of equities in trial preparation, Defendant likewise refrain from contacting its ex-employees until this issue has been resolved. In any event, the Elder "Affirmation" is not particularly enlightening, relevant, or accurate. Moreover, since it is neither properly sworn (or affirmed), nor substantially follows the form of 28 U.S.C. § 1746 for unsworn declarations, it should be stricken.

MICHAEL A. CAULEY
Assistant United States Attorney
Middle District of Florida
500 Zack Street, Suite 400
Tampa, Florida 33602

Exhibit_____(GHB-20)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

95 FEB 13 AM 10:52

FT. MYERS, FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

vs. CASE NO. 93-281-CIV-FTM-21D

FLORIDA CITIES WATER COMPANY,

Defendant.

ORDER

This Cause is before the Court on the defendant's Emergency Motion for a Temporary Protective Order (Doc. 44). The Court has carefully reviewed the submissions of the parties and it is hereby ORDERED:

That the Emergency Motion for a Temporary Protective Order (Doc. 44) is hereby GRANTED to the extent that the plaintiff shall not have any ex parte communications with witnesses until such time as a hearing is held on the Motion to Allow Ex Parte Contacts.

DONE and ORDERED in Chambers, Fort Myers, Florida, this 13th day of February, 1995.

GEORGE T. SWARTZ
UNITED STATES MAGISTRATE JUDGE

Exhibit_____(GHB-21)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

FORT MYERS DIVISION

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
V.	)CASE NO. 93-CV-281-ETM-21
	)
FLORIDA CITIES WATER COMPANY,	)
	)
Defendant.	)
	)

95 MAR 16 PM 2:14

FILED

ORDER

The matter came before the Court on plaintiff's motion for an Order allowing ex parte contacts with defendant's employees, defendant's motion to disqualify counsel, and defendant's motion for a protective order to postpone the depositions of Lawrence Wilkov and James Elder. Upon consideration of the arguments of counsel, and the entire record in this matter, it is hereby ORDERED that:

1. Plaintiff's motion to allow ex parte contacts with defendant's employees is DENIED.

a. Except as set forth in the next two paragraphs, no attorney in the United States Department of Justice shall communicate with any of defendant's present or past employees, unless the communication is at a formal deposition at which the employee or witness will have the right to be represented by counsel.

54

b. If counsel for the plaintiff wishes to communicate other than at a deposition with a potential witness represented by counsel, counsel for the plaintiff shall give counsel for the defendant reasonable advance notice, so that defense counsel can contact counsel for the witness before any communication from plaintiff occurs.

c. If counsel for the plaintiff wishes to communicate other than at a deposition with a potential witness not represented by counsel, counsel for the plaintiff shall give counsel for the defendant reasonable advance notice, so that defense counsel can discuss the matter with the witness before any communication from plaintiff occurs. Thereafter, counsel for the plaintiff shall advise the witness that he or she should retain counsel before any communication occurs, and further advise the witness that he or she may be subject to potential criminal prosecution under the Clean Water Act.

2. Defendant's motion to disqualify plaintiff's current counsel is DENIED.

3. Defendant's motion to continue the depositions of Messrs. Wilkov and Elder is GRANTED; provided however, that those depositions shall take place on or before March 17, 1995. Counsel for those witnesses shall make a filing confirming that the deponents themselves favored a continuance of their depositions for the reasons stated by counsel for defendant. If no such filing is

made, the Court will consider whether to award the plaintiff its costs associated with the continuance of the depositions.

DONE AND ORDERED at Fort Myers, Florida, this 16th day of March, 1995.

GEORGE T. SWARTZ
UNITED STATES MAGISTRATE JUDGE

Pursuant to Rule 1.080, service of the foregoing Order has been made by U.S. Mail this _____ day of _____, 1995, upon: counsel identified on Service List attached.

By:_____
Judicial Assistant

SERVICE LIST

Daniel S. Jacobs, Esq.
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P. O. Box 7611
Washington, DC 20044

Lois J. Schiffer, Esq.
Acting Assistant Attorney General
Environment and Natural Resources Division

U.S. Department of Justice
P. O. Box 7611
Washington, DC 20044

Douglas N. Frazier, U. S. Attorney
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500 Zack Street, Suite 400
Tampa, Florida 33602

Michael A. Cauley, Asst. U. S. Attorney
Middle District of Florida
500 Zack Street, Suite 400
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Gwendolen G. Easton, Asst. Regional Counsel
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345 Courtland Street, NE
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Gary H. Baise, Esq.
Don G. Scroggin, Esq.
Gabeler, Baise & Miller, P.C.
1320 Old Chain Bridge Road, Suite 200
McLean, VA 22101

John A. Noland, Esq.
Harold N. Hume, Jr., Esq.
Henderson, Franklin, Starnes & Holt, P.A.
P. O. Box 280
Fort Myers, FL 33902-0280

Deposition Summary
John Marlar (I)
May 5, 1994

Title: Branch Chief, Environmental Compliance Branch

Responsibilities: field investigation and inspection

He discusses the 201 grant program for wastewater treatment facilities; the 303 program; 303 plans; NPDES permitting and how a permit drafter would use the 303 plans to evaluate a permit application. He also discusses how the permit drafters would include a WLA if one was developed in the 303 plan; the contents of an NPDES permit and the Administrative Procedures Act process for issuing NPDES permits.

He was questioned about a 201 grant meeting that was held; the difference between an Advanced Wastewater Treatment facilities and secondary facilities; and a draft permit application which was submitted by FCWC. He discusses the process in the CWA that requires states to develop WLA; the process of developing technical documents with WLAs that are used by the EPA in making regulatory decisions. He answers questions about section 501 of the CWA (allows states to set more stringent standards); what happens when a permit applicant meets the secondary treatment effluent limitations and water quality standards---typically the EPA follows the state's recommendation and issues the permit.

He responded to questions about the 401 certification from Florida and a letter from the state certifying that the FCWC facilities were meeting water quality standards. He stated that under such circumstances the EPA would typically issue the permit.

Page	Notes	Topic	Volume
8.00	Was not involved in enforcement at Waterway Estates.	WWE	2
9.00	Marlar asked his staff to inspect Barefoot Bay at request of Alex Alexander of FDEP/	Barefoot Bay inspection	
10.00	Does not recall who conducted EPA inspection of Barefoot Bay on September 14, 1989. There was no penalty action against the facility.	Barefoot Bay inspection	
11.00	He is knowlgeable regarding penalty actions and 309(a) administrative orders. No enforcement responsibilty over Carrollwood, and no knowledge of Carrollwood generally.	Carrollwood	
16.00	An administrative order does not authorize a discharge, only an NPDES permit does so.	AO	
18.00	Tracking compliance with administrative orders is done by notation to enforcement file by compliance officer. Interim effluent limits found in an AO are normally determined by inspector's "professional judgment."	AO	
19.00	Interim effluent limits should be stringent enough to assure that facility operates at maximum capacity, but not so onerous that limits cannot be achieved. Inspector should rely on effluent data found in monthly operating reports.	development of effluent limits	
20.00	Marlar believes there is no mechanism for appeal of interim limit found in an AO.	development of effluent limits	
21.00	Effluent limits for new NPDES permittee are site specific.	development of effluent limits	
24.00	In Marlar's opinion, right to appeal effluent limit will lie only during NPDES permitting process.	appeal of effluent limits	
27.00	Deference accorded state permits by EPA depends on the type of state permit involved; conditions such as monitoring frequency, which are matters of state regulation, are given greater deference.	deference to state standards	
28.00	State temporary operating permit is similar to EPA-issued AO: it imposes reporting requirements, interim effluent limits, and other conditions upon a discharge that is not in compliance with state law (and not allowed under an operating permit).	deference to state standards	
30.00	Does not know difference (in effect on discharger) between state consent order and temporary operating permit, or whether there is a right of appeal from CO.	deference to state standards	

Page	Notes	Topic	Volume
31.00	EPA will defer to state effluent limits in operating or temporary operating permit where limits are more stringent than EPA's.	deference to state standards	
32.00	Major difference between AO and NPDES process is that latter has a public notice and comment period.	deference to state standards	
33.00	Does not know normal enforcement response to failure to meet AO limits.	EPA enforcement, discretion	
34.00	There are a range of enforcement reponses to failure to meet NPDES limits, from telephone calls to bringing criminal suit. EPA has considerable discretion in responding to AO violations.	EPA enforcement, discretion	
35.00	Factors weighed in AO enforcement are weighed on case-by-case basis: damage to receiving water or good faith by discharger are two examples. Seriousness of violation likewise determined on case-by-case basis.	EPA enforcement, discretion	
41.00	CBOD test is not often appropriate for secondary treatment facility; it may be where plant is oversized, and nitrification is likely. CBOD is an appropriate test for an AWT facility.	EPA enforcement, discretion	
44.00	In establishing enforcement action compliance schedules, EPA will consider discharger's ability to pay for compliance-related capital costs.	EPA enforcement, discretion	
48.00	In general, a historical violation is less serious than a present violation. An AO, as an injunctive remedy, is indicative of a presently occurring violation.	EPA enforcement, discretion	
50.00	Referrals to DOJ for civil enforcement typically arise out of violation of the law, although MArlar believes he has seen referrals for violations of an AO.	EPA enforcement, discretion	
52.00	There is no specific procedure for termination of an AO; generally, a letter is sent notifying discharger of termination of the order.	EPA enforcement, discretion	
53.00	Closure of an AO does not necessarily mean AO has been fully complied with.	EPA enforcement, discretion	
54.00	Delegation agreements outline the specifications of state NPDES permitting and residual state law enforcement authority.	delegation; state enforcement	
55.00	Because Florida did not have delegation authority in 1991, Marlar ignored Florida's enforcement activities (state and federal enforcement programs were independent of each other, and respective enforcement activities were not coordinated).	delegation; state enforcement	

Page	Notes	Topic	Volume
62.00	However, if a state had established a compliance schedule in a CO or temporary operating permit, EPA might defer to the schedule by including it in the federal AO.	delegation; state enforcement	
73.00	Marlar believes that BEN is used to calculate benefit to discharger of foregoing/delaying expenditures needed to comply with Clean Water Act. It is used in civil litigation or penalty calculations in an adminstrative action.	penalty calculations; BEN	
74.00	May be other factors, in addition to economic benefit and deterrent assessments, that EPA considers in seeking a penalty.	penalty calculations	
75.00	Has never heard of "wrongful profits" analysis.	penalties; wrongful profits	
80.00	Does not know if violation of AO and underlying violation of permit count as separate CWA violations.	counting violations	
81.00	Has never heard of situation where EPA sought penalties from parent company of discharger.	imputed liability, parent co.	
84.00	Typically, pattern of corporate misbehavior will trigger an action that includes facilities owned by a single corporation.	corporate misbehavior	
107.00	Permit renewal can be denied for failure to meet any condition of the permit.	Basis for permit denial	
109.00	Fact sheet should include effluent limits both for a proposed permit, and for a proposed permit denial.	Basis for permit denial	
120.00	WWE may have had a wasteload allocation in September 1983, but it is unclear what it was.	Basis for permit denial	
122.00	January 1981 wasteload allocation study was a planning document, not a basis for legal requirements.	Basis for permit denial	
123.00	Kagey apparently relied on 1981 study as a basis for permit denial, as stated in her fact sheet.	Basis for permit denial	
133.00	It is desirable, though not necessary, for wasteload allocations to be approved by EPA before they can be used in permit determinations; technical adequacy of allocations can be addressed during the public review and comment phase of the NPDES permit process.	Basis for permit denial	

Page	Notes	Topic	Volume
137.00	Set of technical information, even if not approved by EPA as a 303(d) wasteload allocation, could be used as the basis for NPDES permit effluent limits.	Basis for permit denial	
142.00	EPA can, under its own CWA authority, develop or adopt its own WLA, and place it in a NPDES permit for public scrutiny.	Basis for permit denial	
150.00	The purpose of State-EPA region IV agreements on the development of WLAs was to "heighten [states'] interest in complying with the law"; but the agreements themselves have "no official status..under the law."	state-EPA WLA agreement	
168.00	Permit was issued and not challenged.	Basis for permit denial	
172.00	Zero wasteload allocation could not have been used as basis for denial, at least as an approved allocation under 303(d), since it was apparently not noticed and approved as required under the CFR.	Basis for permit denial	
178.00	Marlar suggests that he does not agree with Barrett's assessment that Kagey had no basis for denying the permit.	Basis for permit denial	

Deposition Summary
Peter McGarry
May 17, 1994

Title: Chief of Compliance and Enforcement Unit in the Drinking Water Section of EPA's Region IV's Water Management Division.

He stated that he is not responsible for writing NPDES permits but he did review them on occasion; his staff had the authority to make a recommendation that a permit be terminated. He describes the process of applying for an NPDES permit.

He could not recall if facilities other than FCWC had their permit renewal applications denied. He did not participate in meetings concerning the EPA's decision to deny FCWC its permit renewal. He doesn't have the authority to revoke a permit but he could recommend enforcement for a violation of water quality standards. He discusses a meeting that was held to review the compliance status at FCWC facilities. He briefly describes the Administrative penalties procedure.

He does not recall if anyone called Florida to find out if FCWC had a WLA before their permit was denied. He has no recollection of whether FCWC was violating water quality standards; no recollection of any time when effluent limitations and water quality standards were being met but the permit was denied; no recollection of any situation in which a permit was completely taken away.

Exhibit_____(GHB-24)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

94 OCT 25 PM 1:22

CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLA.

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.:
	)	93-281-CIV-FTM-21
FLORIDA CITIES WATER COMPANY,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S MOTION TO DISQUALIFY COUNSEL

Pursuant to Rule 7(b) of the Federal Rules of Civil Procedure, and for the reasons set forth in the accompanying memorandum, Florida Cities Water Company, moves for entry of an order disqualifying Plaintiff's counsel in this action. Pursuant to Local Rule 3.01(g) of this Court, counsel for Florida Cities has conferred with counsel for Plaintiff in a good faith effort to resolve the issues raised by this Motion and have been unable to agree on the resolution of the Motion.

Respectfully submitted,

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October 24, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

93 OCT 25 PM 1:22

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.:
	)	93-281-CIV-FTM-21
FLORIDA CITIES WATER COMPANY,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISQUALIFY COUNSEL

Because of ex parte communications by Plaintiff's counsel with a former managerial employee of Defendant who, according to the law of this Court, is a party in this case, Defendant Florida Cities Water Company ("Florida Cities") seeks to disqualify Plaintiff's counsel in this case.

I. BACKGROUND

The detailed factual background regarding the ex parte contacts made by Plaintiff's counsel is set forth in Defendant's Memorandum in Opposition to Plaintiff's Motion for an Order Allowing ex parte Contacts With Former Employees, which is adopted by reference. However, a concise recital of the undisputed facts that constitute the specific inappropriate contacts follows.

In April, 1994, Defendant's counsel learned that meetings between a Department of Justice attorney and a former Florida Cities' employee had

occurred. Specifically, in mid-February, 1994, counsel for Plaintiff traveled to Australia and conducted two meetings with Robert H. French (formerly Senior Vice President of Florida Cities). Mr. French, as a former key employee and manager, possesses personal knowledge of confidential and attorney-client privileged information relating to matters that are at the heart of this litigation. In addition, his statements might be admissions against the corporation or his actions might be imputed to the corporation. These meetings were conducted over a period of two days -- February 14-15, 1994 -- and lasted a total of approximately four hours. Counsel for Florida Cities was neither notified nor given an opportunity to attend or to object to these ex parte meetings. Mr. French did not have any other counsel present. Florida Cities' counsel was subsequently informed by Mr. French that the Department of Justice attorney had met with him and had sought information relating directly to the central legal and factual issues in this litigation. These factual components of the government's inappropriate behavior are not in dispute. See Affirmations of Robert B. Gordon (attached as Exhibit A) and Gerald S. Allen (attached as Exhibit B) and Transcript of Julie L. Karleskint's Deposition of April 21, 1994 (filed with this Court by Plaintiff). Indeed, Plaintiff's counsel "acknowledges that it has had ex parte contacts with Defendant's former employees . . . and stands by its position in its initial brief that such contacts are both entirely proper as well as entirely necessary to professional and efficient trial preparation." Plaintiff's Reply Memorandum at 1.

II. ARGUMENT

A. Former Managerial Employees May Be Parties with Whom Ex Parte Contacts Are Prohibited

The U.S. District Court for the Middle District of Florida, unlike many other jurisdictions, has a well-established rule that former managerial employees may, under certain circumstances discussed below, be considered parties and that ex parte contacts with such former employees by opposing parties' counsel is prohibited and may be grounds for disqualification.[1/] The facts relevant to this Motion To Disqualify clearly meet this Court's test.

The professional conduct of attorneys in this Court "is governed by the Model Rules of Professional Conduct of the American Bar Association as modified and adopted by the Supreme Court of Florida. U.S. Dist. Ct., M.D. Fla. Loc. R. 2.04(c)." Rentclub, Inc. v. Transamerica Rental Finance Corp., 811 F. Supp. 651 (M.D. Fla. 1992) (hereinafter, "Rentclub"). In Rentclub, this court held that while the Rules of Professional Conduct do

> not contain an express provision prohibiting the appearance of impropriety, Florida law clearly retains this requirement. In State Farm Mutual Auto Co. v. K. A. W. etc., et al, 575 So.2d 630, 633 (Fla. 1991),

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[1/] Florida Cities recognizes that many other federal jurisdictions do not consider former managerial employees to be parties. However, this Court has twice affirmed, in Rentclub and Browning, supra, that former managerial employees are parties when they clearly possess attorney-client and other privileged information or when they might make statements attributable to the company. See Glenn J. Waldman, "Can We Talk? Communicating with Former Employees of an Adverse Party in Litigation," The Florida Bar Journal (October 1994) at 120.

> the Florida Supreme Court ruled that attorneys must still avoid even the appearance of impropriety. Accordingly, it has been held "even an appearance of impropriety may, under the appropriate circumstances, require prompt remedial action from the Court . . . Consequently, any doubt is to be resolved in favor of disqualification."

Rentclub at 654.

An organizational party under Rule 4-4.2 of the Rules of Professional Conduct includes managerial employees whose acts or omissions may be imputed to the organization or whose statements may constitute an admission on the part of the organization. Accordingly, contact by an opposing counsel with such managerial employees is prohibited. In this Court, an organizational party under Rule 4-4.2 includes former managerial employees, who possesses confidential and attorney-client privileged information and whose statements might be admissions against the corporation or whose actions might be imputed to the corporation. Browning v. AT&T Paradyne, 835 F. Supp. 1564 (M.D. Fla. 1993) (hereinafter "Browning"); Rentclub, supra. The basic issue is whether Robert H. French is a "party." If so, then the ex parte meetings with him by Plaintiff's counsel were clearly inappropriate.

Defendant's counsel was informed in April 1994 that Plaintiff's counsel had travelled to Australia specifically to meet with Mr. French to discuss this case. Plaintiff's counsel's meetings with Mr. French extended over two days on February 14-15, 1994. The meetings lasted a total of approximately four hours. Plaintiff's counsel during these meetings discussed with Mr. French the central

legal and factual issues in this case, including the costs and circumstances for the delay in Florida Cities' extending the outfall and the related upgrade construction at the Waterway Estates facility, and excess profits allegedly realized by Florida Cities as a result of delays in this construction project. See Affirmation of Gerald S. Allen (attached as Exhibit B). Plaintiff's counsel gave Mr. French a copy of the Complaint brought by the government against Florida Cities in this case and discussed with Mr. French the merits of the Complaint.

Florida Cities' legitimate interests lie in protecting the potential disclosure of confidential or privileged information during these ex parte meetings or the making of statements that might be imputed to Florida Cities. This Court held in Rentclub that

> "[p]rivileged communications present a distinct problem with respect to contact with former employees, thus ex parte contact should be barred to prevent disclosure of any inadvertent confidential communications. The focus is on whether the former employee's statements could be admissions against the corporation or whether their actions could be imputed to the corporation.

Rentclub, supra, at 657.

As evidenced by the attached Affirmations of Robert B. Gordon (attached as Exhibit A) and Gerald S. Allen (attached as Exhibit B),[2/] Robert H. French held the position of Senior Vice President of Florida Cities from June 15, 1987

[2/] As the Affirmations explain, Mr. Gordon's supervisory responsibilities over Mr. French preceded those of Mr. Allen. Taken together, these two Affirmations address the entire time period of Mr. French's employment with Florida Cities.

to November 16, 1990. Many of the actions of Florida Cities that are the subject of this lawsuit took place during Mr. French's employment with Florida Cities. These actions include the extension of the outfall and the related upgrade of Florida Cities Waterway Estates Sewage Treatment Facility in Fort Myers, Florida. As affirmed by the attached Affirmations of Robert B. Gordon (Exhibit A) and Gerald S. Allen (Exhibit B), throughout Mr. French's employment by Florida Cities, which include the time periods of interest to this litigation, Mr. French had the following management responsibilities:

a) He had access to confidential and proprietary information of Florida Cities and Avatar.

b) He was privy to intra-office and inter-office communications relating to technical, financial, policy, environmental compliance, regulatory, and legal matters.

c) He participated in intra-office and inter-office meetings relating to such matters.

d) He had direct and personal contact with Florida Cities' and Avatar's counsel -- both inside counsel and outside counsel regarding such matters -- and reviewed transmittals to and from them.

e) He regularly attended management meetings with senior managers of both Florida Cities and Avatar.

f) He was frequently responsible for disseminating confidential business documents and legal documents to the appropriate other managers and executives of Florida Cities and Avatar.

In light of these responsibilities, Mr. French clearly possesses attorney-client and other privileged and confidential information regarding this case, and he is a former managerial employee whose statements could be admissions against Florida Cities and whose actions or omissions could be imputed to Florida Cities. Thus, by the standards established by this Court, Mr. French is a "party" to this litigation. Therefore, the ex parte contacts by Plaintiff's counsel with Mr. French, without notice to Florida Cities or its counsel, are no less egregious than direct ex parte contacts with other parties to this case, such as current managerial employees of Florida Cities. As such, the remedy for these ex parte contacts should be the same as for similar ex parte contacts with other parties.

B. The Appropriate Remedy for Improper Ex Parte Contacts with Former Employees Who are Parties Is, at a Minimum, Disqualification

The law of the Eleventh Circuit is well-established that improper conduct by counsel should result in disqualification, if the proper circumstances, discussed below, are present. Because those circumstances are present here, Eleventh Circuit law mandates disqualification of Plaintiff's counsel. Further, this Court must devise an appropriate procedure whereby all information

obtained -- directly or indirectly -- or otherwise derived from the ex parte contacts should play no role in this case.

The Eleventh Circuit has established a two-prong test for disqualification based on appearance of professional impropriety. This Circuit has held:

> First, although proof of actual wrongdoing is not required, there must exist a reasonable possibility that some specifically identifiable impropriety did in fact occur. Second, the likelihood of public suspicion or obloquy must outweigh the social interests that will be served by the attorney's continued participation in the case. (Emphasis added.)

Norton v. Tallahassee Memorial Hosp., 689 F. 2d 938 (11th Cir. 1982) (hereinafter "Norton"). Under Norton, both prongs of the test must be met.

The appearance of professional impropriety in this case consists of ex parte contacts by Plaintiff's counsel with the former managerial employee Robert H. French under circumstances (in Australia) where there is the reasonable possibility of disclosure of attorney-client or other privileged and confidential matters relating to this lawsuit or where Mr. French's statements might be imputed to Florida Cities.

In examining whether there is "a reasonable possibility that some specifically identifiable impropriety in fact occurred," the operative facts are not in dispute. First, even though Plaintiff's counsel specifically spoke with Defendant's counsel on more than one occasion about arrangements for the government to depose Mr. French, not once did Plaintiff's counsel advise Florida

Cities' counsel that he was going to have, or had already had, ex parte communications with Mr. French. Second, Plaintiff's counsel did in fact travel to Australia to have ex parte meetings with Mr. French concerning the legal and factual issues in this lawsuit. One can reasonably infer from these undisputed facts that Plaintiff's counsel (even if unintentionally) created a situation in which Mr. French may have disclosed confidential matters directly related to the issues in this case. Mr. French clearly was in possession of much confidential and attorney-client privileged information. Because Mr. French is not an attorney and chose not to have counsel present, under the circumstances of these meetings there is more than "a reasonable possibility" that Mr. French could have disclosed such privileged or confidential information, even if he did not intend to do so.

Moreover, the government's assertion that Plaintiff's counsel offered Mr. French the opportunity to have personal counsel present is irrelevant here. Personal counsel would have known nothing about this case or the privileged information to be protected. Such an offer would have no impact on the reasonable possibility of the impropriety, because the offer in no way protected or addressed Florida Cities' interests. Those interests could only be protected by having Florida Cities' counsel present, not Mr. French's personal counsel.

As Rentclub, supra, emphasizes:

> [T]he interest of the corporation in protecting privileged information acquired by an employee during the course of employment from disclosure to

> an opponent in litigation remains after the employee leaves the corporation . . . It has been recognized that a former employee who is a 'party' because of his position and knowledge will remain a party even after he leaves the corporation because that employee has a memory. The corporation continues to have a vital interest in the employee's knowledge of privileged information and its potential release to opposing counsel in litigation after the employee leaves.

Id. at 658.

As to the second prong of the Norton test, it would seem that the likelihood of public suspicion that would result from improper ex parte contacts with a former managerial employee would clearly outweigh whatever social interest, if any, that would be served by allowing Plaintiff's present counsel to continue to participate in the case. This conclusion is more certain where, as here, Plaintiff's counsel is staff counsel for the Department of Justice.

Plaintiff's counsel argues that it "has taken pains to ensure that no privileged information was elicited from the ex-employees it contacted" during these ex parte contacts (Plaintiff's Reply Memorandum at 3) and that its conduct "has been fully in accord with the Department's guidelines for its attorneys in such matters."[3/] Whether or not the government directly sought, by subterfuge

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[3/] See Letter of April 20, 1994 from Daniel S. Jacobs to Don G. Scroggin at 1 (attached as Exhibit B to "Defendant's Memorandum in Opposition to Plaintiff's Motion for an Order Allowing Ex Parte Contacts with Former Employees." The guidelines referenced in that letter, which have now been published in final form [59 Fed. Reg. 39910 (August 4, 1994)] do not supersede the law of this court. Moreover, the scope of those guidelines, which were not published even in draft form (March 3, 1994) until after the ex parte contacts that are the subject of this Motion, are subject to question. The immediate-past President of the American

(continued...)

or otherwise, to solicit privileged information is irrelevant to protecting the inadvertent or accidental disclosure of such privileged information under these circumstances. Indeed, it is unclear how Plaintiff's counsel could have determined whether the information he gathered from these lengthy ex parte exchanges was privileged. Judge Kovachevich's decision in Rentclub makes clear, as discussed above, that the scope of the Court's prohibition of such ex parte contacts extends beyond the direct solicitation of privileged information. It is precisely because of the "reasonable possibility" of accidental or inadvertent disclosure or the making of statements attributable to Florida Cities under the circumstances of these ex parte meetings that this Court's decision in Rentclub makes both good sense and sound law.

Finally, Plaintiff's counsel emphasizes that during these ex parte meetings Mr. French was "treated fairly by the government," that "the Government had been 'very pleasant,'" and that Mr. French "had not been pressured by the government in any way into speaking to the government." Plaintiff's Reply Memorandum at 4. Whether Plaintiff's counsel was mannerly and polite in conducting these ex parte meetings is beside the point. The very fact of

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3/ (...continued)
Bar Association has termed the government's self-serving new policy "a disturbing arrogation of power." See "Questioning New DOJ Rule: Direct-contact policy disregards ABA Rule 4.2," American Bar Association Journal (October 1994) at 101.

conducting these ex parte meetings with a party was improper under the law of this Court.

As this Court has recognized, an employer such as Florida Cities does not cease to have a legitimate interest in protecting such disclosure after the managerial employee leaves the company. In this complex case, even an experienced environmental attorney might have difficulty in always discerning a bright line distinguishing matters of fact from matters of law. Moreover, this Court has already been involved in the parties' dispute regarding whether Florida Cities' environmental audits were privileged -- an area commenters consider uncertain and in flux.[4/] In the face of such admitted complexity even to experts, it is unclear what basis Mr. French, a nonlawyer, would have for making the fine legal determinations regarding what information might be privileged or what statements might legally bind Florida Cities.

Indeed, the government acknowledges that its purpose in having these ex parte meetings with Mr. French and in seeking schedule similar ex parte meetings with the other former Florida Cities employees in Florida was because "the former employee may be very knowledgeable of facts relevant to the litigation yet not be as reticent as he might be if still employed." Plaintiff's

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[4/] The wide divergence of opinion on the confidentiality of environmental audits and the passage of new legislation in numerous states addressing this subject was the subject of a recent public meeting, held by EPA in Washington, DC, to which EPA said the response was "overwhelming." See 59 Fed. Reg. 38455 (July 28, 1994).

Memorandum at 9. In short, the government sought to gain an unfair advantage by deliberately creating a situation in which there was the reasonable possibility of disclosure of attorney-client and other privileged information. It is significant that Florida Cities had already voluntarily agreed and made preliminary arrangements with Plaintiff's counsel for the deposition of any of Florida Cities' former employees, including specifically Mr. French.[5/]

In disclosing the core information to the government, pursuant to the Federal Rules of Civil Procedure, Florida Cities named Mr. French as one of only five current and former key employees having information central to this case.[6/] In light of Florida Cities' subsequent discussions with government's counsel about Florida Cities' willingness to cooperate in voluntarily arranging Mr. French's deposition, it is hard to read any benign purpose into the government's acknowledged actions. In sum, the government knew that Florida Cities would seek to attend any meetings with Mr. French and the few other former key employees who were potential witnesses, and took steps to set up

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[5/] Plaintiff's counsel and Florida Cities counsel had reached an agreement that the voluntary deposition of Mr. French, tentatively scheduled for August 18-19, 1994 in Australia, would consist of one day for each side to examine Mr. French, as both Florida Cities and the government recognized that Mr. French's living in Australia would probably make him unavailable for trial. The government has now "taken off the calendar" this scheduled deposition without explanation. Florida Cities remains willing to participate in any voluntary deposition of Mr. French.

[6/] See Florida Cities' letter of February 4, 1994, from Gary H. Baise to Daniel S. Jacobs regarding "Disclosure of Core Information," attached as Exhibit A to Plaintiff's Reply Memorandum In Support of Ex Parte Contacts.

undisclosed ex parte meetings during which the reasonable possibility of disclosure of privileged or other confidential information would occur or during which the former employees might, as parties, make statements that could bind Florida Cities. This conclusion remains the same, even if such disclosures or statements were inadvertent or accidental, since the government deliberately created the occasion for such disclosure.

Two types of harm may occur to Florida Cities' interests as a result of these improper ex parte contacts. First, Plaintiff's counsel may have obtained privileged or otherwise confidential information that would not have been disclosed had Florida Cities' counsel been present. Plaintiff's counsel may seek to introduce such tainted evidence at trial. Second, Plaintiff's counsel may have gained information that will lead to the introduction of new witnesses or new evidence that would not otherwise be presented to the Court. Either event would unfairly prejudice Florida Cities' interests. The scope of this harm to Florida Cities' interests has recently been significantly increased, as the Plaintiff has pursued in discovery a several-fold enlargement of this case to cover four other Florida Cities' facilities that are not part of the Complaint.

In addition to the obvious potential prejudice to the interests of Florida Cities resulting from these ex parte meetings, the government's conduct may also compromise the integrity and efficiency of the judicial process now underway before this Court. If the questions of disqualification were to arise later at trial (such as when Plaintiff's counsel might seek to introduce tainted evidence), the

Court would then be faced with the difficult question of how to address the government's impropriety. Disqualification of Plaintiff's counsel at that later time might result in significant delays or the necessity for a new trial. Judicial efficiency and fairness argue for acting on disqualification now, when disqualification of Plaintiff's counsel will cause little or no prejudice to the government or inconvenience to the Court. Disqualification would thus preserve both Florida Cities' legitimate interests and the Court's interest in the integrity and efficiency of the judicial process.

III. CONCLUSION

For all of the above-stated reasons, Defendant submits that the appearance of impropriety and this Circuit's two-prong test for disqualification have been clearly met. Moreover, any doubt is to be resolved in favor of disqualification. State Farm Mutual Auto Co., supra. Accordingly, Defendant respectfully requests that this Court disqualify Plaintiff's counsel. This Court may disqualify the entire Department of Justice or, at a minimum, disqualify Plaintiff's current counsel and develop specific instructions to implement the order of disqualification in order to avoid the passing on of tainted evidence or privileged information to successor counsel. Under the current circumstances, Florida Cities believes that the appropriate remedy is to disqualify plaintiff's current counsel, and Florida Cities requests the opportunity to brief the question of what

specific instructions would most fairly implement the Court's decision to disqualify Plaintiff's counsel.

Respectfully submitted,

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October 24, 1994

CERTIFICATE OF SERVICE

I hereby certify that a copy of "Defendant's Motion To Disqualify Counsel," "Defendant's Memorandum In Support Of Defendant's Motion To Disqualify Counsel," "Affirmation of Robert B. Gordon," and "Affirmation of Gerald S. Allen" has this 24th day of October, 1994 been sent to the following persons by United States first class mail, properly addressed and postage prepaid.

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Exhibit_____(GHB-25)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FLORIDA CITIES WATER,

Defendant.

CASE NO. 93-CV-281

Fort Myers, Florida
February 15, 1995
2:50 P.M.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE GEORGE T. SWARTZ
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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LAWYER'S NOTES

Page	Line	

THE CLERK: Calling Case Number 93-281-CV-FtM-21, United States of America versus Florida Cities Water Company.

THE COURT: Make your appearances, please, gentlemen.

MR. JACOBS: Good afternoon, Your Honor. Daniel Jacobs, U.S. Department of Justice for the United States. I apologize for being a few minutes late. I flew out of a --

THE COURT: I understand the problem.

MR. JACOBS: -- snowstorm this morning.

MR. BAISE: Gary Baise, firm of Gabeler, Baise and Miller, representing Florida Cities Water Company, Your Honor.

MR. SCROGGIN: Don Scroggin, also Gabeler, Baise and Miller, representing Florida Cities.

MR. HUME: Harold Hume of Henderson, Franklin, also on behalf of Florida Cities.

THE COURT: We're here for various purposes. Number one, which I will address first, is the preliminary pretrial conference. Before everybody starts arguing with everybody, let's see where we can get with that first.

Then there was a motion to allow ex-parte contacts, a motion to disqualify counsel, and a motion

for a protective order from two individuals trying to delay a deposition. We'll address all of those.

First things first, the preliminary pretrial conference. I need to know how long before we can cut off the discovery.

MR. JACOBS: Your Honor, on behalf of the United States we would ask the Court to allow us sixty days in which to amend our complaint, and then we would anticipate being in a position to complete discovery approximately three and a half months thereafter.

Referring the Court respectfully to the parties answers to Court's joint standard interrogatories and joint report of parties, I would respectfully suggest that the Court add on to the proposed dates that the United States suggested in that document an additional five months, as I say, to allow for the amendment of the complaint and an additional three months, or three and a half months thereafter for us to complete discovery.

THE COURT: Eight months you're saying?

MR. JACOBS: I'm saying approximately five and a half months from today, Your Honor.

THE COURT: Okay. I thought you said five and three.

MR. JACOBS: If I did, I misspoke. The five refers to the dates that we initially proposed way back

a year ago when we put the suggested dates together, which preceded our anticipation of amending the complaint.

THE COURT: All right. So five to six months.

MR. JACOBS: Yes, Your Honor.

THE COURT: All right.

MR. JACOBS: If the Court pleases.

MR. BAISE: Your Honor, it's a bit difficult to respond to that amount of time and whether or not it is accurate. The Justice Department informed us back on April 13th, 1994, that it was thinking about amending the complaint. It has not done so. It's engaged in massive discovery since that period of time. Only when we finally see the amended complaint will we have some idea as to how much time it will take us to respond to that particular complaint.

At this point, as you know, we just have a complaint that involves one facility. The Government is looking at four additional facilities at this point. The Government has obtained approximately a half million documents that we have readily provided to them for review, but at this point we have not seen the complaint filed nor do we know what charges they're likely to bring against us. So it's unlikely that we can respond with respect to the exact date and the amount of time

today until we see that complaint.

THE COURT: Well, this is -- as I said this is a preliminary pretrial conference. I'm trying to get a handle on it.

MR. BAISE: Yes, sir.

THE COURT: Is that an accurate statement that you're adding other facilities or what is it that you're amending?

MR. JACOBS: Your Honor, this company operates six permitted facilities in the State of Florida. Five out of six of those are in violation or have been in violation of the Clean Water Act within recent years and we are indeed studying the possibility of amending the complaint to bring enforcement actions with respect to those five or some of those five facilities.

I'm a little bit aggrieved about this April 13th date. I can tell you that on the record the Government has never advised the Defendant that we would be amending the complaint. We might have off the record tried to give them a head's up that we were headed that way. But, Mr. Baise, I'm a little surprised that you're putting that date before the Court at this time. I have no record of having told you that, but I can certainly assure you that if I did it was meant as an informal communication, not on the record.

MR. BAISE: I believe we can back that date up, Your Honor, and we'll take the opportunity to do so.

THE COURT: Before we get any further then this, let me tell you something so you know where I'm coming from. Counsel will not address each other, they will address this Court and that's it. You understand?

MR. JACOBS: Yes, Your Honor.

MR. BAISE: Yes, Your Honor.

THE COURT: Unless I tell you to do otherwise, so we don't have any arguments going on. Only one you're suppose to talk to here is me.

I'm going to give you sixty days to get an amended complaint filed. And if you don't, from there on in it may be very difficult to file an amended complaint.

MR. JACOBS: Thank you, Your Honor. Would I have to seek leave of Court at that time or is the Court granting me leave at this time?

THE COURT: I'm going to grant you leave at this time.

MR. JACOBS: Thank you, Your Honor.

THE COURT: But that's it as far as I'm concerned, I'm not going to drag this on.

MR. JACOBS: Understood, Your Honor.

THE COURT: All right. I'm going to add

another four months to that for cut-off of discovery. So it will be a total of six months. We'll fill in the dates as we go along.

The motion to add parties will be within that sixty days I would assume.

MR. JACOBS: Yes, Your Honor.

THE COURT: Motions for summary judgment to be filed -- should be able to be filed thirty days after discovery. So seven months.

We've already discussed -- are there any other motions outstanding other than --

MR. JACOBS: Other than the ones before the Court today, Your Honor, the United States I believe in February of '94 filed a motion to strike the affirmative defenses that the Defendant presented in its answer.

THE COURT: That's moot at this point if you're going to file an amended complaint, because they're going to file a whole new answer, I would assume.

MR. JACOBS: I agree, Your Honor, or it will be moot shortly.

THE COURT: We'll set a pretrial conference, a final pretrial conference eight months from today. Pretrial statement is to be filed five days before the conference.

I know it's early, but can anybody hazard a guess as to how long the trial will be?

MR. JACOBS: Your Honor, again the parties have stipulated in our answers to the Court's joint interrogatories that the trial would take approximately one week if there were a decision on the Government's motion for summary judgment prior to trial. If both liability and penalties needed to be tried, we thought it would take two weeks.

MR. BAISE: Again, Your Honor, it's very difficult to make any estimate until we see whether or not they're going to bring charges against one facility only or four additional facilities at this point.

THE COURT: I'll just put temporarily down the two weeks and we'll see where we go from there.

MR. BAISE: Okay.

MR. JACOBS: Judge, on the subject - and I hope I'm not jumping ahead - the parties stipulated it would be a nonjury trial.

THE COURT: Okay. Is that correct?

MR. BAISE: Agreed, sir.

THE COURT: All right. I don't know anything else that I want to add on that then at this time.

THE LAW CLERK: Do you want to set the trial date for nine months from now?

THE COURT: I'm going to withhold setting a trial date at this time. I'm not too sure about some of these other dates yet, in trying to set a schedule. I think after the first sixty days go by we'll see what the complaint takes shape.

All right. Defendant's motion for a protective order in regards to Mr. Lawrence Wilkov and James Elder. I'm not sure you have standing to file that motion unless you can tell me that you have represented those two individuals.

MR. HUME: Your Honor, I believe that until just maybe as recently as yesterday Mr. Baise and Mr. Scroggin did in fact represent those individuals. Part of the reason for the motion for protective order is to give those individuals an opportunity to have new counsel. I understand, at least as of yesterday, they have done so.

THE COURT: They have?

MR. HUME: They have. A gentleman by the name of John Campbell with the Holland and Knight firm in Miami.

I believe, Your Honor, I can't cite the rule off the top of my head, but I believe that the rule provides that a party or a person whose deposition is scheduled to be deposed may file for a protective order.

We did it --

THE COURT: If you represented him, yes.

MR. HUME: Well, we did represent him. As of today, I would say we do not. Is that correct, gentlemen?

MR. BAISE: Correct, Your Honor.

MR. JACOBS: If I may, Your Honor, as of yesterday they were -- we were advised at least by Mr. Campbell and his associate that Holland and Knight in Miami represented these individuals, and that conversation took place literally minutes after the Court contacted us to see whether we had any objection to the protective order motion being heard today. And in view of the fact that we did not and understood it would go forward today, we alerted Holland and Knight that the hearing would take place today at three p.m.

MR. HUME: Your Honor, that's consistent with what I -- I think it's consistent with what I just told the Court, that until yesterday we did represent -- I shouldn't say I, I did not, but Mr. Scroggin and Mr. Baise did.

THE COURT: Where is Holland and Knight? I don't think you have any right to argue that motion since you no longer represent those people. And I think their counsel should be here to argue it and they better

be here to have a deposition, and I don't see any reason why they can't be here to have a deposition.

MR. BAISE: Your Honor, may I address the Court with regard to this issue and how this has developed and why this request for protective order was filed? May I proceed?

THE COURT: Yes, you may.

MR. BAISE: Your Honor, the Clean Water Act has criminal provisions, as you are well aware. These provisions have been under construction by the courts around the country for some period of time, particularly the 1987 amendments.

The case that brought this issue to the forefront with respect to the two individuals in question here is a case that was argued before the Ninth Circuit Court of Appeals and decided in August of 1994. Went up to the U.S. Supreme Court and cert. was just denied on this case sometime around January 23rd through the 30th of this year. I first picked up the first notice that the cert. had been denied with respect to this matter from a publication that covers EPA activities and court activities.

This case is a stunner with respect to those of us who practice in the Clean Water Act area. What the dissent points out -- and would Your Honor allow me

to approach the bench and provide -- it would be marked as an exhibit, a copy of this Weitzenhoff case.

MR. JACOBS: Your Honor, while Counsel is approaching the bench, if I may interject with the Court's permission, this is a 1993 case, not a 1994 case. And the amendments that Counsel refers to were indeed passed in 1987. This is not new news.

THE COURT: Okay. Go ahead.

MR. BAISE: I beg the Court's indulgence to correct Counsel. It's dated August 8th, 1994. It was a rehearing on EnBanc. It was denied with the opinion as written. You can turn to Page 1,293. The initial decision was in 1993, but the date as you will see is August 8th, 1994.

The fact is, what the dissent points out, Your Honor, is that the majority criminalizes entirely innocent conduct. In fact, there's some interesting language that I would bring to the Court's attention at the bottom of Page 1,293, left-hand column, bottom paragraph where the Court says, "We have now made felons of a large number of innocent people doing socially valuable work."

In that same paragraph, the last full sentence -- and this is talking about people who run sewage treatment plants, Your Honor. This is about

individuals who know that they are discharging into waters of the United States or waters of the State of Florida or any state in this country. And the Court in it's dissent -- and there are five members of the court here pointing out, and it's describing people who work in sewage treatment plants or those who work around them, "If they know they are discharging into water, have a permit for the discharges, think they are conforming to their permits, but unknowingly violate their permit conditions, into prison they go with the most violent criminals."

The dissent also points out on Page 1,299, that's the last page, Your Honor, about midway down, again left-hand column on page 1,299, it says, "We have now imposed on these vitally important public servants a massive legal risk unjustified by law or precedent, if they unknowingly violate their permit conditions."

Most of us who have practiced in the Clean Water Act area, for my own case about twenty-two years, they've all always felt that to be convicted of a criminal act you had to knowingly know that you had the permit and knowingly violate the conditions in that permit. What this decision does is criminalize perfectly innocent conduct. It criminalizes negligent conduct.

The reason we sought originally to file this protective order with regard to the individuals in this case is that these folks clearly knew that they had plants that discharged water into waters of the United States. So this case -- in fact, there are a number of people that are looking at how to go to Congress to change the outcome of this case, because it criminalizes perfectly innocent conduct.

And as you read this case you will see the dissent saying people who go to work in sewage treatment plants are not paid nearly enough to expose themselves to potential criminal conduct. So once I saw that the Supreme Court had denied certiorari with respect to this case, I looked at it, I contacted the general counsel of Florida Cities, we had a meeting last Thursday to go over this issue.

Last Friday I instructed one of the lawyers representing Florida Cities to contact Mr. Jacobs, to talk to him about postponing these depositions coming up this week. The Weitzenhoff case as far as I know was not discussed with him by that counsel, but he can speak for himself regarding that point. Once Mr. Jacobs indicated he wanted to proceed with these depositions of the two individuals, and that was reported to me roughly five o'clock Friday afternoon, I discussed it again with

my client, we raised it with the individuals in question, and felt at that point in light of the fact that the Supreme Court had denied certiorari with this case, that these individuals should seek their own counsel and proceed as they saw fit in light of this case.

That in general, Your Honor, is the background of why we filed this motion for protective order, did not adhere to this Court's normal rule of bringing or giving ten days notice and then asking for the matter to be brought on for hearing.

MR. HUME: Your Honor, if I may before Mr. Jacobs responds to the substance. On the standing issue, I was looking for the rule and it is 26C, and it says that -- it is with protective orders, it says, upon motion by a party, which Florida Cities is, or by the person from whom discovery is sought, so it's either/or, the Court may then, you know, enter a protective order.

So even though at the time -- or at the time the motion was filed it was filed on behalf of Florida Cities. As it happens, Mr. Baise and Mr. Scroggin also represented these two individuals. But I believe, Your Honor, Rule 26C confers standing upon a party to ask for the protective order and for the reasons that Mr. Baise just stated that was it. The purpose is to try to give

their new counsel the opportunity to get up to speed on this case before his clients are deposed, and that's why the additional thirty days was asked for.

I believe I can accurately represent to the Court that Mr. Campbell spoke yesterday with Mr. Jacobs in an effort to get him to agree to postpone it for some period of time, and Mr. Jacobs indicated that he was not willing to do so, which is why we're here today.

MR. BAISE: And, Your Honor, with respect to this case and with respect to the counsel representing the individuals in question, and obviously I do not -- no longer represent those two, but in light of this case and the reason we're asking for the postponement is that in my judgment these individuals have no choice but to take the Fifth Amendment as a result of this case. That's why we're asking for the delay.

Again I have no idea, nor can I speak for their new counsel, but I do think if you proceed with the depositions it turns out to be at least at this moment a waste of time. So in terms of saving time and effort, and we obviously are concerned about the shortness of time by which we brought this on, but that's the reason I wanted to give you some context into which to fit your thinking with regard to one, this case, why the motion, why the shortness of time, and why the Holland and

Knight lawyer is not here today.

THE COURT: Well, you haven't excused that, you haven't excused Holland and Knight from not being here.

MR. JACOBS: Your Honor, I tend to agree with the Court notwithstanding Counsel's citation to the rule, that the proper parties to bring the motion are not here today. The motion has not been brought by the proper parties, they are not in attendance.

The Defendant itself has no grounds to delay. They agreed to the dates long ago. If there is a party that has grounds to ask for the delay, it is the two witnesses. They did not bring the motion. They are not represented here today. They were advised minutes after I was advised that the Court would hear the motion today, they were advised that the Court would hear the motion today.

To give the Court some further background, the deposition of Mr. Elder was originally noticed for October 6th, 1994. This was not the first time we noticed his deposition. We actually sought to interview Mr. Elder back in April of 1994. We have now been waiting ten months to speak to Mr. Elder. And as I say, the date of February 16th was agreed to by the Defendant, we understand who represented at that time that he made that agreement that he represented -- that

the Defendant, rather, represented both -- or I'm sorry, that counsel for the Defendant represented both Mr. Elder and the Defendant. And the same applies to Mr. Wilcov.

This was not a case of the Government just sending marshals out and suppoenaing these individuals. We agreed with Counsel and then we issued notices and subpoenas. And yesterday we hear for the first time that we ought not to be able to go forward.

As far as the reference to the Weitzenhoff case, Mr. Campbell and I did discuss the Weitzenhoff case. I relied on the 1993 decision, because that's the one that Mr. Campbell brought to my attention.

I would note for the record that there was not a rehearing on EnBanc, that the petition for rehearing on EnBanc was in fact denied. And the dissents that Mr. Baise quotes from are the denial from the rehearing on EnBanc, if I've read this correctly in the last five minutes, the 1994 decision.

In any event, I think the important point to make here is that the Ninth Circuit hasn't legislated criminal activity, Your Honor, Congress legislated criminal activity under the Clean Water Act when it amended it in 1987. The Ninth Circuit -- the Government doesn't think the Ninth Circuit has done anything to

change the law. In fact, the majority of the Ninth Circuit obviously is interpreting the law consistent with the way Congress intended it.

THE COURT: It still could put individuals in the position of having criminal charges brought against them.

MR. JACOBS: Absolutely.

THE COURT: I don't care who did it.

MR. JACOBS: Absolutely. That was done in 1987, Your Honor. So the point I'm --

THE COURT: And these people need protection.

MR. JACOBS: I'm not going -- I'm a civil enforcement attorney.

THE COURT: I understand.

MR. JACOBS: I'm not really all that capable of addressing --

THE COURT: I'm going to grant the motion to the extent that I'm going to require that Counsel show to me that this was not just a delay and that these individuals were in fear of having -- I'm disappointed that their counsel is not here, nor are those individuals if that's what they want to have happen. And I'm going to have to have something from their attorney showing that they are consistent with this and they wanted the delay for the purposes that you

showed -- that you brought up. If they don't, I'm going to require that the Government be paid for making a trip down here for the depositions, and any costs that are attributable. At this time I'll reserve on any of that, but I may award it at a later date.

Yes, sir?

MR. JACOBS: Your Honor, one more point before we move on, if I may. The motion speaks in terms of a delay only. A letter that was faxed to me by Mr. Baise which accompanied the motion threatens that the witnesses won't actually appear. So I wonder - and I'd be happy to supply the Court with a copy of that letter - if I might quote the pertinent part: 'Counsel retained by Mr. Wilcov and Mr. Elder will decide whether their clients will agree to testify in response.'

THE COURT: Well, they will appear. If they want to use the Fifth Amendment, that's up to them, but they will appear. And I will expect that this be done within thirty days from today's date, and if it's not done then I may -- you can file whatever kind of sanctions you wish to ask for.

MR. JACOBS: Thank you, Your Honor.

MR. BAISE: I assure you, Your Honor, they will appear within the thirty days that the question was --

THE COURT: What they testify to is something

else.

MR. BAISE: Absolutely, Your Honor.

MR. HUME: Your Honor, point of clarification, you just made a comment that this is to happen within thirty days. Are you saying the rescheduling of their deposition should occur within thirty days?

THE COURT: Their depositions shall occur within thirty days.

MR. HUME: Okay. Thank you. That's what I thought.

THE COURT: Rescheduling is whenever you wish to do it.

MR. HUME: The taking of the depositions will take place within thirty days from today.

THE COURT: That's correct.

MR. HUME: Thank you, sir.

MR. JACOBS: Your Honor, as you've probably gleened we've had terrible times picking dates. May we have the luxury of picking the dates this time as long as we're going to come back for a second time.

THE COURT: As long as you work with them on any conflicts, but they still have to do it within thirty days.

MR. JACOBS: Yes, Your Honor.

THE COURT: That firm's big enough that they

can find someone to go sit in a deposition, I guarantee you.

Now, there's two motions which I'll hear together, that's the motions for ex-parte contact and disqualification. I don't know who wants to go first. I guess the motion to disqualify should go first.

MR. JACOBS: Chronologically, the motion for permission to conduct the contacts occurred five or six months before the motion to disqualify, with all due respect. And if the Court grants that motion, the Defendant's motion is moot.

THE COURT: Okay. Well, both are -- either way. I think I'd rather have them go forward with the motion to disqualify. Go ahead.

MR. HUME: Thank you, Your Honor.

As the Court I think is already aware from some comments that were made, the United States of America is suing Florida Cities Water Company to attempt to recover very substantial civil penalties for alleged violations of the Clean Water Act.

The Department of Justice is prosecuting the case through Mr. Jacobs primarily, as I understand it, and probably other attorneys within the department are assisting Mr. Jacobs.

THE COURT: It's a civil case so I don't think

they're prosecuting it.

MR. HUME: Well, I didn't mean in the criminal sense, I mean they are handling the case on behalf the Department of Justice.

The Department of Justice has admitted in filings that are before the Court today even that they have had ex-parte contacts with former employees of Florida Cities Water Company.

Affidavits that have been filed by Florida Cities we believe establish that these were high-level managerial employees who had access to privileged and confidential information, whose actions could be imputed to Florida Cities and whose statements could be used as admissions against Florida Cities.

Florida Cities believes, for reasons I'll state very shortly, that those contacts, those ex-parte contacts were improper. We are relying primarily, Your Honor, on the Rentclub case. I would imagine you already have a copy. I gave Miss Heise a copy.

THE COURT: I read it about forty times.

MR. HUME: Okay. In that case then, as the Court is well aware, Judge Kovachevich reasoned that a party includes former employees whose acts or statements could result in vicarious liability to the former employer. Thus, ex-parte contacts should be barred to

prevent disclosure of confidential or privileged information.

She recognized what I think is probably obvious, that the interest of a corporation in protecting such information from being disclosed to an opponent in litigation remains after that employee leaves the corporation, and that such a former employee, who is a party because of his position and knowledge, will remain a party even after he leaves the corporation because that employee has a memory. And the corporation continues to have a vital interest in the employee's knowledge of such information, and its potential release to opposing counsel in litigation after the employee leaves.

The Department of Justice is saying that Rentclub constitutes a -- I forgot the exact wording -- a substantial minority view and it is basically erroneous. I cannot represent to the Court that I have read all of the cases dealing with this subject both pro and con, because there are cases that go both ways. But I believe that in many of the cases at least, that adopt the position that such contact is appropriate, they didn't go into the very detailed discussion and analysis that Judge Kovachevich did in both the Rentclub and the Browning case which came afterwards.

She really tried to carve out a particular niche. She didn't say that all contact with all prior employees is improper. She said only those employees whose actions or statements might be used and serve the basis of the liability for the corporation are protected.

THE COURT: How does one find that out?

MR. HUME: Well, one does it by -- it's a factual question. And we have in this case submitted affidavits to support our position that these employees occupied that position. And in a moment I will go through that list of things that we believe fit the standards or meet the standards that Judge Kovachevich set forth.

THE COURT: The Government's reply implies that they got a list of employees from your company, but with that list there was no advisory notes that would say that these people had such information. Don't you think they should have done that?

MR. HUME: Your Honor, I'm really not knowledgeable about whether they got such a list and maybe if Mr. Baise could respond.

MR. BAISE: Yes, Your Honor, if I could address that. Under the new rules you are to advise the other party as to the persons that you think will be those

that have potential information.

THE COURT: I understand.

MR. BAISE: There's no indication that you have to identify them as high-level employees, low-level employees, mid-level employees, Your Honor.

THE COURT: I understand that, but if you're trying to protect certain people from any ex-parte communication, don't you think that would have been a wise thing to do?

MR. BAISE: Your Honor, we did not think they would fly off to Australia to talk to this fellow without taking the depositions or contacting a number of the other folks. It did strike us as very odd that they flew to Australia to make this ex-parte contact.

THE COURT: Well, if this guy had been a machinist you wouldn't have thought anything about it, right?

MR. BAISE: No. Because the case law, Your Honor, clearly under Judge Kovachevich's opinion talks about managerial employees and certainly implies high-level managerial employees.

THE COURT: With confidential information or with an attorney/client information.

MR. BAISE: That's correct. The machinist would not have that kind of information.

THE COURT: Might have. I mean, he might have been the one who was in charge of doing something that this whole lawsuit was about.

MR. BAISE: The machinist?

THE COURT: Yes. Not in this particular case, but I'm saying in some other case, like one of the auto accident cases that we've had. He could be, that's why I'm saying it seems to me it's incumbent if knowledge of that is known, it's incumbent upon the parties to advise of that knowledge.

MR. BAISE: Certainly the Government has not made any such effort to advise us of the key individual who made decisions. In fact, if anything they've tried to obscure who the parties were with respect to who had the key information, Your Honor.

THE COURT: Go ahead.

MR. HUME: Our position, Judge, on the Rentclub case is that it was a very well-reasoned case, I think it makes sense, the holding. It's, we believe, the law that is established in the Middle District and that it makes good sense and it makes good law.

The Department of Justice makes a point in opposition that the Florida Bar's position, the state bar's position under advisory opinion, Opinion 88-14, which is attached to their memorandum, says that they

have not accepted the interpretation that Judge Kovachevich put on it. I would point out to the Court two things. First of all, that a state court's interpretation is not binding on the federal court; and the Pellicast case which is referred to by Judge Kovachevich in her decision so states. That's at 129 FRD 621, it's a case out of New York.

And also I would point out to the Court that the Manor case, which is a Florida case, Second DCA, it's a 1993 decision, this was a motion for protective order which was denied, but in a footnote, Footnote 6, the Second DCA notes as follows -- well, I won't read the whole thing, but they refer to Judge Kovachevich's decision in Rentclub, and then they go on to say that,

"In moving for protective order, Manor Care did not identify specific former employees who might fall within this privileged 'managerial' class identified by Judge Kovachevich, but rather sought a blanket prescription against contact with any and all former employees.

"Our holding is therefore without prejudice to Manor Care to renew it's objection in the event it can point to individuals who have been the recipients of privileged information."

So in the Manor Care case -- and I don't think

I gave you the cite, it's --

THE COURT: Until they talk to them how do they know if they do or don't?

MR. HUME: How with will the Government know?

THE COURT: Yes.

MR. HUME: One suggestion that comes to mind is, if they know the person and know the position that he occupied in the company it would probably be a pretty good indication. I believe Mr. French, for example, whom they contacted --

THE COURT: Then they're just guessing, right, until they talk to them.

MR. HUME: Perhaps. Perhaps.

THE COURT: After they learn, then they should cease all further discussions maybe.

MR. HUME: Well, yes, it's a fair question, Judge, and I'm not sure I've got a good answer to it frankly. But the problem is if these are individuals who have the type of information that is protected and they shouldn't be contacted, then the harm can be done before they come back and say, oh, I spoke with this guy and I probably should not have done so.

THE COURT: So you're going to extend the rule to the point now that if anybody's in a managerial position they should never be addressed on an

ex-parte -- that's about what you're telling me, because that's the only way you could do it, because you would have to guess because that person was in a position he can't be addressed, you can't even go approach him.

MR. HUME: I guess, Judge, maybe the opposing party, whether it's the Department of Justice in this case or any other opposing party, they kind of run a risk if they make contact and it turns out that they goofed, then they run the risk of being disqualified, as has happened in Rentclub. And that's what we're asking the Court to do here.

THE COURT: Well, in Rentclub we had some other facts involved.

MR. HUME: There were some other factors, but the principle --

THE COURT: Paying a witness, that's what the impropriety was in Rentclub.

MR. HUME: Admittedly that was another factor that was present in Rentclub, but it's our position that the principle that was established in Rentclub is what we are asserting here, that contact with those high-level individuals who have that kind of information is prohibited under the rules of professional responsibility.

THE COURT: All right.

MR. HUME: Anyway, the point I was trying to make on the Manor Care case, Judge, and that cite is 611 So.2d. 1305, is that this is at least an indication from Florida courts that they recognize the correctness of Rentclub, and that if a proper delineation had been made and they left the door open for them to come forward with it, then the court might rule differently. The court might not have denied the motion for protective order.

The Department of Justice also argues that, well, gee, this takes away from us rights of informal discovery. And there's one case again we cited in our information or in our filings, Judge, but it's the Public Service case at 745 F.Supp. 1037, where this same kind of argument was made and the court I think disposed of it better than I could say it, so I'll just read the brief language from it. The court said on Page 1043, Judge, kind of in the middle of the left-hand column: "It is true that today's result will close off certain avenues of informal discovery, and in the process increase the need for depositions.

But the court went on to conclude in the final paragraph at the bottom that -- or even before we get to that, the court said that, "Requiring the depositions to be the way to obtain this information may ultimately

produce less procedural haggling, and thus maybe in the long run more cost efficient.

And finally the Court said, "It is also true that the deposition process is the best method of developing clear factual records and protecting the rights of all parties without unduly favoring or prejudicing either side. It is a far more reliable and ethically sound procedure than the informal methods espoused."

Our filings, Judge, show that the position of the Department of Justice regarding such contact is not just limited to this particular case, it's acquired national attention. I will concede that for the most part the attention is directed toward the Department of Justice's position that they can have this kind of contact even with existing or current employees. But there was one article that actually mentioned this case even though we're talking about a former employee, and if the former employee is considered a party, then the principle is the same anyway.

THE COURT: Or if they have an attorney.

MR. HUME: Pardon me?

THE COURT: Or if they're independently represented.

MR. HUME: I'm not sure I get your point,

Judge.

THE COURT: If they have counsel, then they -- whether they're an employee or not they shouldn't be without having their own counsel there.

MR. HUME: Well, that may be, if they say I have a lawyer and I want my lawyer present, then that contact shouldn't occur. But it's our position that even if they say they have a lawyer and they want their lawyer present, if in this case Florida Cities' attorney can't be present, no one's there to look out for Florida Cities' interests. The former employee's attorney would be looking out for the former employee's interest only. And so we think that Florida Cities or whoever the opposing party is would need to be present in any case.

Let me just go over the list of things that I mentioned about Mr. French. These are set forth in affidavits that are attached to our motion to disqualify. There are two, one of Robert Gordon and one of Gerald Allen. And so you can see how close perhaps Mr. French comes to the individuals who were -- or to the individual who was involved in the Rentclub case.

He had access to confidential and proprietory information of Florida Cities. He was privy to interoffice and intraoffice communications relating to technical financial policy, environmental compliance,

regulatory and legal matters. He participated in intraoffice and interoffice meetings relating to such matters. He had direct and personal contact with Florida Cities' and Avatar's counsel, both inside counsel and outside counsel, regarding such matters, and reviewed transmittals to and from them.

He regularly attended meetings, management meetings with senior managers of both Florida Cities and Avatar, and he was frequently responsible for assimilating confidential business documents and legal documents to the appropriate other managers and executives of Florida Cities and Avatar.

We think that under the standards of Rentclub he qualifies as that type of former employee who is protected, and anything that he might have said would be something that could be used against Florida Cities in this case. The contacts, therefore, we believe were improper. There is clearly an appearance of professional impropriety by virtue of such ex-parte contacts.

And, Judge, I would like to emphasis that we're not contending that the Department of Justice attorneys did anything intentionally wrong. We will acknowledge, let's say, that they did not know of the Rentclub decision and that their contacts were inappropriate.

But nevertheless, we believe that there is at least an appearance of professional impropriety and that if Mr. French was in fact a party by definition under Rentclub, even though he's a former employee, that contact was no less inappropriate than the contact would have been if they'd gone to the existing senior vice president of Florida Cities and had similar discussions with him. In fact, Judge, I think if we were in that context there wouldn't be any question that that's considered inappropriate, you can't do it.

THE COURT: Are you going to tell me that we'd have to disqualify the entire Justice Department from this case?

MR. HUME: No, sir. We're not asking that that be done.

THE COURT: It's their -- it's not just Mr. Jacobs that's made these -- set up these rules or internal rules, it's the Justice Department as I understand it.

MR. HUME: That's correct. He's doing what they said. But my point is, we're not asking that the entire Department of Justice be disqualified from the case, we are asking that Mr. Jacobs and whoever else may have been involved and be privy to these contacts be disqualified and that other attorneys within the

Department of Justice be required to handle the case, pursuant to whatever instructions the Court deems appropriate to prevent any taint, so to speak, spilling over.

THE COURT: How do you know there is any?

MR. HUME: Well, we don't know that there is, but that brings me to my next point, which is part of the two-prong test that must be met in the Eleventh Circuit, that there must be a reasonable possibility that some specifically identifiable impropriety has occurred.

As I indicated, they have admitted that they had the contact. We believe that the contact itself is improper and is an identifiable impropriety because it should not have occurred. That is sufficient in and of itself, but it's also not disputed that the Department of Justice attorney spent four hours over a two-day period speaking with Mr. French about matters pertaining to this lawsuit.

We think that under those circumstances there is at least a reasonable possibility that Mr. French could have disclosed privileged or confidential information. We don't have to prove that it actually happened, only that there's a reasonable possibility that it did.

THE COURT: So they're saying [illegible]

MR. HUME: Well --

THE COURT: He's an officer of the Court just like you are.

MR. HUME: Yes, sir, I understand that. But if -- I suppose if that were the test, and that's all it takes, then there would never be a disqualification.

THE COURT: Well, unless we had other facts.

MR. HUME: Well, perhaps so. We think that the test is probably lenient where it says a reasonable possibility that something happened. And Mr. Jacobs may not even yet be aware that something improper did happen. He may not know that some confidential information was imparted to him, so he may be unaware that something happened, but the information may have been imparted to him nonetheless.

The second prong of the test is the likelihood of public suspicion must outweigh the social interest that will be served by counsel's continued participation. Basically, you know, how's the public going to look on this knowing it's a wrong, the contact was inappropriate. How does that reflect on the legal profession and the legal system versus the social interest of a client being able to chose the attorney of his own choice.

Typically it arises in private situations where an individual's gone out and hired a lawyer and says, I want Joe to represent me, and now somebody's asking the court to take Joe away from him. We don't think that we have that situation here. We think the likelihood of public suspicion for the prohibited conduct would outweigh any social interest. We're not really sure there is one here when we've got the Department of Justice. I don't mean any disrespect to Mr. Jacobs, I'm really seeing him today for the first time. But I think where you have the Department of Justice, the attorneys perhaps are a little more fungible or interchangeable than for a private citizen to go and hire a lawyer of his own choice.

I'm not sure that anyone but the Department of Justice could handle this suit for the United States, but certainly it's less onerous for another lawyer in that department to handle the case than it is for a private individual to have to get somebody else.

As Rentclub and other cases point out, even the appearance of impropriety may require prompt remedial action from the court, and any doubt should be resolved in favor of disqualification. We think that certainly there is a reasonable possibility that something occurred and something improper occurred,

and that there is at least a doubt and that that doubt should be resolved in favor of disqualification.

As I indicated, we're not seeking to disqualify the entire Department of Justice, rather we're only seeking to disqualify Mr. Jacobs and any other attorneys who have had this contact with these former managerial employees.

I think any further comments, Judge, I will wait for rebuttal purposes.

THE COURT: If I give it to you.

MR. HUME: Okay. If you give it to me. Thank you.

MR. JACOBS: May it please the Court. This is a civil environmental enforcement action brought for violations of the Clean Water Act. The Defendant owns and operates the Waterway Estates Waste Water Treatment Plant located in North Fort Myers, Florida, as well as other waste water treatment plants in Florida.

The Waterway Estates Plant discharges into the Caloosahatchee River. The United States alleges in its complaint that the Defendant violated the act by, one, unlawfully discharging pollutants into the river without an EPA permit; two, unlawfully discharging pollutants into a tributary canal instead of the river itself once it obtained an EPA permit; and three, unlawfully

discharging pollutants into the river in excess of the limits specified in the EPA permit.

The issue before the Court today put simply is whether the United States is barred by Rule 4-4.2 of the Florida Rules of Professional Conduct from contacting Defendant's ex-employees without Defendant's permission. Your Honor, by my count there have now been no fewer than nine briefs filed by the parties on this issue, and I do not intend to use the Court's time today to rehash the briefs.

Suffice it to say, however, that as we have said in our briefs, the Government's position is that such contacts are entirely proper under the rules of this Court, the rules of professional conduct adopted by the Supreme Court of Florida, the model rules of professional conduct of the American Bar Association and the regulations of the the U.S. Department of Justice. The Board of Governors of the Florida Bar in a published opinion has stated that such contacts are perfectly appropriate. The ABA Standing Committee on Ethics and Professional Responsibility in a published formal opinion has said that ABA Model Rule 4.2 on which the Florida Rule is modeled, does not apply to ex-employees.

The U.S. Department of Justice in a

promulgated regulation has expressly said that a communication with an ex-employee of an organization is not a communication with the organization. Nearly every federal court considering the issue after the ABA formal opinion in 1991 agrees. The Government recognizes that Judge Kovachevich of this Court has held otherwise in Rentclub and Browning. Notwithstanding those holdings, there is still an ample basis to grant the Government's motion because the facts in Rentclub are readily distinguishable from the instant case.

Judge Kovachevich's decision in Rentclub was based on a unique and extraordinary set of facts. There the plaintiff actually hired the defendant's ex-employee as a trial consultant; money changed hands. Here the Government hasn't hired Defendant's ex-employees, it merely interviewed one of them, ensuring in the process, I should add, that no privileges were violated.

The Government is very concerned, Your Honor, about the practical effects of the application of Rule 4-4.2 to former employees. By limiting an important avenue of informal discovery, it would necessarily increase the use of formal, more costly discovery, a result clearly antithetical to the Supreme Court's intentions in amending the discovery rules in the Federal Rules of Civil Procedure in December 1993,

amendments which postdate both Judge Kovachevich's opinions.

Moreover, ex-employees could well be Government witnesses. Is the Government to be precluded from directly contacting its own witnesses? Is the Government to be required to contact opposing counsel and have opposing counsel present when preparing its own witnesses for trial? We say no, Your Honor. In fact --

THE COURT: Even if they have -- even if they're found to have attorney/client information or -- as set forth in the comment on Rule 4.2, having matters or information which could be imputed to the corporation?

MR. JACOBS: I think that the gloss on the comment -- or the comment or the gloss on the rule says, without looking at it, that current employees might be able to bind the corporation, but not former employees.

THE COURT: Well, if they were -- I would think there would be cases where they could.

MR. JACOBS: I believe that former employees can make statements.

THE COURT: And I think that's what Judge Kovachevich said.

MR. JACOBS: I believe Judge Kovachevich said that. I think the prevailing weight of authority

disagrees. Professor Hazard, who wrote the book on ethics, so to speak --

THE COURT: What if he was one day out of employment, he just happened to retire one day and you talked to him the next. It's how many fairies can dance on the head of a pin.

MR. JACOBS: And if I talked to him the next, as an officer of the court, I would advise him that I was not there to listen and could not entertain hearing attorney/client privilege material.

THE COURT: So then that's an exception from what you just said, right?

MR. JACOBS: I'm sorry, I don't follow the Court.

THE COURT: That would be one exception from what you've said, that no former employees are subject to the rule.

MR. JACOBS: No, Your Honor. No former -- our position is that no former employees are subject to the rule. And the logic is that they cannot make admissions on behalf of the corporation because they do not any longer work for the corporation.

If I were to take -- I have taken mid-level managers' depositions in this case, they are in a position to make admissions for the corporation, the

ex-employees can't. And that's what the commentators say, that's what Professor Hazard says, that's what most of the case law says. That's what --

THE COURT: There's also case law that says something else.

MR. JACOBS: Well, I suggest that before the ABA interpreted its own rule in 1991, there was a splattering of decisions that went both ways. Since the ABA itself, which drafted the model rule and which the Florida rule is modeled, since that time, as far as I know, Judge Kovachevich is the only judge with respect that's gone the other way and we do disagree.

The authorities on ethics, Professor Baker, Professor Hazard -- Professor Hazard incidentally was on the board of directors of the parent corporation of the department until recently when he resigned. Professor Hazard said you can't -- the former employees rather, excuse me, former employees cannot make admissions on behalf of the corporation.

THE COURT: What about ex-parte communications in a situation such as we have here, where people could be testifying against themselves?

MR. JACOBS: They could certainly make admissions against themselves and that's why I'm somewhat sympathetic to the plea of the new lawyers as

of yesterday, that they have some time to work with their new clients. And I was sympathetic to Mr. Campbell when he contacted me yesterday. I'm less sympathetic to the Defendant's Counsel, who have repeatedly claimed, as I'll say later in my address, have repeatedly claimed to represent every single witness, every single ex-employee witness who I've attempted to contact, whether I've contacted them directly or through counsel for the other side as they've requested. I'd get a phone call back saying, oh, we represent them also.

THE COURT: How many individuals have you actually taken ex-parte statements from?

MR. JACOBS: We had one interview and that's the interview of Mr. French.

THE COURT: Mr. French, and where was that?

MR. JACOBS: That was in Australia, and that took place --

THE COURT: Who was there?

MR. JACOBS: I'm sorry?

THE COURT: Who was there?

MR. JACOBS: I was there. That took place the second week of February. We were provided with the list that the Court has already referred to in Defendant's presentation, with the witness list. We did not know

who Mr. French was at the time; this was on February 4th. I already had my ticket for my two-week vacation in Australia, and while I was there I took a day out to speak to Mr. French. And at that time I learned that he was a manager, but we took every step to advise Mr. French at the time that he had the right to counsel, that he had the right to have the counsel for the company present. And we specifically advised him that he should not make reference to any communications that he had with counsel. We took every step to be very careful here, Your Honor.

Counsel was right when he says we didn't know of Rentclub, and Counsel has confided that they didn't know of Rentclub either. I personally practice in roughly fifteen judicial districts, and I do try to keep up with every potentially important decision and I'm embarrassed to say I didn't know about Rentclub when I conducted that interview. But I certainly knew of the issue and the Department's position on the issue, and I went forward as the Department would have me go forward and the Department authorized me to go forward. But we had no indication about Mr. French other than his name and address. And as I said to Mr. Scroggin and Mr. Baise as I gave them a lift back in my car to their office that day on February 4th, well, if there's

somebody in Australia, I think I'll start with him. And I left a week later, and I spoke to Mr. French a few days later.

As I say, Your Honor, the Government is very concerned about the practical effects of the application of Rule 4-4.2 to former employees. By limiting an important avenue of informal discovery, it would necessarily increase the use of formal, more costly discovery.

This very case serves an illustration of why such limitations are ill-advised. On every occasion - and I started to allude to this a moment ago - on every occasion since the Government has voluntarily agreed to contact opposing counsel prior to contacting an ex-employee, opposing counsel has taken the opportunity before allowing the contact to solicit the ex-employee as a client.

Defendant's Counsel actually did represent both the Defendant corporation and an ex-employee at his deposition last month. Until only yesterday Defendant's Counsel also represented two additional ex-employees whose depositions were scheduled for tomorrow and the next day. And, Your Honor, we've been advised that each witness who's separately represented is represented at Defendant's expense, not at their own expense.

Your Honor, I respectfully suggest that what Judge Kovachevich was driving at in Rentclub was fair play. It was simply wrong in that case for one party to pay an ex-employee of the other party. Is it less wrong in this case for a Defendant to provide free legal services to the Government's potential witnesses, and to use every tactic available to prevent the Government from having access to them? Is it less wrong in this case for the Defendant to have hired counsel -- to have hired as counsel a former EPA employee who had ultimate supervisory responsibility for the Agency's enforcement actions against this very Defendant during the time that it was committing the violations in question? Or for that matter, for the Defendant to pay a former employee, a former EPA employee a consulting fee in his testimony as a fact witness, not an expert witness, at a deposition.

Your Honor, the Government doesn't necessarily quarrel with opposing Counsel's aggressive representation of their client. And we agree that reasonable minds may differ as to how Rule 4-4.2 ought to be construed. We do quarrel, however, with the unnecessarily offensive way Defendant has insisted on framing the issue, particularly since the Government itself first brought the matter to the Court's attention

last June, long before Defendant filed its October motion.

We urge the Court to grant the Government's motion and deny the Defendant's so we can proceed with this action without further interference, so that the Defendant can be brought to justice for unlawfully polluting the Caloosahatchee River.

Thank you, Your Honor.

THE COURT: Thank you, Counsel.

MR. HUME: May I have just a few minutes?

THE COURT: About two minutes.

MR. HUME: Thank you, Judge. It won't take but a moment.

Just a few things, Judge. First, he referred again to the opinion of the Florida Bar 88-14. Our response basically is that Judge Kovachevich is not bound by that, and to the extent that her ruling disagrees with that in Rentclub, then she doesn't agree with it. And we submit that that's what should govern in the Middle District of the Federal Court and not the opinion of the Florida Bar.

Again, as I commented before, the one case that I cited talks about how discovery -- or excuse me, formal discovery, deposition is the better way to do this. We would submit the protection of privileged

information should not be sacrificed at the alter cost of discovery.

One thing I would point out, the Court may have already seen it, but the comment to Rule 4-4.2 talks about three categories of people, and it says in the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter and representation with persons having a managerial responsibility on behalf of the corporation, and with any other person who's act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability, or whose statement may constitute an admission on the part of the organization. That's the language that Judge Kovachevich picked up on in making her ruling, and we think that makes good sense.

Basically the Department of Justice is telling this Court, Your Honor, that the Rentclub case is wrong and he wants you to change it or doesn't want you to follow it. We believe that it's good law and you should follow it. We think the important thing is the appearance of impropriety is present with his contacts. He's admitted he was unaware of Rentclub. Ignorance of the law is certainly no excuse.

THE COURT: Especially for an attorney.

MR. HUME: Pardon me? Especially for a lawyer. I didn't want to say that, Judge, but thank you.

He mentioned the list of witnesses that were provided. The purpose of that list, as I understand it, was to provide the key witnesses who have important information. That should have been some clue to Mr. Jacobs that these were important people who might have privileged information.

I understand that the discussions that were had with Mr. Jacobs about Australia were going there to depose Mr. French, not an authorization or consent to his going down there and contacting him in an ex-parte manner.

I'm further told that these witnesses who later became represented by Mr. Baise and Mr. Scroggin were not solicited; they sought out the representation on their own. And that finally the payment to -- on this point, final point is, the payment to that EPA agent was done at the request of Mr. Jacobs.

We would ask that you deny the Government's motion, grant our motion. If you, however, agree with the Government and disagree with us, we would also then ask that you extend your ruling to provide that those former employees cannot bind Florida Cities, their statements cannot be introduced as admissions of Florida

Cities, and their actions cannot be imputed to Florida Cities. And that's based on the rationale that the Government is asserting in support of its position. And I will give you a few quick references.

THE COURT: Counsel, I'm going to deny both motions. And I don't really think I have to disagree with Judge Kovachevich in any way for doing it.

First of all, to disqualify an attorney, it's a very severe penalty and I would only do so if the actions of counsel were unconscionable, and I don't think we have that in this case. Although we may have had -- and I will go on the record and say I don't agree with the Justice Department's position either. I don't think they have carte blanche authority to go contact every witness in a lawsuit. If they wanted to, they could have investigated this case before they filed the lawsuit and had their investigators talking to these people, whether they wanted to talk to them or not. But they -- it's not as severe as having a Justice attorney call you, and whether they did or not, it comes on pretty strong and it's hard for people to back off of that. But in relationship to -- but I don't believe that that actually took place to that extent in this case, and I don't think Counsel should be disqualified.

However, I am -- for the purpose that was

brought out about the fact that these witnesses may be subject to criminal problems, I'm going to refuse to allow the Justice Department to talk to any of the witnesses in this case, or for that matter any employees in this case without doing so with a full deposition and with their having the right to have their attorney there and present.

MR. HUME: Does that include the right of Florida Cities Counsel to be present? It's a deposition you're talking about, right?

THE COURT: They're going to have to depose them if they're going to do so, but these witnesses are going to have to be -- or former employees or whoever they are, are going to have to have the right to have their attorney with them.

MR. HUME: Certainly.

THE COURT: And if they depose them, I would assume you have the right to be there too.

MR. HUME: Yes, sir. Thank you.

THE COURT: Counsel?

MR. JACOBS: For the sake of clarification, Your Honor, with respect to the ex-employees who have separately retained counsel, with the consent of that counsel may we interview their clients, and with the consent of that counsel may we interview their clients

Outside the presence of the Defendant.)

MR. BAISE: In all due reference, Your Honor, that emasculates your ruling, because what they are seeking here is to sit down with counsel that has absolutely no expertise in the Clean Water Act area and Mr. Jacobs would have superior knowledge with respect, one, to the facts, two, with regard to the law over such individual and his counsel.

MR. HUME: More importantly, Judge --

THE COURT: I'm going to require -- my order's going to be additionally that you're going to have to give notice of such a request so that these counsel can at least discuss that with the other attorney just as you can.

MR. JACOBS: That's fair, Your Honor.

THE COURT: Then after they've talked to an attorney and you've talked to the attorney, and the attorney talk to his client and they still want to talk to you outside of that, I figure they're -- at that point they're going to be adverse to Florida Cities Water Company and would fit in the other case, which I can't remember what it is, but there's another case which was filed where a party became adverse in a discrimination case. So in that case they -- the holding was that since they were adverse, they certainly

couldn't be held as a former employee. I think that's where they would put them.

So what you would have to do in this case is to notify Florida Cities Counsel that you intend to talk to the witness's counsel to see if they would be willing to do that and then give them the opportunity, they can also discuss that with counsel.

MR. HUME: (Nodded head affirmatively.)

MR. JACOBS: And with respect to the ex-employees, Your Honor, who have not advised us that they have separate counsel, how does the Court wish us to proceed?

THE COURT: You will have to advise them that they're going to have to get counsel if they want to talk to you. Unless they, you know -- but then you're still going to have to notify them if you're going to talk to them, so that they can talk to those people too.

Once they have been notified I think that they could be subject to criminal activity, I'm sure that they'll get their own attorney. I don't think we'll have a problem with that, and that would be your obligation too.

MR. JACOBS: To notify the witness --

THE COURT: That's right, because of the Clean Air Act they could be subject to some kind of criminal

prosecution.

MR. JACOBS: Very well. And then if the witness still wants to talk to us with or without counsel --

THE COURT: If he still wants to talk to you after all that, he can talk away.

MR. JACOBS: Without the company's being present.

THE COURT: That's right.

MR. JACOBS: Thank you, Your Honor.

MR. HUME: But he has to notify us of when he's going to meet --

THE COURT: He has to notify you that he's going to talk to him, right.

MR. HUME: Thank you.

MR. JACOBS: But not when and I don't have to invite them, Your Honor, right? I just need to --

THE COURT: You don't have to invite them, you've just got to tell them that you are going to talk to a certain ABC or whoever it is, so that they can also do so.

MR. JACOBS: Yes, Your Honor.

THE COURT: And give them a chance to talk to the witness.

MR. JACOBS: I understand.

MR. HUME: (Nodded head affirmatively.)

THE COURT: I hope you got all that now.

MR. JACOBS: Is the Court going to issue an order or would you like me to prepare one, Your Honor?

THE COURT: If you two sides can get together and prepare such an order, I'd be glad to have you do so.

MR. BAISE: Yes. It would be a joint order, Your Honor.

MR. HUME: We will -- if we can agree on an order, we will do it and submit it. If we can't, we will ask that the Court --

THE COURT: Then my order will be that you will agree on an order.

MR. HUME: Okay, sir. We will agree on an order. Thank you for your time.

THE COURT: All right, gentlemen.

MR. JACOBS: Thank you, Your Honor.

THE COURT: Have a good day.

(Hearing concluded.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript of the record of proceedings in this case on February 15, 1995.

Patsy Lynn Coleman

Patsy Lynn Coleman, Deputy
Official Court Reporter.

March 1st, 1995
Date

Exhibit_____(GHB-26)

FILED

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MIDDLE DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

V.

CASE NO. 93-281-CIV-FTM-21

FLORIDA CITIES WATER COMPANY,

Defendant.

_____/

ORDER

This cause comes before the Court on two objections to the Magistrate Judge's Order (Dkt. 54) entered March 16, 1994: (1) United States' Objections to the Magistrate Judge's Order on the United States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees (Dkt. 58) and the Defendant's response (Dkt. 75) in opposition thereto; and (2) Defendant's Objections to the Magistrate Judge's Order on Defendant's Motion to Disqualify Counsel (Dkt. 66). Pursuant to Rule 72, Federal Rules of Civil Procedure, the Court "shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to the law."

I. Motion to Allow Ex-Parte Contacts

After hearing oral argument, the Magistrate Judge issued an order denying the Plaintiff's Motion for an Order Allowing Ex-Parte Contacts with Former Employees. The United States objects solely to paragraph 1 of the Magistrate Judge's Order, which provides:

1. Plaintiff's motion to allow ex parte contacts with defendant's employees is DENIED.

a. Except as set forth in the next two paragraphs, no attorney in the United States Department of Justice shall communicate with any of defendant's present or past employees, unless the communication is at a formal deposition at which the employee or witness will have the right to be represented by counsel.

b. If counsel for the plaintiff wishes to communicate other than at a deposition with a potential witness represented by counsel, counsel for the plaintiff shall give counsel for the defendant reasonable advance notice, so that defense counsel can contact counsel for the witness before any communication from plaintiff occurs.

c. If counsel for plaintiff wishes to communicate other than at a deposition with a potential witness not represented by counsel, counsel for the plaintiff shall give counsel for the defendant reasonable advance notice, so that defense counsel can discuss the matter with the witness before any communication occurs, and further advise the witness that he or she may be subject to potential criminal prosecution under the Clean Water Act.

The Plaintiff argues that under Rule 4-4.2[1], Florida Rules of Professional Conduct, Rule 4.2, ABA Rules of Professional Conduct, prevailing case law, and commentary, there exists no legal barrier to the Plaintiff's ex parte informal interviews with Defendant's ex-employees. The Plaintiff states that neither Florida Rule 4-4.2 nor the ABA Rule addresses the issue whether a former employee is deemed to be represented by the former employer's counsel for purposes of

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[1]Rule 4-4.2, Florida Rules of Professional Conduct, modelled largely on Rule 4.2, ABA Model Rules of Professional Conduct, provides, in pertinent part, that a lawyer shall not communicate:

> about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

The Florida Rules also adopt the following provision from the Official Comment to ABA Rule 4.2:

> In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

ex parte communications. The Plaintiff maintains, however, that Opinion 88-14 (March 7, 1989) of the Governors of the Florida Bar, reprinted in Professional Ethics of the Florida Bar at 1299 supports their requested ex parte communications. They quote the Opinion, which states, "A plaintiff's attorney may communicate with former managers and former employees of a defendant corporation without seeking and obtaining consent of corporation's attorney." (Dkt. 58, Exh. A). The Plaintiff also points out that a 1991 formal ABA opinion expressly held that Rule 4.2 does not apply to former corporate employees. ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion No. 91-359 (March 22, 1991) reprinted in ABA/BNA Lawyers' Manual on Professional Conduct at 1001:101 (Dkt. 58, Exh. B).

Additionally, the Plaintiff cites several courts outside the Eleventh Circuit that have held that Rule 4.2 or its equivalent does not apply to former employees. The Plaintiff also attempts to distinguish two cases in which this Court has held that under certain circumstances ex-employees may not be contacted, and asserts that Judge Kovachevich's holdings in those cases are in the distinct minority and inconsistent with the Florida Bar and ABA ethics opinions. See Browning v. AT & T Paradyne, 838 F.Supp. 1564 (M.D. Fla. 1993); Rentchub Inc. v. Transamerica Rental Finance Corp., 811 F.Supp. 651 (M.D. Fla. 1992). Finally, the Plaintiff states that the U.S. Department of Justice promulgated extensive guidelines on August 4, 1994, which provide that "[a] communication with a former employee of an organization that is represented by counsel shall not be considered to be a communication with the organization for purposes of this part." See 59 Fed. Reg. 39910.

In response, the Defendant asserts that the Defendant's former employees with whom Defendant knows the Justice Department attempted to interview ex parte were all "managerial"

employees who were responsible for making, or had knowledge of, several important decisions at issue in this case. The Defendant asserts that it has an ongoing interest in protecting Defendant's former employees' knowledge of privileged or confidential information. Further, the Defendant maintains that the Magistrate Judge's denial of the government's motion to allow ex parte contacts was mandated by this Court's prior decisions in Rentclub and Browning. The Defendant argues that those decisions are correct, particularly here, where the persons sought to be interviewed ex-parte were high ranking personnel with privileged information. Further, the Defendant asserts that the Justice Department's regulations purport to override the states' Codes of Professional Responsibility and have been "universally condemned by all authorities considering them."

Finally, the Defendant argues that the Magistrate Judge's ruling is correct in light of [illegible], 1 F.3d 1523 (9th Cir. 1993), amended and superseded on denial of rehearing en banc, 35 F.3d 1275 (1994), cert. denied, Mariani v. U.S., 115 S.Ct. 939 (1995). The Defendant asserts that in Weitzenhoff, the Ninth Circuit increased the potential liability of all Defendant's current and former managerial employees by its interpretation of 33 U.S.C. § 1319(C)(2)(a). Under § 1319(C)(2)(a), any person who "knowingly violates [various sections of the Act] . . . or any permit condition or limitation . . . [commits a felony]." In Weitzenhoff, the Court construed the term "knowingly" to require that a person know that he was discharging the pollutants in question, not that he knew that his conduct was violating the terms of the Act or a permit. 35 F.3d at 1284. The Defendant asserts that in light of the Supreme Court's denial of certiorari, Defendant's counsel concluded that past and present employees of the Defendant would have to be informed of their Fifth Amendment privileges

against self incrimination before giving deposition testimony. The Defendant further states that various former employees of the Defendant have retained separate counsel to represent them, and that those represented by counsel have invoked the Fifth Amendment when deposed. Additionally, the Defendant notes that the Magistrate Judge's Order directs counsel for the Plaintiff to advise a witness, who is not represented by counsel and with whom the Plaintiff wishes to communicate with other than at a deposition, that he or she may be subject to potential criminal prosecution under the Clean Water Act.

The Court finds that the Order by the Magistrate Judge was not clearly erroneous or contrary to the law. First, this Court has held that a former employee may be considered a "party" for purposes of Model Rule 4.2. Rentclub, 811 F.Supp. at 657. In Rentclub the Court stated:

> Privileged communications present a distinct problem with respect to contact with former employees, thus *ex parte* contact should be barred to prevent disclosure of any inadvertent confidential communications. . . The interest of the corporation in protecting privileged information acquired by an employee during the course of employment from disclosure to an opponent in litigation remains after the employee leaves the corporation.

Id. at 657-58. The Court agrees that the decision in Rentclub is applicable here, where the Defendant has demonstrated an interest in protecting privileged information. Further, the Magistrate Judge's Order does not prohibit the Justice Department's informal interviews with the Defendant's former employees, but rather requires that counsel for the Defendant be notified in advance and be given the opportunity to be present. Finally, in light of the potential criminal liability of the former employees sought to be interviewed, the Magistrate Judge properly ruled that before the Plaintiff's counsel could communicate with a witness not represented by counsel,

the Plaintiff's counsel would have to advise that person of his or her possible prosecution under the Act.

II. Motion to Disqualify Counsel

The Defendant objects to the portion of the Magistrate Judge's Order which states, "Defendant's motion to disqualify plaintiff's current counsel is DENIED." The Defendant states that it primarily seeks to disqualify Plaintiff's counsel based on the impropriety of two ex parte meetings that occurred over a period of two days in Australia with Mr. Robert H. French, the former Senior Vice President of the Defendant. The Defendant asserts that Mr. French had personal knowledge of confidential and attorney-client privileged information, and that his statements might be admissions against the corporation or his actions might be imputed to the corporation. The Defendant further asserts that the conduct of Plaintiff's counsel in the instant case satisfies the Eleventh Circuit two-prong test for disqualification:

> First, although proof of actual wrongdoing is not required, there must exist a reasonable possibility that some specifically identifiable impropriety did in fact occur. Second, the likelihood of public suspicion or obloquy must outweigh the social interests that will be served by the attorney's continued participation in the case.

Norton v. Tallahassee Memorial Hosp., 689 F.2d 938 (11th Cir. 1982).

Even assuming, however, that the Court finds that the Plaintiff's counsel created a reasonable possibility of impropriety, the Court does not find persuasive the Defendant's argument that the second prong, the attorney's continued participation is outweighed by social interests, has been satisfied. Thus, the Court finds that the Magistrate Judge's Order on the Motion to Disqualify was not clearly erroneous or contrary to the law.

Upon consideration of the foregoing, it is hereby **ORDERED and ADJUDGED** that the United States' Objections to the Magistrate Judge's Order on the United States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees (Dkt. 58) and the Defendant's Objections to the Magistrate Judge's Order on Defendant's Motion to Disqualify Counsel (Dkt. 66) are **DENIED**, and the Magistrate Judge's Order is **AFFIRMED** with respect to the subject of said objections.

DONE AND ORDERED, at Tampa, Florida, this 26th day of April, 1995.

RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of record

Exhibit____(GHB-27)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

RECEIVED
JUN 16 1994
DGS

UNITED STATES OF AMERICA,

Plaintiff,

v.

FLORIDA CITIES WATER COMPANY, INC.,

Defendant.

CIVIL ACTION NO.
93-281-CIV-FTM-21

UNITED STATES' SECOND REQUEST FOR PRODUCTION OF DOCUMENTS

Plaintiff, the United States of America, pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, requests Defendant Florida Cities Water Company to produce and permit the United States to inspect and copy each of the following documents in defendant's possession, custody or control. These documents shall be produced on July 18, 1994, unless such time is modified by order of the Court or by counsel for the United States, at the offices of the U.S. Department of Justice, Environment and Natural Resources Division, 1425 New York Avenue, N.W., Washington, D.C., or at such other location as agreed upon by counsel for the United States

INSTRUCTIONS

1. Unless otherwise stated, these requests apply to documents written, produced, drafted, or generated on or after October 1, 1988, and ending at the trial of this matter, and excludes documents already produced in response to the United States' First Request for Production of Documents. (Where the

October 1, 1988 date does not apply the words "regardless of date" appear in parenthesis in the individual request.)

2. Unless otherwise specified, these document requests pertain to Florida Cities Water Company, Inc. ("defendant") and mean the designated entity and its parent companies, departments, divisions, officers, employees, agents, servants, assigns and, unless privileged, its attorneys.

3. For each document produced, indicate on the document or in some other reasonable manner, the numbered request(s) to which it responds.

4. This request covers all documents in the possession, control or custody of defendant, its parent companies, officers, employees, agents, servants, consultants, attorneys and assigns.

5. Words used in the plural shall also be taken to mean and include the singular. Words used in the singular shall also be taken to mean and include the plural. "Or" and "and" shall be construed either conjunctively or disjunctively to bring within the scope of these interrogatories any information that might otherwise be construed to be outside their scope. The past tense includes the present tense where the clear meaning is not distorted by change of tense.

6. If any document is withheld under any claim of privilege or exemption, furnish a list identifying each document for which the privilege or exemption is claimed, together with the following information:

(a) its title, or if it has no title, its subject matter;

(b) the date of origin;

(c) the author or addressor;

(d) the recipient(s) of all copies; and

(e) the basis upon which privilege or exemption is claimed.

7. Please produce the complete original exact copy of each document and, unless otherwise stated, each non-identical copy (whether different from the original because of notes made on the copy or otherwise), including drafts, of each writing of every kind and description (together with all worksheets, support documents, and other relevant materials), whether inscribed by hand or mechanical, electronic, microfilm, photographic, or other means (such as by recording, film, tape or other medium) from which such information may be obtained.

DEFINITIONS

Unless otherwise indicated, the terms used in these Requests shall have the same meaning ascribed to them under the Clean Water Act.

In addition, unless otherwise stated, the following definitions shall apply to these discovery requests:

A. "Contractor" or "consultant" means any person who acts as agent for, or on behalf of, any other person, whether or not for consideration, and includes subcontractors.

B. The terms "bypass" and "upset" shall have the meaning

ascribed to those terms by 40 C.F.R. § 122.41.

C. "Clean Water Act" means the Federal Water Pollution Control Act, as amended by the Water Quality Act of 1987, 33 U.S.C. §§ 1251-1387, including all regulations promulgated thereunder.

D. "Defendant," "Florida Cities Water Company," "FCWC," "you," and "your," unless otherwise indicated, all mean Defendant Florida Cities Water Company, Inc., each merged, consolidated, and acquired predecessor or successor, parent, subsidiary, division, and affiliate, each past and present officer, director, employee, agent, servant, consultant and representative of each such entity or individual, and each past and present attorney of each such entity or individual.

E. "Document" means any and all material that is written, printed, typed, photographed, recorded (electronically, magnetically, graphically or otherwise) or which is capable of being recorded in any form. It includes, but is not limited to, any logs of materials received, other logs, invoices, purchase orders, receipts, bills of lading, loading tickets, receiving tickets, shipping orders, inventories, letters and other correspondence, offers, contracts, agreements, bids, proposals, applications, licenses, permits, reports to government agencies, other reports, minutes of meetings, sales estimates, sales reports, memoranda, handwritten or other notes, calendar or diary entries, agendas, bulletins, graphs, charts, maps, photographs, drawings, data, price lists, lists of accounts, summaries,

telegraphs, teletypes, computer printouts, magnetic tapes, discs, microfilm, and microfiche.

F. "DMR" means Discharge Monitoring Report as defined in 40 C.F.R. § 122.2.

G. "EPA" shall refer to the United States Environmental Protection Agency.

H. The "Facilities" shall refer to the following wastewater treatment plants and related sewerage systems, unless a facility is otherwise indicated by name:

Gulf Gate Treatment Plant, Sarasota, Florida
South Gate Treatment Plant, Sarasota, Florida
Barefoot Bay Treatment Plant, Barefoot Bay, Florida
Carrollwood Treatment Plant, Tampa, Florida

I. "Inspection" means the physical observation of any tangible matter.

J. "Navigable waters" is defined in Section 502(7) of the Clean Water Act, 33 U.S.C. § 1362(7).

K. "Non-Compliance Report" means any report of non-compliance [pursuant to the requirements of 40 C.F.R. §§ 122.41(1) and (4)-(7)] with any term or condition of a NPDES permit issued for the discharge of pollutants from one of the Facilities.

L. "NPDES" shall refer to the National Pollutant Discharge Elimination System of Section 402 of the Clean Water Act, 33 U.S.C. § 1342.

M. "NPDES Permit" in relation to the Gulf Gate Treatment Plant means NPDES Permit No. FL0032816; in relation to South Gate Treatment Plant means NPDES Permit No. FL 0032808; in relation to

Barefoot Bay Treatment Plant means FL0042293; and in relation to Carrollwood Treatment Plant means FL0029319; all as amended, extended, renewed, reissued or modified.

N. "NPDES Permit Limit(s)" means any discharge limitation, term or condition contained in the permits listed in the preceding paragraph, as amended, extended, renewed, reissued or modified.

O. "Person" or "persons" means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body, together with their predecessors, successors and assigns, their agents servants, consultants, contractors, subcontractors, employees, and representatives, and all agents and representatives thereof.

P. "Point source" is defined in Section 502(14) of the Clean Water Act, 33 U.S.C. § 1362(14).

Q. "Relate(s)" or "relating to" means constituting, defining, containing, embodying, reflecting, identifying, stating, referring to, dealing with or in any way pertaining to.

R. "Refer to" or "refers to" means mentioning, discussing, making reference to or relating to in any way.

S. "State" means the State of Florida including, any department, agency or individual representing the State of Florida, and includes the Florida Department of Environmental Protection ("FDEP") and its predecessor-agency, the Florida

Department of Environmental Regulation ("FDER").

REQUESTS

1. All environmental audits of any FCWC wastewater treatment plant (regardless of date).

2. All complaint logs relating to any of the Facilities.

3. All documents relating to spills, overflows, leaks, bypasses, excessive discharges, and unpermitted discharges at/from any of the Facilities.

4. All DMRs reporting the discharge of pollutants from the Facilities.

5. All Non-Compliance Reports submitted by the defendant to EPA or the State of Florida relating to the discharge of pollutants from the Facilities.

6. All permit requests and applications, permit renewal requests and applications, and permit modification requests and applications, including all such documents whether they relate to NPDES or non-NPDES permit requests and applications filed by the defendant with federal, state or local authorities that pertain to the discharge of pollutants from the Facilities.

7. All organizational charts showing overall organizational structure of the defendant in detail, to include documents identifying all persons employed by the defendant with responsibility for, or authority over, the operation, maintenance and/or management of the Facilities, including lines of authority

and reporting relationships.

8. All maps, charts and diagrams, that identify and/or depict the geographic service area of the Facilities.

9. All maps (including USGS maps) that identify or depict the discharge location of the Facilities.

10. All documents relating to contacts, discussions, meetings and correspondence, between the defendant and its contractors (including subcontractors), to the extent that those documents relate to the operation of the Facilities.

11. All audits, evaluations, advice, Facilities Plans, reports, sampling results, surveys, tests, evaluations, analyses or studies, of any kind, prepared by the defendant or its contractors (including subcontractors), to the extent that those documents relate to the operation of the Facilities.

12. All documents including, but not limited to, all progress reports, correspondence, memoranda, and studies relating to meetings, discussions or oral or written communications relating to any and all EPA Administrative Orders issued to FCWC.

13. All documents relating to any test results, laboratory analyses, flow measurements or concentration analyses of any pollutants discharged from the Facilities.

14. All documents which refer or relate to the effects of the discharge of pollutants from the Facilities on the receiving waters.

15. All documents which refer or relate to whether or not discharges from the Facilities are and have been in

compliance with applicable water pollution control laws, including the applicable NPDES Permit.

16. All designs, including any plans and specifications, and modifications thereof, for the treatment elements and processes at the Facilities.

17. All documents that identify, describe or explain the treatment processes and operations at the Facilities.

18. All maps, charts, photographs and diagrams depicting any of the treatment elements and processes at the Facilities.

21. All documents, including maps, charts, photographs, and diagrams indicating the sampling location(s) for wastewater discharged from the Facilities.

19. All documents relating to process or equipment changes at the Facility which were designed to, or had the effect of, evaluating, preventing, increasing, reducing or otherwise affecting discharges of pollutants from the Facilities.

20. All documents relating to all operating, maintenance and inspection procedures at the Facilities, and any and all changes in these procedures, which were designed to, or had the effect of, preventing, increasing, reducing, or otherwise affecting discharges of pollutants from the Facilities.

21. All documents relating to procedures used or prescribed for use by FCWC to report to the EPA or the State, any water pollution discharges, violations of water pollution laws, regulations, or violations of your NPDES Permits.

22. All documents relating to any and all difficulties or problems FCWC encountered in meeting applicable water pollution control effluent limitations or the NPDES Permit Limits regarding pollutants discharged from the Facilities.

23. All documents relating to planning and/or consideration by FCWC of whether or not to install or to defer installation of any water pollution control equipment at the Facilities.

24. All documents relating to consideration by the defendant of whether or not to implement or defer implementation of process changes or facility procedures that would in any way affect water and/or pollutant discharges from the Facilities.

25. All documents relating to the advantages, disadvantages or potential implications to the defendant of delaying installation of water pollution equipment at the Facilities.

26. All documents relating to the capital, operating or maintenance costs of water pollution control equipment installed, or considered for installation, at the Facilities to achieve or contribute to the achievement of applicable water pollution control standards and/or NPDES Permit Limits.

27. All documents including, but not limited to, bid solicitations, bid requests, bids, engineering estimates and other cost documents, contracts or staff memoranda, which relate to any water pollution control equipment installed or considered for installation at the Facilities.

28. All documents including, but not limited to, bid requests, bids, estimates and other documents, that relate to costs of operation and maintenance, construction and equipment, of any and all plans, whether implemented or proposed, to either increase the treatment efficiency of the Facility or expand the capacity of the Facilities.

29. All documents relating to meetings, discussions or other written or oral communications regarding technology, personnel training, inspection, maintenance or any other means to eliminate or reduce water pollutant discharges or achieve compliance with water pollution control standards or your NPDES Permits.

30. All documents including training manuals, relating to operation, testing or maintenance procedures with respect to water pollution control equipment at the Facilities.

31. All documents relating to complaints received by the defendant from any person regarding the operation of the Facility or the discharge of pollutants from the Facilities.

32. All documents including, but not limited to, minutes, notes and memoranda, relating to meetings held by defendant at which any of the Facilities' compliance with the Clean Water Act and NPDES Permit Limits was discussed.

33. All documents relating to inquiries made by FCWC into the causes of discharges of pollutants at the Facilities which were not authorized under applicable water pollution control laws or the terms and limitations of NPDES Permit limits.

34. All documents that refer or relate to contacts, discussions, meeting, or correspondence of any kind between representatives of EPA, the State and/or any other governmental agency, and FCWC or any person representing or acting on its behalf, which relate in any way to the discharge of pollutants from the Facilities.

35. All daily operation and maintenance logs for the Facilities.

36. All records relating to the operation, maintenance and calibration of flow meters at the Facilities.

37. All treatability studies, wastewater characterization studies, industrial waste surveys, evaluations, tests, reports or other documents prepared by you or any consultant or contractor of FCWC or by any other person, relating to monitoring, sampling or analyses of wastewater discharged from the Facilities into navigable waters.

38. All documents relating to toxicity testing and nitrification procedures at the Facilities.

39. All documents relating to actual toxicity testing and nitrification at the Facilities.

40. All operational reports (internal and external) relating to the Facilities and Waterway Estates.

41. All permit applications and design documents relating to the original construction of the Waterway Estates Treatment Plant (regardless of date), including, but not limited to, such documents relating to the discharge location.

42. All documents relating to the acquisition of the Waterway Estates Treatment Plant.

43. All documents relating to permits of any nature obtained for plant upgrades at any FCWC wastewater treatment plant (regardless of date).

44. All applications relating to the discharge of pollutants at the Waterway Estates Treatment Plant (regardless of date).

45. All copies of the document entitled "CALOOSAHATCHEE RIVER: Wasteload Allocation Documentation: Lee County" (FDER Water Quality Technical Series Volume 2 Number 52). (regardless of date).

46. All documents relating to the development of wasteload allocations for the Caloosahatchee River and the unnamed canal to which the Waterway Estates Treatment Plant has discharged (regardless of date).

47. All documents relating to field data collection and modelling of the Caloosahatchee River and the unnamed canal to which the Waterway Estates Treatment Plant has discharged (regardless of date).

48. All project files (both levels) relating to the Waterway Estates upgrade/expansion (regardless of date).

49. All documents relating to all communications with Jack Schenkman (regardless of date).

50. All copies of all feasibility studies relating to the Waterway Estates upgrade/expansion (regardless of date).

51. All documents relating to all alternatives (including, but not limited to, "tie-in" to other facilities) to discharging wastewater from the Waterway Estates Treatment Plant into the Caloosahatchee River (regardless of date).

52. All documents relating to all authorizations to proceed relating to the Waterway Estates upgrade/expansion (regardless of date).

53. All documents relating to the Lee County 201 Facilities Plan.

54. All documents relating to FCWC policies and procedures for spending authorizations/approvals.

55. Bob Gordon's desk calendars (appointment books).

56. All management contracts (i.e., contracts for services such as environmental consulting, safety, etc.) between FCWC and any Avatar Utilities, Inc. or affiliate.

57. The 1994 monthly operating statements for FCWC.

58. The 1993 audited financial statements for Avatar Utilities, Inc. and subsidiaries, FCWC, Consolidated Water Company and subsidiaries.

59. Any and all 1995 FCWC budgets.

60. All documents reviewed by any expert retained by Defendant for the purpose of testifying in this case.

61. All documents Defendant intends to rely upon or introduce into evidence at trial.

62. All documents relating to the discharge of pollutants from the Facilities not otherwise subsumed by another request herein.

Respectfully submitted,

LOIS J. SCHIFFER
Acting Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

By: _____

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing "United States' Second Request for Production of Documents" were served by United States Mail (unless otherwise indicated) on the 16th day of June, 1994, to the following counsel of record:

Gary H. Baise
Don G. Scroggin **(BY HAND)**
Jenner & Block
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Post Office Box 280
Fort Myers, FL 33902-0280

Daniel S. Jacobs
Trial Attorney

Question	Expected Answer/Notes	Page/Line	
Ms. Kagey, you wrote the intent to deny the Waterway Estates NPDES permit renewal application in July 1986, is that correct?	Yes	49/12-50/11	Denial
You also wrote the fact sheet that accompanies the notice of intent to deny the Waterway Estates NPDES permit renewal application, is that correct?	Yes		
Ms. Kagey, you have been with EPA since January 1980, correct?	Yes	16/17	Employ
Ms. Kagey, you have been an environmental engineer since January 1980, is that correct?	Yes.	17/16-22	Employ
Ms. Kagey, you have been writing NPDES permits for EPA Region IV since 1981, is that correct?	Yes.	19/13-22	Employ
Ms. Kagey, there are only three methods for writing NPDES permits is that correct?	Yes.	32/11-20	Permit
Ms. Kagey, one of the three methods for writing permits is effluent limitation guidelines, is that correct?	Yes.	31/6-10	Permit
Ms. Kagey, the second method for developing effluent limitations is water quality considerations, is that correct?	Yes	31/6-10	Permit
Ms. Kagey the third method for developing effluent limitations is through the permit writer's "best professional judgment", is that correct?	Yes	31/6-10	Permit
Ms. Kagey, you have never written a NPDES permit based on best professional judgment is that correct?	That is correct	36/19-20	Permit
Ms. Kagey, the fact that you have never written a permit based on best professional judgment means that the 1986 Waterway Estates denial was based upon either effluent limitation guidelines or water quality standards, is that correct?			Denial
Ms. Kagey, effluent limitation guidelines are codified in the Code of Federal Regulations, is that correct?			
Ms. Kagey, there are effluent limitation guidelines listed in the Code of Federal Regulations for sewage treatment works, is that correct?	Yes	40/13-16	Denial
Ms. Kagey, you do not use BPJ when an effluent limitation guideline has been promulgated for an industry, such as sewage treatment works, is that correct?	She should say "Yes": the permit writers guide says that you only use BPJ when no industry standards have been promulgated.		
Ms. Kagey water quality considerations are communicated to EPA in the form of wasteload allocations, is that correct?			
To use your testimony, you said that "Wasteload allocations are developed by states for a specific river or facility giving specific limits for allowable discharge." is that correct?	Yes	41/23-42/2	WLA
Ms. Kagey, as a general proposition, states develop wasteload allocations to protect the receiving water from high amounts of pollution, is that correct?	Yes	42/3-5	WLA
Ms. Kagey, you would not rely upon a draft WLA is that correct?	Yes	42/17-20	WLA

Question	Expected Answer/Notes	Page/Line	
The reason you would not rely on a draft WLA is that the final WLA might change from the draft, is that correct?	Yes	42/21-23	WLA
Ms. Kagey, do you know anything about how EPA approves WLAs?	No	41/17-20	WLA
Ms. Kagey, you do not know why a particular WLA might be submitted to EPA do you?	No--she knows that WLAs are submitted but does not know the purpose behind them.	43/10-14	WLA
Ms. Kagey, EPA denied the WWE application for a renewal permit based on your recommendation, is that correct?	yes	52/24-53/2	WLA
Ms. Kagey, your recommendation is detailed in the fact sheet attached to the notice of denial of the WWE renewal application, is that correct?	Yes	50/12-19	Denial
Your recommendation to deny was based upon a document entitled Caloosahatchee River Wasteload Allocation Documentation, Volume 2, Number 52, dated January 1981, is that correct?	Yes	52/8-23	Denial
Ms. Kagey you received the 1981 WLA directly from the state of Florida in June of 1986, is that correct	Yes	53/3-9	Denial
Ms. Kagey, you did not draft or read any memoranda regarding this particular WLA did you?	no	53/10-12	Denial
Ms. Kagey, renewal application denials are very rare in your experience, correct?	Yes	58/11-13	Denial
In fact, the 1986 WWE denial is the only renewal application denial that you recall, correct?	Yes	58/20-22	Denial
Ms. Kagey, you do not know why the 1981 document specified no discharge WLA for WWE, correct?	Yes	59/11-20	
Ms. Kagey, you assumed the WLA was approved by EPA?	Yes	67/18-20	Denial
Ms. Kagey, you do not know for a fact whether the 1981 WLA was approved by EPA?	Correct	67/15-17	Denial
Ms. Kagey, you did not check to verify that the 1981 wasteload allocation had been approved by EPA, correct?	Correct.	74/12-15	WLA
In fact, Ms. Kagey, you cannot state whether the State of Florida meant the figures in the 1981 document to be required limitations, correct?	Correct.	81/18-82/1	WLA
Ms. Kagey, when you reviewed the 1981 document, you only reviewed pages 1 and 17, correct? You did not review any other pages, correct?	Correct.	83/17-24; 88/19-89/8	WLA
After January 1981, you are not aware whether Florida Cities requested a wasteload allocation from FDER for discharge to the canal leading to the Caloosahatchee, correct?	Correct.	110/1-7	WLA
Ms. Kagey, if WWE had a wasteloal allocation, you would have given those limits in a permit to discharge, correct?	Correct.	111/18-112/4	WLA
Ms. Kagey, you testified that "as a permit writer I would use the most recent information that I had," correct?	Yes.	117/22-118/4	WLA
Ms. Kagey, permit writers are instructed to obtain the current FDEP operating permit from a NPDES applicant, correct?	Yes.	134/13-135/3	Permit

Question	Expected Answer/Notes	Page/Line	
Ms. Kagey, you usually draft permits in accordance with FDER operating permits, correct?	Yes.	135/9-17	Permit
Ms. Kagey, Florida Cities included in its application to EPA a copy of the current Florida operating permit, correct?	Correct.	147/2-6	Permit
Ms. Kagey, as of 1986 the current FDER permit permitted discharges to the canal leading to the Caloosahatchee River, correct?	Correct	141/21-144/1	Permit
Ms. Kagey, the current Florida operating permit was written in 1983, correct?	Correct, Correct.		Permit
Isn't the 1983 FDER operating permit permitting discharges to the canal leading to the Caloosahatchee River written more than two years after the 1981 document?			
Ms. Kagey, it is apparent that FDEP did not interpret the 1981 document to mean that WWE cease discharge to the canal leading to the Caloosahatchee, correct?	Correct.		Permit
Ms. Kagey, you based your denial on the supposed 1981 wasteload allocation, not on the FDER operating permit, because the WLA was more stringent than the permit, correct?	Correct.	145/24-146/17	Denial
Ms. Kagey, in reaching your decision to deny the 1986 WWE NPDES renewal application, you knew that WWE had a valid state operating permit until 1988, correct.	Correct.	147/7-11	Denial
Ms. Kagey, you cannot interpret whether the 1981 document is a state requirement or a state recommendation, correct?	Correct.	148/22-149/3	
Ms. Kagey, the wasteload allocations unit interprets submissions from the state to determine in order to approve the wasteload allocation, correct?	Correct.		
Ms. Kagey, in performing your duties in 1986, you had a mental checklist of items, although there was no written checklist, correct?	Correct.	153/12-23	Permit
When you were deposed, you included state permits on your "mental checklist", correct?	Correct.	154/9-14	Permit
Ms. Kagey, you have seen 40 cfr 122.64, correct?	Correct.	154/21-155/3;168/9-1	Permit

Bruce Barrett
Deposition Digest
October 25, 1994

Mr. Barrett described his education and professional background. He was the Director of the Water Management Division in EPA Region IV. He discussed the three methods by which effluent limitations are developed, as well as the way TMDLs (Total Daily Maximum Loads) are developed. However, he was not familiar with the state wasteload allocation processes. He was generally knowledgeable about the purpose of wasteload allocations and the circumstances in which a wasteload allocation might be developed. He responded to questions concerning the relationship between wasteload allocations and effluent limitations and when the "best professional judgment" standard would be used.

He was asked whether or not it was common for the EPA to deny permit renewals and answered that it was not. He further explained that EPA generally defers to state decisions regarding wasteload allocations and permitting. He was also questioned about the Waterway facility and the wasteload allocation for the facility. Mr. Barrett discussed, in general terms, the permit approval process and stated that he was unaware of any other instance in which EPA denied a permit renewal (other than Waterway). He also briefly discussed the four reasons for EPA to terminate or deny a permit renewal request as listed in the Code of Federal Regulations.

Exhibit_____(GHB-30)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS INC., Defendants.	)	CIVIL ACTION NO.: 93-281-CIV-FTM-21

DEFENDANT FLORIDA CITIES WATER COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND REQUEST FOR ORAL ARGUMENT

Defendant Florida Cities Water Company ("Florida Cities") hereby moves, pursuant to Fed. R. Civ. P. 56, before this Court for an order granting summary judgment on its behalf as to the allegations contained paragraphs 16, 17, 18, 19, 20, 21, 22, 23, 28, 30, and 45 of Plaintiff's Second Amended Complaint. No genuine issues of material fact exist as to these allegations and therefore, Florida Cities is entitled to summary judgment as a matter of law. The grounds for this motion are set forth in the accompanying memorandum. Defendant contends that genuine issues of material fact exist regarding all remaining allegations of Plaintiff's Second Amended Complaint and these issues should be reserved for a full trial on

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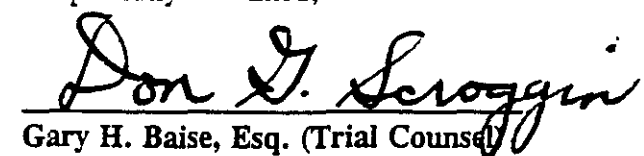
the merits. Florida Cities respectfully requests that this Court schedule oral argument on this Motion and estimates 45 minutes per side.

Respectfully submitted,



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September 11, 1995

IN THE UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS INC., Defendants.	)	CIVIL ACTION NO.: 93-281-CIV-FTM-21

Florida Cities Water Company's Memorandum in Support of Its Motion for Partial Summary Judgment and in Response To Plaintiff's Motion for Partial Summary Judgment

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Florida Cities Water Company's Memorandum in Support of Its Motion for Partial Summary Judgment and in Response To Plaintiff's Motion for Partial Summary Judgment

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS INC., Defendants.	)	CIVIL ACTION NO.: 93-281-CIV-FTM-21

Florida Cities Water Company's Memorandum in Support of Its Motion for Partial Summary Judgment and in Response To Plaintiff's Motion for Partial Summary Judgment

Plaintiff has brought these actions alleging Clean Water Act ("CWA") violations at three small wastewater treatment facilities owned and operated by Florida Cities Water Company ("Florida Cities"): Barefoot Bay, Carrollwood, and Waterway Estates.[1] Although these facilities had state authorizations to discharge treated effluent at all times relevant to these causes of action, this case addresses certain alleged violations of the federal Clean Water Act, none of which involved any evidence of environmental harm. This Memorandum is filed in support of Florida Cities' Cross-Motion for Partial Summary Judgment. It is also filed in response to Plaintiff's Motion for Partial

[1] Plaintiff commenced this action on October 1, 1993, alleging violations of the Clean Water Act at Florida Cities' Waterway Estates sewage treatment facility. On March 30, 1995 Plaintiff added two additional Florida Cities's sewage treatment facilities, Barefoot Bay and Carrollwood. However, the issues were not fully joined as to these facilities until the Court's June 22, 1995 Order.

Summary Judgment, which is premature because it was filed before Florida Cities filed its Answer to the Second Amended Complaint, before Plaintiff produced any documents relating to Barefoot Bay and Carrollwood, and before Plaintiff designated and produced its key Rule 30(b)(6) witness for Waterway Estates and any of its Rule 30(b)(6) witnesses for Barefoot Bay and Carrollwood. Further, Plaintiff's summary judgment motion is premature because Plaintiff is unable to state the number of alleged violations with which Florida Cities is being charged. It is fundamental that Florida Cities has a right to know the charges it faces before it can respond meaningfully or present a defense.

The facts revealed during discovery regarding Barefoot Bay and Carrollwood demonstrate that Plaintiff has failed to review key documents in its own files or talk to its own employees with knowledge of the facts at issue. These documents and key employees' testimony demonstrate that Plaintiff failed to conduct a competent preliminary review and factual inquiry before filing this action. As specified in Florida Cities' Motion for Summary Judgment, the facts established through discovery demonstrate that no genuine issue of material fact exists as to a select number of these alleged violations, for which the Court should find no liability: discharge without a permit at the Barefoot Bay and Carrollwood wastewater treatment facilities (barred by 33 U.S.C. § 1319(g) (CWA § 309(g)), violations of the Administrative Order at Barefoot Bay, and permit violations at Barefoot Bay, Carrollwood, and Waterway Estates. In spite of the Environmental Protection Agency's ("EPA") admission that it has no evidence that Florida Cities' alleged actions caused any environmental harm and heedless of the facts contained in its own files and the testimony of its own witnesses,

Plaintiff continues to pursue multi-million dollar penalties in this action. Accordingly, Florida Cities is entitled to judgment as a matter of law as to these causes of action. Florida Cities' discovery has also established that the remaining claims present genuine issues of material fact which should be resolved at a trial on the merits of these issues.

I. STATEMENT OF THE FACTS

Florida Cities, a Florida corporation, owns and operates both drinking water treatment and wastewater treatment facilities serving communities in central and south Florida.[2] Florida Cities is regulated by local, state, and federal environmental authorities. At all times relevant to these actions, Barefoot Bay, Carrollwood, and Waterway Estates had state authorizations to discharge treated effluent and substantially met all applicable water quality standards and effluent limitations. All of the rates which Florida Cities charges its customers are regulated by the Florida Public Service Commission, except for the service areas located in Sarasota and Hillsborough Counties, in which the respective county commissions regulate rates.

II. LEGAL ANALYSIS

A. Standard for Summary Judgment

Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing

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[2] A more complete statement of the facts regarding each facility is presented in the discussions of the specific facilities, *infra* part III.

law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party bears the burden of establishing the absence of dispute over material facts. Reynolds v. Bridgestone/Firestone, Inc., 989 F.2d 465, 469 (11th Cir. 1993). The Court must view the evidence presented in the light most favorable to the non-moving party. Clark v. Coats & Clark, Inc., 929 F.2d 604, 606 (11th Cir. 1991). Reasonable doubts about material facts are to be resolved in favor of the party opposing the motion for summary judgment. Reynolds, 989 F.2d at 469. If the moving party fails to meet its burden of establishing no genuine issue of material fact, its summary judgment motion will be denied. United States v. Four Parcels of Real Property, 941 F.2d 1428, 1437 (11th Cir. 1991).

Plaintiff is seeking summary judgment on "all violations alleged in its Revised Amended Complaint."[3] However, Plaintiff's Second Amended Complaint fails to state a specific number of CWA violations. Plaintiff's key witness, EPA environmental engineer Kenneth Kwan, calculated the number of alleged violations at issue in this case.[4] In its Answers to Defendant's First Interrogatories, served on April 28, 1995,[5]

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[3] Pl.'s Mot. for Summ. J. at 4.

[4] Mr. Kwan has verified Plaintiff's Answers to Defendant's Interrogatories, has filed a "Declaration" in support of Plaintiff's Motion for Summary Judgment, has been listed as a person having knowledge of the facts surrounding this lawsuit, and has testified as one of Plaintiff's Rule 30(b)(6) witnesses. However, Mr. Kwan admits that he has no personal knowledge of the facts surrounding the CWA 309(g) settlements for Barefoot Bay and Carrollwood and made no effort to educate himself prior to attempting to calculate the number of violations at issue. See discussions of Barefoot Bay's and Carrollwood's alleged unpermitted discharges, infra.

[5] See Exhibit 1 (attached).

Plaintiff states that there are a total of 4,173 violations at issue. Subsequently, Plaintiff submitted Mr. Kwan's Declaration, dated June 15, 1995, in support of its Motion for Summary Judgment. In contrast to the Answers to Defendant's First Interrogatories, the Kwan Declaration and the attached tables reference, without any explanation for the discrepancy, 2,991 violations.[6] At his August 29-30, 1995 deposition (taken five months after the filing of the Second Amended Complaint and almost three months after the filing of Plaintiff's Motion for Summary Judgment), Mr. Kwan testified that Plaintiff is "still fine tuning the number."[7] Mr. Kwan further testified on August 29, 1995 that the final number of violations would not be known for "another month."[8]

In his testimony, Mr. Kwan stated:

> Q (By Mr. Scroggin) Are those recalculations still underway or have they finally reached a steady state constant value for each of the vio-- for each of the three facilities?
> Mr. Quinn: Objection.
> A We are still fine tuning the number.
> Q (By Mr. Scroggin) Do you have any estimate of when you think you'll know how many violations there were at these three facilities?
> Mr. Quinn: Objection.
> A I don't know; another month. We are still adding the numbers up.[9]

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[6] On its own, this unexplained change would reduce the maximum penalty Plaintiff calculates for alleged violations from $104,325,000 to $74,775,000. Compare the tables found in Defendant's Ex. 1 (drafted by Mr. Kwan) with Plaintiff's Ex. C, F, and I (also drafted by Mr. Kwan and attached to his Declaration).

[7] Kwan Dep. at 151 l. 20; See Exhibit 2. See also Exhibit 45 (Condensed version of Kwan Video Deposition, with videotape excerpts marked) and Exhibit 46 (Videotape of Excerpts of Kwan Deposition).

[8] Kwan Dep. at 151 l. 25. See Exhibit 2 (attached). See also Exhibit 45 (Condensed version of Kwan Video Deposition, with videotape excerpts marked) and Exhibit 46 (Videotape of Excerpts of Kwan Deposition).

[9] Id. at l. 15-152 l. 1. See Exhibit 2 (attached). See also Exhibit 45 (Condensed (continued...)

Given the still-evolving status of Plaintiff's calculations of the violations that are the subject of Plaintiff's motion, Florida Cities contends that Plaintiff's Motion for Summary Judgment is premature.

B. The Clean Water Act

The federal Clean Water Act prohibits discharge of pollutants to waters of the United States unless authorized by a federal NPDES permit. 33 U.S.C. §§ 1311(a), 1342. In states such as Florida, where EPA issues and enforces the NPDES program, each permit requires state certification that the permit will fully satisfy state water quality standards (which EPA independently approves). NPDES permits usually contain, among other requirements, limitations on the discharge of specific pollutants. For a full discussion of the permitting and enforcement structure, see generally, U.S. v. CPS Chem. Co., 779 F. Supp. 437 (E.D. Ark. 1991).

III. CLAIMS AT ISSUE

A. Barefoot Bay

1. Alleged Unpermitted Discharges

Plaintiff alleges that Florida Cities discharged pollutants without a federal NPDES permit from April 1, 1990 until November 1, 1991 at its Barefoot Bay facility, located in Brevard County. This allegation has been made even though the discharge of treated effluent from the Barefoot Bay facility was authorized by the state and was already treated to a level that would remove more pollutants than would be required by the

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[9](...continued)
version of Kwan Video Deposition, with videotape excerpts marked) and Exhibit 46 (Videotape of Excerpts of Kwan Deposition).

federal NPDES permit that was finally issued.[10] Florida Cities acknowledges that it did discharge without a federal NPDES permit into the Sebastian Creek during this period. However, this matter was settled by the Consent Agreement and Order Assessing Administrative Penalties No. CWA-IV 91-538 ("Consent Agreement") -- a conclusion supported by EPA's own administrative enforcement files and witnesses. The CWA specifically precludes EPA from seeking judicial or other enforcement of violations that have already been settled in EPA administrative enforcement proceedings that include payment of an administrative penalty. Under the CWA:

> Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violations-
>
> . . .
>
> > iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,
>
> shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

33 U.S.C. § 1319(g)(6) (CWA § 309(g)(6)). Because EPA's administrative record, as well as the testimony of EPA and Florida Cities' witnesses, demonstrate that the issue of discharge without a permit was for the entire period at issue, no genuine issue of material fact exists, and Florida Cities is entitled to summary judgment as a matter of law on Paragraph 16 of the Second Amended Complaint.

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[10] See Pl.'s 30(b)(6) Dep. [Herwig] at 106 l. 17 - 109 l. 24 (hereafter "Herwig"). See Exhibit 3 (attached). The Barefoot Bay's level of treatment was superior to the standards of secondary treatment that were imposed in the final NPDES permit.

On September 14, 1989, EPA enforcement officer Roy Herwig visited Barefoot Bay and discovered that, although authorized to discharge into the Sebastian Creek by the Florida Department of Environmental Protection ("FDEP"), the facility did not have an NPDES permit.[11] On September 20, 1990, EPA issued an Administrative Order ("AO 90-106"), drafted by Mr. Herwig, that authorized discharge from the Barefoot Bay facility and established interim effluent limits for that discharge until a federal NPDES permit could be issued. On July 12, 1991, EPA initiated an enforcement action to address the years of discharge without a federal NPDES permit by this facility by issuing a Notice of Show Cause for discharge without an NPDES permit for "the period from September 14, 1989 until the present."[12] The Show Cause meeting was held on August 9, 1991.[13] Following this Show Cause meeting, Mr. Herwig drafted the EPA's Administrative Complaint and the Consent Agreement with the accompanying "Notes on the Proposed Penalty Assessment" ("Notes").[14]

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[11] Inspection Report of September 14, 1989 by Roy Herwig. See Exhibit 4 (attached).

[12] The administrative record in this case for Barefoot Bay consists of (1) AO 90-106 (attached as Exhibit 5), (2) Notice of Show Cause (attached as Exhibit 6), (3) Notes on the Proposed Penalty Assessment (attached as Exhibit 7), (4) Administrative Complaint (attached as Exhibit 8), and (5) Consent Agreement and Order Assessing Administrative Penalties (attached as Exhibit 9).

[13] Herwig at 159 l. 2-18 (attached as Exhibit 10).

[14] Id. at 155 l. 10 (attached as Exhibit 11).
See Ex. 7. The Notes are prepared by the enforcement officer and are routed along with the Complaint for approval from the chain of command at EPA. The Notes then become part of the administrative record. EPA, Enforcement Management System (attached as Exhibit 12), Region IV 456 (1990) (hereafter "EMS"). The Notes provide the underlying justification of an enforcement officer's decision to penalize a company. In practice, the Notes are the only document that provides detailed analysis of EPA's penalty considerations. The Notes are prepared in every administrative penalty action.

These Notes outlined the nature of Florida Cities' alleged violations at Barefoot Bay, reviewed the statutory mitigation factors contained in CWA § 309(g)(3), and proposed a $6,000 penalty to settle the alleged violations of discharge without an NPDES permit. EPA issued an Administrative Complaint on September 25, 1991 and entered into the final Consent Agreement on November 6, 1991. The NPDES permit for Barefoot Bay became effective on November 1, 1991, one week prior to these negotiations.[15]

A thorough review of the complete administrative record establishes that both parties intended to settle all violations for discharge without an NPDES permit at Barefoot Bay, and that the Consent Agreement with its attached Notes did in fact settle all such matters, even though the Consent Agreement specifically references only the day of EPA's inspection, September 14, 1989. Plaintiff's Rule 30(b)(6) witness, Roy Herwig, testified that he was the author of the Notes, which are routinely prepared by the responsible EPA enforcement officer to explain the basis for EPA's proposed penalty amount.[16] Mr. Herwig was also the lead negotiator for EPA during the settlement negotiations, including the Show Cause hearing.[17] He testified that the Notes were reviewed by an EPA staff counsel;[18] that the purpose of the Notes, which

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[15] Florida Cities had originally applied for a permit on February 28, 1990 (fully 19 months earlier). When asked, EPA cannot explain why the Agency took 19 months to issue this permit, nor can EPA explain why or how the Agency lost the permit application after acknowledging in writing its receipt and completeness. EPA's losing the permit application required Florida Cities to start the entire permitting process over again on June 6, 1990, by submitting still another application.

[16] See Herwig Dep. at 156 ll. 16-18 (attached as Exhibit 13).

[17] Id. at 159 ll. 11-14 (attached as Exhibit 10).

[18] Id. at ll. 19-25 (attached as Exhibit 10).

physically accompany the proposed Consent Agreement when the senior EPA official signs the proposed Consent Agreement, "is to memorialize what information we can for the public, related to how we disposed of a certain case so that six years later somebody will say why did you do this"[19]; and that all the statements in the Notes were correct.[20] In the Notes EPA carefully reviewed Florida Cities' actions in light of the statutory mitigation factors under CWA § 309(g)(3)[21] and found:

> Respondent operated a mobile home community known as Barefoot Bay which discharged treated wastewater to a drainage canal leading to the north prong of the Sebastian Creek, a water of the United States, without the benefit of a valid NPDES permit for the discharge during the period from 1985 to present.
>
> In September 1991, an NPDES permit was issued to Respondent. The effluent limitations contained in the permit are limitations that the facility would have been able to meet since 1985. Thus, the environmental harm was not any greater than if Respondent had had an NPDES permit.[22]

Through the use of its economic benefit computer model ("BEN"), EPA measured the benefit gained by Florida Cities from its failure to obtain an NPDES permit. The BEN model determined that Florida Cities' total economic gain from noncompliance

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[19] Id. at 155 ll. 11-20 (attached as Exhibit 11).

[20] Id. at 156 l. 19-157 l. 2 (attached as Exhibit 13).

[21] Mitigation factors which the CWA requires EPA to consider in determining the amount of any administrative penalties are: (1) the nature, circumstances, extent and gravity of the violation, or violations, and with respect to the violator, (2) ability to pay, (3) any prior history of such violations, (4) the degree of culpability, (5) economic benefit or savings (if any) resulting from the violation, and (6) such other matters as justice may require. 33 U.S.C. § 1319(g)(3); CWA § 309(g)(3).

[22] Notes at 2.

during the period September 14, 1989 to September 11, 1991 was $73.00.[23] Under the category titled "Other matters that justice may require," EPA noted:

> The enforcement team considered the fact that Respondent has been working closely with the Florida Department of Environmental Regulation since 1985 to develop a solution to the problem. Since being contacted by EPA, Respondent has been very cooperative. Consideration was given to calculating liability on a daily basis beginning with the initial overflow in 1985. However, since the respondent had been working with DER and since the effluent being discharged would have met the limitations contained in the permit now being issued by EPA, it is believed that the true violation was limited to that of not applying for an NPDES permit.[24]

The Notes' "Summary" states "that the assessed penalty of $6,000 represents a fair and equitable application of the factors identified in CWA § 309(g)(3) of the Act in this case."[25] Mr. Herwig testified that he believed that some monetary fine was appropriate because "[Florida Cities] had been in noncompliance with the Clean Water Act since 1985 in that [it] did not have a permit" for discharges from the Barefoot Bay facility.[26] Read in its entirety, the administrative record shows that EPA considered all the days of discharge without an NPDES permit commencing in 1985 and ending on November 1, 1991.[27] Even after considering all these years of discharge without an

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[23] Id.; Herwig at 151 l. 9-152 l. 2 (attached as Exhibit 14).

[24] Barefoot Bay Notes at 3 (emphasis added) (attached as Exhibit 7).

[25] Id.

[26] Herwig at 148 l. 25-149 l. 1 (attached as Exhibit 15).

[27] Michael Hom, Mr. Herwig's supervisor in 1991, stated that it is EPA's general policy to settle all violations of which EPA is aware at the settlement of administrative enforcement actions. See Dep. of Michael Hom at 46 ll. 16-19 (attached as Exhibit 16). Not only did EPA have concrete evidence of discharges on virtually all days between September 14, 1989 and November 6, 1991 (the date of the settlement), but the Agency also had the DMRs for AO 90-106, which disclosed exceedances of the AO's interim effluent limitations.

NPDES permit at Barefoot Bay, the Notes explain that EPA "believe[d] that the assessed penalty amount of $6,000.00 represent[ed] a fair and equitable application of the factors identified in § 309(g)(3) of the Act, to this case."[28]

Plaintiff argues that because the Consent Agreement is analogous to a contract, this Court may not look beyond the four corners of the document, no matter what the two parties intended or understood they were settling and no matter what explanatory documents accompanied the Consent Agreement when it was signed.[29] This argument, however, ignores the language of the Consent Agreement itself and the requirements of EPA's Enforcement Management System ("EMS").[30] The introductory paragraph to Section III of the Consent Agreement states that EPA has

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[28] Notes at 3.

[29] Plaintiff argues that this matter has been addressed in the Court's Order denying Florida Cities' Motion for Partial Summary Judgment on the Waterway Estates facility. Plaintiff is in error. This issue was not addressed in Florida Cities' motion or in the Court's Order of June 21, 1991. Plaintiff raised this "contract defense" in its response to Florida Cities' Motion to Strike Paragraphs 15 through 39 of Plaintiff's Amended Complaint. In a companion order to the above referenced order of June 21, 1991, the Court denied Florida Cities' Motion to Strike. However, the Court's ruling was in the context of a Rule 12(f) motion on the sufficiency of the pleading. At that time, Florida Cities had not yet answered these allegations, EPA had not produced the administrative records for Barefoot Bay and Carrollwood, and no EPA witnesses relevant to these facilities had been deposed. Although EPA's current practice is to attach a copy of the entire administrative record with the Consent Agreement and Order Assessing Administrative Penalties, Florida Cities had no knowledge of the Notes On Proposed Penalty Assessment until EPA produced these documents in July, 1995, after the Court's order denying Florida Cities' Motion to Strike. Summary judgment is appropriate only after Defendant has had an opportunity to conduct discovery into important factual matters. Plaintiff's contention that it is entitled to summary judgment in the context of a Motion to Strike is therefore without merit.

[30] The EMS is an internal manual published by EPA. It provides guidelines to use in administering a proper penalty for a particular violation or set of violations. 50 Fed. Reg. 34648 (1985).

"taken into account" the factors enumerated in CWA § 309(g)(3). The only analysis of these factors in the administrative record is in the Notes, which demonstrate that the EPA's intention was to settle all outstanding violations for discharge without a federal NPDES permit. Mr. Herwig testified that although he referenced the September 14, 1989 date because that was the only date on which he personally witnessed a discharge at Barefoot Bay,[31] he believed, and EPA fully understood, that the facility was discharging on a daily or near-daily basis.[32] At the end of the negotiations, Mr. Herwig believed that the issue of discharge without an NPDES permit was fully resolved and "none of this would be revisited."[33] Mr. Herwig's understanding is bolstered by the affidavit of Kathleen L. Blizzard, counsel for Florida Cities at the Show Cause meeting. Ms. Blizzard states that at the end of the Show Cause meeting it was her understanding that all of the "discharge without a permit" violations were resolved and that this was EPA's understanding as well.[34] These facts suggest the clear inference that neither Mr. Kwan nor any member of the litigation team ever discussed with Mr. Herwig the facts of the Barefoot Bay settlement. In light of the complete administrative record, any other reading of the documents is unreasonable.

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[31] Herwig at 152 l. 3-153 l. 3 (attached as Exhibit 14).

[32] Id. at 54 ll. 7-11 (attached as Exhibit 17).

[33] Id. at 90 ll. 13-14 (attached as Exhibit 18).

[34] Kathleen Blizzard, counsel for Florida Cities at the Barefoot Bay settlement, states in her Declaration that "it was my understanding that by execution of the Consent Agreement and Order Assessing Administrative Penalties . . . and payment of the agreed $6,000 penalty, EPA intended to resolve the matter of enforcement by EPA for the discharge until an NPDES permit could be issued." See Declaration of Kathleen Blizzard of September 8, 1995 (attached as Exhibit 19).

From a practical perspective, Plaintiff's "one-day" theory would result in the expenditure over several months of hundreds of man-hours and thousands of dollars by both EPA and Florida Cities to resolve only one day, out of several hundreds of days of discharge without an NPDES permit. According to Plaintiff's argument, once the single day's discharge without a permit on September 14, 1989 was resolved, EPA might have initiated the whole administrative enforcement process again and again for each sequential day of discharge, even though the parties were fully aware of all the days of discharge at issue. Because the time period between the drafting of the Administrative Complaint and the actual signing of the Consent Agreement for the first day consumed more than one month, Plaintiff's theory would require EPA to spend a minimum of several years to resolve all of the days of discharge without an NPDES permit, by which time the statute of limitations (5 years) would have expired.

Plaintiff's characterization of the facts and the administrative process is both impractical and unrealistic. Significantly, none of the EPA officials deposed can remember, despite their many years of experience with such matters, a single instance in which EPA has ever engaged in such a sequential resolution of daily violations known to all parties participating in the settlement. To the contrary, the administrative record for Barefoot Bay shows that both parties were fully aware of and considered all of the hundreds of days of violation in settling on the $6000 penalty. Read together, the administrative record, Mr. Herwig's testimony, and Ms. Blizzard's affidavit show that all of these violations were fully settled.

The principal support for Plaintiff's case is provided by the analysis, calculations, and testimony of Mr. Kwan. However, Mr. Kwan admits that he has no personal

knowledge of the settlements of "discharge without a permit" violations at Barefoot Bay.[35] Mr. Kwan was not the responsible enforcement officer at the time of the settlement.[36] The "discharge without a permit" violations were negotiated and settled between Florida Cities and Mr. Herwig's EPA team on November 6, 1991. However, Mr. Kwan has not inquired into Mr. Herwig's intent.[37] Although he has no personal knowledge of the events at issue, Mr. Kwan summarily rejected EPA's official determination in the Notes for the Barefoot Bay settlement and failed to consult with any member of EPA's negotiating team.

Mr. Kwan's surprising failure to verify his reinterpretations of the official EPA settlement documents constitutes a glaring lack of due diligence and borders on recklessness. When asked at his deposition why he failed to make any efforts to reconcile EPA's official determinations with his own personal interpretation of the facts surrounding the Barefoot Bay negotiations, Mr. Kwan testified:

> Q (By Mr. Scroggin) Did it occur to you to have a conversation with Mr. Herwig regarding his opinion since he was the enforcement officer that drafted this document and negotiated the settlement for EPA?
> Mr. Quinn: Objection.
> A Mr. Herwig is not on the litigation team.[38]

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[35] Pl.'s 30(b)(6) Dep. [Kwan Vol. I] at 37 ll. 15-18 (hereafter "30(b)(6) Kwan") (attached as Exhibit 20).

[36] Roy Herwig had enforcement oversight of Barefoot Bay from late 1989 to early 1992. See Herwig at 14 l. 22 (attached as Exhibit 21); Deposition of Ken Kwan at 242, ll. 12-13 (attached as Exhibit 22). See generally Kwan Dep. at 374 ll. 20-25; see also Id. at 375 (attached as Exhibit 23).

[37] Kwan Dep. at 242 ll. 5-13 (attached as Exhibit 22), 259 l. 11 - 260 l. 21 (attached as Exhibit 24).

[38] Kwan Dep. at 262 ll. 4-9; see generally Kwan Dep. at 254-259, 263-267, 281- (continued...)

It is fundamental that Plaintiff base its allegations on known facts, not unsupported conjecture by Mr. Kwan four years after events in which he played no part. Mr. Herwig, not Mr. Kwan, is the enforcement officer for Barefoot Bay with knowledge of the violations and the settlement. Mr. Kwan's own testimony demonstrated that he is not qualified to determine whether the "discharge without a permit" violations had been settled, because he was not present at the settlement negotiations and he has made no inquiries of the persons who were present. Mr. Kwan's conclusions directly contradict findings in EPA's own administrative record and are not supported by the administrative record or any objective source.[39]

Plaintiff has failed to present credible evidence to refute EPA's own administrative record. Accordingly, pursuant to CWA § 309(g)(6), no genuine issue of material fact exists as to the allegations contained in Paragraph 16 of Plaintiff's Second Amended Complaint, and Florida Cities is entitled to judgment as a matter of law as to the 579 violations for discharge without a federal NPDES permit at Barefoot Bay.

2. Alleged Violations of Barefoot Bay's AO 90-106

Plaintiff has erroneously based this action for violations of a CWA § 309(a) order on the Administrator's authority in CWA § 309(b).[40] Significantly, neither CWA § 309(b) nor any other CWA section authorizes either administrative or judicial

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[38](...continued)
287, 289-290 (all attached as Exhibit 25). See also Exhibit 45 (Condensed version of Kwan Video Deposition, with videotape excerpts marked) and Exhibit 46 (Videotape of Excerpts of Kwan Deposition).

[39] See Kwan Dep. at 95 l. 10, 97 ll. 4-9, 99 l. 10, 103-107, 235-245, 250-251 (all attached as Exhibit 26).

[40] Second Amended Complaint ¶ 1.

enforcement of violations of § 309(a) AOs. In spite of this lack of statutory authority, this complaint includes numerous allegations of violations of Barefoot Bay's AO 90-106. Plaintiff's novel theory alleging liability for the AO violations would result in the double counting of violations at this facility.[41]

In general, an NPDES permit acts as a "shield" to protect a discharger from liability as long as the discharges conform to the requirements and limitations contained in the permit. 33 U.S.C. § 1342(k).[42] The Eleventh Circuit has confirmed that individually enforceable effluent limitations may be imposed on a discharger only through the NPDES permitting process:

> As to effluent limitations, EPA can only authorize discharge to [surface waters], and could only impose an effluent limitation on a discharger, through the NPDES permitting process.

City of Sarasota v. EPA, 813 F.2d 1106, 1109 (11th Cir. 1987).[43] In Paragraphs 18-23 of the Second Amended Complaint, the United States has alleged effluent limitation violations, not of Barefoot Bay's NPDES permit, but of Barefoot Bay's administrative order.

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[41] These violations are the same alleged violations for discharge without a permit discussed immediately above.

[42] See also Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 1993 U.S. App. LEXIS 35911, 24 Envtl. L. Rep. 20122 (2d Cir. 1993).

[43] EPA must subject a draft NPDES permit to rigorous public and internal review before issuing a final permit. See 40 C.F.R. 122.1(e), 124.1 et seq. As part of this process, the permittee and members of the public have the opportunity to comment on the draft permit and any proposed effluent limitations it contains. Opportunity for notice and comment protects the rights of every interested party. The statute provides an opportunity for a party to appeal an effluent limitation contained in a permit. See 33 U.S.C. § 1369(b); CWA § 509(b).

As a complement to the NPDES system, administrative orders ("AOs") are "enforcement tools"[44] used to bring a discharger back into compliance with the CWA. An AO is a like a "sword." See United States v. Metropolitan Dist. Comm'n., 23 Env't Rep Cas. (BNA) 1350, 16 Envtl. L. Rep. 20621 (D. Mass. 1985). Therefore, before EPA issues an AO, EPA must determine that the discharger has violated the CWA. The purpose of an AO is always to address underlying violations of the CWA. Indeed, all that EPA may refer to DOJ for enforcement is the underlying violation of the CWA itself. The underlying violation falls within this Court's subject matter jurisdiction; violation of an AO falls outside this Court's subject matter jurisdiction.

Plaintiff relies on CWA § 309(b) as authority for EPA's referring AO violations to DOJ for judicial enforcement. However, there is no such authority under CWA § 309(b) for EPA to refer AO violations to DOJ for enforcement. Section 309(b) specifically limits the kinds of violations that EPA can refer to DOJ, as follows:

> The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance.

33 U.S.C. § 1319(b) (emphasis added). Thus, the subject matter jurisdiction of this Court is limited to considering allegations of CWA violations that are capable of being the underlying basis of an AO. If a permit violation or other CWA violation were the subject of a § 309(a) order, that violation would fall within the subject matter jurisdiction of this Court. But since a violation of a 309(a) order itself cannot be the

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[44] 30(b)(6) Kwan Dep. Vol. III at 49 ll. 3-4 (attached as Exhibit 27).

underlying basis for another 309(a) order,[45] this Court does not have subject matter jurisdiction over such a violation, and the cause of action would be dismissed. In this case, Plaintiff has alleged in Paragraphs 18-23 violations of a § 309(a) order at Barefoot Bay. These allegations are outside the subject matter jurisdiction of this Court and should be dismissed.

CWA § 309(a)(3) provides the types of violations proper for an AO for a non-delegated state.[46] For a CWA § 309(a) administrative order to be issued, and for a case to be the subject matter of a civil referral under CWA § 309(b), a discharger must have violated section "1311, 1312, 1316, 1317, 1318, 1328, or 1345 . . . or is in violation of any permit condition or limitation implementing any of such sections in a permit under section 1342." 33 U.S.C. § 1319(a)(3) (referring to CWA sections). As the subsection goes on to state, the Administrator may issue an AO requiring such facility to comply, or she may bring a civil action. But the Administrator may not bring a civil action for a violation of a § 309(a) order.[47]

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[45] See 33 U.S.C. § 1319(a); CWA §309(a).

[46] Prior to May 1, 1995, Florida was a "non-delegated state," meaning that Florida did not have NPDES permitting authority. However, Florida did have its own permitting and enforcement program, and Florida Cities was required to comply with the state, as well as federal, requirements.

[47] An AO cannot substitute for a permit or as a modification of a permit. Rather, CWA § 309(a) authorizes EPA to "specify a time for compliance," but does not allow EPA to incorporate into an AO interim effluent limitations that are independently enforceable. Thus, Plaintiff's reliance in the Second Amended Complaint on CWA § 309(a) for such enforcement authority for violations of interim effluent limits is misplaced. A CWA § 309(a) order is issued unilaterally by EPA without public notice and comment. Deposition of Michael Hom, EPA Enforcement Supervisor, at 55 l. 17 - 56 l. 2 (attached as Exhibit 29). This distinction between interim effluent limits in an AO and the effluent limits in an NPDES permit is reflected (continued...)

This reading of the statute is reflected in EPA's own internal guidelines. The EMS states:

> The Clean Water Act does not authorize the issuance of an AO for a violation of a previously issued AO nor may an administrative penalty order be issued for violation of an administrative order. Any successive AO issued must be based upon the underlying violations of the Act contained in the previous AO . . . .

EMS at 62 n.5.[48] Thus, a violation of a previous AO is not a ground for issuing another AO, nor is a violation of a previous AO a ground for civil referral.

Plaintiff's attempt to impose multiple daily liability (for discharge without a permit and for violations of effluent limits in an AO), instead of a single violation for each day's discharge without a permit, is not authorized by law. Therefore, this Court lacks subject matter jurisdiction over Paragraphs 18, 19, 20, 21, 22, and 23, and Defendant is entitled to summary judgment as a matter of law.

3. Alleged Violations of Barefoot Bay's NPDES Permit No. FL0042293

a. Test Method for Total Residual Chlorine

Plaintiff alleges that on a daily basis between November 1, 1991 and June 28, 1993 the Barefoot Bay facility used a test method for total residual chlorine ("TRC") not specified in NPDES permit FL0042293. However, both the plain language of the

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[47](...continued)
by EPA's separation of enforcement activities from permit writing; permit writers, who develop effluent limitations for NPDES permits, must do so pursuant to rigorous procedures established by formal EPA regulations. 40 C.F.R. § 124.1 - 124.21.

[48] (Attached as Exhibit 25). Note 5 arises from the Enforcement Response Guide contained within the EMS. The Enforcement Response Guide provides proper responses for particular types of violations. The text of Note 5, which occurs on page 62, is referenced on page 56 under the heading for "Administrative Order Interim Limits." AO Interim Limits are the types of violations being asserted against the Barefoot Bay plant.

permit and the testimony of EPA's own Rule 30(b)(6) witness demonstrate that Florida Cities used one of the two methods allowed in its permit. Indeed, three EPA officials conducted a Performance Audit Inspection of Barefoot Bay on June 10, 1993 and noted in their report that the test method being used by the facility (DPD colorimetric) was approved by EPA's regulations.[49]

Although the permit language lists three test methods for TRC, the first two methods are subparts of the same alternative. The language at issue in Part I of Barefoot Bay's permit, entitled "Effluent Limitations and Monitoring Requirements," states:

> Testing for total residual chlorine (TRC) shall be conducted according to either the amperometric titration method, the low-level amperometric titration method (if compliance with a permit limitation of 0.20 mg/l or less is to be demonstrated), or the DPD colorimetric method as specified in Section 4500-Cl D., 4500-Cl E., or 4500-Cl G., respectively. Standard Methods for the Examination of Water and Wastewater, 17th Edition.[50]

NPDES Permit No. FL0042293. EPA's own 30(b)(6) designated witness for enforcement at Barefoot Bay (Mr. Herwig) acknowledged that the language of this permit provision was "hard to read."[51] While the language may be confusing, the grammatical structure ("either" . . . "or") makes clear that the choice is between two test methods, one of which has two subparts. During the time period in question, Florida Cities used the DPD colorimetric method to test for TRC and reported its test results to EPA on its DMRs. During this period EPA inspected Barefoot Bay and

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[49] See Letter of July 18, 1993 from Antonio Quinones (EPA) to Florida Cities, attaching Performance Audit Inspection. Specifically, see pages L-2, L-3, and L-4 of the inspection report (all attached as Exhibit 30).

[50] See Plaintiff's Memorandum for Partial Summary Judgment, Exhibit B.

[51] Herwig at 119 l. 21; Id. at 122 ll. 2-6 (all attached as Exhibit 31).

noted no problems with Florida Cities' use of the DPD colorimetric method.[52] Accordingly, no genuine issue of material fact exists as to the allegations contained in Paragraph 28 of Plaintiff's Second Amended Complaint, and Florida Cities is entitled to judgment as a matter of law as to Paragraph 28 of the Second Amended Complaint.

b. Other Claims at Barefoot Bay

Florida Cities acknowledges that the DMRs filed with EPA reported some exceedances (values higher than the permit's effluent limitations) during the relevant time period for TRC, toxicity, and Biochemical Oxygen Demand ("BOD"). However, Florida Cities is unable to determine what appropriate legal defenses and mitigating circumstances are applicable until the government can determine the number of violations being alleged (which Mr. Kwan estimated would take "another month").[53] Accordingly, summary judgment is premature until Plaintiff can state with particularity the charges against Florida Cities. Moreover, at trial Florida Cities will present evidence of mitigating circumstances that should significantly reduce, or eliminate altogether, any applicable penalties.

B. Carrollwood

1. Alleged Unpermitted Discharges

Plaintiff alleges that the Carrollwood facility discharged effluent without a federal NPDES permit from August 1990 to June 1991. Florida Cities acknowledges that while it did discharge effluent into Sweetwater Creek between August 1990 and June

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[52] See Note 49 and accompanying text.

[53] See Note 9 and accompanying text.

1991, it settled with EPA for these discharges in a Consent Agreement, dated April 19, 1991. Therefore, just as with Barefoot Bay, no genuine issue of material fact exists, and Florida Cities is entitled to judgment as a matter of law.

EPA issued Carrollwood's initial NPDES permit on August 15, 1975. In April of 1980 Florida Cities filed a timely application to renew its Carrollwood permit. Four years later EPA denied the renewal application, based on Florida's designation of Sweetwater Creek as a "no discharge area," which would have precluded Florida from providing to EPA the state certification required for EPA to renew Carrollwood's NPDES permit.[54] In November 1984, EPA issued AO 85-044, ordering Carrollwood to cease discharge into Sweetwater Creek by June 1987. EPA's Notes on the Carrollwood Consent Agreement state that "DER [now FDEP] issued Respondent Temporary Operating Permits (TOPs) throughout this time period allowing discharges into Sweetwater Creek, thereby not enforcing their [sic] own 'no discharge' rule."[55]

During the late 1970s and the 1980s, Florida Cities had been negotiating with Hillsborough County ("County") to connect Carrollwood to the Hillsborough facility. In June 1979 the County notified Florida Cities that connection to the facility would not be available until June 1983. This date was subsequently extended by the County to the spring of 1988 and then extended again to 1990. Hillsborough's 1990 offer at that

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[54] EPA's Carrollwood Notes (attached as Exhibit 32) explain that the sole basis for EPA's failure to renew the NPDES permit was Florida's designation of the receiving waters of Sweetwater Creek as a "no discharge area." Such designation precluded Florida from providing the state certification necessary for EPA to renew Carrollwood's NPDES permit. The Notes make no mention of any other basis for EPA's failure to renew the permit.

[55] Carrollwood Notes at 1 (attached as Exhibit 32).

time included a capacity fee of over $5.5 million, which could have quadrupled the rates charged to customers.[56]

In 1987 the Florida legislature passed the Grizzle-Figg Act[57] which allowed discharge into Sweetwater Creek within certain limitations. In November 1989 Florida Cities applied to FDEP for a permit to construct an upgrade to Advanced Wastewater Treatment ("AWT")[58] at Carrollwood, which FDEP issued in July 1990. Following receipt of the FDEP construction permit -- a clear indication that Florida would no longer withhold the required state certification for an NPDES permit -- Florida Cities applied for an NPDES permit on July 31, 1990. EPA issued an Administrative Complaint to Florida Cities for CWA violations on September 25, 1990; two days later, it issued AO 90-100, which temporarily authorized discharge into Sweetwater Creek until an NPDES permit was issued. EPA issued NPDES permit No. FL0029319 for an AWT facility on April 19, 1991, effective July 1, 1991. During this period Florida Cities and Hillsborough County continued to negotiate, and they finally concluded a connection agreement on June 5, 1991. Throughout this time period, EPA

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[56] In an attempt to find alternative methods of disposal of the effluent during this same period, Florida Cities investigated and sought permits for deep well injection, attempted to purchase surrounding citrus groves on which to spray effluent, negotiated with grove owners to receive effluent, and negotiated with area golf courses to supply effluent for irrigation. None of these options proved to be economically viable given the rate base constraints placed on Florida Cites by the Florida Public Service Commission ("PSC"). Throughout all relevant periods of time, Florida Cities continued to submit DMRs to both EPA and FDEP.

[57] Fla. Stat. ch. 403.086 (1987).

[58] AWT requires a level of treatment more stringent than the "secondary treatment" than is required of all wastewater treatment facilities discharging into Waters of the U.S. See 40 C.F.R. § 122.44.

personnel were kept fully apprised of these negotiations and were immediately informed when the connection agreement was reached. On January 6, 1992, Carrollwood connected with Hillsborough's facility, thereby ceasing any discharge into Sweetwater Creek. On March 6, 1992, EPA "inactivated" AO 90-100, informing Florida Cities that it was in compliance with the AO's terms.[59]

As with the Barefoot Bay proceedings, the Carrollwood administrative record consists of the Notice of Show Cause, Notes, Administrative Complaint, and Consent Agreement.[60] The Consent Agreement settled any unpermitted discharge claims at Carrollwood pursuant to CWA § 309(g)(3). In section III, the Consent Agreement states that EPA has considered the CWA § 309(g)(6) factors. The only examination of these factors in the administrative record is found in the Notes:

> The economic benefit realized by Respondent was computed by using the "BEN" model of calculating the economic benefit of noncompliance. The values entered into the BEN model are based upon the delayed capital savings which Respondent realized as a result of not submitting an NPDES permit application. The period of noncompliance used in the model was calculated from the first day of noncompliance, June 1987, up to the point of expected issuance of an NPDES permit, February 1991.[61] Using the BEN model, the estimated benefit of delayed compliance totals $ 203.00.

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[59] Letter of March 3, 1992 from EPA to Florida Cities (attached as Exhibit 38).

[60] The administrative record in this case for Carrollwood consists of (1) AO 85-044 (attached as Exhibit 33) and AO 90-100 (attached as Exhibit 34), (2) Notice of Show Cause (attached as exhibit 35), (3) Notes on the Proposed Penalty Assessment (attached as Exhibit 32), (4) Administrative Complaint (attached as Exhibit 36), and 5) Consent Agreement and Order Assessing Administrative Penalties (attached as Exhibit 37).

[61] In fact, EPA did not issue the Carrollwood NPDES permit until May 28, 1991, with an effective date of July 1, 1991.

Notes 2 ¶ 4. In Paragraph 6 of the Notes, EPA stated that a penalty reduction was justified because Florida had modified state law to allow for discharge of AWT effluent into Sweetwater Creek. The plain language of the Notes establishes that the penalties were calculated for the entire period of discharge without a permit until the date of issuance of the permit (then estimated to be February 1991).[62]

Plaintiff contends that the Consent Agreement should be read in isolation and that it addresses only the period from June 1987 through July 1990. As noted above, this analysis is unrealistic and impractical. The parties entered into the Consent Agreement in April 1991, leaving an eight-month gap in EPA's enforcement. Joseph W. Landers, Jr., Florida Cities' counsel in the Carrollwood negotiations, has testified by affidavit that at the end of the Carrollwood negotiations, he understood that the parties intended to resolve fully the issue of discharge without a permit.[63] Thomas Plouff, one of EPA's principal negotiators of the Carrollwood settlement, testified that when the Consent Agreement was signed, the fact that there was a period of time in which Florida Cities would be discharging without a permit did not warrant an increase in the penalty assessed because "[t]he case was settled, long since settled."[64] Mr. Plouff chose the date ending liability for discharge without an NPDES permit from

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[62] Both the Carrollwood Notes (attached as Exhibit 32) and the draft NPDES permit (attached as Exhibit 39) estimate the effective date of the final NPDES permit as February 1991. In fact, comments received on the draft permit delayed EPA's process, so that the permit became effective July 1, 1991.

[63] Declaration of Joseph W. Landers, Jr. (attached as Exhibit 40).

[64] Deposition of Thomas Plouff at 120 ll. 5-6 (attached as Exhibit 41).

Carrollwood as July 1990, because that was the date on which Florida Cities had applied for the permit.[65]

As with the Barefoot Bay allegations, Mr. Kwan again failed to check with EPA's Enforcement Officer who negotiated the Carrollwood settlement, Mr. Thomas Plouff,[66] with Florida Cities or to undertake any due diligence to verify his reinterpretation of the documents in this closed file for a facility that had ceased to discharge.[67] The entire administrative record demonstrates that the CWA § 309(g)(6) penalty paid by Florida Cities applied to the entire period of discharge without a permit. Therefore, no genuine issue of material fact exists, and Florida Cities is entitled to judgment as a matter of law as to Paragraph 30 of Plaintiff's Complaint.

2. Alleged Violations of Carrollwood's NPDES Permit No. FL0029319

EPA was fully aware when it issued NPDES Permit No. FL0029319, which required AWT at the Carrollwood facility, that Carrollwood was incapable of meeting these stringent AWT standards without constructing new treatment facilities. Mr. Kwan testified that, based on his eighteen years experience in such matters at EPA, such construction would routinely take one to four years. Further, when it issued the permit, EPA was also fully apprised that Florida Cities was near completion of the years-long negotiations with Hillsborough County to connect the discharge and

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[65] Id. at 119 ll. 18-21 (attached as Exhibit 41).

[66] Mr. Plouff conducted a site inspection and negotiated the Carrollwood settlement for the discharge without a permit violations. See Deposition of Thomas Plouff at 57-59 (attached as Exhibit 42).

[67] Carrollwood connected with Hillsborough County on January 6, 1992 and the facility was subsequently physically dismantled and removed from the site.

eliminate any need for an NPDES permit. Indeed, once EPA issued the permit in April 1991, thus assuring that Florida Cities had an alternative to connecting to the Hillsborough facility, the County promptly dropped its demand for a $5.5 million capacity fee and concluded a connection agreement with Florida Cities on June 5, 1991. While these facts support mitigation of any penalties for violations of the AWT provisions of the permit (which EPA never sought to enforce until Plaintiff's litigation team recommended that Mr. Kwan resurrect this case and refer it to DOJ for enforcement),[68] Florida Cities acknowledges that some exceedances of the unachievable AWT standards did occur.

Florida Cities further acknowledges that the DMRs filed with EPA reported exceedances during the relevant time period because the plant, as EPA knew, was incapable of meeting stringent AWT standards. However, as with Barefoot Bay, EPA's Mr. Kwan is still "adding the numbers up"[69] regarding the number of alleged violations. Consequently, Florida Cities is unable to determine what appropriate legal defenses and mitigating circumstances are applicable until the government can decide the number of violations being alleged. Accordingly, summary judgment is premature until Plaintiff can state with particularity the charges against Florida Cities. Moreover,

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[68] Q (By Mr. Scroggin) And the decision, Mr. Kwan, was the decision to make a referral of the Carrollwood case to the Department of Justice based on your recommendation?
A It is based on the recommendation of the litigation team.
Kwan Dep. at 372 (attached as Exhibit 23).

[69] Kwan Dep. at 152 (attached as Exhibit 2). See discussion in text, supra, at Note 9.

at trial Florida Cities will present evidence of mitigating circumstances that should significantly reduce, or eliminate altogether, any applicable penalties.

C. Waterway Estates

1. Alleged Unpermitted Discharges

Florida Cities has acknowledged that, although fully permitted by FDEP, it discharged secondarily treated effluent from its Waterway Estates sewage treatment facility into the Caloosahatchee River without a federal NPDES permit during the relevant time period. The Court is already aware that EPA erroneously rejected Florida Cities' 1986 application to renew the Waterway Estates' NPDES permit, thus creating by its own wrongful act the very absence of a federal permit that is now the subject of this case. Ultimately, EPA corrected its own error and issued a new permit for the Waterway Estates facility. The government should not be permitted to profit by obtaining penalties from Florida Cities for its own mistake.

2. Alleged Discharges to an Unpermitted Location

Plaintiff alleges that by discharging effluent from Waterway Estates into a tributary canal of the Caloosahatchee River, Florida Cities violated NPDES Permit No. FL0030325. However, the facts developed through discovery (including Plaintiff's own testimony and the testimony of the FDEP official responsible for this facility) and the relevant federal regulations establish that the plant's outfall was within the permitted area of discharge. Therefore, no genuine issue of material fact exists, and Florida Cities is entitled to a judgment in its favor as to the allegations of discharge to an unpermitted location.

NPDES Permit No. FL0030325, effective November 1, 1989, states that Waterway Estates is authorized to discharge into "receiving waters named Caloosahatchee River." Plaintiff's Complaint alleges that because the outfall of the plant discharged into the tributary canal between November 1, 1989 and July 14, 1991, Florida Cities violated the terms of its permit. Plaintiff bases this allegation on Mr. Kwan's Declaration, which alleges that NPDES permit No. FL0030325 authorizes discharge "to a point at the six (6) foot contour line in the Caloosahatchee River." Kwan Decl. ¶ 21. In Plaintiff's Answers to Defendant's First Interrogatories, which were verified by Mr. Kwan, Plaintiff claims that the permit "specified that they were to discharge the effluent from the Waterway Estates Treatment plant directly to six-foot [sic] contour line of the Caloosahatchee River, during the period alleged . . . ."[70] However, when Mr. Kwan was asked at the United States' 30(b)(6) deposition to identify where NPDES permit No. FL0030325 specifies that discharge must be directly to the six-foot contour line, he was unable to do so. In fact, there is no reference in NPDES permit No. FL0030325 specifying discharge to the six-foot contour line. The only reference to a discharge point found in the permit names the receiving waters simply as the "Caloosahatchee River."

Between November 1, 1989, and July 14, 1991, Florida Cities discharged effluent into a canal adjacent to the Caloosahatchee River. Dr. Abdul B. Ahmadi, Water Facilities Administrator of the FDEP, has testified by affidavit that "FDEP was aware of the physical location of the discharge point from the Waterway Estates facility into a tidally influenced canal to the Caloosahatchee River. This canal was considered part of

[70] Pl.'s Resp. to Def.'s First Interrogs. ¶ 45. See Ex. 1.

the Caloosahatchee River."[71] Plaintiff has presented no evidence to the contrary. Accordingly, Florida Cities was discharging in accordance with the plain meaning of the permit's language and is entitled to summary judgment as a matter of law.[72]

3. Alleged Violations of Waterway Estates' NPDES Permit No. FL0030325

Florida Cities acknowledges that the DMRs filed with EPA reported some exceedances for nitrogen (concentration and loading) and toxicity tests, during the relevant time period. However, as with Barefoot Bay and Carrollwood, the government still has not yet specifically identified the number of alleged violations. It is fundamental that Florida Cities has the right to know the charges it faces before it can respond meaningfully or present a defense. Accordingly, summary judgment is premature until Plaintiff can state with particularity the charges against Florida Cities. Moreover, at trial Florida Cities will present evidence of mitigating circumstances that should significantly reduce, or eliminate altogether, any applicable penalties.

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[71] Ahmadi Aff. ¶ 11 (emphasis added) (attached as Exhibit 43).

[72] EPA's own regulations state that the discharge point in the canal is within the scope of the permit. EPA's own regulations state that the application form shall provide:

> (1) Outfall location. The latitude and longitude to the nearest 15 seconds [1500 feet] and the name of the receiving water.

40 CFR § 122.21(g). The canal is within 15 seconds of the location of the current, permitted Waterway Estates outfall.

IV. THE FIFTH AMENDMENT AND NEGATIVE INFERENCES

Plaintiff contends that "a number of key witnesses in this case have refused to testify on Fifth Amendment grounds,"[73] and implies that its prosecution of this case has somehow been thwarted because these witnesses have exercised their constitutional rights. Plaintiff argues that this Court should draw inferences from these witnesses's invocation of the Fifth Amendment that all of the violations at issue occurred as alleged in the Plaintiff's Complaint.[74]

Plaintiff's argument ignores several significant facts. First, Plaintiff has engaged in thorough and wide-ranging discovery against all three Florida Cities facilities for fifteen months before any witness invoked the Fifth Amendment. Second, Florida Cities has produced over 500,000 pages of documents, covering all three facilities. Additionally, Plaintiff has deposed seven Florida Cities officials, who testified fully under oath, for a total of eight days of testimony. These witnesses are:

- Julie Karleskint, Operations Manager, Florida Cities Water Company;
- Larry L. Good, Regional Manager for Sarasota Division and North Division, Florida Cities Water Company;

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[73] Pl.'s Mot. for Summ. J. at 14.

[74] The Supreme Court has held that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a civil cause.' 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961)." Baxter v. Palmigiano, 425 U.S. 308, 318 (1976). Furthermore, "the inference is not required: it may be drawn, but it does not necessarily need to be drawn." Daniels v. Pipefitters' Association Local Union No. 597, 983 F.2d 800, 802 (7th Cir. 1993) (emphasis in original). In addition, no inference drawn through the invocation of the Fifth Amendment can form the sole basis of a judgment against a witness; it is a fact to be considered along with other facts. Director of the Office of Thrift Supervision v. Lopez, 960 F.2d 958, 965 (11th Cir. 1992); Koester v. American Republic Investments, 11 F.3d 818, 824 (8th Cir. 1993).

- William Sansbury, Division Manager, Barefoot Bay Division, Florida Cities Water Company;
- Glen Siler, Wastewater Operator, Barefoot Bay Plant, Florida Cities Water Company;
- Johnnie Overton, Senior Vice President, Florida Cities Water Company, 1992-94 (currently Executive Vice President and Chief Operating Officer, Avatar Utility Services, Inc.);
- Paul Bradtmiller, Executive Vice President and Chief Operating Officer, Florida Cities Water Company; and
- Jack Tompkins, former Operations Manager, Florida Cities Water Company.

Since the Supreme Court denied certiorari in United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1994), cert. denied, 115 S.Ct. 939 (1995),[75] Plaintiff has also deposed Leon Levy, Avatar Holdings Inc.'s Chairman of the Board of Directors and Edwin Jacobson, Chief Executive Officer of Avatar Holdings Inc. Both witnesses have testified fully in response to Plaintiff's questions. In addition, Plaintiff has conducted a series of site inspections at all three facilities, including two inspections of Waterway Estates. The document discovery, depositions, and inspections have provided Plaintiff a full and fair opportunity to discover all facts relevant to this suit.[76] Additionally, all evidence, including all inferences, must be viewed in the light most favorable to the

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[75] The Ninth's Circuit's holding in Weitzenhoff dramatically changed the well-established legal standard of criminal liability for "knowing" violations of the CWA. Under Weitzenhoff, any violation of the CWA, regardless of the mitigating circumstances, can give rise to criminal felony liability. This result applies to anyone knowingly causing a discharge that results in any violation, even if that person believed in good faith that the facility was in compliance with the CWA.

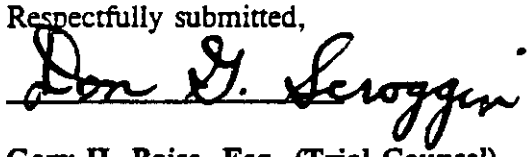
[76] Florida Cities has repeatedly informed Plaintiff that the witnesses who have exercised their Fifth Amendment rights would testify in exchange for immunity from individual criminal prosecution under the CWA. Florida Cities has formally requested such immunity, but to date, Plaintiff has not responded to Florida Cities' request. The Department of Justice, unlike a private plaintiff, is uniquely empowered to grant this immunity and obtain both deposition and trial testimony from all of these witnesses. See letters exchanged between Don G. Scroggin and Daniel S. Jacobs (attached as Exhibit 44).

party opposing summary judgment, Florida Cities. In light of Plaintiff's sweeping and exhaustive discovery, this Court should decline to draw any adverse inferences and should instead rule on the actual facts of this case.

V. CONCLUSION

Based on the foregoing, Defendant Florida Cities should prevail on its Motion for Summary Judgment on: Paragraph 16 (Barefoot Bay discharge without a valid NPDES permit); Paragraphs 17, 18, 19, 20, 21, 22, 23 (Barefoot Bay effluent limitation violations of Administrative Order 90-106); Paragraph 28 (Barefoot Bay alleged violations for using the improper test method for total residual chlorine); Paragraph 30 (Carrollwood discharge without a valid NPDES permit); Paragraph 45 (Waterway Estates discharge at the wrong location) of the Second Amended Complaint. Plaintiff's Motion for Partial Summary Judgment should be denied.

Respectfully submitted,



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September 11, 1995

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of Defendants' "Motion for Partial Summary Judgment" and "Memorandum in Support of Its Motion for Partial Summary Judgment and in Response to Plaintiff's Partial Summary Judgment" has this September 11, 1995 been sent to the following persons by United States first class mail, properly addressed and postage prepaid.

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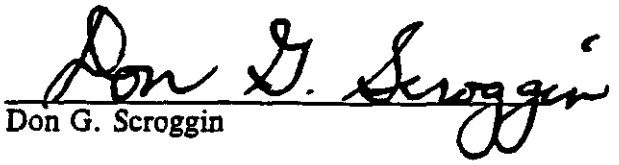

Don G. Scroggin

Volume	Page	Designation	Counter attack
1.00	8.00	employed by FCWC as Exec. V.P., Feb. 1992, in charge of day-to-day operations; responsible for environmental compliance	
1.00	10.00	list of FCWC wwtp	
1.00	12.00	salary of $84000	
1.00	13.00	joined FCWC in Feb. 1991 as Senior V.P.	
1.00	14.00	company is given opportunity to comment on permits	
1.00	18.00	doesn't recall whether BB had a permit to discharge into Sebastian River	permit never was for discharge to the Sebastian River, it's for discharge into drainage canal which leads to Sebastian River a couple of miles downstream
1.00	21.00	canal flows into Sebastian River thence to Indian River Lagoon	
1.00	27.00	BB NPDES permit applications; Bradt no involved with BB application; was only involved once Tompkins started writing letters for his signature	
1.00	32.00	[probably a screwed up designation]	
1.00	38.00	public notice of BB permit; Bradt wrote letter saying limits were acceptable	
1.00	42.00	letter to Metcalf; Metcalf works for Avatar Properties; Getman is counsel to Holdings and all subsidiaries	
1.00	58.00	Bradt contacts Getman weekly by telephone	
1.00	59.00	Calls to Getman; operator says Avatar; one central receptionist at Avatar; memory dial on telephone; central receptionist for Properties/Utilities/Holdings	

Volume	Page	Designation	Counter attack
1.00	74.00	PSC approval needed for cost pass through to rate-payers; risk of not approving capital expenditures; need an economically prudent increment; need the best reasonable cost; must be used and useful; sometimes they get input from the PSC for a declaratory order	
1.00	78.00	when the grove owners need the water then an agreement will be reached	
1.00	82.00	lease payments for use of land is an issue; grove owners are haggling over 2 cents per 1000 gallons; Sebastian River doesn't charge anything to dispose of effluent	
1.00	91.00	Properties has an interest in Hearndon PUD; Hearndon is property to the north of BB	
1.00	99.00	matrix organization; AUSI is heavily involved in day-to-day operations and administrative decisions; AU, Poinciana, FCWC are all wrapped up into matrix organization	
1.00	111.00	environmental policy is memorialized in writing in Avatar's compliance procedures and internal audit procedures	
1.00	135.00	re-use with BB golf course; Getman putting on "developer" hat; choosing which company to be counsel of	
2.00	12.00	reports to Allen; meets daily with Allen; talk about WWTP issues if it is of sufficient level	
2.00	18.00	Utilities has 6 employees in Coral Gables; Allen's secretary is shared; Consolidated is a paper company; Consolidated might have tax ramifications	
2.00	26.00	Jacobson makes quarterly visits; Avatar employees means FCWC, Poinciana employees	
2.00	40.00	rate case-PSC proceedings; Ken Gatlin is rate counsel; WWE rate case in 1992; utility practic to pass through rates; PSC might approve certain litigation expenses	
2.00	44.00	rate of return is around 9%	
2.00	69.00	compliance inspections used as harassment by Sarasota County for acquisition program	

Volume	Page	Designation	Counter attack
2.00	72.00	Allen involved with environmental compliance	
2.00	91.00	Allen to Metcalf memo re: capacity fees; Getman, Gordon, Wilkov are cc:'d; Metcalf reports to Wilkov	
2.00	93.00	condemnation proceedings; memo sent to Allen, Getman, Reeves, Sharp, Wilkov; Wilkov is director of FCWC; if $1M-$2M is involved then Utilities is interested in the expenditure	
2.00	97.00	Allen to Metcalf; trying to amend state law; Avatar engages the law firm for legislative monitorings; law firm acts on behalf of the whole company; expenses are covered in rate base	
2.00	101.00	Bradtmiller focused on permit limitations and expiration dates; Tompkins briefed him on the permits	
2.00	103.00	[authenticates DMRs]	
2.00	107.00	[Bradt signed DMRs]	
2.00	108.00	DMRs are prepared at the plant and forwarded to main office for verification	
2.00	116.00	memo to Getman re Lee County re-use ordinance; Lee County prohibited surface water discharge unless by permit; FCWC got the permit and then decided to challenge the ordinance; trying to get the ratepayers excited about increased rates and then have the rate payers challenge the ordinance; might receive 13 cents per 1000 gallons for effluent	
2.00	122.00	memo from Getman to Allen; WWE show cause meeting in Atlanta; EPA has negative attitude; McGarry not a pleasant man	
2.00	126.00	Memo from Getman re WWE enforcement strategy; Cape Coral settlement; enforcement strategy being reviewed at "parent company"; Bradt kept informed through "parent company"	
2.00	129.00	"bunny hugger" memo	

Volume	Page	Designation	Counter attack
2.00	132.00	Conward signed by Acosta, Bradtmiller, Allen, Gordon, Wilkov	
2.00	135.00	Conward took 9 weeks to be signed; many signatures required; Stone & Webster claim for additional services; Elder's lack of record keeping re Stone & Webster projects; work was necessary according to S&W but it was outside the scope of the original agreement	
2.00	138.00	memo re: WWE notice of violation, Karleskint, Overton, Acosta	
2.00	139.00	Getman memo to Allen re Toxicity at WWE; costs to test placed into rate base; costs passed through to rate payers if prudent; rate filing costs are rising; toxicity testing is $1500/month; $6000/year is a substantial cost for a single item; daily flow has exceeded capacity at WWE in November 1992; need to add capacity for future growth; show cause meeting for WWE in June 1988; not worried about enforcement; thought the meeting was about the AOs	
2.00	154.00	Fax to DGS; 2650 linear feet of pipe were installed to the new outfall in the Caloosahatchee	
2.00	163.00	May 1991 dropped the CW AWT upgrade; less $ to tie into the County facility; $5M for a small division is not a prudent expenditure; very difficult to justify investment to rate payers for a CW upgrade	
2.00	168.00	doesn't know whether the company had exhausted the tie-in alternatives at CW	
2.00	171.00	1 mile of force main was constructed; pass costs through to the customer	
2.00	187.00	undepreciated portion would not be amortized, $398,000 purchase price for the CW site	

Deposition Summary
Johnnie Overton
November 17, 1994

Title: June 1992 - June 1994 - Senior VP for FCWC; June 1994 - Avatar Utilities Services, Inc. Executive Vice President (reports to Gerald Allen).

As Senior VP he was responsible for the overall operation of 6 facilities; he was responsible for environmental compliance. He was questioned about his knowledge of environmental science and stated that he had taken no classes in the subject---only seminars in connection with his job. He was questioned on his involvement with NPDES permits; he had done some renewal applications.

He answers questions about exceedances at the facilities; meetings with Paul Bradtmiller about various environmental matters; visits to the wastewater treatment facilities.

He discusses the Barefoot Bay facility at length: the perc. ponds, sprayfield and the overflows into the canal; the plan to upgrade the facility; various alternatives that were explored in order to stop discharging into the river (and the cost scenarios associated with each).

Page	Designation	Counter Attack
14.00	DGS might have conflict of interest by representing Tompkins personally	
36.00	Began work for FCWC in August 1989	
40.00	ended work for FCWC in September 1991	
41.00	was hired as construction manager; moved to operations manager	
42.00	he reported to French then to Bradtmiller	
43.00	*had oversight of day to day operations*	
44.00	responsibilities included permitting; permit reviewing and applications for permits and DMRs	
53.00	Tompkins visited WWE; WWE discharges to a canal	
55.00	AO 89-109; her circulated the AO to French and Wittenmyer	
64.00	Tompkins recalls Harrop and conflict with Harrop; FDER requested more information and Source needed $ in order to respond; tried to work out an agreement with Source in July 1989; needed DER permit so construction could go forward; fee dispute; DER issued a comment letter on 6/16/89 that needed to be responded to; November 1989 the DER application was still incomplete; Tompkins met with Ahmadi; FDER frowned on surface water discharges; Ahmadi called to talk about anti-degradation	
84.00	Tompkins says the discharge was at unpermitted location	[Tompkins is only responding to what the permit says; he is not factoring in the AO and what it says]
89.00	10 month fee dispute holds things up at WWE	

Page	Designation	Counter Attack
94.00	FCWC retained a different engineer in May 1990 because of dissatisfactio with Source	
96.00	another engineering firm takes over construction; not necessarily delays involved with the construction; Tompkins does not know the length of delay attributable to the dispute with Source; [Jacobs wants Tompkins to say that dispute with Source led to Total Nitrogen violations because construction was not complete]	
105.00	No permit to discharge to the canal	
116.00	Tompkins told FCWC and Avatar of WWE deadlines; Elder, Reeves, Allen, Getman	
119.00	Tompkins had several dealings with Allen, Getman and Avatar	
120.00	Tompkins concerned for need to speed up compliance	
122.00	No reponse from Getman but Getman did write memo asking Tompkins to document all issues related to WWE project for possibility of future litigation	
132.00	McGarry wrote notice of violation; EPA's dissatisfaction because compliance date is behind schedule; Temporary facilities could have been used	
134.00	that FCWC was working to meet all schedules related to WWE is an exaggeration	
135.00	Bradt was supervisor and was kept apprised of the situation; Tompkins was trying to speed things up in April 1991	
139.00	memo to Bradtmiller for a sulfunator; trying to get facility into compliance ASAP; proposing temporary measures to improve effluent quality; if recommended measures are approved by FDER that would reduce construction time; Reeves did not allow letter to FDER to be sent requesting temporary measures	
144.00	Bradtmiller is providing resistance to WWE measures; Tompkins recommendation would reduce time for compliance	

Page	Designation	Counter Attack
146.00	Tompkins efforts were meeting resistance; Bradtmiller didn't follow his recommendations	
149.00	Memo to Bradt recommending denitrification filter before 10/1/91; would improve effluent quality; Bradt was concerned with expenses; justifiable cost; Bradtmiller never waived his concerns with the expenses	
153.00	Bradtmiller sent letter to Kwan in August 1991; delays were partially within the company's control	
155.00	no permit at BB when Tompkins started	
158.00	serious matter not to have a permit at BB	
174.00	Bradt, Reeves, and Allen knew BB was without a permit	
176.00	Tompkins tried to remedy permit situation at BB; FCWC knew of discharge without a permit; Memo cc:'d to Gordon, Sladkus, Reeves, Wilkov, Getman	
182.00	Allen was lead person for company in terms of eliminating the discharge	
199.00	problems meeting state consent order for BB; Avatar Properties was pursuing the 300 acre purchase	
201.00	wastewater flow rates are accurrate	
207.00	plenty of orange groves available near BB to accept effluent	
208.00	plenty of land was available for purchase near BB to pursue spray field	
210.00	had contacts with Crawford and Kwan; found them reasonable to deal with	
219.00	Allen, Reeves, French, Lander, Getman are copied on mem re: Carrollwood problems and lack of permit	

Page	Designation	Counter Attack
222.00	EPA, DER, County had problems with Carrollwood	

Florida Cities Water Company
Docket No._____
Rate Application for Recovery
of Legal Expenses
Exhibits____(GHB-34 thru GHB-53)
Gary H. Baise
Volume 2 of 7

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663-WS EXHIBIT NO 6-Vol. 2
COMPANY
WITNESS: Baise
DATE: 8-12-98

FLORIDA CITIES WATER COMPANY

RATE APPLICATION FOR RECOVERY OF LEGAL EXPENSES

EXHIBITS____(GHB-1 THRU GHB-110) OF

GARY H. BAISE

Exhibit List for Testimony of Gary H. Baise

Exhibit	Document
1	Player's List
2	TIME LINE, *U.S. v. Florida Cities Water Company*
3	Resume of Gary H. Baise
4	List of Gary H. Baise's reported cases
5	Court's Standard Interrogatories
6	United States' Answers to Court's Standard Interrogatories
7	Defendant Florida Cities Water Company's Answers to Court's Standard Interrogatories
8	Motion for Extension of Time in Which to File Motion to Strike Affirmative Defenses
9	United States' Motion to Strike Affirmative Defenses
10	Memorandum in Support of United States' Motion to Strike Affirmative Defenses
11	United States' First Request for Production of Documents
12	Deposition digest of Julie Karleskint Deposition
13	Defendant's Motion for a Protective Order
14	Order re: Florida Cities Water Company's Motion for Protective Order (dated April 18, 1994)
15	Letter to Mr. Jacobs from Mr. Scroggin (dated April 19, 1994)
16	Letter to Mr. Scroggin from Mr. Jacobs (dated April 20, 1994)
17	Memorandum in Support of United States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees
18	Memorandum in Opposition to Plaintiff's Motion for an Order Allowing

Ex Parte Contacts with Former Employees

19	Motion and Memorandum for Permission to File Reply Memorandum in Support of United States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees
20	Order re: Defendant's Emergency Motion for a Temporary Protective Order (dated Feb. 13, 1995)
21	Order re: Plaintiff's Motion for an order allowing ex parte contacts (dated March 16, 1995)
22	Deposition digest of John Marlar deposition
23	Deposition digest of Peter McGarry deposition
24	Defendant's Motion to Disqualify Counsel
25	Transcript of February 15, 1995 hearing before U.S. District Judge Swartz
26	Order re: Motion to Allow Ex-Parte Contacts and Motion to Disqualify Counsel
27	United States' Second Request for Production of Documents
28	Deposition digest of Connie Kagey deposition
29	Deposition digest of Bruce Barrett deposition
30	Defendant Florida Cities Water Company's Motion for Partial Summary Judgment and Request for Oral Argument
31	Deposition digest of Paul Bradtmiller deposition
32	Deposition digest of Johnnie Overton deposition
33	Deposition digest of Jack Tompkins deposition
34	Letter to Mr. Baise from Mr. Jacobs (dated Jan. 30, 1995)
35	United States' Reply to Defendant's Emergency Motion for a Temporary Protective Order and Defendant's Request for Oral Argument in Connection with Defendant's Motion to Disqualify Counsel

36	*United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994)
37	United States' First Set of Interrogatories to Defendant Florida Cities Water Company
38	Defendant's Second Request for Production of Documents to Plaintiff United States of America
39	Defendant's Offer of Judgment
40	Defendant's Notice of Intention to Oppose Constructive Motion by United States for Leave to File Amended Complaint
41	Defendant's Memorandum in Partial Opposition to Plaintiff's Motion for Leave to Amend Complaint
42	Order re: United States' Revised Amended Complaint (dated April 26, 1995)
43	Revised Amended Complaint
44	Defendant Florida Cities Water Company's Motion to Strike
45	United States' Motion for Reconsideration of Court's Order on Amendment of Complaint
46	Defendant Florida Cities Water Company's Answer to Revised Amended Complaint
47	United States' Opposition to Defendant Florida Cities Water Company's Motion to Strike
48	United States' Third Request for Production of Documents
49	Defendant's Motion for Partial Summary Judgment
50	United States' Opposition to Defendant Florida Cities Water Company's Motion for Partial Summary Judgment
51	Order Denying FCWC's Motion for Partial Summary Judgment
52	United States' Motion for Partial Summary Judgment (exhibits omitted)
53	United States' Second Set of Interrogatories and First Request for Admissions

54	Research Memos
55	FCWC Motion for Partial Summary Judgment and Request for Oral Argument
56	Deposition Summaries
57	Deposition Summaries
58	FCWC's Fourth Request for Production of Documents and Third Request for Interrogatories
59	United States' Fifth Request for Production of Documents
60	FCWC's Notice of Dispositive Authority
61	Order re: Summary Judgment Motions
62	FCWC Exhibit List and Stipulations
63	DOJ Exhibits
64	Joint Pretrial Statements
65	United States' Motion for an Order Permitting Discovery of Defendant's Late-Named Witnesses
66	FCWC Memorandum in Opposition to Plaintiff's Motion for an Order Admitting Discovery of Defendant's Late-Named Witnesses and for Expedited Consideration
67	Order re: Discovery of Late-Named Witnesses
68	United States' Motion for Expedited Reconsideration of the Court's Ruling on Res Judicata and in Reply to Avatar Holdings' Motion for Clarification of the Court's Order
69	Order re: Motion for Reconsideration on Res Judicata and Motion for Clarification
70	FCWC Proposed Findings of Fact and Conclusions of Law
71	FCWC's Pretrial Brief

72	Defendant's Joint Motion in Limine to Exclude the Testimony and Report of Mark J. Klingenstein.
73	United States' Motion in Limine
74	Defendant's Joint Motion in Limine to Exclude the Testimony and Report of Eileen Zimmer
75	Berz Settlement Proposal
76	Trial Transcript
77	United States' Offer of Proof in Lieu of the Testimony of Witnesses who Plead the Fifth Amendment
78	Defendants' Joint Memorandum of Law Addressing the Invocation of the Fifth Amendment
79	FCWC's Witness List
80	Plant Effluent Quality Report (Black & Veatch)
81	FCWC Motion to Strike the Deposition Testimony of Jack Williams Tompkins
82	Parties' Proposals for Post-Trial Submissions
83	Order Regarding Fifth Amendment and Request Court Draw Inferences from Refusal to Testify
84	United States' Post-Trial Memorandum
85	United States' Post-Trial Proposed Findings of Fact and Conclusions of Law
86	FCWC Post-Trial Brief
87	FCWC Proposed Findings of Fact and Conclusions of Law
88	United States' Motion for Reconsideration on Adverse Inferences and Extension of Page Limits
89	FCWC Memorandum in Opposition to Motion for Reconsideration
90	Order Granting in Part and Denying in Part Motion for Reconsideration

91	United States' Citation of Additional Authority
92	Defendants' Joint Response to Plaintiff's Citation of Additional Authority
93	Order Directing Parties to File Memorandums on Borough of Ridgeway
94	United States' Reply Memorandum in Support of Reinstatement of Res Judicata
95	Defendants' Joint Response to Memorandum Seeking Reinstatement of Res Judicata
96	Order Reaffirming Res Judicata Effects
97	Opinion
98	FCWC Verified Motion for Attorney Fees
99	FCWC Motion for Bill of Costs
100	United States' Memorandum in Opposition to Attorney Fees
101	Order Denying Attorney Fees
102	United States' Notice of Appeal
103	FCWC Notice of Cross Appeal
104	Order Granting Motion to Dismiss with Prejudice
105	Pleadings Table
106	Depositions Table
107	Correspondence re: Fees
108	Billing Chart
109	Cover Letter to Bills
110	Letter to Avatar on Fees

Exhibit_____(GHB-34)

JCC:DSJ
90-5-1-1-3965

January 30, 1995
BY FAX AND U.S. MAIL

Gary H. Baise
Gabeler, Baise & Miller
1320 Old Chain Bridge Road
Suite 200
McLean, VA 22101

Exhibit 2

Re: United States v. Florida Cities Water
No. 93-281-CIV-FTM-21 (M.D. Fla.)

Dear Mr. Baise:

Reference is made to my letters of April 20, 1994 and June 23, 1994 regarding the United States' interviews of former Florida Cities Water Company employees.

Pursuant to the representations made in the referenced correspondence, I am writing to advise you that effective seven days from the date of this letter, the United States will no longer voluntarily refrain from conducting interviews of former employees of Florida Cities Water Company and its parent companies who have advised us that they have separately retained counsel to represent them in the above-captioned matter, and have consented to being interviewed outside the presence of counsel for Florida Cities. Any such interviews will be conducted without further notice to Florida Cities and its parent companies.

Sincerely,

Assistant Attorney General
Environment and Natural Resources
Division

By: _____
Daniel S. Jacobs
Trial Attorney
Environmental Enforcement Section

Exhibit_____(GHB-35)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY, INC., Defendant.	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' REPLY TO DEFENDANT'S EMERGENCY MOTION FOR A TEMPORARY PROTECTIVE ORDER AND DEFENDANT'S REQUEST FOR ORAL ARGUMENT IN CONNECTION WITH DEFENDANT'S MOTION TO DISQUALIFY COUNSEL

On January 27, 1995, Defendant filed a request for oral argument on its Motion to Disqualify Counsel (filed on October 25, 1994), and a memorandum in support thereof. On February 6, 1995, Defendant filed an Emergency Motion for a Temporary Protective Order, and a memorandum in support thereof. The United States opposes both Defendant's Request for Oral Argument and Defendant's Emergency Motion for a Temporary Protective Order.

Defendant's Request for Oral Argument should be denied as untimely.[1] Both the United States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees (filed on June 24, 1994), which, if granted, renders moot Defendant's Motion to Disqualify Counsel, and Defendant's Motion to Disqualify Counsel, have been

[1] By filing its request for oral argument on January 27, 1995, Defendant violated Local Rule 3.01(d), which requires that a request for oral argument be filed concurrently with the motion to which it relates and estimate the time required for argument.

fully briefed, and can be decided without oral argument.[2] Nonetheless, if the Court deems oral argument to be helpful to its consideration of the issue at bar, the United States will be pleased to participate in oral argument on the pending motions.

The parties' earlier briefs focused largely on the Rules of Professional Conduct adopted by the Supreme Court of Florida, the Model Rules of Professional Conduct of the American Bar Association, and relevant case law. Defendant, in its Memorandum in Support of its Request for Oral Argument, now attempts to redirect the Court's attention to the Department of Justice's new regulations governing contacts with represented persons.[3] While the United States' conduct in this case is authorized by and consistent with these regulations, it is also entirely consistent with the rules of professional conduct otherwise applicable in the State of Florida. As applied to the facts of this case, there is simply no conflict between the Department's regulations and Florida's Rules of Professional Conduct.

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[2] Indeed, considering Defendant has now submitted no fewer than five briefs on the issue at bar, Defendant has had a sufficient opportunity to be heard.

[3] As noted in its Memorandum in support of United States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees, the Department of Justice regulations governing its attorneys' communications with represented persons were promulgated as a final rule on August 4, 1994, see 59 Fed. Reg. 39910, after twice being published as proposed rules long before the ex parte contacts at issue here, see 57 Fed. Reg. 54734 (November 20, 1992) and 58 Fed. Reg. 39976 (July 26, 1993), and at all times relevant here have expressly excluded former employees from their purview. Defendant has had every opportunity to discuss these regulations in earlier submissions to the Court.

Defendant's "Emergency Motion" should be denied because it is moot, because Defendant falls far short of meeting its burden of showing good cause for the extraordinary relief it seeks, and because there is no sufficient legal basis to preclude interviews of former employees separately represented by counsel. As stated in the United States' Notice to Court Regarding Scheduling of Interview with Former Employee (filed February 2, 1995), the United States wished to proceed with the interview in question, scheduled for February 15, 1995, as soon as possible.[4] In deference to the Court, however the United States offered to postpone the interview, pending the Court's ruling on the pending motions, if the Court indicated that a postponement was advisable. On February 4, 1995, with notice to counsel for defendant, the attorney for the witness whose interview was to take place cancelled the interview after being contacted by Defendant's attorney. See Exhibit A.[5] Thus, no interviews of ex-employees are presently scheduled, and the United States will again notify Defendant and the Court before any such interviews are conducted. Accordingly, Defendant's Motion is moot.

Defendant's Emergency Motion should also be denied because Defendant has patently failed to show good cause for a protective

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[4] The interview was scheduled in conjunction with depositions on February 16 and 17, 1995.

[5] Defendant is careless with the truth when it suggests that the United States misled the witness' attorney by not advising him of the pending motions. To the contrary, when scheduling the interview, the United States made full disclosure of the pending motions. See Exhibit B.

order. The only so-called irreparable injury Defendant alleges might take place if the United States were to proceed with interviews of ex-employees separately represented by counsel is that the United States (1) "may obtain privileged or otherwise confidential information that would not have been disclosed had Florida Cities' counsel been present," and "may seek to introduce such tainted evidence at trial," and (2) "may gain information that will lead to the introduction of new witnesses or new evidence that would not otherwise be presented to the Court." Defendant's brief at 7-8. As to the first point, there is no reason to believe such a disclosure would occur, since the United States has no intention of eliciting, soliciting, or receiving from any witness it interviews privileged information. If an accidental disclosure were to take place, the parties, with the Court's assistance, if necessary, could fashion an appropriate remedy. As to the second point, witness interviews are indeed intended to lead to discoverable evidence and are a legitimate and important tool in discovery and trial preparation. Thus, there clearly is no realistic likelihood of any untoward injury to Defendant, let alone irreparable injury, and no good cause for an emergency protective order.

Finally, Defendant's Emergency Motion should be denied because the interview of a represented person in the presence of his own counsel but outside the presence of Defendant's counsel in entirely consistent both with Rule 4-4.2 of the Florida Rules of Professional Conduct, as well as with U.S. Department of

Justice regulations governing communications with represented persons. See 59 Fed. Reg. 39910 (August 4, 1994).

In short, Defendant should stop crying wolf and stop impugning the integrity of the United States and its counsel. Defendant's Request for Oral Argument and Emergency Motion should be denied. The United States should be allowed to go forward with its case without further obstruction or delay.

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

By: _____

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing "United States' Reply to Defendant's Emergency Motion For A Temporary Protective Order and Defendant's Request For Oral Argument in Connection With Defendant's Motion to Disqualify Counsel" was served by U.S. Mail on the 9th day of February, 1995, to the following attorneys of record:

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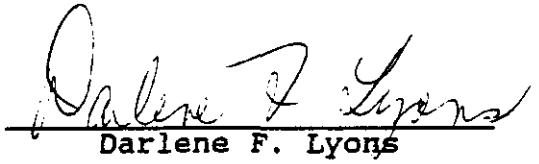

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February 4, 1995

VIA TELECOPY & U.S. MAIL

Daniel Jacobs, Esquire
Environmental Enforcement Section
United States Department of Justice
Post Office Box 7611
Washington, D.C. 20044

Re: United States of America v. Florida Cities Water Company

Dear Mr. Jacobs:

On January 26, 1995, we spoke concerning producing Mr. A.A. Reeves, a former employee of Florida Cities Water Company, and Jack Schenkman, primary stockholder in North Fort Myers Utilities, Inc. for informal interviews on Wednesday, February 15th in Fort Myers, Florida.

I have now been contacted by Attorney Don G. Scroggin, who has advised that Mr. Reeves may be held to be a "party" to the litigation because of recent court rulings in the Middle District of Florida.

Additionally, Mr. Scroggin provided to me, via fax, a copy of the "Defendant's Memorandum in Support of Defendant's Motion to Disqualify Counsel", dated October 24, 1994, and a copy of the "United States' Notice to the Court Regarding Scheduling of Interview with Former Employee", which is undated. The last paragraph in the United States Notice states:

> United States wishes to proceed with the interview, presently scheduled for February 15, 1995, as soon as possible. In deference to the Court, however, the United States will postpone the interview, pending the Court's ruling on the Motions reference above, if the Court indicates that a postponement is advisable.

GOVERNMENT EXHIBIT A

Personally, I have no philosophical problem with producing Mr. Reeves for an informal interview. However, as I have now been apprised of, but have not read, a judicial determination that Mr. Reeves may be a party, and out of abundance of caution and our view of our ethical obligations in this regard, we must conclude that it is not appropriate to produce Mr. Reeves for an informal interview, without providing an opportunity for counsel to Florida Cities to also attend.

Because he can in no way be defined as a "party", we will produce Mr. Schenkman on the 15th as discussed. I cannot imagine your needing much time with Mr. Schenkman. Therefore, I would like to suggest a late morning meeting on the 15th at your downtown Fort Myers' offices. Please call me to confirm that arrangement.

As regards Mr. Reeves, I will make arrangements with you and Mr. Scroggin for a mutually convenient time and place for an informal interview. If you would prefer to proceed to deposition, please advise so that we may similarly come to agreement as to a mutually convenient time and place.

Should you have any questions or comments concerning the above, please do not hesitate to contact me.

Sincerely,

ROSE, SUNDSTROM & BENTLEY

William E. Sundstrom, P.A.
For the Firm

WES:bsr
cc: Don G. Scroggin, Esq. (Via Telecopy)
Mr. A. A. Reeves
Mr. Jack Schenkman

n:\wu\jacobs.wes

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February 9, 1995

VIA TELECOPY & U.S. MAIL

Daniel Jacobs, Esquire
Environmental Enforcement Section
United States Department of Justice
Post Office Box 7611
Washington, D.C. 20044

Dear Mr. Jacobs:

This letter is to summarize our telephone conference of January 25, 1995 regarding the federal government's legal action against Florida Cities Water Company. In that telephone conference you had asked that we produce our clients, Jack Schenkman and Tony Reeves, for an informal interview. At that time you advised me that Florida Cities Water Company had filed a motion with the federal court prohibiting the federal government from interviewing any former employees of Florida Cities Water Company, of which Mr. Reeves is one, without counsel for Florida Cities Water Company being present.

It is further my understanding that the federal government filed pleadings in opposition to that motion and that it is presently pending before the Federal District Court. You further advised me that in absence of a court ruling to the contrary you believed that there was no prohibition against interviewing former employees, particularly where the former employee had separate counsel from that of Florida Cities Water Company. We further discussed a scheduling of those interviews.

Very truly yours,

MARTIN S. FRIEDMAN

MSF:tas

GOVERNMENT EXHIBIT B

Exhibit_____(GHB-36)

1

Walter Louis INGRAM, petitioner, v. UNITED STATES.

No. 94–6500.

Jan. 23, 1995.

Case below, *United States v. Kennedy*, 32 3d 876.

Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

2

Michael K. HOLDRIDGE, petitioner, v. UNITED STATES.

No. 94–6575.

Jan. 23, 1995.

Case below, *United States v. Quigley*, 798 Supp. 451; 30 F.3d 134.

Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

3

Fulvio DESANTIAGO–MARTINEZ, petitioner, v. UNITED STATES.

No. 94–6634.

Jan. 23, 1995.

Case below, 38 F.3d 394.

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

4

Suzanne SEARLES, petitioner, v. Peter RELIC, et al.

No. 94–6673.

Jan. 23, 1995.

Case below, 29 F.3d 620.

Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

5

Thomas MARIANI and Michael Weitzenhoff, petitioners, v. UNITED STATES.

No. 94–6683.

Jan. 23, 1995.

Case below, *United States v. Weitzenhoff*, 35 F.3d 1275.

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

6

Grove Lawrence FLOWER, petitioner, v. UNITED STATES.

No. 94–6736.

Jan. 23, 1995.

Case below, 838 F.Supp. 544; 29 F.3d 530.

Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

erty value. *See Eide*, 908 F.2d at 720–22 (describing this as a due process takings claim). Second, the plaintiff can allege that the regulation is arbitrary, irrational, and not substantially related to a legitimate governmental purpose. *See id.* (describing this as an arbitrary and capricious due process claim); *see also Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir.1990) (city council actions that are not for valid regulatory reasons are a violation of the developers' substantive due process rights).

[7] Because the district court dismissed the Partnership's complaint without reaching the merits of these issues, we reverse and remand the Partnership's as applied claims.[15] Furthermore, from our review of the record, the County has forced the Partnership to bear a burden that should fairly have been allocated throughout the entire watershed area. "A strong public desire to improve the public condition will not warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Dolan v. City of Tigard*, — U.S. ——, ——, 114 S.Ct. 2309, 2322, 129 L.Ed.2d 304 (1994) (quotation omitted). We believe that the Partnership is entitled to recoup the portion of its expenditures in excess of its pro rata share and remand to the district court to determine the details and amounts.

B. The Facial Claim

[8, 9] The Partnership alleges that the Criteria, on their face, violate the equal protection clause. The Partnership claims that the enactment of the Criteria creates a financial obligation for the first developer in a watershed area to construct a drainage system for the whole area. In order to state a facial challenge to a statute or regulation, the plaintiff must assert that "*any* application of the regulation is unconstitutional." *Eide*, 908 F.2d at 724 n. 14. We agree with the district court that the Partnership has not demonstrated a facial challenge to the Criteria. Therefore, the district court's dismissal of the Partnership's facial challenge is affirmed.

[15] Although neither party discussed the application of Mo. Const. art. 1, § 26 to this case, we also remand this as applied issue to the district court.

III. CONCLUSION

For the foregoing reasons, we reverse the district court's judgment and remand this case for further proceedings consistent with this opinion.

UNITED STATES of America, Plaintiff–Appellee,

v.

Michael H. WEITZENHOFF; Thomas W. Mariani, Defendants–Appellants.

Nos. 92–10105, 92–10108.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Jan. 11, 1993.

Decided Aug. 3, 1993.

As Amended on Denial of Rehearing and Rehearing En Banc Aug. 8, 1994.

Managers of sewage treatment plant that operated under Environmental Protection Agency (EPA) permit were convicted for felony violations of Clean Water Act (CWA) by permitting discharge of waste activated sludge (WAS) directly into ocean without treatment after jury trial in the United States District Court for the District of Hawaii, David Alan Ezra, J. Defendants appealed. The Court of Appeals, 1 F.3d 1523, affirmed. Following denial of motion for rehearing en banc, the Court of Appeals, Fletcher, Circuit Judge, issued amended opinion, holding that: (1) authorizing illegal discharges established required intent; (2) delegating interpretation of permit to jury was harmless error; (3) permit was not unconstitutionally vague; (4) entrapment by estoppel defense did not apply; (5) emphasizing health risks of discharges was not prose-

cutorial misconduct; and (6) one defendant's perjury justified obstruction of justice enhancement.

Affirmed.

1. **Health and Environment** ⇐25.7(24)

Provision of Clean Water Act making it a felony offense to "knowingly" violate any permit condition did not require that polluter be cognizant of requirements of even existence of permit, but only that polluter knowingly engaged in conduct that resulted in permit violation. Federal Water Pollution Control Act Amendments of 1972, §§ 301(a), 309(c)(2, 4), as amended, 33 U.S.C.A. §§ 1311(a), 1319(c)(2, 4).

See publication Words and Phrases for other judicial constructions and definitions.

2. **Health and Environment** ⇐25.7(24)

Criminal provisions of Clean Water Act are designed to protect public at large from potentially dire consequences of water pollution and, as such, fall within category of "public welfare legislation." Federal Water Pollution Control Act Amendments of 1972, §§ 301(a), 309(c)(2, 4), as amended, 33 U.S.C.A. §§ 1311(a), 1319(c)(2, 4).

3. **Criminal Law** ⇐769, 790

Permitting witnesses familiar with waste water management field to testify about various technical terms in and obligations imposed by permit issued under Clean Water Act, and then instructing jury to construe permit based on plain meaning of language in permit and testimony of expert and other witnesses rather than resolving conflicts in testimony in its jury charge amounted to impermissible delegation of district judge's duty; in effect, witness instructed jury on law rather than judge. Federal Water Pollution Control Act Amendments of 1972, §§ 301(a), 309(c)(2, 4), as amended, 33 U.S.C.A. §§ 1311(a), 1319(c)(2, 4).

4. **Criminal Law** ⇐469.2, 1153(1)

Admission of expert testimony is within discretion of trial court and reversible only for abuse of discretion or manifest error. Fed.Rules Evid.Rules 702, 704, 28 U.S.C.A.

5. **Criminal Law** ⇐469.1

Expert testimony is properly admissible when it serves to assist trier of fact to understand evidence or determine fact in issue. Fed.Rules Evid.Rules 702, 704, 28 U.S.C.A.

6. **Criminal Law** ⇐1137(3)

Defendants charged with criminal violations of Clean Water Act (CWA) did not invite error by court in permitting experts to instruct jury on contested issue of law and as to meaning of various technical terms and obligations imposed by CWA permit rather than resolving conflicting testimony in jury charge by insisting that court not define any of permit's terms for jury in its charge, but merely to instruct jury to follow plain meaning of language in permit, where defendants had initially objected to admission of any expert testimony concerning permit terms and, after court ruled such testimony admissible, presented their own expert testimony to counter that of government witnesses. Fed.Rules Evid.Rules 702, 704, 28 U.S.C.A.; Federal Water Pollution Control Act Amendments of 1972, §§ 301(a), 309(c)(2, 4), as amended, 33 U.S.C.A. §§ 1311(a), 1319(c)(2, 4).

7. **Criminal Law** ⇐1172.1(2)

Trial court's error in admitting expert testimony on contested issues of law as to interpretations of technical terms and obligations imposed by permit issued under Clean Water Act in lieu of instructing jury was harmless where, under proper interpretation of permit, discharges admitted to by defendants necessarily violated permit and appellate court was able to accomplish task of permit interpretation without turning to experts. Federal Water Pollution Control Act Amendments of 1972, §§ 301(a), 309(c)(2, 4), as amended, 33 U.S.C.A. §§ 1311(a), 1319(c)(2, 4).

8. **Criminal Law** ⇐1134(3)

Since construction of Clean Water Act permit is matter of law, Court of Appeals is in position to interpret permit provisions at issue. Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., as amended, 33 U.S.C.A. § 1251 et seq.

9. **Health and Environment** ⇐25.7(6.1)

Excess waste activated sludge (WAS that was separated out from plant's treatment process to be stored and eventually disposed of clearly fell with Clean (CWA) permit's definition of "rer stance," and, as such, could n charged into ocean unless discha tuted permissible bypass of treat tem. Federal Water Pollution C Amendments of 1972, §§ 301 309(c)(2, 4), as amended, 33 §§ 1311(a), 1319, 1319(c)(2, 4).

10. **Health and Environment** ⇐ 4h Even assuming that direct dumping of waste activated sludge (not violate treatment facility's effl dards, discharges were not "permi passes" of treatment system auth Clean Water Act (CWA) because c were not for "essential maintenanc sure efficient operation. Federal W lution Control Act Amendments §§ 301(a), 309, 309(c)(2, 4), as ame U.S.C.A. §§ 1311(a), 1319, 1319(c)(

See publication Words and Pl for other judicial constructions an initions.

11. **Health and Environment** ⇐2. ted "Essential maintenance," withi ing of regulation establishing guide hibiting bypass of treatment syster where necessary for essential main means unavoidable measures to ins tinuing operation of treatment plan ment. Federal Water Pollution Cor Amendments of 1972, §§ 301(a 309(c)(2, 4), as amended, 33 §§ 1311(a), 1319, 1319(c)(2, 4).

12. **Administrative Law and Pr** ⇐413

Health and Environment ⇐25. Environmental Protection A (EPA) interpretation of its regulation iting bypass of treatment system where necessary for essential mainten entitled to considerable weight.

13. **Health and Environment** ⇐25.7 National Pollution Discharge E tion System (NPDES) permit was not stitutionally vague so as to preclude c conviction of managers of sewage tre plant under Clean Water Act (CW violating permit in absence of requir that defendants knew they were vi law, where defendants were knowled in waste water field and could be expec

disposed of clearly fell with Clean Water Act (CWA) permit's definition of "removed substance," and, as such, could not be discharged into ocean unless discharge constituted permissible bypass of treatment system. Federal Water Pollution Control Act Amendments of 1972, §§ 301(a), 309, 309(c)(2, 4), as amended, 33 U.S.C.A. §§ 1311(a), 1319, 1319(c)(2, 4).

10. **Health and Environment** ⇐25.7(16)

Even assuming that direct oceanic dumping of waste activated sludge (WAS) did not violate treatment facility's effluent standards, discharges were not "permissible bypasses" of treatment system authorized by Clean Water Act (CWA) because discharges were not for "essential maintenance" to assure efficient operation. Federal Water Pollution Control Act Amendments of 1972, §§ 301(a), 309, 309(c)(2, 4), as amended, 33 U.S.C.A. §§ 1311(a), 1319, 1319(c)(2, 4).

See publication Words and Phrases for other judicial constructions and definitions.

11. **Health and Environment** ⇐25.7(16)

"Essential maintenance," within meaning of regulation establishing guideline prohibiting bypass of treatment system except where necessary for essential maintenance, means unavoidable measures to insure continuing operation of treatment plant equipment. Federal Water Pollution Control Act Amendments of 1972, §§ 301(a), 309, 309(c)(2, 4), as amended, 33 U.S.C.A. §§ 1311(a), 1319, 1319(c)(2, 4).

12. **Administrative Law and Procedure** ⇐413

Health and Environment ⇐25.15(6.1)

Environmental Protection Agency's (EPA) interpretation of its regulation prohibiting bypass of treatment system except where necessary for essential maintenance is entitled to considerable weight.

13. **Health and Environment** ⇐25.7(24)

National Pollution Discharge Elimination System (NPDES) permit was not unconstitutionally vague so as to preclude criminal conviction of managers of sewage treatment plant under Clean Water Act (CWA) for violating permit in absence of requirement that defendants knew they were violating law, where defendants were knowledgeable in waste water field and could be expected to have understood what permit meant, and particularly, that it did not give them license to dump thousands of gallons of partially treated sewage into ocean on regular basis, and that defendants had adequate notice of illegality of their dumping considering pains taken to conceal activities. U.S.C.A. Const. Amends. 5, 14; 18 U.S.C.A. §§ 2, 371; Federal Water Pollution Control Act Amendments of 1972, §§ 301(a), 309, 309(c)(2, 4), as amended, 33 U.S.C.A. §§ 1311(a), 1319, 1319(c)(2, 4).

14. **Criminal Law** ⇐1139

Whether National Pollution Discharge Elimination System (NPDES) permit was unconstitutionally vague was question of law which Court of Appeals reviewed de novo. U.S.C.A. Const.Amends. 5, 14.

15. **Criminal Law** ⇐13.1(1)

In evaluating question of vagueness of statute, Court of Appeals ordinarily looks to common understanding of terms of statute; however, if statutory prohibition involves conduct of select group of persons having specialized knowledge, and challenged phraseology is indigenous to idiom of that class, standard is lowered and court may uphold statute which uses words or phrases having technical or other special meaning well enough to enable those within its reach to correctly apply them. U.S.C.A. Const. Amends. 5, 14.

16. **Health and Environment** ⇐41

Exclusion of Federal Register excerpt describing regulation proposed in 1984 by Environmental Protection Agency (EPA) but never adopted, which would have permitted bypass of effluent from wastewater treatment facility by where resultant effluent is in compliance with permit limitations, in trial in criminal charges under Clean Water Act for violating National Pollution Discharge Elimination System (NPDES) permit was not an abuse of discretion, notwithstanding fact that jury was impermissibly assigned task of interpreting permit; although explanation of proposed regulation might properly have been considered or disregarded by court in ruling on legal issues in case, it was not relevant to jury's determination of facts. 18 U.S.C.A. §§ 2, 317; Federal Water Pollution

Control Act Amendments of 1972, §§ 301(a), 309(c)(2, 4), as amended, 33 U.S.C.A. §§ 1311(a), 1319(c)(2, 4).

17. Criminal Law ⇐37(6.1)

Defendants charged with criminal violations of Clean Water Act due to violations of discharge permit by dumping waste activated sludge (WAS) in ocean were not entitled to instruction on elements of "entrapment by estoppel" defense, despite defendant's claim that regulatory authorities previously permitted them to haul excess WAS to waste treatment facility where it only underwent primary treatment process before being discharged into ocean; fact that it was lawful to discharge WAS at one facility without secondary treatment had no bearing on discharge limitations at another plant which operated under its own permit and defendants failed to seek advice from appropriate authorities as to how properly to dispose of excess WAS. Federal Water Pollution Control Act Amendments of 1972, §§ 301(a), 309(c)(2, 4), as amended, 33 U.S.C.A. §§ 1311(a), 1319(c)(2, 4).

18. Criminal Law ⇐37(2.1)

"Entrapment by estoppel" applies when authorized government official tells defendant that certain conduct is legal and defendant believes official.

19. Criminal Law ⇐37(2.1)

To invoke "entrapment by estoppel" defense, defendant must show that he relied on official statement and that his reliance was reasonable in that person sincerely desirous of obeying law would have accepted information as true and would not have been put on notice to make further inquiries.

20. Criminal Law ⇐1036.1(3.1), 1037.1(2)

Although challenged testimony regarding potential health effects of waste activated sludge discharges in prosecutor's remarks as to public health hazard engendered by defendants' activities of dumping untreated waste activated sludge (WAS) directly into ocean in violation of permit were of questionable relevance and indeed conveyed repugnant images, they could not have materially affected verdict or rendered trial on charges of criminal violations of Clean Water Act unfair, where substantial amount of testimony regarding health risks associated with WAS came in without objection prior to testimony defendants claimed was prejudicial and, as for most exceptionable testimony, court sustained defendants' objections and issued prompt curative instructions. Federal Water Pollution Control Act Amendments of 1972, §§ 301(a), 309(c)(2, 4), as amended, 33 U.S.C.A. §§ 1311(a), 1319(c)(2, 4).

21. Criminal Law ⇐1171.1(1)

Reversal is justified only if alleged misconduct of prosecutor materially effects verdict or deprives defendant of fair trial. U.S.C.A. Const.Amend. 6.

22. Criminal Law ⇐730(1)

Depending upon circumstances, prompt and effective admonishment of counsel or curative instruction from trial court may effectively neutralize damage from prosecutorial misconduct.

23. Criminal Law ⇐706(3), 723(2)

Prosecutor's few additional questions touching upon health issue with regard to defendants' discharge of waste activated sludge (WAS) directly into ocean without treatment and comments in prosecutor's summation could not be considered misconduct, where both defendants attempted to portray their discharging of WAS into ocean as responsible tactic to forestall environmental disaster, thus putting safety of public at issue, and one defendant testified that in ordering discharges, public health was first and foremost in his mind.

24. Criminal Law ⇐1253

Two-point upward adjustment of defendant's base offense level for criminal violation of Clean Water Act based on obstruction of justice based on trial court's finding that defendant perjured himself was not clearly erroneous, where defendant's testimony that he believed his activities were within scope of permit were not illegal was belied by efforts to conceal activities. U.S.S.G. § 3C1.1, 18 U.S.C.A.App.

25. Criminal Law ⇐986.2(6)

Witnesses ⇐88

Sentencing increase based on false testimony does not constitutionally burden defendant's right to testify. U.S.C.A. Const.

Amend. 6; U.S.S.G. § 3C
U.S.C.A.App.

Craig H. Nakamura, Asst. U.S. A
olulu, Hawai'i, for plaintiff-appelle

Philip H. Lowenthal, Lowentha
and Graham, Wailuku, Hawai'i,
dant-appellant Weitzenhoff.

Peter C. Wolff, Jr., Honolulu, H
defendant-appellant Mariani.

Appeal from the United State
Court for the District of Hawaii.

Before: GOODWIN and FLET
Circuit Judges and HUFF,* Distri

ORDER AMENDING OPINION A
NYING PETITION FOR R
ING AND REHEARING EN

Aug. 8, 1994.

The opinion filed at 1 F.3d 1523 is
ed as follows:

At 1 F.3d 1530, bottom of the first
delete:

But see United States v. Speach,
795 (9th Cir.1992) (distinguishing
and holding that different subse
RCRA uses word "knowingly" in
manner so as to require showi
transporter of hazardous wastes kr
receiving facility lacked storage

Add footnote "5" following "violating
the line prior to the deleted text:

5 Weitzenhoff argues that this
controlled by *United States v. Spec*
F.2d 795, 796–97 (9th Cir.1992), ir
we held that 42 U.S.C. § 6928(d)(1)
imposes criminal liability on partie
"knowingly transport[ ] ... haz
waste ... to a facility which does nc
a permit," requires that the trans
know that he acted in violation
statute. This argument is unavaili
cause *Speach* recognizes the gener
that public welfare offenses are not
construed to require proof that the
dant knew he was violating the law
absence of clear evidence of contrar
gressional intent and finds only a n

*Honorable Marilyn L. Huff, United States D
Judge for the Southern District of Cali

Amend. 6; U.S.S.G. § 3C1.1, 18 U.S.C.A.App.

Craig H. Nakamura, Asst. U.S. Atty., Honolulu, Hawai'i, for plaintiff-appellee.

Philip H. Lowenthal, Lowenthal, August and Graham, Wailuku, Hawai'i, for defendant-appellant Weitzenhoff.

Peter C. Wolff, Jr., Honolulu, Hawai'i, for defendant-appellant Mariani.

Appeal from the United States District Court for the District of Hawaii.

Before: GOODWIN and FLETCHER, Circuit Judges and HUFF,* District Judge.

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING AND REHEARING EN BANC

Aug. 8, 1994.

The opinion filed at 1 F.3d 1523 is amended as follows:

At 1 F.3d 1530, bottom of the first column, delete:

But see United States v. Speach, 968 F.2d 795 (9th Cir.1992) (distinguishing *Hoflin* and holding that different subsection of RCRA uses word "knowingly" in different manner so as to require showing that transporter of hazardous wastes knew that receiving facility lacked storage permit).

Add footnote "5" following "violating law)." in the line prior to the deleted text:

5 Weitzenhoff argues that this case is controlled by *United States v. Speach*, 968 F.2d 795, 796–97 (9th Cir.1992), in which we held that 42 U.S.C. § 6928(d)(1), which imposes criminal liability on parties who "knowingly transport[ ] ... hazardous waste ... to a facility which does not have a permit," requires that the transporter know that he acted in violation of the statute. This argument is unavailing because *Speach* recognizes the general rule that public welfare offenses are not to be construed to require proof that the defendant knew he was violating the law in the absence of clear evidence of contrary congressional intent and finds only a narrow exception to this general rule. In *Speach*, we relied on the fact that the defendant was not the permittee but simply the individual who transported waste to the permittee, and, as contrasted to the permittee was not "the person in the best position to know the facility's permit status." *Id.* at 797. Although we considered it unreasonable to put the defendant at risk for failing to ascertain the permit status of the receiving facility, we recognized that such a risk is not unreasonable when the permittee is also the defendant. *Id.* In this case, as the permittees, appellants are clearly in the best position to know their own permit status, and are among those persons upon whom the *Speach* court would impose liability.

Replace the deleted language of text with:

Other courts have also followed *International Minerals* by similarly construing the knowledge requirement in statutes that regulate deleterious devices or obnoxious waste materials. *E.g., United States v. Laughlin*, 10 F.3d 961, 965–66 (2d Cir. 1993) (§ 6928(d)(2)(A) of RCRA), *cert. denied*, — U.S. —, 114 S.Ct. 1649, 128 L.Ed.2d 368 (1994); *United States v. Buckley*, 934 F.2d 84, 88 (6th Cir.1991) (pre–1990 version of § 7413(c)(1)(C) of the Clean Air Act); *United States v. Dee*, 912 F.2d 741, 745 (4th Cir.1990), *cert. denied*, 499 U.S. 919, 111 S.Ct. 1307, 113 L.Ed.2d 242 (1991) (§ 6928(d)(2)(A) of RCRA); *United States v. Corbin Farm Serv.*, 444 F.Supp. 510, 519–20 (E.D.Cal.), *aff'd*, 578 F.2d 259 (9th Cir.1978) (Federal Insecticide, Fungicide and Rodenticide Act).[6]

6 Like the court in *International Minerals*, we construe the language in § 1319(c)(2)(A) prohibiting knowing violation of "any permit condition" as a "shorthand designation for specific acts" that violate the CWA. *See International Minerals*, 402 U.S. at 567, 91 S.Ct. at 1703. In both § 1319(c)(2)(A) and the statute in question in *International Minerals*, the penalty provisions were drafted in a general fashion to encompass a wide variety of possible violations of the Acts and the word "knowingly" is used to reflect a re-

* Honorable Marilyn L. Huff, United States District Judge for the Southern District of California, sitting by designation.

quirement that the government prove general intent in order to establish a violation. *See also Buckley*, 934 F.2d at 88 ("knowingly ... violates section 7411(e) ..."); *Sherbondy*, 865 F.2d at 1002 ("knowingly violates subsection ... (g) ... of section 922"); *Corbin Farm Serv.*, 444 F.Supp. at 518 ("knowingly violates any provision of this subchapter").

At 1 F.3d 1530, second column, immediately following first paragraph, insert:

Subsequent to the filing of the original opinion in this case, the Supreme Court decided two cases which Weitzenhoff contends call our analysis into question. *See Ratzlaf v. United States*, — U.S. —, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994); *Staples v. United States*, — U.S. —, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994). We disagree.

The statute in *Ratzlaf* does not deal with a public welfare offense, but rather with violations of the banking statutes. The Court construed the term "willfully" in the anti-structuring provisions of the Bank Secrecy Act to require both that the defendant knew he was structuring transactions to avoid reporting requirements and that he knew his acts were unlawful. The Court recognized that the money structuring provisions are not directed at conduct which a reasonable person necessarily should know is subject to strict public regulation and that the structuring offense applied to all persons with more than $10,000, many of whom could be engaged in structuring for innocent reasons. *Ratzlaf*, — U.S. at ——, 114 S.Ct. at 660–62. In contrast, parties such as Weitzenhoff are closely regulated and are discharging waste materials that affect public health. The *International Minerals* rationale requires that we impute to these parties knowledge of their operating permit. This was recognized by the Court in *Staples*.

The specific holding in *Staples* was that the government is required to prove that a defendant charged with possession of a machine gun knew that the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun. But the Court took pains to contrast the gun laws to other regulatory regimes, specifically those regulations that govern the handling of "obnoxious waste materials." *See Staples*, — U.S. at ——, 114 S.Ct. at 1798. It noted that the mere innocent ownership of guns is not a public welfare offense. *Id.* at ——, 114 S.Ct. at 1804. The Court focussed on the long tradition of widespread gun ownership in this country and, recognizing that approximately 50% of American homes contain a firearm, *id.* at ——, 114 S.Ct. at 1801, acknowledged that mere ownership of a gun is not sufficient to place people on notice that the act of owning an unregistered firearm is not innocent under the law.

Staples thus explicitly contrasted the mere possession of guns to public welfare offenses, which include statutes that regulate " 'dangerous or deleterious devices or products or obnoxious waste materials.' " *id.* at ——, 114 S.Ct. at 1800, and confirmed the continued vitality of statutes covering public welfare offenses, which "regulate potentially harmful or injurious items" and place a defendant on notice that he is dealing with a device or a substance "that places him in 'responsible relation to a public danger.' " *Id.* "[I]n such cases Congress intended to place the burden on the defendant to ascertain at his peril whether [his conduct] comes within the inhibition of the statute." *Id.* at ——, 114 S.Ct. at 1798 (citations and internal quotations omitted).

Unlike "[g]uns [which] in general are not 'deleterious devices or products or obnoxious waste materials,' *International Minerals, supra* [402 U.S.], at 565 [91 S.Ct. at 1702], that put their owners on notice that they stand 'in responsible relation to a public danger[,]' *Dotterweich*, 320 U.S. at 281 [64 S.Ct. at 136]," *Staples*, — U.S. at ——, 114 S.Ct. at 1800, the dumping of sewage and other pollutants into our nation's waters is precisely the type of activity that puts the discharger on notice that his acts may pose a public danger. Like other public welfare offenses that regulate the discharge of pollutants into the air, the disposal of hazardous wastes, the undocumented shipping of acids, and the use of pesticides on our food, the improper and excessive discharge of sewage causes chol-

era, hepatitis, and other seriou
and can have serious reperc
public health and welfare.[7]

7 In *Staples*, the Court also
the penalty attached to a vio
criminal statute in the past h
relevant factor in determining w
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402 U.S. 558, 91 S.Ct. 1697 (
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suggest that public welfare offense
not extend to felonies, but noti
"[w]e need not adopt such a definit
of construction to decide this case

Except for the above amendments,
tition for rehearing is denied and the
for rehearing en banc is rejected.

The petition for rehearing en ban
circulated to the full court. An active
of this court requested a vote as to w
the case should be reheard en banc.
than the required majority of the n
cused active judges voted to take the c
banc.

No further petitions for rehearing
hearing en banc will be entertained.
mandate shall issue forthwith.

OPINION

FLETCHER, Circuit Judge:

Michael H. Weitzenhoff and Thoma
Mariani, who managed the East Hon

era, hepatitis, and other serious illnesses, and can have serious repercussions for public health and welfare.[7]

7 In *Staples*, the Court also noted that the penalty attached to a violation of a criminal statute in the past has been a relevant factor in determining whether the statute defines a public welfare offense. The Court recognized that public welfare offenses originally involved statutes that provided only light penalties such as fines or short jail sentences, *see* —— U.S. at ——, 114 S.Ct. at 1802, but that modern statutes now punish public welfare offenses with much more significant terms of imprisonment. *E.g., International Minerals*, 402 U.S. 558, 91 S.Ct. 1697 (ten years imprisonment if death or bodily injury results from violation); *United States v. Freed*, 401 U.S. 601, 609–10, 91 S.Ct. 1112, 1118–19, 28 L.Ed.2d 356 (1971) (five years imprisonment for possession of unregistered grenade); *Hoflin*, 880 F.2d 1033 (two years imprisonment for certain violations of RCRA). While the *Staples* opinion expresses concern with this evolution of enhanced punishments for public welfare offenses, it refrains from holding that public welfare offenses may not be punished as felonies. *Staples*, —— U.S. at ——, 114 S.Ct. at 1804 (stating that the early cases suggest that public welfare offenses might not extend to felonies, but noting that "[w]e need not adopt such a definitive rule of construction to decide this case").

Except for the above amendments, the petition for rehearing is denied and the petition for rehearing en banc is rejected.

The petition for rehearing en banc was circulated to the full court. An active judge of this court requested a vote as to whether the case should be reheard en banc. Less than the required majority of the non-recused active judges voted to take the case en banc.

No further petitions for rehearing or rehearing en banc will be entertained. The mandate shall issue forthwith.

OPINION

FLETCHER, Circuit Judge:

Michael H. Weitzenhoff and Thomas W. Mariani, who managed the East Honolulu Community Services Sewage Treatment Plant, appeal their convictions for violations of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 et seq., contending that 1) the district court misconstrued the word "knowingly" under section 1319(c)(2) of the CWA; 2) the court improperly permitted witnesses to testify as to the meaning of the terms and provisions of the permit issued to the East Honolulu plant; 3) the court erred in concluding that the permit was not unconstitutionally vague; 4) evidence they sought to introduce concerning a regulation proposed by the EPA was improperly excluded; 5) the court erred in refusing their proposed instruction on entrapment by estoppel; and 6) the court should have granted a mistrial due to prosecutorial misconduct. In addition, Mariani contends that his sentence was improperly adjusted upward for obstruction of justice based on his testimony at trial.

We affirm the convictions and sentence.

FACTS AND PROCEDURAL HISTORY

In 1988 and 1989 Weitzenhoff was the manager and Mariani the assistant manager of the East Honolulu Community Services Sewage Treatment Plant ("the plant"), located not far from Sandy Beach, a popular swimming and surfing beach on Oahu. The plant is designed to treat some 4 million gallons of residential wastewater each day by removing the solids and other harmful pollutants from the sewage so that the resulting effluent can be safely discharged into the ocean. The plant operates under a permit issued pursuant to the National Pollution Discharge Elimination System ("NPDES"), which established the limits on the Total Suspended Solids ("TSS") and Biochemical Oxygen Demand ("BOD")—indicators of the solid and organic matter, respectively, in the effluent discharged at Sandy Beach. During the period in question, the permit limited the discharge of both the TSS and BOD to an average of 976 pounds per day over a 30–day period. It also imposed monitoring and sampling requirements on the plant's management.

The sewage treatment process that was overseen by Weitzenhoff and Mariani began

with the removal of large inorganic items such as rags and coffee grounds from the incoming wastewater as it flowed through metal screens and a grit chamber at the head of the plant. The wastewater then entered large tanks known as primary clarifiers, where a portion of the organic solids settled to the bottom of the tanks. The solid material which settled in the primary clarifiers, known as primary sludge, was pumped to separate tanks, known as anaerobic digesters, to be further processed. Those solids that did not settle continued on to aeration basins, which contained microorganisms to feed on and remove the solids and other organic pollutants in the waste stream.

From the aeration basins the mixture flowed into final clarifiers, where the microorganisms settled out, producing a mixture that sank to the bottom of the clarifiers called activated sludge. The clarified stream then passed through a chlorine contact chamber, where the plant's sampling apparatus was, and emptied into the plant's outfall, a long underground pipe which discharged the plant's effluent into the ocean through diffusers 1,100 to 1,400 feet from shore (the "Sandy Beach outfall").

Meanwhile, the activated sludge that had settled in the final clarifiers was pumped from the bottom of the clarifiers. A certain portion was returned to the aeration basins, while the remainder, known as waste activated sludge ("WAS"), was pumped to WAS holding tanks. From the holding tanks, the WAS could either be returned to other phases of the treatment process or hauled away to a different sewage treatment facility.

From March 1987 through March 1988, the excess WAS generated by the plant was hauled away to another treatment plant, the Sand Island Facility. In March 1988, certain improvements were made to the East Honolulu plant and the hauling was discontinued. Within a few weeks, however, the plant began experiencing a buildup of excess WAS. Rather than have the excess WAS hauled away as before, however, Weitzenhoff and Mariani instructed two employees at the plant to dispose of it on a regular basis by pumping it from the storage tanks directly into the outfall, that is, directly into the ocean. The WAS thereby bypassed the plant's effluent sampler so that the samples taken and reported to Hawaii's Department of Health ("DOH") and the EPA did not reflect its discharge.

The evidence produced by the government at trial showed that WAS was discharged directly into the ocean from the plant on about 40 separate occasions from April 1988 to June 1989, resulting in some 436,000 pounds of pollutant solids being discharged into the ocean, and that the discharges violated the plant's 30–day average effluent limit under the permit for most of the months during which they occurred. Most of the WAS discharges occurred during the night, and none was reported to the DOH or EPA. DOH inspectors contacted the plant on several occasions in 1988 in response to complaints by lifeguards at Sandy Beach that sewage was being emitted from the outfall, but Weitzenhoff and Mariani repeatedly denied that there was any problem at the plant. In one letter responding to a DOH inquiry in October 1988, Mariani stated that "the debris that was reported could not have been from the East Honolulu Wastewater Treatment facility, as our records of effluent quality up to this time will substantiate." (U.S. Excerpts of Record ("U.S.E.R.") at 37.) One of the plant employees who participated in the dumping operation testified that Weitzenhoff instructed him not to say anything about the discharges, because if they all stuck together and did not reveal anything, "they [couldn't] do anything to us." (2 R.T. at 66–67.)

Following an FBI investigation, Weitzenhoff and Mariani were charged in a thirty-one-count indictment with conspiracy and substantive violations of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq.* At trial, Weitzenhoff and Mariani admitted having authorized the discharges, but claimed that their actions were justified under their interpretation of the NPDES permit. The jury found them guilty of six of the thirty-one counts.[1]

Weitzenhoff was sentenced to twenty-one months and Mariani thirty-three months im-

1. Weitzenhoff and Mariani were found guilty of count 1, conspiracy to discharge the WAS in violation of the NPDES permit and the Clean Water Act, a violation of 18 U.S.C. § 371; count 9, knowingly discharging WAS in violation of the

prisonment. Each filed a time appeal.

DISCUSSION

A. Intent Requirement

[1] Section 1311(a) of the CW the discharge of pollutants int waters without an NPDES p U.S.C. § 1311(a). Section 1319(c it a felony offense to "knowingl section 1311, 1312, 1316, 13 1321(b)(3), 1328, or 1345 . . ., or a condition or limitation implementi such sections in a permit issued tion 1342."

Prior to trial, the district court "knowingly" in section 1319(c)(2) as only that Weitzenhoff and Mari aware that they were discharging tants in question, not that they k were violating the terms of the s permit. According to appellants, th court erred in its interpretation of t and in instructing the jury that "the ment is not required to prove that th dant knew that his act or omissio unlawful," (14 R.T. at 117),[2] as we rejecting their proposed instruction t the defense that they mistakenly their conduct was authorized by the Apparently, no court of appeals has c ed the issue raised by appellants.

We review a question of statuto struction de novo. *United States v.*

permit between March and October 1988 lation of 33 U.S.C. §§ 1311(a) and 1319(c)(18 U.S.C. § 2; count 10, knowingly ren inaccurate the plant's monitoring method charging WAS beyond the plant's effluen pler during a period in 1988, a violation U.S.C. § 1319(c)(4) and 18 U.S.C. § 2; co knowingly making false representatio monthly discharge monitoring reports file government regulators by failing to repor discharges of WAS, a violation of 33 § 1319(c)(4) and 18 U.S.C. § 2; count 30, ingly discharging WAS in violation of the between January and July 1989, a violation U.S.C. §§ 1311(a) and 1319(c)(2) and 18 § 2; and count 31, knowingly rendering in rate the plant's monitoring method by disc ing WAS beyond the plant's effluent san during a period in 1989, a violation of 33 U § 1319(c)(4) and 18 U.S.C. § 2.

On appeal, most of appellants' energies directed against the section 1319(c)(2) violat

prisonment. Each filed a timely notice of appeal.

DISCUSSION

A. Intent Requirement

[1] Section 1311(a) of the CWA prohibits the discharge of pollutants into navigable waters without an NPDES permit. 33 U.S.C. § 1311(a). Section 1319(c)(2) makes it a felony offense to "knowingly violate[ ] section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 . . ., or any permit condition or limitation implementing any of such sections in a permit issued under section 1342."

Prior to trial, the district court construed "knowingly" in section 1319(c)(2) as requiring only that Weitzenhoff and Mariani were aware that they were discharging the pollutants in question, not that they knew they were violating the terms of the statute or permit. According to appellants, the district court erred in its interpretation of the CWA and in instructing the jury that "the government is not required to prove that the defendant knew that his act or omissions were unlawful," (14 R.T. at 117),[2] as well as in rejecting their proposed instruction based on a defense that they mistakenly believed their conduct was authorized by the permit.[3] Apparently, no court of appeals has confronted the issue raised by appellants.

We review a question of statutory construction de novo. *United States v. Richi-*

son, 901 F.2d 778, 780 (9th Cir.1990). "In construing statutes in a case of first impression, we first look to the language of the controlling statutes, and second to legislative history." *Central Mont. Elec. Power Coop., Inc. v. Administrator of Bonneville Power Admin.*, 840 F.2d 1472, 1477 (9th Cir.1988). Whether a jury instruction misstates elements of a statutory crime is also a question of law reviewed de novo. *United States v. Johnson*, 956 F.2d 197, 199 (9th Cir.1992). If the district court was correct in its interpretation of the statute, then it did not err in giving the instruction it did or refusing to submit appellants' mistake of law defense to the jury.

As with certain other criminal statutes that employ the term "knowingly," it is not apparent from the face of the statute whether "knowingly" means a knowing violation of the law or simply knowing conduct that is violative of the law. We turn, then, to the legislative history of the provision at issue to ascertain what Congress intended.

In 1987, Congress substantially amended the CWA, elevating the penalties for violations of the Act. *See* H.R.Conf.Rep. No. 1004, 99th Cong., 2d Sess. 138 (1986). Increased penalties were considered necessary to deter would-be polluters. S.Rep. No. 50, 99th Cong., 1st Sess. 29 (1985). With the 1987 amendments, Congress substituted "knowingly" for the earlier intent requirement of "willfully" that appeared in the predecessor to section 1319(c)(2).[4] The Senate

mit between March and October 1988, a violation of 33 U.S.C. §§ 1311(a) and 1319(c)(2) and U.S.C. § 2; count 10, knowingly rendering curate the plant's monitoring method by discging WAS beyond the plant's effluent samduring a period in 1988, a violation of 33 § 1319(c)(4) and 18 U.S.C. § 2; count 22, ingly making false representations in ly discharge monitoring reports filed with ument regulators by failing to report their rges of WAS, a violation of 33 U.S.C. (c)(4) and 18 U.S.C. § 2; count 30, knowischarging WAS in violation of the permit n January and July 1989, a violation of 33 §§ 1311(a) and 1319(c)(2) and 18 U.S.C. d count 31, knowingly rendering inaccuplant's monitoring method by dischargAS beyond the plant's effluent sampler period in 1989, a violation of 33 U.S.C. (4) and 18 U.S.C. § 2.

peal, most of appellants' energies are against the section 1319(c)(2) violations, which are premised on the language of the NPDES permit. Section 1319(c)(4) criminalizes the making of false statements in any document or rendering inaccurate of any monitoring device or method required to be maintained under the CWA.

2. Appellants do not challenge the court's giving of the same instruction with respect to the section 1319(c)(4) reporting and monitoring violations charged in the indictment.

3. This defense is mistakenly labeled "mistake of fact" in Weitzenhoff's brief on appeal.

4. At least two courts held that specific intent was not required for conviction under the earlier version of section 1319, which imposed penalties for "willful or negligent" violations of the CWA without distinction. The current statute imposes harsher penalties for knowing violations than for negligent ones. *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 618–19 & n. 32 (5th

report accompanying the legislation explains that the changes in the penalty provisions were to ensure that "[c]riminal liability shall ... attach to any person who is not in compliance with all applicable Federal, State and local requirements and permits *and causes* a POTW [publicly owned treatment works] to violate any effluent limitation or condition in any permit issued to the treatment works." *Id.* (emphasis added). Similarly, the report accompanying the House version of the bill, which contained parallel provisions for enhancement of penalties, states that the proposed amendments were to "provide penalties for dischargers or individuals who knowingly or negligently violate *or cause the violation of* certain of the Act's requirements." H.R.Rep. No. 189, 99th Cong., 1st Sess. 29–30 (1985) (emphasis added). Because they speak in terms of "causing" a violation, the congressional explanations of the new penalty provisions strongly suggest that criminal sanctions are to be imposed on an individual who knowingly engages in conduct that results in a permit violation, regardless of whether the polluter is cognizant of the requirements or even the existence of the permit.

Our conclusion that "knowingly" does not refer to the legal violation is fortified by decisions interpreting analogous public welfare statutes. The leading case in this area is *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 91 S.Ct. 1697, 29 L.Ed.2d 178 (1971). In *International Minerals*, the Supreme Court construed a statute which made it a crime to "knowingly violate[ ] any ... regulation" promulgated by the ICC pursuant to 18 U.S.C. § 834(a), a provision authorizing the agency to formulate regulations for the safe transport of corrosive liquids. *Id.* at 559, 91 S.Ct. at 1699. The Court held that the term "knowingly" referred to the acts made criminal rather than a violation of the regulation, and that "regulation" was a shorthand designation for the specific acts or omissions contemplated by the act. *Id.* at 560–62, 91 S.Ct. at 1699–1700. "[W]here ... dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *Id.* at 565, 91 S.Ct. at 1701–02.

This court followed *International Minerals* in *United States v. Hoflin*, 880 F.2d 1033 (9th Cir.1989), *cert. denied*, 493 U.S. 1083, 110 S.Ct. 1143, 107 L.Ed.2d 1047 (1990), when it held that knowledge of the absence of a permit is not an element of the offense defined by 42 U.S.C. § 6928(d)(2)(A), part of the Resource Conservation and Recovery Act ("RCRA"). *Id.* at 1039. "There can be little question that RCRA's purposes, like those of the Food and Drug Act, '... touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection.'" *Id.* at 1038 (quoting *United States v. Dotterweich*, 320 U.S. 277, 280, 64 S.Ct. 134, 136, 88 L.Ed. 48 (1943) (construing Food, Drug and Cosmetic Act)); *see also United States v. Sherbondy*, 865 F.2d 996, 1001–03 (9th Cir.1988) (use of word "knowingly" in 18 U.S.C. §§ 922(g) & 924(A)(1)(B), part of Firearms Owners' Protection Act, does not require proof that defendant knew he was violating law).[5] Other courts have also followed *International Min-*

Cir.1991); *United States v. Frezzo Bros., Inc.*, 546 F.Supp. 713, 720–21 (E.D.Pa.1982), *aff'd*, 703 F.2d 62 (3d Cir.), *cert. denied*, 464 U.S. 829, 104 S.Ct. 106, 78 L.Ed.2d 109 (1983).

5. Weitzenhoff argues that this case is controlled by *United States v. Speach*, 968 F.2d 795, 796–97 (9th Cir.1992), in which we held that 42 U.S.C. § 6928(d)(1), which imposes criminal liability on parties who "knowingly transport[ ] ... hazardous waste ... to a facility which does not have a permit," requires that the transporter know that he acted in violation of the statute. This argument is unavailing because *Speach* recognizes the general rule that public welfare offenses are not to be construed to require proof that the defendant knew he was violating the law in the absence of clear evidence of contrary congressional intent and finds only a narrow exception to this general rule. In *Speach*, we relied on the fact that the defendant was not the permittee but simply the individual who transported waste to the permittee, and, as contrasted to the permittee was not "the person in the best position to know the facility's permit status." *Id.* at 797. Although we considered it unreasonable to put the defendant at risk for failing to ascertain the permit status of the receiving facility, we recognized that such a risk is not unreasonable when the permittee is also the defendant. *Id.* In this case as the permittees, appellants are clearly in the best position to know their own permit status and are among those persons upon whom the *Speach* court would impose liability.

erals by similarly construing the knov requirement in statutes that regulate rious devices or obnoxious waste mat *E.g., United States v. Laughlin*, 10 F.3 965–66 (2d Cir.1993) (§ 6928(d)(2)(RCRA), *cert. denied*, — U.S. —, 114 1649, 128 L.Ed.2d 368 (1994); *United* g *Buckley*, 934 F.2d 84, 88 (6th Cir (pre–1990 version of § 7413(c)(1)(C) Clean Air Act); *United States v. Dee* F.2d 741, 745 (4th Cir.1990), *cert. denie* U.S. 919, 111 S.Ct. 1307, 113 L.Ed.2 (1991) (§ 6928(d)(2)(A) of RCRA); *U States v. Corbin Farm Serv.*, 444 F. 510, 519–20 (E.D.Cal.), *aff'd*, 578 F.2 (9th Cir.1978) (Federal Insecticide, Fung and Rodenticide Act).[6]

s Appellants seek to rely on the Sup Court's decision in *Liparota v. United St* 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2 (1985), to support their alternative readi the intent requirement. *Liparota* conce 7 U.S.C. § 2024(b)(1), which provides anyone who "knowingly uses, transfers, quires, alters, or possesses [food stamp] pons or authorization cards in any ma not authorized by [the statute] or reg tions" is subject to a fine or imprisonm *Id.* at 420, 105 S.Ct. at 2085. The Co noting that the conduct at issue did not stitute a public welfare offense, distinguis the *International Minerals* line of cases held that the government must prove defendant knew that his acquisition or p session of food stamps was in a man unauthorized by statute or regulations. at 432–33, 105 S.Ct. at 2092.

Subsequent to the filing of the origi opinion in this case, the Supreme Court d cided two cases which Weitzenhoff conten call our analysis into question. *See Ratz United States*, — U.S. —, 114 S.C 655, 126 L.Ed.2d 615 (1994); *Staples v. Un ed States*, — U.S. —, 114 S.Ct. 1793, 1 L.Ed.2d 608 (1994). We disagree.

6. Like the court in *International Minerals*, construe the language in § 1319(c)(2)(A) prohi ting knowing violation of "any permit conc tion" as a "shorthand designation for specif acts" that violate the CWA. *See Internation Minerals*, 402 U.S. at 567, 91 S.Ct. at 1703. both § 1319(c)(2)(A) and the statute in questio in *International Minerals*, the penalty provision were drafted in a general fashion to encompass wide variety of possible violations of the Acts an

als by similarly construing the knowledge requirement in statutes that regulate deleterious devices or obnoxious waste materials. *E.g., United States v. Laughlin*, 10 F.3d 961, 965–66 (2d Cir.1993) (§ 6928(d)(2)(A) of RCRA), *cert. denied*, — U.S. —, 114 S.Ct. 1649, 128 L.Ed.2d 368 (1994); *United States v. Buckley*, 934 F.2d 84, 88 (6th Cir.1991) (pre–1990 version of § 7413(c)(1)(C) of the Clean Air Act); *United States v. Dee*, 912 F.2d 741, 745 (4th Cir.1990), *cert. denied*, 499 U.S. 919, 111 S.Ct. 1307, 113 L.Ed.2d 242 (1991) (§ 6928(d)(2)(A) of RCRA); *United States v. Corbin Farm Serv.*, 444 F.Supp. 510, 519–20 (E.D.Cal.), *aff'd*, 578 F.2d 259 (9th Cir.1978) (Federal Insecticide, Fungicide and Rodenticide Act).[6]

Appellants seek to rely on the Supreme Court's decision in *Liparota v. United States*, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985), to support their alternative reading of the intent requirement. *Liparota* concerned 7 U.S.C. § 2024(b)(1), which provides that one who "knowingly uses, transfers, acquires, alters, or possesses [food stamp] coupons or authorization cards in any manner not authorized by [the statute] or regulations" is subject to a fine or imprisonment. 471 U.S. at 420, 105 S.Ct. at 2085. The Court, finding that the conduct at issue did not constitute a public welfare offense, distinguished *International Minerals* line of cases and held that the government must prove the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations. *Id.* at 432–33, 105 S.Ct. at 2092.

Subsequent to the filing of the original opinion in this case, the Supreme Court decided two cases which Weitzenhoff contends call our analysis into question. *See Ratzlaf v. United States*, — U.S. —, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994); *Staples v. United States*, — U.S. —, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994). We disagree.

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The specific holding in *Staples* was that the government is required to prove that a defendant charged with possession of a machine gun knew that the weapon he possessed had the characteristics that brought it within the statutory definition of a machine-gun. But the Court took pains to contrast the gun laws to other regulatory regimes, specifically those regulations that govern the handling of "obnoxious waste materials." *See Staples*, — U.S. at —, 114 S.Ct. at 1798. It noted that the mere innocent ownership of guns is not a public welfare offense. *Id.* at —, 114 S.Ct. at 1804. The Court focussed on the long tradition of widespread gun ownership in this country and, recognizing that approximately 50% of American homes contain a firearm, *id.* at —, 114 S.Ct. at 1801, acknowledged that mere ownership of a gun is not sufficient to place

[6] the court in *International Minerals*, we ue the language in § 1319(c)(2)(A) prohibnowing violation of "any permit condias a "shorthand designation for specific that violate the CWA. *See International ls*, 402 U.S. at 567, 91 S.Ct. at 1703. In 1319(c)(2)(A) and the statute in question *national Minerals*, the penalty provisions rafted in a general fashion to encompass a riety of possible violations of the Acts and the word "knowingly" is used to reflect a requirement that the government prove general intent in order to establish a violation. *See also Buckley*, 934 F.2d at 88 ("knowingly ... violates section 7411(e) ..."); *Sherbondy*, 865 F.2d at 1002 ("knowingly violates subsection ... (g) ... of section 922"); *Corbin Farm Serv.*, 444 F.Supp. at 518 ("knowingly violates any provision of this subchapter").

people on notice that the act of owning an unregistered firearm is not innocent under the law.

Staples thus explicitly contrasted the mere possession of guns to public welfare offenses, which include statutes that regulate " 'dangerous or deleterious devices or products or obnoxious waste materials,' " *id.* at ——, 114 S.Ct. at 1800, and confirmed the continued vitality of statutes covering public welfare offenses, which "regulate potentially harmful or injurious items" and place a defendant on notice that he is dealing with a device or a substance "that places him in 'responsible relation to a public danger.' " *Id.* "[I]n such cases Congress intended to place the burden on the defendant to ascertain at his peril whether [his conduct] comes within the inhibition of the statute." *Id.* at ——, 114 S.Ct. at 1798 (citations and internal quotations omitted).

Unlike "[g]uns [which] in general are not 'deleterious devices or products or obnoxious waste materials,' *International Minerals, supra* [402 U.S.], at 565 [91 S.Ct. at 1702], that put their owners on notice that they stand 'in responsible relation to a public danger[,]' *Dotterweich*, 320 U.S. at 281 64 S.Ct. at 136]," *Staples*, — U.S. at ——, 114 S.Ct. at 1800, the dumping of sewage and other pollutants into our nation's waters is precisely the type of activity that puts the discharger on notice that his acts may pose a public danger. Like other public welfare offenses that regulate the discharge of pollutants into the air, the disposal of hazardous wastes, the undocumented shipping of acids, and the use of pesticides on our food, the improper and excessive discharge of sewage causes cholera, hepatitis, and other serious illnesses, and can have serious repercussions for public health and welfare.[7]

[2] The criminal provisions of the CWA are clearly designed to protect the public at large from the potentially dire consequences of water pollution, *see* S.Rep. No. 99–50, 99th Cong., 1st Sess. 29 (1985), and as such fall within the category of public welfare legislation. *International Minerals* rather than *Liparota* controls the case at hand. The government did not need to prove that Weitzenhoff and Mariani knew that their acts violated the permit or the CWA.

B. Expert Testimony

[3] The essence of Weitzenhoff and Mariani's defense was that their clandestine dumping of thousands of gallons of toxic sludge into the ocean at Sandy Beach was an effort to restore the plant's biological balance so as to avoid a complete plant shutdown and avert environmental disaster. They claim that the discharges of WAS were fully consistent with the NPDES permit. The central issue at trial, therefore, was the meaning of the permit.

In addition to establishing TSS and BOD limits for the effluent discharged at Sandy Beach and imposing monitoring requirements, the permit issued to the East Honolulu plant provided that substances removed from the wastewater could only be disposed of "in a manner such as to prevent any pollutant from such materials from entering navigable water." (Mariani Excerpts of Record ("M.E.R.") at 68) (NPDES permit). "Removed substances," according to the permit, include "[s]olids, sludges, filter backwash, or other pollutants removed in the course of treatment or control of wastewaters." (*Id.*)

The permit also regulates "bypass," defined as "the intentional diversion of waste

7. In *Staples*, the Court also noted that the penalty attached to a violation of a criminal statute in the past has been a relevant factor in determining whether the statute defines a public welfare offense. The Court recognized that public welfare offenses originally involved statutes that provided only light penalties such as fines or short jail sentences, *see* — U.S. at ——, 114 S.Ct. at 1802, but that modern statutes now punish public welfare offenses with much more significant terms of imprisonment. *E.g., International Minerals*, 402 U.S. 558, 91 S.Ct. 1697 (ten years imprisonment if death or bodily injury results from violation); *United States v. Freed*, 401 U.S. 601, 609–10, 91 S.Ct. 1112, 1118–1119, 28 L.Ed.2d 356 (1971) (five years imprisonment for possession of unregistered grenade); *Hoflin*, 880 F.2d 1033 (two years imprisonment for certain violations of RCRA). While the *Staples* opinion expresses concern with this evolution of enhanced punishments for public welfare offenses, it refrains from holding that public welfare offenses may not be punished as felonies. *Staples*, — U.S. at ——, 114 S.Ct. at 1804 (stating that the early cases suggest that public welfare offenses might not extend to felonies, but noting that "[w]e need not adopt such a definitive rule of construction to decide this case").

streams from any portion of facility." (*Id.* at 66.) Under bypass is generally prohibited "prevent loss of life, personal i were property damage" and in th feasible alternatives. (*Id.*) The vides, however, that where it w effluent limitations to be exce permittee may allow any bypass only if it ... is for essential ma assure efficient operation." (*Id.*

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We note that the defense contribut error by insisting that the court not def the permit's terms for the jury in its c merely instruct the jury to "follow meaning of the language" in the

streams from any portion of a treatment facility." (*Id.* at 66.) Under the permit, bypass is generally prohibited, except to "prevent loss of life, personal injury, or severe property damage" and in the absence of feasible alternatives. (*Id.*) The permit provides, however, that where it will not cause effluent limitations to be exceeded, "[t]he permittee may allow any bypass to occur, but only if it ... is for essential maintenance to assure efficient operation." (*Id.*)

Weitzenhoff and Mariani assert that the discharges were permissible bypasses. They claim that WAS is not a "removed substance," that the discharges they oversaw were for the purpose of "essential maintenance," and that, because they are properly considered "bypasses," the discharges were not required to be reflected in the monitoring reports submitted to government authorities.

The trial judge—concerned that were he to construe the permit, "we [wouldn't] have a case.... [w]e would just have a bench trial," (4 R.T. at 168)—treated the interpretation of the permit as a question for the jury. Consistent with this approach, the court permitted witnesses familiar with the wastewater management field to testify about the various technical terms within and obligations imposed by the permit. Since both sides presented witnesses on these issues, the explications of the permit were, as might be expected, contradictory. For example, one government witness testified that a discharge of WAS from a WAS holding tank to an outfall would constitute the disposal of a removed substance in violation of the permit. But he was contradicted by a defense witness who testified that WAS was not a "removed substance" and therefore did not come under the prohibition. While the same government witness defined "essential maintenance" as pertaining only to the maintenance of the plant's "physical facilities," the defense expert stated that the term could apply to maintenance of the plant's biological process as well as its physical facilities. The court did not resolve these conflicts in its jury charge but instead instructed the jury to "construe" the permit based on "the plain meaning of the language therein" and the testimony of the expert and other witnesses. (14 R.T. at 122.)

Weitzenhoff and Mariani argue that the testimony defining key terms of the permit and explaining its prohibitions amounted to an impermissible delegation of the district judge's duties because, in effect, it was witnesses who instructed the jury on the law rather than the judge. We agree with appellants in this assessment.

[4, 5] The admission of expert testimony is within the discretion of the trial court and reversible only for abuse of discretion or manifest error. *United States v. Arvin*, 900 F.2d 1385, 1388–89 (9th Cir.1990), *cert. denied*, 498 U.S. 1024, 111 S.Ct. 672, 112 L.Ed.2d 664 (1991). Expert testimony is properly admissible when it serves to assist the trier of fact to understand the evidence or determine a fact in issue. *United States v. Brodie*, 858 F.2d 492, 496 (9th Cir.1988). It is well settled, however, that the judge instructs the jury in the law. *Id.* "Resolving doubtful questions of law is the distinct and exclusive province of the trial judge." *Id.* at 497.

[6] Here the district court did not decide the issues of law raised by the parties. Instead of applying the court's interpretation of the law to the facts, then, the jurors applied their own rendition(s) of the law, presumably derived to some degree from the conflicting expert testimony, to the facts. Although the testimony of the witnesses regarding technical terms in the permit might have been permissible had the judge proceeded properly to instruct the jury, *see* Fed.R.Evid. 702 (expert testimony admissible if it will assist the trier of fact), 704 (opinion on ultimate issue to be decided by factfinder not necessarily objectionable), in this case it compounded the error of consigning the interpretation of the law to the jury. The court's admission of expert testimony on contested issues of law in lieu of instructing the jury was manifestly erroneous.[8]

8. We note that the defense contributed to this error by insisting that the court not define any of the permit's terms for the jury in its charge, but merely instruct the jury to "follow the *plain meaning* of the language" in the permit. (U.S.E.R. at 74.) The defendants, however, had initially objected to the admission of any expert testimony concerning permit terms. After the court ruled such testimony admissible, defendants presented their own expert testimony to

[7, 8] Nonetheless, we hold that the error was harmless because, under a proper interpretation of the permit, the discharges admitted to by Weitzenhoff and Mariani necessarily violated the permit.[9] Since construction of the permit is a matter of law, we are in a position to interpret the permit provisions at issue. *Hemlani v. Guerrero*, 902 F.2d 1412, 1415 (9th Cir.1990) ("The interpretation of this statute is purely a question of law, the issue has been fully briefed, and we are in as good a position as the [district] court to decide if the statute means what it says."). We note that in deciding what the provisions mean, we need not choose between the conflicting expert opinions; the critical terms are either defined in the permit itself or their meaning is apparent from EPA's commentary on its permitting guidelines. As we are able to accomplish the task of permit interpretation without turning to the experts, we are not hampered by questions of witness credibility, which of course could not be resolved by us on appeal. *United States v. Gordon*, 844 F.2d 1397, 1405 (9th Cir.1988) ("Questions of credibility are for the jury to decide and are generally immune from appellate review.")

[9] We begin by observing that, notwithstanding the "expert" testimony to the contrary, the excess WAS that was separated out from the plant's treatment process to be stored and eventually disposed of clearly falls within the permit's definition of a "removed substance" because it was a "sludge[ ] ... removed in the course of treatment or control of wastewaters." (M.E.R. at 68.) As such, it could not be discharged into the ocean unless the discharge constituted a permissible bypass of the treatment system.

[10, 11] Even assuming that the oceanic dumping of WAS at Sandy Beach did not violate the East Honolulu facility's effluent standards,[10] a doubtful proposition, we hold that the discharges were not permissible bypasses because they were not for "essential maintenance to assure efficient operation." (*Id.* at 66.) An NPDES permit must conform to EPA regulations. *See* 40 C.F.R. § 122.1 *et seq.* (permitting requirements). In establishing the guideline prohibiting bypass except where necessary for essential maintenance, 40 C.F.R. § 122.41(m), the EPA explained that "[g]enerally, maintenance is that which is necessary to maintain the performance, removal efficiency and effluent quality of the *pollution control equipment*. However, for the purposes of this section, it is necessary to distinguish between maintenance that is 'essential' and that which is routine." 49 Fed.Reg. 38,037 (1984) (emphasis added). The discussion in the Federal Register focuses on necessary repairs and upkeep of plant equipment and emphasizes that if it is feasible to perform the maintenance "with no loss in treatment plant performance," the maintenance is not considered "essential" for the purposes of the bypass exception. *Id.* There is no indication that the EPA considered anything other than unavoidable measures to ensure the continuing operation of plant equipment to be "essential maintenance."

[12] The EPA's interpretation of its bypass regulation is entitled to considerable weight. *Force v. Director, Office of Workers' Compensation Programs*, 938 F.2d 981, 983 (9th Cir.1991); *Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency*, 822 F.2d 104, 122 (D.C.Cir.1987) (upholding bypass provision). We therefore reject appellants' interpretation of the bypass exception as authorizing their wholesale dumping of WAS into the ocean and circumvention of the plant's monitoring apparatus. The discharges they directed were not for the purpose of maintaining plant equipment. Nor were they essential, for the record establishes that a ready alternative existed.

counter that of the government witnesses. Under these circumstances, we decline to hold that appellants invited the error.

9. The government presented evidence and arguments indicating that the permit was violated in more than one way. There was no special verdict in the case, however, and consequently, there is no means for us to ascertain which theory or theories the jury adopted. Even though the government presented compelling evidence that the discharges caused the plant's effluent limitations to be exceeded, we assume for the purposes of this analysis that the jury rejected this evidence, as it was entitled to, and rely only on appellants' admissions to support our conclusion that the permit was violated.

10. *See supra* note 6.

Weitzenhoff and Mariani could have excess WAS hauled away.

Finally, we note that appellants' construe the permit as allowing charges turns the entire statute on its head. In keeping with the CWA, the EPA's bypass rule was to ensure "that the applicable technology, implemented for the purpose achieving pollution reduction ... the 'best technology,' be ... signed." *Natural Resources Council*, 822 F.2d at 124. To endorse interpretation would be to grant ... ers' carte blanche to pollute ... slightest managerial inconvenience itself. We are certain that ... Congress intended.

C. Vagueness

[13] Weitzenhoff and Mariani ... that, especially in the absence ... ment that they knew they were ... law, the NPDES permit is unconstitutionally vague. They assert that key ... the permit, in particular those ... debated at trial, have no established ... ing. The district court declined ... defendants' vagueness claim ... hearing but denied a motion ... based on the ambiguity of the ... the close of the government's ...

[14, 15] Whether the permit ... stitutionally vague is a question ... we review de novo. *United States ... topher*, 700 F.2d 1253, 1258 (9th ... *denied*, 461 U.S. 960, 103 S.Ct. ... L.Ed.2d 1321 (1983). "A ... deemed to have fair notice of an ... reasonable person of ordinary ... would understand that his or her ... prohibited by the law in question." *States v. Fitzgerald*, 882 F.2d 397 ... Cir.1989). In evaluating a question ... ness, we ordinarily look to the ... derstanding of the terms of a ... However, if the statutory prohibition ... volves conduct of a select group ... having specialized knowledge, and ... lenged phraseology is indigenous to ... of that class, the standard is lower ... court may uphold a statute which ... or phrases having a technical or other ... meaning, well enough known to enable ...

'eitzenhoff and Mariani could have had the ress WAS hauled away.

Finally, we note that appellants' attempt to construe the permit as allowing these discharges turns the entire statutory scheme on its head. In keeping with the goal of the CWA, the EPA's bypass rule was devised to ensure "that the applicable treatment technology, implemented for the purpose of achieving pollution reduction equivalent to the 'best technology,' be operated as designed." *Natural Resources Defense Coun-*, 822 F.2d at 124. To endorse appellants' terpretation would be to grant permit holders carte blanche to pollute whenever the ightest managerial inconvenience presented self. We are certain that this is not what ongress intended.

Vagueness

[13] Weitzenhoff and Mariani contend at, especially in the absence of a requirent that they knew they were violating the , the NPDES permit is unconstitutionally ue. They assert that key provisions of permit, in particular those that were ated at trial, have no established mean- . The district court declined to rule on ndants' vagueness claim at a pretrial g but denied a motion for acquittal d on the ambiguity of the permit after close of the government's case.

[14, 15] Whether the permit was unconitionally vague is a question of law which review de novo. *United States v. Chris-*, 700 F.2d 1253, 1258 (9th Cir.), *cert.* ed, 461 U.S. 960, 103 S.Ct. 2436, 77 2d 1321 (1983). "A defendant is ed to have fair notice of an offense if a nable person of ordinary intelligence understand that his or her conduct is bited by the law in question." *United v. Fitzgerald*, 882 F.2d 397, 398 (9th 89). In evaluating a question of vague- we ordinarily look to the common unnding of the terms of a statute. *Id.* ver, if the statutory prohibition "inconduct of a select group of persons specialized knowledge, and the chal- phraseology is indigenous to the idiom class, the standard is lowered and a may uphold a statute which 'uses words ases having a technical or other special g, well enough known to enable those within its reach to correctly apply them.'" *Precious Metals Assocs., Inc. v. Commodity Futures Trading Commission*, 620 F.2d 900, 907 (1st Cir.1980) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926)).

Pursuant to the preceding analysis of the permit's terms, which, as we have demonstrated, have meaning in the context of the EPA regulatory scheme, we have no trouble in upholding the permit against appellants' vagueness challenge. Weitzenhoff and Mariani were knowledgeable in the wastewater field and can be expected to have understood what the permit meant. In particular, they should have known that it did not give them license to dump thousands of gallons of partially treated sewage into the ocean on a regular basis.

We are further persuaded that appellants had adequate notice of the illegality of their dumping by the considerable pains they took to conceal their activities. The discharges were effected mainly at night; plant personnel were not to discuss them; and Weitzenhoff and Mariani consistently repeatedly denied the illicit operation when questioned by health authorities. These are not the ways of conscientious managers seeking to safeguard the environment.

Although we affirm the convictions on the basis of Weitzenhoff and Mariani's factual admissions and our interpretation of the permit rather than attempting to divine the facts upon which the jury based its verdict, we nonetheless address the additional concerns raised by appellants relating to the presentation of the case to the jury. We do this because had the court erroneously deprived the jury of an opportunity to acquit or wrongly refused to grant a mistrial, we might not be in a position to affirm. That is, had the jury acquitted or a mistrial been declared, there would be no convictions to uphold.

D. Exclusion of Evide

[16] At trial, defenc duce an excerpt from describing a regulatio the EPA but never ad 49 Federal Register

lation would have permitted bypass of effluent from a wastewater treatment facility

> where the resultant effluent is in compliance with permit limitations. The proposal would allow any bypass which does not cause a violation of permit limitations or other permit conditions. However, to ensure that permit limitations are, in fact, not exceeded during the bypass, the proposed amendment would require permittees to monitor all affected discharge points at the time of any bypass.

(Weitzenhoff Excerpts of Record at 74.) Weitzenhoff and Mariani claim this should have been admitted as evidence because, combined with the fact that it was never adopted, it suggests that the EPA did not require them to monitor the discharges they characterize as bypasses. The district court held the excerpt inadmissible since the regulation was never adopted, the language cited by the defense was of dubious significance, and such "evidence" would confuse the jury.

We review the exclusion of the evidence for abuse of discretion. *United States v. Kessi*, 868 F.2d 1097, 1107 (9th Cir.1989); *United States v. Soulard*, 730 F.2d 1292, 1296 (9th Cir.1984). Although the explanation of the proposed regulation might properly have been considered (or disregarded) by the court in ruling on the legal issues in the case, it was not relevant to the jury's determination of the facts. Thus, notwithstanding the fact that the jury was impermissibly assigned the task of interpreting the permit, the district court did not abuse its discretion in excluding the Federal Register excerpt from the jury's consideration.

E. Entrapment by Estoppel Defense

[17] The district court ruled after the close of evidence that it would not give Weitzenhoff and Mariani's proposed jury instruction on the elements of an entrapment by estoppel defense because the defense was not warranted by the law or the facts of the case. Appellants claim the court's refusal to give the instruction warrants reversal.

"A defendant is entitled to an instruction covering a theory of defense if it has a basis in law and there is some foundation for it in the evidence." *United States v. Ibarra-Alcarez*, 830 F.2d 968, 973 (9th Cir.1987). A trial court's determination that the evidence was insufficient to justify the giving of an instruction on a theory of defense is a question of law which we review de novo. *Id.*

[18, 19] Entrapment by estoppel applies when an authorized government official tells the defendant that certain conduct is legal and the defendant believes the official. *United States v. Brebner*, 951 F.2d 1017, 1024 (9th Cir.1991). To invoke the entrapment by estoppel defense, the defendant must show that he relied on the official's statement and that his reliance was reasonable in that a person sincerely desirous of obeying the law would have accepted the information as true and would not have been put on notice to make further inquiries. *United States v. Lansing*, 424 F.2d 225, 227 (9th Cir.1970).

Weitzenhoff and Mariani contend that the jury should have been permitted to consider whether they were entrapped by the government, for two reasons: because they were entitled to rely upon the "plain language" of the permit as a "comprehensive official statement of the law"—at the same time, of course, claiming that they abided by the permit; and because of the fact that regulatory authorities had previously permitted them to haul excess WAS to the Sand Island waste treatment facility where it only underwent a primary treatment process before being discharged into the ocean. According to Weitzenhoff and Mariani, the authorization to haul the WAS to the another facility that lacked a secondary treatment process somehow implies that it was acceptable to discharge the WAS from the East Honolulu plant without additional treatment.

The first of appellants' theories is flawed because it merely begs the critical inquiry in this case, that is, the correct interpretation of the permit. It would have been entirely superfluous to have the jury decide whether appellants properly relied on the permit since no one disputes that they were bound by it.

The second asserted rationale is a tortured one that does not make out a claim of entrapment by estoppel. Even if disposing of the WAS by hauling it to the Sand Island facility could somehow plausibly be equated with dumping it into the Sandy Beach outfall

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F. Prosecutorial Misconduct

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appellants do not point to a statement on the part of a government official upon which they relied in reaching this conclusion. Moreover, the fact that it was lawful to discharge WAS at Sand Island without secondary treatment has no bearing on the discharge limitations at the East Honolulu plant, which operated under its own permit.[11] If Weitzenhoff and Mariani had had a genuine desire to obey the law, they would have sought advice from the appropriate authorities as to how properly to dispose of the excess WAS.

F. Prosecutorial Misconduct

[20–22] Weitzenhoff and Mariani object to what they characterize as the prosecutor's deliberate attempts to elicit irrelevant and inflammatory testimony regarding the potential health effects of the WAS discharges despite the trial court's ruling limiting such testimony. "A claim of prosecutorial misconduct must be viewed in the entire context of the trial." *United States v. Christophe*, 833 F.2d 1296, 1300 (9th Cir.1987). Reversal is justified only if the alleged misconduct materially affected the verdict or deprived the defendant of a fair trial. *Id.* at 1301; *see also United States v. Simtob*, 901 F.2d 799, 806 (9th Cir.1990) ("[P]rosecutorial misconduct invites reversal if it appears more probable than not that the alleged misconduct affected the jury's verdict."). Depending upon the circumstances, a prompt and effective admonishment of counsel or curative instruction from the trial judge may effectively "neutralize the damage." *Simtob*, 901 F.2d at 806.

During the first part of the trial, the government introduced evidence about the health concerns associated with sewage through three witnesses who testified about the waste treatment process and its goal of ridding wastewater of disease-causing microorganisms to the extent possible. One of these witnesses, Ken Greenberg, noted that the discharge from a treatment facility could have adverse effects on the receiving waters and harm swimmers. Defendants failed to object to any of this testimony.

Later on in the trial, however, when the government asked a question of another witness concerning the length of the outfall at Sandy Beach, defendants objected on relevance grounds. The government argued that the testimony was relevant to show defendants' motive in concealing their activities. The court, while expressing initial concern about the lack of relevance and prejudicial effects of injecting "gruesome" testimony about "viruses floating in the water," ruled that testimony regarding the potential health risks of discharging WAS into the water could come in, so long as the prosecutor stayed away from detailed accounts of "viruses and AIDS and all other kinds of stuff." (8 R.T. at 36.)

Edmund Pestana, a lifeguard at Sandy Beach, subsequently testified for the government about the plumes of brown water he had observed coming out of the outfall. The prosecutor asked whether Pestana was aware of people getting sick at the beach, to which the lifeguard answered "yes." The court sustained defendants' objection and instructed the jury to disregard the response. Later, Pestana was asked what he noticed during an incident in which he had windsurfed through discolored water. Pestana stated that he knew he was going through sewage water: "It smelled of it, and it looked of it, and it's nothing less than what your imagination can conjure up. I was scared to fall off my board and into it and get my face wet or anything like that in my mouth or my ears or my nose." (8 R.T. at 126.) The judge ordered the quoted testimony stricken and instructed the jury to disregard it.

At the conclusion of Pestana's testimony, defendants moved for a mistrial, alleging that the prosecutor had deliberately violated the court's ruling regarding the limitations on such testimony. The court denied the motion, noting its curative instructions and the fact that it was common knowledge that WAS, if ingested, would pose a health risk.

Appellants also point to the prosecutor's cross-examination of their wastewater expert regarding the length of the Sandy Beach versus the Sand Island outfall. In the course of this exchange, the court sustained the

11. The government points out that the outfall for the Sand Island facility is many times longer than the one at Sandy Beach, which accounts for the stricter waste handling requirements imposed on the East Honolulu plant.

defendants' objections to two questions regarding whether there were many swimmers near these outfalls.

Finally, in his closing argument, the prosecutor drew attention to the public health hazard engendered by defendants' activities, stating that Weitzenhoff and Mariani "placed at risk the hundreds of people, surfers, body boarders, swimmers, divers, fishermen, people who use Sandy Beach every day." (14 R.T. at 9–10.) The court did not respond to these remarks as defendants did not object to them.

Although the challenged testimony and prosecutorial remarks were of questionable relevance and indeed conveyed repugnant images, considered in the context of the entire proceeding, we do not believe they could have materially affected the verdict or rendered the trial unfair. A substantial amount of testimony regarding the health risks associated with WAS—indeed, the most specific references to viruses, bacteria, and so forth—came in without objection prior to the testimony appellants claim was so prejudicial. As for the most exceptionable testimony, that of the lifeguard, the court sustained objections and issued prompt curative instructions.

[23] Most significant to our analysis, though, is that throughout the trial, Weitzenhoff and Mariani attempted to portray their discharging of WAS into the ocean as a responsible tactic to forestall environmental disaster, thus putting the safety of the public at issue. Both defendants made this point in their opening statements. Later on, Mariani testified that in ordering the discharges, the public health was "first and foremost" in his mind. (11 R.T. at 23, 25.) Against this backdrop, the prosecutor's few additional questions touching upon the health issue and the comments in his summation cannot be considered misconduct.

G. Upward Adjustment of Mariani's Sentence

[24] Mariani contends that the court's two-point upward adjustment of his offense level pursuant to U.S.S.G. § 3C1.1 for obstruction of justice based on the court's finding that he perjured himself was not warranted by his conduct at trial and represents an unconstitutional interference with his right to testify.[12] We review the court's interpretation of the sentencing guidelines de novo, and the factual findings underlying the upward adjustment for clear error. *United States v. McAninch*, 994 F.2d 1380, 1383 (9th Cir.1993).

In sentencing Mariani, the court expressly adopted the determination of the presentence report that Mariani had lied in his testimony at trial. The presentence report notes, with support in the record, that Mariani perjured himself on several occasions when he stated that he believed that the discharges of WAS did not violate the permit. The record shows, for example, that at trial, Mariani consciously underrepresented the size of a WAS holding tank, thus underrepresenting the potential size and impact of the discharges from it. His testimony that he believed that his activities were within the scope of the permit is belied by his efforts to conceal them. The district court's findings in support of the upward adjustment were not clearly erroneous.

[25] Mariani's constitutional challenge to the obstruction of justice enhancement is unavailing. The Supreme Court recently rejected the contention, as had this court, that a sentencing increase based on false testimony unconstitutionally burdens a defendant's right to testify. *United States v. Dunnigan*, — U.S. —, —, 113 S.Ct. 1111, 1117, 122 L.Ed.2d 445 (1993); *see also United States v. Torres–Rodriguez*, 930 F.2d 1375, 1389–90 (9th Cir.1991); *United States v. Barbosa*, 906 F.2d 1366, 1369–40 (9th Cir.), *cert. denied*, 498 U.S. 961, 111 S.Ct. 394, 112 L.Ed.2d 403 (1990). "[A] defendant's right to testify does not include a right to commit perjury." *Dunnigan*, — U.S. at —, 113 S.Ct. at 1117. Mariani's sentence was justly enhanced.

We **AFFIRM** both the convictions and Mariani's sentence.

12. Weitzenhoff elected not to testify at trial.

DISSENTING OPINION FRO
REJECTING SUGGESTION
REHEARING EN BAN

Aug. 8, 1994

KLEINFELD, Circuit Judge, v
Circuit Judges REINHARDT, K
TROTT, and T.G. NELSON join,
from the order rejecting the sugg
rehearing en banc.

I respectfully dissent from our
reject the suggestion for rehearing

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DISSENTING OPINION FROM ORDER REJECTING SUGGESTION FOR REHEARING EN BANC

Aug. 8, 1994

KLEINFELD, Circuit Judge, with whom Circuit Judges REINHARDT, KOZINSKI, TROTT, and T.G. NELSON join, dissenting from the order rejecting the suggestion for rehearing en banc.

I respectfully dissent from our decision to reject the suggestion for rehearing en banc.

Most of us vote against most such petitions and suggestions even when we think the panel decision is mistaken. We do so because federal courts of appeals decide cases in three judge panels. En banc review is extraordinary, and is generally reserved for conflicting precedent within the circuit which makes application of the law by district courts unduly difficult, and egregious errors in important cases. In my view, this is a case of exceptional importance, for two reasons. First, it impairs a fundamental purpose of criminal justice, sorting out the innocent from the guilty before imposing punishment. Second, it does so in the context of the Clean Water Act. This statute has tremendous sweep. Most statutes permit anything except what is prohibited, but this one prohibits all regulated conduct involving waters and wetlands except what is permitted. 33 U.S.C. § 1311(a); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985). Much more ordinary, innocent, productive activity is regulated by this law than people not versed in environmental law might imagine.

The harm our mistaken decision may do is not necessarily limited to Clean Water Act cases. Dilution of the traditional requirement of a criminal state of mind, and application of the criminal law to innocent conduct, reduces the moral authority of our system of criminal law. If we use prison to achieve social goals regardless of the moral innocence of those we incarcerate, then imprisonment loses its moral opprobrium and our criminal law becomes morally arbitrary.

We have now made felons of a large number of innocent people doing socially valuable work. They are innocent, because the one thing which makes their conduct felonious is something they do not know. It is we, and not Congress, who have made them felons. The statute, read in an ordinary way, does not. If we are fortunate, sewer plant workers around the circuit will continue to perform their vitally important work despite our decision. If they knew they risk three years in prison, some might decide that their pay, though sufficient inducement for processing the public's wastes, is not enough to risk prison for doing their jobs. We have decided that they should go to prison if, unbeknownst to them, their plant discharges exceed permit limits. Likewise for power plant operators who discharge warm water into rivers near their plants, and for all sorts of other dischargers in public and private life. If they know they are discharging into water, have a permit for the discharges, think they are conforming to their permits, but unknowingly violate their permit conditions, into prison they go with the violent criminals.

The statute does not say that. The statute at issue makes it a felony, subject to three years of imprisonment, to "knowingly violate[ ] ... any permit condition or limitation." 33 U.S.C. § 1319(c)(2)(A).[1] Here is the statutory scheme, with the portion applied in *Weitzenhoff* in boldface:

"Any person who ...

"negligently violates [various sections of the Clean Water Act] ... or any permit condition or limitation ... [commits a misdemeanor]. 33 U.S.C. § 1319(c)(1)(A);

"negligently introduces into a sewer system or a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or ... which causes such treatment works to violate any effluent limitation or condition in any permit ... [commits a misdemeanor]. 33 U.S.C. § 1319(c)(1)(B);

"knowingly violates [various sections of the Clean Water Act] ... or any permit condition or limitation ... [commits a felony]. 33 U.S.C. § 1319(c)(2)(A);

[1] 1987 amendment raised the crime from a misdemeanor to a felony, and changed the intent requirement from "willfully" to "knowir Pub.L. No. 100-4, § 312, 101 Stat. 42 (1

"knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or ... which causes such treatment works to violate any effluent limitation or condition in a permit ... [commits a felony]. 33 U.S.C. § 1319(c)(2)(B);

"knowingly violates [various sections of the Clean Water Act] ... or any permit condition or limitation ... and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury ... [commits a felony punishable by up to 15 years imprisonment]. 33 U.S.C. § 1319(c)(3)(A).

In this case, the defendants, sewage plant operators, had a permit to discharge sewage into the ocean, but exceeded the permit limitations. The legal issue for the panel was what knowledge would turn innocently or negligently violating a permit into "knowingly" violating a permit. Were the plant operators felons if they knew they were discharging sewage, but did not know that they were violating their permit? Or did they also have to know they were violating their permit? Ordinary English grammar, common sense, and precedent, all compel the latter construction.

As the panel opinion states the facts, these two defendants were literally "midnight dumpers." They managed a sewer plant and told their employees to dump 436,000 pounds of sewage into the ocean, mostly at night, fouling a nearby beach. Their conduct, as set out in the panel opinion, suggests that they must have known they were violating their National Pollution Discharge Elimination System (NPDES) permit. *United States v. Weitzenhoff*, 1 F.3d 1523, 1527–28 (9th Cir. 1993). But we cannot decide the case on that basis, because the jury did not. The court instructed the jury that the government did not have to prove the defendants knew their conduct was unlawful, and refused to instruct the jury that a mistaken belief that the discharge was authorized by the permit would be a defense. Because of the way the jury was instructed, its verdict is consistent with the proposition that the defendants honestly and reasonably believed that their NPDES permit authorized the discharges.

This proposition could be true. NPDES permits are often difficult to understand and obey. The EPA had licensed the defendants' plant to discharge 976 pounds of waste per day, or about 409,920 pounds over the fourteen months covered by the indictment, into the ocean. The wrongful conduct was not discharging waste into the ocean. That was socially desirable conduct by which the defendants protected the people of their city from sewage-borne disease and earned their pay. The wrongful conduct was violating the NPDES permit by discharging 26,000 more pounds of waste than the permit authorized during the fourteen months. Whether these defendants were innocent or not, in the sense of knowing that they were exceeding their permit limitation, the panel's holding will make innocence irrelevant in other permit violation cases where the defendants had no idea that they were exceeding permit limits. The only thing they have to know to be guilty is that they were dumping sewage into the ocean, yet that was a lawful activity expressly authorized by their federal permit.

The statute says "knowingly violate[s] any permit condition or limitation." "Knowingly" is an adverb. It modifies the verb "violates." The object of the verb is "any permit condition or limitation." The word "knowingly" is placed before "violates" to "explain its meaning in the case at hand more clearly." 1 George O. Curme, A Grammar of the English Language 72 (1935). Congress has distinguished those who knowingly violate permit conditions, and are thereby felons, from those who unknowingly violate permit conditions, so are not. The panel reads the statute as though it says "knowingly discharges pollutants." It does not. If we read the statute on the assumption that Congress used the English language in an ordinary way, the state of mind required is knowledge that one is violating a permit condition.

This approach has the virtue of attributing common sense and a rational purpose to Congress. *Cf. Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1311 (9th Cir.1992); *United States v. Martinez-Cano*, 6 F.3d

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1400, 1405 (9th Cir.1993) (dissent). It is one thing to defy a permit limitation, but quite another to violate it without realizing that one is violating it. Congress promulgated a parallel statute making it a misdemeanor "negligently" to violate a permit condition or limitation. 33 U.S.C. § 1319(c)(1)(A). If negligent violation is a misdemeanor, why would Congress want to make it a felony to violate the permit without negligence and without even knowing that the discharge exceeded the permit limit? That does not make any sense. It would deter people from working in sewer plants, instead of deterring people from violating permits. All dischargers acting lawfully pursuant to a permit know that they are discharging pollutants. The presence or absence of that knowledge, which is the only mental element determining guilt under the panel's decision, has no bearing on any conduct Congress could have meant to turn into a felony. The only knowledge which could have mattered to Congress, the only knowledge which distinguishes good conduct from bad, is knowledge that the discharge violates the permit. That is what the statute says, "knowingly violates," not "knowingly discharges." There is no sensible reason to doubt that Congress meant what it said and said what it meant.

The panel reaches its surprising result in surprising ways. First, it says that the statute is ambiguous. "As with certain other criminal statutes that employ the term 'knowingly,' it is not apparent from the face of the statute whether 'knowingly' means a knowing violation of the law or simply knowing conduct that is violative of the law." *Weitzenhoff*, 1 F.3d at 1529. As explained above, a grammatical and sensible reading of the statute leaves no room for ambiguity. But for the sake of discussion, suppose that the statute is ambiguous, as the panel says. Then the rule of lenity requires that the construction allowing the defendant more liberty rather than less be applied by the court. *Ratzlaf v. United States*, — U.S. —, —, 114 S.Ct. 655, 662–63, 126 L.Ed.2d 615 (1994); *Hughey v. United States*, 495 U.S. 411, 422, 110 S.Ct. 1979, 1986, 109 L.Ed.2d 408 (1990). "[L]enity applies 'demand resolution of ambiguities in criminal statutes in favor of the defendant.' *Ratzlaf*, — U.S. at —, 114 S.Ct. at 663. The reason is the need for "fair warning." *Id.* (quoting *McBoyle v. United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 341, 75 L.Ed. 816 (1931) (Holmes, J.)).

Instead of applying the rule of lenity, as it was required to do, the panel, after identifying the ambiguity, said "[w]e turn, then, to the legislative history of the provision at issue to ascertain what Congress intended." That is not an appropriate way to resolve an ambiguity in a criminal law. "Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Crandon v. United States*, 494 U.S. 152, 160, 110 S.Ct. 997, 1002–03, 108 L.Ed.2d 132 (1990). We cannot fairly put sewer plant workers in peril of prison if they do not read House and Senate committee reports.

Even if the use of legislative history were proper here, it would not support the panel's construction. The legislative history furnished a column of quotations and references in the opinion, but no genuine support for the panel's analysis. The opinion relies on two quotations. The first says that criminal liability is to be imposed on any person who "*causes* a POTW [publicly owned treatment works] to violate any effluent limitation or condition in any permit." *Weitzenhoff*, 1 F.3d at 1529 (quoting S.Rep. No. 50, 99th Cong., 1st Sess. 29 (1985)) (emphasis in *Weitzenhoff*). That sounds as though it supports the panel's construction, but no doubt the panel overlooked the context of these words. If one looks up the quotation, one discovers that the Senate report was referring here to another provision, 33 U.S.C. § 1319(c)(2)(B), not to the provision at issue. The other provision has entirely different language, "knowingly introduces ... any pollutant ... which causes such treatment works to violate any effluent limitation or condition in a permit," as opposed to "knowingly violates ... any permit condition or limitation."

The second quotation, from a House report, says that the "knowingly violates" and "negligently violates" crimes are intended to penalize those who "knowingly or negligently violate or cause the violation" of certain laws.

H.R.Rep. No. 189, 99th Cong., 1st Sess. 29–30 (1985). This quotation does not help to answer the question before the panel. The opinion applies subtle grammatical analysis to the phrase in the House committee report, "or cause the violation," to draw an inference that knowing conduct which unknowingly violates a permit was meant to be turned into a felony. Careful grammatical analysis might better be applied to the law which Congress passed and the President signed. Even if inference from unexpressed intent in a committee report from one house were an appropriate means of turning innocent conduct into a felony, the inference from these words is too weak to carry the argument.

The panel's entire excursion into legislative history was fruitless and mistaken. The Supreme Court recently said in *Ratzlaf v. United States*, — U.S. —, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994), "we do not resort to legislative history to cloud a statutory text that is clear. Moreover, were we to find § 5322(a)'s 'willfulness' requirement ambiguous as applied to [structuring], we would resolve any doubt in favor of the defendant." *Id.* at ——–—, 114 S.Ct. at 662–63 (footnote omitted). Analogously, the legislative history cannot properly be used to cloud the legislative restriction of felonies to those permit violations in which the person has "knowingly violate[d]." Even if the statute were ambiguous, the rule of lenity would compel resolution of the ambiguity in favor of the defendant.

The panel then tries to bolster its construction by categorizing the offense as a "public welfare offense," as though that justified more aggressive criminalization without a plain statutory command. This category is a modernized version of "malum prohibitum." Traditionally the criminal law distinguishes between malum in se, conduct wrong upon principles of natural moral law, and malum prohibitum, conduct not inherently immoral but wrong[illegible]e prohibited by law. [illegible]ry 1112 (4th ed. 1951). [illegible]odern terms, any nor[illegible]der, rape and robbery [illegible]ould be wrong even in [illegible]ign and no law. Dis[illegible]tants than one's per[illegible] because the law says [illegible]nodern term "public welfare offense" for the traditional one, malum prohibitum, allows for confusion by rhetorical suggestion. The new term suggests that other offenses might merely be private in their impact, and therefore less serious. The older set of terms made it clear that murder was more vile than violating a federal regulation. The category of malum prohibitum, or public welfare offenses, makes the rule of lenity especially important, most particularly for felonies, because persons of good conscience may not recognize the wrongfulness of the conduct when they engage in it.

Staples v. United States, — U.S. —, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994), reminds us that "offenses that require no *mens rea* generally are disfavored." *Id.* at —, 114 S.Ct. at 1797. *Mens rea* may be dispensed with in public welfare offenses, but the penalty is a "significant consideration in determining whether the statute should be construed as dispensing with *mens rea*." *Id.* at —, 114 S.Ct. at 1802.

The potentially harsh penalty attached to violation of § 5861(d)—up to 10 years' imprisonment—confirms our reading of the Act. Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*. Certainly, the cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary.

As commentators have pointed out, the small penalties attached to such offenses logically complemented the absence of a *mens rea* requirement: in a system that generally requires a "vicious will" to establish a crime, imposing severe punishments for offenses that require no *mens rea* would seem incongruous. Indeed some courts justified the absence of *mens rea* in part on the basis that the offenses did not bear the same punishments as "infamous crimes," and questioned whether imprisonment was compatible with the reduced culpability required for such regulatory offenses.

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Id. at ——-——, 114 S.Ct. at 1802–03 (footnote and citations omitted). If Congress makes a crime a felony, the felony categorization alone is a "factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement. In such a case, the usual presumption that a defendant must know the facts that make his conduct illegal should apply." *Id.* at ——, 114 S.Ct. at 1804. In the case at bar, "the facts that make his conduct illegal" are the permit violations, not the discharges of pollutants. Discharge of pollutants was licensed by the federal government in the NPDES permit. Under *Staples*, it would be presumed, even if the law did not plainly say so, that the defendant would have to know that he was violating the permit in order to be guilty of the felony.

Precedent cuts strongly against the panel's decision. Two Supreme Court decisions came down this term which should have caused us to rehear the case.

Ratzlaf v. United States, — U.S. ——, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994), reversing a decision of ours, holds that to commit the crime of "willfully violating" the law against structuring cash transactions to evade currency transaction reporting requirements, the defendant has to know that his conduct is unlawful. It is not enough that he is engaging in the cash transactions with a purpose of evading currency transaction reporting requirements. *Id.* at ——, 114 S.Ct. at 657. Ignorance of the law generally is no excuse, but "Congress may decree otherwise." *Id.* at ——, 114 S.Ct. at 663. The Court was concerned that a narrower reading of the mental element of the crime would criminalize conduct committed without the criminal motive with which Congress was concerned. *Id.* at ——, 114 S.Ct. at 661.

At issue in *Staples v. United States*, — U.S. ——, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994), was a statute which made it a felony to possess an unregistered "firearm." The statute defined "firearm" to include a fully automatic gun, which would fire more than one bullet on a single pull of the trigger, but not a semiautomatic. The defendant possessed a fully automatic gun, but testified that he did not know it would fire more than one bullet with a single trigger pull. The trial judge had instructed the jury that his ignorance did not matter, so long as the government proved he possessed "a dangerous device of a type as would alert one to the likelihood of regulation." The Supreme Court again rejected dilution of the mental element of the crime. The Court explained that unlike the hand grenades in *United States v. Freed*, 401 U.S. 601, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971), semiautomatics are innocently possessed by many people. Nor was knowledge that guns are regulated enough to require the owner to ascertain compliance with the regulations at his peril. That might do for a misdemeanor, but the felony status of the offense suggested a more plainly criminal mental state. Nor would the dangerousness of guns suffice to weaken the mens rea requirement:

> If we were to accept as a general rule the Government's suggestion that dangerous and regulated items place their owners under an obligation to inquire at their peril into compliance with regulations, we would undoubtedly reach some untoward results. Automobiles, for example, might also be termed "dangerous" devices and are highly regulated at both the state and federal levels. Congress might see fit to criminalize the violation of certain regulations concerning automobiles, and thus might make it a crime to operate a vehicle without a properly functioning emission control system. But we probably would hesitate to conclude on the basis of silence that Congress intended a prison term to apply to a car owner whose vehicle's emissions levels, wholly unbeknownst to him, began to exceed legal limits between regular inspection dates.

Staples, — U.S. at ——-——, 114 S.Ct. at 1801–02.

Nor does our own precedent support the panel's result. Our case most closely in point goes the other way. It is a crime to "knowingly transport[ ] or cause[ ] to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit." 42 U.S.C. § 6928(d)(1). Must the government prove that the defendant knew the facility did not have a permit, or can a person be convicted if he knows he is transporting, even if he honestly and rea-

sonably believes that the facility does have a permit? We held in *United States v. Speach*, 968 F.2d 795 (9th Cir.1992), that the government must prove that the transporter knew the facility did not have a permit. "Removing the knowledge requirement would criminalize innocent conduct...." *Id.* at 796.

The panel's suggested distinctions of *Speach* do not justify the difference in result. In *Speach*, we construed an ambiguous statute to require more rather than less knowledge of what made the conduct wrong, because diluting the knowledge requirement could ensnare the innocent. Likewise here. If a sewage worker pulls the switch to discharge sludge into the sea, because that is his job and the plant has a federal permit to discharge sludge into the sea, the panel opinion makes him guilty of a felony, if unbeknownst to him the particular discharge will violate the permit limits. *Speach* says that a narrow construction of the knowledge requirement in that case would "criminalize innocent conduct." 968 F.2d at 796. The statute could be read literally either way, so *Speach* read it, consistently with the rule of lenity, in the way which required that the defendant know of the absence of a permit, not just that he or she was transporting a hazardous waste. The same reasoning applies in *Weitzenhoff*, if the statute is ambiguous at all.

The panel cites *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 91 S.Ct. 1697, 29 L.Ed.2d 178 (1971), and *United States v. Hoflin*, 880 F.2d 1033 (9th Cir.1989), in support of its reading. *International Minerals* was a pre-*Ratzlaf* misdemeanor case. Because of the syntactically similar statute at issue in that case, it is the strongest authority for the panel's decision and raises the most serious question for my own analysis. It held that a shipper of sulfuric acid could be convicted of violating a statute applying to those who "knowingly violate[ ]" regulations governing shipments of corrosive liquids, regardless of whether he had knowledge of the regulations. *International Minerals* expressly limits its holding to "dangerous or deleterious devices or products or obnoxious waste materials." 402 U.S. at 565, 91 S.Ct. at 1702. The Court distinguished materials not obviously subject to regulation:

> Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require ... "*mens rea*" as to each ingredient of the offense. But where, as here ..., dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.

Id. at 564–65, 91 S.Ct. at 1701–02. *International Minerals* would have much persuasive force for *Weitzenhoff*, because of the grammatical similarity of the statute, if (1) the Clean Water Act limited pollutants to "dangerous or deleterious devices or products or obnoxious waste materials;" (2) the crime was only a misdemeanor; and (3) *Staples* had not come down this term. But all three of these conditions are contrary to fact. The pollutants to which the Clean Water Act felony statute applies include many in the "pencils, dental floss, paper clips" category. Hot water, rock, and sand are classified as "pollutants" by the Clean Water Act. *See* 33 U.S.C. § 1362(6). Discharging silt from a stream back into the same stream may amount to discharge of a pollutant. For that matter, so may skipping a stone into a lake. So may a cafeteria worker's pouring hot, stale coffee down the drain. Making these acts a misdemeanor is one thing, but a felony is quite another, as *Staples* teaches.

> In *Hoflin*, the statute made it a crime to: (2) knowingly ... dispose[ ] of any hazardous waste....
>
> (A) without having obtained a permit ... or
>
> (B) in knowing violation of [a permit condition].

We held that the "stark contrast" between the presence of "knowing" in subsection (B) and its absence in subsection (A) implied that knowledge of the absence of a permit was not an element of the subsection (A) crime. It was apparent from the nonparallel syntax of the statute that the word "knowing" in the introductory line modified only "disposes," not "without having obtained a permit." The

U.S. v. Cite

statute in *Hoflin* is not like the o[ne] The panel unfortunately did [not] the careful analysis of the synta[x] statute in our case that was made i[n] her

The panel, finally, asserts that as [a] of policy, the Clean Water Act cri[es] clearly designed to protect the publi[c] from the dire consequences of wa[ter] tion." That is true, but the panel explain how the public is to be pro[tected] making felons of sewer workers who ingly violate their plants' permits. [The] for sanitary sewage disposal is an most ancient laws of civilization. De[ut.] my 23:12–13. Sewage workers per[form] sential work of great social value. [Little] nothing has prevented more infant [deaths] or freed more people from cholera, [typhoid] typhoid fever, and other disease, t[han] development in the last two centuries nicipal sewer systems. *See* W.H. [Corfield] The Treatment and Utilisation of Sew[age] 27 (1871). Sewage utility workers their difficult work in malodorous a[nd] gerous environments. We have now on these vitally important public ser[vices] massive legal risk, unjustified by law cedent, if they unknowingly violate th[eir] mit conditions.

Nor is the risk of prison limited to plant workers. It applies to anyo[ne] discharges pollutants pursuant to a and unknowingly violates the permi[t]. panel suggests that criminalizing thi[s] cent conduct will protect the publi[c] water pollution. It is at least as like[ly] the increased criminal risk will raise t[he] and reduce the availability of such law essential public services as sewage d[is]. We should not deprive individuals of whether the judicial action would serv[e] desirable policy or not. It is by no certain that the panel's construction v[ia]vance the underlying policy it attribu[tes] Congress. We should apply the word gress and the President promulgated leaving the difficult policy choices to

We undermine the foundation of cr[im]inal when we so vitiate the requiremen[t]

statute in *Hoflin* is not like the one before us. The panel unfortunately did not make the careful analysis of the syntax of the statute in our case that was made in *Hoflin*.

The panel, finally, asserts that as a matter of policy, the Clean Water Act crimes "are clearly designed to protect the public at large from the dire consequences of water pollution." That is true, but the panel does not explain how the public is to be protected by making felons of sewer workers who unknowingly violate their plants' permits. Provision for sanitary sewage disposal is among the most ancient laws of civilization. Deuteronomy 23:12–13. Sewage workers perform essential work of great social value. Probably nothing has prevented more infant mortality, or freed more people from cholera, hepatitis, typhoid fever, and other disease, than the development in the last two centuries of municipal sewer systems. *See* W.H. Corfield, The Treatment and Utilisation of Sewage 17–27 (1871). Sewage utility workers perform their difficult work in malodorous and dangerous environments. We have now imposed on these vitally important public servants a massive legal risk, unjustified by law or precedent, if they unknowingly violate their permit conditions.

Nor is the risk of prison limited to sewage plant workers. It applies to anyone who discharges pollutants pursuant to a permit, and unknowingly violates the permit. The panel suggests that criminalizing this innocent conduct will protect the public from water pollution. It is at least as likely that the increased criminal risk will raise the cost and reduce the availability of such lawful and essential public services as sewage disposal. We should not deprive individuals of justice, whether the judicial action would serve some desirable policy or not. It is by no means certain that the panel's construction will advance the underlying policy it attributes to Congress. We should apply the words Congress and the President promulgated as law, leaving the difficult policy choices to them.

We undermine the foundation of criminal law when we so vitiate the requirement of a criminal state of knowledge and intention as to make felons of the morally innocent.

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to".... Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."

Morissette v. United States, 342 U.S. 246, 250–51, 72 S.Ct. 240, 243–44, 96 L.Ed. 288 (1952) (footnote omitted). As Justice Jackson explained, "Consequences of a general abolition of intent as an ingredient of serious crimes have aroused the concern of responsible and disinterested students of penology. Of course, they would not justify judicial disregard of a clear command to that effect from Congress, but they do admonish us to caution in assuming that Congress, without clear expression, intends in any instance to do so." *Id.* at 254 n. 14, 72 S.Ct. at 246 n. 14.

Congress made it a serious felony "knowingly" to violate permit limitations on discharge of pollutants. The harsh penalty for this serious crime must be reserved for those who know they are, in fact, violating permit limitations.

Exhibit_____(GHB-37)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY, INC., Defendant.	)	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' FIRST SET OF INTERROGATORIES TO DEFENDANT FLORIDA CITIES WATER CO.

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, Plaintiff, the United States of America, serves upon Defendant Florida Cities Water Company the following interrogatories to be answered by Defendant separately and fully in writing and under oath, and served upon the undersigned attorney within 30 days.

INSTRUCTIONS AND DEFINITIONS

A. Unless otherwise specified, these interrogatories pertain to Florida Cities Water Company, Inc. ("Defendant") and and its parent companies, and the directors, departments, divisions, officers, employees, agents, servants, assigns and, unless privileged, the attorneys of Defendant and its parent companies.

B. These interrogatories are continuing in nature and require you to provide supplemental answers promptly in the event that you or your attorney obtain information that alters or augments the answers now given.

C. Where an individual interrogatory calls for an answer that involves more than one piece of information, each part of the answer is to be set out clearly so that it is understandable.

D. Words used in the plural shall also be taken to mean and include the singular. Words used in the singular shall also be taken to mean and include the plural. "Or" and "and" shall be construed either conjunctively or disjunctively to bring within the scope of these interrogatories any information that might otherwise be construed to be outside their scope. The past tense includes the present tense where the clear meaning is not distorted by change of tense.

E. "EPA" means the United States Environmental Protection Agency, and its agents and employees.

F. "Person" includes any natural person, firm, corporation, partnership, joint venture, association, proprietorship, company, government agency, group, or other entity or organization.

G. "Document" means any and all material that is written, printed, typed, photographed, recorded (electronically, magnetically, graphically or otherwise) or which is capable of being recorded in any form. It includes, but is not limited to, any logs of materials received, other logs, invoices, purchase orders, receipts, bills of lading, loading tickets, receiving tickets, shipping orders, inventories, letters and other correspondence, offers, contracts, agreements, bids, proposals, applications, licenses, permits, reports to government agencies, other reports, minutes of meetings, sales estimates, sales

reports, memoranda, handwritten or other notes, calendar or diary entries, agendas, bulletins, graphs, charts, map, photographs, drawings, data, price lists, list of accounts, summaries, telexes, telegrams, teletypes, computer printouts, magnetic tapes, discs, microfilm, and microfiche.

H. "Relate(s)" or "relating to" means constituting, defining, containing, embodying, reflecting, identifying, stating, referring to, dealing with, or in any way pertaining to.

I. "Identify", "identification" and "identifying" mean and include, with respect to a natural person the following:

(1) full name;

(2) home address and telephone number;

(3) present employer, business address and telephone number; and

(4) present occupation, job title and responsibilities.

J. All terms not expressly defined above are used herein as used in common English and/or as used within the meaning of the Clean Water Act, 33 U.S.C. §§ 1251 to 1387.

INTERROGATORIES

1. For each interrogatory in this and subsequent sets, identify fully (see instructions) all persons who have assisted in any way in answering the interrogatory, except for those persons providing clerical and secretarial assistance.

2. For each Request for Production of Documents served upon you by the United States in this action, state each employee, officer, and director of Florida Cities Water Company (and its parent companies) from whose files documents responsive to the request were produced.

3. For each allegation in the United States' Complaint in this action denied by Defendant, summarize in full the facts supporting Defendant's denial. (If the answers to these interrogatories are served subsequent to the filing of an Amended Complaint, this interrogatory shall apply to the Amended Complaint and not to the Complaint.)

4. Identify fully (see instructions) all directors, officers, and employees of Defendant from January 1, 1980 to the present. For each such person, state the term of their employment and, if no longer employed, the reason for the termination of their employment; the total compensation received from Defendant on an annual basis for each calendar year 1980 to the present; and specify in what respect, if any, each such person's responsibilities relate(d) to the operation of Defendant's wastewater treatment facilities and Defendant's

compliance with environmental laws and regulations.

5. Identify each wastewater treatment plant owned and/or operated by Defendant during the period 1980 through the trial of this action. For each such plant, state (1) the years in which the plant discharged effluent into waters of the United States; (2) during what years Defendant held an EPA National Pollutant Discharge Elimination System (NPDES) permit to discharge effluent from the plant into waters of the United States; and (3) which persons identified in response to interrogatory no. 3 were aware of any unpermitted discharges and on or about what date they became so aware.

6. For the period 1988 to the trial of this matter, list, by date and type, each violation of any federal, state, or local environmental law or regulation, including all violations of any permit, at any facility owned and/or operated by Florida Cities Water Company. If you deem the use of the word "violation" to constitute a legal conclusion, list, by date and type, any instance of non-compliance with any federal, state, or local environmental law or regulation, including all instances of non-compliance with any permit, and any exceedance of a permit limitation or condition, at any facility owned and/or operated by Florida Cities Water Company.

7. For each violation (or instance of non-compliance, etc.) listed in response to interrogatory no. 5 above, state (1) the nature of the violation; (2) the reason for the violation; (3) any and all measures taken to prevent the violation; and (4)

which persons identified in response to interrogatory no. 3 were aware of the violations and on or about what date they became so aware.

8. Identify fully (see instructions) all persons whom you intend to call as factual witnesses at any hearing, trial, or other proceeding in this case, state the subject matter on which each witness is expected to testify, and summarize the facts to which each witness is expected to testify.

9. Identify fully (see instructions) all expert witnesses you intend to call at trial in this case; the subject matter on which, and the substance of the facts and opinions to which, the expert is expected to testify; and provide a summary of the grounds for each opinion.

10. State whether you intend to attempt to recover through your rates the costs associated with this action, including the costs of civil penalties and legal expenses incurred.

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

By: _____

DANIEL S. JACOBS
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 514-4076

CHARLES R. WILSON
United States Attorney
Middle District of Florida

MICHAEL A. CAULEY
Assistant United States Attorney
Middle District of Florida
500 Zack Street, Suite 400
Tampa, Florida 33602

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing "United States' First Set of Interrogatories to Defendant Florida Cities Water Co." was served by U.S. Mail (except as otherwise indicated) on the 1st day of March, 1995, to the following attorneys of record:

Gary Baise (by fax and U.S. mail)
Don G. Scroggin
Gabeler, Baise & Miller
Suite 200
1320 Old Chain Bridge Road
McLean, VA 22101

David R. Berz
Weil, Gotshal & Manges
1615 L Street, NW
Washington, DC 20036

John Noland
Russell P. Schropp
Henderson, Franklin, Starnes & Holt
Post Office Box 280
Fort Myers, FL 33902-0280

Darlene F. Lyons

Exhibit_____(GHB-38)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.:
	)	93-281-CIV-FM-21
FLORIDA CITIES WATER COMPANY,	)	
	)	
Defendant.	)	
	)	

Defendant's Second Request for Production of Documents to Plaintiff United States of America

Defendant Florida Cities Water Company ("FCWC"), pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure ("FRCP"), hereby requests that Plaintiff United States of America ("United States") produce and make available for inspection and copying, at a mutually agreeable location, the documents identified in this Request for Production of Documents ("Request for Production") that are within Plaintiff's possession, custody, or control, within thirty (30) days of the date of service of this Request for Production. Such production of documents shall be in accordance with the FRCP and the following instructions and definitions.

Definitions

1. "Plaintiff" or "United States" means all agencies of the United States, including the United States Department of Justice, the United States Attorneys' Offices, and the national headquarters, regional offices, field offices, laboratories, or other facilities of the United States Environmental Protection Agency ("EPA"), and any other agent, representative, or person acting on behalf of the United States.

2. "Defendant" or "FCWC" means the Florida Cities Water Company, including its officers, employees, agents, and any others acting on its behalf.

3. "Person," unless otherwise specified, means any present or past individual or natural person, firm, partnership, association, corporation, municipal corporation, proprietorship, governmental body or political subdivision thereof, government agency or commission, or any other organization or entity.

4. "Government" or "governmental" means relating to any federal, state, local, municipal, county, city, or other similar entity or organization.

5. "Document" is used in the broadest sense and includes, but is not limited to, the original and all non-identical copies of the following items, whether

in draft or final form, and whether printed, recorded, reproduced by hand, or maintained in any computer database or machine-readable form: memoranda, letters, reports, evaluations, correspondence, summaries and/or reports of inspections, communications, intra-office memoranda and/or communications, inter-office communications, agreements, contracts, invoices, checks, journals, records, ledgers, diaries, logs, summaries and/or records of telephone or personal conversations or interviews, telegrams, summaries, notebooks, handwritten, typewritten or otherwise maintained or recorded notes, periodicals, pamphlets, brochures, circulars, computer or business machine print-outs, accountants' work papers, other working papers, accountants' statements and writings, marginal or other notation, minutes or records of meetings, reports and/or summaries of negotiations, printers' galleys, books, papers, speeches, public relations issues, advertising, press releases, material filed with government agencies, office manuals, appraisals or evaluations, employee manuals or office rules and regulations, opinions or reports of experts or consultants, any other written matter, tape recordings or other sound or visual reproduction materials, photographs, drawings, computer data bases, or any tangible or physical objects however produced or reproduced upon

which words or other information are affixed or recorded or from which by appropriate transcription written matter or a tangible thing may be produced.

6. "Relate," "relating to," "refer to," "with respect to," or "refers to" means in whole or in part, directly or indirectly, mentioning, discussing, reflecting, containing, embodying, stating, dealing with, analyzing, constituting, defining, concerning, identifying, or in any way pertaining or relevant to.

7. "State" means the State of Florida, including all its departments, agencies, agents, officials, or any other representative acting in its behalf.

9 "NPDES permits" means any National Pollutant Discharge Elimination System permits issued by EPA to FCWC, including, but not limited to, permits that are or were temporary, renewed, continuing, permanent, or in any way modified.

Instructions

1. Plaintiff is requested to respond to this Request for Production within thirty (30) days by producing and making available for inspection and copying each of the documents identified in this Request for Production that are within Plaintiff's possession, custody, or control.

2. In particular, Plaintiff must produce and make available for inspection and copying all non-identical, responsive documents that are within the possession, custody or control of (1) EPA's main offices or Headquarters in Washington, D.C., and (2) EPA Region IV offices. If Plaintiff is aware of additional, non-identical, responsive documents in other Regions or other EPA offices, such documents should also be produced.

3. Documents shall be produced in the order in which they are currently maintained, and in the form in which they are maintained in the files (i.e., stapled, clipped, or otherwise fastened together). File folders in which the documents are contained shall be considered as part of each document contained therein.

4. For each document produced, indicate on the document or in some other reasonable manner, the numbered request(s) to which it responds.

5. In your response, specify for each request the location, volume, file title(s), and custodian(s) of the requested documents.

6. This Request for Production of Documents is continuing, and Plaintiff shall supplement or amend its initial responses in accordance with Rule 26(e) of the Federal Rules of Civil Procedure, or if Plaintiff obtains further or

different information, and as otherwise becomes necessary during the course of this litigation.

7. If any document was, but is no longer in your possession, custody or control, state:

(a) the disposition of the document;

(b) the date such disposition was made;

© the identity and address of the present custodian of the document or, if the document and/or the custodian no longer exists, so state;

(d) the person(s) who made the decision to dispose of the document;

(e) the reason(s) for the disposition; and

(f) a description of the document and a description of the contents of the document.

8. If any document is withheld under any claim of privilege, furnish a list identifying each document for which the privilege is claimed, together with the following information:

a. the title of the document, or if it has no title, the subject of the document;

b. the type of document;

c. the date of the document;

d. the name and job title of each author or addresser;

e. the name and job title of each addressee;

f. the name and job title of all recipients of copies;

g. the privilege asserted and basis upon which the privilege is claimed; and

h. name, address and telephone number of the custodian of the document and/or copies thereof.

9. If anything is deleted from a document produced in response to these requests, state:

a. the reason for the deletion; and

b. the subject matter of the deleted material.

10. Plaintiff is to retain in its possession, custody and control, and to refrain from destroying, any document requested herein that is in the possession, custody or control of Plaintiff as of the date of service of these requests.

11. Words used in the plural shall also be taken to mean and include the singular. Words used in the singular shall also be taken to mean and include the plural. Any references to gender shall also be taken to mean and include the opposite gender, so as to include, rather than exclude, documents.

12. "And" and "or" shall be construed conjunctively or disjunctively, as necessary, to make the request inclusive rather than exclusive.

13. Unless otherwise stated, these requests apply to the period beginning on January 1, 1980 and ending at the conclusion of trial of this matter.

Documents Requested

31. All documents currently in existence called for by Defendant's First Request for Production of Documents (paragraphs 1 to 30), which plaintiff has not previously produced.

32. All documents reflecting the facts and circumstances relating to the referral of this matter to the Department of Justice for litigation, including the persons responsible for that referral, the reasons for it, and a comparison between this case and other Clean Water Act cases which EPA considered for referral between January 1, 1984 and December 31, 1988.

33. All documents reflecting the criteria and procedures used by EPA Region IV for referral of matters to the Department of Justice for litigation.

34. Documents reflecting the general procedures, practices, and internal agency guidance of EPA in reviewing and approving lists of water quality-limited stream segments under the Clean Water Act during the years 1980-1990.

35. Documents reflecting all denials by EPA Region IV of NPDES permit renewal applications from 1980-present.

36. All documents reflecting EPA's knowledge and efforts to coordinate state, county and local permitting requirements as they relate to the

upgrade to AWT and extension of the outfall pursuant to EPA's Administrative Orders of May 11, 1987 and September 26, 1989.

37. All documents reflecting the facts and circumstances surrounding other EPA Region IV NPDES initial and renewal permit application denials from 1980 to the present, and the results of any litigation (criminal or civil) arising from said NPDES permit application denials.

38. All documents reflecting any evidence known to EPA of actual environmental harm caused by Defendant's discharges including, but not limited to, the amount of pollutant, the toxicity of pollutant, and the environmental sensitivity of the area.

39. All documents reflecting the risk of harm inherent in the violations alleged in the complaint at the time they were committed.

40. Documents reflecting: a) the criteria for inclusion on EPA Region IV's Significant Non-compliance List for Clean Water Act violations, b) the identity of all companies included on said list from 1980 to present, and c) the types and results of enforcement actions, both administrative and judicial, taken between 1980 and the present against the identified companies.

41. All documents referred to in your responses to any of defendant's interrogatories, or relied upon by plaintiff in the preparation of those responses.

March 22, 1995.

Respectfully submitted,

Gary H. Baise, Esq. (Trial Counsel)
Don G. Scroggin, Esq.
Gabeler, Baise & Miller, P.C.
1320 Old Chain Bridge Road
Suite 200
McLean, Virginia 22101
Phone: 703-790-3456
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David R. Berz, Esq.
Weil, Gotshal & Manges
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Phone: 202-682-7272
Fax: 202-857-0939

Of Counsel:

Dennis J. Getman, Esq.
General Counsel
Florida Cities Water Company
P.O. Box 523000
Miami, FL 33152-3000
Phone: 305-442-7000
Fax: 305-448-9927

Exhibit_____(GHB-39)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.:
	)	93-281-CIV-FTM-21
FLORIDA CITIES WATER COMPANY,	)	
	)	
Defendant.	)	
_____	)	

DEFENDANT'S OFFER OF JUDGMENT

Defendant Florida Cities Water Company, pursuant to F.R.Civ.P. 68, hereby offers to allow judgment to be taken against it in the amount of five hundred thousand dollars ($500,000.00), and costs thus far accrued.

Respectfully submitted,

Gary H. Baise, Esq. (Trial Counsel)
Don G. Scroggin, Esq.
Gabeler, Baise & Miller, P.C.
Suite 200
1320 Old Chain Bridge Road
McLean, VA 22101
Phone: 703-790-3456
Fax: 703-790-5862

Certificate of Service

I certify that, although I have not filed this document with the Court, on March 30, 1995 I caused a copy of this "Defendant's Offer of Judgment" to be served by hand, and also by certified mail, upon:

Daniel S. Jacobs, Esquire
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Room 11002
1425 New York Avenue, Northwest
Washington, D.C. 20005

and was sent by first class mail, properly addressed and postage prepaid, to:

Lois J. Schiffer, Esquire
Acting Assistant Attorney General
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044

Douglas N. Frazier, Esquire
United States Attorney
Middle District of Florida
500 Zack Street, Suite 400
Tampa, Florida 33602

Michael A. Cauley, Esquire
Assistant United States Attorney
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Tampa, Florida 33602

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Washington, DC 20036
Phone: 202-682-7272
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John A. Noland, Esq.
Henderson, Franklin, Starnes & Holt, P.A.
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Fax: 813-332-4494

Of Counsel:

Dennis J. Getman, Esq.
General Counsel
Florida Cities Water Company
P.O. Box 523000
Miami, FL 33152-3000
Phone: 305-442-7000
Fax: 305-448-9927

March 14, 1995

Gwendolyn G. Eason, Esquire
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region IV
345 Courtland Street, Northeast
Atlanta, Georgia 30365

Gary H. Baise

Exhibit_____(GHB-40)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY, Defendant.	)	CIVIL ACTION NO.: 93-281-CIV-FTM-21

Defendant's Notice of Intention To Oppose Constructive Motion by United States for Leave To File Amended Complaint

Defendant Florida Cities Water Company ("Florida Cities") hereby gives notice that it intends to oppose the United States' constructive motion for leave to file an Amended Complaint.

Although the United States served an Amended Complaint upon Florida Cities by facsimile on March 30, 1995, it served no motion for leave to file the Amended Complaint. F.R.Civ.P. 15(a) provides that, in the circumstances obtaining here, the United States may amend its complaint "only by leave of court . . . ." This Court's February 27, 1995 Order provides, consistent with F.R.Civ.P. 15(a), that "[motions to add parties or amend pleadings must be filed by April 15, 1995." (¶ 5, Order Limiting Time For Completion Of Discovery And Scheduling Of Final Pretrial Conference And Trial, filed Feb. 27, 1995) (emphasis supplied).

The Court gave oral leave to amend at the February 15, 1995 hearing before Magistrate Judge Swartz. However, the only Order entered by the Court addressing potential amendments to the complaint is the Court's February 27, 1995 Order, which specifically requires the United States to move for the court's leave to amend the complaint. Since that February 27, 1995 Order is the only Order from the court on this matter, it appears controlling in this situation. Thus, the Court has

given the United States until April 15, 1995 to move the Court to amend the complaint; it has not given the United States a license to file whatever amended complaint it wished without leave of Court to do so

On March 30, 1995, the United States served upon Florida Cities a "Motion for Leave To Add a New Party Defendant." That Motion was limited to adding a new party, not adding new allegations against Florida Cities. Rather than delay these proceedings to allow time for the government to correct its filing to amend the complaint to comply with the Court's Order, Florida Cities will treat the government's Motion To Add a New Party as also a motion for leave to amend the complaint. Defendant Florida Cities will be filing an opposition to the United States' constructive motion for leave to amend within the time allowed by the local and federal rules.

Respectfully submitted,

Gary H. Baise, Esq. (Trial Counsel)
Don G. Scroggin, Esq.
Gabeler, Baise & Miller, P.C.
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1320 Old Chain Bridge Road
McLean, VA 22101
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Fax: 813-332-4494

Of Counsel

Dennis J. Getman, Esq.
General Counsel
Florida Cities Water Company
P.O. Box 523000
Miami, FL 33152-3000
Phone: 305-442-7000
Fax: 305-448-9927

April 4, 1995

Certificate of Service

I certify that, on April 4, 1995, I caused a copy of "Defendant's Notice of Intention To Oppose Constructive Motion by United States for Leave To File Amended Complaint" to be served by fax and by first class mail, postage prepaid, upon:

Daniel S. Jacobs, Esquire
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044

and to be sent by first class mail, properly addressed and postage prepaid, to:

Lois J. Schiffer, Esquire
Assistant Attorney General
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044

Douglas N. Frazier, Esquire
United States Attorney
Middle District of Florida
500 Zack Street, Suite 400
Tampa, Florida 33602

Michael A. Cauley, Esquire
Assistant United States Attorney
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Gwendolyn G. Eason, Esquire
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region IV
345 Courtland Street, Northeast
Atlanta, Georgia 30365

Gary H. Baise

Exhibit_____(GHB-41)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

United States of America,

Plaintiff,

v.

Florida Cities Water Company,

Defendant.

Case No. 93-281-CIV-FTM-21D

DEFENDANT'S MEMORANDUM IN PARTIAL OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

This memorandum by Defendant Florida Cities Water Company ("Florida Cities"), is in opposition to portions of Plaintiff's Motion for Leave to Amend Complaint, and is submitted pursuant to this Court's Order, dated April 10, 1995.

SUMMARY OF ARGUMENT

In its proposed Amended Complaint ("Amended Complaint"), the Plaintiff seeks a second bite of an apple it has already eaten. The Clean Water Act makes clear that EPA may not seek civil judicial penalties for violations already settled by an EPA administrative order assessing penalties. Florida Cities has already agreed to administrative orders assessing penalties for alleged violations, including discharges without a federal permit, at both its Barefoot Bay and Carrollwood facilities. The Amended Complaint makes claims for relief for those same violations, already settled by

these parties. As the Clean Water Act expressly prohibits EPA from seeking civil penalties for violations for which an administrative order has already been issued and a penalty paid, it would be futile for EPA to amend the complaint to seek these prohibited penalties.. When it is futile to allege newly-asserted claims, a trial court should deny leave to amend a complaint.

PROCEDURAL AND FACTUAL BACKGROUND

1. Introduction. This is an action by the United States under the Clean Water Act, 33 U.S.C. §§ 1251-1387 (the "Act"). Under 33 U.S.C. § 1319(d), Plaintiff seeks to recover up to $25,000.00 for each day Florida Cities allegedly violated any provision of the Act, or any order or permit issued pursuant to the Act. Florida Cities has operated, among others, the Waterway Estates Wastewater Treatment Plant ("Waterway Estates"), the Barefoot Bay Wastewater Treatment Plant ("Barefoot Bay") until January 5, 1992, and the Carrollwood Wastewater Treatment Plant ("Carrollwood"). Plaintiff's original complaint alleged violations of the Act only at Waterway Estates. The Amended Complaint alleges for the first time similar violations of the Act at Barefoot Bay and Carrollwood consisting essentially of two categories of violations: discharging without a federal permit and a collection of intermittent exceedances of the permit. This memorandum addresses only the first category of violations, for discharge without an NPDES permit.

Paragraph 16 of the Amended Complaint alleges that from about April 1, 1990 to October 31, 1991, Florida Cities discharged pollutants from Barefoot Bay without an

NPDES permit[1]. Paragraph 30 alleges that from about August 1990 to June 1991, Florida Cities discharged pollutants from Carrollwood without an NPDES permit. Florida Cities opposes granting the Plaintiff leave to amend the complaint by adding paragraphs 16 and 30.[2] Florida Cities does not oppose granting Plaintiff leave to add the other paragraphs of the Amended Complaint, except that Florida Cities supports the opposition of Avatar Holdings Inc. to Plaintiff's motion for leave to add it as a party.

The Clean Water Act requires that a discharger of effluent into waters of the United States obtain authorization to discharge in the form of a permit, pursuant to the National Pollutant Discharge Elimination System (an "NPDES permit"). The Act also authorizes EPA to delegate responsibility for issuing these NPDES permits to those states with an approved permitting program. This system of delegation eliminates the need for a facility to have both federal and state authorizations to discharge. As Florida has not yet been granted authority to issue NPDES permits (anticipated shortly), facilities in Florida with discharges to surface waters must still obtain both state authorization and a federal NPDES permit to discharge.

The discharges at issue in this case are alleged to have occurred without a federal NPDES permit, perhaps giving the incorrect impression that these discharges were unregulated by any environmental regulatory agency. At all relevant times, however,

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[1] National Pollutant Discharge Elimination System ("NPDES") permits are issued by the United States Environmental Protection Agency ("EPA"), pursuant to 33 U.S.C. § 1342.

[2] The other claims concerning Barefoot Bay and Carrollwood are minor allegations of discharges in excess of administrative order or permit limits.

Florida Cities had authorizations from the state of Florida to discharge effluent, as necessary, from these facilities to surface waters. Further, both these facilities were in substantial compliance with these state authorizations, which imposed extensive monitoring requirements, effluent limitations, and monthly reporting of these data to the state. EPA must have been aware of these state authorizations, which would have been considered as part of EPA's process for evaluating applications for a federal NPDES permit.

2. Barefoot Bay. On September 26, 1990, the EPA issued an Administrative Order concerning Barefoot Bay. Ex. 1. That Order noted that Florida Cities was violating the Act by discharging from Barefoot Bay without a valid NPDES permit and directed that Florida Cities comply with specific effluent limitations and monitoring requirements until the NPDES permit for which it had applied was issued. Ex. 1 at 2-3.

On July 12, 1991, the EPA issued to Florida Cities a Notice to Show Cause, which alleged violations of the Act and sought penalties. Ex. 2. EPA specifically described those violations as follows:

> "[T]he Company discharged from the Barefoot Bay Wastewater Treatment Plant to the waters of the United States during the period from September to [sic] 1989 to present without a valid NPDES permit."

Ex. 2, at 1.

Florida Cities and EPA thereafter met and negotiated a settlement of these alleged violations. On September 25, 1991, EPA issued an Administrative Complaint proposing to assess an administrative penalty against Florida Cities for one violation at

Barefoot Bay, i.e., discharging without an NPDES permit on September 14, 1989.[3] Florida Cities received an NPDES permit for Barefoot Bay, effective November 1, 1991. NPDES Permit No. FL0042293. On November 6, 1991, EPA issued a Consent Agreement and Order Assessing Administrative Penalties. Ex. 3. That Consent Order referred to the same allegation cited in the Administrative Complaint, and required Florida Cities to pay $6,000.00 for that violation. Ex. 3 at 2. As indicated by an internal Florida Cities document, the November 1991 Consent Agreement was understood as resolving all allegations of discharges without an NPDES permit at Barefoot Bay, as referred to by the Notice of Show Cause. Ex. 4.

The Consent Order required Florida Cities to send EPA a certified check, payable to "Treasurer, United States of America", no later than December 6, 1991. Ex. 3, at 2-3, 5. This check was timely sent to EPA, which cashed it. Ex. 5. In September 1992, EPA sent Florida Cities a letter confirming that the September 26, 1990 Order, which required compliance with effluent limitations and monitoring reports, "has been complied with and placed in an inactive status." Ex. 6.

3. Carrollwood. In November 1984, EPA issued an order requiring Carrollwood to cease discharging by June 1987. For some time after June 1987, Carrollwood allegedly discharged without an NPDES permit. On July 31, 1990, Florida Cities submitted an application for an NPDES permit for Carrollwood.

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[3] State and federal officials conducted an inspection of the Barefoot Bay facility on that date.

On September 25, 1990, EPA issued an Administrative Complaint to Florida Cities for Carrollwood. Ex. 7. The Complaint alleged that Carrollwood had been discharging without an NPDES permit since June 1987, a period of more than three years, and proposed an administrative penalty of $25,000.00. Ex. 7, at 1-2. On September 27, 1990, EPA issued an Administrative Order that alleged that Florida Cities had been discharging at Carrollwood without a valid NPDES permit, and required Florida Cities to comply with specific monitoring requirements and effluent limitations until the NPDES permit was issued. Ex. 8, at 3-4.

Florida Cities and EPA thereafter negotiated the penalty amount to be assessed. On April 19, 1991, EPA issued a Consent Agreement and Order Assessing Administrative Penalties for Carrollwood. The Consent Agreement noted the filing of the Administrative Complaint, alleged that Florida Cities violated the Act by discharging without a permit from June 1987 through July 1990, the date Florida Cities applied for an NPDES permit, and provided that Florida Cities would pay a penalty of $15,000.00, rather than the $25,000.00 originally proposed by the EPA. Ex. 9, at 2-3. Just as at Barefoot Bay, as part of the conclusion of these negotiations, EPA issued an NPDES discharge permit for Carrollwood, effective July 1, 1991.

The Consent Agreement required Florida Cities to send EPA a money order or certified check for $15,000, payable to "Treasurer, United States of America," no later than May 19, 1991. Ex. 9, at 3, 5. This check was timely sent to EPA, which cashed it. Ex. 10. In March 1992, EPA sent Florida Cities a letter confirming that the September 27, 1990 order, which required monitoring reports and compliance with effluent limitations, "has been complied with and placed in an inactive status." Ex. 11.

4. Prior Proceedings. Plaintiff instituted this action in October 1993. The complaint addressed alleged violations of the Act only at Florida Cities' Waterway Estates facility. The primary claim was that Waterway Estates discharged without an NPDES permit from October 1, 1988 to October 1, 1989. Prior to October 1988, EPA had denied Florida Cities' application to renew its federal permit.

In October 1994, Florida Cities deposed the EPA official ultimately responsible for denying the permit renewal application for Waterway Estates. He admitted there was no legal basis for the denial of that application.[4] This meant that, although EPA was seeking civil penalties of up to $25,000.00 per day for each day Waterway Estates allegedly discharged without an NPDES permit, EPA's mistake was the sole reason the permit renewal application was denied. Denials of permit renewals are themselves extremely unusual; EPA has denied no more than a handful over the last twenty years.

The government now seeks leave to file its proposed Amended Complaint adding allegations against Barefoot Bay and Carrollwood. This Court has imposed a discovery cutoff of July 15, 1995, and set this case for trial during the trial term commencing October 2, 1995.

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[4] Bruce Barrett, the former Director of the Water Management Division in EPA Region IV, testified: "I don't see the basis for the federal action denying the permit based on the correspondence [demonstrating Waterway Estates had a wasteload allocation, which entitled it to a permit]." Barrett Dep., October 25, 1994, at 60; see id. at 54-60; Ex. 12.

ARGUMENT

I. PLAINTIFF SHOULD BE DENIED LEAVE TO AMEND THE COMPLAINT TO SEEK PENALTIES FOR DISCHARGES WITHOUT AN NPDES PERMIT AT BAREFOOT BAY AND CARROLLWOOD.

A. Legal Standard for Amendment. Plaintiff may amend its Complaint only by leave of court. Fed. R. Civ. P. 15(a). Leave will be freely granted under Rule 15(a), unless there is a substantial reason to deny leave to amend. Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A., 39 F.3d 292, 297 (11th Cir. 1994); Shipner v. Eastern Air Lines, Inc., 868 F.2d 401, 407 (11th Cir. 1989). The futility of a proposed amended complaint is a sufficient reason to deny a motion to amend. Motorcity, 39 F.3d at 297 (citing Foman v. Davis, 371 U.S. 178, 182 (1962)); Moore v. Baker, 989 F.2d 1129, 1131 (11th Cir. 1993); Mahon v. City of Largo, 829 F.Supp. 377, 385 (M.D. Fla. 1993). It is proper for the trial judge to consider the futility of an amended complaint on a motion to amend. To delay until there is a later motion to dismiss or for summary judgment would be a wasteful formality. See Moore, 989 F.2d at 1131 (quoting Middle Atl. Util. Co. v. S.M.W. Dev. Corp., 392 F.2d 380, 385 (2d Cir. 1968)) (statute of limitations barred the newly-asserted claim). As we now explain, the government cannot seek additional penalties in this case for discharges without an NPDES permit at Barefoot Bay and Carrollwood because it settled those claims years ago.

B. Barefoot Bay. The Clean Water Act expressly forbids EPA from seeking to collect, in court, penalties for violations for which EPA has already collected an administrative penalty. In relevant part, Section 309 of the Clean Water Act provides that:

"any violation — . . .

> *for which the Administrator* . . . has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection . . . ,

shall not be the subject of a civil penalty action under subsection (d) of this section . . . ."

33 U.S.C. § 1319(g)(6)(A).

EPA issued a Consent Order for Barefoot Bay covering discharges without a permit; that order is not subject to further judicial review; Florida Cities paid an administrative penalty assessed under § 1319; and this action seeks civil penalties under § 1319(d). Ex. 3; Amended Complaint, Paragraph 49. As a matter of law, the government is therefore barred from seeking penalties in this case for discharges from Barefoot Bay without an NPDES permit.

The government may argue that the Barefoot Bay Consent Order settled only a claim that Defendant discharged on one day, September 14, 1989, for which it paid a $6,000.00 penalty. There is no merit to such an argument. While Florida Cities paid a penalty for only one day's discharge, the settlement covered all claims for discharges without a permit before and after that date. The Notice of Show Cause alleged discharges without an NPDES permit from September 1989 forward. Ex. 2, at 1. Florida Cities and EPA agreed to settle the allegation of discharges from Barefoot Bay without an NPDES permit, as reflected in the Administrative Complaint and Consent Order. EPA was aware throughout this period of the alleged discharges from Barefoot

Bay, and of Barefoot Bay's permit status.[5] The Administrative Complaint and Consent Order refer only to one date, September 14, 1989,[6] not because it was the only alleged violation, but because that was the penalty agreed upon by Florida Cities and EPA. The November 6, 1991 Consent Order settled all penalty claims for discharging without an NPDES permit for the entire period from September 1989 through November 6, 1991, and Plaintiff cannot now reopen that settlement. Indeed, it would be ludicrous for the government to now suggest that the parties settled penalties for discharges without an NPDES permit for only one day of this period and intended to leave EPA free to later seek penalties for every other day.

3. Carrollwood. EPA long ago settled all claims for discharging without an NPDES permit at Carrollwood, and Florida Cities paid the penalty agreed upon. Plaintiff should therefore be barred from attempting to reopen that settlement by seeking to recover more penalties through the Amended Complaint.

EPA may take the position that the Carrollwood settlement covered only the period from June 1987 through July 1990, and not the period from August 1990 to June 1991. See Amended Complaint, Paragraph 30. That position is unsound. It is true that the April 1991 Consent Order alleged violations of the Act only from June 1987 through

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[5] See Disclosure Monitoring Reports submitted to EPA for Barefoot Bay. Notice of Show Cause, Ex. 2.

[6] EPA may have selected this date because state and federal inspectors visited Barefoot Bay on that date, when they apparently personally observed a discharge from Barefoot Bay.

July 1990, because during negotiations EPA determined that penalties were not warranted for the period after July 31, 1990, the date on which Carrollwood applied for an NPDES permit.

The Administrative Complaint issued on September 25, 1990 sought $25,000.00 in penalties for discharges without a permit from June 1987 through September 1990, two months beyond July 31, 1990. Ex. 7, at 1-2. The parties thereafter negotiated the amount and scope of the penalties. Throughout the period of the settlement discussions, Carrollwood continued to submit reports to the EPA indicating discharges, and EPA was fully apprised of Carrollwood's permit status. In fact, at the time of the Consent Order, EPA was in the final stages of reviewing the NPDES permit application, which it granted in May 1991. Florida Cities and EPA's ultimate agreement, reflected in the April 19, 1991 Consent Order was that Florida Cities would not be charged with any violations after July 1990, and that the total penalty would be reduced from $25,000.00 to $15,000.00 for all violations involving discharges without a permit at Carrollwood, not just those occurring before August 1990.

EPA agreed to a settlement under which discharges without a permit at Carrollwood from June 1987 through July 1990 resulted in penalties of about $13.00 per day. Obviously, Florida Cities' conduct after July 31, 1990 -- when it had applied for a permit, was submitting discharge reports, and complying with effluent limitations -- was far more acceptable to the EPA than its discharges before that date. After the parties negotiated a settlement and executed a consent agreement, EPA closed out the matter with its March 3, 1992 compliance letter. EPA's March 3, 1992 letter confirmed that the Carrollwood administrative order requiring monitoring and compliance with effluent

limitations "has been complied with and placed in an inactive status." Ex. 11.

After the compliance letter was sent, any attempts by EPA to try to recover additional administrative penalties for discharges between July 31, 1990 and July 1, 1991, when the NPDES permit became effective, would have reflected bad faith. There is even less basis to allow the EPA now to reopen the settlement agreement to seek penalties in Court of up to $25,000.00 per day for this same time period.

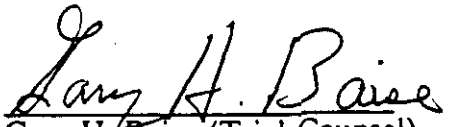
* * * * *

EPA's original case against Florida Cities (involving the Waterway Estates facility) suffered a potentially lethal blow when it was discovered that EPA had wrongly refused to grant the permit renewal for Waterway Estates -- a renewal that EPA was legally obligated to grant. This lack of a federal permit was the basis of the original complaint. Instead of accepting the consequences of this significant discovery by dropping the complaint, the Department of Justice has, rather, sought to salvage the case by engaging in open-ended and massive discovery in a transparent attempt to prop up its failed case by seeking to find <u>any</u> technical violation, no matter how trivial, at any of the several other facilities owned and operated by Florida Cities. This unwarranted ploy and abuse of power appears to be an effort to punish Florida Cities for not settling the case on terms acceptable to the Department of Justice. As Florida Cities remains convinced that both the original and amended complaints are unwarranted and represent an abuse of government power, it has so far refused to settle and has borne the costly consequences of opposing the government's unjustified vendetta.

CONCLUSION

Plaintiff should be denied leave to include paragraphs 16 and 30 in its proposed Amended Complaint.

Respectfully submitted,



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Certificate of Service

I hereby certify that a copy of the foregoing Defendant's Memorandum in Partial Opposition to Plaintiff's Motion for Leave to Amend Complaint was sent on this 13th day of April, 1995, by first-class mail, postage prepaid, to the following:

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Exhibit_____(GHB-42)

FILED

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MIDDLE DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

V. CASE NO. 93-281-CIV-FTM-21

FLORIDA CITIES WATER COMPANY,

Defendant.

_____/

ORDER

This cause comes before the Court on two objections to the Magistrate Judge's Order (Dkt. 54) entered March 16, 1994: (1) United States' Objections to the Magistrate Judge's Order on the United States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees (Dkt. 58) and the Defendant's response (Dkt. 75) in opposition thereto; and (2) Defendant's Objections to the Magistrate Judge's Order on Defendant's Motion to Disqualify Counsel (Dkt. 66). Pursuant to Rule 72, Federal Rules of Civil Procedure, the Court "shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to the law."

I. Motion to Allow Ex-Parte Contacts

After hearing oral argument, the Magistrate Judge issued an order denying the Plaintiff's Motion for an Order Allowing Ex-Parte Contacts with Former Employees. The United States objects solely to paragraph 1 of the Magistrate Judge's Order, which provides:

1. Plaintiff's motion to allow ex parte contacts with defendant's employees is DENIED.

a. Except as set forth in the next two paragraphs, no attorney in the United States Department of Justice shall communicate with any of defendant's present or past employees, unless the communication is at a formal deposition at which the employee or witness will have the right to be represented by counsel.

b. If counsel for the plaintiff wishes to communicate other than at a deposition with a potential witness represented by counsel, counsel for the plaintiff shall give counsel for the defendant reasonable advance notice, so that defense counsel can contact counsel for the witness before any communication from plaintiff occurs.

c. If counsel for plaintiff wishes to communicate other than at a deposition with a potential witness not represented by counsel, counsel for the plaintiff shall give counsel for the defendant reasonable advance notice, so that defense counsel can discuss the matter with the witness before any communication occurs, and further advise the witness that he or she may be subject to potential criminal prosecution under the Clean Water Act.

The Plaintiff argues that under Rule 4-4.2[1], Florida Rules of Professional Conduct, Rule 4.2, ABA Rules of Professional Conduct, prevailing case law, and commentary, there exists no legal barrier to the Plaintiff's ex parte informal interviews with Defendant's ex-employees. The Plaintiff states that neither Florida Rule 4-4.2 nor the ABA Rule addresses the issue whether a former employee is deemed to be represented by the former employer's counsel for purposes of

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[1]Rule 4-4.2, Florida Rules of Professional Conduct, modelled largely on Rule 4.2, ABA Model Rules of Professional Conduct, provides, in pertinent part, that a lawyer shall not communicate:

> about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

The Florida Rules also adopt the following provision from the Official Comment to ABA Rule 4.2:

> In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

ex parte communications. The Plaintiff maintains, however, that Opinion 88-14 (March 7, 1989) of the Governors of the Florida Bar, reprinted in Professional Ethics of the Florida Bar at 1299 supports their requested ex parte communications. They quote the Opinion, which states, "A plaintiff's attorney may communicate with former managers and former employees of a defendant corporation without seeking and obtaining consent of corporation's attorney." (Dkt. 58, Exh. A). The Plaintiff also points out that a 1991 formal ABA opinion expressly held that Rule 4.2 does not apply to former corporate employees. ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion No. 91-359 (March 22, 1991) reprinted in ABA/BNA Lawyers' Manual on Professional Conduct at 1001:101 (Dkt. 58, Exh. B).

Additionally, the Plaintiff cites several courts outside the Eleventh Circuit that have held that Rule 4.2 or its equivalent does not apply to former employees. The Plaintiff also attempts to distinguish two cases in which this Court has held that under certain circumstances ex-employees may not be contacted, and asserts that Judge Kovachevich's holdings in those cases are in the distinct minority and inconsistent with the Florida Bar and ABA ethics opinions. See Browning v. AT & T Paradyne, 838 F.Supp. 1564 (M.D. Fla. 1993); Rentchub Inc. v. Transamerica Rental Finance Corp., 811 F.Supp. 651 (M.D. Fla. 1992). Finally, the Plaintiff states that the U.S. Department of Justice promulgated extensive guidelines on August 4, 1994, which provide that "[a] communication with a former employee of an organization that is represented by counsel shall not be considered to be a communication with the organization for purposes of this part." See 59 Fed. Reg. 39910.

In response, the Defendant asserts that the Defendant's former employees with whom Defendant knows the Justice Department attempted to interview ex parte were all "managerial"

employees who were responsible for making, or had knowledge of, several important decisions at issue in this case. The Defendant asserts that it has an ongoing interest in protecting Defendant's former employees' knowledge of privileged or confidential information. Further, the Defendant maintains that the Magistrate Judge's denial of the government's motion to allow ex parte contacts was mandated by this Court's prior decisions in Rentclub and Browning. The Defendant argues that those decisions are correct, particularly here, where the persons sought to be interviewed ex-parte were high ranking personnel with privileged information. Further, the Defendant asserts that the Justice Department's regulations purport to override the states' Codes of Professional Responsibility and have been "universally condemned by all authorities considering them."

Finally, the Defendant argues that the Magistrate Judge's ruling is correct in light of [illegible] Weitzenhoff, 1 F.3d 1523 (9th Cir. 1993), amended and superseded on denial of rehearing en banc, 35 F.3d 1275 (1994), cert. denied, Mariani v. U.S., 115 S.Ct. 939 (1995). The Defendant asserts that in Weitzenhoff, the Ninth Circuit increased the potential liability of all Defendant's current and former managerial employees by its interpretation of 33 U.S.C. § 1319(C)(2)(a). Under § 1319(C)(2)(a), any person who "knowingly violates [various sections of the Act] . . . or any permit condition or limitation . . . [commits a felony]." In Weitzenhoff, the Court construed the term "knowingly" to require that a person know that he was discharging the pollutants in question, not that he knew that his conduct was violating the terms of the Act or a permit. 35 F.3d at 1284. The Defendant asserts that in light of the Supreme Court's denial of certiorari, Defendant's counsel concluded that past and present employees of the Defendant would have to be informed of their Fifth Amendment privileges

against self incrimination before giving deposition testimony. The Defendant further states that various former employees of the Defendant have retained separate counsel to represent them, and that those represented by counsel have invoked the Fifth Amendment when deposed. Additionally, the Defendant notes that the Magistrate Judge's Order directs counsel for the Plaintiff to advise a witness, who is not represented by counsel and with whom the Plaintiff wishes to communicate with other than at a deposition, that he or she may be subject to potential criminal prosecution under the Clean Water Act.

The Court finds that the Order by the Magistrate Judge was not clearly erroneous or contrary to the law. First, this Court has held that a former employee may be considered a "party" for purposes of Model Rule 4.2. Rentclub, 811 F.Supp. at 657. In Rentclub the Court stated:

> Privileged communications present a distinct problem with respect to contact with former employees, thus *ex parte* contact should be barred to prevent disclosure of any inadvertent confidential communications. . . The interest of the corporation in protecting privileged information acquired by an employee during the course of employment from disclosure to an opponent in litigation remains after the employee leaves the corporation.

Id. at 657-58. The Court agrees that the decision in Rentclub is applicable here, where the Defendant has demonstrated an interest in protecting privileged information. Further, the Magistrate Judge's Order does not prohibit the Justice Department's informal interviews with the Defendant's former employees, but rather requires that counsel for the Defendant be notified in advance and be given the opportunity to be present. Finally, in light of the potential criminal liability of the former employees sought to be interviewed, the Magistrate Judge properly ruled that before the Plaintiff's counsel could communicate with a witness not represented by counsel,

the Plaintiff's counsel would have to advise that person of his or her possible prosecution under the Act.

II. Motion to Disqualify Counsel

The Defendant objects to the portion of the Magistrate Judge's Order which states, "Defendant's motion to disqualify plaintiff's current counsel is DENIED." The Defendant states that it primarily seeks to disqualify Plaintiff's counsel based on the impropriety of two ex parte meetings that occurred over a period of two days in Australia with Mr. Robert H. French, the former Senior Vice President of the Defendant. The Defendant asserts that Mr. French had personal knowledge of confidential and attorney-client privileged information, and that his statements might be admissions against the corporation or his actions might be imputed to the corporation. The Defendant further asserts that the conduct of Plaintiff's counsel in the instant case satisfies the Eleventh Circuit two-prong test for disqualification:

> First, although proof of actual wrongdoing is not required, there must exist a reasonable possibility that some specifically identifiable impropriety did in fact occur. Second, the likelihood of public suspicion or obloquy must outweigh the social interests that will be served by the attorney's continued participation in the case.

Norton v. Tallahassee Memorial Hosp., 689 F.2d 938 (11th Cir. 1982).

Even assuming, however, that the Court finds that the Plaintiff's counsel created a reasonable possibility of impropriety, the Court does not find persuasive the Defendant's argument that the second prong, the attorney's continued participation is outweighed by social interests, has been satisfied. Thus, the Court finds that the Magistrate Judge's Order on the Motion to Disqualify was not clearly erroneous or contrary to the law.

Upon consideration of the foregoing, it is hereby **ORDERED and ADJUDGED** that the United States' Objections to the Magistrate Judge's Order on the United States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees (Dkt. 58) and the Defendant's Objections to the Magistrate Judge's Order on Defendant's Motion to Disqualify Counsel (Dkt. 66) are **DENIED**, and the Magistrate Judge's Order is **AFFIRMED** with respect to the subject of said objections.

DONE AND ORDERED, at Tampa, Florida, this 26th day of April, 1995.

RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of record

Exhibit_____(GHB-43)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

REVISED AMENDED COMPLAINT

The United States of America, by authority of the Attorney General, acting at the request of the Administrator of the U.S. Environmental Protection Agency ("EPA"), alleges as follows:

NATURE OF ACTION

1. This is a civil action brought pursuant to section 309(b) of the Clean Water Act ("the Act"), 33 U.S.C. § 1319(b), for civil penalties for violations of section 301 of the Act, 33 U.S.C. § 1311, and of the conditions and limitations of National Pollutant Discharge Elimination System ("NPDES") permits issued by EPA pursuant to section 402 of the Act, 33 U.S.C. § 1342. Notice of the commencement of the action has been provided to the State of Florida.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1345, and 1355, and section 309(b) of the Act, 33 U.S.C. § 1319(b).

3. Venue is proper in the Middle District of Florida pursuant to 28 U.S.C. §§ 1391(b) and (c) and 1392, and section 309(b) of the Act, 33 U.S.C. § 1319(b).

THE DEFENDANTS

4. Defendant Avatar Holdings, Inc. is a Delaware corporation which resides and does business in Florida.

5. Defendant Florida Cities Water Company, Inc., is a subsidiary of Avatar Holdings, Inc., and is a Florida corporation that resides and does business in Florida.

6. As the parent company of Florida Cities Water Company, Inc., Defendant Avatar Holdings, Inc. directly controls the management of Florida Cities Water Company's environmental compliance practices, and is thereby directly responsible for the acts and [illegible] thus, each subsequent reference to "Defendants" herein should be read to include Avatar Holdings, Inc., acting through Florida Cities Water Company.

7. Each of the defendants is a "person" within the meaning of section 502(5) of the Act, 33 U.S.C. § 1362(5).

GENERAL ALLEGATIONS

8. At times relevant herein, Defendants have owned and operated privately owned wastewater treatment plants known as the Barefoot Bay Wastewater Treatment Plant, Carrollwood Wastewater Treatment Plant, and Waterway Estates Wastewater Treatment Plant, all located in the State of Florida.

9. At times relevant herein, Defendants have collected wastewater from residential and/or commercial sources,

treated that wastewater at the various wastewater treatment plants listed in the preceding paragraph, and then discharged that wastewater either directly or indirectly into waters of the United States.

10. At times relevant herein, Defendants have caused the "discharge of pollutants" within the meaning of section 502(12) of the Act, 33 U.S.C. § 1362(12), from the treatment plants listed in paragraph 8 above through a "point source" within the meaning of section 502(14) of the Act, 33 U.S.C. § 1362(14), into a "navigable water" within the meaning of section 502(7) of the Act, 33 U.S.C. § 1362(7).

11. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person except as in compliance with certain sections of the Act, including the requirement that a person obtain a National Pollutant Discharge Elimination System (NPDES) permit for discharges to waters of the United States.

12. At times relevant herein Defendants were required by NPDES permits to submit monthly discharge monitoring reports ("DMRs") to EPA containing the results of the required sampling for each month, and reporting the actual number of any permit exceedances. On each report, the Defendants were required to certify, by the signature of a principal executive officer or authorized agent, that the submitted information is true, accurate and complete.

13. Subsection 309(d) of the Act, 33 U.S.C. § 1319(d), provides, in part, that any person who violates, inter alia, section 301 of the Act, 33 U.S.C. § 1311, including any permit condition or limitation implementing that section, violates any condition or limitation in a NPDES permit issued under section 402 of the Act, 33 U.S.C. § 1342, or violates any order issued by EPA under section 309(a) of the Act, 33 U.S.C. § 1319(a), shall be subject to a civil penalty not to exceed $25,000 per day for each such violation.

14. Each occurrence of a (1) discharge without a NPDES permit; (2) violation of an EPA Administrative Order; (3) discharge at an unpermitted location; (4) violation of an effluent limitation or other condition in a NPDES permit constitutes a separate violation of section 301 [illegible] U.S.C. § 1311 punishable in accordance with section 309(d) of the Act, 33 U.S.C. § 1319(d).

FIRST CLAIM FOR RELIEF
(Barefoot Bay)

15. Paragraphs 1 through 14 are realleged and incorporated herein by reference as if fully set forth below.

16. Pursuant to section 309(a) of the Act, 33 U.S.C. § 1319(a), on September 26, 1990, EPA issued an Administrative Order (No. 90-106) to Defendant Florida Cities Water Company, finding it in violation of the Act for discharging pollutants from its Barefoot Bay plant into waters of the United States, a drainage canal leading to the Sebastian Creek, without a valid NPDES permit and prescribing certain interim effluent limitations

and monitoring requirements on pollutants discharged from the Barefoot Bay plant into the waters of the United States.

17. On repeated occasions (during the period in or about November 1990 to June 1991), Defendants violated EPA Administrative Order No. 90-106 by discharging effluent from the Barefoot Bay Treatment Plant which exceeded the Total Suspended Solids daily maximum limitation in that Order.

18. On repeated occasions (during the period in or about 1990-1991), Defendants violated EPA Administrative Order No. 90-106 by discharging effluent from the Barefoot Bay Treatment Plant which exceeded the Fecal Coliform daily maximum limitation in that Order.

19. On at least one occasion (May 1991), Defendants violated EPA Administrative Order No. 90-106 by discharging effluent from the Barefoot Bay Treatment Plant which did not meet the Dissolved Oxygen daily minimum requirement in that Order.

20. On at least one occasion (in or about October 1990), Defendants violated EPA Administrative Order No. 90-106 by discharging effluent from the Barefoot Bay Treatment Plant which exceeded the Biological Oxygen Demand (BOD) daily maximum limitation in that Order.

21. On at least one occasion (in or about October 1990), Defendants violated EPA Administrative Order No. 90-106 by discharging effluent from the Barefoot Bay Treatment Plant which exceeded the Biological Oxygen Demand (BOD) monthly average maximum limitation in that Order.

22. On at least one occasion (in or about November 1990), Defendants violated EPA Administrative Order No. 90-106 by discharging effluent from the Barefoot Bay Treatment Plant which exceeded the pH daily maximum limitation in that Order.

23. Beginning on or about November 1, 1991, Defendants were authorized by NPDES Permit Number FL0042293, subject to certain terms and conditions, to discharge pollutants from the Barefoot Bay Wastewater Treatment Plant into a drainage canal leading to the north prong of Sebastian Creek.

24. In at least seven months (in or about September 1992, October 1992, November 1992, December 1992, January 1993, February 1993, and March 1993), Defendants discharged pollutants from the Barefoot Bay Treatment Plant in excess of the Total Residual Chlorine daily maximum limitation [illegible] FL0042293.

25. On at least three occasions (during the periods in or about September-October 1992, May 1993, and February 1994), the effluent from the Barefoot Bay Treatment Plant failed the test for chronic whole effluent toxicity in NPDES Permit Number FL0042293.

26. On a weekly basis during the period in or about November 1991 and continuing through at least June 1993, and on at least two occasions in November 1993, Defendants failed to monitor biological oxygen demand (BOD) at the Barefoot Bay Treatment Plant, as required by NPDES Permit No. FL0042293.

27. On a daily basis during the period on or about February 1, 1992 and continuing through at least June 28, 1993, Defendants failed to test for total residual chlorine (TRC) at the Barefoot Bay Treatment Plant using the method specified by Part I, Section A-2 of NPDES Permit No. FL0042293.

SECOND CLAIM FOR RELIEF
(Carrollwood)

28. Paragraphs 1 through 14 are realleged and incorporated herein by reference as if fully set forth below.

29. Beginning on or about July 1, 1991, Defendants were authorized by NPDES Permit Number FL0029319, subject to certain terms and conditions, to discharge pollutants from the Carrollwood Wastewater Treatment Plant into the Sweetwater Creek.

30. In at least three months (in or about October, November, December 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Suspended Solids monthly average limitation in Permit Number FL0029319.

31. On repeated occasions (in or about October, November, December 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Suspended Solids daily maximum limitation in Permit Number FL0029319.

32. In at least five months (during the period in or about July-November 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Phosphorus monthly average limitation in Permit Number FL0029319.

33. On repeated occasions (during the period in or about July-November 1991), Defendants discharged pollutants from

the Carrollwood Treatment Plant in excess of the Total Phosphorus daily maximum limitation in Permit Number FL0029319.

34. On repeated occasions (during the period in or about July-October 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Fecal Coliform daily maximum limitation in Permit Number FL0029319.

35. In at least four months (during the period in or about July-November 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Nitrogen monthly average limitation in Permit Number FL0029319.

36. On repeated occasions (during the period in or about July-November 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Nitrogen daily maximum limitation in Permit Number FL0029319.

37. In at least one month (in or about October 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Carbonaceous Biochemical Oxygen Demand monthly average limitation in Permit Number FL0029319.

38. On at least two occasions (in or about July and October 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Carbonaceous Biochemical Oxygen Demand daily maximum limitation in Permit Number FL0029319.

39. On repeated occasions (during the period in or about July-December 1991), Defendants discharged pollutants from

the Carrollwood Treatment Plant in excess of the Total Residual Chlorine daily maximum limitation in Permit Number FL0029319.

THIRD CLAIM FOR RELIEF
(Waterway Estates)

40. Paragraphs 1 through 14 are realleged and incorporated herein by reference as if fully set forth below.

41. During the period on or about October 1, 1988 to October 31, 1989, Defendants discharged pollutants from the Waterway Estates Wastewater Treatment Plant into the Caloosahatchee River without a NPDES permit.

42. Beginning on or about November 1, 1989, Defendants were authorized by NPDES Permit Number FL0030325, subject to certain terms and conditions, to discharge pollutants from the Waterway Estates Wastewater Treatment Plant directly into the Caloosahatchee River via "Outfall 001."

43. On each day during the period on or about November 1, 1989 to July 14, 1991, Defendants discharged pollutants from the Waterway Estates Treatment Plant indirectly into the Caloosahatchee River via a tributary canal which was not a permitted discharge location during the referenced period.

44. In at least nine months (each month during the period in or about July 1991 to March 1992), Defendants discharged pollutants from the Waterway Estates Treatment Plant in excess of the Total Nitrogen concentration limitation in Permit Number FL0030325.

45. In at least nine months (each month during the period in or about July 1991 to March 1992), Defendants

discharged pollutants from the Waterway Estates Treatment Plant in excess of the Total Nitrogen loading limitation in Permit Number FL0030325.

46. On at least three occasions (in or about February 1992, April 1992, and June 1992), the effluent from the Waterway Estates Treatment Plant failed the test for chronic whole effluent toxicity in Permit Number FL0030325.

RELIEF

47. Pursuant to section 309(b) and (d) of the Act, 33 U.S.C. §§ 1319(b) and (d), Defendants are liable for civil penalties up to $25,000 per day for each violation of the Act, including up to $25,000 per day for each month in which a monthly average was violated.

WHEREFORE, Plaintiff, the United States of America, respectfully requests that:

1. The Defendants, and each of them, be ordered to pay a civil penalty up to $25,000 per day for each violation of the Act; and

2. This Court grant such other relief as it deems just and appropriate.

Respectfully submitted,

LOIS J. SCHIFFER
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By: _____

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CERTIFICATE OF SERVICE

I certify that copies of the "Revised Amended Complaint" and "Notice of Filing of Revised Amended Complaint" were served by U.S. Mail (and facsimile where noted) on the 4th day of May, 1995, to the following attorneys of record:

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Darlene F. Lyons

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

NOTICE OF FILING OF REVISED AMENDED COMPLAINT

Pursuant to the Court's Order of April 26, 1995, the United States is filing a Revised Amended Complaint which does not include paragraphs 16 and 30 of the proposed Amended Complaint. In so doing, the United States respectfully reserves the right to request the Court to reconsider those claims.

Respectfully submitted,

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By: _____

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Exhibit_____(GHB-44)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

United States of America,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 93-281-CIV-FTM-21D
	)	
Avatar Holdings Inc. and Florida Cities Water Company,	)	
	)	
Defendants.	)	

DEFENDANT FLORIDA CITIES WATER COMPANY'S MOTION TO STRIKE

Pursuant to the Order of this Court dated April 26, 1995, and Rule 12(f) of the Federal Rules of Civil Procedure, Defendant Florida Cities Water Company hereby moves to strike the First and Second Claims for Relief in their entirety, paragraphs 15 through 39 of the Revised Amended Complaint.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

United States of America,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 93-281-CIV-FTM-21D
	)	
Avatar Holdings Inc. and Florida Cities Water Company,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT FLORIDA CITIES WATER COMPANY'S MOTION TO STRIKE

("Florida Cities") motion to strike the First and Second Claims for Relief in their entirety, paragraphs 15 through 39 of the Revised Amended Complaint. This Court has already ruled that Plaintiff may not amend its complaint to include claims concerning Barefoot Bay and Carrollwood. As noted by this Court, raising these claims less than three months before the close of discovery is untimely and would clearly prejudice Florida Cities.

FACTUAL BACKGROUND

On October 1, 1993, plaintiff filed its original complaint, alleging violations of the Clean Water Act by Florida Cities at one facility, its Waterway Estates wastewater treatment

plant ("Waterway Estates"). On February 27, 1995, this Court issued an order requiring that all discovery be completed by July 15, 1995, and set a trial date of October 2, 1995. This Court indicated that discovery may be extended beyond July 15, 1995 under limited circumstances, but only so long as there was no delay of the trial date.

On or about March 30, 1995, plaintiff submitted an Amended Complaint. This Amended Complaint added numerous claims concerning two new facilities, the Barefoot Bay wastewater treatment plant and the Carrollwood wastewater treatment plant, and sought to add a party, Avatar Holdings Inc. ("Avatar Holdings"). On April 14, 1995, Florida Cities filed its partial opposition to plaintiff's motion for leave to amend its complaint. On that same date, Avatar Holdings filed its opposition to plaintiff's motion to add it as a party, citing the untimely nature of the amended complaint and the prejudice to it of having to join the litigation shortly before the close of discovery.

On April 26, 1995, this Court issued its order directing plaintiff to file a revision of [illegible] amended complaint by ordering that "paragraphs 16 and 30 of the proposed Amended Complaint and any allegations relating to paragraphs 16 and 30 that are not relevant to the remaining claims shall not be permitted." Order of April 26, 1995 ("Order") at 5. Paragraph 16 of the proposed amended complaint and the related allegations referred to Barefoot Bay. Paragraph 30 of the proposed amended complaint and the related allegations referred to Carrollwood.

On or about May 4, 1995, plaintiff filed its Revised Amended Complaint. The First Claim for Relief, paragraphs 15 through 27, contains allegations concerning Barefoot Bay.

The Second Claim for Relief, paragraphs 28 through 39, contains allegations concerning Carrollwood.

ARGUMENT

Under Rule 12(f) of the Federal Rules of Civil Procedure, this Court may "order stricken from any pleading any . . . immaterial, impertinent, or scandalous matter." A motion to strike will be granted where the allegations have no possible relation to the controversy and may cause prejudice to one of the parties. Cherry v. Crow, 845 F.Supp. 1520 (M.D.Fla. 1994)

1. This Court determined that claims concerning Barefoot Bay and Carrollwood will not be permitted.

In its April 26, 1995 Order, this Court ruled that claims regarding Barefoot Bay and Carrollwood would not be permitted in the revised amended complaint. The revised amended

this Court's Order.

As the Court stated, "it is evident that even if the Plaintiff had viable claims against Barefoot Bay and Carrollwood, it should have been aware of those claims at the time of the filing of the original Complaint. Raising such claims three months before the expiration of discovery is clearly prejudicial to the Defendant." Order at 4. This statement summarized the conclusions of the Court concerning the effect of the proposed amendment on Florida Cities. The Court went on to analyze whether Avatar Holdings should be added as a party.

The Court concluded that Avatar Holdings would not be prejudiced by being added as

a party just three months before the close of discovery because "the Court will not permit portions of the amended complaint that allege claims against Barefoot Bay and Carrollwood." Order at 5. That is, the case would remain limited to its original scope, Waterway Estates. With this narrow focus to the case, the Court ruled that Avatar Holdings would not be prejudiced by "an enlargement of claims." Id.

Both Florida Cities and Avatar Holdings would have been prejudiced by a late addition of claims concerning other facilities so soon before the close of discovery. Recognizing that inequitable result, the Court determined that the claims concerning Barefoot Bay and Carrollwood would not be permitted, thus permitting Avatar Holdings to be added as a party without prejudice.

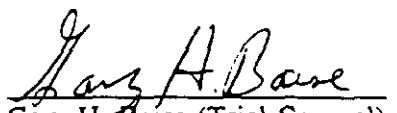
2. The new allegations have no relation to the original controversy and expansion of the litigation at this time would prejudice Florida Cities.

The original complaint included claims concerning the Waterway Estates facility only. [illegible] allegations. The revised amended complaint filed by plaintiff would greatly expand the scope of this case less than three months before the close of discovery and less than five months before trial. The claims on Barefoot Bay and Carrollwood are unrelated to the claims in the original complaint on Waterway Estates. All of the facts and most of the legal issues are different. Accordingly, Florida Cities would be prejudiced by expansion of the litigation at this time to include the claims concerning Barefoot Bay and Carrollwood.

CONCLUSION

For the reasons stated above, the First and Second Claims for Relief in the Revised Amended Complaint should be stricken.

Respectfully submitted,



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Certificate of Service

I hereby certify that copies of the foregoing Defendant Florida Cities Water Company's Motion to Strike and Memorandum in Support of Defendant Florida Cities Water Company's Motion to Strike were sent on this 9th day of May 1995, by first-class mail, postage prepaid, to the following:

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Exhibit_____(GHB-45)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' MOTION FOR RECONSIDERATION OF COURT'S ORDER ON AMENDMENT OF COMPLAINT

The Court entered an Order on April 26, 1995 permitting the United States to file an Amended Complaint in this action, and to add Avatar Holdings, Inc. as a party, but disallowing the United States' claims for unpermitted discharges at Defendants' Barefoot [illegible] plants. For the reasons set out in the accompanying memorandum, the United States respectfully moves the Court to reconsider the portion of the Order disallowing those important claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of the "United States' Motion for Reconsideration of Court's Order on Amendment of Complaint" and accompanying memorandum were served by U.S. Mail on the 12th day of May, 1995, to the following attorneys of record:

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	)	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' MEMORANDUM IN SUPPORT OF ITS MOTION FOR RECONSIDERATION OF COURT'S ORDER ON AMENDMENT OF COMPLAINT

INTRODUCTION

The Court entered an Order on April 26, 1995 permitting the [illegible] to add Avatar Holdings, Inc. as a party, but disallowing the United States' claims for unpermitted discharges at Defendants' Barefoot Bay and Carrollwood plants. The United States respectfully requests the Court to reconsider that portion of the Order disallowing these significant claims.

BACKGROUND

This is a civil action brought on behalf of the Administrator of the U.S. Environmental Protection Agency ("EPA") pursuant to section 309(b) of the Clean Water Act ("the Act"), 33 U.S.C. § 1319(b), for civil penalties for violations of section 301 of the Act, 33 U.S.C. § 1311, and of the conditions and limitations of National Pollutant Discharge Elimination System

("NPDES") permits issued by EPA pursuant to section 402 of the Act, 33 U.S.C. § 1342. The Complaint was filed on October 1, 1993, a proposed Amended Complaint was filed on March 31, 1995, and a Revised Amended Complaint was filed in accordance with the Court's Order of April 26, 1995 on May 5, 1995. Discovery closes on July 15, 1995. Trial has been set for the trial term commencing October 2, 1995.

Defendant Florida Cities Water Company ("Florida Cities") is currently the NPDES permit holder for six wastewater treatment plants in operation in Florida, some of which have been the subject of federal, state, and/or local enforcement actions for violations of applicable environmental laws and regulations. Defendant Avatar Holdings, Inc. is Florida Cities' parent company. Defendants collect and treat wastewater from their customers and then discharge those wastewaters into the waters of the United States. The wastewater discharges contain pollutants which may not be discharged into waters of the United States except in compliance with an NPDES permit.

The original Complaint alleged violations at one of Defendants' plants, the Waterway Estates plant in North Ft. Myers. At a Preliminary Pretrial Conference held before Magistrate Judge Swartz on February 15, 1995, the United States requested and received leave to amend its Complaint within sixty days to add claims at additional facilities. Defendant Florida Cities did not object. Transcript at 6. The Court then proceeded to set discovery and other deadlines.

The United States filed its proposed Amended Complaint on March 31, 1995, well before the April 15, 1995 deadline set by the Court. Because the Amended Complaint added both additional claims and a new party, Avatar Holdings, the United States also filed a Motion to Add Party, which the Court subsequently construed as a Motion to amend the complaint as well as to add a party and to which the Court ordered an expedited response. Order, April 10, 1995. Defendant Florida Cities subsequently filed a response captioned "Defendant's Memorandum in Partial Opposition to Plaintiff's Motion for Leave to Amend Complaint" in which it argued that paragraphs 16 and 30 of the Amended Complaint should be barred on grounds of futility.

On April 26, 1995 the Court ruled that the United States could amend its Complaint to add claims relating to violations at two additional facilities, Barefoot Bay and Carrollwood, and to add Avatar Holdings, Inc. as a party, but prohibited the United States from asserting claims for unpermitted discharges at the two additional facilities. The Court's ruling is based primarily on its finding that the addition of the unpermitted discharge claims would be futile and, secondarily, on its view that the filing of the unpermitted discharge claims was untimely and would be prejudicial to Florida Cities.

Because the United States was earlier barred by Local Rule 3.01(b) from briefing the futility issue, the United States urges the Court to give it de novo review in the context of the instant

motion.[1] The United States contends that such a review will demonstrate that the claims are not futile and that the United States should therefore be allowed to include them in its Amended Complaint. The United States also contends that Defendants will not be unduly prejudiced by inclusion of the two additional unpermitted discharge claims and that leave to amend should therefore not be denied on timeliness grounds.

ARGUMENT

I. The Consent Orders

Paragraphs 16 and 30 of the proposed Amended Complaint, which are at issue here, read in their entireties as follows:

> 16. During the period on or about April 1, 1990 to October 31, 1991, Defendants discharged pollutants from the Barefoot Bay Treatment Plant into the Sebastian River, without a NPDES permit.
>
> 30. During the period in or about August 1990 to June 1991, Defendants discharged pollutants from the Carrollwood Treatment Plant into the Sweetwater Creek, without a NDPES permit.

While not denying that it in fact had discharged without a permit in violation of the Clean Water Act, Florida Cities argued that it would be futile to permit these claims to stand because they had already been settled in EPA administrative orders. Florida Cities is wrong. As is clear from the terms of the administrative orders, the violations that were resolved administratively are separate and distinct from those alleged in paragraphs 16 and 30 of the Amended Complaint. Accordingly, the

---

[1] Local Rule 3.01(b) precludes the filing of a reply brief unless requested by the Court. Because the issue of futility was first raised in Florida Cities' opposition to the United States' Motion to Add Party, the United States was never afforded the opportunity to brief that issue.

United States is not barred from asserting these claims at this time.

This dispute is governed by the provisions of Section 309(g)(6)(A)(iii), 33 U.S.C § 1319(g)(6)(A)(iii), which provides in pertinent part as follows:

> **any violation** ... for which the Administrator...has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection...shall not be the subject of a civil penalty action under subsection (d) of this section....

This provision is straightforward. Violations that are expressly resolved in a final administrative order, and for which the violator has paid a penalty, may not be the subject of a subsequent judicial proceeding for civil penalties pursuant to Section 309(d). Section 309(g)(6)(A)(iii) is limited in scope, however. The statute refers to specific **violations** that have been resolved by the payment of a penalty, not to generalized conduct. This distinction is important because, as the Act makes clear, each day that illegal conduct continues constitutes a separate day of violation, and may be penalized separately. 33 U.S.C. §1319(d). See Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1137-38 (11th Cir. 1990).

When examined closely, it is clear that the administrative orders and Florida Cities' payments under those orders, resolved only a limited number of past violations, i.e., those that were specifically referenced in the orders, and no others. Paragraphs 16 and 30 of the proposed Amended Complaint allege only violations that occurred after the administrative orders became

final. For this reason, Section 309(g)(6)(A)(iii) does not bar the United States from bringing these claims now. Each of the administrative orders will be discussed in turn.

The order relating to Barefoot Bay is styled "Consent Agreement and Order Assessing Administrative Penalties" and is dated November 6, 1991. Exhibit A. The three paragraphs critical to the instant motion, paragraphs II.4, III.2, and IV.1, read as follows:

> Respondent **has violated** Section 301(a) of the Act, 33 U.S.C. Section 1311(a), by discharging pollutants into waters of the United States without a valid NPDES permit issued pursuant to Section 402 of the Act (33 U.S.C. 1342), **on September 14, 1989** from its Barefoot Bay WWTP into a drainage canal leading to the Sebastian River.
>
> . . . .
>
> Florida Cities Water Company **shall** pay $5,000 for its past violations . . . cited above. . . .
>
> This Consent Agreement and Order represents **full monetary settlement** of the proposed administrative penalties sought by EPA **for the underlying violations as alleged in the Complaint.**

[Emphasis added.]

In its brief on the subject, Florida Cities overlooks the critical language of the second paragraph, which makes absolutely clear that the Administrative Order only resolved the violation on September 14, 1989. This conclusion is further buttressed by the provisions of the third paragraph which makes it clear that the only violations being resolved were those alleged in the Administrative Complaint. As Florida Cities concedes, the only violation alleged in the Administrative Complaint, exhibit B, was

the illegal discharge occurring on September 14, 1989. There is no ambiguity here. When the relevant portions of the Administrative Order and Administrative Complaint are read together, the conclusion becomes inescapable: as a matter of law, the only violation Florida Cities resolved in the Administrative Order was the unpermitted discharge on September 14, 1989.

The order relating to Carrollwood is styled "Consent Agreement and Order Assessing Administrative Penalties" and is dated April 19, 1991. Exhibit C. The two paragraphs critical to the instant motion, paragraphs II.4 and III.1 read as follows:

> Respondent has violated Section 301(a) of the Act, 33 U.S.C. Section 1311(a), by discharging pollutants into waters of the United States without a valid NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. Section 1342, during the period of June 1987 through July 1990.
>
> . . . .
>
> Florida Cities Water Company shall pay $15,000 for its past violations . . . cited above. . . .

[Emphasis added.]

Again, Florida Cities ignores the second paragraph of the Order, which makes clear that the only violations being settled were the unpermitted violations during the period June 1987 through July 1990. When the two paragraphs quoted above are read together, as a matter of law, there simply can be no other conclusion. Moreover, it is significant that the Carrollwood consent order, unlike the Barefoot Bay consent order, does not contain language to the effect that the order settles the violations alleged in the complaint. The Administrative

Complaint for Carrollwood, exhibit D, is dated September 25, 1990 and alleges that Florida Cities had been discharging without a permit "since June 1987." By not referring in the consent order to the allegation in the complaint, and by referring instead in to a finite period of time, the parties clearly signified their intention to limit the settlement to the time period specifically referenced in the consent order.

The Court's Order cites to language contained in section III in the Administrative Orders as support for the notion that EPA intended to resolve all violations at Barefoot Bay and Carrollwood. This reliance is misplaced. The language cited by the Court comes from Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3), and merely describes the factors that EPA or the Court should consider in determining an appropriate penalty amount to resolve a specific set of violations. It does not describe the violations being resolved in a particular action.

Florida Cities argues that the consent orders settled all unpermitted discharge violations at Barefoot Bay and Carrollwood, past and future, whether specifically referenced or not in the consent orders. This argument is nonsensical. Essentially, Florida Cities argues that, in exchange for its payment of $6,000 at Barefoot Bay and $15,000 at Carrollwood, it was absolved for all time from being subjected to additional penalties no matter how long it continued to discharge without a permit and no matter what the environmental consequences of its discharges were.

Moreover, Florida Cities' argument flies in the face of

applicable law. It is axiomatic that "since consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts...." United States v. ITT Continental Baking Co., 420 U.S. 223, 236 (1975). Under contract law, the terms of an unambiguous contract are exclusively contained within the four corners of the document itself, and "the instrument must be construed as it is written." Id. at 236. Each of the two administrative orders is unambiguous and therefore must be construed as it was written. Clearly, as written, each order settled only the violation(s) explicitly referenced therein.

Florida Cities, which now holds six NPDES permits for its separate facilities, is a sophisticated corporate player, represented by experienced counsel, heavily involved in activities that are pervasively regulated by both [illegible] and USEPA. The record demonstrates that high-level officers of Florida Cities and Avatar Holdings, including counsel, were involved in the negotiations with EPA that led to issuance of the orders in question. In light of these facts, it is simply disingenuous for the company to claim that it understood the terms and provisions of the consent orders to be anything other than what were clearly stated in the orders themselves.[2]

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[2] An October 4, 1991, memorandum from Avatar's Vice President and General Counsel indicates that he personally reviewed the Barefoot Bay order. Exhibit E. It is also quite apparent from this memorandum that counsel thought Florida Cities had negotiated a favorable settlement, and wanted to close the deal quickly. Of particular note are counsel's observations that he "was very pleasantly surprised with the format and especially the minimal

Florida Cities attempts to bootstrap its argument by relying on a number of largely irrelevant exhibits, which serve only to obfuscate, not crystallize, the issue at bar. As discussed above, Section 309(g)(6)(A)(iii) bars subsequent claims for civil penalties only for those violations that were resolved in final administrative orders. For this reason, Florida Cities' reliance on the administrative compliance orders (exhibits 1 and 8 to Florida Cities' brief) is misplaced. These orders do not penalize Florida Cities for the unpermitted discharges at Barefoot Bay and Carrollwood, but impose requirements to ensure that EPA could assess the nature of the unpermitted discharges at those facilities. Because they did not impose a penalty, these orders have no relevance under section 309(g)(6)(A)(iii).

For the same reason, EPA's Show Cause Notice relating to Barefoot Bay (exhibit 2 to Florida Cities' brief) is irrelevant. While the Notice refers to ongoing unpermitted discharges, the reason for its issuance was to command Florida Cities to appear at EPA's offices "to show cause why this agency should not refer the matter to the U.S. Attorney for initiation of civil or criminal proceedings **or institute administrative proceedings to assess penalties.** [Emphasis added]. Thus, by its terms the Notice did not assess penalties, but rather informed Florida Cities that EPA might do so in a separate proceeding. EPA, in

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penalty of $6,000 [the maximum possible penalty for the one-day violation was $25,000]" and his belief that "it is in the best interest of Florida Cities Water Company to conclude this matter as quickly and quietly as possible."

fact did commence a separate proceeding for the violations at Barefoot Bay. But the only illegal discharge resolved by that separate proceeding was that occurring on September 14, 1989. While Florida Cities could have sought to settle all potential claims (and pay the higher penalty which would have resulted), it did not. Indeed, as noted above, Florida Cities' counsel delighted in the low one-day penalty and sought to conclude the matter "quickly and quietly." See Exhibit E.

The "internal Florida Cities document" which Florida Cities asserts "was understood as resolving all allegations of discharges without an NDPES permit at Barefoot Bay" (exhibit 4 to Florida Cities' brief) does nothing of the sort. This document, like EPA's letter of September 14, 1992 (exhibit 6 to Florida Cities' brief), merely says that EPA had deactivated the Barefoot Bay compliance order.[3] Even assuming arguendo that this "internal document" does manifest the understanding suggested by Florida Cities, a document generated by one party one and one-half years after the ratification of a contract cannot alter or amend that party's obligations which have been described

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[3] This exhibit is not probative of anything. There is no indication who authored the document or whether that person had any personal knowledge of the prior administrative proceedings. There is also no indication of the purpose for which this document was generated or any discussion of the issue at bar. Moreover, the document was generated on May 10, 1993, one and one-half years after the issuance of the administrative penalty order. At best, this document is a post hoc interpretation of a contractual agreement that is entitled to no weight whatsoever.

In fact, at the time that it was deactivated, the compliance order had been superseded by the permit that EPA had issued for the facility.

unambiguously in that contract.

The remainder of Florida Cities' exhibits are similarly unhelpful to the discussion. EPA's letter of March 3, 1992 (exhibit 11 to Florida Cities' brief) deactivates the Carrollwood compliance order.[4] Because the order did not impose penalties, it falls outside the ambit of Section 309(g)(6)(A)(iii) and is therefore irrelevant. The cancelled checks (exhibits 5 and 10 to Florida Cities' brief) add nothing because the issue is not whether the penalties due under the administrative orders were actually paid, but what violations the penalties covered.

In short, Florida Cities' arguments are nothing more than an ill-founded attempt to avoid liability for years of continuing illegal discharges. The administrative orders are clear on their fact and demonstrate that Florida Cities only settled -- and should have known that it was only settling -- the violations specifically referenced in the consent orders. To conclude otherwise would be contrary to law, and would have the effect of rewarding Florida Cities' unlawful conduct and neutralizing EPA's enforcement efforts against this and other polluters.

II. Significance of the Unpermitted Discharges at Barefoot Bay and Carrollwood

The United States respectfully offers the Court some

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[4] As the March 3, 1992 letter states on its face, the compliance order responds to -- and was deactivated as a result of -- Florida Cities' letter of February 10, 1992 advising EPA that it had ceased discharging from its Carrollwood plant, not because, as Florida Cities intimates in its brief, see p. 11, Florida Cities had eleven months earlier settled its liability for some three years of discharge.

background into why the claims for discharging without a permit are critical to the United States' action and why they are brought at this time. Operating a plant without a permit challenges the very integrity of the Clean Water Act and the National Pollutant Discharge Elimination System. The central prohibition of the Act declares that "the discharge of any pollutant by any person shall be unlawful," except as specified by the Act. 33 U.S.C. § 1311(a). This prohibition represents a significant change from prior federal water pollution law. The Senate Report on the 1972 amendments to the Act describes the change in both emphasis and method:

> This section [§ 301, now 33 U.S.C. § 1311] clearly establishes that the discharge of pollutants is unlawful. Unlike its predecessor program which permitted the discharge of certain amounts of pollutants under the conditions described above, this legislation would clearly establish that no one has the right to pollute -- that pollution continues because of technological limits, not because of any inherent right to use the nation's waterways for the purpose of disposing of wastes. ... The Committee believes it is important to clarify this point: **no one has the right to pollute.**

Legislative History at 1460-61 (emphasis added). See also, United States v. City of Menominee and Menominee Paper Co., 727 F. Supp. at 1122 ("No right exists to pollute our nation's waters.").

To reduce and eventually eliminate the discharge of pollutants to the nation's waters, the Act established a regulatory system to control those discharges. The Act provided that EPA would promulgate federal effluent limitations reflecting the degree of effluent control achievable by polluters using

various levels of pollution control technology. See Section 301, 33 U.S.C. § 1311; S. Rep. No. 414, 92d Cong., 1st. Sess. 42 (1971). See also E.I. Du Pont de Nemours & Co. v. Train, 430 U.S. 112, 126-29 (1977); EPA v. National Crushed Stone Ass'n, 449 U.S. 64, 69-71 (1980). Regulation of wastewater treatment plants is primarily effected through the issuance of NPDES permits under section 402 of the Act, 33 U.S.C. § 1342. The permits authorize the direct discharge of pollutants into the nation's waters, under narrowly prescribed terms and conditions. See, EPA v. California ex rel. State Water Resources Control Board, 426 U.S. 200 (1976); Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1374-77 (D.C. Cir. 1977). Each permit contains specific limitations on the amount of certain pollutants a given discharger is allowed to discharge into a specified body of water. NPDES permits also contain self-monitoring, testing, and reporting requirements which are central to the integrity of the NPDES Program. Although state and local regulators may also require certain permits for the operation of a wastewater treatment plant, any discharge of pollutants into the waters of the United States in the State of Florida must be permitted by EPA.

Florida Cities operated the Barefoot Bay Wastewater Treatment plant unlawfully for close to a decade before it even applied for an NPDES permit. Operating without a permit, it discharged pollutants into the Sebastian River on a daily basis. Simultaneously, Avatar Holdings continued to expand its Barefoot

Bay development beyond its sewage capabilities, exacerbating the situation.[5]

According to Florida Cities' own Division Manager, Larry Good, as of 1983, there were roughly 2,000 units in the development, resulting in a flow of approximately 200,000 gallons of wastewater per day. While the wastewater treatment plant had the capacity to treat one-million gallons of effluent per day, more than enough to accommodate the wastewater flow, inadequate provision had been made for the discharge of the treated effluent. The plant discharged into two percolation ponds, which together had only a 50,000-100,000 gallon/day disposal capacity. As a result, the percolation ponds overflowed on a daily basis into a drainage canal leading to the Sebastian River, and then to the Indian River, both of which are navigable waters. (The

gallons of treated effluent per day in 1983 to 300,000 per day in later years.) Notwithstanding the daily overflows to the canal, Florida Cities continued to operate the Barefoot Bay wastewater treatment plant without an NPDES permit. Moreover, Avatar Holdings continued to develop Barefoot Bay: some 300 units were added each year from 1984-89, some 200 units from 1989-90, and

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[5] The Sebastian River discharges directly into the Indian River, not far from the Barefoot Bay plant. Deposition of William Sansbury at 45, and Exhibit F. The Indian River is an important Florida waterway to which the State has given special protection in the Indian River Lagoon System Act, ch. 90-262 (1990), which requires that all existing sewage treatment facilities discharging into the Indian River Lagoon System must be eliminated before July 1, 1995.

some 100 units in 1991. These new units were connected to the existing treatment facility which led to steadily increasing volumes of wastewater being discharged without a permit to the Sebastian River. See Deposition of Larry Good at 183-89. Florida Cities finally applied to EPA for an NPDES permit in March 1990, and one was granted in November 1991.

Unlike at Barefoot Bay, Florida Cities had an NDPES permit for Carrollwood at one point in time. The permit, valid from 1975-80 authorized Florida Cities to discharge from the Carrollwood facility into Sweetwater Creek, which flows into Tampa Bay. On September 21, 1979, as the permit expiration date approached, the Florida Department of Environmental Regulation ("FDER")[6] determined that the Carrollwood plant should no longer be allowed to discharge into Sweetwater Creek because of a "zero wasteload allocation" for the creek, and, on October 5, 1979, FDER notified Florida Cities of that determination. Exhibit G. In 1984, EPA denied Florida Cities' permit renewal application on the basis of the zero wasteload allocation, exhibit H, and Florida Cities failed to challenge that denial. 33 U.S.C. § 1369(b)(2).[7] Notwithstanding the absence of such a permit,

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[6] FDER has since been renamed the Florida Department of Environmental Protection ("FDEP").

[7] The denial notice itself notified Florida Cities of its right to an evidentiary hearing on the permit. Florida Cities failed to avail itself of that opportunity, and is now prohibited by law from challenging the permit denial by section 509(b)(2) of the Clean Water Act, which provides as follows:

> Action of the Administrator with respect to which review could have been obtained under paragraph (1)

however, Florida Cities continued to discharge on a daily basis to the Sweetwater Creek for an additional seven years. Not until May 1991 did EPA, based on promises by Florida Cities to construct a highly advanced treatment system so that the discharge to the Sweetwater Creek would not be harmful, issue another permit, which was effective July 1, 1991. Not until January 1992, however, did Florida Cities actually cease its illegal discharges by hooking up to the Hillsborough County regional treatment system.

III. Timeliness of Amendment

In striking paragraphs 16 and 30 of the proposed Amended Complaint, the Court also indicated that the amendment was untimely and that it would result in prejudice to Florida Cities. The United States respectfully submits that, while these claims might have been brought as part of the initial complaint, filing them now will not prejudice Florida Cities. Thus, under the principles set forth by the Supreme Court in Foman v. Davis, 371 U.S. 178 (1962), the amendment should be allowed.

When the United States commenced this action by bringing suit only for the violations at the Waterway Estates facility, it was aware that Florida Cities had discharged without permits at Barefoot Bay and Carrollwod. However, it was not aware at that time -- and only learned during discovery in this action -- of

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> of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

33 U.S.C. § 1369(b)(2).

the extent and nature of Florida Cities' operations, and particularly Avatar's role in developing Barefoot Bay in the face of continuing Clean Water Act violations. This fact pattern, summarized above, especially the evidence that the percolation ponds at Barefoot Bay were so inadequate, leading to daily violations dating back to the early 1980s, only became apparent during the course of the depositions of Florida Cities' managers in October and November 1994.

Moreover, the Defendants will not be prejudiced if the unpermitted discharge claims are included in the Amended Complaint. Florida Cities has been on notice from the very start of this litigation that its other plants were under examination. Indeed, on April 18, 1994, Florida Cities filed a Motion for Protective Order in which it sought to prevent the United States from taking discovery relating to violations at plants other than Waterway Estates. The Court, in an order issued on the same day, denied the Motion and allowed discovery into violations at the other facilities.

Additionally, at the preliminary pretrial conference in February 1995, the United States made known its intention to add additional facilities to the complaint, and obtained permission from the Magistrate Judge to do so. The proposed Amended Complaint was filed promptly in March 1995. A full six months remained between the date on which the proposed Amended Complaint was filed and the date of the trial term. Three-and-one-half months remained for completion of discovery. To date, there have

been no extensions of either date. Based on these facts, there can be no argument that any delay by the United States in formally filing the Amended Complaint resulted in undue prejudice to Florida Cities.[8] This case is readily distinguishable from Nolin v. Douglas County, 903 F.2d 1546 (11th Cir. 1990) where "both the parties and the court were fully prepared for trial and the addition of a new claim would have re-opened the pretrial process and delayed the trial." 903 F.2d at 1551.

Moreover, once this Court concludes, as we believe it must, that the proposed amendments dealing with unpermitted discharges are not futile, there is a compelling practical reason to resolve all of the claims alleged in a single proceeding. This Court has already allowed the United States to add claims against Florida Cities for violations of permit conditions at the Carrollwood and Barefoot Bay plants. As a matter of efficiency and judicial economy, it is far preferable to include all claims and all parties in the context of the instant civil action, than to separately litigate the Barefoot Bay and Carrollwood unpermitted discharge claims in a new civil action. Any perceived prejudice is readily cured by an extension in the discovery and/or trial dates, which have thus far not been requested by either

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[8] Nor can Avatar Holdings claim prejudice, inasmuch as it has just been named as a defendant. Moreover, from the pleadings it has filed, it appears that Avatar Holdings has retained some of the same counsel who are representing Florida Cities. Thus, there will be no need for additional time for counsel to educate himself about the facts of the case.

defendant, and which the United States would not oppose.

CONCLUSION

The United States' claims for the unpermitted discharges at Barefoot Bay and Carrollwood are important to its case and are neither futile or untimely. Moreover, it would be simply be inefficient for all concerned for those claims to be brought and tried in a separate action. They are very much related to -- and should be part of -- the instant action. Accordingly, the United States respectfully requests that it be permitted to file its proposed Amended Complaint, nunc pro tunc, as of March 31, 1995.[9]

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice

By: _____

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Washington, D.C. 20044
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(202) 514-5270

CHARLES R. WILSON
United States Attorney
Middle District of Florida

[9] The date of the filing of the Amended Complaint is important because the statute of limitations is running on the Barefoot Bay unpermitted discharge claim.

MICHAEL A. CAULEY
Assistant United States Attorney
Middle District of Florida
500 Zack Street, Suite 400
Tampa, Florida 33602

TES ENVIRONMENTAL PROTECTION AGENCY
REGION IV

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	)	Docket No. CWA-IV 91-538
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mpany	)	Proceeding to Assess Class I
100	)	Administrative Penalty Under
l	)	Clean Water Act, Section 309(g)

NSENT AGREEMENT AND ORDER
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, 33 U.S.C. Section 1319(g). The
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IV, who has in turn delegated them to the
nagement Division of EPA Region IV, who
Order.

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parties by their attorneys and authorized
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Water Company, ("Respondent"), a person
ction 502(5) of the Act, 33 U.S.C. Section
s a facility located at Barefoot Bay, Brevard
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19(g), EPA Region IV hereby
that:
Agreement shall be binding
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and successors or assigns.
all pay $6,000.00 for its
ited above, by mailing a

GOVERNMENT EXHIBIT A

money order or certified check payable to "Treasurer, United Stat of America" by the effective date defined below, to the following address:

U.S. EPA Region IV
P.O. Box 100142
Atlanta, Georgia 30384

Respondent shall send notice of such payment, including a cop of the money order or check, to the Hearing Clerk at the following address:

Regional Hearing Clerk
U.S. EPA Region IV
345 Courtland Street, NE
Atlanta, Georgia 30365

IV. General Provisions

1. This Consent Agreement and Order represents full monetary settlement of the proposed administrative penalties sought by EPA for the underlying violations as alleged in the Complaint. However, issuance of this Consent Agreement and Order does not constitute a waiver by EPA of its right to issue an administrative order pursuant to Section 309(a) of the Act, 33 U.S.C. Section 1319(a), to require any remedial actions necessary (other than penalty assessment) to address the cause of the underlying violations. In addition, issuance of this Consent Agreement and Order does not constitute a waiver by EPA of its right to seek injunctive relief pursuant to Section 309(b) of the Act, 33 U.S.C. Section 1319(b), or to seek criminal penalties for the underlying violations pursuant to Section 309(c) of the Act, 33 U.S.C. Section 1319(c). Nor, pursuant to Section 309(g)(7) of the Act, 33 U.S.C. Section 1319(g)(7) of the Act, does issuance or compliance with this Consent Agreement and

Order exempt Respondent from responsibility to comply with all requirements of the Act and of any legal order or permit issued pursuant thereto.

2. Failure by Respondent to pay in full the penalty assessed Section III, Paragraph 2 shall render the entire proposed penalty o $6,000.00 due and owing, and it shall be paid immediately in the manner provided in Section III, Paragraph 2 of the Consent Agreemen

Failure by Respondent to pay the penalty set forth in Section III, Paragraph 2 may subject Respondent to a civil action tc collect the assessed penalty, plus interest, attorney's fees, costs and an additional quarterly nonpayment penalty equal to 20 percent c the aggregate amount of such penalty pursuant to Section 309(g)(9) c the Act, 33 U.S.C. Section 1319(g)(9). In any such collection action, the validity, amount and appropriateness of the penalty and of the Consent Agreement and Order shall not be subject to review. Interest will accrue on the penalty at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. Section 3717. A late payment handling charge of twenty ($20.00) dollars will be imposed after thirty (30) days, with an additional charge of ten ($10.00) dollars for each subsequent 30-day period over which an unpaid balance remains. In addition, a six percent (6%) per annum penalty will be applied on any principal amount not paid within ninety (90) days of the effective date of this Order.

3. For purposes of federal income taxation, Respondent shall not be entitled to, and agrees not to, claim a deduction for any penalty payment made pursuant to this Consent Agreement and Order.

4. Respondent knowingly and explicitly waives its rights pursuant to Sections 309(g)(2) and (8), 33 U.S.C. Section 1319(g)(2)

and (8), to a hearing on this penalty assessment, and to judicial review of this administrative penalty assessment.

5. Each party to this Consent Agreement shall bear its own attorneys' fees, costs and expenses in this action. Should Respondent subsequently be determined to have violated the terms and conditions of this Consent Agreement, then the United States Environmental Protection Agency reserves its rights to seek payment of all attorneys' fees, costs and expenses it incurs in any actions against Respondent for noncompliance with this Consent Agreement.

V. Effective Date

This Consent Agreement and Order shall become effective thirty (30) days after the date of issuance noted below.

Florida Cities Water Company
Paul H. Bradtmiller, Senior Vice President
4837 Swift Road, Suite 100
Sarasota, Florida 34231

W. Ray Cunningham, Director
Water Management Division
EPA Region IV

Issued this _____ day of _____, 19 .

CERTIFICATE OF SERVICE

I certify that on the date noted below, I hand delivered the origin of the foregoing "CONSENT AGREEMENT AND ORDER ASSESSING ADMINISTRATIVE PENALTIES" to the Regional Hearing Clerk, Region IV. Further, I certify that on the date noted below, I sent by certifie mail, return receipt requested, a copy of this "CONSENT AGREEMENT A ORDER ASSESSING ADMINISTRATIVE PENALTIES" to the following persons a the addresses listed below:

Mr. Paul H. Bradtmiller
Florida Cities Water Company
4837 Swift Road, Suite 100
Sarasota, Florida 34231

Ms. Carol Browner
Secretary
Florida Department of
Environmental Regulation
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

NOV 6 1991

DATE

NAME
TITLE
ADDRESS

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV

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IN THE MATTER OF:	)	Docket No. CWA-IV 91-538
Florida Cities Water Company 4837 Swift Road, Suite 100 Sarasota, Florida 34231	)	Proceeding to Assess Class I Administrative Penalty Under Clean Water Act, Section 309(

ADMINISTRATIVE COMPLAINT

I. Statutory Authority

The following Findings are made, and Notices given under the authority vested in the Administrator of the U. S. Environmental Protection Agency ("EPA") by Section 309(g) of the Clean Water Act ("Act"), 33 U.S.C. Section 1319(g). The Administrator has delegated these authorities to the Regional Administrator of EPA Region IV, who has in turn delegated them to the Director of the Water Management Division of EPA Region IV, who hereby issues this Complaint.

II. Findings of Violation:

1. Florida Cities Water Company, ("Respondent"), a person within the meaning of Section 502(5) of the Act, 33 U.S.C. Section 1362(5), owns or operates a facility located at Barefoot Bay, Brevard County, Florida, which is a point source and discharges pollutants to the drainage canal to Sebastian River, a navigable water of the United States, all within the respective definitions established in Section 502 of the Act, 33 U.S.C. Section 1362. Respondent is therefore subject to the provisions of the Act, 33 U.S.C. Section 1251 et seq.

2. Respondent has violated Section 301(a) of the Act, 33 U.S.C. Section 1311(a), by discharging pollutants into waters of the United States without a valid NPDES permit issued pursuant to Section 402 of the Act (33 U.S.C. 1342), on September 14, 1989 from its

Barefoot Bay WWTP into a drainage canal leading to the Sebastian River.

3. EPA has consulted with the State of Florida regarding thi proposed action by mailing a copy of this document to the appropria State official, and offering an opportunity for the State to consul with EPA on this proposed penalty assessment.

III. Notice of Proposed Order Assessing A Civil Penalty

Based on the foregoing findings of violation, and pursuant to the authority of Section 309(g) of the Act, 33 U.S.C. Section 1319(g), EPA Region IV hereby proposes to issue a Final Order Assessing Administrative Penalties to Florida Cities Water Company, assessing a penalty in the amount of $6,000.00.

The proposed penalty amount was determined by EPA after taking into account the nature, circumstances, extent and gravity of the violation or violations, and Respondent's prior compliance history, degree of culpability for the cited violations, any economic benefit or savings accruing to Respondent by virtue of the violations, and Respondent's ability to pay the proposed penalty, all factors identified at Section 309(g)(3) of the Act, 33 U.S.C. Section 1319(g)(3). EPA may issue the Final Order Assessing Administrative Penalties thirty days after Respondent's receipt of this Notice, unless Respondent, within that time, requests a hearing on this Notice pursuant to the following section.

IV. Notice of Opportunity to Request A Hearing

1. Respondent may, pursuant to Section 309(g) of the Act, 33 U.S.C. Section 1319(g), request within thirty days of receipt of this Notice a hearing on the proposed civil penalty assessment, and at the hearing may contest any material fact contained in the Findings of Violation at Section II above, and the appropriateness of any penalty

amount. The request for a hearing must specify the factual and le issues which are in dispute and the specific factual and legal grounds for Respondent's defense. Any and all specific allegation not responded to by Respondent shall be deemed admitted. The procedures for the hearing, if one is requested, are set out in "Guidance on Class I Clean Water Act Administrative Penalty Procedures", a copy of which is enclosed.

2. Respondent must send any request for a hearing to:

Regional Hearing Clerk
U. S. EPA Region IV
345 Courtland Street
Atlanta, Georgia 30365

3. Be aware that should you request a hearing on this propose penalty assessment, members of the public, to whom EPA is obligatec to give notice of this proposed action, will have a right under Section 309(g)(4)(B) of the Act, 33 U.S.C. Section 1319(g)(4)(B), t be heard and to present evidence on the appropriateness of the penalty assessment. Should you not request a hearing, EPA will iss a Final Order Assessing Administrative Penalties, and only members the public who submit timely comment on this proposal will have an additional 30 days to petition EPA to set aside the Final Order Assessing Administrative Penalties and to hold a hearing thereon. EPA will grant the petition and will hold a hearing only if the petitioner's evidence is material and was not considered by EPA in the issuance of the Final Order Assessing Administrative Penalties.

4. Neither assessment nor payment of an administrative civil penalty pursuant to this section of the Act shall affect your continuing obligation to comply with the Clean Water Act and with any separate Compliance Order issued under Section 309(a) of the Ac 33 U.S.C. Section 1319(a), for the violations alleged herein.

SEP 25 1981
DATE

W. Ray Cunningham, Director
Water Management Division

CERTIFICATE OF SERVICE

I certify that on the date noted below, I hand delivered the origin of the foregoing "Administrative Complaint" to the Regional Hearing Clerk, Region IV. Further, I certify that on the date noted below, sent by certified mail, return receipt requested, a copy of this "Administrative Complaint" and a copy of the enclosed Guidance on Class I Clean Water Act Administrative Penalty Procedures, to the following person at the address listed below:

Mr. Paul H. Bradtmiller
Florida Cities Water Company
4837 Swift Road, Suite 100
Sarasota, Florida 34231

I further certify that on the same date below I sent by certified mail, return receipt requested, a copy of this document to the following person at the address listed below:

Ms. Carol Browner
Secretary
Florida Department of
Environmental Regulation
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

SEP 25 1991

DATE

Susan J. Pope

NAME Susan J. Pope
TITLE Compliance Analyst
ADDRESS US EPA, Region IV
345 Courtland Street, NE
Atlanta, GA 30365

36176

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV

IN THE MATTER OF:	)	Docket No. CWA-IV 90-542
Florida Cities Water Company Carrollwood Subdivision P.O. Box 5846 Sarasota, Florida 34277	)	Proceeding to Assess Class I Administrative Penalty Under Clean Water Act, Section 309(

CONSENT AGREEMENT AND ORDER
ASSESSING ADMINISTRATIVE PENALTIES

I. Statutory Authority

The following Findings are made and Consent Agreement issued unde the authority vested in the Administrator of the U.S. Environmenta Protection Agency ("EPA") by Section 309(g) of the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. Section 1319(g),. The Administrato has delegated these authorities to the Regional Administrator of EP Region IV, who has in turn delegated them to the Director of the Wate Management Division of EPA Region IV, who hereby issues this Fina Order.

II. Findings of Violation

Upon consent of the parties by their attorneys and authorize officials, the Director finds:

1. Florida Cities Water Company, ("Respondent"), a person withi the meaning of Section 502(5) of the Act, 33 U.S.C. Section 1362(5) owns or operates the Carrollwood Wastewater Treatment Facility locate at 11700 Orange Grove Drive, Tampa, Florida 33618, which is a point source and discharges pollutants to the Sweetwater Creek, a navigable water of the United States, all within the respective definitions established in Section 502 of the Act, 33 U.S.C. Section 1362.

GOVERNMENT EXHIBIT C

Respondent is therefore subject to the provisions of the Act, 33 U.S.C. Section 1251 et seq.

2. On September 25, 1990, EPA Region IV issued to Respondent a notified the public of an Administrative Complaint, Docket No. CWA-90-542 which included formal findings of violation, notice of proposed assessment of a civil penalty against Respondent, and noti of Respondent's opportunity to request a hearing on the propos administrative penalty assessment. EPA Region IV has taken in consideration any public comments timely received.

3. On September 25, 1990, the State of Florida was given a opportunity to consult with EPA regarding the assessment of a administrative penalty against Respondent. EPA Region IV has take into consideration any comments received from the State.

4. Respondent has violated Section 301(a) of the Act, 33 U.S.C Section 1311(a), by discharging pollutants into waters of the Unite States without a valid NPDES permit issued pursuant to Section 402 o the Act, 33 U.S.C. Section 1342, during the period of June 1987 throug July 1990.

III. Penalty Order and Consent:

Based on the foregoing stipulations and findings, and having taken into account the nature, circumstances, extent and gravity of the violations, Respondent's prior history of compliance, degree of culpability, economic benefit or savings resulting from the violations, and ability to pay, and under the authority of Section 309(g) of the Act, 33 U.S.C. Section 1319(g), EPA Region IV hereby ORDERS AND RESPONDENT HEREBY CONSENTS, that:

1. The provisions of this Consent Agreement shall be binding upon the Respondent, its officers, directors, agents, servants, authorized representatives, employees, and successors or assigns.

2. Florida Cities Water Company shall pay $15,000 for its p violations of the Clean Water Act cited above, by mailing a money or or certified check payable to "Treasurer, United States of America" the effective date defined below, to the following address:

Regional Hearing Clerk
U.S. EPA Region IV
P.O. Box 100142
Atlanta, Georgia 30384

Respondent shall send notice of such payment, including a copy the money order or check, to the Hearing Clerk at the follow address:

Regional Hearing Clerk
U.S. EPA Region IV
Department 12
345 Courtland Street, NE
Atlanta, Georgia 30365

IV. General Provisions

1. Issuance of this Order does not constitute a waiver by EPA o its right to enforce the substantive legal requirements underlying thi administrative penalty assessment, either administratively o judicially pursuant to Section 309(a),(b), and (c) of the Act, 3 U.S.C. Sections 1319(a),(b), and (c). Nor, pursuant to Sectio 309(g)(7) of the Act, does issuance or compliance with this Orde exempt Respondent from responsibility to comply with all requirements of the Act and of any legal order or permit issued pursuant thereto.

2. Failure by Respondent to pay in full the penalty assessed in Section III, Paragraph 2 shall render the entire proposed penalty of $25,000 due and owing, and it shall be paid immediately in the manner provided in Section III, Paragraph 2 of the Consent Agreement.

Failure by Respondent to pay the penalty set forth in Sect: III, Paragraph 2 may subject Respondent to a civil action to colle the assessed penalty, plus interest, attorney's fees, costs and additional quarterly nonpayment penalty equal to 20 percent of t aggregate amount of such penalty pursuant to Section 309(g)(9) of t Act, 33 U.S.C. Section 1319(g)(9). In any such collection action, t validity, amount and appropriateness of the penalty and of the Conse: Agreement and Order shall not be subject to review. Interest wil accrue on the penalty at the rate established by the Secretary of th Treasury pursuant to 31 U.S.C. Section 3717. A late payment handlin charge of twenty ($20.00) dollars will be imposed after thirty (30 days, with an additional charge of ten ($10.00) dollars for eac subsequent 30-day period over which an unpaid balance remains. I addition, a six percent (6%) per annum penalty will be applied on an principal amount not paid within ninety (90) days of the effective dat of this Order.

3. Respondent knowingly and explicitly waives its rights pursuant to Sections 309(g)(2) and (8) of the Act, 33 U.S.C. Sections 1319(g)(2) and (8) of the Act, to a hearing on this penalty assessment, and to judicial review of this administrative penalty assessment.

greement and Order shall become effective thirty
date of issuance noted below.

SERVICE

I hand delivered the origin
MENT AND ORDER ASSESSI
onal Hearing Clerk, Region I
ted below, I sent by certifie
of this "CONSENT AGREEMENT AN
" to the following persons a

Company
xecutive Vice President
ion

4277

irector
ision

day of _____, 19 .

Angela Felton
Clerk - Typist
US EPA
345 Courtland St
Atlanta, GA 30365

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV

IN THE MATTER OF:	Docket No. CWA-IV 90-542
Florida Cities Water Company P.O. Box 5846 Sarasota, Florida 34277	Proceeding to Assess Class I Administrative Penalty Under Clean Water Act, Section 309(

ADMINISTRATIVE COMPLAINT

I. Statutory Authority

The following Findings are made, and Notices given under the authority vested in the Administrator of the U. S. Environmental Protection Agency (EPA) by Section 309(g) of the Clean Water Act, 33 U.S.C. Section 1319(g), (CWA or the Act). The Administrator has delegated these authorities to the Regional Administrator of EPA Region IV, who has in turn delegated them to the Director of the Water Management Division of EPA Region IV, who hereby issues this Complaint.

II. Findings of Violation:

1. Florida Cities Water Company, (Respondent), a person within the meaning of Section 502(5) of the Act, 33 U.S.C. Section 1362(5), owns or operates the Carrollwood Wastewater Treatment Facility located on Orange Grove Drive in Tampa, Florida, which is a point source and discharges pollutants to the Sweetwater Creek, a water of the United States, all within the respective definitions established in Section 502 of the Act, 33 U.S.C. Section 1362. Respondent is therefore subject to the provisions of the Act, 33 U.S.C. Section 1251 et seq.

2. Respondent has violated Section 301(a) of the Act, 33 U.S.C. Section 1311(a), by discharging pollutants into Sweetwater

[illegible] of the United States without a valid NPDES permit
ant to Section 402 of the Act, 33 U.S.C. 1342, since June

has consulted with the State of Florida regarding this
on by, at least, mailing a copy of this document to the
tate official, and offering an opportunity for the State
th EPA on this proposed penalty assessment.

of Proposed Order Assessing A Civil Penalty

n the foregoing findings of violation, and pursuant to
of Section 309(g) of the Act, 33 U.S.C. Section
Region IV hereby proposes to issue a Final Order
inistrative Penalties to Florida Cities Water Company,
nalty in the amount of $25,000.
osed penalty amount was determined by EPA after taking
nature, circumstances, extent and gravity of the
violations, and Respondent's prior compliance history,
ability for the cited violations, any economic benefit
ruing to Respondent by virtue of the violations, and
bility to pay the proposed penalty, all factors
Section 309(g)(3) of the Act, 33 U.S.C. Section
PA may issue the Final Order Assessing Administrative
ty days after Respondent's receipt of this Notice,
ent, within that time, requests a hearing on this
t to the following section.

Opportunity to Request A Hearing

dent may, pursuant to Section 309(g) of the Act, 33
9(g), request within thirty days of receipt of this
g on the proposed civil penalty assessment, and at the
test any material fact contained in the Findings of

violation at Section II above, and the appropriateness of any penalty amount. The request for a hearing must specific factual and legal issues which are in dispute and the specific factual and legal grounds for Respondent's defense. Any and all specific allegations not responded to by Respondent shall be deemed admitted. The procedures for the hearing, if one is requested, are set out in "Guidance on Class I Clean Water Act Administrative Penalty Procedures", a copy of which is attached.

2. Respondent must send any request for a hearing to:

Regional Hearing Clerk
U. S. EPA Region IV
345 Courtland Street
Atlanta, Georgia 30365

3. Be aware that should you request a hearing on this proposed penalty assessment, members of the public, to whom EPA is obligated to give notice of this proposed action, will have a right under Section 309(g)(4)(B) of the Act, 33 U.S.C. Section 1319(g)(4)(B), to be heard and to present evidence on the appropriateness of the penalty assessment. Should you not request a hearing, EPA will issue a Final Order Assessing Administrative Penalties, and only members of the public who submit timely comment on this proposal will have an additional 30 days to petition EPA to set aside the Final Order Assessing Administrative Penalties and to hold a hearing thereon. EPA will grant the petition and will hold a hearing only if the petitioner's evidence is material and was not considered by EPA in the issuance of the Final Order Assessing Administrative Penalties.

4. Neither assessment nor payment of an administrative civil penalty pursuant to this section of the Act shall affect your continuing obligation to comply with the Clean Water Act and with a separate Compliance Order issued under Section 309(a) of the Act, 3 U.S.C. Section 1319(a), for the violations alleged herein.

SEP 25 1990
DATE

James S. Hutchinson for
W. Ray Cunningham, Director
Water Management Division

CERTIFICATE OF SERVICE

I certify that on the date noted below, I hand delivered the original of the foregoing "Administrative Complaint" to the Regional Hearing Clerk, Region IV. Further, I certify that on the date noted below, I sent by certified mail, return receipt requested, a copy of this "Administrative Complaint" and a copy of the attached Guidance on Class I Clean Water Act Administrative Penalty Procedures, to the following person at the address listed below:

Mr. A. A. Reeves, III
Florida Cities Water Company
P.O. Box 5846
Sarasota, Florida 34277

I further certify that on the same date below I sent by certified mail, return receipt requested, a copy of this document to the following person at the address listed below:

Mr. Dale Twachtmann
Secretary
Florida Department of
Environmental Regulation
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32301

September 25, 1990
DATE

Susan J. Rollins
NAME Susan J. Rollins
TITLE Compliance Officer
ADDRESS EPA, Region IV
345 Courtland Street, NE
Atlanta, GA 30365

(E) Ex. 7.8 OCT 0
Barefoot Bay - Consent Or.

AVATAR

LEGAL - CONFIDENTIAL

From: Dennis J. Getman
To: See Distribution
Subject: Barefoot Bay Wastewater Treatment Facilities - EPA
Date: October 4, 1991

Encl:

Ref:

CC:

ATTORNEY WORK PRODUCT

Please be advised that I have reviewed the "Administrative Complaint" and "Consent Agreement and Order Assessing Administrative Penalties" drafts forwarded to Florida Cities Water Company by EPA in conjunction with the inquiry into the possible pollutant discharges from the Barefoot Bay Wastewater Treatment Facilities. To say the least, I was very pleasantly surprised with the format and especially the minimal penalty of $6,000. Obviously, if I had my druthers, I would change the Consent Agreement so that the "Findings" were determined by the Directors with Florida Cities Water Company not admitting or stipulating to anything. However, under the prevailing circumstances, I believe it is in the best interest of Florida Cities Water Company to conclude this matter as quickly and quietly as possible.

It is very obvious to me that EPA took into full consideration the nature, circumstances, compliance history, etc. of Florida Cities Water Company and that the meetings with the EPA by the staff were extremely beneficial. Everyone associated with these meetings from the standpoint of Florida Cities Water Company is to be congratulated, in my opinion, for doing an excellent job.

If anyone receiving this memorandum has any questions thereon, I would request they contact me immediately. Otherwise, let's get this matter completed and behind us.

THIS IS A LEGAL OPINION MEMORANDUM WHICH IS LEGAL/ CONFIDENTIAL AND OF AN ATTORNEY WORK PRODUCT WHICH IS PROTECTED BY THE ATTORNEY/CLIENT PRIVILEGE. THE FURTHER DISSEMINATION OR REPRODUCTION OF THIS MEMORANDUM IS STRICTLY PROHIBITED WITHOUT THE WRITTEN PERMISSION OF THE ISSUER.

Distribution

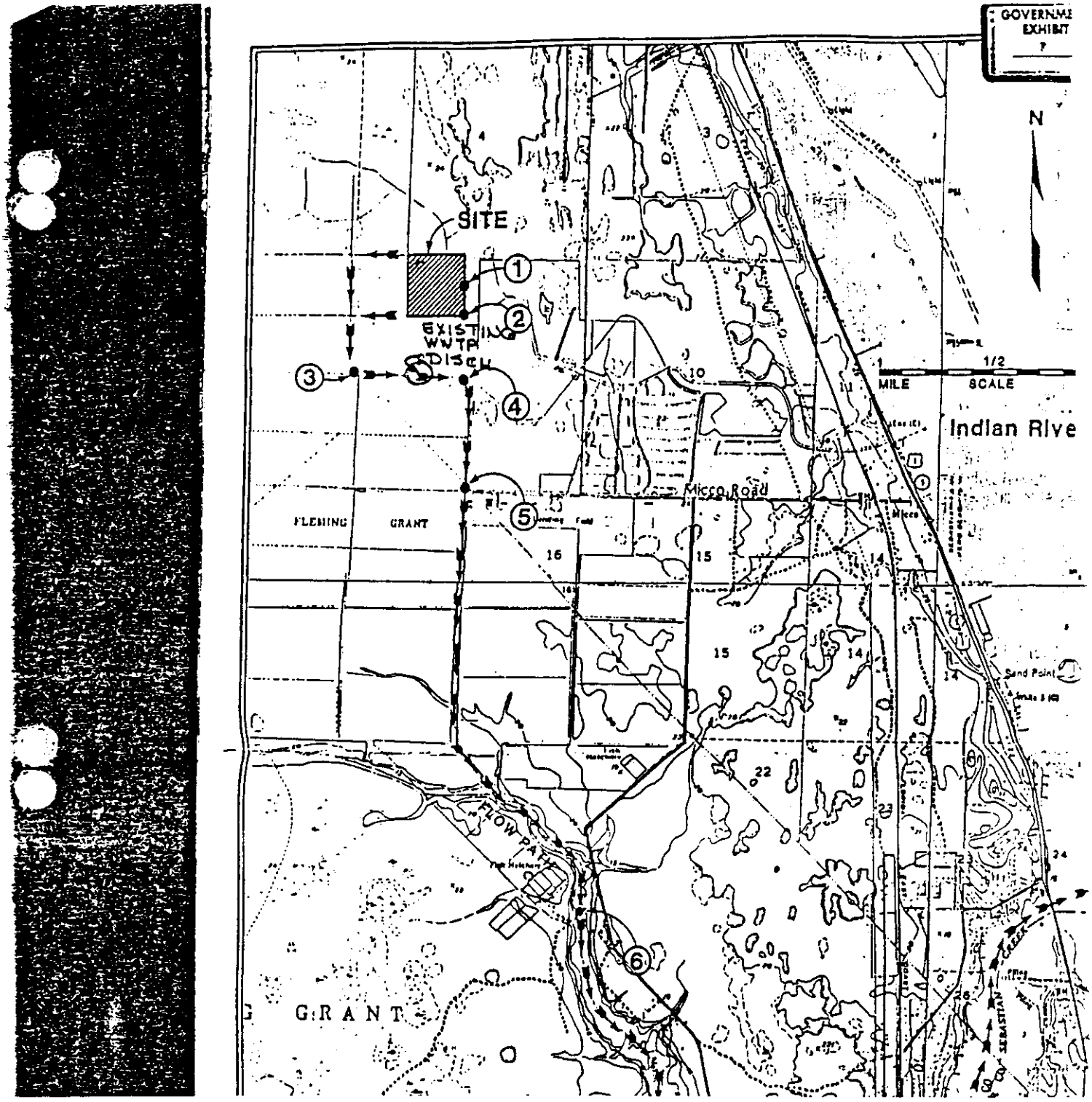
Gerald Allen
Paul Bradtmiller
Robert Gordon
A. A. Reeves, III

DJG/ps

GOVERNMENT EXHIBIT F

0403537

CM 817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GRANT
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22
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Sand Point
FLOW PATH
GRANT
SEBASTIAN
CREEK

Memorandum

Florida Cities Water Company

2112 Gulf Gate Drive
Sarasota, Florida 33581

To Mr. Robert B. Gordon
City Mr. Dan Wittenmyer
Mr. A.A. Reeves III

From C.A. Osborne

Date October 11, 1979

Subject Carrollwood S.T.P.

Attached is a copy of letter from D.E.R., Southwest District. This letter refers to the waste load allocation (also attached) for the Carrollwood S.T.P. The D.E.R. has determined there shall be no discharge of effluent from this S.T.P.

The author of the letter, E.G. Snipes, suggests a meeting be arranged between concerned parties, and I would like to arrange such a meeting for the week of October 15, 1979.

If you concur, please notify me and I will set up a meeting.

GOVERNMENT EXHIBIT
G

30702

7601 HIGHWAY 301 NORTH
TAMPA, FLORIDA 33610

BOB
GO

JACOB
SEC

DAVID F
DISTRICT M.

STATE OF FLORIDA

DEPARTMENT OF ENVIRONMENTAL REGULATION

SOUTHWEST DISTRICT

Hillsborough County - DW
Carrollwood S/D

October 8, 1979

OCT 10 1979

SARASOTA OFFICE

Mr. William G. Lee
Vice President and General Manager
Florida Cities Water Company
P. O. Box 5846
Sarasota, Florida 33579

Dear Mr. Lee:

Attached is a copy of the wasteload allocation for the Carrollwood S/D wastewater plant. This allocation provides for no discharge of effluent to the receiving waters.

Since you will not be able to meet the time schedule on the Temporary Operating Permit, we suggest that a meeting be held for you to outline what steps will be taken to bring the system into compliance.

We look forward to hearing from you at your earliest convenience.

Sincerely,

E. G. Snipes, P.E.

EGS/nc

Enc.

cc: HCEPC
Ross A. McVoy, Madigan, Parker,
Gatlin, Truett

30703

original typed on 100% recycled paper

State of Florida
DEPARTMENT OF ENVIRONMENTAL REGULATION

INTEROFFICE MEMORANDUM

For Routing And/Or Other — Office Addresses
To: Manor Parkway — Loctn: Tampa
To: Attn: Tampa — Loctn: Tampa
To: _____ Loctn: _____
From: _____ Date: _____

TO: Mr. David Puchaty, Manager, Southwest Florida District

ATTENTION: Mr. Ed Snipes, Southwest District

THROUGH: Dr. G. J. Thabaraj, Chief, BWA

FROM: Randy Armstrong, Administrator, WQAS

DATE: September 21, 1979

SUBJECT: Water - Planning - Wasteload Allocation - Florida Cities Water Company Carrollwood STP (Hillsborough County, Segment 24.4D)

This memorandum defines the wasteload allocation for the above referenced facility. The effluent limitations are listed in the attached table as maximum 30-day average.

This allocation was coordinated by Mr. Steve Palmer of the Water Quality Analysis Section. If you have any technical questions regarding this allocation, please contact this person at SUNCOM 278-0780.

RA/sp/cc

DER
OCT 5 1979
SOUTHWEST DISTRICT
TAMPA

30704

TABLE

EFFLUENT LIMITATIONS - WASTELOAD ALLOCATIONS

Plant Name: Florida Cities Water Co., Carrollwood STP
Receiving Water: Sweetwater Creek
Design Flow (MGD): .453
Daily Maximum Flow (MGD):

Segment: 24.4D
County: Hillsborough
Date: September 21, 1
WPIS #:

WASTELOAD ALLOCATION

Parameter	Effluent Limitation (Maximum 30-day Average)	
	CONCENTRATION (mg/l)	LOADING (lb/day)
Ultimate Oxygen Demand (UOD)		
Biochemical Oxygen Demand (BOD)	There shall be no discharge	
Total Nitrogen as N (TN)	of effluents from this	
Total Kjeldahl Nitrogen as N (TKN)	facility to the receiving	
Total Phosphorus as P (TP)	water noted above.*	
Dissolved Oxygen (DO) (minimum)		
Other:		

*Due to a 7-day/10-year low flow of zero cfs the design stream flow is equivale to the proposed discharge. This does not provide enough assimilative capacity a wasteload treated at AWT. Applicable Class III water quality standards would be violated more than 800 meters downstream from the point of discharge. The discharger may wish to consider the provision for relief from water quality standards as specified in Chapters 17-3 and 17-4 FAC.

NOTES:

(a) NA - Not Applicable
(b) NC - Not Calculated
(c) % Removal

30705

TRANSMISSION SLIP

DATE 1-24-80

THE ATTACHED PAPERS ARE REFERRED

TO Judi Weinberg

BY Stan Bauer

FOR THE PURPOSE INDICATED BY CHECK MARKS

✓ PLEASE NOTE AND FILE.

_____ PLEASE NOTE AND RETURN TO ME.

_____ PLEASE SEE ME ABOUT THIS_____

_____ PLEASE ANSWER.

_____ PLEASE PREPARE REPLY FOR MY SIGNATURE.

_____ PLEASE TAKE CHARGE OF THIS.

_____ TO BE SIGNED.

_____ PLEASE CALL ME WHEN YOU CAN DISCUSS THIS.

_____ PLEASE APPROVE IF O.K.

Had to go to Brooksville to get it straight.

_____ IMMEDIATE ACTION DESIRED.

30706

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET
ATLANTA, GEORGIA 30365

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

SEP 27 1984

REF: 4WM-PP

GOVERNMENT EXHIBIT H

Mr. A. A. Reeves, III
Vice President & General Manager
Florida Cities Water Company
2112 Gulf Gate Drive
P. O. Box 5846
Sarasota, Florida 33579

RE: NPDES Permit Application
NPDES No. FL0029319

Dear Mr. Reeves:

You are hereby notified of denial of the National Pollutant Discharge Elimination System (NPDES) permit application for the above referenced facility. This action constitutes a final permit decision under Title 40, Code of Federal Regulations, Section 124.15 (April 1, 1983).

This action will become effective thirty days from receipt of this letter, provided that no request for an evidentiary or panel hearing is granted by the Agency. If you wish to request an evidentiary hearing or a panel hearing, you must submit such request (an original and two copies) to the Regional Hearing Clerk within thirty (30) days from the receipt of this letter. The request will be timely if mailed by certified mail within a thirty (30) day time period. For the request to be valid, it must conform to the requirements of 40 CFR 124.74. A summary of these requirements is enclosed.

Since this facility is presently discharging pollutants to waters of the United States, EPA also intends to issue an Administrative Order after the permit denial effective date. The Administrative Order will contain a schedule for this facility to cease discharge, and specify interim discharge limits. You will be contacted under separate cover regarding the details of the Administrative Order.

Information on procedures and legal matters pertaining to an evidentiary or panel hearing request may be obtained by contacting Mr. Andrew Robert Greene, Attorney, Office of Regional Counsel at (404) 881-3506.

Sincerely yours,

Paul J. Traina, Director
Water Management Division

RECEIVED
SARASOTA OFFICE

OCT 1 1984

Enclosures (1): Requirements for Evidentiary/
Panel Hearing Request

cc: Dr. J. P. Subramani, Florida Department of
Environmental Regulation

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

United States of America,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 93-281-CIV-FTM-21D
	)	
Florida Cities Water Company and Avatar Holdings Inc.,	)	
	)	
Defendants.	)	

DEFENDANT FLORIDA CITIES WATER COMPANY'S
ANSWER TO REVISED AMENDED COMPLAINT

Defendant, Florida Cities Water Company ("FCWC"), through undersigned counsel, files its Answer to the Revised Amended Complaint in the above-captioned action. Florida Cities would note that it has moved to strike paragraphs 15 through 39 of the Revised Amended Complaint in their entirety and reserves all rights to make arguments related to that motion. Defendant states:

NATURE OF ACTION

1. This is a civil action brought pursuant to section 309(b) of the Clean Water Act ("the Act"), 33 U.S.C. § 1319(b), for civil penalties for violations of

section 301 of the Act, 33 U.S.C. § 1311, and of the conditions and limitations of a National Pollutant Discharge Elimination System ("NPDES") permit issued by EPA pursuant to section 402 of the Act, 33 U.S.C. § 1342. Notice of the commencement of the action has been provided to the State of Florida.

ANSWER: These allegations are conclusions of law requiring no response. To the extent a response is required, the allegations are denied except to the extent borne out by the authorities referenced, which are the best evidence of their contents. FCWC lacks knowledge or information sufficient to form a belief regarding whether notice of commencement of this action has been given to the State of Florida.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1345, and 1355 and section 309(b) of the Act, 33 U.S.C. § 1319(b).

ANSWER: FCWC neither admits nor denies that this Court has subject matter jurisdiction, in that this represents a conclusion of law requiring no response.

3. Venue is proper in the Middle District of Florida pursuant to 28 U.S.C. §§ 1391(b) and (c) and 1392, and section 309(b) of the Act, 33 U.S.C. § 1319(b).

ANSWER: FCWC does not dispute venue in this district.

THE DEFENDANT

4. Defendant Avatar Holdings Inc. is a Delaware corporation which resides and does business in Florida.

ANSWER: FCWC cannot answer for Avatar Holdings Inc. To the extent that a response is required, the allegation is denied.

5. Defendant, Florida Cities Water Company, Inc., is a subsidiary of Avatar Holdings Inc., and is a Florida corporation that resides and does business in

ANSWER: FCWC denies that it is a direct subsidiary of Avatar Holdings Inc. FCWC admits that it is a corporation that resides and does business in Florida.

6. As the parent company of Florida Cities Water Company, Inc., Defendant Avatar Holdings Inc. directly controls the management of Florida Cities Water Company's environmental compliance practices, and is thereby directly responsible for the acts and omissions alleged herein. Thus, each subsequent

reference to "Defendants" herein should be read to include Avatar Holdings Inc., acting through Florida Cities Water Company.

ANSWER: The first sentence is denied. The second sentence does not require an answer.

7. Each of the defendants is a "person" within the meaning of section 502(5) of the Act, 33 U.S.C. § 1362(5).

ANSWER: This allegation is a conclusion of law requiring no response.

GENERAL ALLEGATIONS

8. At times relevant herein, Defendants have owned and operated privately owned wastewater treatment plants known as the Barefoot Bay Wastewater Treatment Plant, Carrollwood Wastewater Treatment Plant, and Waterway Estates Wastewater Treatment Plant, all located in the State of Florida.

ANSWER: FCWC does not know the meaning of the statement "[a]t times relevant herein." FCWC admits that it owns and operates privately owned wastewater treatment plants known as Barefoot Bay Wastewater Treatment Plant, Carrollwood Wastewater Treatment Plant, and Waterway Estates Wastewater Treatment Plant, all located in the State of Florida.

9. At times relevant herein, Defendants have collected wastewater from residential and/or commercial sources, treated that wastewater at the various

wastewater treatment plants listed in the preceding paragraph, and then discharged that wastewater either directly or indirectly into the waters of the United States.

ANSWER: FCWC does not know the meaning of the statement "[a]t times relevant herein." FCWC admits that it collected wastewater from residential and commercial sources, treated wastewater at the various wastewater treatment plants, and then at various times discharged treated wastewater into waters of the United States.

10. At times relevant herein, Defendants have caused the "discharge of pollutants" within the meaning of section 502(12) of the Act, 33 U.S.C. § 1362(12), from the treatment plants listed in paragraph 8 above through a "point source" within the meaning of section 502(14) of the Act, 33 U.S.C. § 1362(14), into "navigable waters" within the meaning of section 502(7) of the Act, 33 U.S.C. § 1362(7).

ANSWER: FCWC does not know the meaning of the statement "[a]t times relevant herein." FCWC admits that it has caused the discharge of treated effluent through point sources at various times. The other allegations are conclusions of law requiring no response.

11. Section 301(a) of the Act, 33 U.S.C. § 1311(a) prohibits the discharge of pollutants by any person except as in compliance with certain sections of the Act, including the requirement that a person obtain a National Pollutant

Discharge Elimination System (NPDES) permit for discharges to waters of the United States.

ANSWER: FCWC neither admits nor denies these allegations which are conclusions of law requiring no response.

12. At times relevant herein Defendants were required by NPDES permits to submit monthly discharge monitoring reports ("DMRs") to EPA containing the results of the required sampling for each month, and reporting the actual number of any permit exceedences. On each report, the Defendants were required to certify, by the signature of a principal executive officer or authorized agent, that the submitted information is true, accurate and complete.

ANSWER: The allegations are denied except to the extent borne out by the permits, which speak for themselves and are the best evidence of their contents.

13. Subsection 309(d) of the Act, 33 U.S.C. § 1319(d), provides, in part, that any person who violates, inter alia, section 301 of the Act, 33 U.S.C. § 1311, including any permit condition or limitation implementing that section, violates any condition or limitation in a NPDES permit issued under Section 402 of the Act, 33 U.S.C. § 1342, or violates any order issued by EPA under section 309(a) of the Act, 33 U.S.C. § 1319(a), shall be subject to a civil penalty not to exceed $25,000 per day for each such violation.

ANSWER: These allegations are conclusions of law requiring no response.

14. Each occurrence of a (1) discharge without a NPDES permit; (2) violation of an EPA Administrative Order; (3) discharge at an unpermitted location; (4) violation of an effluent limitation or other condition in a NPDES permit constitutes a separate violation of section 301 of the Act, 33 U.S.C. § 1311 punishable in accordance with section 309(d) of the Act, 33 U.S.C. § 1319(d).

ANSWER: These allegations are conclusions of law requiring no response.

First Claim for Relief
(Barefoot Bay)

15. Paragraphs 1 through 14 are realleged and incorporated herein by reference as if fully set forth below.

ANSWER: FCWC hereby incorporates its responses to Paragraphs 1 through 14 of the Amended Complaint.

16. Pursuant to section 309(a) of the Act, 33 U.S.C. § 1319(a), on September 26, 1990, EPA issued an Administrative Order (No. 90-106) to Defendant Florida Cities Water Company, finding it in violation of the Act for discharging pollutants from its Barefoot Bay plant into waters of the United States, a drainage canal leading to the Sebastian Creek, without a valid NPDES permit and prescribing certain interim effluent limitations and monitoring requirements on

pollutants discharged from the Barefoot Bay plant into the waters of the United States.

ANSWER: The allegations are denied except to the extent borne out by the Administrative Order No. 90-106, which speaks for itself and is the best evidence of its contents.

17. On repeated occasions (during the period in or about November 1990 to June 1991), Defendants violated EPA Administrative Order No. 90-106 by discharging effluent from the Barefoot Bay Treatment Plant which exceeded the Total Suspended Solids daily maximum limitation in that Order.

ANSWER: FCWC denies this allegation except to admit that it reported some exceedences of the total suspended solids daily maximum limitations to EPA Region IV. However, all liability arising therefrom is denied.

18. On repeated occasions (during the period in or about 1990-1991), Defendants violated EPA Administrative Order No. 90-106 by discharging effluent from the Barefoot Bay Treatment Plant which exceeded the Fecal Coliform daily maximum limitation in that Order.

ANSWER: FCWC denies this allegation except to admit that it reported some exceedences of the fecal coliform daily maximum limitations to EPA Region IV. However, all liability arising therefrom is denied.

19. On at least one occasion (May 1991), Defendants violated EPA Administrative Order No. 90-106 by discharging effluent from the Barefoot Bay Treatment Plant which did not meet the Dissolved Oxygen daily minimum requirement in that Order.

ANSWER: FCWC denies this allegation except to admit that it reported an exceedence of the dissolved oxygen daily minimum limitation to EPA Region IV. However, all liability arising therefrom is denied.

20. On at least one occasion (in or about October 1990), Defendants violated EPA Administrative Order No. 90-106 by discharging effluent from the Barefoot Bay Treatment Plant which exceeded the Biological Oxygen Demand (BOD) daily maximum limitation in that Order.

ANSWER: FCWC denies this allegation except to admit that on one occasion it reported an exceedence of the biochemical oxygen demand daily limitation to EPA Region IV. However, all liability arising therefrom is denied.

21. On at least one occasion (in or about October 1990), Defendants violated EPA Administrative Order No. 90-106 by discharging effluent from the Barefoot Bay Treatment Plant which exceeded the Biological Oxygen Demand (BOD) monthly average maximum limitation in that Order.

ANSWER: FCWC denies this allegation except to admit that on one occasion it reported an exceedence of the biochemical oxygen demand monthly limitation to EPA Region IV. However, all liability arising therefrom is denied.

22. On at least one occasion (in or about November 1990), Defendants violated EPA Administrative Order No. 90-106 by discharging effluent from the Barefoot Bay Treatment Plant which exceeded the pH daily maximum limitation in that Order.

ANSWER: FCWC denies this allegation except to admit that on one occasion it reported an exceedence of the pH daily maximum limitation to EPA Region IV. However, all liability arising therefrom is denied.

23. Beginning on or about November 1, 1991, Defendants were authorized by NPDES Permit Number FL0042293, subject to certain terms and conditions, to discharge pollutants from the Barefoot Bay Wastewater Treatment Plant into a drainage canal leading to the north prong of Sebastian Creek.

ANSWER: FCWC admits it was issued National Pollutant Discharge Elimination System ("NPDES") Permit No. FL0042293 ("Permit"), which speaks for itself.

24. In at least seven months (in or about September 1992, October 1992, November 1992, December 1992, January 1993, February 1993, and March 1993),

Defendants discharged pollutants from the Barefoot Bay Treatment Plant in excess of the Total Residual Chlorine daily maximum limitation in NPDES Permit Number FL0042293.

ANSWER: FCWC denies this allegation except to admit it reported exceedences for total residual chlorine daily maximum limitations to EPA Region IV for each month specified. However, FCWC denies all liability arising therefrom.

25. On at least three occasions (during the periods in or about September-October 1992, May 1993, and February 1994), the effluent from the Barefoot Bay Treatment Plant failed the test for chronic whole effluent toxicity in NPDES Permit Number FL0042293.

ANSWER: FCWC denies this allegation except to admit it reported exceedences for the tests for chronic whole effluent toxicity for these three occasions. However, FCWC denies any liability arising therefrom.

26. On a weekly basis during the period in or about November 1991 and continuing through at least June 1993, and on at least two occasions in November 1993, Defendants failed to monitor biological oxygen demand (BOD) at the Barefoot Bay Treatment Plant, as required by NPDES Permit No. FL0042293.

ANSWER: FCWC denies this allegation.

27. On a daily basis during the period on or about February 1, 1992, and continuing through at least June 28, 1993, Defendants failed to test for total residual chlorine (TRC) at the Barefoot Bay Treatment Plant using the method specified by Part I, Section A-2 of NPDES Permit No. FL0042293.

ANSWER: FCWC admits these allegations with respect to the Barefoot Bay Treatment facility, however, FCWC denies all liability arising therefrom.

Second Claim for Relief
(Carrollwood)

28. Paragraphs 1 through 14 are realleged and incorporated herein by reference as if fully set forth below.

ANSWER: FCWC hereby incorporates its responses to Paragraphs 1 through 14 of the Amended Complaint.

29. Beginning on or about July 1, 1991, Defendants were authorized by NPDES Permit Number FL0029319, subject to certain terms and conditions, to discharge pollutants from the Carrollwood Wastewater Treatment Plant into the Sweetwater Creek.

ANSWER: FCWC admits it was issued National Pollutant Discharge Elimination System ("NPDES") Permit No. FL0029319 ("Permit"). The permit speaks for itself.

30. In at least three months (in or about October, November, December 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Suspended Solids monthly average limitation in Permit Number FL0029319.

ANSWER: FCWC admits it reported some exceedences for the total suspended solids monthly average limitation for these three months. However, FCWC denies all liability arising therefrom.

31. On repeated occasions (in or about October, November, December 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Suspended Solids daily maximum limitation in Permit Number FL0029319.

ANSWER: FCWC admits it reported some exceedences of the total suspended solids daily maximum limitation to EPA Region IV for these three months. However, FCWC denies all liability arising therefrom.

32. In at least five months (during the period in or about July-November 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Phosphorous monthly average limitation in Permit Number FL0029319.

ANSWER: FCWC admitted it reported some exceedences of the total phosphorous monthly average limitation to EPA Region IV. However, FCWC denies all liability arising therefrom.

33. On repeated occasions (during the period in or about July-November 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Phosphorous daily maximum limitation in Permit Number FL0029319.

ANSWER: FCWC admits that it reported some exceedences of the total phosphorous daily maximum limitation to EPA Region IV for these months. However, FCWC denies all liability arising therefrom.

34. On repeated occasions (during the period in or about July-October 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Fecal Coliform daily maximum limitation in Permit Number FL0029319.

ANSWER: FCWC admits that it reported exceedences of the fecal coliform daily maximum limitation to EPA Region IV for some of these months. However, FCWC denies all liability arising therefrom.

35. In at least four months (during the period in or about July-November 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in

excess of the Total Nitrogen monthly average limitation in Permit Number FL0029319.

ANSWER: FCWC admits that it reported exceedences of the total nitrogen monthly average limitation for some of these months. However, FCWC denies all liability arising therefrom.

36. On repeated occasions (during the period in or about July-November 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Nitrogen daily maximum limitation in Permit Number FL0029319.

ANSWER: FCWC admits that it reported exceedences of the total nitrogen daily maximum limitation to EPA Region IV for some of these months. However, FCWC denies all liability arising therefrom.

37. In at least one month (in or about October 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Carbonaceous Biochemical Oxygen Demand monthly average limitation in Permit Number FL0029319.

ANSWER: FCWC admits it reported an exceedence of the carbonaceous biochemical oxygen demand monthly average limitation to EPA Region IV for one month. However, FCWC denies all liability arising therefrom.

38. On at least two occasions (in or about July and October 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Carbonaceous Biochemical Oxygen Demand daily maximum limitation in Permit Number FL0029319.

ANSWER: FCWC admits it reported an exceedence of the carbonaceous oxygen demand daily maximum limitation to EPA Region IV for these two occasions. However, FCWC denies all liability arising therefrom.

39. On repeated occasions (during the period in or about July- December 1991), Defendants discharged pollutants from the Carrollwood Treatment Plant in excess of the Total Residual Chlorine daily maximum limitation in Permit Number FL0029319.

ANSWER: FCWC admits it reported some exceedences of the total residual chlorine daily maximum limitation to EPA Region IV during this period. However, FCWC denies all liability arising therefrom.

Third Claim for Relief
(Waterway Estates)

40. Paragraphs 1 through 14 are realleged and incorporated herein by reference as if fully set forth below.

ANSWER: FCWC hereby incorporates its responses to Paragraphs 1 through 14 of the Amended Complaint.

41. During the period on or about October 1, 1988 to October 31, 1989, Defendants discharged pollutants from the Waterway Estates Wastewater Treatment Plant into the Caloosahatchee River without a NPDES Permit.

ANSWER: FCWC admits it discharged treated effluent from the Waterway Estates Wastewater Treatment Plant into the Caloosahatchee River during the period on or about October 1, 1988 to October 31, 1989. The remaining allegations are conclusions of law requiring no response.

42. Beginning on or about November 1, 1989, Defendants were authorized by NPDES Permit Number FL0030325, subject to certain terms and conditions, to discharge pollutants from the Waterway Estates Wastewater Treatment Plant directly into the Caloosahatchee River via "outfall 001."

ANSWER: FCWC admits it was issued National Pollutant Discharge Elimination System ("NPDES") Permit No. FL0030325 ("Permit"). The other allegations are conclusions of law requiring no response. To the extent a response is required, the allegations are denied except to the extent borne out by the Permit, which speaks for itself and is the best evidence of its contents.

43. On each day during the period on or about November 1, 1989 to July 14, 1991, Defendants discharged pollutants from the Waterway Estates Treatment

Plant indirectly into the Caloosahatchee River via a tributary canal which was not a permitted discharge location during the referenced period.

ANSWER: FCWC admits that during the period on or about November 1, 1989, to July 14, 1991, it discharged pollutants from the Waterway Estates Treatment Plant into the Caloosahatchee River. Any remaining allegations are denied.

44. In at least nine months (each month during the period in or about July 1991 to March 1992), Defendants discharged pollutants from the Waterway Estates Treatment Plant in excess of the Total Nitrogen concentration limitation in Permit Number FL0030325.

ANSWER: FCWC admits that it reported some exceedences of the total nitrogen concentration limitation to EPA Region IV. FCWC denies that during July, August, and September 1991, pollutant levels in effluent discharged by FCWC were in excess of the applicable Total Nitrogen concentration limitation.

45. In at least nine months (each month during the period in or about July 1991 to March 1992), Defendants discharged pollutants from the Waterway Estates Treatment Plant in excess of the Total Nitrogen loading limitation in Permit Number FL0030325.

ANSWER: FCWC admits that it reported some exceedences of the total nitrogen loading limitation to EPA Region IV. FCWC denies that during July, August, and September 1991, pollutant levels in effluent discharged by FCWC were in excess of the applicable total nitrogen loading limitation.

46. On at least three occasions (in or about February 1992, April 1992, and June 1992), the effluent from the Waterway Estates Treatment Plant failed the test for chronic whole effluent toxicity in Permit Number FL0030325.

ANSWER: On three occasions (February 1992, April 1992, and June 1992) FCWC reported measurements for toxicity that were in excess of the numerical values specified in the permit. To the extent any remaining allegations are conclusions of law, no response is required.

Relief

47. Pursuant to section 309(b) and (d) of the Act, 33 U.S.C. §§ 1319(b) and (d), Defendants are liable for civil penalties up to $25,000 per day for each violation of the Act, including up to $25,000 per day in each month in which a monthly average was violated.

ANSWER: FCWC denies that it is liable for any civil penalties. All other allegations are conclusions of law requiring no response.

AFFIRMATIVE DEFENSES

Pursuant to Fed. R. Civ. P. 12(b), FCWC, having specifically answered each and every allegation, further defends:

First Defense

Plaintiff's Complaint fails to state a claim upon which relief can be granted.

Second Defense

Plaintiff's claims are barred because FCWC has paid administrative penalties assessed by EPA for certain violations alleged herein. See 33 U.S.C. § 1319.

Third Defense

Plaintiff's claims are barred because they were the subject of earlier settlement agreements with EPA for certain violations alleged herein.

Fourth Defense

Plaintiff's claims are barred because FCWC's application for renewal of the NPDES Permit Number FL0030325 was illegally, wrongfully, or improperly denied by EPA in 1986.

Fifth Defense

Plaintiff's claims are barred because FCWC has paid penalties assessed by the state of Florida under comparable Florida law. See 33 U.S.C. § 1319.

Sixth Defense

Plaintiff's claims are barred by the doctrines of res judicata and collateral estoppel.

Seventh Defense

Plaintiff's claims are barred by the doctrine of impossibility.

Eighth Defense

Plaintiff's claims are barred by the doctrine of estoppel.

Ninth Defense

State and local governments delayed issuing permits, enacting zoning changes, signing agreements, or granting other approvals necessary for FCWC to meet compliance schedules.

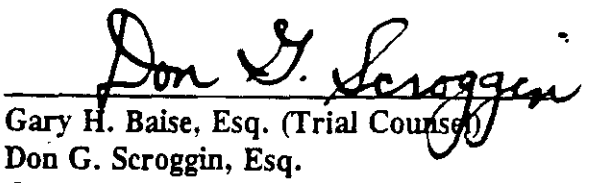
Tenth Defense

In some instances, the complaint improperly seeks duplicative penalties for the same violation.

Eleventh Defense

The Plaintiff violated the Defendants' due process rights under the Fifth Amendment.

Respectfully submitted,



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January 25, 1995

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of "Defendant Florida Cities Water Company's Answer to Revised Amended Complaint" has this 20th day of May 1995 been sent to the following persons by United States first class mail, properly addressed and postage prepaid.

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Lance W. High

Exhibit_____(GHB-47)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	)	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' OPPOSITION TO DEFENDANT FLORIDA CITIES WATER COMPANY'S MOTION TO STRIKE

Defendant Florida Cities has moved to strike in their entireties the First and Second Claims for Relief in the United States' Revised Amended Complaint. The motion is spurious and should be denied.

The original Complaint filed in this action alleged violations at one of Defendants' plants, the Waterway Estates plant in North Ft. Myers. On March 31, 1995, the United States filed a proposed Amended Complaint which included a variety of claims against Defendants for violations at two additional plants, the Barefoot Bay plant in Brevard County, and the Carrollwood plant in Tampa. Defendant Florida Cities in its "Partial Opposition to Plaintiff's Motion for Leave to Amend its Complaint," urged the Court to deny the United States leave to amend its Complaint to allege unpermitted discharge violations at the Barefoot Bay and Carrollwood plants (paragraphs 16 and 30 of the proposed Amended Complaint) on grounds of futility, but

otherwise did not oppose the filing of Amended Complaint.[1] Defendant now belatedly seeks to preclude the United States from asserting all claims for violations at the two additional facilities.

In its April 26, 1995 Order, the Court sustained Florida Cities' opposition to the Barefoot Bay and Carrollwood unpermitted discharge claims, but otherwise permitted the filing of the Amended Complaint.[2] The operative language of the Court's order reads as follows:

> ...[I]t is hereby ORDERED and ADJUDGED that the United States' Motion for Leave to Add Party (Dkt. 56) is GRANTED with the limitation that paragraphs 16 and 30 of the proposed Amended Complaint and any allegations relating to paragraphs 16 and 30 that are not relevant to the remaining claims shall not be permitted.

Order, April 26, 1995 at 6.

The remaining claims are set forth in paragraphs 17-28, and 31-49. All of the allegations included in the Revised Amended Complaint relate to the remaining claims. Thus, the United States has complied fully with the letter and spirit of the Court's Order.

Florida Cities, on the other hand, has taken splices of the Order out of context, and read them in an imaginative fashion,

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[1] In its Order of April 26, 1995, the Court noted "[t]he Defendant's opposition to the motion to amend, however, addresses only the first category of violations, for discharge without a NPDES permit." Order, April 26, 1995 at 3.

[2] On May 15, 1995, the United States filed a motion asking the Court to reconsider this Order.

thereby blatantly misconstruing the Court's Order. In so doing, Florida Cities now seeks to revisit its limited opposition to the proposed Amended Complaint by urging the Court to strike all of the claims relating to Barefoot Bay and Carrollwood. Florida Cities claims that such a result is mandated by the Court's April 26, 1995 Order.

It is abundantly clear from both the focus and text of the Order addressing revision of the proposed Amended Complaint, however, that the Court intended for the United States to withdraw only the Barefoot Bay and Carrollwood unpermitted discharge claims, not all of the claims relating to those two facilities. The Court's analysis, like Florida Cities' initial opposition to amendment of the Complaint, was limited to the unpermitted discharge claims. The operative language of the Order must be read in this context.

As the United States notes in its Memorandum in Support of its Motion for Reconsideration, Florida Cities' argument on futility in its initial opposition to the amendment of the complaint was simply wrong as a matter of law. Not content in having prevailed thus far in that effort to obfuscate, Florida Cities has launched yet another such attempt designed to shield itself from liability for polluting Florida's waters.

The Court should rebuff this latest attempt by denying the Motion to Strike.

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice

By: _____

Dated: 5/25/95

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MICHAEL A. CAULEY
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CERTIFICATE OF SERVICE

I certify that copies of the "United States' Opposition to Defendant Florida Cities Water Company's Motion to Strike" were served by U.S. Mail on the 25th day of May, 1995, to the following attorneys of record:

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John Noland
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_____
Darlene F. Lyons

Exhibit_____(GHB-48)

MAR 1 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY, INC., Defendant.	)	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' THIRD REQUEST FOR PRODUCTION OF DOCUMENTS

Plaintiff, the United States of America, pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, requests Defendant Florida Cities Water Company to produce and permit the United States to inspect and copy each of the following documents in defendant's possession, custody or control. These documents shall be produced on April 17, 1995 unless such time is modified by order of the Court or by counsel for the United States, at the offices of the U.S. Department of Justice, Environment and Natural Resources Division, 1425 New York Avenue, N.W., Washington, D.C., or at such other location as agreed upon by counsel for the United States

INSTRUCTIONS

1. Unless otherwise indicated, these requests apply to all documents written, produced, drafted, or generated on or after October 1, 1988, and ending at the trial of this matter, but **exclude** documents already produced in response to the United States' First and Second Requests for Production of Documents.

2. For each document produced, indicate on the document or in some other reasonable manner, the numbered request(s) to which it responds.

3. This request covers all documents in the possession, control or custody of defendant, its parent companies, sister companies, departments, divisions, directors, officers, employees, agents, servants, consultants, attorneys and assigns.

4. Words used in the plural shall also be taken to mean and include the singular. Words used in the singular shall also be taken to mean and include the plural. "Or" and "and" shall be construed either conjunctively or disjunctively to bring within the scope of these interrogatories any information that might otherwise be construed to be outside their scope. The past tense includes the present tense where the clear meaning is not distorted by change of tense.

5. If any document is withheld under any claim of privilege or exemption, furnish a list identifying each document for which the privilege or exemption is claimed, together with the following information:

(a) its title, or if it has no title, its subject matter;

(b) the date of origin;

(c) the author or addressor;

(d) the recipient(s) of all copies; and

(e) the basis upon which privilege or exemption is claimed.

6. Please produce the complete original exact copy of each document and, unless otherwise stated, each non-identical copy (whether different from the original because of notes made on the copy or otherwise), including drafts, of each writing of every kind and description (together with all worksheets, support documents, and other relevant materials), whether inscribed by hand or mechanical, electronic, microfilm, photographic, or other means (such as by recording, film, tape or other medium) from which such information may be obtained.

DEFINITIONS

Unless otherwise indicated, the terms used in these Requests shall have the same meaning ascribed to them under the Clean Water Act.

In addition, unless otherwise stated, the following definitions shall apply to these discovery requests:

A. "Clean Water Act" means the Federal Water Pollution Control Act, as amended by the Water Quality Act of 1987, 33 U.S.C. §§ 1251-1387, including all regulations promulgated thereunder.

B. "Document" means any and all material that is written, printed, typed, photographed, recorded (electronically, magnetically, graphically or otherwise) or which is capable of being recorded in any form. It includes, but is not limited to, any logs of materials received, other logs, invoices, purchase orders, receipts, bills of lading, loading tickets, receiving tickets, shipping orders, inventories, letters and other

correspondence, offers, contracts, agreements, bids, proposals, applications, licenses, permits, reports to government agencies, other reports, minutes of meetings, sales estimates, sales reports, memoranda, handwritten or other notes, calendar or diary entries, agendas, bulletins, graphs, charts, maps, photographs, drawings, data, price lists, lists of accounts, summaries, telegraphs, teletypes, computer printouts, magnetic tapes, discs, microfilm, and microfiche.

C. "Relate(s)" or "relating to" means constituting, defining, containing, embodying, reflecting, identifying, stating, referring to, dealing with or in any way pertaining to.

REQUESTS

1. All documents requested in the United States' First and Second Requests for Production of Documents, including, but not limited to, in particular, all such documents from the files of Robert Gordon, Dennis Getman, Leon Levy, Edwin Jacobson, and Lawrence Wilkov, and all such responsive documents generated since those requests were propounded.

2. All minutes of the Board of Directors meetings of Avatar Holdings, Inc. (regardless of date).

3. All minutes of the Board of Directors meetings of the Barefoot Bay Development Corporation (regardless of date).

4. All copies of "Pipeline."

5. All FCWC monthly operating statements (regardless of date).

6. All financial reports, income statements, balance

sheets, cash flow statements, budgets and audits relating to the Barefoot Bay Development Corporation, or any predecessor corporation or corporate entity (dating back to the date that Avatar acquired GAC).

7. All documents relating to the development and financing of Barefoot Bay, including copies of all loan and/or working capital agreements (dating back to the date that Avatar acquired GAC).

8. All documents reflecting the lots developed, marketed, and/or sold at Barefoot Bay and the prices of those lots (dating back to the date that Avatar acquired GAC).

9. All documents relating to all intercompany transfers of funds relating to the development and operation of Barefoot Bay (dating back to the date that Avatar acquired GAC).

10. All documents reviewed by any expert retained by Defendant for the purpose of testifying in this case.

11. All documents Defendant intends to rely upon or introduce into evidence at trial.

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice

By: _____

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing "United States' Third Request for Production of Documents" was served by U.S. Mail (except as otherwise indicated) on the 16th day of March, 1995, to the following attorneys of record:

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Darlene F. Lyons

Exhibit_____(GHB-49)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

United States of America, Plaintiff, v. Florida Cities Water Company, Defendant.	Case No. 93-281-CIV-FTM-21D Dispositive Motion

DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant Florida Cities Water Company hereby moves for partial summary judgment on the First Claim for Relief, as set forth in the Complaint.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

United States of America, Plaintiff, v. Florida Cities Water Company, Defendant.	)	Case No. 93-281-CIV-FTM-21D

DEFENDANT'S REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 3.01(d), Defendant Florida Cities Water Company ("Florida Cities") hereby requests oral argument on its motion for partial summary judgment. Florida Cities estimates that one hour will be required for oral argument.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

United States of America,	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 93-281-CIV-FTM-21D
	)	
	)	
Florida Cities Water Company,	)	
	)	
	)	
Defendant.	)	
	)	
	)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This memorandum is in support of Defendant Florida Cities Water Company's ("FCWC's"), motion for partial summary judgment. In 1986, the U.S. Environmental Protection Agency ("EPA") exceeded its specific regulatory authority by purporting to deny FCWC's application to renew its National Pollutant Discharge Elimination System ("NPDES") permit. As EPA had no legal basis to deny the permit, according to the Agency's own regulations, this action was void *ab initio*. EPA thus cannot now assert that FCWC violated the Clean Water Act ("CWA") by discharging without that permit.

As set forth below, this private utility has been bedeviled by bureaucratic carelessness and indifference, and a stubborn unwillingness by the government to admit error. For more than twenty years, the treated effluent discharged from FCWC's

Waterway Estates sewage treatment plant ("Waterway Estates") has met substantially all applicable state and federal effluent guidelines and water quality standards. EPA's claim concerning FCWC's permit is not about environmental harm, but rather asserts only a technical violation of EPA's permitting regulations. Yet, instead of acknowledging that it lacked the requisite grounds for denying FCWC's permit, a fact we believe established beyond reasonable dispute, EPA is now compounding the error by seeking civil penalties from FCWC for allegedly discharging without a permit -- the consequence of EPA's own error.

FACTUAL BACKGROUND

1. Permit History. Waterway Estates has served the people of Lee County, Florida for twenty years, providing wastewater treatment to several thousand residents since the mid-1970s. Throughout that time, the State of Florida has authorized FCWC to discharge the treated water from the facility.[1]

FCWC first received an operating permit for the Waterway Estates treatment plant on October 26, 1971, although apparently operations did not begin immediately.[2] The original design capacity for Waterway Estates was 0.33 million gallons per day

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[1] In most states, the federal and state discharge permits are the same, as the state has been delegated authority by EPA to administer the federal program. Due to a long-standing dispute between EPA and the State of Florida, not relevant here, in Florida the state and federal governments both issue permits. The state permit imposes extensive monitoring requirements, effluent limitations, and monthly reporting requirements. The State of Florida and EPA are currently negotiating delegation of the federal program, and the program may be administered by Florida shortly.

[2] Permit No. DT-36-732, effective October 26, 1971 until April 26, 1972. Ex. 1.

("mgd"). In 1975, with the growth of population in south Florida, Waterway Estates received permission to expand its facility from 0.33 mgd to 1.08 mgd. Waterway Estates continued to receive operating permits from the State of Florida, authorizing discharges from the facility.[3]

Over most of the last twenty years FCWC, without dispute, has maintained an NPDES discharge permit for Waterway Estates.[4] Throughout this period, Waterway Estates faithfully met the strict discharge limits imposed by its state and federal permits. For example, a federal inspection in 1985 indicated that the Waterway Estates facility was in compliance, with only four minor exceptions.[5] Even EPA alleges only technical violations of permit terms in 1991 and 1992, which posed no risk to human health. To improve Waterway Estates' ability to treat wastewater, FCWC upgraded the facility to an advanced wastewater treatment plant from 1987 to 1991, at a cost of more than $4 million.

2. Purported Permit Denial. On December 8, 1986, EPA purported to deny

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[3] Permit No. DO-36-732, effective July 14, 1972 until July 14, 1977; Permit No. DO36-2543, effective February 10, 1977 until February 10, 1981; Permit No. DO36-7407, effective April 1, 1981 until July 1, 1983; Permit No. DO36-72569, effective August 2, 1983 until August 2, 1988; Permit No. DT-36-152486; effective September 23, 1988 until November 1, 1990; Permit No. DT-36-188171, effective January 22, 1991 until June 9, 1993; Permit No. DO36-228850, effective August 25, 1993 until August 25, 1998. See Ex. 2.

[4] NPDES Permit No. FL003025, effective August 15, 1975 until August 15, 1980; NPDES Permit No. FL0030325, effective September 24, 1981 until September 24, 1986; NPDES Permit No. FL0030325, effective November 1, 1989 until September 30, 1994. See Ex. 3.

[5] The flow meter was not adequately calibrated, samples were not refrigerated, the time of sample collection and analysis was not recorded, and quality control could be improved by use of spiked samples. Letter dated May 28, 1985, from Priscilla Oliver, Compliance Section, EPA Region IV to Anthony Reeves, Vice President, FCWC. Ex. 4.

Waterway Estates' application for an NPDES permit renewal.[6] This action, taken without authority, is at issue in this litigation. The denial by EPA was based solely on a statement extracted out of context from a 1981 Florida planning document ("the DeGrove analysis"), which was mistakenly interpreted by EPA to mean that Waterway Estates had a zero waste load allocation[7] -- also called "no discharge."[8]

This conclusion was wrong in at least three respects: (1) EPA carelessly took an isolated statement in the DeGrove analysis out of context, for Waterway Estates had a waste load allocation in 1981; (2) the statement EPA relied on in the DeGrove analysis was based on an earlier, outdated assumption that Waterway Estates would eventually tie in to another facility; and (3) EPA knew as a fact in 1986 that Waterway Estates then had a wasteload allocation. In other words, the decision by EPA on Waterway Estates' permit had no basis at the time, and has no basis now.

Lest there be any doubt, let us review this matter in more detail. EPA's decision to deny Waterway Estates' permit was based solely on the understanding that Florida had determined that Waterway Estates could not discharge to the Caloosahatchee River. This was not true. In 1981, in a planning document that never became a state

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[6] Letter dated December 8, 1986, from Bruce R. Barrett, Director, Water Management Division, EPA Region IV to A.A. Reeves, III, Vice President and General Manager, FCWC. Ex. 5.

[7] A waste load allocation is defined as that portion of a receiving water's loading capacity allocated to one of its existing or future dischargers. Loading capacity is the amount of pollution that a water can receive and still maintain water quality standards. 40 C.F.R. §§ 130.2(f), 130.2(h) (1993).

[8] Fact Sheet dated June 30, 1986, EPA Region IV at 2, Ex. 6; Deposition of Connie A. Kagey ("Kagey Deposition") at 56, Ex. 7; Bruce D. DeGrove, Caloosahatchee River Wasteload Allocation Documentation Lee County, January 1981 ("DeGrove") at 17, Ex. 8.

requirement, Florida considered how much each of several dischargers could discharge to the river. For several of its scenarios, Florida hypothetically assumed no discharges from Waterway Estates. As the 1981 DeGrove analysis explained, "[t]he Waterway Estates Treatment Plant was eliminated from further modeling due to the assumed tie-in to the Cape Coral facility and the assumed impracticality of upgrading to AWT and relocating the outfall for such a small flow."[9]

That is, based on purely hypothetical assumption that the Waterway Estates facility would hook up to another facility, the study included discharges from Waterway Estates under the listing of discharges from that regional facility instead of listing them separately. As this hook up never occurred, and within a year or two it was clear that it would not occur, Waterway Estates retained its wasteload allocation.[10]

Five years later, a staff-level EPA official came across a few pages of this unofficial planning document, misinterpreted its status and significance, took an isolated statement out of context, and concluded, wrongly, that Waterway Estates had no discharge allocation and thus could not be permitted to discharge to the Caloosahatchee River. This is crucial because, as set forth below, EPA has by regulation only four grounds on which it can deny a permit renewal. Three of them are not relevant here; the fourth, under which EPA purported to act, was the mistaken belief that the State of Florida had required the "elimination of any discharge or sludge use or disposal practice

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[9] DeGrove at 12. Ex. 8.

[10] DeGrove at 1, 3, Ex. 8; Permit No. DO36-72569, effective August 2, 1983. In 1981, Florida permitted Waterway Estates to discharge. Permit No. DO-36-732; Permit DO36-7407. See Ex. 2.

controlled by the permit."[11]

The EPA permit writer testified under oath that she did not even have, much less read, the entire DeGrove analysis, but only the cover sheet and one page describing the hypothetical situation.[12] This misreading of a single page was the sole basis for EPA's decision to deny Waterway Estates an NPDES permit.

Yet, in 1986 EPA was officially aware that Waterway Estates continued to have a wasteload allocation for discharge to the Caloosahatchee River.[13] The fact is beyond dispute because in May 1986 the Florida Department of Environmental Regulation informed EPA, while EPA was considering Waterway Estates' permit application, that Waterway Estates had a wasteload allocation of 1.08 mgd.[14] This letter went from Florida to EPA Region IV -- to the same agency, the same Regional office, the same building, and into the very same water management office where the EPA permit writer was reviewing the permit renewal application.

This was not some bureaucratic oversight on a routine matter. Denials of permit renewals are extremely rare. Surprising as it may seem, in almost a quarter century,

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[11] See 40 C.F.R. § 122.64(a)(4) (1993).

[12] Kagey Deposition at 87. Ex. 7.

[13] Waterway Estates had a wasteload allocation in 1975, in 1981, in 1983, and most importantly, had a wasteload allocation in 1986 when EPA denied its permit. Lower Florida River Basin Water Quality Management Plan. Florida Department of Environmental Regulation, December 1975, at III-232, III-241, Ex. 9; DeGrove at 1, 3, Ex. 8; Memorandum dated February 23, 1983, from Ron Blackburn to Phil Edwards, Wasteload Allocations for the Caloosahatchee River; Richardson Letter at 1, Ex. 10.

[14] Letter dated May 7, 1986 from D.G. Richardson, Florida Department of Environmental Regulation to Marshall Hyatt, EPA Region IV ("Richardson Letter"). Ex. 11.

EPA has denied a permit renewal in only a handful of cases throughout the nation. Never has the agency, to our knowledge, denied a permit renewal of a facility that was in substantial compliance with all environmental standards and where none of the four regulatory criteria for terminating a permit were triggered. For such a virtually unprecedented action, one would expect careful checking and rechecking, but no such obvious measures were taken. No supervision was undertaken by higher-level EPA officials to ensure that a grievous mistake by a careless staff-level official was prevented.

In hindsight, even the former EPA official that denied Waterway Estates' permit renewal has acknowledged that there was no legal basis for the permit denial. Bruce Barrett, the former director of the Water Management Division in EPA Region IV testified, "I don't see the basis for the federal action denying the permit based on the correspondence [demonstrating that Waterway Estates had a wasteload allocation]."[15]

Unfortunately, EPA has indicated an appalling lack of concern for whether or not EPA had a basis for its decision to deny Waterway Estates' permit. The former branch chief for NPDES permits and enforcement at EPA Region IV has testified that EPA can put anything in a permit, no matter how arbitrary or factually insupportable, and so long as it is not challenged, bring an enforcement action against a permit holder.[16] To EPA, whether its original decision had any factual, environmental, or legal basis at all is apparently beside the point. On the contrary, it is the main point. The irony of this case is that the government seeks to impose massive penalties against Florida Cities for EPA's own blunder.

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[15] Barrett Deposition at 60; see Barrett Deposition at 54-60, Ex. 12.

[16] Deposition of John T. Marlar at 75-84. Ex. 13.

ARGUMENT

A party seeking summary judgment must demonstrate that there is no genuine issue of material fact. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986); Cover v. Wal-Mart Stores, Inc., 812 F.Supp. 1215, 1216 (M.D.Fla. 1993).

1. EPA violated its own regulations in denying Florida Cities' permit renewal.

The fact is undisputed that EPA violated its own regulations in denying FCWC's application for permit renewal. The sole basis for EPA's denial of the permit was the erroneous notion that Waterway Estates had a wasteload allocation of "no discharge."[17] It bears repeating -- during the time that EPA was reviewing Waterway Estates' permit application, Florida sent EPA an official written confirmation that, at that very moment, Waterway Estates had a wasteload allocation for discharge to the Caloosahatchee River.[18] EPA instead relied on a sentence from an outdated 1981 planning document, taken out of context and never true even in 1981, that Waterway Estates had a "no

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[17] Fact Sheet at 2, Ex. 6; Kagey Deposition at 56, Ex. 7.

[18] EPA cannot quibble that this information went to Marshall Hyatt, a Region IV, Water Management Division employee, while Connie Kagey, another Region IV, Water Management Division employee, reviewed Waterway Estates' permit application. As EPA is fond of pointing out to companies, even in criminal cases knowledge of employees and agents of an entity is attributable to that entity. Steere Tank Lines, Inc. v. U.S., 330 F.2d 719, 722 (5th Cir. 1963) (knowledge of employees attributable to corporation and their acts may amount to willfulness by corporation). "[A] corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly." U.S. v. Bank of New England, N.A., 821 F.2d 844, 856 (1st Cir.), cert. denied, 484 U.S. 943 (1987) (quoting U.S. v. T.I.M.E. - D.C., Inc., 381 F.Supp. 730, 738 (W.D. Va. 1974)).

discharge" wasteload allocation.

EPA's regulations establish only four legal grounds for denying a permit renewal.[19] None of these four grounds was satisfied here. The one under which EPA purported to act was: "A change in any condition that requires either a temporary or permanent reduction or elimination of any discharge or sludge use or disposal practice controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW)." 40 C.F.R. § 122.64(a)(4).

2. EPA must follow its own regulations. There was never a change that required a reduction or elimination of discharge. EPA officials have freely admitted as much. Without this condition, or one of the other three set forth in the regulations, the agency had no authority to deny a permit. It is axiomatic that an Agency must follow its own regulations. U.S. v. Nixon, 418 U.S. 683, 695-696 (1974); U.S. ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 265-267 (1954); Finkelstein v. U.S., 29 Fed.Cl. 611, 616 (1993). As noted in a recent contract case, "[t]he government has the power to act only

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[19] Termination of Permits

(a) The following are causes for terminating a permit during its term, or for denying a permit renewal application:

(1) Noncompliance by the permittee with any condition of the permit;

(2) The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time;

(3) A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination; or

(4) A change in any condition that requires either a temporary or permanent reduction or elimination of any discharge or sludge use or disposal practice controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW).

(b) The Director shall follow the applicable procedures in part 124 or State procedures in terminating any NPDES permit under this section. 40 C.F.R. § 122.64 (1993).

through its agents whose authority and manner of exercise thereof is rigidly prescribed and limited by statute, regulation, and judicial and administrative determinations. Failure to follow the applicable rules *negates* the agent's authority to enter into a contract binding on the government. To permit otherwise would be to nullify those very statutes, regulations, and determinations -- a result clearly contrary to the public interest."[20] "When an administrative agency promulgates rules to govern its proceedings, these rules must be scrupulously observed . . . If an agency in its proceedings violates its rules and prejudice results, any action taken as a result of the proceedings cannot stand." Pacific Molasses Company v. F.T.C., 356 F.2d 386, 389-390 (5th Cir. 1966) (citations omitted). Where, as here, EPA acted contrary to its specific regulations, and where its actions were unauthorized, beyond the powers that EPA had itself specified, its action was null and void.

3. The concept of void *ab initio* is well-established. The concept of an action as void *ab initio* is well-established throughout the law.[21]

In bankruptcy law, for example, the concept of a void judgment has long been recognized. See, e.g., Briley v. Hidalgo, 981 F.2d 246 (5th Cir. 1993) (default judgment void as covered by prior discharge in bankruptcy). Moreover, violations of the automatic stay provision applicable in bankruptcy actions are void. As stated in this Circuit,

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[20] U.S. v. Amdahl Corp., 786 F.2d 387, 392 (Fed.Cir. 1986) (quoting Brous, Termination for Convenience: A Remedy for the Erroneous Award., 5 Pub.Cont.L.J. 221, 222-223 (1972)) (footnotes omitted, emphasis supplied).

[21] "Void" is defined as having no legal force or binding effect. Black's Law Dictionary 1411 (5th ed. 1979).

"[a]ctions taken in violation of the automatic stay are void and without effect." Borg-Warner Acceptance Corp. v. Hall, 685 F.2d 1306, 1308 (11th Cir. 1982) (citing Kalb v. Feuerstein, 308 U.S. 433 (1940)), (other citations omitted).

In property law, an option violating the rule against perpetuities is void *ab initio*. Certified Corp. v. GTE Products Corp., 467 N.E.2d 1336 (Mass. 1984). A conveyance of homestead real estate contrary to Florida law is a nullity and the attempt is void. Gotshall v. Taylor, 196 So. 2d 479 (Fl. Ct. App. 1967).

Bigamous or incestuous marriages are void *ab initio*. See, e.g., Va. Code Ann. Sections 20-38.1(a)(1), 20-43, 20-45.1 (bigamous) (Supp. 1990); Va. Code Ann. Sections 20-38.1(2), (3), 20-45.1 (incestuous) (Supp. 1990). A void marriage is invalid from its inception, and the parties may simply separate without benefit of a court order of divorce or annulment. Darling v. Darling, 335 N.E.2d 708, 710-711 (Ohio Ct. App. 1975).

Without a prior use in commerce, a trademark application is void *ab initio*. Avakoff v. Southern Pacific Co., 765 F.2d 1097 (Fed.Cir. 1985).

In corporate law, an *ultra vires* contract, that is, one not within the powers conferred on the corporation, is wholly void and of no legal effect. Jacksonville &c. Railway v. Hooper, 160 U.S. 514, 524-525 (1896); Thomas v. Railroad Co., 101 U.S. 71, 83 (1879).

The concept of void *ab initio* is also widely accepted in international law. As one U.S. government attorney recently observed, under the Vienna Convention on the Law of Treaties, a treaty procured by the threat or use of force is void *ab initio*. Steven R.

Ratner, The Cambodia Settlement Agreements, 87 Am. J. Int'l. L. 1, 34 (1993). Even a treaty freely entered into by states, but contradicting fundamental norms, is void *ab initio.* R. A. Mullerson, Agora: New Thinking by Soviet Scholars, 83 Am. J. Int'l. L. 494, 507 (1989); Thomas M. Franck, Legitimacy in the International System, 82 Am. J. Int'l. L. 705, 757 (1988).

In landlord-tenant law, housing code violations making premises uninhabitable at the time of a lease render that lease void *ab initio.* Brown v. Southall Realty Company, 237 A.2d 834, 837 (D.C. App. 1968).

Under Indian law, a conveyance of aboriginal lands without the sovereign's consent is void *ab initio.* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 245 (1985).

An action beyond an agency's authority is void *ab initio.* See Chrysler v. Brown, 441 U.S. 281, 313 (1979) (regulation promulgated without proper notice and comment is void *ab initio*); Cabazon Band of Mission Indians v. City of Indio, 694 F.2d 634, 637 (9th Cir. 1982) (an act in violation of a statutory mandate is void *ab initio*); Alabama Rural Fire Ins. Co. v. U.S., 572 F.2d 727, 733 (Ct.Cl. 1978) (noncompliance with statute or regulation made contract award a nullity); U.S. v. Goodner Bros. Aircraft, Inc., 966 F.2d 380, 385 (8th Cir. 1992), cert. denied, 113 S. Ct. 967 (1993) (criminal conviction overturned when underlying regulations were vacated).

Finally, it has been regarded as fundamental, since the beginnings of the Republic, that an act violative of the Constitution is void. Marbury v. Madison, 5 U.S. 137, 176-180 (1803). An unconstitutional law is void *ab initio.* As the Supreme Court observed:

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." Norton v. Shelby County, 118 U.S. 425, 442 (1886); see also Chicago, Ind. & L. Ry. Co. v. Hackett, 228 U.S. 559, 566 (1913). As recently reaffirmed in a criminal case, an unconstitutional statute is to be considered no statute at all. Hiett v. U.S., 415 F.2d 664, 666 (5th Cir. 1969), cert. denied, 397 U.S. 936 (1970).

Since EPA acted without authority in denying Florida Cities' permit renewal without satisfying the requirements of its own specific regulation, EPA cannot now maintain an action for discharging without a permit. That decision must be treated as void *ab initio*.

4. A void act may be challenged at any time. A void act is subject to collateral attack at any time. In 1795, the Oneida Indian Nation agreed to convey virtually all of its remaining land to New York State for annual cash payments. In 1970, almost two centuries later, descendants of those Indians brought suit alleging that the original conveyance was void, as violative of the Trade and Intercourse Act of 1793. The Supreme Court ruled that the Oneidas had a cause of action for violation of their possessory rights, notwithstanding the passage of 175 years. Oneida, 470 U.S. at 230.

Similarly, a void judgment may be attacked at any time. Fed. R. Civ. P. 60(b)(4). As one commentator observed, "there is no time limit on an attack on a judgment as void . . . A void judgment cannot acquire validity because of laches on the part of the judgment debtor." Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil Section 2862 (1973).

It is well-recognized that if an action is void *ab initio*, parties need not take action within any prescribed statutory time to establish invalidity. In 1970, the City of Indio, California annexed lands including a portion of the Cabazon Indian Reservation, without federal consent. The city claimed that the running of the statue of limitations "cured" its failure to comply with the annexation statute. The Court held that as the attempted annexation was void *ab initio*, the Cabazon Indians were not required to take action within the limitations period. Cabazon, 694 F. 2d at 638.

5. EPA's reckless disregard of the facts makes its action void *ab initio*, and subject to challenge at any time. In everyday life, we realize that a void marriage cannot be made legally valid simply by asking whether "anyone knows of any reason why this couple should not be joined in holy matrimony, speak now or forever hold your peace." If the bridegroom is already married, for example, the second, bigamous marriage does not become valid because someone did not immediately protest.

Consequently, if an agency takes an unconstitutional action, or if an agency arrogates to itself powers it does not legally possess, its *ultra vires* actions are null and void, whether or not someone protests, and whether or not the protest is deemed timely. Thus, for example, if EPA required as a condition of a water permit that a newspaper must clear its editorials with the agency; or if through an airline company's water discharge permit EPA attempted to dictate routes and fares; or if the agency mistakenly acted pursuant to provisions of law that actually did not exist, these actions would not become unassailably lawful simply because no interested party sounds a timely warning. Instead, they would be void *ab initio*, as being beyond the powers of the agency. To find

otherwise would allow agencies to expand their authority infinitely, without benefit of legislation or regulations.

Similarly, where an agency knowingly disregards crucial facts and instead assumes facts that it knows are wrong, and where it thereafter acts with reckless disregard as to whether the facts are right or wrong, or even relevant, it cannot pretend that it has acted pursuant to its regulations. This is not a question of whether the agency's decision was arguably correct or incorrect; it is a remarkable situation in which the agency was first negligently, then recklessly, indifferent to satisfying the legal criteria under which it was supposed to operate. This did not rise above even the minimum threshold of the agency's regulatory obligations, and thus it must be estopped from claiming it acted pursuant to them.

The government's action is especially offensive when one recalls the relief it seeks in this case. It does not seek the ending of some polluting practice, nor the cleanup of past contamination. As a practical matter, the significance of purportedly having discharged without an NPDES permit is minimal, as FCWC had a Florida permit, was in substantial compliance with federal and state discharge limits, and most importantly had no reasonable alternative to continued discharge. An immediate shutdown of the Waterway Estates facility would have been worse environmentally than continued discharge, as it would have left raw sewage untreated. FCWC subsequently applied for, and received, a federal NPDES permit. In fact, this case is not about the environment at all. It is about a blatant attempt by the government to impose massive financial penalties on a company for EPA's own mistake.

When EPA wrongly denied FCWC's permit in December 1986, FCWC did not seek judicial review of that decision. The Clean Water Act allows judicial review in a United States Court of Appeals within 120 days (then 90 days) of action denying a permit. 33 U.S.C. § 1369(b)(1) (1994). That section further provides that actions with respect to which review could have been obtained "shall not be subject to judicial review in any civil . . . enforcement proceeding." 33 U.S.C. § 1369(b)(2) (1994). These provisions should not bar FCWC from raising defects in EPA's action in this case. Where, as here, EPA acted in violation of its own regulations and without authority, EPA's action was void *ab initio*. As the permit denial was void *ab initio*, FCWC's then existing permit must be deemed to have continued in effect.[22] EPA therefore cannot claim that FCWC discharged without a permit. In addition, when the decision upon which EPA bases a civil penalty action is void *ab initio*, that decision should be subject to judicial review under § 1369(b)(2) in the civil penalty action. This is especially so where, as here, EPA is suing not to obtain injunctive relief or otherwise correct continuing violations of the Clean Water Act, but instead to collect penalties. EPA simply should not be allowed to recover penalties for conduct which was lawful, and would have remained so except for a lawless EPA decision.

If EPA's action was void, under the law the then-existing permit continues and the permittee was entitled to discharge pursuant to the prior permit. EPA therefore has no basis for its claim that Waterway Estates was discharging without a permit.

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[22] See 5 U.S.C. § 558(c) (1994); 40 C.F.R. § 122.6 (1993).

CONCLUSION

For the reasons stated above, Defendant's motion for partial summary judgment should be granted.

Respectfully submitted,

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Exhibit_____(GHB-50)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' OPPOSITION TO DEFENDANT FLORIDA CITIES WATER COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant Florida Cities Water Company has moved for partial summary judgment on the United States' allegation that Defendants discharged pollutants from their Waterway Estates Wastewater Treatment Plant into the Caloosahatchee River without an NPDES permit (Revised Amended Complaint, ¶ 41). For the reasons set forth below, as a matter of law, the motion must be denied.

Florida Cities was authorized by an NPDES permit valid from September 24, 1981 to September 24, 1986 to discharge effluent from its Waterway Estates plant to a tributary canal leading to the Caloosahatchee River. Declaration of Kenneth Kwan. On July 28, 1986, EPA notified the company that it had tentatively decided to deny its application for renewal of the permit. Deposition of Connie A. Kagey, October 24, 1994 at 49 and exhibit 32 thereto. On December 8, 1986, EPA issued its final denial,

which took effect on January 9, 1987.[1] Id. at 55, and exhibit 33 thereto. The basis of both the tentative and final denial was that in a January 1981 report, the Florida Department of Environmental Regulation (FDER) had developed a "no discharge" allocation for the Waterway Estates plant. Id. at 52-57 and exhibits 32-33.

Defendant Florida Cities does not deny that it continued to discharge from the Waterway Estates plant into the Caloosahatchee River even after it lost its permit. Answer ¶41.[2] Rather, Defendant maintains that it would have had a permit during that period of time were it not for EPA error, to wit, the denial of Defendant's permit renewal application. Defendant reasons that EPA's action in denying Defendant a permit is "void ab initio" because Defendant was entitled to such a permit, and, by extension of its argument, that EPA cannot now claim that Defendant violated the act by discharging without the permit.

Defendant's argument is not simply novel, it is directly contrary to an express provision of the Clean Water Act. When it passed the 1972 amendments to the Clean Water Act which included

---

[1] Pursuant to 40 C.F.R. § 122.6, having made a timely renewal application, the company was entitled to continue to discharge under the existing permit, even though it had expired, until the effective date of the denial.

[2] The company's discharges were unpermitted from January 9, 1987, the effective date of the permit denial, until November 1, 1989, the effective date of a new NPDES permit authorizing it to discharge directly into the Caloosahatchee River. Because the initial Complaint was filed in this matter on October 1, 1993, the statute of limitations arguably bar claims before October 1, 1988. Hence, paragraph 41 pleads violations occurring on and after that date.

the NPDES permitting program, Congress made very clear that a challenge to a permit denial **must** be timely made to the appropriate U.S. Court of Appeals, and **may not** be in the context of an enforcement action. Defendant exhausted neither its administrative nor judicial remedies to challenge the permit denial it now so vigorously contests. Instead, Defendant essentially asks that the Court rewrite the law and confer on this court jurisdiction which Congress has chosen not to confer.

The only **material** fact relevant to Defendant's summary judgment motion is whether Defendant had a NPDES permit to discharge pollutants from its Waterway Estates Wastewater Treatment plant into the Calooshatchee River during the period October 1, 1988 to October 31, 1989.[3] It did not. Declaration of Kenneth Kwan. The only **material** law relevant to this issue is section 509(b) of the Clean Water Act, which, at the time, provided in pertinent part as follows:

> (1) Review of the Administrator's action ... in issuing or denying any permit under section 1342 of this title [National Pollutant Discharge Elimination System], may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person.
>
> . . . .
>
> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

---

[3] Defendant's motion does not include a statement of material facts, but rather only its version of unsubstantiated and immaterial facts.

33 U.S.C. § 1369(b) (1986).[4]

Every federal court in the nation which has construed this statute has held that it means what it says: EPA's actions (including permit denials) under section 509(a) are reviewable only within the time provided in the Court of Appeals and cannot be challenged in a District Court enforcement proceeding. In fact, the Supreme Court, in summarizing the enforcement provisions of the 1972 amendments to the Clean Water Act held as follows:

> [U]nder § 509(b), 33 U.S.C. § 1369(b), "any interested person" may seek judicial review in the United States courts of appeals of various particular actions by the Administrator, including establishment of effluent standards and issuance of permits for discharge of pollutants. Where review could have been obtained under this provision, the action at issue may not be challenged in any subsequent civil or criminal proceeding for enforcement. § 1369(b)(2).

Middlesex Count Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 14 (1981). See also, Crown Simpson Pulp Co. v. Costle, 445 U.S. 193 (1980) (EPA veto of state-proposed NPDES permit is equivalent of permit denial reviewable by Court of Appeals). Judge (now Justice) Ginsburg, writing in 1982 for the D.C. Court of Appeals, summarized section 509(b) as follows:

> Section 509(b)(1) contains a ninety-day "statute of limitations" for challenging any action of the Administrator that falls within its terms.

---

[4] In 1986, an interested party had ninety (90) days in which to seek review of a permit denial in the Court of Appeals. This subsection was amended in 1987 to allow an interested party 120 (120) days. See United States v. CPS Chemical Company, Inc., 779 F. Supp. 437, 441 (E.D. Ark. 1991). Because no application for review was ever filed, the amendment is academic to the issue at bar.

> Complementing this provision, section 509(b)(2), 33 U.S.C. § 1369(b)(2) (1976), provides that "[a]ction of the Administrator with respect to which review could have been obtained under [section 509(b)(1)] shall not be subject to judicial review in any civil and criminal proceeding for enforcement." Under these two provisions, **one who wishes to challenge an action of the Administrator must**, if the action is held to be within the categories of section 509(b)(1), **do so within ninety days or lose forever the right to do so, even though that action might eventually result in the imposition of severe civil or criminal penalties.**

Natural Resources Defense Council v. Environmental Protection Agency, 673 F.2d 400, 406 (D.C. Cir. 1982) (emphasis added).

All other courts considering section 509(b) have reached the same conclusion. See Public Interest Research Group of New Jersey, 913 F.2d 64, 78 (3rd Cir. 1990) ("[S]ection 509(b)(2) of the Act clearly states that EPA action in issuing a permit 'shall not be subject to judicial review in any civil or criminal proceeding for enforcement'"); Texas Municipal Power Agency v. Administrator, 836 F.2d 1482 (5th Cir. 1988) (referring to section 509(b) as jurisdictional in nature and a "now or never" rule); Champion International v. U.S. Environmental Protection Agency, 850 F.2d 182, 188 (4th Cir. 1988); Natural Resources Defense Council, Inc. v. Outboard Marine Corp., 702 F. Supp. 690, 693 (N.D. Ill. 1988) (characterizing section 509(b) as "exhaustion-of-remedies provisions" in context of permit denial); Connecticut Fund for the Environment v. Job Plating Co., 623 F. Supp. 207, 216-17 (D. Conn. 1985); United States v. Velsicol Chemical Corp., 438 F. Supp. 945, 949 (W.D. Tenn. 1976).

Assuming, arguendo, that the application in question had been improperly denied in 1986, defendant seeks relief in the

wrong court at the wrong time. At the time, under section 509(b)(1) of the Act, 33 U.S.C. § 1369(b)(1) (1986), defendant had ninety (90) days from the date of the EPA Administrator's action to challenge the denial of the permit in the United States Court of Appeals. Having failed to challenge the denial, defendant is now precluded from doing in this Court by section 509(b)(2) of the Act, 33 U.S.C. § 1369(b)(2).

In sum, nearly nine years ago, Defendant failed to avail itself of the opportunity to seek judicial review of EPA's permit denial. It cannot now be allowed to circumvent the law by challenging the denial in the context of a civil enforcement proceeding, directly contrary to section 509(b)(2) and the case law construing it.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	)	CIVIL ACTION NO. 93-281-CIV-FTM-21

DECLARATION OF KENNETH KWAN

I, Kenneth Kwan, declare as follows:

1. I am an Environmental Engineer employed by the U.S. Environmental Protection Agency, Region IV, Atlanta, Georgia.

2. In that capacity, I am the enforcement officer assigned to the above-captioned action and am familiar with the EPA National Pollutant Discharge Elimination System (NPDES) permits issued to Florida Cities Water Company.

3. From September 24, 1981 to January 8, 1987, Florida Cities Water Company was authorized by NPDES Permit No. FL0030325 to discharge effluent from the Waterway Estates plant into a tributary canal leading to the Caloosahatchee River.

4. From November 1, 1989 to the present, Florida Cities Water Company was authorized by NPDES Permit No. FL0030325 to discharge effluent from the Waterway Estates plant to a point at the six (6) foot contour line in the Caloosahatchee River.

5. During the period January 9, 1987 to October 31, 1989, Florida Cities Water Company did not have an NPDES permit to

discharge effluent from the Waterway Estates plant either directly or indirectly into the Caloosahatchee River.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 6 day of June, 1995 in Atlanta, Georgia.

Kenneth Kwan
U.S. Environmental Protection Agency

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing "United States' Opposition to Defendant Florida Cities Water Company's Motion for Partial Summary Judgment" was served by U.S. Mail on the 7th day of June, 1995, to the following attorneys of record:

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

NOTICE OF FILING OF TRANSCRIPT OF CONNIE KAGEY

The United States hereby gives notice of the filing of the transcript of the deposition of Connie Kagey on October 24, 1994, for the Court's consideration with the United States' Opposition to Defendant Florida Cities Water Company's Motion for Partial Summary Judgment.

Respectfully submitted,

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Assistant Attorney General
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Exhibit_____(GHB-51)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

Plaintiff,

V.

CASE NO. 93-281-CIV-FTM-21

AVATAR HOLDINGS, INC., and
FLORIDA CITIES WATER COMPANY,

Defendants.

_____/

ORDER

This cause comes before the Court on Defendant Florida Cities' Motion for Partial Summary Judgment (Dkt. 79, refiled at Dkt. 98) and the United States' response (Dkt. 118) in opposition thereto.

BACKGROUND

Florida Cities first received an operating permit for Waterway Estates treatment plant on October 26, 1971. During most of the time prior to the period in dispute, Florida Cities maintained a National Pollutant Discharge Elimination System ("NPDES") discharge permit for Waterway Estates. On July 28, 1986, however, the Environmental Protection Agency ("EPA") notified Florida Cities that it had tentatively decided to deny Florida Cities' application for a renewal permit. On December 8, 1986, the EPA issued its final denial, which took effect on January 9, 1987. The basis for both the tentative and final denial was that in a January 1981 report, the Florida Department of Environmental Regulation had developed a "no discharge" allocation for the Waterway Estates plant.

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SUMMARY JUDGMENT STANDARD

The Court will enter summary judgment only if the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). On the issue of materiality, "the substantive law will identify which facts are material." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Material facts are those over which disputes "might affect the outcome of the suit under the governing law." Id. at 248.

The movant bears the burden of establishing the absence of dispute over material facts. Reynolds v. Bridgestone/Firestone, Inc., 989 F.2d 465, 469 (11th Cir. 1993). Where, as here, the party opposing the summary judgment motion has the burden of proof at trial, the moving party must either point out to the Court specific portions of the record which show that the nonmoving party cannot prevail at trial, or introduce affirmative evidence negating the opposing party's case. United States v. Four Parcels of Real Property, 941 F.2d 1428, 1438 (11th Cir. 1991). In determining whether the party seeking summary judgment has met its initial burden, the Court must view the evidence and factual inferences therefrom in the light most favorable to the opposing party. Clark v. Coats & Clark, Inc., 929 F.2d 604, 606 (11th Cir. 1991). Any reasonable doubts about the facts are to be resolved in favor of the party opposing the motion for summary judgment. Reynolds, 989 F.2d at 469. If the moving party does not meet its burden, the motion for summary judgment will be denied. Four Parcels of Real Property, 941 F.2d at 1437. Where the moving party meets its initial burden, the burden shifts "to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." Clark, 929 F.2d at 608.

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DISCUSSION

Florida Cities argues that the EPA violated its own regulations in denying its renewal permit and that the EPA's denial of the permit is "void ab initio." Florida Cities thus argues that the EPA cannot now assert that Florida Cities violated the Clean Water Act by discharging without that permit. Florida Cities first points out that during the time the EPA was reviewing Waterway Estates' permit application, the state of Florida sent the EPA an official written confirmation that, at that time, Waterway Estates had a wasteload allocation for discharge to the Caloosahatchee River. Florida Cities asserts that the EPA wrongfully relied on a sentence from an outdated 1981 planning document, taken out of context and not true in 1981, that Waterway Estates had a "no discharge" wasteload allocation. Further, Florida Cities asserts that the EPA has admitted that there was never a change that required a reduction or elimination of discharge. Thus, Florida Cities maintains that where, as here, the EPA acted contrary to its specific regulations, and where its actions were unauthorized, its action was null and void.

Finally, Florida Cities argues that a void act may be challenged at any time. Florida Cities cites as an example the case of the Oneida Indian Nation, which in 1795 agreed to convey virtually all of its remaining land to New York State for annual cash payments. In 1970, descendants of the Oneida Indians brought suit alleging that the original conveyance was void, as violative of the Trade and Intercourse Act of 1793. County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985). The Supreme Court held that the Oneida Indians had a cause of action for violation of their possessory rights, even though the events occurred 175 years earlier. Id. at 230. Florida Cities thus asserts that despite the provisions of the Clean Water Act (discussed in greater depth below), which allowed Florida Cities to seek judicial review of the

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EPA's denial of the permit within 90 days of the action denying the permit, Florida Cites should not be barred from raising defects in the EPA's action.

In response, the United States argues that Florida Cities' argument is directly contrary to an express provision of the Clean Water Act. The United States submits that the only material fact relevant to Defendant's summary judgment motion is whether Florida Cities had a NPDES permit to discharge pollutants from Waterway Estates into the Caloosahatchee River during the period of October 1, 1988 to October 31, 1989.[1] The United States notes that Florida Cities did not have a NPDES permit during said period. Further, the United States states that the only material law relevant to this issue is Section 509(b) of the Clean Water Act, which at the relevant time, provided in pertinent part:

> (1) Review of the Administrator's action . . . in issuing or denying any permit under section 1342 of this title [National Pollutant Discharge Elimination System], may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. . .
>
> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

33 U.S.C. § 1369(b) (1986). Thus, the United States maintains that Florida Cities seeks relief in the wrong court at the wrong time. It maintains that having failed to challenge the denial within ninety (90) days of the EPA's denial of the permit in accordance with 33 U.S.C. § 1369 (b)(1) (1986), Florida Cities is now precluded from making such a challenge.

---

[1]The United States indicates that Florida Cities' discharges at Waterway Estates were unpermitted from January 9, 1987, the effective date of the permit denial, until November 1, 1989, the effective date of a new NPDES permit authorizing it to discharge directly into the Caloosahatchee River. Further, the United States indicates that because the initial Complaint in this action was filed on October 1, 1993, the statute of limitations arguably bars claims before October 1, 1988. Thus, the United States notes, paragraph 41 of the Amended Complaint (Dkt. 82) pleads violations occurring on and after that date.

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The Court finds that Florida Cities' argument that the United States should be barred from asserting violations at Waterway Estates due to its own conduct in wrongfully denying the permit request is without merit. As the Supreme Court has held with respect to the enforcement provision of the Clean Water Act:

> [U]nder § 509 (b), 33 U.S.C. § 1369 (b), "any interested person" may seek judicial review in the United States courts of appeals of various particular actions by the Administrator, including establishment of effluent standard and issuance of permits for discharge of pollutants. Where review could have been obtained under this provision, the action at issue may not be challenged in any subsequent civil or criminal proceeding for enforcement. § 1369 (b)(2).

Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1. 13-14 (1981). Further, Judge, now Justice, Ginsburg, writing in 1982 for the D.C. Court of Appeals, summarized section 509 (b) as follows:

> Section 509(b)(1) contains a ninety-day "statute of limitations" for challenging any action of the Administrator that falls within its terms. Complementing this provision, section 509(b)(2), 33 U.S.C. § 1369(b)(2) (1976), provides that "[a]ction of the Administrator with respect to which review could have been obtained under [section 509(b)(1)] shall not be subject to judicial review in any civil and criminal proceeding for enforcement." Under these two provisions, **one who wishes to challenge an action of the Administrator must, if the action** is held to be within the categories of section 509(b)(1), **do so within ninety days or lose forever the right to do so, even though that action might eventually result in the imposition of severe civil or criminal penalties.**

Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 673 F.2d 400, 406 (D.C. Cir. 1982)(emphasis added). In consideration of the above authorities and the clear language of 33 U.S.C. § 1369 (b) (1986), which provides that Florida Cities had ninety (90) days from the date of the EPA's denial of the permit to seek judicial review, the Court finds that Florida Cities is now precluded from challenging the EPA's denial in the context of a civil enforcement proceeding.

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Upon consideration of the foregoing, it is hereby **ORDERED and ADJUDGED** that Defendant Florida Cities' Motion for Partial Summary Judgment (Dkts. 79 & 98) is **DENIED.**

DONE AND ORDERED, at Tampa, Florida, this 27 day of June, 1995.

RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of record

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(Rev. 8/82)

Exhibit_____(GHB-52)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 56, Fed. R. Civ. P., the United States moves for summary judgment on liability as to all violations alleged in its Revised Amended Complaint, and all violations in its proposed Amended Complaint, if allowed. The grounds for this motion are set forth in the accompanying memorandum.

Respectfully submitted,

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Dated: June 22, 1995

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I certify that copies of the "Notice of Filing of Transcripts," "Motion and Memorandum to Exceed Page Limit and Request for Oral Argument," and "United States' Motion for Partial Summary Judgment," and memorandum in support thereof were served by hand (unless otherwise indicated) on the 22nd day of June, 1995, to the following attorneys of record:

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

This is a civil action brought on behalf of the Administrator of the U.S. Environmental Protection Agency ("EPA") pursuant to section 309(b) of the Clean Water Act ("the Act"), 33 U.S.C. § 1319(b), for civil penalties for violations of section 301 of the Act, 33 U.S.C. § 1311, and of the conditions and limitations of National Pollutant Discharge Elimination System ("NPDES") permits issued by EPA pursuant to section 402 of the Act, 33 U.S.C. § 1342. The Complaint was filed on October 1, 1993, a proposed Amended Complaint was filed on March 31, 1995, and a Revised Amended Complaint was filed on May 5, 1995. Discovery closes on July 15, 1995. Trial has been set for the trial term commencing October 2, 1995.

Defendant Florida Cities Water Company ("Florida Cities") is currently the NPDES permit holder for a total of six wastewater treatment plants in operation in Florida. Three of its plants, one of which is no longer in operation, are the subject of this

law suit. Defendant Avatar Holdings, Inc. is Florida Cities' parent company. Defendants collect and treat wastewater from their customers and discharge the treated wastewater ("effluent") on a daily basis into the waters of the United States. The wastewater discharges contain pollutants which may not be discharged into waters of the United States unless authorized by, and under the terms and conditions of, an NPDES permit.

The initial Complaint alleged violations at one of Defendants' plants, the Waterway Estates plant. The Revised Amended Complaint added claims relating to violations at two additional facilities, Barefoot Bay and Carrollwood, and added Avatar Holdings, Inc. as a defendant. The violations alleged in the proposed Amended Complaint against defendants include the following: (1) discharging without an NPDES permit (Waterway Estates); (2) violation of an EPA Administrative Order (Barefoot Bay); (3) discharging at an unpermitted location (Waterway Estates); (4) exceeding NPDES effluent limitations (all three facilities); (5) failure to monitor specified effluent parameters as required by an NPDES permit (Barefoot Bay); and (6) failure of toxicity tests required by an NPDES permit (Barefoot Bay and Waterway Estates).[1] The United States has brought the instant

[1] The Revised Amended Complaint brings identical claims as the proposed Amended Complaint, except that the latter also included unpermitted discharge claims at the Barefoot Bay and Carrollwood plants. As of this date, the Court has not permitted the United States to bring these claims, see, Order, April 26, 1995, and the United States has moved for reconsideration. The United States has included discussions of the unpermitted discharges at the Barefoot Bay and Carrollwood plants in this

(continued...)

action to redress those violations through the imposition of a substantial civil penalty, and, in the process, to deter both this polluter and others in the State of Florida and elsewhere, from such major violations of the nation's environmental laws.

The Barefoot Bay plant treats wastewater from an upscale mobile home development in Brevard County and discharges its effluent into a drainage canal which leads into the Sebastian Creek and Indian River. Barefoot Bay itself is operated by Avatar Holdings through another of its subsidiaries, Barefoot Bay Development Corporation. The Carrollwood plant treated wastewater from the Carrollwood area of Tampa, discharging effluent into the Sweetwater Creek, which leads to Tampa Bay, until 1992. Since then, Florida Cities has pumped the sewage from its Carrollwood customers to a Hillsborough County treatment facility. The Waterway Estates plant treats wastewater from an area bearing that name in North Fort Myers. Until 1991, its effluent was discharged into a tributary canal leading to the Caloosahatchee River; since 1991, the effluent has been discharged directly into the river itself.

Extensive discovery has taken place over the course of the pendency of this action, as a result of which there remains no genuine issue of material fact for trial as to any of the

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[1](...continued)
brief because the facts relevant to those claims overlap with the facts relevant to the remaining claims. Also, should the Court grant the United States' Motion for Reconsideration, then summary judgment on the Barefoot Bay and Carrollwood unpermitted discharge claims also would be appropriate.

violations alleged in the United States' three claims for relief. The United States therefore moves for summary judgment on liability as to all violations alleged in its Revised Amended Complaint. In addition, if the Court grants the United States' Motion for Reconsideration of its claims against Defendants for discharging without a permit at the Carrollwood and Barefoot Bay plants, the United States respectfully requests that this motion be treated as a motion for summary judgment on those claims as well.

II. STATUTORY BACKGROUND

A. Overview

The Clean Water Act prohibits the introduction of pollutants into the waters of the United States, except under an NPDES permit. Thus, the requirement that a permit be obtained is a central underpinning of the Act, designed to protect our nation's waters. The permitting process is EPA's means of controlling whether a given water body can sustain pollutant discharges, and, if so (and a permit is issued), EPA's means of controlling the location and content of those discharges.[2] The permit sets out specific terms and conditions governing a permittee's discharge, including parameters which govern the nature of the discharge and various monitoring and reporting requirements to ensure that

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[2] In determining whether to issue a permit, EPA may rely on a state's "wasteload allocation," that is, its determination of whether a given water body can sustain a pollutant discharge, and, if so, at what locations. The location of the discharge point is very important because the capacity of a given water body to sustain pollutant discharges without damage can vary greatly depending on the precise point of discharge.

permit conditions are met. Violations of the Act and of a permit issued under the Act subject a polluter to a civil penalty not to exceed $25,000 per day for each violation.

B. The Clean Water Act

Prior to 1972, federal involvement in water pollution control focused on assisting states in developing water quality standards for interstate waters within their boundaries. These state water quality standards were set according to a particular water body's intended uses, taking into account the water's ability to assimilate the pollution. In 1972, Congress concluded that water quality standards alone were not adequate to restore and maintain the integrity of the nation's waters, and enacted the Federal Water Pollution Control Act Amendments of 1972, also commonly known as the Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816, 33 U.S.C. § 1251 et seq. See S. Rep. No. 414, 92d Cong., 1st Sess. 8 (1971), reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972 ("Legislative History") at 1426 (1973). See also EPA v. California ex rel. State Water Resources Control Board, 426 U.S. 200, 202-206 (1976). The Act was intended "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. 49, 52 (1987) (quoting Section 101(a) of the Act).

The Act prohibits "the discharge of any pollutant by any person," except as specified by the Act. 33 U.S.C. § 1311(a). This prohibition represents a significant change from prior

federal water pollution law. The Senate Report describes the change in both emphasis and method:

> This section [§ 301, now 33 U.S.C. § 1311] clearly establishes that the discharge of pollutants is unlawful. Unlike its predecessor program which permitted the discharge of certain amounts of pollutants under the conditions described above, this legislation would clearly establish that no one has the right to pollute -- that pollution continues because of technological limits, not because of any inherent right to use the nation's waterways for the purpose of disposing of wastes. ... The Committee believes it is important to clarify this point: no one has the right to pollute.

Legislative History at 1460-61. See also, United States v. City of Menominee and Menominee Paper Co., 727 F. Supp. 1110, 1122 (W.D. Mich. 1989) ("No right exists to pollute our nation's waters.").

C. Permits and Enforcement

Regulation of dischargers such as defendants is primarily effected through the issuance of NPDES permits under section 402 of the Act, 33 U.S.C. § 1342. The permits authorize the direct discharge of pollutants into the nation's waters, under narrowly prescribed terms and conditions. See EPA v. California ex rel. State Water Resources Control Board, 426 U.S. 200 (1976); Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1374-77 (D.C. Cir. 1977). Each permit contains specific limitations on the amount of certain pollutants a given discharger is allowed to discharge into a specified body of water. NPDES permits also contain self-monitoring, testing, and reporting requirements which are central to the integrity of the NPDES Program. See 33 U.S.C. § 1318.

The permitting process is designed to ensure the participation and rights of the applicant, the state, and the public. To that end, before taking final action on an application, EPA prepares a draft of the permit conditions or denial, 40 C.F.R. § 124.6; seeks state certification of the permit, 40 C.F.R. § 124.53; and submits the draft permit for public notice and comment, 40 C.F.R. § 124.10. During the public comment period, any interested party may submit written comments on the draft permit (or denial) and may request a public hearing. 40 C.F.R. § 124.11. Any person, including an applicant, who wishes to contest a draft permit (or denial) is obliged to raise such issues during the public comment period. 40 C.F.R. § 124.13. After consideration of any comments by the applicant, the state, and the public, EPA then takes final action on the application. 40 C.F.R. § 124.15. Following EPA's final action, any interested party may request an evidentiary hearing. 40 C.F.R. § 124.74. Any party which considers itself aggrieved by EPA's final action, including an applicant, may then challenge it in the U.S. Court of Appeals. 33 U.S.C. § 1369(b)(1). An aggrieved party that fails to make a timely appeal waives its right to later challenge EPA's decision. 33 U.S.C. § 1369(b)(2).

EPA has delegated the authority to issue NPDES permits to state authorities in many states, see 33 U.S.C. § 1342(b), including, as of May 1, 1995, the State of Florida. Prior to May 1, 1995, however, Florida was not such a "delegated state," and, consequently, any discharge of pollutants into the waters of the

United States in the State of Florida required an NPDES permit. Thus, only the United States can bring suit to redress the violations alleged in the instant case, although State and local agencies had independent regulatory authority to impose and enforce other requirements for the operation of wastewater treatment plants within their jurisdictions.[3]

IV. STANDARD OF REVIEW

A. Summary Judgment Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is to be granted to the moving party if the evidence of record shows "that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed. R. Civ. P. The standard which has emerged from a trilogy of Supreme Court decisions construing Rule 56 can be stated as follows: while the moving party bears the initial burden of identifying evidence which demonstrates the absence of a genuine issue of material fact, once that burden has been met, the nonmoving party must set forth "specific facts showing that there is a genuine issue for trial," Rule 56(e), Fed. R. Civ. P., or the factual record will be taken as presented by the moving party and judgment will be entered as

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[3] Not only are dischargers subject to federal, state, and local laws and regulations and enforcement actions, they are subject to both federal and state enforcement action even when a state issues the NPDES permit (i.e., in a delegated state). See 33 U.S.C. § 1342(b) and (i). This important federal enforcement role has been expressly recognized by the Supreme Court. See Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. 49, 52-53 (1987).

matter of law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). See also, United States v. Fleet Factors Corp., 901 F.2d 1550, 1553 (11th Cir. 1990), cert. denied, 498 U.S. 1046 (1991); Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1318 (11th Cir. 1990). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis original).

In order to meet its burden, the non-movant must show more than a mere scintilla of evidence to present a genuine issue of fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). If the non-moving party's "evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id. at 249-250; See also, Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Or, as the Eleventh Circuit has put it, "[o]nce a moving party has sufficiently supported its motion for summary judgment, the non-moving party must come forward with significant, probative evidence demonstrating the existence of a triable issue of fact." Chanel v. Italian Activewear of Florida, Inc., 931 F.2d 1472, 1477 (11th Cir. 1991).

Courts have routinely granted summary judgment as a means of resolving liability issues in Clean Water Act cases. See, e.g.,

County of Honolulu, 821 F.Supp. 1368, 1392 (D. Hawaii, 1993). And, as the court noted in United States v. CPS Chemical Co., Inc., 779 F. Supp. 437, 442 (E.D.Ark. 1991), "the legislative history of the Act reveals that Congress intended to keep enforcement actions simple and speedy."

C. Estoppel is Not a Defense

Florida Cities may not defend Clean Water Act claims by contending that the United States is somehow estopped by its own actions. Estoppel can neither be applied against the United States when acting in its sovereign capacity, Alacare Home Health Services, Inc. v. Sullivan, 891 F.2d 850, 855 (11th Cir. 1990), nor serve as the "means of successfully avoiding the requirements of legislation enacted for the protection of a public interest." Scott Paper Co. v. Marcalus Manufacturing Co., Inc., 326 U.S. 249, 257 (1945). While, as the Eleventh Circuit recently observed, the Supreme Court has not resolved the issue of whether estoppel may ever be applied against the United States, Ferry v. Hayden, 954 F.2d 658, 661 (11th Cir. 1992), citing Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 61 (1984), the Supreme Court itself noted in Office of Personnel Management v. Richmond, 496 U.S. 414, 422 (1990), that it has "reversed every finding of estoppel [against the federal government] that we have reviewed." See Ferry v. Hayden, 954 F.2d at 661 n.5. See also Deltona Corp. v. Alexander, 682 F.2d 888 (11th Cir. 1982) (Court upheld Army Corp of Engineers' denial of a permit under the Clean Water Act relying on earlier binding

Fifth Circuit precedents to the effect that estoppel cannot be asserted against the United States in actions arising out of the exercise of its sovereign powers).

D. Discharge Monitoring Reports are Conclusive Evidence of Noncompliance

Discharge Monitoring Reports (DMRs) constitute conclusive evidence of Clean Water Act violations. The requirement that these reports be submitted to EPA is an important self-reporting mechanism of the Clean Water Act designed to ensure that EPA has accurate information to monitor each discharger's compliance with its permit: "Compliance monitoring and enforcement by the EPA are based primarily on the self-monitoring requirements in permits and the information in the DMRs permittees are required to submit." United States v. CPS Chemical Co., Inc., 779 F.Supp. 437, 442 (E.D. Ark. 1991).

The DMRs are sworn to by a permittee's authorized agent and include results of tests measuring the pollutants discharged from its plant.[5] For enforcement purposes, the reports constitute

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[5] The certification block on the DMRs reads as follows:

> I certify under penalty of law that I have personally examined and am familiar with the information submitted herein; and based on my inquiry of those individuals immediately responsible for obtaining the information, I believe the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment. See 18 U.S.C. § 1001 and 33 U.S.C. § 1319. (Penalties under these statutes may include fines up to $10,000 and or maximum imprisonment of between 6 months and 5 years.)

[Parenthetical in original]

admissions, which may be used to conclusively establish a defendant's liability for summary judgment purposes. Atlantic States Legal Foundation v. Tyson Foods, 897 F.2d 1128, 1135 (11th Cir. 1990); Sierra Club v. Simkins Industries, Inc., 847 F.2d 1109, 1115 (4th Cir. 1988), cert. denied 491 U.S. 904 (1989); United States v. Aluminum Company of America, 824 F.Supp. 640, 648 (E.D. Texas 1993); Arkansas Wildlife Federation v. Bekaert Corporation, 791 F.Supp. 769 (W.D. Ark. 1992); Sierra Club v. Union Oil Co. of California, 716 F.Supp. 429, 434 (N.D. Calf. 1988); Student Public Interest Research Group of New Jersey, Inc. v. P.D. Oil & Chemical Storage, Inc., 627 F. Supp. 1074, 1090 (D.N.J. 1986).

Similarly, defendants cannot attempt to impeach the data they reported in their own DMRs. See Sierra Club v. Union Oil Company of California, 813 F.2d 1480, 1492 (9th Cir. 1987), vacated on other grounds, 485 U.S. 931 (1988), judgment reinstated, 853 F.2d 667 (9th Cir. 1988); U.S. V. Aluminum Co. of America, 824 F.Supp. 640, 648 (E.D. Texas 1993); McClellan Ecological Seepage Situation v. Weinberger, 707 F.Supp. 1182, 1203 (E.D. Cal. 1988). Indeed, "a court cannot accept a defense based simply on error or sloppiness in laboratory practices for the Act relies on accurate monitoring by dischargers and they will be held accountable for the data they collect and report." Natural Resources Defense Council, Inc. v. Outboard Marine Corp., 692 F.Supp. 801, 819 (N.D. Illinois, E.D. 1988) [citations omitted].

E. Adverse Inference from Assertion of Fifth Amendment

A number of key witnesses in this case have refused to testify on Fifth Amendment grounds. Every past and present officer and employee of both Defendants who has been deposed from March 1995 to date has refused to answer any questions whatsoever, other than to testify to his name and address.[6] These witnesses include high-ranking past and present managers and officers of both defendants, individuals who possess a wealth of knowledge regarding the claims brought by the United States. As discussed in section IV.C of this brief, they authored a number of the important documents and are key decision-makers on environmental matters that are the subject of this action. The clear implication is that these witnesses would have provided additional evidence to support the United States' allegations had they not taken the Fifth Amendment. The inference that may be drawn from these individuals' assertion of the Fifth Amendment is that the violations were committed as alleged, and that Avatar Holdings pervasively controlled Florida Cities' environmental practices. The Court can and should draw that adverse inference from their failure to testify. See Baxter v. Palmigiano, 425 U.S. 308, 318 (1976); Director of the Office of Thrift Supervision v. Lopez, 960 F.2d 958, 965 (11th Cir. 1992); United States v. A Single Family Residence, 803 F.2d 625, 629 n.4 (11th

[6] See Deposition of James Elder, March 6, 1995; Lawrence Wilkov, March 7, 1995; Gerald S. Allen, March 27, 1995; Antone A. Reeves, March 28, 1995; Dennis Getman, May 1, 1995; Robert Gordon, May 1, 1995.

Cir. 1986); Shell Oil Company v. Altina Associates, Inc., 866 F. Supp. 536, 540 (M.D. Fla. 1994).

V. ARGUMENT

The United States is Entitled to Summary Judgment on Liability on all its Claims for Relief

Based on the pleadings, depositions, answers to interrogatories, and admissions on file at this time, there is no genuine issue of material fact as to any of the United States' claims for relief. Indeed, because the law and facts in this case are straightforward, it is very suitable for disposition by summary judgment.

There are in essence three types of violations: (1) operating without a permit; (2) discharging at an unpermitted location; and (3) violating the terms of a permit or administrative order. With respect to the first, it is beyond dispute that Defendants did not possess the required NPDES permits during the periods in question, yet they operated all three plants anyway. With respect to the second, there is no question that Defendants discharged from its Waterway Estates plant to a canal during a time when they were supposed to discharge to the Caloosahatchee River itself. With respect to the third, Defendants violated effluent limitations in NPDES permits at all three plants, effluent limitations in a Barefoot Bay administrative order, and monitoring requirements in the Barefoot Bay permit.

All of the United States' allegations are premised on Defendants' own DMRS, admissions, or testimony. The various

violations of the Act, the administrative order, and the permits are discussed next, as are Florida Cities' asserted defenses to them.[7]

A. The Elements of Liability

In an action under section 309 of the Act, 33 U.S.C. § 1319, to establish a violation of section 301, 33 U.S.C. § 1311, the United States need only show that (1) a person (2) discharged a pollutant into navigable waters (3) from a point source, and that (4) the person had no permit for the discharge or, as applicable, that the discharge violated the terms of the applicable NPDES permit or administrative order. See United States v. Velsicol Chemical Corp., 438 F. Supp. 945, 948 (W.D. Tenn. 1976); Michigan v. City of Allen Park, 501 F. Supp. 1007, 1014 (E.D. Mich. 1980), aff'd, 667 F.2d 1028 (6th Cir. 1981), cert. denied, 456 U.S. 927 (1982).

Florida Cities has admitted the first three elements with respect to each of the United States' claims. As to the first element, Florida Cities admits that it owned and operated the three plants in question at all times relevant to each respective

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[7] The United States notes that its Motion to Strike Affirmative Defenses is pending and incorporates it and its accompanying memorandum herein by reference pursuant to rule 10(c), Fed. R. Civ. P. In the instant brief, the United States discusses those affirmative defenses for which Defendants have alleged supporting facts in a reponse to an interrogatory requiring them to do so. See Defendant Florida Cities Water Company's Answers to Plaintiff's Second Set of Interrogatories [hereinafter "FCWC Second Set of Interrogatory Answers"], no. 2 (filed herewith).

claim for relief in the United States' Revised Amended Complaint. Defendant Florida Cities Water Company's Answers to Plaintiff's First Request for Admissions [hereinafter "FCWC Admission"] Admission No. 3 (filed herewith). As to the second element, Florida Cities admits that it is a "person" within the meaning of section 502(5) of the Act, 33 U.S.C. § 1362(5), which specifically defines the term "person" to include a corporation. FCWC Admission No. 5. As to the third element, Florida Cities admits that it caused the discharge of pollutants through a point source into a navigable water within the meaning of the Act at all relevant times with respect to each of its three facilities. FCWC Admission No. 7. The fourth element, discharge without a permit or in violation of a permit or administrative order will be discussed below in the context of the individual claims.

B. The Violations

1. Barefoot Bay

a) Unpermitted Discharges

Paragraph 16 of the Amended Complaint alleges that Defendants discharged pollutants without an NPDES permit from the Barefoot Bay Plant into the Sebastian River during the period on or about April 1, 1990 to October 31, 1991.

Florida Cities did not have an NPDES permit to discharge effluent from the Barefoot Bay Wastewater Treatment Plant into the Sebastian River prior to November 1, 1991. Declaration of Kenneth Kwan ¶ 7; FCWC Admission No. 10. Despite the absence of a permit, Florida Cities first began to discharge from the plant

into a drainage canal leading to the Sebastian Creek sometime prior to 1983. FCWC Second Set of Interrogatory Answers No. 5. The canal and creek lead to the Sebastian River. Deposition of William Sansbury at 45, and Exhibit 76.[8] Therefore, Florida Cities has discharged into the Sebastian River without an NPDES permit. Because these unpermitted discharges occurred daily during the period April 1, 1990 to October 31, 1991, see Deposition of Larry Good at 189-90, they account for 579 violations.

Florida Cities has argued that it cannot be held liable for the unpermitted discharge violations at Barefoot Bay because EPA has already penalized the company for them in an administrative penalty order. As set forth in detail, however, in the United States' Memorandum in Support of its Motion for Reconsideration of Court's Order on Amendment of Complaint, that administrative order only covered discharges on September 14, 1989.[9] The discharges now alleged all occurred after that date and were not covered by the administrative order.

b) Violations of EPA Administrative Order 90-106

On September 26, 1990, EPA issued an administrative order requiring Florida Cities to meet prescribed interim effluent

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[8] Numerical exhibits refer to the United States' deposition exhibits, which have been numbered consecutively 1-779 and have been filed with the deposition transcripts. Alphabetic exhibits refer to exhibits being filed herewith in three separate volumes, one for each of the three facilities.

[9] That brief is incorporated by reference herein pursuant to rule 10(c), Fed. R. Civ. P.

limitations while its permit application was pending. Declaration of Kenneth Kwan ¶ 8. Exhibit 206. FCWC Admission No. 12.[10] From September 26, 1990 until the November 1, 1991 effective date of Florida Cities' NPDES permit (which by definition superseded the administrative order), the company regularly exceeded the administrative order's effluent limits. According to Florida Cities' own DMRs, summarized in Exhibit C, there were twenty-nine violations of the Administrative Order, as alleged in paragraphs 17-22 of the Revised Amended Complaint. Declaration of Kenneth Kwan ¶ 9.[11]

Florida Cities alludes vaguely to a "mix-up" in the limits imposed by the administrative order, see FCWC Second Set of Interrogatory Answers No. 1, and to Barefoot Bay's unique construction, FCWC Admission No. 13. The limits in the administrative order, however, essentially mirror the limits later imposed in the permit and Florida Cities never challenged the permit limits. Moreover, there is absolutely no evidence in

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[10] It should be noted that by its own terms the administrative order did not constitute an NPDES permit and did not authorize any discharge; it merely assumed a discharge and, by setting requirements, gave EPA the opportunity to monitor the discharge until a permit was issued. Like other administrative compliance orders EPA issued to Florida Cities, see Exhibit 56, this order contained express language to the effect that it did "not operate [as] an NPDES permit and nothing contained herein shall be construed as preventing prosecution for the violations cited in this Order, for violations of the Order itself, or for any other violations of the Act." Exhibit 206.

[11] The DMRs, which have been summarized for the Court's convenience in exhibits C, F, and I, and attached hereto collectively as Exhibits D, G and J, form the basis of the allegations contained in paragraphs 17-22, 24-25, 30-39, and 44-46 of the United States Revised Amended Complaint.

the record that Florida Cities objected to the limits set out in the order. The Court should conclude from the total absence of objections that Florida Cities recognized that the limits were reasonable.

c) NPDES Permit Violations

1) TRC and Toxicity

NPDES Permit No. FL0042293, applicable to the Barefoot Bay plant, became effective on November 1, 1991. Exhibit B; FCWC Admission No. 14. Since the effective date, Florida Cities has repeatedly violated its conditions and limitations.

According to Florida Cities' own DMRs, there were a total of 182 separate exceedances of the Total Residual Chlorine (TRC) limitation, and three separate toxicity test failures, as alleged in paragraphs 24 and 25 respectively of the Revised Amended Complaint. Declaration of Kenneth Kwan ¶ 11 and Exhibit C.

Florida Cities' convoluted defense to the TRC violations suggests that the company used an imprecise method to test TRC, and that its own reports of exceedances therefore cannot be used to prove up the violations. See FCWC Admission No. 15. This defense must fail because Defendants are estopped from challenging the data they submitted on their DMRS. See section III.C above.[12]

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[12] Past and present Florida Cities agents who signed the DMRs have challenged neither their authenticity nor accuracy. See Deposition of Paul Bradtmiller II:109; Deposition of Johnnie Overton I:42, II:5, and Deposition of Jack Tompkins at 160.

Florida Cities attributes its toxicity test failures to the inadequacy of its plant's design, suggesting that the permit limits were written for a more advanced plant, the improvements for which are now under construction, see FCWC Admission No. 16, and obliquely implies that it would have met its permit limits were it not for delays caused by regulatory agencies in issuing permits it needed to make necessary improvements to its plant. FCWC Second Set of Interrogatory Answers No. 2, sixth paragraph. Section 509(b) of the Clean Water Act, 33 U.S.C. § 1369(b), however, clearly prohibits Florida Cities from challenging the permit limits in the context of an enforcement action. That section provides in pertinent part that any final Agency action relating to an NPDES permit must be challenged within a specified period of time in the U.S. Court of Appeals. Defendant failed to avail itself of the opportunity to seek judicial review of the permit limits, and cannot be allowed to circumvent the law by challenging the denial in the context of a civil enforcement proceeding.[13] Moreover, the question of fault is not an appropriate inquiry at this stage of the proceedings in view of the Clean Water Act's strict liability scheme, see section III.B above, but rather should be addressed in the penalty phase of the case when the court considers the factors set out in section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d). See Atlantic

[13] Section 509(b) was discussed extensively in the United States' Opposition to Defendant Florida Cities Water Company's Motion for Partial Summary Judgment to which the Court is respectfully referred, and which is incorporated herein by reference pursuant to rule 10(c), Fed. R. Civ. P.

States Legal Foundation v. Tyson Foods, 897 F.2d 1128, 1140-42 (11th Cir. 1990).

2) Monitoring Violations

BOD

From November 1991 through June 1993 (and twice in November 1993), Florida Cities also failed to monitor biological oxygen demand (BOD) as required by its permit. The Barefoot Bay plant manager has admitted that Florida Cities was reporting to EPA values for carbonaceous biological oxygen demand (CBOD) instead of BOD during the time alleged. Deposition of William Sansbury pp. 207, 209-10; exhibits 114, 116, 117. Based on his testimony, there were 79 such violations.[14]

Florida Cities admits that what it reported as BOD was really CDOB, but blames the mistake on its contract laboratory. See FCWC Admission No. 17. Again, such an excuse, even if truthful, is simply not a defense to liability under the Clean Water Act's strict liability scheme. It was Florida Cities' responsibility to ensure that the proper data was reported to EPA. If it failed to monitor the actions of its laboratory then it must bear the consequences. It has no one to blame but itself.

TRC

The Barefoot Bay permit also requires daily monitoring of total residual chlorine (TRC) using a method specified in the

[14] The applicable permit requires BOD sampling on a weekly basis. Exhibit 139. There were a total of 79 weeks during the period alleged in the Revised Amended Complaint.

permit itself. From February 1992 through June 1993, Florida Cities failed to use the correct method.

The text of Part I.2 of the permit provides in pertinent part that "[t]esting for total residual chlorine (TRC) shall be conducted according to ... the low-level amperometric titration method (if compliance with a permit limitation of 0.20 mg/l or less is to be demonstrated)...." Exhibit 139. Because at all times since the permit became effective the TRC limit was 0.20 mg/l or less, see id. Part I.2 (first two paragraphs), there was only the one approved method, the low-level titration method. Declaration of Kenneth Kwan ¶ 13. According to one of Florida Cities' plant operators, prior to June 28, 1993, however, Florida Cities used the DR-100 method. See Deposition of Glen Siler at 99, exhibit 133. As a result of the use of this unapproved method, there were 514 days of violations.[15]

Florida Cities has twice admitted the TRC allegations, see Defendant's Answer to Amended Complaint ¶ 28 and Defendant Florida Cities Water Company's Answer to Revised Amended Complaint ¶27, but now denies them. Defendant Florida Cities Water Company's Amended Answer to Revised Amended Complaint ¶ 27.[16] Florida Cities now argues that it used one of three EPA-

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[15] There were 514 days during the period alleged in paragraph 27 of the Revised Amended Complaint.

[16] Florida Cities recently filed a motion for leave to amend its answer to deny this allegation. Because the United States believes that the merits of the defense are best adjudicated in the context of the instant motion, it did not oppose the filing of the amended answer, although it believes Florida Cities had no basis on which to change its answer.

approved methods. See FCWC Admission No. 18. This argument ignores the unambiguous permit requirement that only one method (low-level amperometric titration) be used for TRC limits of .020 mg/l or less.

There were a total of 579 unpermitted discharges, 778 permit violations, and 29 administrative order violations, for a grand total of 1,386 violations at Barefoot Bay. Declaration of Ken Kwan ¶ 14.

2. Carrollwood

a) Unpermitted Discharges

It is uncontested that during the period November 1, 1984 to June 30, 1991, Florida Cites did not have an NPDES permit to discharge from the Carrollwood Plant into the Sweetwater Creek. FCWC Admission No. 23. Likewise, it is uncontested that notwithstanding the absence of the permit, Florida Cities continued to discharge on a daily basis during those seven years. FCWC Admission No. 24. The daily discharges during the period alleged in paragraph 30 of the Amended Complaint (August 1990 to June 1991) account for 234 violations. Declaration of Kenneth Kwan ¶ 17.

Florida Cities offers no defense to this unpermitted discharge claim other than to assert that it has already paid an administrative penalty for the unpermitted discharges in question. It has not. The administrative order in question only covered unpermitted discharges during the period June 1987

through July 1990.[17] The proposed Amended Complaint pleads unpermitted discharge violations beginning in August 1990.

b) NPDES Permit Violations

In May 1991, EPA issued Florida Cities NPDES permit no. FL0029319, which was effective from July 1, 1991 until deactivated. Exhibit E; Declaration of Kenneth Kwan ¶ 16. Admission No. 25. For the six months following the date the permit took effect, Florida Cities violated nearly every one of its effluent parameters. Based on Florida Cities' own DMRs, summarized in Exhibit F, there were a total of 234 separate violations of the Phosphorus, CBOD, Nitrogen, Chlorine, and Fecal Coliform limits, as alleged in paragraphs 30-39 of the Revised Amended Complaint. Declaration of Kenneth Kwan ¶ 17.

Florida Cities now suggests that the Carrollwood permit limits were "inappropriate" because they "were for an advanced wastewater treatment facility." FCWC Admission No. 25. As discussed above, and in the United States' Opposition to Defendant Florida Cities Water Company's Motion for Partial Summary Judgment, however, Florida Cities may not now challenge the permit limits, having failed to exercise that right at the

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[17] As is the case with the Barefoot Bay unpermitted discharges, Florida Cities has argued that it cannot be held liable for the unpermitted discharge violations at Carrollwood because EPA has already penalized the company for them in an administrative order. As set forth in detail, however, in the United States' Memorandum in Support of its Motion for Reconsideration of Court's Order on Amendment of Complaint, none of the discharges now alleged were covered by the administrative order.

appropriate time and in the appropriate forum. Moreover, as the United States will discuss at length in the penalty phase of the case, Florida Cities' failure to timely upgrade its plant to an advanced wastewater treatment facility was its own making.

3. Waterway Estates

a) Unpermitted Discharges

Paragraph 41 of the Revised Amended Complaint alleges that Defendants discharged without an NPDES permit from the Waterway Estates Plant during the period October 1, 1988 to October 31, 1989.

Florida Cities was authorized by an NPDES permit valid from September 24, 1981 to January 8, 1987 to discharge effluent from its Waterway Estates plant to a tributary canal leading to the Caloosahatchee River. Declaration of Kenneth Kwan ¶ 19. On July 28, 1986, EPA notified the company that it had tentatively decided to deny its application for renewal of the permit. Deposition of Connie A. Kagey, October 24, 1994 at 49; Exhibit 32. On December 8, 1986, EPA issued its final denial, which took effect on January 9, 1987, thirty days after receipt by the company.[18] Id. at 55; Exhibit 33; FCWC Admission No. 28. The basis of both the tentative and final denial was that in a January 1981 report, the Florida Department of Environmental Regulation (FDER) had developed a "no discharge" allocation for

[18] Pursuant to 40 C.F.R. § 122.6, having made a timely renewal application, the company was entitled to continue to discharge under the existing permit, even though it had expired, until the effective date of the denial.

the Waterway Estates plant based on its discharge location at the time (the canal). Id. at 52-57; Exhibits 32-33. It is uncontested that Florida Cities did not challenge the permit denial. FCWC Admission No. 29.

Florida Cities admits that it continued to discharge from the Waterway Estates plant from January 9, 1987 (the effective date of the permit denial) until October 31, 1989. FCWC Admission No. 31. These daily unpermitted discharges account for 396 violations.[19] Declaration of Kenneth Kwan. ¶ 20.

Florida Cities now contends that EPA wrongly denied the permit and, as a result, that its earlier permit continued in force. As set forth in detail the United States' Opposition to Defendant Florida Cities Water Company's Motion for Partial Summary Judgment, however, this argument fails as a matter of law because Florida Cities failed to challenge the permit denial at the time in the U.S. Court of Appeals as required by section 509(b) of the Clean Water Act, 33 U.S.C. § 1369, and cannot now attempt to evade liability in this enforcement action.

b) Discharges to an Unpermitted Location

On November 1, 1989, EPA issued NPDES permit No. FL0030325, which Florida Cities admits was applicable to Waterway Estates. FCWC Admission No. 32. The permit required Florida Cities to discharge directly to the Caloosahatchee River itself rather than

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[19] Because the initial Complaint was filed in this matter on October 1, 1993, the statute of limitations arguably bar claims before October 1, 1988. Hence, paragraph 41 of the Revised Amended Complaint pleads violations occurring on and after that date.

to the canal. Exhibit 153. Declaration of Kenneth Kwan at 21. FCWC Admission No. 33. Notwithstanding the new location, Defendants continued to discharge to the tributary canal during the period alleged in paragraph 43 of the Revised Amended Complaint, with knowledge that it was an unpermitted location. Deposition of Jack Tompkins at 84. Again, each day of discharge to an unpermitted location is a separate violation. Accordingly, there were 617 such violations. Declaration of Kenneth Kwan ¶ 24.

c) NPDES Permit Violations

Florida Cities periodically violated the effluent parameters in the new Waterway Estates permit. Based on Florida Cities' own DMRs, summarized in Exhibit I, there were a total of twenty-one separate violations of the Total Nitrogen limitations (concentration and loading), as well as three toxicity test failures, as alleged in paragraphs 44-46 of the Revised Amended Complaint. Declaration of Kenneth Kwan ¶ 22; Exhibit I.

Florida Cities argues that it should not be held to the permit limits because delays in upgrading its plant resulted in its not beginning advanced wastewater treatment until April 3, 1992. See FCWC Admission Nos. 35-37. This argument, which is not a defense to liability under the strict liability scheme of the Clean Water Act, will be rebutted at the penalty stage of this litigation. Nor can Florida Cities escape liability by claiming that EPA allowed it additional time in which to complete construction. The purpose of EPA's administrative orders setting

new deadlines for construction represented efforts to speed up construction which was behind schedule, not forgive the delays. By their own terms, the administrative orders were not permits and did not vary the terms of the permit itself. Moreover, the administrative orders made clear that EPA was reserving the right to take enforcement action, and there is no evidence in the record to suggest that EPA intended otherwise.[20]

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[20] The administrative order issued on September 26, 1989 provides in pertinent part as follows:

> 2. This should in no way be considered a permit to discharge, however, if the Respondent does discharge to waters of the United States in violation of the Act, the Respondent's discharge of treated wastewater shall at least comply with the effluent limitations, monitoring schedule and other requirements contained in its previous permit.
>
> . . . .
>
> 7. Nothing contained in this Order shall be construed to prevent further enforcement of the violations stated herein, nor shall it preclude the use of Administrative Penalties or civil litigation based on violations of the Clean Water Act.

Exhibit 304.

When this administrative order was amended on July 24, 1990, the amendment stressed even further that the order was not a permit and that the Agency retained its right to take enforcement action:

> This Amendment is issued to enforce existing requirements under your NPDES permit and therefore, does not replace, modify or eliminate any NPDES requirement. Notwithstanding the issuance of this Section 309(A) Order, EPA retains the right to bring further enforcement action under Section 309(d) or 309(g) of the Act, for their violations cited in this Order and for any other violation of your NPDES permit and the Act. Violations of the Act including requirements contained in and [sic] NPDES permit or a

(continued...)

Florida Cities also alludes to a consent agreement it negotiated with the State of Florida which penalized it for "certain violations" at Waterway Estates, and asserts that the United States can not seek penalties for those same violations. See FCWC Second Set of Interrogatory Answers No. 2, third paragraph. While Florida Cities is silent both as to the legal and factual basis for this defense, the United States assumes that defendant intends it to arise under section 309(g)(6) of the Act, 33 U.S.C. § 1319(g)(6), which provides, inter alia, that violations which have been the subject of a final administrative State order and penalty under comparable State law shall not be the subject of a federal civil judicial penalty action.

The United States understands that Florida Cities has indeed been cited by state officials for state violations at its Waterway Estates plant. The particular violations of federal law alleged by the United States in this action, however, have never been the subject of a state administrative order or penalties. An administrative Consent Order before the Florida Department of Environmental Regulation ("FDER") (now the Florida Department of Environmental Protection ("FDEP")), OGC Case No. 88-0384, settled the State's allegations regarding a major upset at Waterway Estates in 1987 which resulted in a number of state permit

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[20](...continued)
Section 309(a) Order, remain subject to a civil penalty up to $25,000 per day for each violation pursuant to Section 309(d) of the Act.

Exhibit 320 [emphasis in original].

violations. That agreement, signed by Florida Cities on July 15, 1988, resolved 1987 violations of Florida Administrative Code Rules 17-600.750(1), 17-7.040, 17-600.740(a)(b)(1.d and 17-601.500(1). The federal violations alleged by the United States in this case all occurred after 1987. A subsequent FDER Consent Order, OGC Case No. 90-1747, signed by Florida Cities on November 25, 1990, resolved Florida Cities' liability for violating a Florida statute by failing to comply with the previous consent agreement's requirement that it complete construction and obtain certification of plant upgrades by November 1, 1990. The United States does not seek to penalize Defendants for that violation but rather for discrete NPDES permit violations.

In sum, the United States' claims are distinctly different from the state violations covered by the state orders, each of which contained language expressly stating that it "does not relieve Respondent of the need to comply with all applicable federal, state or local laws, regulations or ordinances." By no stretch of the imagination could the consent agreements have covered the violations at issue in the instant case, the United States' is not barred by those agreements from bringing the claims in this suit.

C. Liability of Avatar Holdings

Standard of Liability of a Parent Company

Avatar Holdings should be held liable for the violations of the Act alleged in this action because, as Florida Cities' parent

company, Avatar directly and pervasively controlled Florida cities' environmental practices.

There is sound authority in this jurisdiction for finding a parent company directly liable under federal environmental protection statutes for the acts of its subsidiary. Under Jacksonville Electric Authority v. Eppinger and Russell Company, 996 F.2d 1107 (11th Cir. 1993), a parent may be held liable as an operator of its subsidiary's business under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or "Superfund"). In Jacksonville Electric, the Eleventh Circuit adopted the test for parent company liability formulated by Judge Moore in his district court decision, Jacksonville Electric Authority v. Eppinger and Russell Company, 776 F. Supp. 1542 (M.D. Fla. 1991). Judge Moore held that a parent company is liable when it "exercises actual and pervasive control of the subsidiary to the extent of actually involving itself in the daily operations of the subsidiary. Actual involvement in decisions regarding the disposal of hazardous substances is a sufficient, but not a necessary condition to the imposition of operator liability." 776 F. Supp. at 1547-48.

Courts in other jurisdictions have also held that a parent company may be liable under CERCLA. See Lansford-Coaldale Water Authority v. Tonolli Corp., 4 F.3d 1209, 1221, 1222 & n.13 (3d Cir. 1993); United States v. Kayser-Roth Corp., 910 F.2d 24, 26-27 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991); United States v. Amtreco, Inc., 809 F. Supp. 959, 966 (M.D. Ga. 1992);

New York v. Shore Realty Corp., 759 F.2d 1032, 1052-53 (2d Cir. 1985); United States v. Nicolet, Inc., 712 F. Supp. 1193 (E.D. Pa. 1989); United States v. Mottolo, 695 F.Supp. 615, 624-25 (D.N.H. 1988); Idaho v. Bunker Hill Co., 635 F.Supp. 665, 672 (D. Idaho 1986). And, courts in other jurisdictions also have embraced direct liability theories in order to find individual corporate officers liable in cases arising under other environmental protection statutes. See United States v. Pollution Abatement Services of Oswego, Inc., 763 F.2d 133 (2d Cir. 1985)(Rivers and Harbors Act); United States v. Production Plated Plastics, 742 F. Supp. 956 (W.D. Mich. 1990) (Resource Conservation and Recovery Act (RCRA)); Vermont v. Staco, Inc., 684 F.Supp. 822, 830-32 (D.Vt. 1988) (CERCLA and RCRA); United States v. Tzavah Urban Renewal Corp., 696 F. Supp. 1013 (D.N.J. 1988) (Clean Air Act).

Judge Moore's analysis was based on United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990), cert. denied, 498 U.S. 1046 (1991); Riverside Mkt. Dev. Corp. v. International Bldg. Products, Inc., 931 F.2d 327, 330 (5th Cir. 1991), cert. denied, 502 U.S. 1004 (1991), and United States v. Kayser-Roth Corp., 910 F.2d 24, 26-27 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991). In Fleet, the Eleventh Circuit held a secured creditor liable for Superfund cleanup costs, notwithstanding an express exemption in CERCLA for secured creditors, see 42 U.S.C. § 9601(20)(A), reasoning that their "awareness that they are potentially liable under CERCLA will encourage them to monitor

the hazardous waste treatment systems and policies of their debtors and insist upon compliance with acceptable treatment standards as a prerequisite to continued and future financial support." United States v. Fleet Factors Corp., 901 F.2d at 1558.

Both the Eleventh Circuit in Fleet, and Judge Moore in Jacksonville Electric, found Kayser-Roth to be instructive. In Kayser-Roth, finding the parent directly liable, the court considered the following factors as indicia of the parent's "total control" control over the subsidiary:

> 1) its total monetary control including collection of accounts payable; 2) its restriction on Stamina Mills' financial budget; 3) its directive that subsidiary-governmental contact, including environmental matters, be funneled directly through Kayser-Roth; 4) its requirement that Stamina Mills' leasing, buying or selling of real estate first be approved by Kayser-Roth; 5) its policy that Kayser-Roth approve any capital transfer or expenditures greater than $5,000; and finally, its placement of Kayser-Roth personnel in almost all Stamina Mills' director and officer positions, as a means of totally ensuring that Kayser-roth corporate policy was exactly implemented and precisely carried out.

910 F.2d at 27.

The holdings in Jacksonville Electric, Fleet, and Kayser-Roth (as well as the holdings in the individual direct liability cases referenced above which were brought under other environmental protection statutes), should apply equally to a Clean Water Act enforcement action. Both CERCLA and the Clean Water Act are environmental protection statutes. Indeed, CERCLA itself was modelled in part on the Clean Water Act. See, e.g., United States v. Carr, 880 F.2d 1550, 1553 (2d Cir. 1989);

Conservation Law Foundation of New England v. Browner, 840 F. Supp. 171, 174 (D. Mass. 1993); Lincoln Properties, Ltd. v. Higgins 823 F. Supp. 1528, 1540-41 (E.D. Cal. 1992). The underlying question of liability in Jacksonville Electric and Kayser-Roth turned on whether the parent companies were "operators" within the meaning of CERCLA. As the court in Kayser-Roth noted, the definition of operator relies in large part on the definition of "person," which "[t]he statute defines ... extremely broadly and certain includes a parent corporation." United States v. Kayser-Roth, 910 F.2d at 26 and n.5. Similarly, section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), provides that **"any person"** who violates specified provisions of the Act or an administrative order issued under the Act is liable for civil penalties [emphasis added]. Like CERCLA, "person" is defined extremely broadly under the Clean Water Act, and includes a corporation.[21] Finally, the Eleventh Circuit in Fleet makes it clear that it intends those with the authority to prevent pollution to take responsibility for doing so.

Facts Supporting Avatar's Liability

The United States submits that based on the facts developed in discovery, Avatar Holdings must be held directly liable under the Jacksonville Electric test for the violations alleged in this case. The deposition testimony and exhibits demonstrate that

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[21] "Person" is defined as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5). Avatar Holdings admits that it is a corporation. Answer of Avatar Holdings, Inc. ¶4.

Avatar Holdings exercised pervasive control of the environmental practices of Florida Cities. Under the case law in this Circuit and District, these facts demonstrate that Avatar is liable for the violations.

Avatar Holdings, whose offices are in Coral Gables, Florida, is a publicly-traded company, whose primary business activities include retail land sales, land development and utility service.[22] Florida Cities, whose offices are in Sarasota, is a subsidiary of Avatar Holdings. FCWC Admission No. 1.

Florida Cities asserts that Avatar Holdings owns it through a paper chain of other companies. Id. The distinction is unimportant, however, because, as will be demonstrated herein, Avatar Holdings, in fact, directly controls Florida Cities and, particularly, its environmental practices.[23]

While the other companies may at least nominally have officers, they all function simply as one company. Even Florida Cities tends to refer to all of the Avatar entities simply as "Avatar." In interrogatory answers, Florida Cities listed Avatar personnel without distinguishing between the nominally distinct entities. FCWC First Set of Interrogatory Answers no. 4. Florida Cities managers also tend simply to refer to the Avatar

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[22] This information is based on Securities and Exchange Commission public filings of which this Court may take judicial notice pursuant to Fed. R. Evid. 201(c).

[23] It is unclear whether any of them presently operates or even has any employees. Avatar Utilities, Inc. has undergone "downsizing" from a staff of roughly six employees located at Avatar Holdings' offices in Coral Gables. Deposition of Bradtmiller II:16-18.

entities uniformly as "Avatar." See, e.g., Bradtmiller II:42-43, 59-61, Overton II:125-131. In fact, the Florida Cities' Executive Vice-President commented that Florida Cities employees are Avatar employees. Bradtmiller II:27. And, as the exhibits cited below will make abundantly clear, inter-office memoranda, even between officers of the allegedly distinct companies make no mention of title of corporate affiliation.

Avatar exercises not simply the type of routine oversight that one might expect that a parent would exercise over a subsidiary. Rather, the chain of command, as well as certain logistical details, confirms that the Avatar management is simply an extension of the Florida Cities management. Indeed, a memorandum written by the Avatar Utilities president suggests that Florida Cities is ultimately managed not by its own officers or even Avatar Holdings officers, but by Avatar Holdings Board members, who are referred to as "Senior Management in New York." Exhibit 653.[24]

Avatar employees serve on the Florida Cities Board. See "Defendant Florida Cities Water Company, Inc.'s Answers to the United States' First Set of Interrogatories," [hereinafter "FCWC First Set of Interrogatory Answers"] No. 4 (filed herewith). The

[24] The United States' attempts to obtain discovery directly from the "Senior Management in New York" have so far been strongly rebuffed. Defendants have refused to search and produce documents from the Board members' files, and have refused to produce copies of the minutes of Avatar Holdings' Board of Directors meetings. See United States' Motion to Compel Discovery, filed May 22, 1995. The deposition of the Avatar Chairman of the Board, Leon Levy, who resides in New York, was noticed for June 19, 1995, but he failed to appear.

Florida Cities executive vice-president, Paul Bradtmiller, reports not to the Florida Cities president, but directly to Gerald Allen, the executive vice-president of Avatar Utilities, whose office is upstairs from his in Sarasota. Deposition of Paul Bradtmiller I: 61-63.[25] Conversely, the president of Florida Cities, Robert Gordon, who also serves as the Avatar Utilities president, is located in the Avatar suite in Coral Gables, Florida, not in the Florida Cities office in Sarasota. Deposition of Robert Gordon at 4.[26]

Avatar in particular pervasively controls Florida Cities' environmental practices. Bradtmiller, the Florida Cities Executive Vice-President, speaks daily to Allen, the Avatar Utilities Executive Vice-President, Deposition of Paul Bradtmiller II:12-13, who is involved whenever there is a question of environmental compliance, id. II:71-72. A memorandum drafted by Allen instructs Bradtmiller to transmit to him "all notices of violations, consent orders, administrative orders, notices of civil actions, warning letters from regulatory agencies, and other similar documents. . .immediately upon receipt." Bradtmiller II:61-62, exhibit 227. The present

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[25] Although Bradtmiller identifies Allen as executive vice-president of Avatar Utilities, Deposition of Paul Bradtmiller I:61, he has also been addressed as being affiliated with Avatar Holdings, see Exhibit 593.

[26] Gordon has testified in a rate-making proceeding that he is also the president of FCWC Holdings, Consolidated Water, and Avatar Utilities. Exhibit 764. As far as we know, there are no other Florida Cities employees or officers in Coral Gables, and Gordon appears to occupy his office there as an Avatar officer.

Florida Cities operations manager also testified that she reports directly to Allen, Gordon, and the Avatar Holdings Executive Vice President/General Counsel on matters relating to environmental compliance. Deposition of Julie Karleskint at 78-80.

Florida Cities relies on Avatar's "Environmental Assurance Plan" because it has no such plan of its own, Deposition of Paul Bradtmiller I:109-11, and Florida Cities has relied on Avatar to conduct environmental audits. Such audits were conducted by an Avatar employee resident in Florida Cities' Sarasota office from January 1989 through January 1992, see Deposition of Julie Karleskint at 55, 62-67, three critical years in Florida Cities' history in terms of the violations alleged by the United States. As of November 1994, Florida Cities still did not have its own environmental auditor, but claimed that it was planning to hire one. Bradtmiller II. at 75-76. That person's audits will go directly to Dennis Getman, the Avatar Holdings Executive Vice-President/General Counsel. Id.

Avatar officers and directors are not simply consulted and privy to decisions of any significance, they actually make and approve such decisions. During the time periods relevant to this action, expenditures of more than $10,000 at any Florida Cities facility had to be approved by Avatar Holdings officers. These spending authorizations, which Avatar calls "conwards," have separate signature lines within a distinct block for the signature of the Avatar Holdings president and C.E.O. See, e.g., Exhibits 490-538. See also Deposition of Johnnie Overton,

II:150-51. Since, judging from the conwards themselves, Florida Cities relied heavily on contractors and consultants for whom authorizations were required to address its environmental issues (i.e., study discharge alternatives and design and build plant improvements), the ultimate decisions to hire those individuals were made by Avatar Holdings.

A wealth of documentation reveals that Allen, together with Gordon, as the top two Avatar Utilities officers, report on Florida Cities' environmental matters directly to Dennis Getman, an Avatar Holdings officer. Indeed, it is readily apparent from Avatar correspondence, memoranda, and other documents referenced herein that these three individuals were key decision-makers in matters relating directly to the violations alleged by the United States. It is also readily apparent from the documentation that each of these three individuals also reported directly to the Avatar Holdings president and Board members on environmental matters relating directly to the allegations in this law suit.

1. Barefoot Bay

The unpermitted discharges from the Barefoot Bay plant alleged by the United States were directly caused by Avatar Holdings' continued development of Barefoot Bay well beyond its sewage capabilities. The effluent from the plant was discharged into percolation ponds of limited capacity, which, in the early 1980s, began overflowing into a canal leading to the Sebastian River. These overflows, however, did not stop Avatar from continuing to market its lots.

According to the sworn testimony of Florida Cities' own Division Manager, Larry Good, in 1983, when Barefoot Bay came under his supervision, the ponds were already overflowing into the canal. Deposition of Larry Good at 175. At that time, there were roughly 2,000 units in the development, resulting in a flow of approximately 200,000 gallons of wastewater per day. Id. at 181-82. The two percolation ponds, into which the plant discharged, however, together had only a 50,000 gallon/day disposal capacity. Id.. As a result, in 1983 approximately 100,000-150,000 gallons of effluent overflowed from the percolation ponds on a daily basis into the drainage canal. Id. In 1984, the overflow into the canal reached approximately 200,000 gallons per day. Id. at 180.

As early as 1984, it is apparent that Gordon (the Avatar Utilities president) was well aware that the Barefoot Bay percolation ponds were overflowing into the canal, and, in turn, notified Avatar Holdings Board members of the problem and his intended solution. His June 22, 1984 memorandum on the subject of "Effluent Disposal - Barefoot Bay," was directed to the John Sladkus, an Avatar Holdings Executive Vice President at the time, and copied to Peter Sharp, a member of the executive committee of the Avatar Holdings Board of Directors at the time, Deposition of Paul Bradtmiller II:93-95, whom Bradtmiller describes as the boss

of Larry Wilkov, the Avatar Holdings president, id.[27] The memorandum reads in pertinent part as follows:

> As you know the percolation ponds at the Barefoot Bay Wastewater Treatment Plant are not operating properly, and as a consequence, the effluent is leaching into an adjacent canal which periodically has inundated an area of an orange grove which allegedly damaged some trees.

Exhibit 474.

The memorandum goes on to discuss various potential land disposal solutions, including building additional percolation ponds, spray irrigation, and deep-well injection.[28] A year later, with the ponds still overflowing into the canal, Avatar Holdings officers and Board members signed a conward to authorize the design of additional percolation ponds and plant improvements. Exhibit 749.[29]

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[27] Both Sladkus and Sharp are believed to have been part of the "Senior Management in New York" (Sharp died in 1992). While Sladkus has been identified by Florida Cities as an "Avatar employee who served as a Director or Officer of FCWC," with a New York address, see FCWC First Set of Interrogatory Answers, no. 4., Sladkus is further identified in public SEC filings as Avatar Holdings' Executive Vice President.

[28] Testimony on this memorandum (its attachment has never been produced) has been limited by virtue of the fact that its author (Gordon) and two of its recipients (Wilkov and Reeves) have plead the Fifth Amendment, and one of its recipients is dead (Sharp). When the forty acres were eventually acquired, they were used for spray irrigation, not construction of additional basins, Deposition of Paul Bradtmiller II:85, which only partly reduced the overflow from the percolation ponds, Deposition of Larry Good at 216-219.

[29] Avatar had the opportunity to buy more land which ostensibly could have provided additional and immediate land disposal options for the Barefoot Bay effluent: a memorandum dated June 13, 1985 and written on Avatar letterhead to Wilkov advised him of an offer to sell approximately 200 acres adjacent to Barefoot Bay. Exhibit 475. The same memorandum also refers to an "approximate 270 acre Hearndon property." Id.

In the meantime, notwithstanding the daily overflows to the canal, Florida Cities continued to operate the Barefoot Bay wastewater treatment plant without an NPDES permit and Avatar Holdings continued to develop Barefoot Bay. Some 300 units were added each year from 1984-89, some 200 units from 1989-90, and some 100 units in 1991. Deposition of Larry Good at 183-88. These new units were connected to the existing treatment facility even though Avatar must have been aware that they would result in increasing volumes of wastewater being discharged without a permit to the Sebastian River, and even after EPA had issued its administrative order in September 1990 finding that Florida Cities was in violation of the Clean Water Act by discharging without an NPDES permit. Exhibit 206.[30]

Various projects conducted during relevant years which related to studying alternative discharge options at Barefoot Bay were handled directly by Allen (the Avatar Utilities Executive Vice-President) with the participation of Gordon (the Avatar Utilities President) and Getman (the Avatar Holdings Executive Vice-President/General Counsel). Getman personally handled projects which involved the purchase of land. Both, in turn, were closely supervised by Avatar Holdings Board members, including, at times, its Chairman of the Board, Leon Levy.

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[30] By 1987, the overflow to the canal had reached approximately 300,000 gallons per day. Id. at 185-86. It remained at that level during 1988, id., decreased to 200,000-250,000 gallons per day in 1989 (as a result of the addition of a spray irrigation field), Deposition of Larry Good at 187-88, reached 300,000 gallons per day again in 1990, id., and peaked at approximately 330,000 gallons per day in 1991, id. at 189-90.

In April 1989, Gordon forwarded to Sladkus (an Avatar Executive Vice-President) an engineering report on deep well injection at Barefoot Bay. Exhibit 758. Gordon recommends that "we arrange a meeting to review the entire injection well controversy with CH2M Hill so that everyone has first hand information relative to the Barefoot Bay project's success." Id. In June 1989, Allen travelled to New York to brief Avatar Board members on the various alternatives. Exhibit 541. Unidentified handwritten notes of the meeting appear to read "Continue to pursue deep well simultaneously with permit to irrigate." Exhibit 704.

In July 1989, even while the Barefoot Bay plant was discharging without a permit, a memorandum written by Sladkus to Wilkov reveals that Avatar Holdings had plans to acquire and develop an additional tract of land, known as the Hearndon Property, and was debating whether to use the Barefoot Bay plant to treat effluent from the new development. Exhibit 476.

In August 1989, Gordon wrote a memorandum to Sharp and Wilkov about the possibility of using neighboring orange groves on which to dispose of the Barefoot Bay effluent. Exhibit 477.[31] The recipients of that memorandum included Levy and Sladkus. Id. By September 1989, it was evident that the deep well injection project had not been a success, and Gordon sent Sladkus a copy of

[31] Even details such as flow data from the Barefoot Bay treatment plant were later provided directly to Sharp. Exhibit 717.

a submittal to FDER proposing spray irrigation. Exhibit 759. In November 1989, a report entitled "Wastewater Disposal Alternatives to Deep Well Injection, Barefoot Bay" was transmitted directly from Allen to Board members including Levy. Exhibit 706.

Although there are many more examples which serve to illustrate why Florida Cities Water Company is merely Avatar Holdings' alter ego, perhaps the best example is Avatar's ill-fated attempt in 1990 to acquire orange groves known as the Micco Groves adjacent to the Barefoot Bay plant to be used for disposal of the Barefoot Bay effluent. In February 1990, Getman contacted Sun Bank regarding an outstanding Avatar offer to purchase the groves, which the bank held in trust. Exhibit 707. Using Avatar Holdings letterhead, he signed as Executive Vice President - General Counsel of Avatar Properties, Inc. Id. Using the same letterhead and title, he increases Avatar's offer on May 10, 1990, copying the Avatar Holdings president, among others. Exhibit 708. On June 14, 1990, a Getman memorandum to file reflects that there is competition for the orange groves. Exhibit 709. That memorandum is also copied to the Avatar president, among others, id., and then forwarded by Gordon on June 15, 1990 to Sladkus, among others, Exhibit 710. Sladkus responded personally on June 18, 1990, injuring about the possibility of obtaining the property through condemnation proceedings. Exhibit 711. On June 18, Getman writes another memorandum saying that he has set up a meeting on the subject for

June 22, 1990, noting in a "P.S." that "Mr. Sladkus would like to join this discussion by telephone conference." Exhibit 712. On June 19, Gordon writes directly to Sladkus saying that "condemnation of the Micco Grove property would be extremely difficult because (a) the property is not unique (other property would be available for a price) and (b) there are alternatives to spray irrigation." Exhibit 713. Sharp then gets involved, again urging eminent domain. Exhibit 760.

On July 25, 1990, Getman, writing on Avatar Holdings letterhead, signing as "Executive Vice President" of Avatar Properties increases his offer again. Exhibit 714.[32] On August 24, 1990, Getman ups his offer yet again. Exhibit 716. He again uses Avatar Holdings letterhead, but this time, he makes the offer on behalf of Florida Cities Water Company, signing as its "General Counsel." Id.

A March 31, 1991 memo from Gordon to Getman, Sharp, and Wilkov, among others, shows that Avatar did eventually begin condemnation proceedings, notwithstanding Gordon's evaluation that they would be inappropriate, and thereafter did reach a tentative agreement reached for purchase of the property, subject. Exhibit 233. Ultimately, however, the property was never acquired. Deposition of Paul Bradtmiller II:97.

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[32] The same day, Getman writes a letter about wastewater treatment to a state environmental regulator, again using Avatar Holdings letterhead, but this time signing on behalf of Barefoot Bay Development Corporation as its Executive Vice President - General Counsel. Exhibit 715.

The Micco Grove illustration is useful from a number of perspectives. First, it highlights Avatar's pervasive involvement in the management of Florida Cities Water Company and the Barefoot Bay treatment plant. Second, it demonstrates Avatar's intimate knowledge of the unpermitted discharges. Third, it reveals the commonality of interest of the various Avatar entities.[33] Fourth, it indicates high-level Avatar Holdings involvement at the time of the unpermitted discharges alleged in the instant action.

The conclusion is inevitable that Avatar, a sophisticated development company, continued to expand the Barefoot Bay development with knowledge that it would thereby increase the magnitude of the unpermitted discharge violations. Avatar made that business decision both as the developer of Barefoot Bay and as the parent company of Florida Cities, choosing not to defer developing until it was able to comply with the law and ignoring the consequences to the environment.

2. Carrollwood

Avatar officials were also well aware that Florida Cities was operating its Carrollwood plant without a permit. As far back of August 6, 1984, Robert Gordon (the Avatar Utilities President) sent a memorandum to Sladkus (an Avatar Holdings

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[33] Getman's role is apparently multi-faceted. According to the testimony of a Florida Cities vice-president, Getman is corporate counsel for Avatar Holdings, Avatar Properties, and Avatar Utilities, Deposition of Johnnie Overton II:126. As Getman himself put it in a memorandum, at times he wore both his "developer" hat and the "utility" hat, purporting to represent both sides to an agreement. Id. at II:133 and Exhibit 188.

Executive Vice President), with a copy to Wilkov (the Avatar Holdings President), which reads in pertinent part as follows:

> Attached is a letter from the EPA denying our application for an extension of our Temporary Operating Permit for the Carrollwood Wastewater Treatment Plant located in Hillsborough County. The plant discharges its effluent into Sweetwater Creek. In October 1979 the Company was advised that it would have to stop discharging into the creek and would have to find another method of effluent disposal. At that time, the Company looked into spray irrigation on golf courses, building percolation ponds and other possible methods of disposal, all of which were rejected for one reason or another.
>
> . . . .
>
> We intend to write to the EPA and inform them of our negotiations with the County and attempt to have them reconsider their position. If they refuse, I believe our only alternative is to fight their mandate through the courts.

Exhibit 489.

Gordon's resolution that they would fight the matter in the courts perhaps accounts in part for why there is so little documentation of efforts to cease the discharge: Avatar simply decided not to make any serious efforts to comply. And, a 1986 memorandum from Gordon to Getman makes it clear that Avatar decided to stall and continue its unpermitted discharge until Hillsborough County would accept the Carrollwood sewage:

> Enclosed is a proposed consent order to be entered into by FCWC with the DER to allow FCWC's Hillsborough WWTP to continue to discharge treated effluent into Sweetwater Creek. FCWC has been ordered by the DER to discontinue discharging its treated effluent to Sweetwater Creek. The solution to the problem is for the Company to connect to Hillsborough County's regional plant. The problem has been Hillsborough Countys [sic] inability to provide adequate capacity for our plant at this time.

> **The consent order will buy us time,** I do not see any resolve of the problem short of connecting to the Hillsborough plant. **I doubt that we will be connected by August 1988, expiration of consent order.**

Exhibit 726 [emphasis added].

Getman not only endorsed the stall, but also suggested that Gordon negotiate language that would enable Florida Cities to stall even longer with impunity. He wrote back as follows:

> You're probably 100% correct, in that a proposed Consent Order would only buy us further time.
>
> . . . .
>
> 2. I would be greatly surprised if the DER agreed without a fight to Paragraph #5 which states FCWC's only alternative. I believe that this language must be somewhere in the Consent Order as it is important for future leverage when, and if, FCWC is unable to comply with the cease and desist date of August 31, 1988.
>
> 3. Is there any chance that the aforesaid cease and desist date could be extended?

Exhibit 727.

Eventually, Avatar did begin to study the alternatives. In 1986, Wilkov approved an expenditure for an engineering study of the design of a pumping station and force main (pipe) to transfer the Carrollwood wastewater to the Hillsborough County facility. Exhibit 652.[34] Avatar apparently debated whether to tie in to another treatment plant or improve its own. In 1989, a conward was actually signed, Exhibit 567, authorizing the advanced wastewater treatment plant, which prompted an exchange of memoranda between Gordon and Sharp. Exhibit 762. As noted in

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[34] Sharp's name also appears on the conward.

section "F" above, however, the AWT plant was never built,[35] and not until 1992 did Florida Cities cease discharging by connecting of the Carrollwood sewage to the Hillsborough County system.

3. Waterway Estates

Avatar officials at the highest levels were also aware of the violations at Waterway Estates and made critical decisions relating to compliance.

On June 30, 1986, some six months before EPA actually denied Florida Cities' permit renewal at Waterway Estates, it sent a letter to Florida Cities advising it of the impending denial. Exhibit 665. On August 14, 1986, Gordon forwarded that letter to Avatar officials, including Sladkus, Getman, and Wilkov, with a brief explanation: "The EPA wants the Company to either discontinue discharging effluent to a canal which ultimately goes to the Caloosahatchee River or improve the treatment to AWT and seek a wasteload allocation to the Caloosahatchee." Exhibit 732. Gordon's letter is enlightening in two important respects: first, Avatar Holdings knew of the impending permit denial; and second, Avatar Holdings knew that any future permitted discharge would have to go not to the canal but to the river itself.

In June 1987, Gordon forwarded to Sladkus a copy of EPA's compliance order. Exhibit 733.[36] On August 31, 1987, Gordon forwarded to Sladkus a copy of an engineering report on the

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[35] Because the AWT plant was never built, the permit violations at Carrollwood were inevitable.

[36] In January 1987, the permit denial had taken effect, and Waterway Estates simply continued discharging without a permit.

feasibility of disposing of wastewater at the Waterway Estates plant. Exhibit 765. Cost remains the primary issue. Gordon wrote, "[a]s you can imagine from the recommended cost of treatment and disposal, additional work [on the options] will have to be done." On November 19, 1987, apparently after additional work was done, Gordon again writes to Sladkus attaching an options memorandum. Exhibit 766. It is clear from the evidence that Defendants were evaluating whether to expend a large sum of money to upgrade the Waterway Estates plant or to contract with another private wastewater treatment company, North Fort Myers Utilities (NFMU) to treat its waste. Ultimately, Defendants made a business decision to forego connecting to NFMU (which used land disposal methods of disposing of its effluent). That decision is memorialized as follows in a later letter from Gordon to the Avatar Chairman of the Board, Leon Levy:

> Prior to deciding to upgrade our existing plant, we contacted NFMU to determine whether or not we could enter into an agreement whereby NFMU would treat waste from the Waterways Estates area. NFMU was agreeable to this arrangement, however, they insisted upon a connection fee plus gross-up for the equivalent units connecting to the system. The tax gross-up impact made the connection uneconomic as compared to upgrading our existing plant. Florida Cities also tried to lease a part of their plant and also inquired about purchasing an interest in their plant. Being unable to reach an agreement that made economic sense, the gross-up was the killer, Florida Cities turned its attention to upgrading its existing wastewater treatment facility.

Exhibit 772.

In order to comply with the new Waterway Estates permit, issued on September 29, 1989 and effective on November 1, 1989, Exhibit H, Florida Cities needed to upgrade the plant and move

its discharge. At the same time, they were considering expanding the plant. But, high level Avatar officials were concerned by the construction costs that were to be incurred in effecting the changes. Sharp writes Sladkus on October 2, 1989 that he is "very worried" about the content of a September 18 memo by Allen detailing the costs of the Waterway Estates upgrade and expansion. Exhibit 575. By cover memo dated June 5, 1990, Allen sends Sladkus conward number 940 requesting approval for the Waterway Estates improvements. Exhibit 576. On June 11, 1990, Sladkus rejects the conward. Exhibit 770. In short, in the absence of testimony from these individuals, these documents suggest that delays in the upgrade and expansion necessary for compliance are directly attributable to expenditures directly and pervasively controlled by Avatar officials. Avatar knew in August 1986 that it needed to move the outfall from the canal to the River, but it did not do so until July 1991. See discussion in section IV.B.3 above.

High-level Avatar officials were kept apprised every step of the way. When, in July 1991, it became clear that the Waterway Estates improvements were again behind the schedule (making the NPDES permit violations inevitable), Allen wrote a memorandum directly to Sharp, with copies to Getman, Gordon, and Wilkov. Exhibit 582. In September 1992, Allen alerted Gordon to the toxicity violations at Waterway Estates. Exhibit 591.

Avatar Holdings was not only directly involved in decision-making resulting in the violations, but also in strategy relating

to EPA's enforcement actions as a result of the violations. Dennis Getman, the Avatar Holdings Executive Vice-President/General Counsel personally planned the strategy for negotiating a penalty for the Waterway Estates violations in a May 18, 1992 memorandum to Gerald Allen:

> At this point in time, I believe that the position of FCWC to the USEPA should be "firm" in nature without being too aggressive. Of course, that is not to say that we may not want to get aggressive at a later stage as sometimes you can cut a better deal with the attorneys at the Justice Department than you can with the "bunny hugger" environmentalist attorneys at the USEPA.

Exhibit 273.

The facts summarized above clearly establish that Avatar Holdings exhibits actual and pervasive control over Florida Cities' environmental practices. These facts readily meet both the Jacksonville Electric test. Avatar was not only the real decision-maker on environmental matters relating directly to the allegations in the complaint, but also the real party in interest. It was Avatar Holdings that stood to gain financially -- and did gain -- by the development of Barefoot Bay. It was Avatar Holdings that ultimately stood to gain financially by the operation of Florida Cities' wastewater treatment plants. And, it should be Avatar Holdings, as well as Florida Cities, which should be penalized as a result of the violations which have been committed.

V. CONCLUSION

No genuine issue of material fact remains as to the Defendants' liability for any of the United States' claims for

relief.[37] Accordingly, summary judgment on liability should be entered in its favor pursuant to Rule 56, Fed. R. Civ. P. Trial should be limited to a determination of the appropriate penalty each defendant should pay for the violations.

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources
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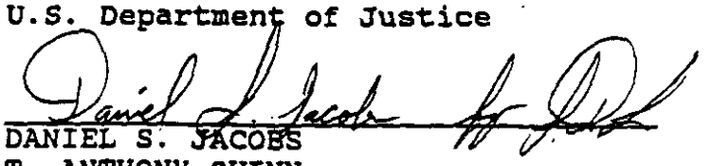
By: 

Dated: June 22, 1995

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[37] As alleged in the Revised Amended Complaint, Defendants violated the Clean Water Act no fewer than 2,078 times. As alleged in the proposed Amended Complaint, Defendants violated the Clean Water Act no fewer than 2,991 times.

Exhibit_____(GHB-53)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' SECOND SET OF INTERROGATORIES TO DEFENDANT FLORIDA CITIES WATER COMPANY, INC.

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, Plaintiff, the United States of America, serves upon Defendant Florida Cities Water Company the following interrogatories to be answered by Defendant separately and fully in writing and under oath, and served upon the undersigned attorney within 30 days.

INSTRUCTIONS AND DEFINITIONS

A. Unless otherwise specified, these interrogatories pertain to Florida Cities Water Company, Inc. ("Defendant") and its parent companies, and the directors, departments, divisions, officers, employees, agents, servants, assigns and, unless privileged, the attorneys of Defendant and its parent companies.

B. These interrogatories are continuing in nature and require you to provide supplemental answers promptly in the event that you or your attorney obtain information that alters or augments the answers now given.

C. Where an individual interrogatory calls for an answer that involves more than one piece of information, each part of the answer is to be set out clearly so that it is understandable.

D. Words used in the plural shall also be taken to mean and include the singular. Words used in the singular shall also be taken to mean and include the plural. "Or" and "and" shall be construed either conjunctively or disjunctively to bring within the scope of these interrogatories any information that might otherwise be construed to be outside their scope. The past tense includes the present tense where the clear meaning is not distorted by change of tense.

E. "EPA" means the United States Environmental Protection Agency, and its agents and employees.

F. "Person" includes any natural person, firm, corporation, partnership, joint venture, association, proprietorship, company, government agency, group, or other entity or organization.

G. "Relate(s)" or "relating to" means constituting, defining, containing, embodying, reflecting, identifying, stating, referring to, dealing with, or in any way pertaining to.

H. "Identify", "identification" and "identifying" mean and include, with respect to a natural person, the following:

(1) full name;

(2) home address and telephone number;

(3) present employer, business address and telephone number; and

(4) present occupation, job title and responsibilities.

I. All terms not expressly defined above are used herein as used in common English and/or as used within the meaning of the Clean Water Act, 33 U.S.C. §§ 1251 to 1387.

INTERROGATORIES

1. For each allegation in the United States' Revised Amended Complaint in this action denied by Defendant, summarize in full the facts supporting Defendant's denial, and identify each person of whom you are aware with knowledge of the facts either supporting or refuting Defendant's denial.

2. For each affirmative defense asserted by Florida Cities Water Company, Inc. in its Answer to the United States' Revised Amended Complaint in this action, summarize in full the facts supporting the affirmative defense and identify each person of whom you are aware with knowledge of the facts either supporting or refuting the affirmative defense.

3. For each violation alleged in the United States' Revised Amended Complaint in this action, and without regard to whether or not you believe that Florida Cities Water Company, Inc. is liable for such violation, state:

a. the number of days of each type of violation;

b. the seriousness of the violation;

c. the economic benefit to Florida Cities Water Company, Inc. (if any) resulting from the violation;

d. whether Florida Cities Water Company, Inc. has a history of such violations;

e. all good-faith efforts Florida Cities Water Company, Inc. has made to comply with the applicable requirements of the Clean Water Act;

f. the economic impact on Florida Cities Water Company, Inc. of any civil penalty which may be assessed for the alleged violations;

g. such other matters as you contend the court should consider in assessing a civil penalty against Florida Cities Water Company, Inc; and

h. the identity of each person of whom you are aware with knowledge of facts either supporting or refuting your contentions with respect to a-g above.

4. If your response to any Request for Admission served herewith is anything other than an unqualified admission, summarize in full the facts supporting your contention that the matter is not true as stated, and identify each person of whom you are aware with knowledge of the facts either supporting or refuting your contention.

5. On what date did Florida Cities Water Company, Inc. first begin to discharge effluent from the Barefoot Bay Wastewater Treatment Plant into a drainage canal leading to the Sebastian Creek?

6. Identify fully (see instructions) all persons of whom you are aware with knowledge of the facts alleged in the United States' Revised Amended Complaint, and summarize in full the facts of which each witness is aware.

7. Identify fully (see instructions) all persons whom you intend to call as factual witnesses at any hearing, trial, or other proceeding in this case; state the subject matter on which each witness is expected to testify; state whether each witness has provided statements under oath in any matter; and summarize the facts to which each witness is expected to testify.

8. Identify fully (see instructions) all expert witnesses you intend to call at trial in this case; the subject matter on which, and the substance of the facts and opinions to which, the expert is expected to testify; and provide a summary of the grounds for each opinion.

DATED: May 10, 1995

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

By: _____

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing UNITED STATES' SECOND SET OF INTERROGATORIES TO DEFENDANT FLORIDA CITIES WATER COMPANY, INC. were served by U.S. Mail (except as otherwise indicated) on May 10, 1995 on the following attorneys of record:

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	)	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' FIRST REQUESTS FOR ADMISSION TO DEFENDANT FLORIDA CITIES WATER COMPANY, INC.

Pursuant to Rules 36 and 37(c)(2) of the Federal Rules of Civil Procedure, Defendant Florida Cities Water Company, Inc., is requested to admit the truth of the matters set forth below.

DEFINITIONS

A. "Defendant" shall mean Florida Cities Water Company, [illegible] its parent companies, and the directors, [illegible] divisions, officers, employees, agents, servants, assigns and, unless privileged, the attorneys of Defendant and its parent companies.

B. "EPA" shall mean the United States Environmental Protection Agency.

C. Words used in the plural shall also be taken to mean and include the singular. Words used in the singular shall also be taken to mean and include the plural. "Or" and "and" shall be construed either conjunctively or disjunctively to bring within the scope of these interrogatories any information that might otherwise be construed to be outside their scope. The past tense

includes the present tense where the clear meaning is not distorted by change of tense.

D. All terms not expressly defined herein are used within the meaning of common English and/or the Clean Water Act, 33 U.S.C. §§ 1251 to 1387.

REQUESTS FOR ADMISSIONS

1. Florida Cities Water Company, Inc., is a subsidiary of Avatar Holdings, Inc.

2. Avatar Holdings, Inc. controls the management of Florida Cities Water Company Inc.'s environmental compliance practices.

3. (a) At all times alleged in the First Claim for Relief in the United States' Revised Amended Complaint, Florida Cities Water Company, Inc. owned and operated the Barefoot Bay Wastewater Treatment Plant, located in Barefoot Bay (Brevard County), Florida;

(b) At all times alleged in the Second Claim for Relief in the United States' Revised Amended Complaint, Florida Cities Water Company, Inc. owned and operated the Carrollwood Wastewater Treatment Plant, located in Tampa (Hillsborough County), Florida;

(c) At all times alleged in the Third Claim for Relief in the United States' Revised Amended Complaint, Florida Cities Water Company, Inc. owned and operated the Waterway Estates Wastewater Treatment Plant, located in North Fort Myers (Lee County), Florida.

4. (a) At all times alleged in the First Claim for Relief in the United States' Revised Amended Complaint, Florida Cities Water Company, Inc. collected wastewater from residential and/or commercial sources and treated it at the Barefoot Bay, Wastewater Treatment Plant, located in Barefoot Bay (Brevard County), Florida;

(b) At all times alleged in the Second Claim for Relief in the United States' Revised Amended Complaint, Florida Cities Water Company, Inc. collected wastewater from residential and/or commercial sources and treated it at the Carrollwood Wastewater Treatment Plant, located in Tampa (Hillsborough County), Florida;

(c) At all times alleged in the Third Claim for Relief in the United States' Revised Amended Complaint, Florida Cities Water Company, Inc. collected wastewater from residential and/or commercial sources and treated it at the Waterway Estates Wastewater Treatment Plant, located in North Fort Myers (Lee County), Florida.

5. Florida Cities Water Company, Inc., is a "person" within the meaning of section 502(5) of the Clean Water Act, 33 U.S.C. § 1362(5).

6. (a) At all times alleged in the First Claim for Relief in the United States' Revised Amended Complaint, the treated effluent discharged from the Barefoot Bay Wastewater Treatment Plant contained "pollutants" within the meaning of section 502(6) of the Clean Water Act, 33 U.S.C. § 1362(6).

(b) At all times alleged in the Second Claim for Relief in the United States' Revised Amended Complaint, the treated effluent discharged from the Carrollwood Wastewater Treatment Plant contained "pollutants" within the meaning of section 502(6) of the Clean Water Act, 33 U.S.C. § 1362(6).

(c) At all times alleged in the Third Claim for Relief in the United States' Revised Amended Complaint, the treated effluent discharged from the Waterway Estates Wastewater Treatment Plant contained "pollutants" within the meaning of section 502(6) of the Clean Water Act, 33 U.S.C. § 1362(6).

7. (a) At all times alleged in the First Claim for Relief in the United States' Revised Amended Complaint, Florida Cities Water Company, Inc. caused the "discharge of pollutants" within the meaning of section 502(12) of the Clean Water Act, 33 U.S.C. § 1362(12), from the Barefoot Bay Wastewater Treatment Plant through a "point source" within the meaning of section 502(14) of the Clean Water Act, 33 U.S.C. § 1362(12), into a "navigable water" within the meaning of section 502(7) of the Clean Water Act, 33 U.S.C. § 1362(7).

(b) At all times alleged in the Second Claim for Relief in the United States' Revised Amended Complaint, Florida Cities Water Company, Inc. caused the "discharge of pollutants" within the meaning of section 502(12) of the Clean Water Act, 33 U.S.C. § 1362(12), from the Carrollwood Wastewater Treatment Plant through a "point source" within the meaning of section 502(14) of the Clean Water Act, 33 U.S.C. § 1362(12), into a

"navigable water" within the meaning of section 502(7) of the Clean Water Act, 33 U.S.C. § 1362(7).

(c) At all times alleged in the Third Claim for Relief in the United States' Revised Amended Complaint, Florida Cities Water Company, Inc. caused the "discharge of pollutants" within the meaning of section 502(12) of the Clean Water Act, 33 U.S.C. § 1362(12), from the Waterway Estates Wastewater Treatment Plant through a "point source" within the meaning of section 502(14) of the Clean Water Act, 33 U.S.C. § 1362(12), into a "navigable water" within the meaning of section 502(7) of the Clean Water Act, 33 U.S.C. § 1362(7).

8. Under the Clean Water Act, the violation of a weekly average limitation in an NPDES permit subjects the violator to a maximum penalty for that violation equivalent to seven (7) days of violation.

9. Under the Clean Water Act, the violation of a monthly average limitation in an NPDES permit subjects the violator to a maximum penalty for that violation equivalent to the penalty for a violation on every day in that month.

10. At no time prior to November 1, 1991, did Florida Cities Water Company, Inc. have an NPDES permit to discharge effluent from the Barefoot Bay Wastewater Treatment Plant into the Sebastian River.

11. For approximately a decade prior to October 31, 1991, Florida Cities Water Company, Inc. discharged pollutants from the

Barefoot Bay Wastewater Treatment Plant into the Sebastian River (via a drainage canal) on a daily basis without an NPDES permit.

12. On September 26, 1990, EPA issued Administrative Order No. 90-106 to Florida Cities Water Company, Inc. finding it in violation of the Clean Water Act for discharging pollutants from its Barefoot Bay Wastewater Treatment Plant into waters of the United States, a drainage canal leading to the Sebastian Creek, without a valid NPDES permit, and prescribing interim effluent limitations and monitoring requirements.

13. On the number of separate occasions indicated in parentheses in each subparagraph below, Florida Cities Water Company, Inc. discharged effluent from the Barefoot Bay Wastewater Treatment Plant which exceeded a limitation (or failed to meet a requirement) contained in EPA Administrative Order No. 90-106, as specified below:

(a) Total Suspended Solids daily maximum limitation (22);

(b) Fecal Coliform daily maximum limitation (3);

(c) Dissolved Oxygen (DO) daily minimum requirement (1);

(d) Biological Oxygen Demand (BOD) daily maximum limitation (1);

(e) Biological Oxygen Demand (BOD) monthly average maximum limitation (1);

(f) pH daily maximum limitation (1).

14. On and after November 1, 1991, NPDES Permit No. FL0042293 was the applicable NPDES permit relating to the Barefoot Bay Wastewater Treatment Plant.

15. In at least seven (7) months (in or about September 1992, October 1992, November 1992, December 1992, January 1993, February 1993, and March 1993) Florida Cities Water Company, Inc. discharged pollutants from the Barefoot Bay Wastewater Treatment Plant in excess of the Total Residual Chlorine daily maximum limitation in NPDES Permit No. FL0042293.

16. On three (3) occasions (during the periods in or about September-October 1992, May 1993, and February 1994), the effluent from the Barefoot Bay Wastewater Treatment Plant failed the test for chronic whole effluent toxicity in NPDES Permit No. FL0042293.

17. On a weekly basis during the period on or about November 1991 and continuing through June 1993, and on two occasions in November 1993, Florida Cities Water Company, Inc. failed to monitor biological oxygen demand (BOD) at the Barefoot Bay Wastewater Treatment Plant as required by NPDES Permit No. FL0042293.

18. On a daily basis during the period on or about November 1, 1991 and continuing through at least June 28, 1993 (i.e., on at least 514 days), Florida Cities Water Company, Inc. failed to test for total residual chlorine (TRC) at the Barefoot Bay Wastewater Treatment Plant using the method specified by Part I, Section A-2 of NPDES Permit No. FL0042293.

19. There are the equivalent of 1,416 days of violations at the Barefoot Bay Wastewater Treatment Plant.

20. On September 21, 1979, Florida Cities Water Company was notified by the Florida Department of Environmental Regulation that it had determined that the Carrollwood plant should no longer be allowed to discharge into Sweetwater Creek because of a "zero wasteload allocation" for the creek.

21. On October 1, 1984, Florida Cities Water Company, Inc. received notification from EPA of the denial of the NPDES permit renewal application for the Carrollwood Wastewater Treatment Plant.

22. Florida Cities Water Company, Inc. did not challenge the denial of the NPDES permit renewal application for the Carrollwood Wastewater Treatment Plant by submitting a timely request for hearing to the Regional Administrator pursuant to either 40 C.F.R. § 124.74 or 40 C.F.R. § 124.114.

23. During the period November 1, 1984 to June 30, 1991, Florida Cities Water Company, Inc. did not have an NPDES permit to discharge from the Carrollwood Wastewater Treatment Plant into the Sweetwater Creek.

24. During the period November 1, 1984 to June 30, 1991, Florida Cities Water Company, Inc. discharged pollutants from the Carrollwood Wastewater Treatment Plant into the Sweetwater Creek on a daily basis without an NPDES permit.

25. From July 1, 1991 until deactivated, NPDES Permit No. FL0029319 was the applicable NPDES permit relating to the Carrollwood Wastewater Treatment Plant.

26. On the number of separate occasions indicated in parentheses in each subparagraph below, Florida Cities Water Company, Inc. discharged effluent from the Carrollwood Wastewater Treatment Plant which exceeded a limitation (or failed to meet a requirement) contained in NPDES Permit No. FL0029319, as specified below:

(a) Total Suspended Solids monthly average limitation (3);

(b) Total Suspended Solids daily maximum limitation (3);

(c) Total Phosphorus monthly average limitation (5);

(d) Total Phosphorus daily maximum limitation (5);

(e) Fecal Coliform daily maximum limitation (5);

(f) Total Nitrogen monthly average limitation (5);

(g) Total Nitrogen daily maximum limitation (6);

(h) Carbonaceous Biochemical Oxygen Demand monthly average limitation (1);

(i) Carbonaceous Biochemical Oxygen Demand daily maximum limitation (3); and

(j) Total Residual Chlorine daily maximum limitation (184).

27. There are the equivalent of 1,044 days of violation at Carrollwood Wastewater Treatment Plant.

28. On December 10, 1986, Florida Cities Water Company, Inc. received notification from EPA of the denial of the NPDES permit renewal application for the Waterway Estates Wastewater Treatment Plant.

29. Florida Cities Water Company, Inc. did not challenge the denial of the NPDES permit renewal application for the Waterway Estates Wastewater Treatment Plant by submitting a timely request for hearing to the Regional Administrator pursuant to either 40 C.F.R. § 124.74 or 40 C.F.R. § 124.114.

30. During the period January 9, 1987 to October 31, 1989, Florida Cities Water Company, Inc. did not have an NPDES permit to discharge from the Waterway Estates Wastewater Treatment Plant into the Caloosahatchee River.

31. From January 9, 1987 to October 31, 1989, Florida Cities Water Company, Inc. discharged pollutants from the Waterway Estates plant (via a tributary canal) into the Caloosahatchee River without an NPDES Permit.

32. On and after November 1, 1989, NPDES Permit No. FL0030325 was the applicable NPDES permit relating to the Waterway Estates plant.

33. Beginning on November 1, 1989, NPDES Permit No. FL0030325 authorized the discharge of pollutants from the Waterway Estates plant through "outfall 001" which refers to a point at the six (6) foot contour line in the Caloosahatchee River.

34. On each day during the period on or about November 1, 1989 to July 14, 1991, Defendants discharged pollutants from the Waterway Estates Treatment Plant indirectly into the Caloosahatchee River via a tributary canal which was not a permitted discharge location during the referenced period.

35. In at least nine months (each month during the period in or about July 1991 to March 1992), Defendants discharged pollutants from the Waterway Estates Treatment Plant in excess of the Total Nitrogen concentration limitation in Permit Number FL0030325.

36. In at least nine months (each month during the period in or about July 1991 to March 1992), Defendants discharged pollutants from the Waterway Estates Treatment Plant in excess of the Total Nitrogen loading limitation in Permit Number FL0030325.

37. On at least three occasions (in or about February 1992, April 1992, and June 1992), the effluent from the Waterway Estates Treatment Plant failed the test for chronic whole effluent toxicity in Permit Number FL0030325.

38. There are the equivalent of 1,713 days of violation at the Waterway Estates Wastewater Treatment Plant.

39. The Summary of NPDES Permit and Administrative Order Effluent Violations, Barefoot Bay, attached hereto as Government Exhibit A, accurately summarizes, inter alia, NPDES permit and Administrative Order exceedances at the Barefoot Bay Wastewater Treatment Plant, and accurately reflects information in Discharge Monitoring Reports submitted by Florida Cities Water Company, Inc. to EPA.

40. The Summary of NPDES Permit and Administrative Order Effluent Violations, Carrollwood, attached hereto as Government Exhibit B, accurately summarizes, inter alia, NPDES permit exceedances at the Carrollwood Wastewater Treatment Plant, and accurately reflects information in Discharge Monitoring Reports submitted by Florida Cities Water Company, Inc. to EPA.

41. The Summary of NPDES Permit and Administrative Order Effluent Violations, Waterway Estates, attached hereto as Government Exhibit C, accurately summarizes, inter alia, NPDES permit exceedances at the Waterway Estates Wastewater Treatment Plant, and accurately reflects information in Discharge Monitoring Reports submitted by Florida Cities Water Company, Inc. to EPA.

DATED: May 10, 1995

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

By: _____
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FLORIDA CITIES WATER COMPANY
SUMMARY OF NPDES PERMIT AND ADMINISTRATIVE ORDER EFFLUENT VIOLATIONS

BAREFOOT BAY

DATE	PARAMETER	MONTHLY AVERAGE	DAILY MAXIMUM	Did Not Report	Reported Exceed	Actual Exceed	"Penalty Days"	Agent
Feb-94	CERIODAPHNIA	1			1	1	28	JO
		0						
May-93	CERIODAPHNIA	<100			1	1	1	JO
		100 MIN						
Mar-93	Chlorine, Total Residual		.05		2	2	2	JO
			.01					
Feb-93	Chlorine, Total Residual		.08		27	27	27	JO
			.01					
Jan-93	Chlorine, Total Residual		.06		31	31	31	JO
			.01					
Dec-92	Chlorine, Total Residual		.08		31	31	31	JO
			.01					
Nov-92	Chlorine, Total Residual		.10		30	30	30	JO
			.01					
Oct-92	Chlorine, Total Residual		.10		31	31	31	JO
			.01					

GOVERNMENT

FLORIDA CITIES WATER COMPANY
SUMMARY OF NPDES PERMIT EFFLUENT VIOLATIONS

BAREFOOT BAY (continued)

DATE	PARAMETER	MONTHLY AVERAGE	DAILY MAXIMUM	Did Not Report	Reported Exceed	Actual Exceed	"Penalty Days"	Agent
Sep-92	Chlorine, Total Residual		.10		30	30	30	JO
			.01					
Sep-Oct-92	CERIODAPHNIA (1/60)	<100			1	1	61	JO
		100 MIN						
Oct-91	Fecal Coliform Effluent		550	X	NONE	1	1	PB
			400					
Jun-91	Total Suspended Solids (TSS) Effluent		40.7		4	4	4	PB
			30.0					
May-91	Total Suspended Solids (TSS) Effluent		49.3		5	5	5	PB
			30.0					
May-91	Dissolved Oxygen (DO) Effluent	3.8			1	1	1	PB
		5.0 MIN						

FLORIDA CITIES WATER COMPANY
SUMMARY OF NPDES PERMIT EFFLUENT VIOLATIONS

BAREFOOT BAY (continued)

DATE	PARAMETER	MONTHLY AVERAGE	DAILY MAXIMUM	Did Not Report	Reported Exceed	Actual Exceed	"Penalty Days"	Agent
Apr-91	Total Suspended Solids (TSS) Effluent		53		3	3	3	PB
			30.0					
Mar-91	Total Suspended Solids (TSS) Effluent		40.7		6	6	6	PB
			30.0					
Feb-91	Total Suspended Solids (TSS) Effluent		38.3		2	2	2	AR
			30.0					
Jan-91	Total Suspended Solids (TSS) Effluent		34.7	X	NONE	1	1	AR
			30.0					
Nov-90	pH Effluent		8.8	X	NONE	1	1	AR
			8.0					
Nov-90	Fecal Coliform Effluent		1048	X	NONE	1	1	AR
			400					

FLORIDA CITIES WATER COMPANY
SUMMARY OF NPDES PERMIT EFFLUENT VIOLATIONS

BAREFOOT BAY (continued)

DATE	PARAMETER	MONTHLY AVERAGE	DAILY MAXIMUM	Did Not Report	Reported Exceed	Actual Exceed	"Penalty Days"	Agent
Nov-90	Total Suspended Solids (TSS) Effluent		32	X	NONE	1	1	AR
			30.0					
Oct-90	Biochemical Oxygen Demand (BOD) Effluent	31.5		X	NONE	1	31	AR
		20.0						
Oct-90	Biochemical Oxygen Demand (BOD) Effluent		153	X	NONE	1	1	AR
			30.0					
Oct-90	Fecal Coliform		1100	X	NONE	1	1	AR
			400					

FLORIDA CITIES WATER COMPANY
SUMMARY OF NPDES PERMIT EFFLUENT VIOLATIONS

CARROLLWOOD

DATE	PARAMETER	MONTHLY AVERAGE	DAILY MAXIMUM	Did Not Report	Reported Exceed	Actual Exceed	"Penalty Days"	Agent
Dec-91	Total Suspended Solids	9.0			0	1	31	PB
		6.25						
Dec-91	Total Suspended Solids		24.0		1	1	1	PB
			10.0					
Dec-91	Total Residual Chlorine		2.5		31	31	31	PB
			.01					
Dec-91	Total Organic Nitrogen	1.5			0	1	31	PB
		1.25						
Nov-91	Total Suspended Solids	7.3			0	1	30	PB
		6.25						
Nov-91	Total Suspended Solids		18.0		1	1	1	PB
			10.0					
Nov-91	Total Residual Chlorine		.18		30	30	30	PB
			.01					
Nov-91	Total Phosphorus	5.1			0	1	30	PB
		1.25						

GOVERNMENT

FLORIDA CITIES WATER COMPANY
SUMMARY OF NPDES PERMIT EFFLUENT VIOLATIONS

CARROLLWOOD (continued)

DATE	PARAMETER	MONTHLY AVERAGE	DAILY MAXIMUM	Did Not Report	Reported Exceed	Actual Exceed	"Penalty Days"	Agent
Nov-91	Total Phosphorus		7.5		3	3	3	PB
		[illegible]	2.0					
Nov-91	Total Nitrogen	5.8			0	1	30	PB
		3.75						
Nov-91	Total Nitrogen		8.1		3	3	3	PB
		[illegible]	6.0					
Oct-91	Total Suspended Solids		16.0		1	1	1	PB
		[illegible]	10.0					
Oct-91	Total Suspended Solids	8.0			0	1	31	PB
		6.25						
Oct-91	BOD, Carbonaceous		6.0		2	2	2	PB
		[illegible]	4.8					
Oct-91	BOD, Carbonaceous	4.0			0	1	31	PB
		3.0						
Oct-91	Total Phosphorus	3.92			0	1	31	PB
		1.25						

FLORIDA CITIES WATER COMPANY
SUMMARY OF NPDES PERMIT EFFLUENT VIOLATIONS

CARROLLWOOD (continued)

DATE	PARAMETER	MONTHLY AVERAGE	DAILY MAXIMUM	Did Not Report	Reported Exceed	Actual Exceed	"Penalty Days"	Agent
Oct-91	Total Phosphorous		4.2		4	4	4	PB
		1	2.0					
Oct-91	Fecal Coliform, General		50		1	1	1	PB
			25					
Oct-91	Total Residual Chlorine		2.0		31	31	31	PB
			.01					
Oct-91	Total Nitrogen	4.12			0	1	31	PB
		3.75						
Sep-91	Total Phosphorus	2.81			0	1	30	PB
		1.25						
Sep-91	Total Phosphorus		4.7		4	4	4	PB
			2.0					
Sep-91	Total Nitrogen	4.82			0	1	30	PB
		3.75						
Sep-91	Total Nitrogen		7.1		1	1	1	PB
			6.0					

FLORIDA CITIES WATER COMPANY
SUMMARY OF NPDES PERMIT EFFLUENT VIOLATIONS

CARROLLWOOD (continued)

DATE	PARAMETER	MONTHLY AVERAGE	DAILY MAXIMUM	Did Not Report	Reported Exceed	Actual Exceed	"Penalty Days"	Agent
Sep-91	Total Residual Chlorine		2.0		30	30	30	PB
		[illegible]	.01					
Aug-91	Total Phosphorus	3.6			0	1	31	PB
		1.25	[illegible]					
Aug-91	Total Phosphorus		4.2		5	5	5	PB
		[illegible]	2.0					
Aug-91	Fecal Coliform, General		76		1	1	1	PB
		[illegible]	25					
Aug-91	Total Residual Chlorine		1.6		31	31	31	PB
		[illegible]	.01					
Jul-91	BOD, Carbonaceous		5.0		1	1	1	PB
		[illegible]	4.8					
Jul-91	Total Phosphorus	4.2			0	1	31	PB
		1.25	[illegible]					
Jul-91	Total Phosphorus		4.6		4	4	4	PB
		[illegible]	2.0					

FLORIDA CITIES WATER COMPANY
SUMMARY OF NPDES PERMIT EFFLUENT VIOLATIONS

CARROLLWOOD (continued)

DATE	PARAMETER	MONTHLY AVERAGE	DAILY MAXIMUM	Did Not Report	Reported Exceed	Actual Exceed	"Penalty Days"	Agent
Jul-91	Total Nitrogen	5.9			0	1	31	PB
		3.58						
Jul-91	Total Nitrogen		10.0		2	2	2	PB
			6.0					
Jul-91	Fecal Coliform		86		3	3	3	PB
			25					
Jul-91	Total Residual Chlorine		1.8		31	31	31	PB
			0.01					

FLORIDA CITIES WATER COMPANY
SUMMARY OF NPDES PERMIT EFFLUENT VIOLATIONS
WATERWAY ESTATES

DATE	PARAMETER	MONTHLY AVERAGE	DAILY MAXIMUM	Did Not Report	Reported Exceed	Actual Exceed	"Penalty Days"	Agent
May-92 through Jun-92	MYSIDOPSIS BAHIA	<100			1	1	1	PB
Mar-92 through Apr-92	MYSIDOPSIS BAHIA	<100			1	1	1	PB
Mar-92	Total Nitrogen	9.8			1	1	31	PB
Feb-92	Total Nitrogen	8.0			1	1	29	PB
Jan-92	Total Nitrogen	14.7			1	1	31	PB
Jan-92 through Feb-92	MYSIDOPSIS BAHIA	<100				1	1	
Dec-91	Total Nitrogen	20.0			1	1	31	PB
Nov-91	Total Nitrogen	14.7			1	1	30	PB
Oct-91	Total Nitrogen	12.3			5	5	31	PB

FLORIDA CITIES WATER COMPANY
SUMMARY OF NPDES PERMIT EFFLUENT VIOLATIONS

WATERWAY ESTATES (continued)

DATE	PARAMETER	MONTHLY AVERAGE	DAILY MAXIMUM	Did Not Report	Reported Exceed	Actual Exceed	"Penalty Days"	Agent
Sep-91 through Oct-91	MYSIDOPSIS BAHIA	<100			1	1	1	PB
Sep-91	Total Nitrogen	12.3			0	1	30	PB
Aug-91	Total Nitrogen	11.4			0	1	31	PB
Jul-91	Total Nitrogen	11.7			0	1	31	PB

CERTIFICATE OF SERVICE

I certify that copies of the foregoing UNITED STATES' FIRST REQUEST FOR ADMISSIONS TO DEFENDANT FLORIDA CITIES WATER COMPANY, INC. were served by U.S. Mail (except as otherwise indicated) on the May 10, 1995 on the following attorneys of record:

Gary Baise (By FAX and US Mail)
Don G. Scroggin
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Fort Myers, FL 33902-0280

Darlene F. Lyons

Florida Cities Water Company
Docket No._____
Rate Application for Recovery
of Legal Expenses
Exhibits____(GHB-54 thru GHB-65)
Gary H. Baise
Volume 3 of 7

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663-WS EXHIBIT NO 6-Vol.3
COMPANY/ WITNESS: Baise
DATE 8-12-98

FLORIDA CITIES WATER COMPANY

RATE APPLICATION FOR RECOVERY OF LEGAL EXPENSES

EXHIBITS____(GHB-1 THRU GHB-110) OF

GARY H. BAISE

Exhibit List for Testimony of Gary H. Baise

Exhibit	Document
1	Player's List
2	TIME LINE, *U.S. v. Florida Cities Water Company*
3	Resume of Gary H. Baise
4	List of Gary H. Baise's reported cases
5	Court's Standard Interrogatories
6	United States' Answers to Court's Standard Interrogatories
7	Defendant Florida Cities Water Company's Answers to Court's Standard Interrogatories
8	Motion for Extension of Time in Which to File Motion to Strike Affirmative Defenses
9	United States' Motion to Strike Affirmative Defenses
10	Memorandum in Support of United States' Motion to Strike Affirmative Defenses
11	United States' First Request for Production of Documents
12	Deposition digest of Julie Karleskint Deposition
13	Defendant's Motion for a Protective Order
14	Order re: Florida Cities Water Company's Motion for Protective Order (dated April 18, 1994)
15	Letter to Mr. Jacobs from Mr. Scroggin (dated April 19, 1994)
16	Letter to Mr. Scroggin from Mr. Jacobs (dated April 20, 1994)
17	Memorandum in Support of United States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees
18	Memorandum in Opposition to Plaintiff's Motion for an Order Allowing

Ex Parte Contacts with Former Employees

19	Motion and Memorandum for Permission to File Reply Memorandum in Support of United States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees
20	Order re: Defendant's Emergency Motion for a Temporary Protective Order (dated Feb. 13, 1995)
21	Order re: Plaintiff's Motion for an order allowing ex parte contacts (dated March 16, 1995)
22	Deposition digest of John Marlar deposition
23	Deposition digest of Peter McGarry deposition
24	Defendant's Motion to Disqualify Counsel
25	Transcript of February 15, 1995 hearing before U.S. District Judge Swartz
26	Order re: Motion to Allow Ex-Parte Contacts and Motion to Disqualify Counsel
27	United States' Second Request for Production of Documents
28	Deposition digest of Connie Kagey deposition
29	Deposition digest of Bruce Barrett deposition
30	Defendant Florida Cities Water Company's Motion for Partial Summary Judgment and Request for Oral Argument
31	Deposition digest of Paul Bradtmiller deposition
32	Deposition digest of Johnnie Overton deposition
33	Deposition digest of Jack Tompkins deposition
34	Letter to Mr. Baise from Mr. Jacobs (dated Jan. 30, 1995)
35	United States' Reply to Defendant's Emergency Motion for a Temporary Protective Order and Defendant's Request for Oral Argument in Connection with Defendant's Motion to Disqualify Counsel

36	*United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994)
37	United States' First Set of Interrogatories to Defendant Florida Cities Water Company
38	Defendant's Second Request for Production of Documents to Plaintiff United States of America
39	Defendant's Offer of Judgment
40	Defendant's Notice of Intention to Oppose Constructive Motion by United States for Leave to File Amended Complaint
41	Defendant's Memorandum in Partial Opposition to Plaintiff's Motion for Leave to Amend Complaint
42	Order re: United States' Revised Amended Complaint (dated April 26, 1995)
43	Revised Amended Complaint
44	Defendant Florida Cities Water Company's Motion to Strike
45	United States' Motion for Reconsideration of Court's Order on Amendment of Complaint
46	Defendant Florida Cities Water Company's Answer to Revised Amended Complaint
47	United States' Opposition to Defendant Florida Cities Water Company's Motion to Strike
48	United States' Third Request for Production of Documents
49	Defendant's Motion for Partial Summary Judgment
50	United States' Opposition to Defendant Florida Cities Water Company's Motion for Partial Summary Judgment
51	Order Denying FCWC's Motion for Partial Summary Judgment
52	United States' Motion for Partial Summary Judgment (exhibits omitted)
53	United States' Second Set of Interrogatories and First Request for Admissions

54	Research Memos
55	FCWC Motion for Partial Summary Judgment and Request for Oral Argument
56	Deposition Summaries
57	Deposition Summaries
58	FCWC's Fourth Request for Production of Documents and Third Request for Interrogatories
59	United States' Fifth Request for Production of Documents
60	FCWC's Notice of Dispositive Authority
61	Order re: Summary Judgment Motions
62	FCWC Exhibit List and Stipulations
63	DOJ Exhibits
64	Joint Pretrial Statements
65	United States' Motion for an Order Permitting Discovery of Defendant's Late-Named Witnesses
66	FCWC Memorandum in Opposition to Plaintiff's Motion for an Order Admitting Discovery of Defendant's Late-Named Witnesses and for Expedited Consideration
67	Order re: Discovery of Late-Named Witnesses
68	United States' Motion for Expedited Reconsideration of the Court's Ruling on Res Judicata and in Reply to Avatar Holdings' Motion for Clarification of the Court's Order
69	Order re: Motion for Reconsideration on Res Judicata and Motion for Clarification
70	FCWC Proposed Findings of Fact and Conclusions of Law
71	FCWC's Pretrial Brief

72	Defendant's Joint Motion in Limine to Exclude the Testimony and Report of Mark J. Klingenstein.
73	United States' Motion in Limine
74	Defendant's Joint Motion in Limine to Exclude the Testimony and Report of Eileen Zimmer
75	Berz Settlement Proposal
76	Trial Transcript
77	United States' Offer of Proof in Lieu of the Testimony of Witnesses who Plead the Fifth Amendment
78	Defendants' Joint Memorandum of Law Addressing the Invocation of the Fifth Amendment
79	FCWC's Witness List
80	Plant Effluent Quality Report (Black & Veatch)
81	FCWC Motion to Strike the Deposition Testimony of Jack Williams Tompkins
82	Parties' Proposals for Post-Trial Submissions
83	Order Regarding Fifth Amendment and Request Court Draw Inferences from Refusal to Testify
84	United States' Post-Trial Memorandum
85	United States' Post-Trial Proposed Findings of Fact and Conclusions of Law
86	FCWC Post-Trial Brief
87	FCWC Proposed Findings of Fact and Conclusions of Law
88	United States' Motion for Reconsideration on Adverse Inferences and Extension of Page Limits
89	FCWC Memorandum in Opposition to Motion for Reconsideration
90	Order Granting in Part and Denying in Part Motion for Reconsideration

91	United States' Citation of Additional Authority
92	Defendants' Joint Response to Plaintiff's Citation of Additional Authority
93	Order Directing Parties to File Memorandums on Borough of Ridgeway
94	United States' Reply Memorandum in Support of Reinstatement of Res Judicata
95	Defendants' Joint Response to Memorandum Seeking Reinstatement of Res Judicata
96	Order Reaffirming Res Judicata Effects
97	Opinion
98	FCWC Verified Motion for Attorney Fees
99	FCWC Motion for Bill of Costs
100	United States' Memorandum in Opposition to Attorney Fees
101	Order Denying Attorney Fees
102	United States' Notice of Appeal
103	FCWC Notice of Cross Appeal
104	Order Granting Motion to Dismiss with Prejudice
105	Pleadings Table
106	Depositions Table
107	Correspondence re: Fees
108	Billing Chart
109	Cover Letter to Bills
110	Letter to Avatar on Fees

Exhibit_____(GHB-54)

MEMORANDUM

TO: Gary Baise and Don Scroggin

FROM: Liz Poliner

DATE: May 10, 1995

RE: Florida Cities: Invoking the 5th Amendment in a Civil Suit

Because of the possibility that under Weitzenhoff Florida Cities' employees could become subject to criminal liability, you have asked me to research the standard for establishing the Fifth Amendment privilege against self-incrimination in Florida Cities' current civil law suit. You would also like to know how to properly establish the privilege and what inferences can be drawn from invoking it. Finally, you would like to know if invocation of the privilege is any different for current employees than for former employees.

In addition to this memorandum, which provides the most recent case law on this subject and is tailored to Eleventh Circuit decisions as much as possible, I am attaching two law review articles that offer good practical advice regarding invocation of the self-incrimination privilege in civil suits.

Standard for Establishing the Privilege Against Self-Incrimination

The Fifth Amendment privilege against self-incrimination can be asserted "in any proceeding, civil or criminal, administrative

or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." Kastigar v. U.S., 406 U.S. 441, 444 (1972). See also U.S. v. Argomaniz, 925 F.2d 1349, 1353 (11th Cir. 1991) (citing Kastigar).

As this rule implies, the appropriateness of raising the privilege in the civil context hinges on the nexus between the information to be disclosed and the possibility of its use in a criminal prosecution against the person being asked to disclose it. In fleshing out this nexus, the Eleventh Circuit has stated that "the central standard [for invoking the self-incrimination privilege] . . . [is] whether the claimant is confronted by substantial and 'real', and not merely trifling or imaginary, hazards of incrimination." U.S. v. Argomaniz, 925 F.2d at 1353 (quoting Marchetti v. U.S., 390 U.S. 39, 53 (1968)). The court has further stated that "the privilege applies in 'instances where the witness has reasonable cause to apprehend danger' of criminal liability." Argomaniz, 925 F.2d at 1353 (quoting Hoffman v. U.S., 341 U.S. 479, 486 (1951)).

In Argomaniz, the court held that a taxpayer could have a legitimate fear of possible tax-related prosecution, and therefore could invoke the privilege, even though the invocation occurred during the IRS's investigation in a civil proceeding. Id. at 1354 ("production of [the requested tax returns] would establish two of the essential elements of the crime [of failing

to file returns] . . . Under these circumstances, this civil tax investigation has become an inquiry with dominant criminal overtones . . . [such that Argomaniz was] entitled to raise his fifth amendment objections"). Applying the standard articulated in Argomaniz to the present situation, it would appear likely, given Weitzenhoff, that the Florida court would find the appropriate nexus between disclosure and potential criminal liability.

The standard for invoking the self-incrimination privilege--establishing a nexus between disclosure and potential criminal implication--would not vary for a current employee or a past employee except to the degree that the work status affects the individual's exposure to criminal liability. That is to say, the privilege is personal, rather than corporate. See e.g., U.S. v. Dean, 989 F.2d 1205, 1207 (D.C. Cir. 1993) ("the fifth amendment privilege is a purely personal one that protects only the natural individual from compulsory incrimination").

With regard to Florida Cities, for example, if a past employee could no longer be exposed to criminal liability under the Clean Water Act, that person would be unlikely to meet the standard for invoking the privilege. However, that does not appear to be the case. Neither the Clean Water Act Section 1362(5), defining "person," nor Section 1319(C)(2)(a), defining a "knowing violation," distinguishes between past and current employees. Under Weitzenhoff, therefore, it appears that any employee could be subject to criminal liability for a knowing

violation in the event that the person knowingly engaged in action that led to a permit violation.

Properly Establishing the Privilege

As Kastigar implies, the privilege against self-incrimination is available during all phases of pretrial discovery. 406 U.S. 441 at 444. See also North River Insurance Company, Inc. v. Stefanou, 831 F.2d 484, 486 (4th Cir. 1987), cert. denied, 486 U.S. 1007 (1988) ("The [fifth amendment] privilege applies not only at trial but also at the pleading stage").

The privilege must be affirmatively invoked. See U.S. v. White, 846 F.2d 678, 690 (11th Cir.), cert. denied, 488 U.S. 984 (1988) ("the settled principle . . . requires a witness to assert his Fifth Amendment rights"). See also Davis v. Fendler, 650 F.2d 1154, 1160 (9th Cir. 1981) ("Clearly, the Fifth Amendment is not a self-executing mechanism. It can be affirmatively waived or lost by not asserting it in a timely fashion" (citing Maness v. Meyers, 419 U.S. 449, 466 (1975)).

No special combination of words are required to invoke the privilege. Quinn v. U.S., 349 U.S. 155, 162 (1955). Still, it is necessary to communicate with clarity that the privilege is indeed being invoked. See Davis, 650 F.2d at 1160 ("[an invocation of the privilege] should be plain enough and specific enough so that the court can understand in what way the [questions] are alleged to be objectionable").

Generally, a witness must personally invoke the privilege, i.e., he cannot rely on his counsel to invoke it for him, but exceptions have been made where good reason exists as to why a privilege was not personally invoked. See e.g., Bigby v. U.S. I.N.S., 21 F.3rd 1059, 1061 (11th Cir. 1994) (holding that a non-English speaking alien could rely on counsel to invoke the Fifth Amendment privilege in a deportation action), and Florida v. Southland Corporation, 684 F. Supp. 292, 294 (S.D. Fla. 1988) (holding that absent compelling circumstances, a witness must personally invoke the privilege against self-incrimination).

Courts generally agree that a blanket refusal to answer questions does not effectively raise the privilege; rather, it must be raised with reference to particular questions and requests for information. Argomaniz, 925 F.2d at 1355; U.S. v. Stoecklin, 848 F. Supp. 1521, 1527 (M.D. Fla. 1994) ("respondent must . . . assert the Fifth Amendment to each question and document to which he believes it applies; he may not assert a blanket privilege"). The rationale for this rule lies in the fact that if the invocation is challenged, a court would be required to decide on its propriety, and a blanket refusal forces a court to speculate as to which questions would tend to incriminate. Anglada v. Sraque, 822 F.2d 1035, 1037 (11th Cir. 1987).

In Argomaniz, the Eleventh Circuit ruled that the following set of circumstances did not constitute a blanket refusal to answer questions. At a civil investigatory hearing, a tax-payer

answered non-incriminating questions and refused to answer questions that would incriminate by citing his privilege against self-incrimination. When the IRS officer realized that the tax-payer would raise the privilege in response to each of her document requests and to each of her questions concerning the tax-payer's tax liability for the years in question, the IRS officer terminated the interview. The court held that this behavior did not constitute a blanket invocation of the privilege, but, rather, that it was proper use of the privilege. The court found that the tax-payer responded to each question raised, and, following the IRS officer's termination of the interview, "could not respond to questions he was not asked." Argomaniz, 925 F.2d at 1356.

With regard to the present situation, a review of several recent depositions (James Elder and Gerald Allen) reveal that when the privilege has been invoked it has been in response to individual questions rather than in a blanket manner. Like Argomaniz, Florida Cities' depositions have been cut short by the government's attorney upon his realizing the privilege will be invoked routinely. This should not pose a problem for Florida Cities. Its main concern is to ensure that deponents discriminate carefully between incriminating and non-incriminating questions, answers those questions that can be answered, and raise the Fifth each time an incriminating question is asked.

Possible Adverse Inferences

It is permissible, though not required, that in a civil suit an adverse inference be drawn against those who invoke the self-incrimination privilege. As the Supreme Court has ruled: "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment does not preclude the inference where the privilege is claimed by a party to a civil cause." Baxter v. Palmigiano, 425 U.S. 308, 318 (1976). See also Daniels v. Pipefitters' Assoc. Local Union No. 597, 983 F.2d 800, 802 (7th Cir. 1993) (citing Baxter for the proposition that adverse inferences against a witness invoking the Fifth Amendment are permissive but not required).

As to how to consider an adverse inference, Baxter has made clear that the invocation of the privilege be given "no more evidentiary value than [is] warranted by the surrounding facts of [a] case." Baxter, 425 U.S. at 318. In other words, a given silence becomes a fact to be considered, along with other facts of a case. The silence cannot become a sole basis for a judgment against the invoker.

Courts have followed Baxter closely. See e.g., Koester v. American Republic Investments, 11 F.3d 818, 824 (8th Cir. 1993) ("Although an adverse inference may be drawn against a party who invokes the Fifth Amendment privilege and refuses to testify in a civil proceeding, that silence alone is insufficient to support an adverse decision . . . The government may not punish assertion

of the constitutional privilege against self-incrimination"); U.S. v. One Parcel of Property, 897 F.2d 97, 103 (2nd Cir. 1990) ("an adverse inference is permitted against the invoker of the privilege where his silence 'was only one of a number of factors to be considered by the finder of fact'"); First Interregional Equity Corp. v. Haughton, 1993 U.S. Dist. LEXIS 12813 at *7 (S.D.N.Y. Sept. 14, 1993) ("There is no doubt that the privilege against compelled self-incrimination may be invoked in a pretrial proceeding such as a deposition . . . It is equally clear, however, that a refusal to answer questions upon assertion of the privilege is relevant evidence from which the trier of fact in a civil action may draw whatever inference is reasonable in the circumstances . . . Permitting an adverse inference to be drawn against a party who invokes the Fifth Amendment privilege during discovery prevents use of the privilege as a weapon in civil litigation").

With regard to the present case, current and former employees who invoke the Fifth Amendment during depositions and other stages of the trial can reasonably expect that the invocation becomes a fact, along with others, that the court considers when determining Florida Cities' civil liability. A question to consider, therefore, is whether the silence can prove or help prove any adverse facts in the civil case.

Generally, "a party's failure to produce evidence which, if favorable, would naturally have been produced, is open to the inference that the facts were unfavorable to his cause." 8

Wigmore on Evidence, Section 2273 (1961). Most obviously, silence raises the adverse inference that a party believed that his response to a particular question might incriminate him. See Robert Heidt, The Conjurer's Circle--The Fifth Amendment Privilege in Civil Cases, 91 Yale L. J. 1062, 1117 (attached). That fact, in turn, might create an inference about the subject matter of the question and in this way help prove an adverse fact. However, in the present case, the court would have to bear in mind that the privilege has been invoked specifically in reference to the extraordinarily broad extension of potential criminal liability implied by Weitzenhoff. That fact could very well mitigate the seriousness of any adverse inference in our case.

Though determining exactly how the government might use silence as adverse evidence involves speculation, it is necessary to consider the possibility that the invocation could be used as a party statement. (This possibility is fleshed out in the Heidt article at 1116-1122.) In this regard we should consider the degree to which a silence, adversely inferring potential incrimination or unfavorable facts, contradicts any prior statements, and how this could harm our case.

With regard to a corporate employee, Heidt recommends that plaintiffs' attorneys consider arguing that any adverse inference be a party statement of the corporate employer:

> An invoking by an employee during a deposition should be treated as a vicarious statement of the defendant corporate employer if the invoker was still working for the defendant corporation at the time of the invoking

> and if the question that triggered the invoking related to the employee's work.

Id. at 1119. With regard to former employees, Heidt's analysis changes slightly.

> That the invoker is no longer the defendant's employee at the time of his invoking need not necessarily bar admitting the invoking as a vicarious admission. The fact of present employment serves primarily to reduce the chance that the employee will falsely claim to have engaged in criminal conduct for which the defendant employer is liable. Any factors suggesting that a former employee retains some loyalty to his former employer--such as the fact that the employer is paying for his attorney--would serve the same purpose.

Id. at 1119-1120, n. 214.

Applying this analysis to the present case, it would appear possible that any negative implication of the invocation by both current and past employees be viewed as vicarious statements of Florida Cities proper. To the degree such statements contradict prior statements, or suggest proof of facts harmful to Florida Cities, the risk of invoking the privilege would have to be balanced against the risk of self-incrimination.

Summary of Facts to Consider

Michael E. Wolfson, in his article Civil Discovery and the Privilege Against Self-Incrimination, 15 Pacific L. J. 785, 796 (1984) (attached), has proposed the following outline of factors to consider regarding invocation of the self-incrimination privilege in civil discovery.

> a. Is the discovery that is being sought relevant to the subject matter of the action?

b. Assuming the allegations contained in the complaint and subsequent pleading are true, do they constitute in whole or in part the basis for a possible criminal prosecution? Has the statute of limitations run on the potential criminal charges?

c. What "juristic consequences" [adverse inferences] may be imposed by the court if the party asserts the privilege as to the discovery requested.

d. When must the party either answer or object to the requested discovery based upon the applicable procedural rule?

e. What information being sought by the opposing party clearly falls within the scope of the privilege?

f. What type of particularized showing can be made so that the validity of the privilege is clear to the court, yet the information sought to be protected remains undisclosed?

MEMORANDUM

TO: Florida Cities Legal Team

FROM: Liz Poliner

DATE: June 28, 1995

RE: Inferences from 5th Amendment Privilege--Follow-up

This memorandum is a follow-up to the May 10, 1995 memorandum, "Invoking the 5th Amendment in a Civil Suit." Specifically, it addresses the government's claim, on page 14 of its Motion for Partial Summary Judgment, that "the inference that may be drawn from these individuals' [i.e., Florida Cities' employees] assertions of the Fifth Amendment is that the violations were committed as alleged."

The cases that the government cites to support this claim state the general rule that in a civil proceeding an adverse inference may be made against a witness or party who invokes the 5th Amendment privilege against self-incrimination. See e.g., Baxter v. Palmigiano, 425 U.S. 308, 318 (1976). Though the adverse inference is permissible, Baxter makes clear that ~~its~~ the evidentiary value of the inference is limited to whatever "is warranted by the surrounding facts of a case." Id. The silence cannot be the sole basis for an adverse decision, but it can become a fact to be considered, along with other facts, when liability is being determined.

The government's claim that the proper inference to make is that "the violations occurred as alleged" appears to be directly

opposed to this rule. At best, a given silence is but one fact, albeit an adverse one, that can be used as evidence against Florida Cities. Moreover, a given silence speaks only to the particular question asked. See U.S. v. Argomaniz, 925 F.2d 1349, 1355 (11th Cir. 1991) (holding that the fifth amendment privilege can be invoked only in response to particular questions and requests for information). Unless the government asked each deponent "Did the violations occur as alleged?" the government cannot infer that a given silence ~~infers~~ this broad--this convenient--a ~~conclusion~~.

Most obviously, what the silence infers is that the questions could be incriminating, or could lead to incriminating evidence, under the broad sweep of Weitzenhoff. Under Weitzenhoff, a person who knowingly engages in conduct that results in a CWA permit violation, regardless of the person's knowledge of the violation or even of the permit, could lead to criminal liability. Perhaps this holding is the basis for the government's conclusion that the permissible inference in ~~the present~~ case is that the alleged violations ~~did~~ occur ~~is that a minimum condition under~~ Weitzenhoff is that there were ~~in fact violations~~. In other words, there would be nothing ~~to worry~~ about ~~under~~ Weitzenhoff without actual permit violations. [does this contradict what I've just said???]

MEMORANDUM

TO: Gary Baise and Don Scroggin

FROM: Liz Poliner

DATE: June 23, 1995

RE: FCWC: Comparability of Florida Enforcement Provisions

You have asked me to research whether Florida's environmental enforcement laws for water are comparable to the enforcement provisions of the federal Clean Water Act (CWA). Under CWA Section 309(g)(6)(A)(iii), EPA cannot pursue a civil penalty action in court when "the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable state law."

To the degree that Florida Cities can argue that Florida state law is comparable to the federal law, it can subsequently argue that under CWA Section 309(g)(6)(A)(iii) its July 15, 1988 Consent Order with the Florida Department of Environmental Protection (DEP)--which by its own terms waived further judicial and administrative review, and under which Florida Cities was assessed and paid[1] a $20,180.00 penalty for violations at the Waterways Estates site--precludes EPA from pursuing additional civil penalties for the same violations.

Florida's Enforcement Provisions

Under Florida law it is a violation to (among other things)

[1] To the best of my knowledge, Florida Cities paid this fine.

cause pollution, fail to obtain a permit, or violate a permit. Fla. Stat. Section 403.161(1). These violations, in turn, are subject to civil judicial penalties of up to $10,000 per offense and criminal penalties of up to $50,000 per offense. Fla. Stat. Sections 403.161(2) and (3); 403.141(1). Each day of an offense counts as a separate violation. Fla. Stat. 403.141(1). In assessing this penalty a court may receive evidence of mitigation. Id.

Florida's DEP can bring different kinds of enforcement actions against a person who violates Section 403.161(1). Under Fla. Stat. Section 403.121, which sets forth enforcement procedures, the DEP can seek civil judicial penalties of not more than $10,000 per day per offense. Fla. Stat. Section 403.121(1)(b). In the alternative, DEP can bring an administrative enforcement action. Fla. Stat. Section 403.121(2). DEP also has the authority to seek injunctive relief and cumulative remedies. Fla. Stat. Section 403.131.

In an administrative action DEP is authorized to order that a violator pay a "specified sum as damages to the state," although the provision does not state a specific amount to be assessed, nor does it refer to "administrative penalties" per se. Fla. Stat. Section 403.121(2)(a). Before any amount of damages is assessed, DEP must provide written notice to the alleged violator, who has twenty days to request a hearing. Fla. Stat. 403.121(2)(c).

In discussing DEP's enforcement procedures with Jerry

Phillips, DEP General Counsel, I was told that under the powers granted in this provision and others DEP often enters into consent decrees with parties. Typically DEP will begin an enforcement action by issuing a warning letter. If compliance is not achieved, it will then attempt to negotiate a consent decree whereby remedial action is specified and a penalty assessed. If compliance is still not achieved, or if a consent decree is violated, DEP then resorts to judicial enforcement.

In addition to judicial and administrative remedies, DEP can also assess a "noncompliance fee" against domestic wastewater treatment facilities for the failure to comply with a permit condition that requires the submittal of monthly operating reports or the reporting of characteristics of the waste stream. Fla. Stat. Section 403.121(3). In assessing this fee, which cannot exceed $250.00 per reported violation or a total of $1,000.00 for all reported violations in a given month, DEP must consider the following factors: the type of violation, the degree of noncompliance, the potential for harm, the good faith of the owner/operator, the efforts to comply, the lack of willfulness or negligence, the economic benefits associated with the failure to comply, the history of violations, and the ability to pay. Id. Noncompliance fees require written notice to the alleged violator and the right to request a hearing. Id.

A party adversely affected by a final agency action may seek judicial review of the action. Fla. Stat. Section 120.68. An administrative consent order is a final agency order. Fla.

Admin. Code Rule 62-103.110.

Florida's public participation provisions include a citizen suit provision, Fla. Stat. Section 120.69, and liberal intervention of citizens in environmental enforcement actions. Fla. Civ. Pro. Rule 1.230 (allowing intervention in any pending litigation by "anyone claiming an interest"), Fla. Stat. 403.412(5) (allowing a Florida citizen to have standing to intervene in environmental actions), and Fla. Stat 120.57 (setting forth procedures for administrative hearings).

Attachment A consists of these various Florida laws. Attachment B is a description of Florida's enforcement provisions regarding water actions. This description was part of Florida's "Program Submission for Authorization to Administer the NPDES Program." As this description indicates, these provisions meet the federal requirements for implementation of the NPDES program. The description further indicates that to get the authorization to administer the NPDES program, Florida did not change its already existing enforcement provisions. I have spoken to a number of officials at EPA Region 4 and the Florida DEP who have confirmed this. Specifically, Kevin Smith, OGC EPA Region 4, explained to me that even though the Florida regulations have not codified CWA Section 309's statutory penalty provisions for administrative penalties, this gap between state and federal law was not substantial enough to hold back the state delegation. However, as discussed below, the state delegation is not the same thing as saying that Florida's laws are "comparable" as that term

is used in CWA Section 309(g)(6).

Legal Standard for Determining Comparability

1. Looking to Scheme As a Whole

To determine whether state law is "comparable" within the meaning of CWA Section 309(g), courts compare CWA Section 309(g)'s administrative enforcement procedures with state water pollution enforcement provisions. See e.g., Orange Environment, Inc. v. County of Orange, 860 F. Supp. 1003, 1014 (S.D. N.Y. 1994)(comparing Section 309(g) with "New York's Water Pollution Control law, Article 17 of the E.C.L. and the penalty provision contained at Title 19 of Article 71").[2]

In general, the factors that courts look at when determining comparability include the state's enforcement goals, the state's ability to assess penalties, the opportunity for citizen participation in enforcement actions, and an alleged violator's right to a hearing and judicial review. See generally, Arkansas Wildlife Federation v. ICI Americas, Inc., 29 F.3d 376, 381 (8th Cir. 1994). On occasion a court can get more particular in its scrutiny such as in Citizens for a Better Environment-Ca. v. Union Oil Co., 861 F. Supp. 889, 908 (N.D. Cal. 1994), where, in addition to the above-mentioned factors, the court examined the state's penalty collection authority and collection procedures.

When determining whether state law is comparable to CWA

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[2] The word "comparable" appears in both CWA Sections 309(g)(6)(A)(ii) and (iii). Though many of the cases discussed below analyze the term as used in section (A)(ii), the same analysis applies to section (A)(iii). Natural Resources Defense Council v. Vygon, 803 F. Supp. 97, 102 (N.D. Oh. 1992).

Section 309(g), courts generally do not require a comparison between any one specific state enforcement provision and CWA Section 309(g). Instead, state enforcement schemes as a whole are compared. See, e.g., Arkansas Wildlife, 29 F.3d at 381; North & South Rivers Watershed Assoc. v. Town of Scituate, 949 F.2d 552, 556 (1st Cir. 1991). But see Citizens for a Better Environment-Ca. v. Union Oil Co., 861 F. Supp. at 889 (requiring comparison of CWA Section 309 with "the specific state enforcement provision actually used" in the enforcement proceeding at issue).

Within these statutory schemes, more often than not courts do not require that state provisions duplicate the federal law such that the two are identical. They need only be "sufficiently similar." See, e.g., Arkansas Wildlife, 29 F.3d at 381; Sierra Club v. Colorado Refining Co., 838 F. Supp. 1428, 1435 (D. Co. 1993). The case that established this principle, North and South Rivers Watershed Assoc., Inc. v. Town of Scituate, 949 F.2d at 556, held that even though Massachusetts law did not duplicate CWA Section 309(g), it is "enough that the Massachusetts statutory scheme, under which the State is diligently proceeding, contains penalty assessment provisions comparable to the Federal Act, that the state is authorized to assess those penalties, and that the overall scheme of the two acts is aimed at correcting the same violations, thereby achieving the same goals."

Not all courts follow Scituate's "sufficiently similar" test. Some have required a closer identity between state and

federal schemes. See Citizens for a Better Environment, 861 F. Supp. at 908 (requiring a state law provision that is virtually identical to CWA Section 309(g)).

Florida has not yet litigated the issue of comparability under CWA Section 309. However, applying this case law to the present situation, it would be at least possible, and perhaps more likely than not, that a Florida court would adopt the majority rule such that even though no one Florida provision mirrors CWA Section 309(g), the statutory scheme as a whole could be looked at to make the comparability determination, and the standard for review would be the "sufficiently similar" test.

The following sections will look at the two weak links in Florida Cities' comparability argument: public participation and administrative penalty assessments.

2. Public Participation

Comparability of state and federal public participation provisions is one of the elements of comparability that has been litigated more than others. This is because many states, like Florida, do not require that prior to the initiation of a penalty action the public receive notice and opportunity to comment as CWA Section 309(g)(4) mandates.[3]

Several jurisdictions have ruled that a state's failure to have the exact notice and comment provisions of CWA Section

[3] CWA Section 309(g)(4)(A) states: "Before issuing an order assessing a civil penalty under this subsection the Administrator or Secretary, as the case may be, shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order.

309(g)(4) does not defeat a finding of comparability, so long as the state grants citizens a meaningful opportunity to participate in the decision-making process of a penalty enforcement action.

For example, in Arkansas Wildlife, 29 F.3d at 381, the court ruled that comparability between state and federal enforcement provisions existed even though the state provisions at issue provided only an ex post facto citizen's right to intervene in an enforcement action, with no public notice or comment at any time. Similarly, in Saboe v. Oregon, 819 F. Supp. 914, 918 (D. Or. 1993), the court ruled that despite Oregon's lack of mandatory public notice and participation rights, Oregon's procedures adequately protect the substantive public interest of citizens in enforcement actions and are thus comparable to the CWA. See also, Scituate, 949 F.2d at 556, n.7, (holding that Massachusetts state law is comparable to CWA Section 309(g) despite its lack of mandatory public notice and comment where the state's administrative orders are public documents, where individuals have a right to intervene in enforcement actions, and where interested parties can request a public hearing); Sierra Club v. Colorado Refining Co., 838 F. Supp. at 1435 (holding that "although the Colorado regulatory scheme does not mandate prior public notice of enforcement proceedings, overall, the scheme adequately protects the public interest"); and Connecticut Coastal Fisherman's Assoc. v. Remington Arms Co. Inc., 777 F. Supp. 173, 182-83 (D. Conn. 1991) (holding that where Connecticut law did not require mandatory public notice and comment, an

element of Connecticut's comparability with CWA Section 309 involves its liberal intervention in enforcement proceedings).

Were the Florida court to follow this line of analysis, in all probability Florida's public participation requirements would not defeat a finding of comparability. That is to say, like the jurisdictions above, Florida law does not mandate public notice and comment prior to the initiation of an enforcement action. Yet it does provide for public intervention in such actions, a level of participation that other courts have found to be meaningful enough to meet the comparability standard.[4]

However, Florida Cities cannot be certain of winning this argument. The Florida court could follow a divergent line of cases whereby under a more strict interpretation of comparability Florida's failure to require public notice and comment could be fatal. See Public Interest Research Group of N.J., Inc. v. New Jersey Expressway Authority, 822 F. Supp. 174, 184 (D.N.J. 1992) (holding that state law enforcement procedures that did not require public notice and comment were not comparable to federal procedures); Natural Resources Defense Council, Inc. v. Vygen, 803 F. Supp. 97, 101 (N.D. Oh. 1992) (holding that because Ohio law failed to provide mandatory public notice and comment, administrative orders issued under state law were not issued under law comparable to CWA Section 309(g)): Atlantic States

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[4] The July 15, 1988 Consent Order includes the following public participation provision: "Persons not subject to this Consent Order have a right, pursuant to Section 120.57, F.S., to petition for an administrative determination (hearing) on it." (Paragraph 16).

Legal Foundation, Inc. v. Universal Tool & Stamping Co. Inc., 735 F. Supp. 1404, 1416 (N.D. Ind. 1990) (Indiana law held not comparable to CWA Section 309(g) in part because of a lack of mandatory public notice and comment period).

3. Administrative Penalty Assessments and Penalty Assessment Factors

In addition to Florida's lack of public notice and comment procedures, the other, more serious, weakness in its comparability argument lies in the fact that Florida law does not provide for the assessment of administrative penalties. Similarly, except with regard to waste water treatment "non compliance fees" Florida law does not provide for administrative penalty assessment factors such as those in CWA Section 309(g)(3).[5]

Under a strict interpretation of the term "comparable," a court could find that without the authority to assess administrative penalties in the amounts specified in CWA Section 309(g), and without the aid of the assessment factors specified in the federal statute, a state law is not comparable. For example, in Atlantic States Legal Foundation, 735 F. Supp. at 1416, the court found that Indiana law was not comparable to CWA Section 309(g) because, in addition to a lack of notice and

[5] CWA Section 309(g)(3) requires that "[i]n determining the amount of any penalty assessed under this subsection the Administrator . . . shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require."

comment, the state law did not contain a provision that specified penalty assessment factors. See also Citizens for a Better Environment, 861 F. Supp. at 908 (holding that where California law does not authorize the imposition of civil penalties it is not comparable to the CWA Section 309(g)).

Fortunately, not all courts have been this strict. For example, in Orange Environment, Inc. v. County of Orange, 860 F. Supp. 1003, 1015 (S.D.N.Y. 1994), the court rejected the argument that because New York's civil penalty provision did not provide for administrative penalties, but instead provided for civil judicial penalties, it was not comparable. The court stated that even though New York's civil penalties are technically recoverable in a judicial action, penalties could nevertheless be assessed in the first instance by the state environmental agency. Under this scheme, the state law was held to be "essentially similar" to the federal law such that the CWA 309(g)(6) bar was applicable. Id.

Applying this analysis, Florida Cities could argue that under Florida law civil judicial penalties are authorized in amounts comparable to the maximum amounts recoverable under CWA Section 309(g). Though technically the statute authorizes $10,000 maximum daily civil judicial penalties, the combination of this authority with DEP's authority to assess penalties in the context of consent decrees, renders the statute, for all practical purposes, "essentially similar" to the federal scheme. Moreover, Citizens for a Better Environment could be

distinguished on the ground that in that case the California court found no authorization for civil penalties at all, whereby in our case there is authority to assess penalties, though this authority differs technically from the federal scheme.

Florida Cities could bolster this argument by pointing out the overall tendency for courts to apply a more practical, less technical, approach to the comparability test. For example, the Scituate decision established the principle that in determining comparability for purposes of CWA Section 309(g), a state need not actually have assessed penalties against an alleged violator; it is enough that the state could assess penalties under a scheme comparable to the CWA. In Scituate, because the state scheme "closely paralleled" the federal scheme, i.e., the Massachusetts DEP could assess civil penalties of up to $25,000 per day per violation, the court held that the law was comparable even though the state had declined to actually assess any penalty at all. Id. at 556. Florida Cities might argue that if comparability can be found in instances where no penalty has been assessed, then surely it can be found in instances where a penalty was indeed assessed, though under provisions that do not mirror CWA Section 309(g) word for word.

Florida's absence of penalty assessment factors is another weakness in the comparability argument. However, the statute does provide for hearing evidence on the mitigation of any assessed penalties, and, like the argument above, Florida Cities could maintain that this provision works to produce the same

result as the federal scheme. Moreover, I have been told that whenever the DEP assesses penalties in the context of a consent decree, it does so pursuant to a "penalty matrix," an internal procedure the DEP has adopted and prepares for each case. Jerry Phillips, DEP General Counsel, is sending me a sample matrix.[6] Again, the argument that comes to mind is that Florida law is in fact comparable when the whole statutory scheme is considered and when the sufficiently similar standard is applied. There is case law to support this position. Specifically, in Sierra Club v. Colorado Refining Co., 838 F. Supp. at 1436, the court held that even though Colorado's laws do not describe any factors to be considered in assessing penalties, it was enough that the state had adopted informal guidelines that required consideration of factors "closely similar" to those of the CWA such that the two schemes were deemed comparable.

In general, applying this case law to the present situation, Florida's lack of an administrative penalty assessment provision, and lack of a provision specifying penalty assessment factors, would likely be an obstacle, though not necessarily a fatal one, in making a claim for comparability. In support of its claim for comparability, Florida Cities could argue that only when a highly technical comparability test is applied to its penalty assessment scheme, does it fall short. For all practical purposes, the civil penalty assessment provisions that Florida operates under

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[6] I've asked Lance if we have a matrix for this consent decree but he doesn't know. Obviously, we should look into this further.

works in a way substantially similar to the federal scheme. Moreover, under the specific consent decree in question a penalty was assessed according to a penalty matrix whereby a number of factors went into the determination of the penalty.

4. NPDES Delegation

The fact that recently Florida was able to receive authority to administer its NPDES permit program could bolster this practical (versus technical) view. As Florida's "Program Submission for Authorization to Administer the NPDES Program," at C-14, states: "State law provides authority to . . . apply civil and criminal penalties and fines comparable to the maximum amounts recoverable under section 309 of the CWA or which represent an actual and substantial deterrent to the actions for which they are assessed or levied. Each day of continuing violation is a separate offense for which civil and criminal penalties and fines may be assessed." Florida Cities could argue that by virtue of EPA's granting Florida the authority to operate the NPDES program, EPA implicitly assessed Florida law to be "comparable" to the federal law.

Be aware, however, that delegation does not necessarily imply comparability as that term is used in CWA Section 309(g). For example, in Universal Tool, 735 F.Supp. at 1416, the court determined that Indiana law was not comparable for purposes of invoking the CWA Section 309(g) bar. Yet Indiana was delegated authority to administer its own NPDES permit program in 1975. Similarly, in Citizens for a Better Environment the court held

that California law was not comparable to CWA Section 309(g). Yet California received its delegation in 1973. Massachusetts has yet to receive EPA authorization to administer its own NPDES permit program, yet in Scituate the court found that its state laws were comparable. As these decisions indicate, the actual relationship between delegation and "comparability" under CWA Section 309(g) is not a close one.

Summary

Overall, it would appear that the best strategy that Florida Cities can take in arguing that Florida law is comparable to CWA Section 309(g) would be to emphasize that when the Florida statutory scheme as a whole is compared, the two schemes are essentially similar. Specifically, like the federal scheme, the state law grants DEP the authority to assess civil penalties, criminal penalties, and issue injunctions. When assessing a civil penalty, the DEP must consider evidence of mitigation and apply a "penalty matrix," and it must never assess penalties without first providing notice to an alleged violator and a right to request a hearing. These enforcement actions are subject to public intervention and are further subject to judicial review.

Of course, the weak links in the argument are still there, and, unfortunately, we cannot be sure how comparable a Florida judge will view the federal and state schemes.

ATTACHMENT A

...nce to litigation and disputes involving the mat... which the association could bring a class ...under this rule. Nothing herein limits any ...tory or common-law right of any individual homeowner or class of homeowners to bring any action ...may otherwise be available. An action under ...rule shall not be subject to the requirements of ...1.220.

...effective Sept. 22, 1988 (541 So.2d 1121, 1123–4). ...ended July 16, 1992, effective Jan. 1, 1993 (604 So.2d ...).

RULE 1.230 INTERVENTIONS

Anyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion.

Amended July 16, 1992, effective Jan. 1, 1993 (604 So.2d 1110).

RULE 1.240 INTERPLEADER

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claim of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of crossclaim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties otherwise permitted.

Amended July 16, 1992, effective Jan. 1, 1993 (604 So.2d 1110).

RULE 1.250 MISJOINDER AND NONJOINDER OF PARTIES

(a) **Misjoinder.** Misjoinder of parties is not a ground for dismissal of an action. Any claim against a party may be severed and proceeded with separately.

(b) **Dropping Parties.** Parties may be dropped by an adverse party in the manner provided for voluntary dismissal in rule 1.420(a)(1) subject to the exception stated in that rule. If notice of lis pendens has been filed in the action against a party so dropped, the notice of dismissal shall be recorded and cancels the notice of lis pendens without the necessity of a court order. Parties may be dropped by order of court on its own initiative or the motion of any party at any stage of the action on such terms as are just.

(c) **Adding Parties.** Parties may be added once as a matter of course within the same time that pleadings can be so amended under rule 1.190(a). If amendment by leave of court or stipulation of the parties is permitted, parties may be added in the ... pleading without further order of court. Parti... be added by order of court on its own initiative motion of any party at any stage of the action ... such terms as are just.

Amended June 19, 1968, effective Oct. 1, 1968 (211 ... 206); July 26, 1972, effective Jan. 1, 1973 (265 So.... July 16, 1992, effective Jan. 1, 1993 (604 So.2d 1110).

Committee Notes

1972 Amendment. Subdivision (c) is amended to p... the addition of parties when the pleadings are amend... stipulation. This conforms the subdivision to all o... permissive types of amendment under rule 1.190(a). I... an inadvertent omission by the committee when the rule in its present form was adopted in 1968 as can be seen by reference to the 1968 committee note.

RULE 1.260 SURVIVOR; SUBSTITUTION OF PARTIES

(a) **Death.**

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on all parties as provided in rule 1.080 and upon persons not parties in the manner provided for the service of a summons. Unless the motion for substitution is made within 90 days after the death is suggested upon the record by service of a statement of the fact of the death in the manner provided for the service of the motion, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action shall not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) **Incompetency.** If a party becomes incompetent, the court, upon motion served as provided in subdivision (a) of this rule, may allow the action to be continued by or against that person's representative.

(c) **Transfer of Interest.** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

FLA. STAT. @ 120.57 (1994) printed in FULL format.

FLORIDA STATUTES 1994

THIS DOCUMENT IS CURRENT THROUGH THE 1994 REGULAR LEGISLATIVE SESSION ***

TITLE X PUBLIC OFFICERS, EMPLOYEES, AND RECORDS
CHAPTER 120 ADMINISTRATIVE PROCEDURE ACT

Fla. Stat. @ 120.57 (1994)

TATUS: CONSULT SLIP LAWS CITED BELOW FOR RECENT CHANGES TO THIS DOCUMENT
=1> LEXSEE 1995 Fl. ALS 147 -- See section 1420.

0.57 Decisions which affect substantial interests.

The provisions of this section apply in all proceedings in which the ibstantial interests of a party are determined by an agency, unless such roceedings are exempt pursuant to subsection (5). Unless waived by all parties ibsection (1) applies whenever the proceeding involves a disputed issue of aterial fact. Unless otherwise agreed, subsection (2) applies in all other ases.

(1) FORMAL PROCEEDINGS.--

(a) A hearing officer assigned by the division shall conduct all hearings nder this subsection, except for:

1. Hearings before agency heads or a member thereof except the secretary o: ie Department of Business and Professional Regulation for matters relating to e regulation of professions, as defined in chapter 455, or a board or member a board within the Department of Business and Professional Regulation for atters relating to the regulation of professions, as defined in chapter 455;

2. Hearings before the Unemployment Appeals Commission in unemployment ompensation appeals, unemployment compensation appeals referees, and special leputies pursuant to s. 443.141;

3. Hearings regarding drivers' licensing pursuant to chapter 322;

4. Hearings conducted within the Department of Health and Rehabilitative ervices in the execution of those social and economic programs administered by he former Division of Family Services of said department prior to the eorganization effected by chapter 75-48, Laws of Florida;

5. Hearings in which the division is a party, in which case an attorney ssigned by the Administration Commission shall be the hearing officer;

6. Hearings which involve student disciplinary suspensions or expulsions nd which are conducted by educational units;

7. Hearings of the Public Employees Relations Commission in which a determination is made of the appropriateness of the bargaining unit, as provide in s. 447.307;

8. Hearings held by the Department of Agriculture and Consumer Services rsuant to chapter 601; and

9. Hearings held by the Division of Florida Highway Patrol of the Department of Highway Safety and Motor Vehicles to deny, suspend, or remove a wrecker operator from participating in the wrecker rotation system established s. 321.051. Such hearings shall be held by a hearing officer appointed by t director of the Division of Florida Highway Patrol.

(b) In any case to which this subsection is applicable, the following procedures apply:

1. A request for a hearing shall be granted or denied within 15 days of receipt.

2. All parties shall be afforded an opportunity for a hearing after reasonable notice of not less than 14 days; however, the 14-day notice requirement may be waived with the consent of all parties. In a preliminary hearing for the revocation of parole, no less than 7 days' notice shall be given. In a hearing involving a student disciplinary suspension or expulsion conducted by an educational unit, the 14-day notice requirement may be waived the agency head or the hearing officer without the consent of the parties. The notice shall include:

a. A statement of the time, place, and nature of the hearing.

b. A statement of the legal authority and jurisdiction under which the hearing is to be held.

c. A reference to the particular sections of the statutes and rules involved.

d. Except for any hearing before an unemployment compensation appeals referee, a short and plain statement of the matters asserted by the agency and by all parties of record at the time notice is given. If the agency or any par is unable to state the matters in sufficient detail at the time initial notice is given, the notice may be limited to a statement of the issues involved, and thereafter, upon timely written application, a more definite and detailed statement shall be furnished not less than 3 days prior to the date set for th hearing.

3. Except for any proceeding conducted as prescribed in s. 120.54(4) or s 120.56, a petition or request for a hearing under this section shall be filed with the agency. If the agency elects to request a hearing officer from the division, it shall so notify the division within 15 days of receipt of the petition or request. When the Florida Land and Water Adjudicatory Commission receives a notice of appeal pursuant to s. 380.07, the commission shall notify the division within 60 days of receipt of the notice of appeal if the commissi elects to request the assignment of a hearing officer. On the request of any agency, the division shall assign a hearing officer with due regard to the expertise required for the particular matter. The referring agency shall take further action with respect to the formal proceeding, except as a party litigant, as long as the division has jurisdiction over the formal proceeding. Any party may request the disqualification of the hearing officer by filing an affidavit with the division prior to the taking of evidence at a hearing, stating the grounds with particularity.

4. All parties shall have an opportunity to respond, to present evidence nd argument on all issues involved, to conduct cross-examination and submit ebuttal evidence, to submit proposed findings of facts and orders, to file ceptions to any order or hearing officer's recommended order, and to be represented by counsel. When appropriate, the general public may be given an opportunity to present oral or written communications. If the agency proposes consider such material, then all parties shall be given an opportunity to cross-examine or challenge or rebut it.

5. All pleadings, motions, or other papers filed in the proceeding must b signed by a party, the party's attorney, or the party's qualified representative. The signature of a party, a party's attorney, or a party's qualified representative constitutes a certificate that he has read the pleading, motion, or other paper and that, to the best of his knowledge, information, and belief formed after reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements the hearing officer, upon motion or his own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

6. The record in a case governed by this subsection shall consist only o

a. All notices, pleadings, motions, and intermediate rulings;

b. Evidence received or considered;

c. A statement of matters officially recognized;

d. Questions and proffers of proof and objections and rulings thereon;

e. Proposed findings and exceptions;

f. Any decision, opinion, proposed or recommended order, or report by th officer presiding at the hearing;

g. All staff memoranda or data submitted to the hearing officer during t hearing or prior to its disposition, after notice of the submission to all parties, except communications by advisory staff as permitted under s. 120.66(1), if such communications are public records;

h. All matters placed on the record after an ex parte communication pursuant to s. 120.66(2); and

i. The official transcript.

7. The agency shall accurately and completely preserve all testimony in proceeding, and, on the request of any party, it shall make a full or partial transcript available at no more than actual cost. In any proceeding before a hearing officer initiated by a consumptive use permit applicant pursuant to subparagraph 14., the applicant shall bear the cost of accurately and complet preserving all testimony and providing full or partial transcripts to the

water management district. At the request of any other party, full or partial transcripts shall be provided at no more than cost.

8. Findings of fact shall be based exclusively on the evidence of record and on matters officially recognized.

9. Except as provided in subparagraph 13., the hearing officer shall complete and submit to the agency and all parties a recommended order consisting of his findings of fact, conclusions of law, interpretation of administrative rules, and recommended penalty, if applicable, and any other information required by law or agency rule to be contained in the final order. The agency shall allow each party at least 10 days in which to submit written exceptions the recommended order.

10. The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the recommended order. The agency may not reject or modify the findings of fact, including findings of fa that form the basis for an agency statement, unless the agency first determine from a review of the complete record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comp with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasc therefor in the order, by citing to the record in justifying the action. When there is an appeal, the court in its discretion may award reasonable attorney' fees and costs to the prevailing party if the court finds that the appeal was ivolous, meritless, or an abuse of the appellate process or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion.

11. If the hearing officer assigned to a hearing becomes unavailable, the division shall assign another hearing officer who shall use any existing recor and receive any additional evidence or argument, if any, which the new hearing officer finds necessary.

12. A hearing officer who is a member of an agency head may participate i the formulation of the final order of the agency, provided he has completed al his duties as hearing officer.

13. In any application for a license or merger pursuant to title XXXVIII which is referred by the agency to the division for hearing pursuant to this section, the hearing officer shall complete and submit to the agency and to al parties a written report consisting of findings of fact and rulings on evidentiary matters. The agency shall allow each party at least 10 days in whi to submit written exceptions to the report.

14. In any application for a consumptive use permit pursuant to part II c chapter 373, the water management district on its own motion may, or, at the request of the applicant for the permit, shall, refer the matter to the divisi for the appointment of a hearing officer to conduct a hearing under this section.

15. Each agency statement defined as a rule under s. 120.52 and not adop by the rulemaking procedure provided by s. 120.54 which is relied upon by an ·ency to determine the substantial interests of a party shall be subject to .vo review by a hearing officer. A statement shall not enlarge, modify, or contravene the specific provision of law implemented or otherwise exceed delegated legislative authority. The statement applied as a result of a proceeding pursuant to this subsection shall be demonstrated to be within the scope of delegated legislative authority. Recommended and final orders pursua to this subsection shall provide an explanation of the statement that include the evidentiary basis which supports the statement applied and a general discussion of the justification for the statement applied.

(2) INFORMAL PROCEEDINGS.--In any case to which subsection (1) does not apply:

(a) The agency shall, in accordance with its rules of procedure:

1. Give reasonable notice to affected persons or parties of the action c the agency, whether proposed or already taken, or of its decision to refuse action, together with a summary of the factual, legal, and policy grounds therefor.

2. Give affected persons or parties or their counsel an opportunity, at convenient time and place, to present to the agency or hearing officer writte or oral evidence in opposition to the action of the agency or of its refusal act, or a written statement challenging the grounds upon which the agency has chosen to justify its action or inaction.

3. If the objections of the persons or parties are overruled, provide a written explanation within 7 days.

(b) The record shall only consist of:

1. The notice and summary of grounds;

2. Evidence received or considered;

3. All written statements submitted by persons and parties;

4. Any decision overruling objections;

5. All matters placed on the record after an ex parte communication pursuant to s. 120.66(2); and

6. The official transcript.

(3) Unless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order.

(4) This section does not apply to agency investigations preliminary to agency action.

(5) This section does not apply to any proceeding in which the substant: .nterests of a student are determined by the State University System. The Bo: of Regents shall establish a committee, at least half of whom shall be

appointed by the Council of Student Body Presidents, which shall establish by January 1, 1985, rules and guidelines ensuring fairness and due process in judicial proceedings involving students in the State University System. This section shall not become effective until January 1, 1985.

(6) In cases where a conceptual review permit has been issued by a water management district, petitions challenging the issuance of a construction or operating permit implementing the conceptual review permit, upon a motion of a party, shall be subject to expedited review. Within 15 days of filing a motion for expedited review by the district or the applicant, the hearing officer shall, by order, establish a schedule for the proceedings, including discovery, which provides for a final hearing within 60 days of the issuance of the order. Proposed recommended orders must be submitted to the hearing officer, if at all, within 10 days of the filing of the hearing transcript. Recommended orders shall be submitted to the district within 30 days of the last day for the filing of the proposed recommended order. The district shall issue its final order within 45 days of the receipt of the recommended order. If the district grants the construction or operating permit, the permittee may proceed unless judicial review of final agency action is sought pursuant to s. 120.68 and a stay is applied for and issued.

HISTORY: s. 1, ch. 74-310; s. 7, ch. 75-191; s. 8, ch. 76-131; s. 1, ch. 77-174; s. 5, ch. 77-453; ss. 6, 11, ch. 78-95; s. 6, ch. 78-425; s. 8, ch. 79-7; s. 7, ch. 80-95; s. 4, ch. 80-289; s. 57, ch. 81-259; s. 2, ch. 83-78; s. 9, ch. 83-216; s. 2, ch. 84-173; s. 4, ch. 84-203; ss. 1, 2, ch. 86-108; s. 44 ch. 87-6; ss. 1, 2, ch. 87-54; s. 5, ch. 87-385; s. 1, ch. 90-283; s. 4, ch. 91-30; s. 1, ch. 91-191; s. 22, ch. 92-315; s. 7, ch. 94-218.

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FLORIDA STATUTES 1994

*** THIS DOCUMENT IS CURRENT THROUGH THE 1994 REGULAR LEGISLATIVE SESSION ***

TITLE X PUBLIC OFFICERS, EMPLOYEES, AND RECORDS
CHAPTER 120 ADMINISTRATIVE PROCEDURE ACT

Fla. Stat. @ 120.68 (1994)

120.68 Judicial review.

(1) A party who is adversely affected by final agency action is entitled judicial review. For purposes of this section, a district school board whose decision is reviewed under the provisions of s. 231.36 and whose final action modified by a superior administrative decision shall be a party entitled to judicial review of the final action. A preliminary, procedural, or intermediat agency action or ruling, including any order of a hearing officer, is immediately reviewable if review of the final agency decision would not provid an adequate remedy.

(2) Except in matters for which judicial review by the Supreme Court is provided by law, all proceedings for review shall be instituted by filing a petition in the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides. If the appeal is o an order rendered in a proceeding initiated under s. 120.54(4) or under s. 120.56, the agency whose rule is being challenged shall transmit a copy of the notice of appeal to the committee. Review proceedings shall be conducted in accordance with the Florida Rules of Appellate Procedure.

(3)(a) The filing of the petition does not itself stay enforcement of the agency decision, but if the agency decision has the effect of suspending or revoking a license, supersedeas shall be granted as a matter of right upon suc conditions as are reasonable, unless the court, upon petition of the agency, determines that a supersedeas would constitute a probable danger to the health safety, or welfare of the state. The agency may also grant a stay upon appropriate terms, but, whether or not the action has the effect of suspending or revoking a license, a petition to the agency for a stay is not a prerequisi to a petition to the court for supersedeas. In any event, the order shall specify the conditions, if any, upon which the stay or supersedeas is granted.

(b) The filing of a petition appealing an order issued by a hearing offic under s. 120.535, whether filed by the agency or any other party, does not sta enforcement of the hearing officer's order, unless the court, upon petition of the agency or other party, determines that a stay is necessary to avoid a probable danger to the public health, safety, or welfare. A stay order shall specify the conditions, if any, upon which the stay is granted.

(4) Judicial review of any agency action shall be confined to the record transmitted and any additions made thereto in accordance with subsection (6).

(5) The record for judicial review shall consist of the following:

(a) The agency's written document expressing the order, the statement of easons therefor, if issued, and the record under s. 120.57, if review of roceedings under that section is sought.

(b) The agency's written document expressing the action, the statement of reasons therefor, if issued, and the materials considered by the agency under s. 120.54, if review is sought of proceedings under that section.

(c) The agency's written document expressing the action, and other written documents identified by the agency as having been considered by it before its action and used as a basis for its action, if review is sought of proceedings under s. 120.56 or s. 120.565 or if there has been no proceeding under s. 120.5 or s. 120.57.

(6) When there has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts, the court shall order the agency to conduct a prompt, factfinding proceeding under this act after having a reasonable opportunity to reconsider its determination on the record of the proceedings.

(7) The reviewing court shall deal separately with disputed issues of agency procedure, interpretations of law, determinations of fact, or policy within the agency's exercise of delegated discretion.

(8) The court shall remand the case for further agency action if it finds that either the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure. Failure of any agency to comply with s. 120.53 shall be presumed to be a material error in procedure.

(9) If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall:

(a) Set aside or modify the agency action, or

(b) Remand the case to the agency for further action under a correct interpretation of the provision of law.

(10) If the agency's action depends on any fact found by the agency in a proceeding meeting the requirements of s. 120.57, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by competent substantial evidence in the record.

(11) If the agency's action depends on facts determined pursuant to subsection (6), the court shall set aside, modify, or order agency action if the facts compel a particular action as a matter of law, or it may remand the case to the agency for further examination and action within the agency's responsibility.

(12) The court shall remand the case to the agency if it finds the agency's exercise of discretion to be:

(a) Outside the range of discretion delegated to the agency by law;

(b) Inconsistent with an agency rule;

(c) Inconsistent with an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency; or

(d) Otherwise in violation of a constitutional or statutory provision;

but the court shall not substitute its judgment for that of the agency on an issue of discretion.

(13)(a) The decision of the reviewing court may be mandatory, prohibitory or declaratory in form; and it shall provide whatever relief is appropriate irrespective of the original form of the petition. The court may:

1. Order agency action required by law, order agency exercise of discretion when required by law, set aside agency action, remand the case for further agency proceedings, or decide the rights, privileges, obligations, requirements or procedures at issue between the parties; and

2. Order such ancillary relief as the court finds necessary to redress the effects of official action wrongfully taken or withheld.

(b) If the court sets aside agency action or remands the case to the agency for further proceedings, it may make such interlocutory order as the court finds necessary to preserve the interests of any party and the public pending further proceedings or agency action.

(14) Unless the court finds a ground for setting aside, modifying, remanding, or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.

(15) No petition challenging an agency rule as an invalid exercise of delegated legislative authority shall be instituted pursuant to this section, except to review an order entered pursuant to a proceeding under s. 120.54(4) s. 120.56, unless the sole issue presented by the petition is the constitutionality of a rule and there are no disputed issues of fact.

HISTORY: s. 1, ch. 74-310; s. 13, ch. 76-131; s. 38, ch. 77-104; s. 1, ch. 77-174; s. 11, ch. 78-425; s. 4, ch. 84-173; s. 7, ch. 87-385; s. 36, ch. 90-302; s. 6, ch. 91-30; s. 1, ch. 91-191; s. 10, ch. 92-166.

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** THIS DOCUMENT IS CURRENT THROUGH THE 1994 REGULAR LEGISLATIVE SESSION ***

TITLE X PUBLIC OFFICERS, EMPLOYEES, AND RECORDS
CHAPTER 120 ADMINISTRATIVE PROCEDURE ACT

Fla. Stat. @ 120.69 (1994)

STATUS: CONSULT SLIP LAWS CITED BELOW FOR RECENT CHANGES TO THIS DOCUMENT
<=1> LEXSEE 1995 Fl. ALS 147 -- See section 766.

120.69 Enforcement of agency action.

(1) Except as otherwise provided by statute:

(a) Any agency may seek enforcement of an action by filing a petition for enforcement, as provided in this section, in the circuit court where the subject matter of the enforcement is located.

(b) A petition for enforcement of any agency action may be filed by any substantially interested person who is a resident of the state. However, no such action may be commenced:

1. Prior to 60 days after the petitioner has given notice of the violation of the agency action to the head of the agency concerned, the Attorney General and any alleged violator of the agency action.

2. If an agency has filed, and is diligently prosecuting, a petition for enforcement.

(c) A petition for enforcement filed by a nongovernmental person shall be in the name of the State of Florida on the relation of the petitioner, and the doctrines of res judicata and collateral estoppel shall apply.

(d) In an action brought under paragraph (b), the agency whose action is sought to be enforced, if not a party, may intervene as a matter of right.

(2) A petition for enforcement may request declaratory relief; temporary or permanent equitable relief; any fine, forfeiture, penalty, or other remedy provided by statute; any combination of the foregoing; or, in the absence of any other specific statutory authority, a fine not to exceed $ 1,000.

(3) After the court has rendered judgment on a petition for enforcement, no other petition shall be filed or adjudicated against the same agency action, on the basis of the same transaction or occurrence, unless expressly authorized on remand. The doctrines of res judicata and collateral estoppel shall apply, and the court shall make such orders as are necessary to avoid multiplicity of actions.

(4) In all enforcement proceedings:

(a) If enforcement depends on any facts other than those appearing in the record, the court may ascertain such facts under procedures set forth in s. 120.68(6).

(b) If one or more petitions for enforcement and a petition for review involving the same agency action are pending at the same time, the court onsidering the review petition may order all such actions transferred to and onsolidated in one court. Each party shall be under an affirmative duty to otify the court when it becomes aware of multiple proceedings.

(c) Should any party willfully fail to comply with an order of the court, the court shall punish him in accordance with the law applicable to contempt committed by a person in the trial of any other action.

(5) In any enforcement proceeding the respondent may assert as a defense the invalidity of any relevant statute, the inapplicability of the administrative determination to respondent, compliance by the respondent, the inappropriateness of the remedy sought by the agency, or any combination of th foregoing. In addition, if the petition for enforcement is filed during the ti within which the respondent could petition for judicial review of the agency action, the respondent may assert the invalidity of the agency action.

(6) Notwithstanding any other provision of this section, upon receipt of evidence that an alleged violation of an agency's action presents an imminent and substantial threat to the public health, safety, or welfare, the agency ma bring suit for immediate temporary relief in an appropriate circuit court, and the granting of such temporary relief shall not have res judicata or collatera estoppel effect as to further relief sought under a petition for enforcement relating to the same violation.

(7) In any final order on a petition for enforcement the court may award the prevailing party all or part of the costs of litigation and reasonable ttorney's fees and expert witness fees, whenever the court determines that su. n award is appropriate.

HISTORY: s. 1, ch. 74-310.

judicial or administrative proceedings when ordered to be produced by appropriate subpoena or by order of the court or a hearing officer. No such subpoena or order of the court or hearing officer shall abridge or alter the rights or remedies of persons affected in the protection of trade secrets or secret processes, in the manner provided by law, and such persons affected may take any and all steps available by law to protect such trade secrets or processes.

(3) Information submitted by or required of permit applicants or permittees pursuant to § 403.0885 is not subject to the provisions of this section but is subject to the provisions of 40 C.F.R. § 122.7.

Derivation

Laws 1993, c. 93-213, § 7; Laws 1993, c. 93-94, § 5; Laws 1990, c. 90-74, § 1; Laws 1974, c. 74-133, § 6; Laws 1969, c. 69-106, §§ 26, 35; Laws 1967, c. 67-436, § 12.

Library References

Witnesses, Key No. 216; C. J. S. Witnesses § 264.

NOTES OF DECISIONS

Construction and application

Statute provides exception to state policy that all public records are open to inspection by public at large and it prohibits DER from releasing for public inspection records containing secret processes and trade secrets; however, court rejected appellant's contention that statute provides absolute immunity from discovery of confidential information where party in a formal administrative proceeding can demonstrate necessity for disclosure. Eastern Cement v. Dept. of Environ. Reg., App., (1st) 512 So. 2d 264 (1987).

In general

Any information obtained by the Florida air pollution control commission or the state board of health (from any source whatsoever) which directly related to air pollution might be used as the commission or board might deem proper in controlling or preventing air pollution in accordance with the provisions of this chapter. Op. Atty. Gen., 060-136, Aug. 12, 1960.

Records of results of sampling and analysis of vegetation, air, etc., in the files of the Florida air pollution control commission for the state board of health insofar as they related directly to air pollution, constituted public records and would be open to the public, and such public records might be used in private suits against a company. Id.

The state board of health and the Florida air pollution control commission are bound to hold confidential the information concerning secret processes, methods of manufacture, and production figures, and any other data filed with either of them from which such information may be deduced. Any information, the confidential nature of which is questionable, should be released or made public only in compliance with a writ of mandamus or other process issued by a court of competent jurisdiction. Id.

403.121 Enforcement; procedure; remedies

The department shall have the following judicial and administrative remedies available to it for violations of this chapter, as specified in § 403.161(1).

(1) Judicial remedies:

(a) The department may institute a civil action in a court of competent jurisdiction to establish liability and to recover damages for any injury to the air, waters, or property, including animal, plant, and aquatic life, of the state caused by any violation.

(b) The department may institute a civil action in a court of competent jurisdiction to impose and to recover a civil penalty for each violation in an amount of not more than $10,000 per offense. However, the court may receive evidence in mitigation. Each day during any portion of which such violation occurs constitutes a separate offense.

(c) It shall not be a defense to, or ground for dismissal of, these judicial remedies for damages and civil penalties that the department has failed to exhaust its administrative remedies, has failed to serve a notice of violation, or has failed to hold an administrative hearing prior to the institution of a civil action.

(2) Administrative remedies:

(a) The department may institute an administrative proceeding to establish liability and to recover damages for any injury to the air, waters, or property, including animal,

plant, or aquatic life, of the state caused by any violation. The department may order that the violator pay a specified sum as damages to the state. Judgment for the amount of damages determined by the department may be entered in any court having jurisdiction thereof and may be enforced as any other judgment.

(b) If the department has reason to believe a violation has occurred, it may institute an administrative proceeding to order the prevention, abatement, or control of the conditions creating the violation or other appropriate corrective action.

(c) An administrative proceeding shall be instituted by the department's serving of a written notice of violation upon the alleged violator by certified mail. The notice shall specify the provision of the law, rule, regulation, permit, certification, or order of the department alleged to be violated and the facts alleged to constitute a violation thereof. An order for corrective action may be included with the notice. However, no order shall become effective until after service and an administrative hearing, if requested within 20 days after service. Failure to request an administrative hearing within this time period shall constitute a waiver thereof.

(d) Nothing herein shall be construed as preventing any other legal or administrative action in accordance with law.

(3)(a) In addition to any judicial or administrative remedy authorized by this part, the department may assess a noncompliance fee for failure of any owner or operator of a domestic wastewater treatment facility to comply with a permit condition that requires the submittal of monthly operating reports or the reporting of the characteristics of the waste stream or the effects of the facility on surface or ground water. For the first and second violations of the reporting requirements, the fee shall not be assessed until the department has given the owner or operator at least 30 days to comply with the reporting requirement. The time shall not begin until the department has given the owner or operator written notice of the facts alleged to constitute the reporting violation, the specific provision of law, rule, or order alleged to have been violated by the owner or operator, the corrective action needed to bring the facility into compliance, and the potential penalties that may be imposed as a result of the owner's or operator's failure to comply with the notice. For subsequent violations, the department does not have to provide 30 days' written notice of the violations prior to assessing a noncompliance fee, except as follows:

1. If any additional reporting violations occur prior to the expiration of either of the 30-day notices issued by the department, the department must provide the owner or operator with 30 days' written notice to correct these violations as well.

2. Upon the renewal of the permit, the department shall reinstate the 30-day notice requirements provided in this subsection prior to assessing a noncompliance fee during the new permit period.

(b) At the time of assessment of a noncompliance fee, the department shall give the owner or operator written notice setting forth the amount assessed, the specific provision of law, rule, or order alleged to be violated, the facts alleged to constitute the violation, the corrective action needed to bring the party into compliance, and the rights available under chapter 120 to challenge the assessment. The assessment shall be final and effective unless an administrative proceeding is requested within 20 days after receipt of the written notice, and shall be enforceable pursuant to § 120.69. Once the assessment has become final and effective, the department may refuse to issue, modify, transfer, or renew a permit to the facility until the fee has been paid.

(c) Before assessing a noncompliance fee, the department shall adopt rules to implement the provisions of this subsection. The rules shall establish specific procedures and assessment amounts for noncompliance fees authorized by paragraph (a). Noncompliance fees shall be set on a sliding scale based upon the type of violation, the degree of noncompliance, and the potential for harm. Such rules shall also authorize the

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application of adjustment factors subsequent to the initial assessment to increase or decrease the total amount assessed, such as the good faith efforts or the lack of good faith efforts of the owner or operator to comply with the reporting requirement, the lack of or degree of willfulness or negligence on the part of the owner or operator, the economic benefits associated with the owner's or operator's failure to comply, the owner's or operator's previous history of reporting violations, and the owner's or operator's ability to pay the noncompliance fee. No noncompliance fee shall exceed $250, and total noncompliance fees assessed shall not exceed $1,000 per assessment for all reporting violations attributable to a specific facility during any one month. No noncompliance fee may be assessed unless the department has, within 90 days of the reporting violation, provided the owner or operator written notice of the violation.

(d) The department's assessment of a noncompliance fee shall be in lieu of any civil action which may be instituted by the department in a court of competent jurisdiction to impose and recover civil penalties for any violation that resulted in the fee assessment, unless the department initiates a civil action for nonpayment of a fee properly assessed pursuant to this subsection.

(e) Fees collected pursuant to this subsection shall be deposited in the Pollution Recovery Fund. The department may use a portion of the fund to contract for services to help in the collection of the fees assessed pursuant to this subsection.

Derivation

Laws 1990, c. 90-82, § 3; Laws 1981, c. 81-259, § 263; Laws 1978, c. 78-95, § 14; Laws 1977, c. 77-117, § 1; Laws 1977, c. 77-104, § 138; Laws 1972, c. 72-286, § 1; Laws 1971, c. 71-355, § 112; Laws 1971, c. 71-136, § 349; Laws 1970, c. 70-139, § 1; Laws 1970, c. 70-114, § 1; Laws 1969, c. 69-106, §§ 26, 35; Laws 1967, c. 67-436, § 13.

Law Review Commentaries

New attitudes about legal protection for remains of Florida's natural environment. Joseph W. Little, 23 U. Fla. L. R. 459 (Spring 1971).

Library References

Health, Key No. 28; Waters and Water Courses, Key No. 196; C. J. S. Health § 21; C. J. S. Waters §§ 232, 269.

NOTES OF DECISIONS

Construction and application

Court found no authority for department's ostensible contention that warning served on appellant was some type of free-form pleading which had no impact upon its substantial interests; notice which was served generally tracked language of § 403.121(c), specifying statute and regulation alleged to have been violated and facts alleged to constitute violation; additionally, by entering into consent orders with 2 of 3 persons served with "warning," department must have considered that substantial interests were affected by such service. Philbro Resources Corp. v. State, Department of Environmental Regulation, App., (1st) 579 So. 2d 118 (1991).

Inconsistencies of §§ 403.171, 403.121(3), and 403.804(1) can be reconciled by construing them to provide for judicial review of final agency action after review of action by Commission. Peterson v. State of Florida Department of Environmental Regulation, App., (1st) 350 So. 2d 544 (1977).

In general

Appellant was made party to administrative proceeding by both statute and rule when NOV was served on it; having achieved status as party pursuant to § 403.121(2)(c) and Rule 17-103.110(1)(b), it was therefore immaterial whether its own interests were determined in proceeding, so long as interests of specific party or parties were there determined. Philbro Resources Corp. v. State, Department of Environmental Regulation, App., (1st) 579 So. 2d 118 (1991).

When legislature amended Ch. 403 in 1972, it eliminated right of defendant to require judicial determination for liability and damages; this amendment restricts right previously held and is substantive, not procedural and, under circumstances of case, Supreme Court declined to give retrospective effect to 1972 amendments. State, Department of Pollution Control v. International Paper Company, 329 So. 2d 5 (1976).

It is apparent that legislature intended that no fine, forfeiture or penalty should be exacted against any citizen for violation of any provision of act, or for damages flowing from any act of pollution, unless and until

such person was granted either an administrative or judicial hearing to determine nature and extent of damage or penalty to be exacted, and that civil liability was limited to $5,000 for each offense. Gardinier, Inc. v. Florida Department of Pollution Control, App., 300 So. 2d 75 (1974).

Before penalties contained in § 403.161, the Air and Water Pollution Control Act, can be imposed and alleged violator is entitled to notice and hearing before Commission as provided in § 403.121; once due process safeguards are met and Commission has determined that one or more violations have occurred, it is then free to initiate complaint seeking judicial imposition of penalties. State, Air & Water Pollution Control Com'n v. St. Regis Paper Co., 257 So. 2d 253 (1971).

In light of apparent legislative intent that all moneys recovered for violations of Part I of Ch. 403 be used to restore polluted areas, all such moneys should be placed in Pollution Recovery Fund established by § 403.165 without regard to statutory procedure (administrative or judicial) employed to obtain recovery. Op. Atty. Gen., 076-169, Aug., 1976.

Public prosecutors are authorized to prosecute violations of § 403.161(3) in proper courts, but there does not exist either authority to seek criminal relief before Board of Department of Pollution Control or authority for public prosecutor to institute action for civil penalties pursuant to § 403.121(1)(b). Op. Atty. Gen., 072-239, August 2, 1972.

Injunctions

Trial court abused its discretion in denying motion for temporary injunction; DER established that samples taken from treatment plants revealed violations of effluent standards; that plant was being operated without necessary permit from DER; that irreparable harm would flow from continued effluent violations at plants; that it lacked adequate remedy at law; that it had clear legal right to relief requested; and that injunction was in public interest. State, Dept. of Environmental Reg. v. Kaszyk, App., (3rd) 590 So. 2d 1010 (1991).

Nature of liability

Provisions of Ch. 403, regarding determination of liability and imposition and enforcement of fines and penalties are penal in nature, and must be strictly construed in favor of those sought to be regulated or penalized. Gardinier, Inc. v. Florida Department of Pollution Control, App., 300 So. 2d 75 (1974).

Notice

Under Air and Water Pollution Control Act, requirement that Commission give notice of violation is condition precedent to any institution of proceeding by Commission in court of competent jurisdiction seeking civil or criminal penalties where continuing violation is charged predicated upon usual and normal daily operation of alleged violator's business. St. Regis Paper Co. v. State By and Through Florida Air and Water Pollution Control Commission, App., 237 So. 2d 797 (1970).

403.131 Injunctive relief, cumulative remedies

(1) The department may institute a civil action in a court of competent jurisdiction to seek injunctive relief to enforce compliance with this chapter or any rule, regulation, permit certification, or order; to enjoin any violation specified in § 403.161(1); and to seek injunctive relief to prevent irreparable injury to the air, waters, and property, including animal, plant, and aquatic life, of the state and to protect human health, safety, and welfare caused or threatened by any violation.

(2) All the judicial and administrative remedies in this section and § 403.121 are independent and cumulative except that the judicial and administrative remedies to recover damages are alternative and mutually exclusive.

Derivation

Laws 1972, c. 72-286, § 2; Laws 1970, c. 70-439, § 1; Laws 1970, c. 70-139, § 1; Laws 1969, c. 69-106, §§ 26, 35; Laws 1967, c. 67-436, § 14.

Cross References

Injunctions, Rules of Civil Procedure, Rule 1.610.

Law Review Commentaries

New attitudes about legal protection for remains of Florida's natural environment. Joseph W. Little, 23 U. Fla. L. R. 459 (Spring 1971).

Library References

Injunction, Key No. 136(1); C. J. S. Injunctions § 17 et seq.

403.141 Civil liability; joint and several liability

(1) Whoever commits a violation specified in § 403.161(1) is liable to the state for any damage caused to the air, waters, or property, including animal, plant, or aquatic life, of the state and for reasonable costs and expenses of the state in tracing the source of the discharge, in controlling and abating the source and the pollutants, and in restoring the air, waters, and property, including animal, plant, and aquatic life, of the state to their former condition, and furthermore is subject to the judicial imposition of a civil penalty for each offense in an amount of not more than $10,000 per offense. However, the court may receive evidence in mitigation. Each day during any portion of which such violation occurs constitutes a separate offense. Nothing herein shall give the department the right to bring an action on behalf of any private person.

(2) Whenever two or more persons pollute the air or waters of the state in violation of this chapter or any rule, regulation, or order of the department so that the damage is indivisible, each violator shall be jointly and severally liable for such damage and for the reasonable cost and expenses of the state incurred in tracing the source of discharge, in controlling and abating the source and the pollutants, and in restoring the air, waters, and property, including the animal, plant, and aquatic life of the state, to their former condition. However, if said damage is divisible and may be attributed to a particular violator or violators, each violator is liable only for that damage attributable to his violation.

(3) In assessing damages for fish killed, the value of the fish is to be determined in accordance with a table of values for individual categories of fish which shall be promulgated by the department. At the time the table is adopted, the department shall utilize tables of values established by the Department of Natural Resources and the Game and Fresh Water Fish Commission. The total number of fish killed may be estimated by standard practices used in estimating fish population.

(4) The damage provisions of this section shall not apply to damage resulting from the application of federally approved or state-approved chemicals to the waters in the state for the control of insects, aquatic weeds, or algae, provided the application of such chemicals is done in accordance with a program approved pursuant to § 403.088(1) and provided said application is not done negligently.

Derivation

Laws 1978, c. 78-98, § 3; Laws 1976, c. 76-112, § 1; Laws 1974, c. 74-133, § 7; Laws 1972, c. 72-286, § 3; Laws 1971, c. 71-204, § 1; Laws 1970, c. 70-141, § 1; Laws 1969, c. 69-106, §§ 26, 35; Laws 1967, c. 67-436, § 15.

Law Review Commentaries

New attitudes about legal protection for remains of Florida's natural environment. Joseph W. Little, 23 U. Fla. L. R. 459 (Spring 1971).

Protection for Florida's Environment. Joseph W. Little, 23 U. Fla. L. Rev. 459 (Spring 1971).

Library References

Health, Key No. 38; Waters and Water Courses, Key No. 211, 212; 61 Am. Jur. 2d Pollution Control § 123 et seq.; C. J. S. Health § 30; C. J. S. Waters § 313.

NOTES OF DECISIONS

Construction and application

State attorney has no standing to independently initiate § 403.141(1) civil action for damages and penalties against an alleged violator of Ch. 403, and state attorney has no standing under § 120.69(1)(a) to file petition for enforcement of rules and regulations promulgated by DER in relation to Ch. 403. State, State Attorney for Twelfth Judicial Circuit v. General Development Corp., App., (2nd) 448 So. 2d 1074 (1984).

In general

When legislature amended Ch. 403 in 1972, it eliminated right of defendant to require judicial determination for liability and damages; this amendment restricts right previously held and is substantive, not procedural and, under circumstances of case, Supreme Court declined to give retrospective effect to 1972

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It is apparent that legislature intended that no fine, forfeiture or penalty should be exacted against any citizen for violation of any provision of act, or for damages flowing from any act of pollution, unless and until such person was granted either an administrative or judicial hearing to determine nature and extent of damage of penalty to be exacted, and that civil liability was limited to $5,000 for each offense. Gardinier, Inc. v. Florida Department of Pollution Control, App., 300 So. 2d 75 (1974).

Department of Pollution Control, under statute, may bring civil action for damages against one who unlawfully discharges contaminants into air or water of state without prior administrative hearing. State v. Saint Regis Paper Co., App., 275 So. 2d 21 (1973).

Nature of liability

Provisions of Ch. 403, regarding determination of liability and imposition and enforcement of fines and penalties are penal in nature, and must be strictly construed in favor of those sought to be regulated or penalized. Gardinier, Inc. v. Florida Department of Pollution Control, App., 300 So. 2d 75 (1974).

Stipulations

Court did not find Stipulation ambiguous; it did not provide that if force majeure is declared by the court, Boiler 4 could be operated after Jan. 1, 1976, without liability if it were not in compliance with regulations; stipulation merely provided for reduced penalty for appellant if force majeure occurred; were it not for Stipulation, appellant could not have operated without suffering full penalty for noncompliance under § 403.141. St. Joe Paper Company v. State of Florida Department of Environmental Regulation, App., (1st) 371 So. 2d 178 (1979).

Validity

Fish table values as authorized by statute are proper and relevant to question of damages; they are admissible and may be introduced as evidence and rebutted like any other evidence. State, Department of Pollution Control v. International Paper Company, 329 So. 2d 5 (1976).

403.151 Compliance with rules or orders of department

All rules or orders of the department which require action to comply with standards adopted by it, or orders to comply with any provisions of this act, may specify a reasonable time for such compliance.

Derivation

Laws 1969, c. 69-106, §§ 26, 35; Laws 1967, c. 67-436, § 16.

Law Review Commentaries

New attitudes about legal protection for remains of Florida's natural environment. Joseph W. Little, 23 U. Fla L. R. 459 (Spring 1971).

Library References

Health, Key No. 38; Waters and Water Courses, Key No. 211, 212; C. J. S. Health § 30; C. J. S. Waters § 313.

403.161 Prohibitions, violation, penalty, intent

(1) It shall be a violation of this chapter, and it shall be prohibited for any person:

(a) To cause pollution, except as otherwise provided in this chapter, so as to harm or injure human health or welfare, animal, plant, or aquatic life or property.

(b) To fail to obtain any permit required by this chapter or by rule or regulation, or to violate or fail to comply with any rule, regulation, order, permit, or certification adopted or issued by the department pursuant to its lawful authority.

(c) To knowingly make any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter, or to falsify, tamper with, or knowingly render inaccurate any monitoring device or method required to be maintained under this chapter or by any permit, rule, regulation, or order issued under this chapter.

(d) For any person who owns or operates a facility to fail to report to the representative of the department, as established by department rule, within one working day of discovery of a release of hazardous substances from the facility if the owner or operator is required to report the release to the United States Environmental Protection

Agency in accordance with 42 U. S.C. § 9603.

(2) Whoever commits a violation specified in subsection (1) is liable to the state for any damage caused and for civil penalties as provided in § 403.141.

(3) Any person who willfully commits a violation specified in paragraph (1)(a) is guilty of a felony of the third degree punishable as provided in §§ 775.082(3)(d) and 775.083(1)(g) by a fine of not more than $50,000 or by imprisonment for 5 years, or by both, for each offense. Each day during any portion of which such violation occurs constitutes a separate offense.

(4) Any person who commits a violation specified in paragraph (1)(a) due to reckless indifference or gross careless disregard is guilty of a misdemeanor of the second degree, punishable as provided in §§ 775.082(4)(b) and 775.083(1)(g) by a fine of not more than $5,000 or by 60 days in jail, or by both, for each offense.

(5) Any person who willfully commits a violation specified in paragraph (1)(b) or paragraph (1)(c) is guilty of a misdemeanor of the first degree punishable as provided in §§ 775.082(4)(a) and 775.083(1)(g) by a fine of not more than $10,000 or by 6 months in jail, or by both for each offense.

(6) It is the legislative intent that the civil penalties and criminal fines imposed by the court be of such amount as to ensure immediate and continued compliance with this section.

Derivation

Laws 1989, c. 89-324, § 8; Laws 1989, c. 89-143, § 2; Laws 1988, c. 88-393, § 21; Laws 1977, c. 77-174, § 1; Laws 1977, c. 77-104, § 139; Laws 1974, c. 74-133, § 8; Laws 1972, c. 72-286, § 4; Laws 1970, c. 70-439, § 1; Laws 1970, c. 70-356, § 1; Laws 1969, c. 69-106, §§ 26, 35; Laws 1967, c. 67-436, § 17.

Law Review Commentaries

New attitudes about legal protection for remains of Florida's natural environment. Joseph W. Little, 23 U. Fla. L. R. 459 (Spring 1971).

Library References

Health, Key No. 38; Waters and Water Courses, Key No. 211, 212; 61 Am. Jur. 2d Pollution Control §§ 37 et seq., 66, 69 et seq., 131; C. J. S. Health § 30; C. J. S. Waters § 313.

NOTES OF DECISIONS

Confidential information

The state board of health and the Florida air pollution control commission were bound to hold confidential the information concerning secret processes, methods of manufacture, and production figures, and any other data filed with either of them from which such information might be deduced. Any information, the confidential nature of which was questionable, should be released or made public only in compliance with a writ of mandamus or other process issued by a court of competent jurisdiction. Op. Atty. Gen., 060-136, Aug. 12, 1960.

Hearings

All hearings conducted pursuant to former provisions of this chapter (the Florida air pollution control law) should be open to the public except when information, including testimony and records, as to secret processes or methods of manufacture or production is being offered or discussed, at such periods during a hearing the public should be excluded and that part of the transcript classified as confidential. Op. Atty. Gen., 060-136, Aug. 12, 1960.

In general

Where appellants, city and Department of Environmental Regulation sought review of order granting summary final judgment in favor of appellee in connection with their complaints for civil penalties claimed for improper asbestos removal, in violation of Environmental Protection Board Rule 2.209 and Florida Administrative Code Rule 17-2.670, where trial court entered summary final judgment based on finding that rules irreconcilably conflict with § 455.302 which court interpreted as absolutely prohibiting unlicensed persons such as appellee from exercising control over asbestos abatement operation, court found no such conflict and reversed and remanded for further proceedings. State, Dept. of Environmental Regulation v. SCM Glidco Organics Corporation, App., (1st) 606 So. 2d 722 (1992).

On appeal of order of Department of Environmental Regulation which finds failure to adequately treat stormwater runoff, in violation of Florida Administrative Code Rule 17-25 and § 403.161(1)(b), and orders corrective action, department had proceeded administratively against party, individually and personally,

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who was neither applicant for permit nor owner of facility at issue; court reversed. Novota v. State, Dept. of Environ. Reg., App., (1st) 588 So. 2d 1053 (1991).

Trial court abused its discretion in denying motion for temporary injunction; DER established that samples taken from treatment plants revealed violations of effluent standards; that plant was being operated without necessary permit from DER; that irreparable harm would flow from continued effluent violations at plants; that it lacked adequate remedy at law; that it had clear legal right to relief requested; and that injunction was in public interest. State, Dept. of Environmental Reg. v. Kaszyk, App., (3rd) 590 So. 2d 1010 (1991).

Where appellant appealed from final administrative order entered by appellee denying its petition for formal administrative hearing, contending that DER's decision that driveway under consideration qualified for agricultural exemption to dredge and fill permitting process was final agency action from which appellant could seek formal administrative hearing under § 120.57, court agreed and reversed and remanded for further proceedings. Friends of the Hatchineha v. State, Dept. of Environmental Regulation, App., (1st) 580 So. 2d 267 (1991).

It is apparent that legislature intended that no fine, forfeiture or penalty should be exacted against any citizen for violation of any provision of act, or for damages flowing from any act of pollution, unless and until such person was granted either an administrative or judicial hearing to determine nature and extent of damage of penalty to be exacted, and that civil liability was limited to $5,000 for each offense. Gardinier, Inc. v. Florida Department of Pollution Control, App., 300 So. 2d 75 (1974).

Emphasis of Air and Water Pollution Control Act is upon prevention and abatement, and legislative scheme is primarily directed toward reestablishing livable habitat for man and not the abatement or elimination of industries and governmental units which are guilty of polluting environment. St. Regis Paper Co. v. State By and Through Florida Air and Water Pollution Control Commission, App., 237 So. 2d 797 (1970).

Section 370.08(10), Florida Statutes, does not authorize the Department of Natural Resources to issue permits which would authorize the placing of poisons, drugs or other chemicals into the marine waters of the state for any purpose other than that of authorizing the capture of live marine species. Op. Atty. Gen., 075-287, Nov., 1975.

Public prosecutors are authorized to prosecute violations of § 403.161(3) in proper courts, but there does not exist either authority to seek criminal relief before Board of Department of Pollution Control or authority for public prosecutor to institute action for civil penalties pursuant to § 403.121(1)(b). Op. Atty. Gen., 072-239, August 2, 1972.

Any information obtained by the Florida air pollution control commission or the state board of health (from any source whatsoever) which directly related to air pollution might be used as the commission or board might deem proper in controlling or preventing air pollution in accordance with the provisions of this chapter. Op. Atty. Gen., 060-136, Aug. 12, 1960.

Nature of liability

Provisions of Ch. 403, regarding determination of liability and imposition and enforcement of fines and penalties are penal in nature, and must be strictly construed in favor of those sought to be regulated or penalized. Gardinier, Inc. v. Florida Department of Pollution Control, App., 300 So. 2d 75 (1974).

Notice

Before penalties contained in F. S. § 403.161, the Air and Water Pollution Control Act, can be imposed and alleged violator is entitled to notice and hearing before Commission as provided in F. S. § 403.121; once due process safeguards are met and Commission has determined that one or more violations have occurred, it is then free to initiate complaint seeking judicial imposition of penalties. State, Air & Water Pollution Control Com'n v. St. Regis Paper Co., 257 So. 2d 253 (1971).

Under Air and Water Pollution Control Act, requirement that Commission give notice of violation is condition precedent to any institution of proceeding by Commission in court of competent jurisdiction seeking civil or criminal penalties where continuing violation is charged predicated upon usual normal daily operation of alleged violator's business. St. Regis Paper Co. v. State By and Through Florida Air and Water Pollution Control Commission, App., 237 So. 2d 797 (1970).

Public records

Records of results of sampling and analysis of vegetation, air, etc., in the files of the Florida air pollution control commission for the state board of health insofar as they relate directly to air pollution, constitute public records and would be open to the public, and such public records may be used in private suits against a company. Op. Atty. Gen., 060-136, Aug. 12, 1960.

Validity

Section 403.161(3) purports to impose criminal liability upon acts or omissions done entirely without intent. This is too broad a condemnation in this instance and must fall. Balance of statute is complete in itself and consitutionally valid. Hence only part of statute penalizing mere negligent conduct is declared

variances submitted under the Florida Electrical Power Plant Siting Act, the Florida Transmission Line Siting Act or the Florida Industrial Siting Act, which shall be granted or denied at the discretion of the Governor and the Cabinet.

(4) The Department shall publish notice of intent in the Florida Administrative Weekly. The petitioner shall publish such notice in a newspaper of general circulation in the area affected by the proposed variance. Notice shall be in accordance with Rule 62-103.150, F.A.C., and shall read substantially as set forth in Rule 62-103.150(3), F.A.C.

(5) An application for a variance or exemption, pursuant to Section 403.854, Florida Statutes, of the Florida Safe Drinking Water Act, shall be in accordance with Rules 62-560.510 and .520, F.A.C. The variance provisions of Section 403.201, Florida Statutes, do not apply to the Florida Safe Drinking Water Act or rules promulgated thereunder.

(6) Relief from Department rules may also be granted pursuant to other specific rules, such as, but not limited to, Rules 62-302.800, 62-4.243, 62-520.500, .510, and .520, F.A.C.

Specific Authority: 120.53(1), F.S.
Law Implemented: 120.53(1), F.S.
History: New 2-6-78; Amended 7-8-82; Transferred from 17-1.57 and Amended 6-1-84, Formerly 17-103.100.

62-103.110 Administrative Enforcement Actions.

(1) Notice of Violation.

(a) A notice of violation is an appropriate initial administrative pleading which may be issued by the Department when, after investigation, it has reason to believe that a person has, or is presently engaged in an activity in violation of the provisions of Chapters 403, 373, 376 or 253, Florida Statutes, or Department rules. Such notice shall be served on the respondent(s) by actual delivery to; service of process on, in accordance with Florida Rules of Civil Procedure; or by certified mail, return receipt requested; and shall identify the provision of law, rule, or Department permit alleged to have been violated, and shall include a brief statement of the facts constituting such alleged violation.

(b) A notice of violation shall be issued by the Secretary, Assistant Secretary or District Manager. Unless a responsive pleading and request for a Section 120.57 administrative hearing is filed within twenty (20) days after service of the notice, or as otherwise provided by Rule 62-103.090, F.A.C. (Informal Conference), the notice of violation, and the allegations contained therein, shall

become binding and final, and the right to an administrative hearing shall be deemed waived.

(2) Orders for Corrective Action.

(a) Orders for corrective action may accompany and be served with a notice of violation upon the alleged violator of provisions of law, rule, or a Department permit. The orders shall include a description of remedial action, with implementing time-table, which is required, and set forth any damages, costs of investigation, or other demands the Department is authorized by law to recover. Unless a responsive pleading and request for a Section 120.57 administrative hearing is filed within twenty (20) days after service of the notice, or as otherwise provided by Rule 62-103.090, F.A.C. (Informal Conference), the orders for corrective action shall become final and effective, and shall constitute a final adjudication of the matters alleged, subject only to judicial review under Section 120.68, Florida Statutes.

(b) Orders for corrective action, which constitute final agency action, shall be enforceable pursuant to Sections 403.161(1)(b), 403.131, 403.412, 403.860, and 120.69, Florida Statutes.

(3) Consent Order.

A consent order is a final agency order wherein all parties and the Department, by negotiation, have arrived at a mutually acceptable resolution of alleged violations of law for the purpose of achieving full and expeditious compliance with Chapters 253, 403, 373 and 376, Florida Statutes, and Department rules promulgated thereunder. A consent order, executed by all parties to an enforcement action, shall have the same force and effect as a final order entered by the Department after a formal Section 120.57 administrative hearing and the submission of hearing officer's recommended order, and shall be enforced in like manner. The Secretary, or his authorized designee, may enter consent orders, copies of which shall be served on all parties. If a notice of violation is issued, in accordance with Rule 62-103.110, F.A.C., no consent order shall be entered until ten (10) days after the filing of the notice.

(4) Where the preparation of documents in response to administrative enforcement action requires the practice of professional engineering or professional geology as described in Chapter 471 or 492, F.S., the applicable portions of such documents shall be signed and sealed by the professional(s) who prepared or approved them.

Specific Authority: 120.53, 403.0877, F.S.
Law Implemented: 120.53, 403.0877, 471.005, 492.102, F.S.

ATTACHMENT B

programs will be reviewed by Division staff for consistency of format and content.

The Department in association with the EPA will provide periodic technical training courses to district and local program personnel in order to maintain the basic skills and knowledge necessary to implement a strong regulatory program.

Enforcement

The enforcement of the regulations governing surface water discharges has long been a departmental priority. The following section outlines the enforcement strategy for violations of the Department rules regulating discharges to surface waters and a pretreatment program.

A. The Department has had a point source permitting system, equivalent to the federal NPDES program, since 1969. During this time a strong enforcement program has developed and is outlined in the Department Enforcement Manual. The manual contains a set of guidelines for the enforcement of permit effluent limits and receiving water quality standards under Chapters 62-4, 62-25, 62-28, 62-302, 62-600, 62-601, 62-604, and 62-660, F.A.C. Under the Department rules, enforcement can also be pursued against dischargers to groundwater. There are several enforcement actions or procedures that may be used by the Department. These include:

1. Warning Letters: Warning letters (similar to EPA Notices of Violation) and other informal correspondence, such as phone calls and Noncompliance Letters, may be used to inform the alleged violator of the problem and request its correction. These letters are an optional step and may be omitted for more serious cases.

2. Notice of Violation: These are official formal pleadings which are similar to EPA Administrative Orders. A Notice of Violation contains findings of fact, conclusions of law, and orders for corrective action (compliance schedule). A respondent may request a formal

administrative hearing under Section 120.57, F.S. If no hearing is requested or after a formal hearing is held, a Final Order, which is a final adjudication on the matters alleged in the Notice of Violation, is issued. The Final Order may be appealed to a district court of appeal for judicial review under Section 120.68, F.S. Civil enforcement of Final Orders will be instituted pursuant to Sections 120.69, 403.121, 403.141(1), and 403.161, F.S., if necessary.

3. Consent Order: The Department and the alleged violator may mutually enter into an agreement spelling out the corrective measures to be undertaken and penalties to be paid. Consent Orders are enforced pursuant to Sections 120.69, 403.121, 403.141(1), and 403.161, F.S.

4. Civil Action: The Department can institute civil actions in a circuit court of competent jurisdiction for violations of department rules, statutes, orders, or permits under Sections 403.121, 403.131, 403.141, and 403.161, F.S. The Department may seek temporary and permanent injunctions and civil penalties against alleged violators to enforce compliance with Chapter 403, F.S., or Department rules, orders or permits; or to prevent irreparable injury to human health, safety, and welfare caused or threatened by any violation.

5. Criminal Action: Pursuant to Section 403.161, F.S., the Department may seek incarceration and criminal fines for causing pollution that harms or injures human health or welfare or the environment; for failure to obtain a required permit and for violations of the terms and conditions of an issued permit; and for knowingly making false statements, representations, or certifications in required forms, reports, or other documents

For the Department to maintain a clear and consistent enforcement approach, enforcement records will show a clear trail of inspection or records review, immediate notification of deficiencies, and prompt correction of these deficiencies or an aggressive enforcement action. Department enforcement actions are initiated and administered in the Department district offices, with technical and legal support (Office of General Counsel staff) from Tallahassee, until the formal enforcement

stage is reached. Formal actions are jointly administered between the district offices and the Office of General Counsel.

Although noncompliance letters or other informal action may be appropriate for some violations, it is expected that Notices of Violation (NOV), followed by Final Orders or Consent Orders, will be commonly used for reportable noncompliance. In those instances where an immediate and substantial risk of harm to the health, safety, and/or welfare of the public exists, or a substantial environmental threat exists, emergency administrative orders, temporary injunctions, or civil suits will be used as required under 40 CFR § 123.27(1)(e). Since resources are limited and inspections cannot be made at facilities as frequently as desired, the Department must rely, wherever feasible, on the facilities to submit conclusive evidence to indicate compliance. The burden of submitting conclusive evidence of compliance is on the facility, and it may consist of any reporting, documentation, or demonstration necessary to sufficiently satisfy the Department and preclude enforcement actions.

An enforcement coordinator, located in Tallahassee, coordinates district personnel, legal, and technical support. Following NPDES program delegation, the enforcement coordinator will provide oversight and ensure enforcement program consistency. In addition, the enforcement coordinator will act as liaison between Department district enforcement personnel and EPA enforcement personnel involved in joint enforcement actions and enforcement program oversight activities.

B. Department Enforcement Process

Upon discovery of a violation, enforcement options are selected based on the severity of the violation and the past compliance history of the permittee. For extremely severe violations that pose an immediate and substantial threat to human health or the environment, the Department may issue a unilateral administrative order under Section 120.59, F.S., or file a petition for a temporary injunction, followed by a civil lawsuit for damages. For violations not requiring immediate

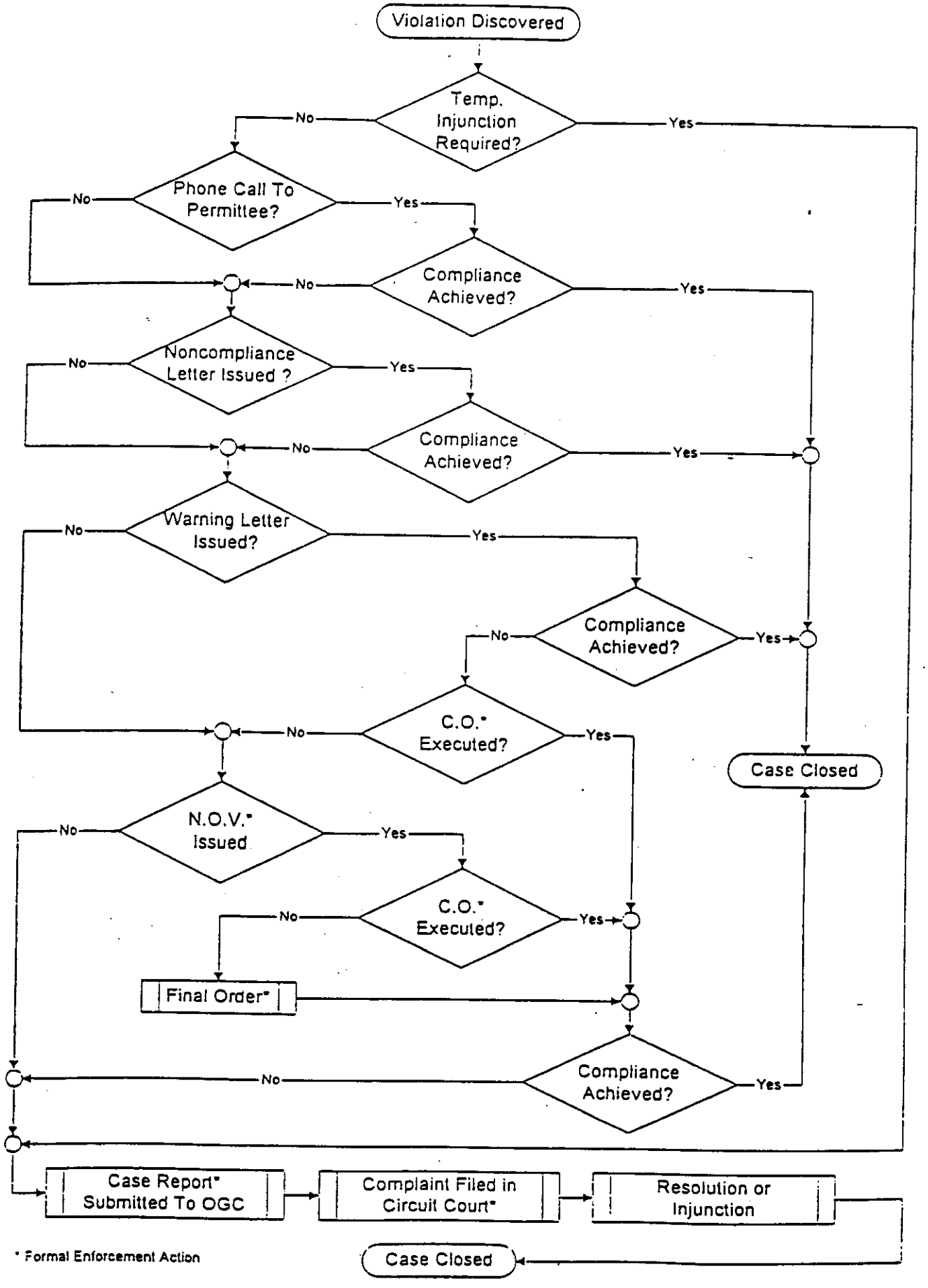
injunctive relief, a less formal approach is taken. For common minor violations, a phone call or noncompliance letter is used to notify the permittee of the noncompliance and request corrective action. If compliance is not achieved within the specified time frame (usually 30 days), a warning letter is issued. A typical warning letter gives the permittee 15 days to return to compliance or negotiate the terms for a Consent Order (CO).

If compliance is not achieved within the 15 days or a CO is not agreed to, a Notice of Violation (NOV) is issued. If compliance is not achieved according to the orders for corrective action, or if a CO is not entered, a Final Order is issued. The time lapse between the issuance of an NOV and a Final Order depends upon the response by the violator. Under Chapter 120, F.S., the violator may request an administrative hearing to adjudicate the issues raised by the NOV.

When requested, an administrative hearing under Section 120.57, F.S., is conducted by the Department of Management Services, Division of Administrative Hearings. The hearing schedule is set by the Hearing Officer assigned to the case. Upon completion of the hearing, receipt of a transcript if requested, and filing of proposed recommended orders, the Hearing Officer will submit a recommended order to the Secretary. The Secretary will issue a Final Order. The Final Order may be appealed to a district court of appeal for judicial review. If the violator challenges the authority of the Department to promulgate the rule which has been violated, a different type of hearing is held by the Division of Administrative Hearings. The violator may also raise a constitutional issue which is not within the purview of the Division of Administrative Hearings and which must be adjudicated in a circuit court of competent jurisdiction.

The majority of violations are resolved directly through informal actions or Consent Orders. Figure B-18 outlines the current Department civil enforcement process.

Figure B-18 FDEP Civil Enforcement Process



of the Florida Administrative Code authorize the Department to modify or revoke permits.

10. AUTHORITY TO ENFORCE THE PERMIT AND THE PERMIT PROGRAM.

State law provides authority to:

a. Abate violations of

(1) Requirements to obtain permits;

(2) Terms and conditions of issued permits;

(3) Effluent standards and limitations and water quality standards (including toxic effluent standards and pretreatment standards applicable to dischargers into publicly-owned treatment works); and

(4) Requirements for recording, reporting, monitoring, entry, inspection, and sampling;

b. Apply sanctions to enforce correction of violations described in paragraph (a) above, including the following:

(1) Injunctive relief, without the necessity of a prior revocation of the permit;

(2) Civil penalties;

(3) Criminal fines for willful or negligent violations; and

(4) Criminal fines against persons who knowingly make any false statement, representation, or certification in forms, notices, reports, or other documents required by the terms or conditions of any permit or otherwise required by the state as part of a recording, reporting, or monitoring requirement; and

c. Apply civil and criminal penalties and fines comparable to the maximum amounts recoverable under section 309 of the CWA or which represent an actual and substantial economic deterrent to the actions for which they are assessed or levied. Each day of continuing violation is a separate offense for which civil and criminal penalties and fines may be assessed.

FEDERAL AUTHORITY: CWA ss. 402(b)(7), 309, 304(a)(2)(C), 402(h), 504; 40 CFR ss. 123.26 and 123.27.

FLORIDA AUTHORITY:

ss. 120.69, 403.061(8), (14), and (31), 403.0885, 403.121, 403.131, 403.141, 403.161, Fla. Stat. (1993).

Rules 62-103.110, 62-103.190, Fla. Admin. Code.

REMARKS:

Sections 403.121(1) and (2), 403.141(1), and 403.161(2), (3), (4) and (5) of the Florida Statutes satisfy the federal enforcement requirements by authorizing the Department to seek penalties in a court of competent jurisdiction for each statutory offense for each day of violation. The Department directly seeks civil penalties and has authority to refer alleged criminal violations to the appropriate State Attorney to prosecute criminal offenses and obtain fines. Further, the Department General Counsel may be deputized by the appropriate State Attorney to appear in court and prosecute environmental crimes under chapter 403 on behalf of the State. The Department is not required to prove that a discharge causes pollution before bringing an enforcement action under Section 403.161, F.S. Section 403.161(1)(b) of the Florida Statutes provides that it shall be a violation of Chapter 403 and it is prohibited for any person to fail to obtain any permit required by Chapter 403 or by any rule. See Rule 62-620.300(1), Fla. Admin. Code. Therefore the Department need only show that a discharge will occur or has occurred in order to bring an enforcement action.

Finally, there is no conflict between section 403.085(2) of the Florida Statutes and enforcement provisions in sections 403.121 through 403.161 of the Florida Statutes. Section 403.085(2) is an outdated statute which provided for a penalty for sanitary sewage treatment plants which did not meet requirements deemed necessary by the Department by January 3, 1974. This statute does not preclude the Department from presently applying enforcement requirements in

sections 403.121 through 403.161, F.S., against such facilities.

11. PUBLIC PARTICIPATION

State law provides for adequate public participation in state enforcement proceedings. Under section 403.412(2) of the Florida Statutes, any citizen of the state may initiate an action for injunctive relief in circuit court against the Department and/or any alleged violator of pollution control laws or Department rules. State law allows intervention in any pending state enforcement proceeding by any citizen of the state. See Rule 1.230 Fla. R. Civ. P. Under sections 403.412(5) and 120.57(1) of the Florida Statutes, any citizen of the state or any substantially affected person may initiate an administrative proceeding or intervene in any Department administrative proceeding. See Rule 60Q-2.010, Fla. Admin. Code; Manasota-88, Inc. v. Department of Environmental Regulation, 441 So. 2d 1109 (Fla. 1st DCA 1983).

State law provides for adequate public participation in state permit proceedings. The Florida statutes allow the permit applicant, any substantially affected person or any citizen of the state to initiate a challenge or intervene in a challenge to a proposed Department permit decision. See Sections 120.57(1) and 403.412(5), Fla. Stat. (1993). Under sections 120.57(1) and (2) of the Florida Statutes full due process is accorded any person that files a petition for hearing and meets the applicable statutory criteria. The final decision under a section 120.57 administrative proceeding is subject to judicial review under section 120.68 of the Florida Statutes by a district court of appeal. This review is appellate in nature and the standard of review is governed by section 120.68 of the Florida Statutes and the Florida case law construing that section. Under section 403.90 of the Florida Statutes, a permit applicant affected by final agency action may initiate an action in circuit court for inverse condemnation. This statutory section allows the affected party to bring an inverse condemnation action without first having to exhaust available administrative remedies. See s. 403.90, Fla. Stat. (1993).

MEMORANDUM

TO: Don Scroggin and Gary Baise

FROM: Liz Poliner

DATE: July 7, 1995

RE: FCWC: Possibility of Bivens Claim

You have asked me to research whether Florida Cities could bring a Bivens-type action against individual EPA employees for their wrongful denial of an NPDES permit at the Waterway Estates site. This memorandum summarizes my preliminary research. I'm communicating my preliminary findings because it seems to me certain threshold matters may block such a claim. I would like to discuss these matters with you before doing more work on this issue. I emphasize the word "preliminary" because research regarding this type of action involves several complex constitutional sub-issues that should be more thoroughly researched should we decide to move forward.

1. Statutory Remedy

A Bivens claim recognizes a cause of action for private damages for unconstitutional conduct committed by a federal official acting under color of law. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). In addition to the threshold matter of there being a constitutional right in violation, a Bivens action cannot be sustained where an alternative means of obtaining redress exists. Stephens v. HHS, 901 F.2d 1571, 1577 (11th Cir.), cert. denied, 498 U.S. 998

(1990). Because the Clean Water Act (CWA) provides for judicial review of the agency's denial of a permit under CWA Section 509(b),[1] I want to discuss this issue first; it strikes me as the most serious initial hurdle.

In Schweiker v.. Chilicky, 487 U.S. 412, 413 (1988), the Supreme Court foreclosed additional remedies for alleged constitutional violations where "Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." The Eleventh Circuit has followed Chilicky holding that "where a government program suggests that Congress has provided for adequate remedies for the constitutional violations that may occur in the course of the program's administration no additional Bivens remedies have been created." See Stephens, 901 F.2d at 1577; Todd v. Richards, No. 94-0377-CIV-ORL-18, 1995 U.S. Dist. Lexis 3561 (M.D. Fla. March 13, 1995); Rosado v. Curtis, No. 94-0059-CIV-ORL-18, 1995 U.S Dist. LEXIS 3241 (M.D. Fla. Feb. 27, 1995).

In Middlesex Country Sewage Authority v. National Sea Clammers Assoc., 435 U.S. 1 (1981), the Supreme Court held that there is no private right of action under the Federal Water Pollution Control Act (FWPCA) because of the existence of express

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[1] This provision reads: "Review of the Administrator's action . . . in issuing or denying any permit . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides. . . . Any such application shall be made within 120 days from the date of such determination.

statutory remedies of judicial review under Section 509(b) and citizens suits under Section 505. Likewise, in Consolidated Edison v. N.Y. Dept. of Environmental Conservation, 726 F. Supp. 1404, 1409 (S.D.N.Y. 1989), the court ruled that there was no private right of action under the CWA.

When the Chilicky and Middlesex County holdings and their prodigy are taken into account, it seems likely that in an attempt to bring a Bivens claim Florida Cities would have to confront the argument that the CWA provides for judicial review of the permit denial in question and this review forecloses other private remedies for possible constitutional violations that occurred in the permit denial process. It seems to me that Florida Cities may not be able to overcome this hurdle and explain why it did not seek judicial review when it could have.

2. Constitutional Violation

The other threshold matter in raising a Bivens claim is the need to demonstrate a constitutional violation. My assumption is that Florida Cities would argue that its constitutional claim is a fifth amendment claim whereby either a deprivation of property or liberty has occurred without due process of law.

The matter of any deprivation occurring without procedural due process of law is discussed above. Again, I'm not sure how Florida Cities could argue it lacked due process when the statute itself provides for judicial review and the company did not take advantage of that review.

Still, assuming for purposes of argument that the company

got around this problem, it would have to demonstrate that it had a property or liberty interest at stake. My sense is that this, too, would be hard to establish.

To claim that the permit amounted to a property interest Florida Cities would need to demonstrate a "concrete entitlement secured by independent sources of law," i.e., sources outside of the Constitution itself. Bank of Jackson County v. Cherry, 980 F.2d 1362, 1367 (11th Cir.) cert. denied, 114 S. Ct. 71 (1993) (holding that a bank has no right to continued participation in a federal agricultural loan program). See also, Marine One, Inc. v. Manatee County, 898 F.2d 1490 (11th Cir. 1990) (holding that Florida law did not create a property right in a permit to perform activities on public land). But see Reserve, Ltd. v. Town of Longboat Key, 17 F.3d 1374 (11th Cir. 1994) (holding that a private landowner has a property right in a building permit "where the landowner possess a building permit and where the circumstances that give rise to the doctrine of equitable estoppel are present").

Nothing in the CWA speaks of a permit being a vested right or an entitlement. Moreover, Florida law makes clear that environmental permits are not vested rights. Specifically, Fla. Stat. Section 403.087(6), regarding permits for "a water pollution source" states that "a permit issued pursuant to this section shall not become a vested right in the permittee." Though the permit in question in the present case was to be issued by EPA and not the Florida DEP, this provision

nevertheless may indicate which way a Florida court will lean in determining whether a water discharge permit constitutes a property right.

As far as a liberty interest goes, there is the possibility that Florida Cities could argue that the denial of the permit affected its liberty interest in its reputation. However, to support such a claim Florida Cities would have to demonstrate a stigmatizing allegation, the dissemination or publication of that allegation, and the loss of some tangible interest due to the publication of the stigmatizing allegation. Bank of Jackson County v. Cherry, 980 F.2d at 1367. Again, my sense is that we do not have the facts to support such a claim. Other than a liberty interest in reputation, I'm not sure what other kind of liberty interest Florida Cities could argue for. I'd be interested to hear your ideas on this issue.

To the degree that Florida Cities is interested in a substantive due process argument, i.e., that the standard under which the permit was denied was arbitrary, unlawful, or discriminatory, it seems that the company would still have to face why it did not take advantage of the judicial review procedures where such concerns could be raised.

3. Defense of Government Immunity

Should Florida Cities make a Bivens claim, it can reasonably expect that the government officials in question would raise the defense of their qualified immunity from suit. This immunity was established in Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982),

where the Supreme Court stated that government officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The court went on the state that the protection of the qualified immunity extends to all but the plainly incompetent or those who knowingly violate the law. See also Jordan v. Doe, 38 F.3rd 1559, 1565 (11th Cir. 1994) (quoting Harlow). In Childress v. Small Business Administration, 825 F.2d 1550, 1552 (11th Cir. 1987) the court explained that the contours of the rights must be sufficiently clear such that a reasonable official would understand that what he is doing violates that right, and that the relevant question is "the objective one of whether the officials could have believed their actions to be lawful in light of clearly established law and the information they possessed" (citing Anderson v. Creighton, 107 S. Ct. 3034 (1987)).

Thus, in addition to the issues of establishing a constitutional violation and confronting why Florida Cities did not seek judicial review of the permit denial when it could have, the company can also expect a defense of government immunity whereby the company would have to establish that the employees in question were either incompetent or knowingly violating a clearly established law. Perhaps Florida Cities feels it can establish incompetency. Nevertheless, such an argument is by no means incontrovertible.

MEMORANDUM

TO: Don Scroggin and Lance High

FROM: Liz Poliner

DATE: August 9, 1995

RE: Florida Cities: Review of Cases on weather NPDES Permit Supersedes Administrative Order

I've reviewed the cases you suggested that I read regarding whether an NPDES permit supersedes an administrative order and I have some thoughts on them.

It seems to me that Hawaii's Thousand Friends v. City of Honolulu, 821 F. Supp. 1368 (D. Ha. 1993), is distinguishable from our case. In Hawaii, the court ruled that because under CWA Section 1211(i)(1) POTWs had to meet secondary treatment effluent limitations by July 1, 1988, the contents of a 1995 administrative consent order between the city and the DOH (the state environmental agency), providing for lower effluent limitations than the secondary treatment limitations, could not be in effect after the statutory July 1, 1988 deadline. In effect the court ruled that the statute supersedes the consent order, not that the NPDES permit supersedes the consent order. See Id. at 1377 (paragraph 70) and 1393 (paragraph 37). To the degree that the AO in our case does not include provisions that violate the statute, as an extension of the AO did in Hawaii, our case is distinguishable. I think that we can argue that it's not clear how the Hawaii court would have ruled on the authority of the DOH to lower the effluent by a consent order if there had been no statutory conflict. Do you agree?

I understand that in Hawaii, the city could have been liable simply because it violated its NPDES permit. However, the court did not make its determination about the invalidity of the consent order on the ground that the permit superseded the consent order but rather on the ground that the consent order, beyond July 1988, violated the statute.

I also think that Citizen's for a Better Environment-CA. v. Union Oil Co., 861 F. Supp. 889 (N.D. CA 1994), is distinguishable. In that case the court ruled that "an administrative enforcement action by a state agency charged with enforcing the CWA that purports to extend a deadline specified in an NPDES permit for complying with the permit's discharge limits does not serve to suspend the permit's deadlines such that they may not be enforced through a citizen suit" (emphasis added). Id. at 903. In other words, the case speaks to the question of whether citizen suits can be maintained where an agency has extended a permit compliance deadline via an AO, and leaves open the question of whether an agency can sue for violation of a permit under these circumstances.

In discussing this issue, the court noted that under the CWA EPA can authorize extended compliance schedules in the course of compliance actions, and under state law the California state agency can do the same. Id. at 902. The court then asked:

> If such extended compliance schedules do not suspend the effect of limits and deadlines contained in NPDES permits such that the permit terms may still be enforced against the polluter through citizen suits, then what good are compliance actions and what meaning do their extended timetables have?

Id. (emphasis added). The phrasing of the question, zeroing in on enforcement through citizen suits, affirms a narrow reading of the case. Moreover, the court answered that "such orders constitute agreements by the issuing enforcement authority on how the authority--be it EPA or a state agency--plans to exercise its prosecutorial discretion." Id. Thus, even though such extensions within administrative orders do not act as shields against citizen suits, they nevertheless "serve a meaningful role in the CWA enforcement scheme." Id.

Perhaps we can use this language favorably. In other words, in our case, where EPA arguably authorized through an administrative order an extension of the deadline to comply with the latest permit terms, wasn't it making "an agreement" on "how it plans to exercise its prosecutorial discretion?" This strikes me as a de facto estoppel argument--what we've been looking for all along--but without the notorious, ineffective word "estoppel," and with the backing of precedent, to boot.

I also think that our case is distinguishable from Washington Public Interest Research Group v. Pendleton Woolen Mills, 11 F.3d 833 (9th Cir. 1993), which is cited in the Union Oil. Id. at 903 n.10. There, the court ruled that a citizen suit was not barred by CWA Section 309(g) because of a prior EPA enforcement compliance action that included an extended compliance schedule. The court concluded that such a bar would not be triggered unless EPA had conducted an administrative penalty action. Id. Again, the holding speaks to whether

citizen suits can be maintained under these circumstances. The holding did not address the issue of whether EPA, which granted the extension, could then turn around and sue for noncompliance of the permit.

U.S. v. Metropolitan District Commission, 23 ERC 1350 (D.Ma. 1985) strikes me as more troublesome, since it does involve a case where EPA is suing, but even here there seem to be points of distinction. First, with regard to the consent orders in question (a 1980 order and a 1994 order, both of which provided for effluent limits below those designated in the permit and both of which were drafted by EPA, the plaintiff in this case), language exists that indicates that the AOs are not meant to replace the permit. Specifically, the 1984 AO states: "compliance with such interim requirements, however, does not amount to compliance with the MDC's permit of the CWA and shall not preclude additional enforcement action by EPA. Any language in the August 9, 1980 Administrative Order which could be read as an authorization for the MDC to violate its permit or the CWA is rescinded."

The court further held that the 1980 AO, like the 1984 AO, did not "allow" the facility to violate its permit. It seems to me that in reaching this result, the court is stretching some. Indeed, the clause quoted above, included in the 1984 AO, indicates quite plainly that according to EPA the 1980 AO could very well have been taken to mean that up until the issuance of the 1984 AO, complying with the 1980 AO's terms, and its terms

alone, even if they differ from the permit, would be okay. As I read the court's opinion, it seems to me that the court is saying that the 1980 AO did not grant the facility the right to "indefinitely violate the limits set by th[e] Permit" (emphasis added). The court focussed on language in the 1980 AO that revealed that it was part of an effort by EPA to get the facility, ultimately, into compliance with the CWA. Thus, the court disagreed with the defendants who, in the court's words, "would remake what was patently a sword to compel compliance into a shield to protect themselves from liability."

In short, it seems that the court is arguing against the view that the 1980 AO indefinitely provided for a legal way to avoid the permit conditions. Nevertheless, while its terms were in effect, the 1980 AO stated that the defendant was to comply with a detailed implementation schedule meant to "bring all discharges of wastewater/stormwater into compliance with the act and with the interim effluent limitation set forth in the 1980 AO." Again, I would urge a narrow reading of the case, one that would grant the facility the right to be in compliance with the 1980 AO while its implementation schedule was in effect, but one that wouldn't protect the facility indefinitely from noncompliance with the permit. Interestingly, the violations noted in the back of the case include violations during the period of the 1980 AO, but the case makes clear that the defendant's self-monitoring reports revealed violations of both the permit and the 1980 AO. This factual finding leaves open the

question of how the court would have ruled on violations of the permit, but not of the 1980 AO.

In our case we have an AO that states plainly that it should not be considered a permit and that the order does not prevent further enforcement by EPA. This language unfortunately opens up the argument that EPA has made its prosecutorial intention clear, at least insofar as it never agreed not to engage in further enforcement. Nevertheless, our facts differ from the case above. In our case we have compliance with the AO, but violation of the newer permit. As mentioned above, it isn't clear that the Metropolitan court would have gone so far as to find liability in this situation and perhaps something could be made of this distinction.

I wonder about another argument altogether. In reading the cover letter to the AO in question, EPA makes it clear to Florida Cities that the AO itself is statutorily issued ("a Section 309 Order"). Therefore, it seems, violation of the order would constitute violation of the CWA. Indeed, such violation is punishable under Section 309. Do you think that we can argue that we are in a "catch 22" situation, where the terms of the AO and the permit conflict, and noncompliance with the AO means violation of the statute, and noncompliance with the permit also means violation of the statute? A weakness in this argument is that compliance with the earlier permit's effluent limitation is not mandated by the AO but, rather, allowed. But the practical ramifications of the provision result in just this paradox.

MEMORANDUM

TO: Don Scroggin and Alex Bullock

FROM: Liz Poliner

DATE: October 13, 1995

RE: Rule 11 and Section 1927 Sanctions

From the group of cases that Lance put together, I've set aside what I feel are the most helpful cases in figuring out whether to raise Rule 11 and/or Section 1927 abuses. My assumption is that we're looking to bring such sanctions against DOJ and possibly Kwan under Rule 11 for not inquiring into the nature of the previous settlements at Barefoot Bay and Carrolwood. Such an inquiry, we would argue, would have conclusively established that these claims were settled for whole periods of time. Moreover, sanctions could be considered for filing the complaint or other papers for an improper purpose under Rule 11 and/or Section 1927, i.e., harassment or vexatious multiplication of the proceedings. With regard to these claims my understanding is that we want to address the fact that DOJ keeps changing the number of claims being brought, and has yet to establish this number conclusively. My assessment that follows is based on these assumptions.

Rule 11 reads in pertinent part as follows:

> (b) Representations to Court. By presenting to the court (whether by signing filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --
>
> 1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or

needless increase in the cost of litigation;

. . .

3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

Under Rule 11, an objective standard is used to determine whether a claim was brought for an improper purpose. U.S. v. Milam, 855 F.2d 739, 742 (11th Cir. 1988). That is to say, the test is not whether the party asking for sanctions feels harassed, but whether the purpose of a given claim was in fact to harass. Lewis v. Anclote Manor Hosp., Inc., 1990 U.S. Dist. LEXIS 20173 (M.D. Fla. 1990). See also Southmark Investment Group 86 v. Turner Dev. Corp., 140 F.R.D. 1, 2 (M.D. Fla. 1991) (holding that Rule 11 (and Section 1927) sanctions were insupportable where "Defendant failed to show that any specific portion of the Plaintiff's complaint, motions or other pleadings was not well grounded in law or fact, [and] that vague allegations of bad faith do not justify the imposition of sanctions"). My sense is that this would be a challenging claim for us to raise, despite the numbers issue, without having direct knowledge as to how the decision to sue Florida Cities was made.

28 U.S.C. Section 1927 reads as follows: "Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct." Section 1927's standard is higher than Rule 11's and such sanctions are usually

reserved for egregious instances of bad faith on the part of counsel. Lewis v. Anclote Manor, 1990 U.S. Dist. LEXIS 20173 (M.D. Fla. 1990). As one court has stated, these sanctions apply to "serious and studied disregard for the orderly process of justice." Overnight Transportation Co. v. Chicago Industrial Tire Co. 697 F.2d 789, 795 (7th Cir. 1983). In other words, some evidence of subjective or objective bad faith must be shown, and such sanctions have been granted in instances where counsel has acted recklessly, such as raising a baseless claim despite notice of its frivolous nature, or showing indifference to statutes, rules, court orders, etc. Vandeventer v. Wabash Natl. Corp., 1995 U.D. Dist. LEXIS 10097 (N.D. In. 1995). See also Maluatea v. Suzuki Motor Co., 987 F.2d 1536, 1541 (11th Cir. 1993) (holding that Section 1927 sanctions were proper where the defendant covered up discoverable material thereby multiplying the proceedings unreasonably and vexatiously).

My sense--though I encourage you to disagree, i.e., there may be facts that I'm not considering--is that in the present case our facts are unlikely to meet this standard of egregious abuse. You might flip through the cases I've marked and see if you agree.

The reasonable inquiry requirement under Rule 11 strikes me as a more hopeful route, but, again, we'd need to be very careful about the facts. The test for a reasonable inquiry by the attorney is objective, i.e., was the inquiry reasonable under the circumstances viewed at the time at which the pleading was filed.

Lewis v. Anclote Manor Hosp., Inc., 1990 U.S. Dist. LEXIS 20173 (M.D. Fla. 1990). Where an attorney's inquiry is based on exclusive reliance on factual representations of the client, the court should consider these factors: 1): the availability of alternate sources of information; 2) the character of the client's knowledge, including whether it is firsthand or derivative in nature; 3) the plausibility of the client's account; 4) the history and duration of the relationship between the attorney and client; and 5) the extent to which the attorney questioned the client. Id.

As this standard applies to the present case, we would need to know whether DOJ relied exclusively on Kwan in bringing the additional claims against Barefoot Bay and Carrolwood. If so, was this reliance reasonable? Or did other evidence, like monitoring reports, provide prima facie support for the claims?

The way I read the timing requirement under Rule 11 is as follows. You must bring such as claim as soon as practicable. Typically, you should not have to wait for a judgment on the merits because if a claim is abusive, you should be able to see that abuse quite plainly without a judge telling you that this is the case. In other words, if we cannot decide whether the claims are abusive or not, if we must concede that there is some debate (however silly or vexing we might view that debate), then we should probably not be thinking about Rule 11 sanctions.

We could justify bringing a sanctions motions now, I think, if such a motion were based on the most recently discovered

evidence (like the Kwan deposition and the penalty assessment documents that you found). Otherwise, if the claim is really based on earlier evidence, the court would have reason to question why we failed to raise such a motion sooner.

MEMORANDUM

TO: FCWC Litigation Team

FROM: Liz Poliner

DATE: October 25, 1995

RE: Summary of Cases Re: Claim Splitting

The following summarizes key cases involving claim splitting, a legal theory that may be useful in light of the recent decision, Borough of Ridgway. (See article, attached. I've had no luck getting hold of this case. Do we know someone who subscribes to ELR?) As used in the environmental area, claim splitting essentially refers to successive actions for additional damages relating to the same underlying harm or violation. The theory is similar to the CWA Section 309(g) argument, and it is a variation on res judicata. (When thinking about this theory, you might review my memorandum of February 28, 1995, "Preclusive Effect of State and Federal Enforcement Actions," which reviews case law involving the Section 309(g) statutory bar, constitutional mootness, res judicata, and double jeopardy.)

In terms of its applicability to our case, a central issue is whether we cam make the factual argument that our current claims are part of an earlier cause of action. To do this we would have to show that the past and present actions involve the same underlying set of circumstances and amount to one act of continuous noncompliance. In addition, the continuous character of the noncompliance must have been known to EPA upon bringing the original suit.

Cases

1. Borough of Ridgway, Pennsylvania (summary based on article in EPA Administrative Law Reporter--don't have case yet)

Held: EPA could not bring separate action (i.e., split claims) for CWA violations based on separate DMR reports because the reports were related to one continuous act of noncompliance. No separate complaints were allowed for "different, but connected, time periods in the same continuous or connected act of noncompliant discharge."

Issue for our case:
1. Do our facts support an argument for one act of continuous noncompliance?

2. Note: The above court rejected res judicata argument that 1990 consent decree between Borough and state barred present action: no identity of claims, since earlier decree involved different NPDES permit. Implication for us: do we have identity of claims?

2. U.S. v. Gurley, 43 F.3d 1188 (8th Cir. 1994)

Held: EPA barred under res judicata or claim preclusion from bringing cleanup action under CERCLA for same mess as earlier CWA action. EPA could and should have brought the CERCLA claims along with the CWA claims.

Rules:
1. res judicata: a final judgment on the merits bars further claims by parties or their privies based on the same cause of action, and such a judgment bars all claims that were or could have been brought.

2. "same cause of action" means "arising out of the same nucleus of operative facts." Are facts related in time, space, origin . . . ?

Issues for our case:
1. Same cause of action?
2. Could current claims have been brought earlier?
3. Does CWA allow for successive actions to recover further response costs like CERCLA, Section 113 (g)(2)? If so, this court would hold no claim splitting. (I don't there is such a provision. See CWA, Section 309.)

3. Prisco v. New York, 1992 U.S. Dist. LEXIS 5273 (April 22, 1992, S.D. NY).

Rule: claim splitting doctrine holds that "later action barred if claim could have been brought in one earlier action"

Same issues for our case as other cases above.

4. U.S. v. Citizens Utilities Co., 1993 U.S.Dist. LEXIS 10340 (July 28, 1993, N.D.Il.)

Held: Earlier proceedings before Il. court re NPDES permit variances did not bar current suit by EPA for enforcement of NPDES permit. Reasons: issues are distinct.

Rule: Res judicata or claim preclusion requires an identity of parties or privies, identity of causes of action, and final judgment on the merits.

Issue for our case: same as above--do we have an identity of claims?

5. Supporters to Oppose Pollution v. Heritage Group, 973 F.2d 1320 (7th Cir. 1992).

Held: Second RCRA suit (brought by citizen's group) was barred under claim preclusion because no new harm was alleged in second suit; the ongoing releases, which were the subject of the second suit, were known at the time of the original claim.

6. Borough of Ridgefield v. U.S. Army Corps of Engrs., 1990 U.S. Dist. LEXIS 17054 (D. N.J.)

Rule: Claim preclusion requires: 1) same wrong (same act and same demand for relief); 2) same theory of recovery; 3) same evidence; 4) material facts alleged are same.

Held: no preclusion because action to challenge permit from Corps not the same as action to overturn state permit. Different acts, and different statutes.

7. U.S. v. Mottolo, 695 F. Supp. 615 (D. N.H. 1988)
Claim splitting as characterized as bringing successive action for additional damages. (CERCLA case)

8. 1902 Atlantic Ltd. v. U.S., 1990 U.S. Cl. Ct., LEXIS 43 (1990)

3 elements of res judicata (claim preclusion)
--same parties
--same events underlying claim or substantial relationship
--did non-moving party have opportunity to fully litigate?

gable waters from a point source without a permit. Battelle admitted, or did not specifically deny, all elements except the discharge of pollutants.

Battelle asserted that (1) "no measurable pollutants" were discharged; (2) the discharge of pollutants, if any, was "in a theoretical or technical sense"; (3) it did not "add any measurable pollutants"; and (4) that what was discharged were "nondetectable quantities of pollutants." Its arguments were based on the company's assertion that any pollutants reflected in its discharge monitoring reports were those found in the intake water from the Halifax River, since its research did not involve the addition of any substance to the intake water; the water from the Halifax River is run through a sand filter, passes through two tanks (one containing concrete pipe samples and another containing metal strip samples), and is discharged back into the Halifax.

The RPO reviewed Battelle's previous permit applications, correspondence and DMRs to determine whether the research activity added pollutants to the Halifax River. The permit applications listed discharges of conventional, unconventional and toxic pollutants, and the supporting laboratory analyses reflected discharges above Halifax River background for chloride, turbidity, specific conductance, COD, cadmium and zinc. Battelle's expired permit contained pH as an effluent limit, with effluent pH levels reported at all times of operation, with and without an NPDES permit. Cadmium and boron, found in Battelle's effluent, were not found in samples of the intake water. Based on this preponderance of evidence, the RPO found that no genuine issue of material fact existed regarding the addition of pollutants by the research facility.

The RPO rejected Battelle's attempts to hypothesize other causes for the pollutants in its effluent (*e.g.*, impact of ocean tides) or to shift the burden to EPA to offer an explanation for any measurable changes. Citing *Natural Resources Defense Council v. Texaco Refining*, 719 F.Supp. 281 (D. Del. 1989), the RPO stated that the CWA legislative history clearly rejected certain defenses, such as sampling error, to enforcement under the CWA based on DMRs.

Having found that the evidence supported the conclusion that Battelle added pollutants to the Halifax River, the RPO did not reach the issue of whether the discharge of toxic pollutants in undetectable quantities constituted the discharge of pollutants within the meaning of the CWA.

Battelle argued that its process was analogous to a dam, did not "add" any pollutants to the navigable waters of the United States, and was thus exempt from NPDES requirements under the holding in *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982). The RPO cited to other case law under similar factual circumstances, where the addition of substances to the water with "the intention of creating a partly chemical, partly physical reaction" brought the activity within the scope of the CWA NPDES requirement. Here, the RPO observed that Battelle intended to test the chemical reaction of sea water with concrete pipe and metal strips. Although the overall objective (reducing pollution from boat paints and surfaces) was "environmentally beneficial," the RPO found that this did not change the strict liability imposed under the CWA.

The RPO thus found that, as a matter of law, Battelle was liable under CWA § 301(a) for discharging pollutants without an NPDES permit. The appropriate civil penalty amount will be determined in a future proceeding.

* * *

CWA; CIVIL PENALTIES; NPDES PERMIT

In re Borough of Ridgway, Pennsylvania, Nos. CWA-III-127 and CWA-III-141 (EPA III RPO Kalkstein June 29, 1995)

Regional Presiding Officer Dismisses One of Two CWA Civil Penalty Cases Against Same Municipality, Finding That EPA Improperly Split Claims Arising Out of a Continuing Series of Violations

On June 29, 1995, Regional Presiding Officer Benjamin Kalkstein found that discharge monitoring reports (DMRs) filed by a municipality conclusively established violations of the municipality's NPDES permit for the dates alleged in two actions filed by Region III, but held that EPA had improperly split claims for continuing violations between the two enforcement actions; as a result of the claim-splitting, the court found that

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the municipality was entitled to summary judgment as to its liability on the second action. The RPO found that at the time the Region filed the first action (which concerned permit violations through April 1994) it had already received the municipality's May 1994 DMR. Under case law, the Restatement (Second) of Judgments, and EPA guidance addressing the issue of claim-splitting in Clean Water Act enforcement cases, the RPO found, the Region should not have initiated the new action where the violations alleged in it could have been raised in the pending action.

The RPO recommended with respect to the second action that the Region withdraw the second administrative complaint with prejudice, and, granting summary judgment to the Region with respect to the first complaint, said that the appropriate amount of civil penalties would be determined in a future proceeding (see document section, *infra*).

Background

The Borough of Ridgway owns and operates a wastewater treatment plant in Elk County, Pennsylvania, which discharges pollutants to the Clarion River under an NPDES permit issued by the Pennsylvania Department of Environmental Resources (PaDER) on July 14, 1993.

EPA Region III filed two administrative complaints against the Borough seeking Class I civil penalties and alleging violations of the NPDES permit's effluent limitations. The first complaint alleged violations in January, February, March and April 1994, while the second complaint alleged violations in May, June, July and August 1994.

Each party moved for summary determination on the issue of liability and accelerated recommended decision in each case pursuant to EPA's Consolidated Rules of Procedure (40 C.F.R. proposed Part 28, § 28.25(a)), and opposed the other party's motion. The Borough filed a second motion for summary determination and accelerated recommended decision, raising issues unique to the second action.

The RPO's decision was based on the unconsolidated proceedings in both civil penalty actions, which involved identical parties and similar issues. The administrative record for the first case was supplemented by an information exchange, and both dockets contained numerous exhibits attached to the parties' motions and responses.

DMRs Are Conclusive Proof of Permit Violations

The discharge monitoring report (DMR) for April 1994 was not in the administrative record at the time the Region filed its motion for summary determination, but was submitted with the Region's second prehearing exchange. The RPO granted the Borough's motion to strike the April 1994 DMR from the record, thus precluding summary judgment on the Borough's liability for violations during that month.

The RPO found that the DMRs on the record were "clear evidence of Respondent's violations of the Permit, executed with required certifications as to accuracy by an authorized representative of the Respondent." Citing EPA and Third Circuit case law, the RPO stated that DMRs are treated as admissions of liability in CWA enforcement proceedings, thus rejecting the Borough's affidavits attempting to undercut the reliability of the DMR data. The RPO was not persuaded that EPA would consider the DMR information as inconclusive based on the Borough's affidavits, despite an EPA inspector's previous comments questioning the Borough's analytical procedures for total suspended solids (TSS) and 5-day carbonaceous biological oxygen demand ($CBOD_5$).

EPA Improperly Split Claims

The Borough argued that EPA had improperly split claims of continuing violations into two complaints, alleging that EPA had already received the May 1994 DMR (covered in the second complaint) when it filed the first complaint (ending with April 1994 violations). EPA did not deny this fact, and the RPO concluded that EPA did have knowledge of the continuing nature of the violations when it filed the first complaint.

The RPO reviewed case law, legal theory (including Restatement (Second) Judgments § 24 (1980)) and EPA policy (Guidance on "Claim-Splitting in Enforcement Actions Under the Clean Water Act", EPA Offices of Water and Enforcement, August 28, 1987) to conclude that the

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"claim-splitting" and "claim-preclusion" doctrines precluded the initiation of a new action involving violations that could or should have been brought with the pending action (the first complaint). Since separate complaints would not be allowed for different effluent limitation violations shown in the same DMR, separate complaints for "different, but connected, time periods in the same continuous or connected act of noncompliant discharge" should not be allowed either. The RPO found that the noncomplying discharge would end, for purposes of triggering a second cause of action, when it became a complying discharge.

The RPO rejected EPA's claim that it could have brought a separate action for each month of noncompliance, since DMRs constitute separable proof. "[W]hen consecutively filed DMRs show substantially similar effluent violations, they are also proving continuous noncompliance, a much larger cause of action than that evidenced by any single DMR."

The RPO was also not persuaded by EPA counsel's arguments about the "cumbersome internal approval process" which discouraged delay in filing the administrative complaint to add additional violations as more noncomplying DMRs were received. Several options were available to EPA, the RPO noted: Class I administrative penalties (as were sought in the two complaints at issue); Class II administrative penalties; or civil judicial penalties.

The RPO found that the Borough was entitled to summary judgment as to its non-liability in the second complaint based on the claim-splitting doctrine, and recommended that the Regional Administrator withdraw the second administrative complaint with prejudice.

Miscellaneous Defenses Rejected

The municipality raised numerous legal and equitable defenses to the remaining claims, which were addressed briefly in the RPO's order.

The RPO found that EPA's letter notifying PaDER of the proposed civil penalty action and requesting the state's input satisfied the statutory requirement for consultation with the state, despite PaDER's lack of response.

The RPO rejected the Borough's argument that the effluent parameters of TSS, $CBOD_5$ and pH were not pollutants, citing *Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 608 F.Supp. 440 (D. Md. 1985) for the proposition that any violation of an NPDES permit is a violation of the CWA.

The Borough's affidavits justifying the pH readings for March 1994 as an allowable excursion under the secondary treatment regulations (40 C.F.R. Part 133) did not raise a genuine issue of material fact, since the NPDES permit made no provision for pH excursions.

Similarly, the RPO rejected the Borough's reliance on the less stringent effluent limitations contained in 40 C.F.R. §§ 133.101(g) and 133.105 for facilities using trickling filter technology, holding that the effluent limits contained in the Borough's NPDES permit were controlling. The RPO also noted that each of the permit violations alleged by the Region in the administrative complaint also would have been violations of the less stringent regulatory effluent limits.

The RPO rejected the Borough's allegations of retaliatory enforcement, holding that the temporal proximity between the first administrative complaint and the Borough's invocation of administrative review rights regarding pretreatment disputes did not create a genuine issue of material fact. The RPO described as a "red herring" the Borough's complaints that EPA's inadequate enforcement against industrial users of its sewage treatment plant had caused the violations underlying EPA's complaint.

The RPO held that joinder of the Commonwealth of Pennsylvania was not required in CWA § 309(g) administrative penalty enforcement actions. The statute did require joinder in civil enforcement actions against municipalities under CWA § 309(b), in order to ensure that state restrictions on municipalities' ability to raise capital were adequately considered by the court. The RPO noted that the statutory cap for administrative civil penalties served the same fiscal restraint purpose as mandatory joinder in civil cases.

The Borough raised the equitable defenses of estoppel, res judicata, laches and unclean hands, relying on a January 1990 consent order and agreement between itself and PaDER. The RPO found that the 1990 consent agreement was not

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sufficiently relevant to the current claims, since there was no identity of claims (it involved a different NPDES permit which predated EPA's current claims by several years), no identity of issues (it involved some, but not all, of the same effluent limitations), and no identity of parties.

The RPO rejected several additional defenses, stating that the facts underlying those defenses might be relevant in establishing a penalty amount. One such fact was the Borough's allegation that EPA affirmatively misled it by inducing investment in an expensive, long-term upgrade of its sewage system without providing federal grant funds, rather than encouraging the Borough to implement a less expensive, short-term fix that would have corrected the violations at issue. Similarly, the Borough's evidence regarding its efforts to comply with the permit and its dispute with EPA's calculation of the number of permit violations might be relevant factors in penalty calculation, but did not relieve the Borough of liability.

* * *

FEDERAL COURT DECISIONS

CLEAN AIR ACT; DETERMINATION OF STATUS AS A "MAJOR SOURCE"

Nat'l Mining Ass'n v. EPA, No. 95-1006 (D.C. Cir. July 21, 1995)

D.C. Circuit Rules EPA Overstepped Authority By Defining "Potential To Emit" To Include Federal but Exclude State and Local Emission Controls; Upholds Aggregation of All Hazardous Emissions Within a Plant in Deciding Whether It Is a "Major Source"

On July 21, 1995, a panel of the D.C. Circuit issued a per curiam opinion ruling upon several challenges to regulatory action of EPA in implementing the 1990 amendments to § 112 of the Clean Air Act. The panel held that EPA had overstepped its authority when it decided that in calculating a facility's "potential to emit" pollutants, pollution controls would only be considered if they were "federally enforceable" controls. The court held that EPA had failed to explain why state and locally imposed emission controls that are actually effective should not be considered in calculating the "potential to emit" toxics.

The panel rejected other challenges to EPA's action. It held that EPA properly chose to aggregate all hazardous air emissions within a plant site, rather than only those emissions from equipment in similar industrial categories, in determining whether the site was a "major source" under § 112. It also held that EPA properly chose to include "fugitive emissions" in a source's aggregate emissions in deciding whether a given site constitutes a "major source."

Background

In 1990, Congress overhauled the Clean Air Act, and among other things it revised § 112, which regulates emissions of hazardous air pollutants. The 1990 Amendments to § 112 established an initial list, which EPA may periodically revise, of 189 hazardous air pollutants. Section 112(c) requires EPA to publish a list of "categories and subcategories" of "major sources" and certain "area sources" that emit these pollutants. Section 112(d) requires EPA to promulgate emission standards for each listed category or subcategory of major sources and area sources.

The Act subjects "major sources" to potentially stricter standards that "area sources." As the panel explained:

> [M]ajor sources must comply with technology-based emission standards requiring the maximum degree of

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MEMORANDUM

TO: Don Scroggin

FROM: Liz Poliner

DATE: October 6, 1995

RE: FCWC: Effect of Blizzard's and Landers' Declaration on Attorney-Client and Work-Product Privileges

You have asked me to research how the declarations of Kathleen Blizzard and Jay Landers, regarding previous settlements between Florida Cities and EPA for alleged violations of the CWA, affect EPA's access to discover other information about these events. Specifically, you have asked me to look into the relationship between these declarations and subsequent use of attorney-client or work-product privilege.

1. Attorney-Client Privilege

A. Definition

The attorney-client privilege protects disclosures that a client makes to his attorney, in confidence, for the purpose of securing legal advice or assistance. Cox v. Administrator United States, 17 F.3d 1386, 1414 (11th Cir. 1994), cert. denied, 115 S.Ct. 900 (1995); In re Hillsborough Holding Corp., 176 Bankr. 223, 241 (M.D. Fla. 1994). More specifically, proper invocation of the privilege requires the following:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is [a] member of a bar of a court, or his subordinates and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d)

> for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

U.S. v. Noriega, 917 F.2d 1543, 1550 (11th Cir.) cert. denied, 498 U.S. 976 (1990).

When this definition is applied to the present situation regarding the settlement discussions between attorneys for Florida Cities and officials from EPA, an initial question is whether any particular communication falls within the narrow scope of the privilege. First, because the client is the holder of the privilege, not the attorney, and because the privilege protects client's communications, the privilege may not extend to any communication by Blizzard or Landers, unless such a communication would force disclosure of (1) Florida Cities' (2) protected communications. Cox 17 F.3rd at 1417.

Moreover, in the present situation the attorney-client privilege may not apply--to the extent that what is being asked of Blizzard and Landers involves inquiry into settlement discussions with EPA--because any communications made in the presence of third parties, rather than between the client and attorney alone, are not privileged. Hillsborough, 176 Bankr. at 241 ("It is well established that a communication between a lawyer and client is confidential only if it is not intended to be disclosed to third persons"). See also In re Consolidated Litigation Concerning International Harvester's Disposition of Wisconsin Steel, 666 F. Supp. 1148, 1156 (N.D. Il. 1987) ("Attorney-client communications made in the presence of third

parties are not privileged unless the third party's presence is consistent with an intention to keep the communications confidential . . . Similar principles apply where attorney-client communications, even though privileged originally, are disclosed to third parties").

B. Waiver

Because the client is the holder of the privilege, only the client can waive the privilege or an attorney acting under the authority of the client. Cox, 17 F.3rd at 1417. An actual waiver of the attorney-client privilege occurs when "a litigant places information protected by the privilege in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would be manifestly unfair to the opposing party." Id. This rule has been characterized by other jurisdictions as the "at issue" doctrine which is operative when "[a] party has asserted a claim or defense that he intends to prove by use of the privileged materials." Pittson Co. v. Allianz Ins. Co., 143 F.R.D. 66, 71 (D. N.J. 1992). Under this rule, privileged information cannot be reached, even when it pertains to matters at issue, unless the party seeking disclosure demonstrates a legitimate need for the privileged information, which includes a showing that there is no less intrusive way to secure the information. See Cox, 17 F.3rd at 1417; Pittson 143 F.R.D. at 71. See also Hillsborough, 176 Bankr. at 238 ("A party waives the attorney-client privilege . . . if that party 'injects' into the case an issue that in fairness

requires an examination of otherwise protected communications").

Generally, a voluntary disclosure of a privileged communication will act as a waiver of "all other disclosures on the same subject." See Wisconsin Steel, 666 F. Supp. at 1153.

As applied to the present situation, these rules suggest that the government could argue that Florida Cities waived any attorney-client privilege relating to statements between the company and its counsel about the settlement discussions when the company chose to place those settlement discussions at issue by raising them as a defense. Florida Cities could respond that raising the settlement discussions--which in and of themselves are not privileged--is not tantamount to waiving privileged disclosures. Moreover, to the degree that the government seeks discovery of any protected disclosures, the government would have to show how it would be prejudiced if it could not reach the information.

It should be noted that the attorney-client privilege applies to written as well as verbal disclosures, to the degree the other elements of the definition are met. For example, memoranda and briefs prepared by a client or attorney which do not reveal information supplied by the client in confidence to the attorney are not protected by the privilege (but may be protected under the work-product doctrine, discussed below). Republication Party, 136 F.R.D. 421, 428 (E.D. N.C. 1991). This means that the privilege does not apply to legal advice which could not arguably reveal a client's confidences, nor does it

extend to the protection of facts underlying any protected communications. Republican Party, 136 F.R.D. at 426; Amarin Plastics, Inc. v. Maryland Cup Corp., 116 F.R.D. 36, 41 (D. Ma. 1987).

In sum, the Blizzard and Landers declarations, and related information, may not be protected by the attorney-client privilege at all, insofar as such communications do not involve protected statements by the client to the counselors. To the degree that some requested information does call for the disclosure of attorney-client confidences, and to the degree there has been any waiver of privileged communications, the test would be whether the degree of prejudice suffered by the government warrants the disclosure of the protected information.

As a last point, it should be noted that the attorney-client privilege is a shield, blocking disclosure of protected information, for the purpose of encouraging full and frank communications between lawyers and clients. It is interpreted narrowly, so as to impede use of it as a sword, i.e., "a defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes." Cox, 17 F.3rd at 1417.

2. Work-Product Privilege

A. Definition

The work-product privilege is separate from and broader than the attorney client privilege. Republican Party, 136 F.R.D. at 429. Work-product does not protect client confidences; rather,

it seeks to shelter the mental processes of the attorney, "providing a privileged area where [s]he can analyze and prepare [her] client's case." Id. Specifically, the doctrine protects documents by or for a party or that party's representative, including his attorney, that reveal mental impressions and legal theories and were prepared in contemplation of litigation. Nadler v. U.S. Dept. of Justice, 955 F.2d 1479, 1491 (11th Cir. 1992) (citing Hickman v. Taylor, 329 U.S. 495, 509-10 (1947)); Auto Owners Ins. v. Totaltape, Inc., 135 F.R.D. 199, 201 (M.D. Fla. 1990).

Fed. R. Civ. Pro. 26(b)(3) governs the disclosure of work product. The rule states:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including [his] attorney . . .) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosures of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Rule 26(b)(3).

This rule has created two kinds of work-product. First, "fact work-product" consists of "documents and tangible things . . . prepared in anticipation of litigation or for trial" that do not contain mental impressions, conclusions, or opinions of

the attorney. U.S. v. Pepper's Steel & Alloys, Inc., 132 F.R.D. 695, 697 (S.D. Fla. 1990). The party seeking such discovery must meet Rule 26's twofold burden of showing a "substantial need" and "undue hardship" in obtaining the materials. Id; Castle v. Sangamo Weston, Inc., 744 F.2d 1464, 1466 (11th Cir. 1984); In re Grand Jury Proceedings, 73 F.R.D. 647, 653 (M.D. Fl. 1977). Nevertheless, the party resisting discovery bears the burden of demonstrating the applicability of the work-product doctrine in the first place. Auto Owners, 135 F.R.D. at 201. See also Republican Party, 136 F.R.D. at 429 (holding that the party seeking to assert the doctrine as a bar to discovery has the burden of establishing that the doctrine is applicable by establishing as to each document all the elements that trigger the protection). Facts gathered from the documents are not protected as "fact work-product." As Wright & Miller have stated, "[t]he courts have consistently held that the work product concept furnishes no shield against discovery . . . of the facts that the adverse party's lawyer has learned, or the persons from whom he has learned such facts, or the existence of nonexistence of documents, even though the documents themselves may not be subject to discovery." Federal Practice and Procedure: Civil, Section 2023.

Second, there is work-product consisting of "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Pepper's Steel, 132 F.R.D. at 698. "Opinion work-

product" is absolutely immune from discovery. Id. See also, In re Grand Jury, 73 F.R.D. at 653. Compare, Republican Party, 136 F.R.D. at 429 (stating that opinion work-product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances). Opinion work-product includes the writings of an attorney because these are her mental impressions. Id.

Under the work-product doctrine it seems likely that Blizzard and Landers could assert opinion work-product to the degree that information is being sought that includes their mental impressions, conclusions, opinions, or legal theories. Moreover, Florida Cities may find it possible to assert factual work-product regarding tangible items prepared in preparation of litigation, shifting the burden to the government to demonstrate prejudice and substantial need. An argument that Florida Cities could raise, if plausible, is that the requested documents would reveal no new facts than the declarations have already provided and therefore no prejudice exists.

Documents prepared for litigation other than the present action would still be protected under the doctrine. Republican Party, 136 F.R.D. at 430 (holding that work-product documents do not lose their protection in subsequent and unrelated litigation); In re Grand Jury, 73 F.R.D. at 653 ("It is not necessary to have foreseen the specific litigation in progress at the time the materials were prepared. . . . If they were prepared in anticipation of some likely litigation, or as an integral

preparation for trial, they are immune from discovery absent the requisite two-fold showing").

B. Waiver

The waiver doctrine for work-product provides that voluntary disclosure of work-product to an adversary waives the privilege. In re Steinhardt Partners, L.P., 9 F.3d 230, 235 (2nd Cir. 1993) (citing U.S. v. Nobles, 422 U.S. 225 (1975), and holding that a defendant's voluntary pre-discovery submission of a memorandum to the SEC, discussing the facts and issues in the case and relevant legal theories, waived a later claim of work product privilege when the memorandum was sought in discovery). The rationale behind this holding is that once a party allows an adversary to share the otherwise privileged thought processes of counsel, the need for the privilege disappears. Id. See also Florida House of Representatives v. U.S., 961 F.2d 941, 947 (11th Cir. 1992) (holding that, in the context of a FOIA action, the government did not waive privileged census data when it included in a public notice census estimates and the reasoning behind the estimates because the notice was not tantamount to actually revealing the privileged data).

In the present case, it is my understanding that we have not disclosed any tangible items to the government regarding the settlement except for the declarations. Therefore, our case can be distinguished from Steinhardt and likened to Florida House of Representatives. That is to say, to the degree that any notes or

other documents do in fact contain attorney work-product, we can still argue that these products fall under the privilege as articulated in Rule 26(b)(3). We would argue that merely referencing notes, as Blizzard does in her declaration, is not the same thing as voluntarily disclosing such notes and creating a waiver of the privilege. Moreover, Florida Cities could argue that to be required to make such a disclosure would be tantamount to forcing disclosure of Blizzard's thought processes, impressions, etc., which are immune from discovery absent a waiver.

Exhibit_____(GHB-55)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS INC., Defendants.	)	CIVIL ACTION NO.: 93-281-CIV-FTM-21

DEFENDANT FLORIDA CITIES WATER COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND REQUEST FOR ORAL ARGUMENT

Defendant Florida Cities Water Company ("Florida Cities") hereby moves, pursuant to Fed. R. Civ. P. 56, before this Court for an order granting summary judgment on its behalf as to the allegations contained paragraphs 16, 17, 18, 19, 20, 21, 22, 23, 28, 30, and 45 of Plaintiff's Second Amended Complaint. No genuine issues of material fact exist as to these allegations and therefore, Florida Cities is entitled to summary judgment as a matter of law. The grounds for this motion are set forth in the accompanying memorandum. Defendant contends that genuine issues of material fact exist regarding all remaining allegations of Plaintiff's Second Amended Complaint and these issues should be reserved for a full trial on

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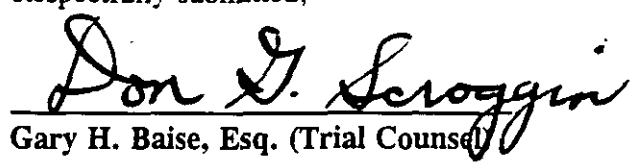
the merits. Florida Cities respectfully requests that this Court schedule oral argument on this Motion and estimates 45 minutes per side.

Respectfully submitted,



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September 11, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS INC., Defendants.	)	CIVIL ACTION NO.: 93-281-CIV-FTM-21

Florida Cities Water Company's Memorandum in Support of Its Motion for Partial Summary Judgment and in Response To Plaintiff's Motion for Partial Summary Judgment

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Florida Cities Water Company's Memorandum in Support of Its Motion for Partial Summary Judgment and in Response To Plaintiff's Motion for Partial Summary Judgment

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS INC., Defendants.	)	CIVIL ACTION NO.: 93-281-CIV-FTM-21

Florida Cities Water Company's Memorandum in Support of Its Motion for Partial Summary Judgment and in Response To Plaintiff's Motion for Partial Summary Judgment

Plaintiff has brought these actions alleging Clean Water Act ("CWA") violations at three small wastewater treatment facilities owned and operated by Florida Cities Water Company ("Florida Cities"): Barefoot Bay, Carrollwood, and Waterway Estates.[1] Although these facilities had state authorizations to discharge treated effluent at all times relevant to these causes of action, this case addresses certain alleged violations of the federal Clean Water Act, none of which involved any evidence of environmental harm. This Memorandum is filed in support of Florida Cities' Cross-Motion for Partial Summary Judgment. It is also filed in response to Plaintiff's Motion for Partial

[1] Plaintiff commenced this action on October 1, 1993, alleging violations of the Clean Water Act at Florida Cities' Waterway Estates sewage treatment facility. On March 30, 1995 Plaintiff added two additional Florida Cities's sewage treatment facilities, Barefoot Bay and Carrollwood. However, the issues were not fully joined as to these facilities until the Court's June 22, 1995 Order.

Summary Judgment, which is premature because it was filed before Florida Cities filed its Answer to the Second Amended Complaint, before Plaintiff produced any documents relating to Barefoot Bay and Carrollwood, and before Plaintiff designated and produced its key Rule 30(b)(6) witness for Waterway Estates and any of its Rule 30(b)(6) witnesses for Barefoot Bay and Carrollwood. Further, Plaintiff's summary judgment motion is premature because Plaintiff is unable to state the number of alleged violations with which Florida Cities is being charged. It is fundamental that Florida Cities has a right to know the charges it faces before it can respond meaningfully or present a defense.

The facts revealed during discovery regarding Barefoot Bay and Carrollwood demonstrate that Plaintiff has failed to review key documents in its own files or talk to its own employees with knowledge of the facts at issue. These documents and key employees' testimony demonstrate that Plaintiff failed to conduct a competent preliminary review and factual inquiry before filing this action. As specified in Florida Cities' Motion for Summary Judgment, the facts established through discovery demonstrate that no genuine issue of material fact exists as to a select number of these alleged violations, for which the Court should find no liability: discharge without a permit at the Barefoot Bay and Carrollwood wastewater treatment facilities (barred by 33 U.S.C. § 1319(g) (CWA § 309(g)), violations of the Administrative Order at Barefoot Bay, and permit violations at Barefoot Bay, Carrollwood, and Waterway Estates. In spite of the Environmental Protection Agency's ("EPA") admission that it has no evidence that Florida Cities' alleged actions caused any environmental harm and heedless of the facts contained in its own files and the testimony of its own witnesses,

Plaintiff continues to pursue multi-million dollar penalties in this action. Accordingly, Florida Cities is entitled to judgment as a matter of law as to these causes of action. Florida Cities' discovery has also established that the remaining claims present genuine issues of material fact which should be resolved at a trial on the merits of these issues.

I. STATEMENT OF THE FACTS

Florida Cities, a Florida corporation, owns and operates both drinking water treatment and wastewater treatment facilities serving communities in central and south Florida.[2] Florida Cities is regulated by local, state, and federal environmental authorities. At all times relevant to these actions, Barefoot Bay, Carrollwood, and Waterway Estates had state authorizations to discharge treated effluent and substantially met all applicable water quality standards and effluent limitations. All of the rates which Florida Cities charges its customers are regulated by the Florida Public Service Commission, except for the service areas located in Sarasota and Hillsborough Counties, in which the respective county commissions regulate rates.

II. LEGAL ANALYSIS

A. Standard for Summary Judgment

Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing

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[2] A more complete statement of the facts regarding each facility is presented in the discussions of the specific facilities, *infra* part III.

law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party bears the burden of establishing the absence of dispute over material facts. Reynolds v. Bridgestone/Firestone, Inc., 989 F.2d 465, 469 (11th Cir. 1993). The Court must view the evidence presented in the light most favorable to the non-moving party. Clark v. Coats & Clark, Inc., 929 F.2d 604, 606 (11th Cir. 1991). Reasonable doubts about material facts are to be resolved in favor of the party opposing the motion for summary judgment. Reynolds, 989 F.2d at 469. If the moving party fails to meet its burden of establishing no genuine issue of material fact, its summary judgment motion will be denied. United States v. Four Parcels of Real Property, 941 F.2d 1428, 1437 (11th Cir. 1991).

Plaintiff is seeking summary judgment on "all violations alleged in its Revised Amended Complaint."[3] However, Plaintiff's Second Amended Complaint fails to state a specific number of CWA violations. Plaintiff's key witness, EPA environmental engineer Kenneth Kwan, calculated the number of alleged violations at issue in this case.[4] In its Answers to Defendant's First Interrogatories, served on April 28, 1995,[5]

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[3] Pl.'s Mot. for Summ. J. at 4.

[4] Mr. Kwan has verified Plaintiff's Answers to Defendant's Interrogatories, has filed a "Declaration" in support of Plaintiff's Motion for Summary Judgment, has been listed as a person having knowledge of the facts surrounding this lawsuit, and has testified as one of Plaintiff's Rule 30(b)(6) witnesses. However, Mr. Kwan admits that he has no personal knowledge of the facts surrounding the CWA 309(g) settlements for Barefoot Bay and Carrollwood and made no effort to educate himself prior to attempting to calculate the number of violations at issue. See discussions of Barefoot Bay's and Carrollwood's alleged unpermitted discharges, infra.

[5] See Exhibit 1 (attached).

Plaintiff states that there are a total of 4,173 violations at issue. Subsequently, Plaintiff submitted Mr. Kwan's Declaration, dated June 15, 1995, in support of its Motion for Summary Judgment. In contrast to the Answers to Defendant's First Interrogatories, the Kwan Declaration and the attached tables reference, without any explanation for the discrepancy, 2,991 violations.[6] At his August 29-30, 1995 deposition (taken five months after the filing of the Second Amended Complaint and almost three months after the filing of Plaintiff's Motion for Summary Judgment), Mr. Kwan testified that Plaintiff is "still fine tuning the number."[7] Mr. Kwan further testified on August 29, 1995 that the final number of violations would not be known for "another month."[8]

In his testimony, Mr. Kwan stated:

> Q (By Mr. Scroggin) Are those recalculations still underway or have they finally reached a steady state constant value for each of the vio-- for each of the three facilities?
> Mr. Quinn: Objection.
> A We are still fine tuning the number.
> Q (By Mr. Scroggin) Do you have any estimate of when you think you'll know how many violations there were at these three facilities?
> Mr. Quinn: Objection.
> A I don't know; another month. We are still adding the numbers up.[9]

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[6] On its own, this unexplained change would reduce the maximum penalty Plaintiff calculates for alleged violations from $104,325,000 to $74,775,000. Compare the tables found in Defendant's Ex. 1 (drafted by Mr. Kwan) with Plaintiff's Ex. C, F, and I (also drafted by Mr. Kwan and attached to his Declaration).

[7] Kwan Dep. at 151 l. 20; See Exhibit 2. See also Exhibit 45 (Condensed version of Kwan Video Deposition, with videotape excerpts marked) and Exhibit 46 (Videotape of Excerpts of Kwan Deposition).

[8] Kwan Dep. at 151 l. 25. See Exhibit 2 (attached). See also Exhibit 45 (Condensed version of Kwan Video Deposition, with videotape excerpts marked) and Exhibit 46 (Videotape of Excerpts of Kwan Deposition).

[9] Id. at l. 15-152 l. 1. See Exhibit 2 (attached). See also Exhibit 45 (Condensed (continued...)

Given the still-evolving status of Plaintiff's calculations of the violations that are the subject of Plaintiff's motion, Florida Cities contends that Plaintiff's Motion for Summary Judgment is premature.

B. The Clean Water Act

The federal Clean Water Act prohibits discharge of pollutants to waters of the United States unless authorized by a federal NPDES permit. 33 U.S.C. §§ 1311(a), 1342. In states such as Florida, where EPA issues and enforces the NPDES program, each permit requires state certification that the permit will fully satisfy state water quality standards (which EPA independently approves). NPDES permits usually contain, among other requirements, limitations on the discharge of specific pollutants. For a full discussion of the permitting and enforcement structure, see generally, U.S. v. CPS Chem. Co., 779 F. Supp. 437 (E.D. Ark. 1991).

III. CLAIMS AT ISSUE

A. Barefoot Bay

1. Alleged Unpermitted Discharges

Plaintiff alleges that Florida Cities discharged pollutants without a federal NPDES permit from April 1, 1990 until November 1, 1991 at its Barefoot Bay facility, located in Brevard County. This allegation has been made even though the discharge of treated effluent from the Barefoot Bay facility was authorized by the state and was already treated to a level that would remove more pollutants than would be required by the

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[9](...continued)
version of Kwan Video Deposition, with videotape excerpts marked) and Exhibit 46 (Videotape of Excerpts of Kwan Deposition).

federal NPDES permit that was finally issued.[10] Florida Cities acknowledges that it did discharge without a federal NPDES permit into the Sebastian Creek during this period. However, this matter was settled by the Consent Agreement and Order Assessing Administrative Penalties No. CWA-IV 91-538 ("Consent Agreement") -- a conclusion supported by EPA's own administrative enforcement files and witnesses. The CWA specifically precludes EPA from seeking judicial or other enforcement of violations that have already been settled in EPA administrative enforcement proceedings that include payment of an administrative penalty. Under the CWA:

> Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violations-
>
> . . .
>
> > iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,
>
> shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

33 U.S.C. § 1319(g)(6) (CWA § 309(g)(6)). Because EPA's administrative record, as well as the testimony of EPA and Florida Cities' witnesses, demonstrate that the issue of discharge without a permit was for the entire period at issue, no genuine issue of material fact exists, and Florida Cities is entitled to summary judgment as a matter of law on Paragraph 16 of the Second Amended Complaint.

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[10] See Pl.'s 30(b)(6) Dep. [Herwig] at 106 l. 17 - 109 l. 24 (hereafter "Herwig"). See Exhibit 3 (attached). The Barefoot Bay's level of treatment was superior to the standards of secondary treatment that were imposed in the final NPDES permit.

On September 14, 1989, EPA enforcement officer Roy Herwig visited Barefoot Bay and discovered that, although authorized to discharge into the Sebastian Creek by the Florida Department of Environmental Protection ("FDEP"), the facility did not have an NPDES permit.[11] On September 20, 1990, EPA issued an Administrative Order ("AO 90-106"), drafted by Mr. Herwig, that authorized discharge from the Barefoot Bay facility and established interim effluent limits for that discharge until a federal NPDES permit could be issued. On July 12, 1991, EPA initiated an enforcement action to address the years of discharge without a federal NPDES permit by this facility by issuing a Notice of Show Cause for discharge without an NPDES permit for "the period from September 14, 1989 until the present."[12] The Show Cause meeting was held on August 9, 1991.[13] Following this Show Cause meeting, Mr. Herwig drafted the EPA's Administrative Complaint and the Consent Agreement with the accompanying "Notes on the Proposed Penalty Assessment" ("Notes").[14]

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[11] Inspection Report of September 14, 1989 by Roy Herwig. See Exhibit 4 (attached).

[12] The administrative record in this case for Barefoot Bay consists of (1) AO 90-106 (attached as Exhibit 5), (2) Notice of Show Cause (attached as Exhibit 6), (3) Notes on the Proposed Penalty Assessment (attached as Exhibit 7), (4) Administrative Complaint (attached as Exhibit 8), and (5) Consent Agreement and Order Assessing Administrative Penalties (attached as Exhibit 9).

[13] Herwig at 159 l. 2-18 (attached as Exhibit 10).

[14] Id. at 155 l. 10 (attached as Exhibit 11).
See Ex. 7. The Notes are prepared by the enforcement officer and are routed along with the Complaint for approval from the chain of command at EPA. The Notes then become part of the administrative record. EPA, Enforcement Management System (attached as Exhibit 12), Region IV 456 (1990) (hereafter "EMS"). The Notes provide the underlying justification of an enforcement officer's decision to penalize a company. In practice, the Notes are the only document that provides detailed analysis of EPA's penalty considerations. The Notes are prepared in every administrative penalty action.

These Notes outlined the nature of Florida Cities' alleged violations at Barefoot Bay, reviewed the statutory mitigation factors contained in CWA § 309(g)(3), and proposed a $6,000 penalty to settle the alleged violations of discharge without an NPDES permit. EPA issued an Administrative Complaint on September 25, 1991 and entered into the final Consent Agreement on November 6, 1991. The NPDES permit for Barefoot Bay became effective on November 1, 1991, one week prior to these negotiations.[15]

A thorough review of the complete administrative record establishes that both parties intended to settle all violations for discharge without an NPDES permit at Barefoot Bay, and that the Consent Agreement with its attached Notes did in fact settle all such matters, even though the Consent Agreement specifically references only the day of EPA's inspection, September 14, 1989. Plaintiff's Rule 30(b)(6) witness, Roy Herwig, testified that he was the author of the Notes, which are routinely prepared by the responsible EPA enforcement officer to explain the basis for EPA's proposed penalty amount.[16] Mr. Herwig was also the lead negotiator for EPA during the settlement negotiations, including the Show Cause hearing.[17] He testified that the Notes were reviewed by an EPA staff counsel;[18] that the purpose of the Notes, which

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[15] Florida Cities had originally applied for a permit on February 28, 1990 (fully 19 months earlier). When asked, EPA cannot explain why the Agency took 19 months to issue this permit, nor can EPA explain why or how the Agency lost the permit application after acknowledging in writing its receipt and completeness. EPA's losing the permit application required Florida Cities to start the entire permitting process over again on June 6, 1990, by submitting still another application.

[16] See Herwig Dep. at 156 ll. 16-18 (attached as Exhibit 13).

[17] Id. at 159 ll. 11-14 (attached as Exhibit 10).

[18] Id. at ll. 19-25 (attached as Exhibit 10).

physically accompany the proposed Consent Agreement when the senior EPA official signs the proposed Consent Agreement, "is to memorialize what information we can for the public, related to how we disposed of a certain case so that six years later somebody will say why did you do this"[19]; and that all the statements in the Notes were correct.[20] In the Notes EPA carefully reviewed Florida Cities' actions in light of the statutory mitigation factors under CWA § 309(g)(3)[21] and found:

> Respondent operated a mobile home community known as Barefoot Bay which discharged treated wastewater to a drainage canal leading to the north prong of the Sebastian Creek, a water of the United States, without the benefit of a valid NPDES permit for the discharge during the period from 1985 to present.
>
> In September 1991, an NPDES permit was issued to Respondent. The effluent limitations contained in the permit are limitations that the facility would have been able to meet since 1985. Thus, the environmental harm was not any greater than if Respondent had had an NPDES permit.[22]

Through the use of its economic benefit computer model ("BEN"), EPA measured the benefit gained by Florida Cities from its failure to obtain an NPDES permit. The BEN model determined that Florida Cities' total economic gain from noncompliance

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[19] Id. at 155 ll. 11-20 (attached as Exhibit 11).

[20] Id. at 156 l. 19-157 l. 2 (attached as Exhibit 13).

[21] Mitigation factors which the CWA requires EPA to consider in determining the amount of any administrative penalties are: (1) the nature, circumstances, extent and gravity of the violation, or violations, and with respect to the violator, (2) ability to pay, (3) any prior history of such violations, (4) the degree of culpability, (5) economic benefit or savings (if any) resulting from the violation, and (6) such other matters as justice may require. 33 U.S.C. § 1319(g)(3); CWA § 309(g)(3).

[22] Notes at 2.

during the period September 14, 1989 to September 11, 1991 was $73.00.[23] Under the category titled "Other matters that justice may require," EPA noted:

> The enforcement team considered the fact that Respondent has been working closely with the Florida Department of Environmental Regulation since 1985 to develop a solution to the problem. Since being contacted by EPA, Respondent has been very cooperative. Consideration was given to calculating liability on a daily basis beginning with the initial overflow in 1985. However, since the respondent had been working with DER and since the effluent being discharged would have met the limitations contained in the permit now being issued by EPA, it is believed that the true violation was limited to that of not applying for an NPDES permit.[24]

The Notes' "Summary" states "that the assessed penalty of $6,000 represents a fair and equitable application of the factors identified in CWA § 309(g)(3) of the Act in this case."[25] Mr. Herwig testified that he believed that some monetary fine was appropriate because "[Florida Cities] had been in noncompliance with the Clean Water Act since 1985 in that [it] did not have a permit" for discharges from the Barefoot Bay facility.[26] Read in its entirety, the administrative record shows that EPA considered all the days of discharge without an NPDES permit commencing in 1985 and ending on November 1, 1991.[27] Even after considering all these years of discharge without an

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[23] Id.; Herwig at 151 l. 9-152 l. 2 (attached as Exhibit 14).

[24] Barefoot Bay Notes at 3 (emphasis added) (attached as Exhibit 7).

[25] Id.

[26] Herwig at 148 l. 25-149 l. 1 (attached as Exhibit 15).

[27] Michael Hom, Mr. Herwig's supervisor in 1991, stated that it is EPA's general policy to settle all violations of which EPA is aware at the settlement of administrative enforcement actions. See Dep. of Michael Hom at 46 ll. 16-19 (attached as Exhibit 16). Not only did EPA have concrete evidence of discharges on virtually all days between September 14, 1989 and November 6, 1991 (the date of the settlement), but the Agency also had the DMRs for AO 90-106, which disclosed exceedances of the AO's interim effluent limitations.

NPDES permit at Barefoot Bay, the Notes explain that EPA "believe[d] that the assessed penalty amount of $6,000.00 represent[ed] a fair and equitable application of the factors identified in § 309(g)(3) of the Act, to this case."[28]

Plaintiff argues that because the Consent Agreement is analogous to a contract, this Court may not look beyond the four corners of the document, no matter what the two parties intended or understood they were settling and no matter what explanatory documents accompanied the Consent Agreement when it was signed.[29] This argument, however, ignores the language of the Consent Agreement itself and the requirements of EPA's Enforcement Management System ("EMS").[30] The introductory paragraph to Section III of the Consent Agreement states that EPA has

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[28] Notes at 3.

[29] Plaintiff argues that this matter has been addressed in the Court's Order denying Florida Cities' Motion for Partial Summary Judgment on the Waterway Estates facility. Plaintiff is in error. This issue was not addressed in Florida Cities' motion or in the Court's Order of June 21, 1991. Plaintiff raised this "contract defense" in its response to Florida Cities' Motion to Strike Paragraphs 15 through 39 of Plaintiff's Amended Complaint. In a companion order to the above referenced order of June 21, 1991, the Court denied Florida Cities' Motion to Strike. However, the Court's ruling was in the context of a Rule 12(f) motion on the sufficiency of the pleading. At that time, Florida Cities had not yet answered these allegations, EPA had not produced the administrative records for Barefoot Bay and Carrollwood, and no EPA witnesses relevant to these facilities had been deposed. Although EPA's current practice is to attach a copy of the entire administrative record with the Consent Agreement and Order Assessing Administrative Penalties, Florida Cities had no knowledge of the Notes On Proposed Penalty Assessment until EPA produced these documents in July, 1995, after the Court's order denying Florida Cities' Motion to Strike. Summary judgment is appropriate only after Defendant has had an opportunity to conduct discovery into important factual matters. Plaintiff's contention that it is entitled to summary judgment in the context of a Motion to Strike is therefore without merit.

[30] The EMS is an internal manual published by EPA. It provides guidelines to use in administering a proper penalty for a particular violation or set of violations. 50 Fed. Reg. 34648 (1985).

"taken into account" the factors enumerated in CWA § 309(g)(3). The only analysis of these factors in the administrative record is in the Notes, which demonstrate that the EPA's intention was to settle all outstanding violations for discharge without a federal NPDES permit. Mr. Herwig testified that although he referenced the September 14, 1989 date because that was the only date on which he personally witnessed a discharge at Barefoot Bay,[31] he believed, and EPA fully understood, that the facility was discharging on a daily or near-daily basis.[32] At the end of the negotiations, Mr. Herwig believed that the issue of discharge without an NPDES permit was fully resolved and "none of this would be revisited."[33] Mr. Herwig's understanding is bolstered by the affidavit of Kathleen L. Blizzard, counsel for Florida Cities at the Show Cause meeting. Ms. Blizzard states that at the end of the Show Cause meeting it was her understanding that all of the "discharge without a permit" violations were resolved and that this was EPA's understanding as well.[34] These facts suggest the clear inference that neither Mr. Kwan nor any member of the litigation team ever discussed with Mr. Herwig the facts of the Barefoot Bay settlement. In light of the complete administrative record, any other reading of the documents is unreasonable.

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[31] Herwig at 152 l. 3-153 l. 3 (attached as Exhibit 14).

[32] Id. at 54 ll. 7-11 (attached as Exhibit 17).

[33] Id. at 90 ll. 13-14 (attached as Exhibit 18).

[34] Kathleen Blizzard, counsel for Florida Cities at the Barefoot Bay settlement, states in her Declaration that "it was my understanding that by execution of the Consent Agreement and Order Assessing Administrative Penalties . . . and payment of the agreed $6,000 penalty, EPA intended to resolve the matter of enforcement by EPA for the discharge until an NPDES permit could be issued." See Declaration of Kathleen Blizzard of September 8, 1995 (attached as Exhibit 19).

From a practical perspective, Plaintiff's "one-day" theory would result in the expenditure over several months of hundreds of man-hours and thousands of dollars by both EPA and Florida Cities to resolve only one day, out of several hundreds of days of discharge without an NPDES permit. According to Plaintiff's argument, once the single day's discharge without a permit on September 14, 1989 was resolved, EPA might have initiated the whole administrative enforcement process again and again for each sequential day of discharge, even though the parties were fully aware of all the days of discharge at issue. Because the time period between the drafting of the Administrative Complaint and the actual signing of the Consent Agreement for the first day consumed more than one month, Plaintiff's theory would require EPA to spend a minimum of several years to resolve all of the days of discharge without an NPDES permit, by which time the statute of limitations (5 years) would have expired.

Plaintiff's characterization of the facts and the administrative process is both impractical and unrealistic. Significantly, none of the EPA officials deposed can remember, despite their many years of experience with such matters, a single instance in which EPA has ever engaged in such a sequential resolution of daily violations known to all parties participating in the settlement. To the contrary, the administrative record for Barefoot Bay shows that both parties were fully aware of and considered all of the hundreds of days of violation in settling on the $6000 penalty. Read together, the administrative record, Mr. Herwig's testimony, and Ms. Blizzard's affidavit show that all of these violations were fully settled.

The principal support for Plaintiff's case is provided by the analysis, calculations, and testimony of Mr. Kwan. However, Mr. Kwan admits that he has no personal

knowledge of the settlements of "discharge without a permit" violations at Barefoot Bay.[35] Mr. Kwan was not the responsible enforcement officer at the time of the settlement.[36] The "discharge without a permit" violations were negotiated and settled between Florida Cities and Mr. Herwig's EPA team on November 6, 1991. However, Mr. Kwan has not inquired into Mr. Herwig's intent.[37] Although he has no personal knowledge of the events at issue, Mr. Kwan summarily rejected EPA's official determination in the Notes for the Barefoot Bay settlement and failed to consult with any member of EPA's negotiating team.

Mr. Kwan's surprising failure to verify his reinterpretations of the official EPA settlement documents constitutes a glaring lack of due diligence and borders on recklessness. When asked at his deposition why he failed to make any efforts to reconcile EPA's official determinations with his own personal interpretation of the facts surrounding the Barefoot Bay negotiations, Mr. Kwan testified:

> Q (By Mr. Scroggin) Did it occur to you to have a conversation with Mr. Herwig regarding his opinion since he was the enforcement officer that drafted this document and negotiated the settlement for EPA?
> Mr. Quinn: Objection.
> A Mr. Herwig is not on the litigation team.[38]

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[35] Pl.'s 30(b)(6) Dep. [Kwan Vol. I] at 37 ll. 15-18 (hereafter "30(b)(6) Kwan") (attached as Exhibit 20).

[36] Roy Herwig had enforcement oversight of Barefoot Bay from late 1989 to early 1992. See Herwig at 14 l. 22 (attached as Exhibit 21); Deposition of Ken Kwan at 242, ll. 12-13 (attached as Exhibit 22). See generally Kwan Dep. at 374 ll. 20-25; see also Id. at 375 (attached as Exhibit 23).

[37] Kwan Dep. at 242 ll. 5-13 (attached as Exhibit 22), 259 l. 11 - 260 l. 21 (attached as Exhibit 24).

[38] Kwan Dep. at 262 ll. 4-9; see generally Kwan Dep. at 254-259, 263-267, 281- (continued...)

It is fundamental that Plaintiff base its allegations on known facts, not unsupported conjecture by Mr. Kwan four years after events in which he played no part. Mr. Herwig, not Mr. Kwan, is the enforcement officer for Barefoot Bay with knowledge of the violations and the settlement. Mr. Kwan's own testimony demonstrated that he is not qualified to determine whether the "discharge without a permit" violations had been settled, because he was not present at the settlement negotiations and he has made no inquiries of the persons who were present. Mr. Kwan's conclusions directly contradict findings in EPA's own administrative record and are not supported by the administrative record or any objective source.[39]

Plaintiff has failed to present credible evidence to refute EPA's own administrative record. Accordingly, pursuant to CWA § 309(g)(6), no genuine issue of material fact exists as to the allegations contained in Paragraph 16 of Plaintiff's Second Amended Complaint, and Florida Cities is entitled to judgment as a matter of law as to the 579 violations for discharge without a federal NPDES permit at Barefoot Bay.

2. **Alleged Violations of Barefoot Bay's AO 90-106**

Plaintiff has erroneously based this action for violations of a CWA § 309(a) order on the Administrator's authority in CWA § 309(b).[40] Significantly, neither CWA § 309(b) nor any other CWA section authorizes either administrative or judicial

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[38](...continued)
287, 289-290 (all attached as Exhibit 25). See also Exhibit 45 (Condensed version of Kwan Video Deposition, with videotape excerpts marked) and Exhibit 46 (Videotape of Excerpts of Kwan Deposition).

[39] See Kwan Dep. at 95 l. 10, 97 ll. 4-9, 99 l. 10, 103-107, 235-245, 250-251 (all attached as Exhibit 26).

[40] Second Amended Complaint ¶ 1.

enforcement of violations of § 309(a) AOs. In spite of this lack of statutory authority, this complaint includes numerous allegations of violations of Barefoot Bay's AO 90-106. Plaintiff's novel theory alleging liability for the AO violations would result in the double counting of violations at this facility.[41]

In general, an NPDES permit acts as a "shield" to protect a discharger from liability as long as the discharges conform to the requirements and limitations contained in the permit. 33 U.S.C. § 1342(k).[42] The Eleventh Circuit has confirmed that individually enforceable effluent limitations may be imposed on a discharger only through the NPDES permitting process:

> As to effluent limitations, EPA can only authorize discharge to [surface waters], and could only impose an effluent limitation on a discharger, through the NPDES permitting process.

City of Sarasota v. EPA, 813 F.2d 1106, 1109 (11th Cir. 1987).[43] In Paragraphs 18-23 of the Second Amended Complaint, the United States has alleged effluent limitation violations, not of Barefoot Bay's NPDES permit, but of Barefoot Bay's administrative order.

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[41] These violations are the same alleged violations for discharge without a permit discussed immediately above.

[42] See also Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 1993 U.S. App. LEXIS 35911, 24 Envtl. L. Rep. 20122 (2d Cir. 1993).

[43] EPA must subject a draft NPDES permit to rigorous public and internal review before issuing a final permit. See 40 C.F.R. 122.1(e), 124.1 et seq. As part of this process, the permittee and members of the public have the opportunity to comment on the draft permit and any proposed effluent limitations it contains. Opportunity for notice and comment protects the rights of every interested party. The statute provides an opportunity for a party to appeal an effluent limitation contained in a permit. See 33 U.S.C. § 1369(b); CWA § 509(b).

As a complement to the NPDES system, administrative orders ("AOs") are "enforcement tools"[44] used to bring a discharger back into compliance with the CWA. An AO is a like a "sword." See United States v. Metropolitan Dist. Comm'n., 23 Env't Rep Cas. (BNA) 1350, 16 Envtl. L. Rep. 20621 (D. Mass. 1985). Therefore, before EPA issues an AO, EPA must determine that the discharger has violated the CWA. The purpose of an AO is always to address underlying violations of the CWA. Indeed, all that EPA may refer to DOJ for enforcement is the underlying violation of the CWA itself. The underlying violation falls within this Court's subject matter jurisdiction; violation of an AO falls outside this Court's subject matter jurisdiction.

Plaintiff relies on CWA § 309(b) as authority for EPA's referring AO violations to DOJ for judicial enforcement. However, there is no such authority under CWA § 309(b) for EPA to refer AO violations to DOJ for enforcement. Section 309(b) specifically limits the kinds of violations that EPA can refer to DOJ, as follows:

> The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance.

33 U.S.C. § 1319(b) (emphasis added). Thus, the subject matter jurisdiction of this Court is limited to considering allegations of CWA violations that are capable of being the underlying basis of an AO. If a permit violation or other CWA violation were the subject of a § 309(a) order, that violation would fall within the subject matter jurisdiction of this Court. But since a violation of a 309(a) order itself cannot be the

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[44] 30(b)(6) Kwan Dep. Vol. III at 49 ll. 3-4 (attached as Exhibit 27).

underlying basis for another 309(a) order,[45] this Court does not have subject matter jurisdiction over such a violation, and the cause of action would be dismissed. In this case, Plaintiff has alleged in Paragraphs 18-23 violations of a § 309(a) order at Barefoot Bay. These allegations are outside the subject matter jurisdiction of this Court and should be dismissed.

CWA § 309(a)(3) provides the types of violations proper for an AO for a non-delegated state.[46] For a CWA § 309(a) administrative order to be issued, and for a case to be the subject matter of a civil referral under CWA § 309(b), a discharger must have violated section "1311, 1312, 1316, 1317, 1318, 1328, or 1345 . . . or is in violation of any permit condition or limitation implementing any of such sections in a permit under section 1342." 33 U.S.C. § 1319(a)(3) (referring to CWA sections). As the subsection goes on to state, the Administrator may issue an AO requiring such facility to comply, or she may bring a civil action. But the Administrator may not bring a civil action for a violation of a § 309(a) order.[47]

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[45] See 33 U.S.C. § 1319(a); CWA §309(a).

[46] Prior to May 1, 1995, Florida was a "non-delegated state," meaning that Florida did not have NPDES permitting authority. However, Florida did have its own permitting and enforcement program, and Florida Cities was required to comply with the state, as well as federal, requirements.

[47] An AO cannot substitute for a permit or as a modification of a permit. Rather, CWA § 309(a) authorizes EPA to "specify a time for compliance," but does not allow EPA to incorporate into an AO interim effluent limitations that are independently enforceable. Thus, Plaintiff's reliance in the Second Amended Complaint on CWA § 309(a) for such enforcement authority for violations of interim effluent limits is misplaced. A CWA § 309(a) order is issued unilaterally by EPA without public notice and comment. Deposition of Michael Hom, EPA Enforcement Supervisor, at 55 l. 17 - 56 l. 2 (attached as Exhibit 29). This distinction between interim effluent limits in an AO and the effluent limits in an NPDES permit is reflected (continued...)

This reading of the statute is reflected in EPA's own internal guidelines. The EMS states:

> The Clean Water Act does not authorize the issuance of an AO for a violation of a previously issued AO nor may an administrative penalty order be issued for violation of an administrative order. Any successive AO issued must be based upon the underlying violations of the Act contained in the previous AO . . . .

EMS at 62 n.5.[48] Thus, a violation of a previous AO is not a ground for issuing another AO, nor is a violation of a previous AO a ground for civil referral.

Plaintiff's attempt to impose multiple daily liability (for discharge without a permit and for violations of effluent limits in an AO), instead of a single violation for each day's discharge without a permit, is not authorized by law. Therefore, this Court lacks subject matter jurisdiction over Paragraphs 18, 19, 20, 21, 22, and 23, and Defendant is entitled to summary judgment as a matter of law.

3. Alleged Violations of Barefoot Bay's NPDES Permit No. FL0042293

a. Test Method for Total Residual Chlorine

Plaintiff alleges that on a daily basis between November 1, 1991 and June 28, 1993 the Barefoot Bay facility used a test method for total residual chlorine ("TRC") not specified in NPDES permit FL0042293. However, both the plain language of the

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[47](...continued)
by EPA's separation of enforcement activities from permit writing; permit writers, who develop effluent limitations for NPDES permits, must do so pursuant to rigorous procedures established by formal EPA regulations. 40 C.F.R. § 124.1 - 124.21.

[48] (Attached as Exhibit 25). Note 5 arises from the Enforcement Response Guide contained within the EMS. The Enforcement Response Guide provides proper responses for particular types of violations. The text of Note 5, which occurs on page 62, is referenced on page 56 under the heading for "Administrative Order Interim Limits." AO Interim Limits are the types of violations being asserted against the Barefoot Bay plant.

permit and the testimony of EPA's own Rule 30(b)(6) witness demonstrate that Florida Cities used one of the two methods allowed in its permit. Indeed, three EPA officials conducted a Performance Audit Inspection of Barefoot Bay on June 10, 1993 and noted in their report that the test method being used by the facility (DPD colorimetric) was approved by EPA's regulations.[49]

Although the permit language lists three test methods for TRC, the first two methods are subparts of the same alternative. The language at issue in Part I of Barefoot Bay's permit, entitled "Effluent Limitations and Monitoring Requirements," states:

> Testing for total residual chlorine (TRC) shall be conducted according to either the amperometric titration method, the low-level amperometric titration method (if compliance with a permit limitation of 0.20 mg/l or less is to be demonstrated), or the DPD colorimetric method as specified in Section 4500-Cl D., 4500-Cl E., or 4500-Cl G., respectively. Standard Methods for the Examination of Water and Wastewater, 17th Edition.[50]

NPDES Permit No. FL0042293. EPA's own 30(b)(6) designated witness for enforcement at Barefoot Bay (Mr. Herwig) acknowledged that the language of this permit provision was "hard to read."[51] While the language may be confusing, the grammatical structure ("either" . . . "or") makes clear that the choice is between two test methods, one of which has two subparts. During the time period in question, Florida Cities used the DPD colorimetric method to test for TRC and reported its test results to EPA on its DMRs. During this period EPA inspected Barefoot Bay and

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[49] See Letter of July 18, 1993 from Antonio Quinones (EPA) to Florida Cities, attaching Performance Audit Inspection. Specifically, see pages L-2, L-3, and L-4 of the inspection report (all attached as Exhibit 30).

[50] See Plaintiff's Memorandum for Partial Summary Judgment, Exhibit B.

[51] Herwig at 119 l. 21; Id. at 122 ll. 2-6 (all attached as Exhibit 31).

noted no problems with Florida Cities' use of the DPD colorimetric method.[52] Accordingly, no genuine issue of material fact exists as to the allegations contained in Paragraph 28 of Plaintiff's Second Amended Complaint, and Florida Cities is entitled to judgment as a matter of law as to Paragraph 28 of the Second Amended Complaint.

b. Other Claims at Barefoot Bay

Florida Cities acknowledges that the DMRs filed with EPA reported some exceedances (values higher than the permit's effluent limitations) during the relevant time period for TRC, toxicity, and Biochemical Oxygen Demand ("BOD"). However, Florida Cities is unable to determine what appropriate legal defenses and mitigating circumstances are applicable until the government can determine the number of violations being alleged (which Mr. Kwan estimated would take "another month").[53] Accordingly, summary judgment is premature until Plaintiff can state with particularity the charges against Florida Cities. Moreover, at trial Florida Cities will present evidence of mitigating circumstances that should significantly reduce, or eliminate altogether, any applicable penalties.

B. Carrollwood

1. Alleged Unpermitted Discharges

Plaintiff alleges that the Carrollwood facility discharged effluent without a federal NPDES permit from August 1990 to June 1991. Florida Cities acknowledges that while it did discharge effluent into Sweetwater Creek between August 1990 and June

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[52] See Note 49 and accompanying text.

[53] See Note 9 and accompanying text.

1991, it settled with EPA for these discharges in a Consent Agreement, dated April 19, 1991. Therefore, just as with Barefoot Bay, no genuine issue of material fact exists, and Florida Cities is entitled to judgment as a matter of law.

EPA issued Carrollwood's initial NPDES permit on August 15, 1975. In April of 1980 Florida Cities filed a timely application to renew its Carrollwood permit. Four years later EPA denied the renewal application, based on Florida's designation of Sweetwater Creek as a "no discharge area," which would have precluded Florida from providing to EPA the state certification required for EPA to renew Carrollwood's NPDES permit.[54] In November 1984, EPA issued AO 85-044, ordering Carrollwood to cease discharge into Sweetwater Creek by June 1987. EPA's Notes on the Carrollwood Consent Agreement state that "DER [now FDEP] issued Respondent Temporary Operating Permits (TOPs) throughout this time period allowing discharges into Sweetwater Creek, thereby not enforcing their [sic] own 'no discharge' rule."[55]

During the late 1970s and the 1980s, Florida Cities had been negotiating with Hillsborough County ("County") to connect Carrollwood to the Hillsborough facility. In June 1979 the County notified Florida Cities that connection to the facility would not be available until June 1983. This date was subsequently extended by the County to the spring of 1988 and then extended again to 1990. Hillsborough's 1990 offer at that

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[54] EPA's Carrollwood Notes (attached as Exhibit 32) explain that the sole basis for EPA's failure to renew the NPDES permit was Florida's designation of the receiving waters of Sweetwater Creek as a "no discharge area." Such designation precluded Florida from providing the state certification necessary for EPA to renew Carrollwood's NPDES permit. The Notes make no mention of any other basis for EPA's failure to renew the permit.

[55] Carrollwood Notes at 1 (attached as Exhibit 32).

time included a capacity fee of over $5.5 million, which could have quadrupled the rates charged to customers.[56]

In 1987 the Florida legislature passed the Grizzle-Figg Act[57] which allowed discharge into Sweetwater Creek within certain limitations. In November 1989 Florida Cities applied to FDEP for a permit to construct an upgrade to Advanced Wastewater Treatment ("AWT")[58] at Carrollwood, which FDEP issued in July 1990. Following receipt of the FDEP construction permit -- a clear indication that Florida would no longer withhold the required state certification for an NPDES permit -- Florida Cities applied for an NPDES permit on July 31, 1990. EPA issued an Administrative Complaint to Florida Cities for CWA violations on September 25, 1990; two days later, it issued AO 90-100, which temporarily authorized discharge into Sweetwater Creek until an NPDES permit was issued. EPA issued NPDES permit No. FL0029319 for an AWT facility on April 19, 1991, effective July 1, 1991. During this period Florida Cities and Hillsborough County continued to negotiate, and they finally concluded a connection agreement on June 5, 1991. Throughout this time period, EPA

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[56] In an attempt to find alternative methods of disposal of the effluent during this same period, Florida Cities investigated and sought permits for deep well injection, attempted to purchase surrounding citrus groves on which to spray effluent, negotiated with grove owners to receive effluent, and negotiated with area golf courses to supply effluent for irrigation. None of these options proved to be economically viable given the rate base constraints placed on Florida Cites by the Florida Public Service Commission ("PSC"). Throughout all relevant periods of time, Florida Cities continued to submit DMRs to both EPA and FDEP.

[57] Fla. Stat. ch. 403.086 (1987).

[58] AWT requires a level of treatment more stringent than the "secondary treatment" than is required of all wastewater treatment facilities discharging into Waters of the U.S. See 40 C.F.R. § 122.44.

personnel were kept fully apprised of these negotiations and were immediately informed when the connection agreement was reached. On January 6, 1992, Carrollwood connected with Hillsborough's facility, thereby ceasing any discharge into Sweetwater Creek. On March 6, 1992, EPA "inactivated" AO 90-100, informing Florida Cities that it was in compliance with the AO's terms.[59]

As with the Barefoot Bay proceedings, the Carrollwood administrative record consists of the Notice of Show Cause, Notes, Administrative Complaint, and Consent Agreement.[60] The Consent Agreement settled any unpermitted discharge claims at Carrollwood pursuant to CWA § 309(g)(3). In section III, the Consent Agreement states that EPA has considered the CWA § 309(g)(6) factors. The only examination of these factors in the administrative record is found in the Notes:

> The economic benefit realized by Respondent was computed by using the "BEN" model of calculating the economic benefit of noncompliance. The values entered into the BEN model are based upon the delayed capital savings which Respondent realized as a result of not submitting an NPDES permit application. The period of noncompliance used in the model was calculated from the first day of noncompliance, June 1987, up to the point of expected issuance of an NPDES permit, February 1991.[61] Using the BEN model, the estimated benefit of delayed compliance totals $ 203.00.

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[59] Letter of March 3, 1992 from EPA to Florida Cities (attached as Exhibit 38).

[60] The administrative record in this case for Carrollwood consists of (1) AO 85-044 (attached as Exhibit 33) and AO 90-100 (attached as Exhibit 34), (2) Notice of Show Cause (attached as exhibit 35), (3) Notes on the Proposed Penalty Assessment (attached as Exhibit 32), (4) Administrative Complaint (attached as Exhibit 36), and 5) Consent Agreement and Order Assessing Administrative Penalties (attached as Exhibit 37).

[61] In fact, EPA did not issue the Carrollwood NPDES permit until May 28, 1991, with an effective date of July 1, 1991.

Notes 2 ¶ 4. In Paragraph 6 of the Notes, EPA stated that a penalty reduction was justified because Florida had modified state law to allow for discharge of AWT effluent into Sweetwater Creek. The plain language of the Notes establishes that the penalties were calculated for the entire period of discharge without a permit until the date of issuance of the permit (then estimated to be February 1991).[62]

Plaintiff contends that the Consent Agreement should be read in isolation and that it addresses only the period from June 1987 through July 1990. As noted above, this analysis is unrealistic and impractical. The parties entered into the Consent Agreement in April 1991, leaving an eight-month gap in EPA's enforcement. Joseph W. Landers, Jr., Florida Cities' counsel in the Carrollwood negotiations, has testified by affidavit that at the end of the Carrollwood negotiations, he understood that the parties intended to resolve fully the issue of discharge without a permit.[63] Thomas Plouff, one of EPA's principal negotiators of the Carrollwood settlement, testified that when the Consent Agreement was signed, the fact that there was a period of time in which Florida Cities would be discharging without a permit did not warrant an increase in the penalty assessed because "[t]he case was settled, long since settled."[64] Mr. Plouff chose the date ending liability for discharge without an NPDES permit from

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[62] Both the Carrollwood Notes (attached as Exhibit 32) and the draft NPDES permit (attached as Exhibit 39) estimate the effective date of the final NPDES permit as February 1991. In fact, comments received on the draft permit delayed EPA's process, so that the permit became effective July 1, 1991.

[63] Declaration of Joseph W. Landers, Jr. (attached as Exhibit 40).

[64] Deposition of Thomas Plouff at 120 ll. 5-6 (attached as Exhibit 41).

Carrollwood as July 1990, because that was the date on which Florida Cities had applied for the permit.[65]

As with the Barefoot Bay allegations, Mr. Kwan again failed to check with EPA's Enforcement Officer who negotiated the Carrollwood settlement, Mr. Thomas Plouff,[66] with Florida Cities or to undertake any due diligence to verify his reinterpretation of the documents in this closed file for a facility that had ceased to discharge.[67] The entire administrative record demonstrates that the CWA § 309(g)(6) penalty paid by Florida Cities applied to the entire period of discharge without a permit. Therefore, no genuine issue of material fact exists, and Florida Cities is entitled to judgment as a matter of law as to Paragraph 30 of Plaintiff's Complaint.

2. Alleged Violations of Carrollwood's NPDES Permit No. FL0029319

EPA was fully aware when it issued NPDES Permit No. FL0029319, which required AWT at the Carrollwood facility, that Carrollwood was incapable of meeting these stringent AWT standards without constructing new treatment facilities. Mr. Kwan testified that, based on his eighteen years experience in such matters at EPA, such construction would routinely take one to four years. Further, when it issued the permit, EPA was also fully apprised that Florida Cities was near completion of the years-long negotiations with Hillsborough County to connect the discharge and

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[65] Id. at 119 ll. 18-21 (attached as Exhibit 41).

[66] Mr. Plouff conducted a site inspection and negotiated the Carrollwood settlement for the discharge without a permit violations. See Deposition of Thomas Plouff at 57-59 (attached as Exhibit 42).

[67] Carrollwood connected with Hillsborough County on January 6, 1992 and the facility was subsequently physically dismantled and removed from the site.

eliminate any need for an NPDES permit. Indeed, once EPA issued the permit in April 1991, thus assuring that Florida Cities had an alternative to connecting to the Hillsborough facility, the County promptly dropped its demand for a $5.5 million capacity fee and concluded a connection agreement with Florida Cities on June 5, 1991. While these facts support mitigation of any penalties for violations of the AWT provisions of the permit (which EPA never sought to enforce until Plaintiff's litigation team recommended that Mr. Kwan resurrect this case and refer it to DOJ for enforcement),[68] Florida Cities acknowledges that some exceedances of the unachievable AWT standards did occur.

Florida Cities further acknowledges that the DMRs filed with EPA reported exceedances during the relevant time period because the plant, as EPA knew, was incapable of meeting stringent AWT standards. However, as with Barefoot Bay, EPA's Mr. Kwan is still "adding the numbers up"[69] regarding the number of alleged violations. Consequently, Florida Cities is unable to determine what appropriate legal defenses and mitigating circumstances are applicable until the government can decide the number of violations being alleged. Accordingly, summary judgment is premature until Plaintiff can state with particularity the charges against Florida Cities. Moreover,

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[68] Q (By Mr. Scroggin) And the decision, Mr. Kwan, was the decision to make a referral of the Carrollwood case to the Department of Justice based on your recommendation?
A It is based on the recommendation of the litigation team.
Kwan Dep. at 372 (attached as Exhibit 23).

[69] Kwan Dep. at 152 (attached as Exhibit 2). See discussion in text, supra, at Note 9.

at trial Florida Cities will present evidence of mitigating circumstances that should significantly reduce, or eliminate altogether, any applicable penalties.

C. Waterway Estates

1. Alleged Unpermitted Discharges

Florida Cities has acknowledged that, although fully permitted by FDEP, it discharged secondarily treated effluent from its Waterway Estates sewage treatment facility into the Caloosahatchee River without a federal NPDES permit during the relevant time period. The Court is already aware that EPA erroneously rejected Florida Cities' 1986 application to renew the Waterway Estates' NPDES permit, thus creating by its own wrongful act the very absence of a federal permit that is now the subject of this case. Ultimately, EPA corrected its own error and issued a new permit for the Waterway Estates facility. The government should not be permitted to profit by obtaining penalties from Florida Cities for its own mistake.

2. Alleged Discharges to an Unpermitted Location

Plaintiff alleges that by discharging effluent from Waterway Estates into a tributary canal of the Caloosahatchee River, Florida Cities violated NPDES Permit No. FL0030325. However, the facts developed through discovery (including Plaintiff's own testimony and the testimony of the FDEP official responsible for this facility) and the relevant federal regulations establish that the plant's outfall was within the permitted area of discharge. Therefore, no genuine issue of material fact exists, and Florida Cities is entitled to a judgment in its favor as to the allegations of discharge to an unpermitted location.

NPDES Permit No. FL0030325, effective November 1, 1989, states that Waterway Estates is authorized to discharge into "receiving waters named Caloosahatchee River." Plaintiff's Complaint alleges that because the outfall of the plant discharged into the tributary canal between November 1, 1989 and July 14, 1991, Florida Cities violated the terms of its permit. Plaintiff bases this allegation on Mr. Kwan's Declaration, which alleges that NPDES permit No. FL0030325 authorizes discharge "to a point at the six (6) foot contour line in the Caloosahatchee River." Kwan Decl. ¶ 21. In Plaintiff's Answers to Defendant's First Interrogatories, which were verified by Mr. Kwan, Plaintiff claims that the permit "specified that they were to discharge the effluent from the Waterway Estates Treatment plant directly to six-foot [sic] contour line of the Caloosahatchee River, during the period alleged . . . ."[70] However, when Mr. Kwan was asked at the United States' 30(b)(6) deposition to identify where NPDES permit No. FL0030325 specifies that discharge must be directly to the six-foot contour line, he was unable to do so. In fact, there is no reference in NPDES permit No. FL0030325 specifying discharge to the six-foot contour line. The only reference to a discharge point found in the permit names the receiving waters simply as the "Caloosahatchee River."

Between November 1, 1989, and July 14, 1991, Florida Cities discharged effluent into a canal adjacent to the Caloosahatchee River. Dr. Abdul B. Ahmadi, Water Facilities Administrator of the FDEP, has testified by affidavit that "FDEP was aware of the physical location of the discharge point from the Waterway Estates facility into a tidally influenced canal to the Caloosahatchee River. This canal was considered part of

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[70] Pl.'s Resp. to Def.'s First Interrogs. ¶ 45. See Ex. 1.

the Caloosahatchee River."[71] Plaintiff has presented no evidence to the contrary. Accordingly, Florida Cities was discharging in accordance with the plain meaning of the permit's language and is entitled to summary judgment as a matter of law.[72]

3. Alleged Violations of Waterway Estates' NPDES Permit No. FL0030325

Florida Cities acknowledges that the DMRs filed with EPA reported some exceedances for nitrogen (concentration and loading) and toxicity tests, during the relevant time period. However, as with Barefoot Bay and Carrollwood, the government still has not yet specifically identified the number of alleged violations. It is fundamental that Florida Cities has the right to know the charges it faces before it can respond meaningfully or present a defense. Accordingly, summary judgment is premature until Plaintiff can state with particularity the charges against Florida Cities. Moreover, at trial Florida Cities will present evidence of mitigating circumstances that should significantly reduce, or eliminate altogether, any applicable penalties.

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[71] Ahmadi Aff. ¶ 11 (emphasis added) (attached as Exhibit 43).

[72] EPA's own regulations state that the discharge point in the canal is within the scope of the permit. EPA's own regulations state that the application form shall provide:

> (1) Outfall location. The latitude and longitude to the nearest 15 seconds [1500 feet] and the name of the receiving water.

40 CFR § 122.21(g). The canal is within 15 seconds of the location of the current, permitted Waterway Estates outfall.

IV. THE FIFTH AMENDMENT AND NEGATIVE INFERENCES

Plaintiff contends that "a number of key witnesses in this case have refused to testify on Fifth Amendment grounds,"[73] and implies that its prosecution of this case has somehow been thwarted because these witnesses have exercised their constitutional rights. Plaintiff argues that this Court should draw inferences from these witnesses's invocation of the Fifth Amendment that all of the violations at issue occurred as alleged in the Plaintiff's Complaint.[74]

Plaintiff's argument ignores several significant facts. First, Plaintiff has engaged in thorough and wide-ranging discovery against all three Florida Cities facilities for fifteen months before any witness invoked the Fifth Amendment. Second, Florida Cities has produced over 500,000 pages of documents, covering all three facilities. Additionally, Plaintiff has deposed seven Florida Cities officials, who testified fully under oath, for a total of eight days of testimony. These witnesses are:

- Julie Karleskint, Operations Manager, Florida Cities Water Company;
- Larry L. Good, Regional Manager for Sarasota Division and North Division, Florida Cities Water Company;

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[73] Pl.'s Mot. for Summ. J. at 14.

[74] The Supreme Court has held that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a civil cause.' 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961)." Baxter v. Palmigiano, 425 U.S. 308, 318 (1976). Furthermore, "the inference is not required: it may be drawn, but it does not necessarily need to be drawn." Daniels v. Pipefitters' Association Local Union No. 597, 983 F.2d 800, 802 (7th Cir. 1993) (emphasis in original). In addition, no inference drawn through the invocation of the Fifth Amendment can form the sole basis of a judgment against a witness; it is a fact to be considered along with other facts. Director of the Office of Thrift Supervision v. Lopez, 960 F.2d 958, 965 (11th Cir. 1992); Koester v. American Republic Investments, 11 F.3d 818, 824 (8th Cir. 1993).

- William Sansbury, Division Manager, Barefoot Bay Division, Florida Cities Water Company;
- Glen Siler, Wastewater Operator, Barefoot Bay Plant, Florida Cities Water Company;
- Johnnie Overton, Senior Vice President, Florida Cities Water Company, 1992-94 (currently Executive Vice President and Chief Operating Officer, Avatar Utility Services, Inc.);
- Paul Bradtmiller, Executive Vice President and Chief Operating Officer, Florida Cities Water Company; and
- Jack Tompkins, former Operations Manager, Florida Cities Water Company.

Since the Supreme Court denied certiorari in United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1994), cert. denied, 115 S.Ct. 939 (1995),[75] Plaintiff has also deposed Leon Levy, Avatar Holdings Inc.'s Chairman of the Board of Directors and Edwin Jacobson, Chief Executive Officer of Avatar Holdings Inc. Both witnesses have testified fully in response to Plaintiff's questions. In addition, Plaintiff has conducted a series of site inspections at all three facilities, including two inspections of Waterway Estates. The document discovery, depositions, and inspections have provided Plaintiff a full and fair opportunity to discover all facts relevant to this suit.[76] Additionally, all evidence, including all inferences, must be viewed in the light most favorable to the

---

[75] The Ninth's Circuit's holding in Weitzenhoff dramatically changed the well-established legal standard of criminal liability for "knowing" violations of the CWA. Under Weitzenhoff, any violation of the CWA, regardless of the mitigating circumstances, can give rise to criminal felony liability. This result applies to anyone knowingly causing a discharge that results in any violation, even if that person believed in good faith that the facility was in compliance with the CWA.

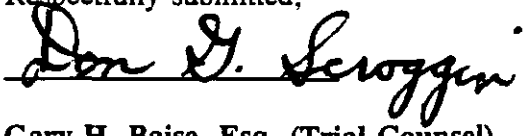
[76] Florida Cities has repeatedly informed Plaintiff that the witnesses who have exercised their Fifth Amendment rights would testify in exchange for immunity from individual criminal prosecution under the CWA. Florida Cities has formally requested such immunity, but to date, Plaintiff has not responded to Florida Cities' request. The Department of Justice, unlike a private plaintiff, is uniquely empowered to grant this immunity and obtain both deposition and trial testimony from all of these witnesses. See letters exchanged between Don G. Scroggin and Daniel S. Jacobs (attached as Exhibit 44).

party opposing summary judgment, Florida Cities. In light of Plaintiff's sweeping and exhaustive discovery, this Court should decline to draw any adverse inferences and should instead rule on the actual facts of this case.

V. CONCLUSION

Based on the foregoing, Defendant Florida Cities should prevail on its Motion for Summary Judgment on: Paragraph 16 (Barefoot Bay discharge without a valid NPDES permit); Paragraphs 17, 18, 19, 20, 21, 22, 23 (Barefoot Bay effluent limitation violations of Administrative Order 90-106); Paragraph 28 (Barefoot Bay alleged violations for using the improper test method for total residual chlorine); Paragraph 30 (Carrollwood discharge without a valid NPDES permit); Paragraph 45 (Waterway Estates discharge at the wrong location) of the Second Amended Complaint. Plaintiff's Motion for Partial Summary Judgment should be denied.

Respectfully submitted,



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September 11, 1995

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of Defendants' "Motion for Partial Summary Judgment" and "Memorandum in Support of Its Motion for Partial Summary Judgment and in Response to Plaintiff's Partial Summary Judgment" has this September 11, 1995 been sent to the following persons by United States first class mail, properly addressed and postage prepaid.

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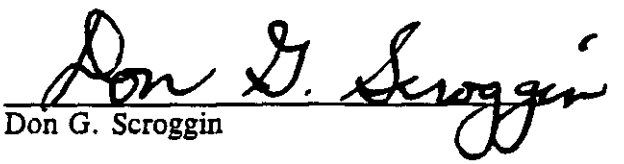


Don G. Scroggin

Exhibit _____
Deposition summaries:

John Marlar, Branch Chief for the EPA's Environmental Compliance Branch. Mr. Marlar was questioned about the Clean Water Act's enforcement provisions. He explained the process for issuing Administrative Orders and Administrative Penalty Orders at length. He was also asked about the NPDES permit application process and the significance of state waste load allocations. Mr. Marlar was also questioned about the circumstances surrounding the denial of FCWC's permit renewal application and the basis for the denial.

James Greenfield, EPA Region IV Waste Load Allocation TMDL Coordinator. Mr. Greenfield was asked about his knowledge of the Clean Water Act. Specifically, he was questioned about section 303 of the Clean Water Act and the procedures it establishes for the EPA. He stated that EPA is required to utilize any state waste load allocations when developing NPDES permits. He further stated that in the FCWC situation, the EPA did not follow the section 303 procedures.

Roosevelt Childress, Designated Representative for the EPA. Mr. Childress was questioned about the EPA's decision to deny FCWC's permit renewal application. He stated that such a denial is uncommon. He stated that typically the EPA grants permit renewals if the state does not have a no discharge waste load allocation.

Fritz Wagener, Chief of the Water Quality Standards Section. Mr. Wagener was questioned about the process of evaluating state water quality standards.

Ken Kwan, EPA Environmental Engineer. Mr. Kwan was asked about his involvement with the Barefoot Bay and Carrollwood facilities. Specifically, he was questioned about he Administrative Orders issued to Carrollwood and Barefoot Bay.

Roger Pfaff, Acting Branch Chief for the Water Permits and Enforcement Branch. Mr. Pfaff was primarily questioned about EPA's enforcement procedures. Specifically, he was asked about the process for issuing Administrative Orders and Administrative Penalty Orders. He was also asked to address the relationship between an Administrative Order and an NPDES permit.

Roy Herwig, Environmental Engineer in the NPDES Enforcement Section. Mr. Herwig was questioned about the NPDES enforcement process and how it was carried out at the Barefoot Bay facility. He also described the sampling that was conducted at Barefoot Bay and the Administrative Order issued to the facility.

Thomas Plouff, Environmental Engineer. He was asked about his inspection of the Carrollwood facility and the subsequent enforcement action that was undertaken. Mr. Plouff was responsible for calculating the penalty levied against FCWC and he was asked about this process.

Michael Hom, Supervisory Environmental Engineer. Mr. Hom briefly described the process of issuing Administrative Orders and Administrative Penalty Orders. He was also questioned about the Administrative Order which was issued to the Barefoot Bay facility and his involvement with the process.

Exhibit _____

Depositions taken by the Department of Justice.

Edwin Jacobson, Chief Executive Officer of Avatar Holdings, Chicago Milwaukee Corporation and CMC Heartland. The Department of Justice questioned Mr. Jacobson about his duties and responsibilities as CEO of Avatar Holdings. Mr. Jacobson explained that he is not involved in overseeing the wastewater treatment facilities. He further explained that he had no knowledge of NPDES Permit violations at any of the facilities.

Leon Levy, Chairman of Avatar Holdings. The Department of Justice questioned the witness about his responsibilities at Avatar Holdings. He stated that he has little involvement with the Barefoot Bay facility and has very limited knowledge of the case. He is questioned about a number of internal memoranda of which he has no recollection. He is also asked about several Avatar Holdings Board Meetings which he attended. He had little or no recollection about these meetings.

Julie Karleskint, Environmental Engineer for Avatar Utilities. She was asked to describe her job duties and responsibilities. She was also asked to verify information on various reports and violation summaries. She was also questioned about the alternative of spray irrigation and the construction of an advanced waste water treatment plant.

Paul Bradtmiller, Executive Vice President for FCWC. He was asked about upgrades to the wastewater treatment facilities and the process of applying to the Public Service Commission for a rate increase.

Patrick Lehman, Engineer for Peace River/Manasota Regional Water Supply Authority. He was employed by FCWC from 1984-1989. He was asked about the work he did at FCWC; specifically he was questioned about the percolation ponds at Barefoot Bay. He was also asked about his knowledge of the NPDES permit renewal application and its subsequent denial. He responded to a series of questions about the Water Ways Estate facility and the Administrative Order issued to the facility.

Michael Murphy, Vice President and Chief Financial Officer for FCWC. The Department of Justice questioned this witness about his general job duties as CFO. He was asked about FCWC's financial condition, financial statements, loans, projected profits and the budget. He was also asked about FCWC's legal expenses and expenses associated with the rate case. He also responded to several questions about rate-making: the purpose of rate filings, their frequency, factors involved in the decision to file and whether FCWC's legal expenses are included in rate filings.

Randy Armstrong The Department of Justice questioned Mr. Armstrong about his opinions about the water quality around the Water Ways Estate facility. He was further questioned about a 1980 survey of water quality and the wasteload allocation that resulted from the survey. The deposition concluded with several questions about the discharge permit issued in 1981.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS INC., Defendants.	)	CIVIL ACTION NO.: 93-281-CIV-FTM-21

DEFENDANT FLORIDA CITIES WATER COMPANY'S
THIRD INTERROGATORIES

Pursuant to Fed. R. Civ. P. 33, Florida Cities Water Company hereby serves its third set of interrogatories upon the Plaintiff, United States of America, and requests that they be answered in writing under oath within thirty days. (Numeration continues from the Defendant's Second Interrogatories.)

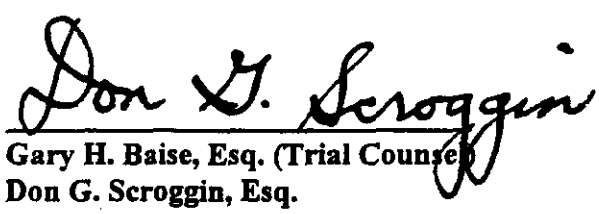
Interrogatory 22: Describe with specificity the review procedure used by EPA Region IV from 1990 to present (including modifications or changes to the procedure) to refer a wastewater treatment facility's CWA violations to the Department of Justice for civil litigation, including but not limited to the levels of officials involved, what officials need to approve a referral, and all types of documentation prepared along the process of a civil referral (for the types of documentation prepared, please include a list of the types of documentation prepared even if the specific contents may be protected by privilege).

Interrogatory 23: Who initiated the process to refer Barefoot Bay, Carrollwood, and Waterway Estates and through whose hands did each recommendation for referral pass before ultimate approval for referral to DOJ for civil litigation. (Include the name of the person, his/her title, and specific date of approval for each step along the chain of command needed to refer each facility to DOJ.)

Interrogatory 24: Describe any additional basis (other than those bases described in the Enforcement Management System) for recommending referral of a facility to the DOJ for civil litigation. (If the Enforcement Management System supplies the exhaustive list of bases for referral, please so state.)

Interrogatory 25: Describe all persons authorized to initiate the civil referral enforcement review process for a given wastewater treatment facility in EPA Region IV.

Respectfully submitted,



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September 15, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS INC., Defendants.	)	CIVIL ACTION NO.: 93-281-CIV-FTM-21

DEFENDANT FLORIDA CITIES WATER COMPANY'S
FOURTH REQUEST FOR PRODUCTION OF DOCUMENTS

Defendant Florida Cities Water Company ("FCWC"), pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure ("FRCP"), hereby requests that Plaintiff United States of America ("United States") produce and make available for inspection and copying, at a mutually agreeable location, the documents identified in this Request for Production of Documents ("Request for Production") that are within Plaintiff's possession, custody, or control, within thirty (30) days of the date of service of this Request for Production. Such production of documents shall be in accordance with the FRCP and the following instructions and definitions.

Definitions and Instructions

The Definitions and Instructions remain the same as in Defendant's Second Request for Production of Documents.

Documents Requested

1. All documents prepared by Environmental Protection Agency ("EPA") Region IV during the referral process to Department of Justice ("DOJ") for Barefoot Bay, Carrollwood, Waterway Estates. (If a document includes privileged information, please redact and produce the redacted copy for inspection.)

2. All documents used in preparing an enforcement matter for civil referral, including but not limited to any EPA or DOJ guidelines or documents describing the referral process.

3. A curriculum vitae for every expert Plaintiff intends to call as a witness at trial, including a list of civil cases in which each expert has previously testified or prepared a report.

4. All testimony of record, either in a judicial or administrative forum, within the past 4 years of every expert Plaintiff intends to call as a witness at trial.

5. All reports prepared by your expert witnesses, in either judicial or administrative forums, other than this action, during the previous ten years.

6. All publications authored by Plaintiff's experts within the past ten years.

7. All documents reflecting agreements between Plaintiff and Plaintiff's experts for the purpose of employing their services in this litigation.

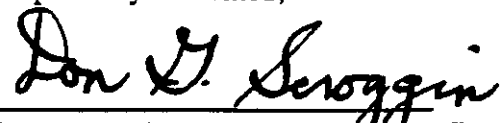
8. All documents reflecting payment or compensation by the United States to Plaintiff's experts within the past ten years for services rendered.

9. All violation summary sheets prepared by the enforcement officers between 1985 and present for Barefoot Bay, Carrollwood, and Waterway Estates.

10. Any memoranda relating to Barefoot Bay, Carrollwood, and Waterway

Estates reviewed by the Regional Administrator (or such person with delegated authority for the Regional Administrator to give final approval of this referral) in approving the referral of this action to DOJ.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of Florida Cities Water Company's "Fourth Request for Production of Documents" and "Third Set of Interrogatories" has this September 15, 1995 been sent to the following persons by United States first class mail, properly addressed and postage prepaid, unless otherwise noted.

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Don G. Scroggin

Don G. Scroggin

Exhibit_____(GHB-59)

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC. and FLORIDA CITIES WATER COMPANY, INC., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' FIFTH REQUEST FOR PRODUCTION OF DOCUMENTS TO FLORIDA CITIES WATER COMPANY, INC.

Plaintiff, the United States of America, pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, requests Defendant Florida Cities Water Company, Inc. to produce and permit the United States to inspect and copy each of the following documents in defendant's possession, custody or control. These documents shall be produced on October 16, 1995 unless such time is modified by order of the Court or by counsel for the United States, at the offices of the U.S. Department of Justice, Environment and Natural Resources Division, 1425 New York Avenue, N.W., Washington, D.C., or at such other location as agreed upon by counsel for the United States.

INSTRUCTIONS

1. Unless otherwise indicated, these requests apply to all documents written, produced, drafted, or generated at any time up until the trial of this matter, but exclude documents already produced by Defendant Florida Cities Water Company in response to the United States' previous Requests for Production of Documents.

2. For each document produced, indicate on the document or in some other reasonable manner, the numbered request(s) to which it responds.

3. This request covers all documents in the possession, control or custody of defendant, its parent companies, sister companies, departments, divisions, directors, officers, employees, agents, servants, consultants, attorneys and assigns.

4. Words used in the plural shall also be taken to mean and include the singular. Words used in the singular shall also be taken to mean and include the plural. "Or" and "and" shall be construed either conjunctively or disjunctively to bring within the scope of these requests for production any documents that might otherwise be construed to be outside their scope. The past tense includes the present tense where the clear meaning is not distorted by change of tense.

5. If any document is withheld under any claim of privilege or exemption, furnish a list identifying each document for which the privilege or exemption is claimed, together with the following information:

(a) its title, or if it has no title, its subject matter;
(b) the date of origin;
(c) the author or addressor;
(d) the recipient(s) of all copies; and
(e) the basis upon which privilege or exemption is claimed.

6. Please produce the complete original exact copy of each document and, unless otherwise stated, each non-identical

copy (whether different from the original because of notes made on the copy or otherwise), including drafts, of each writing of every kind and description (together with all worksheets, support documents, and other relevant materials), whether inscribed by hand or mechanical, electronic, microfilm, photographic, or other means (such as by recording, film, tape or other medium) from which such information may be obtained.

DEFINITIONS

Unless otherwise indicated, the terms used in these Requests shall have the same meaning ascribed to them under the Clean Water Act.

In addition, unless otherwise stated, the following definitions shall apply to these discovery requests:

A. "Document" means any and all material that is written, printed, typed, photographed, recorded (electronically, magnetically, graphically or otherwise) or which is capable of being recorded in any form. It includes, but is not limited to, any logs of materials received, other logs, invoices, purchase orders, receipts, bills of lading, loading tickets, receiving tickets, shipping orders, inventories, letters and other correspondence, offers, contracts, agreements, bids, proposals, applications, licenses, permits, reports to government agencies, other reports, minutes of meetings, sales estimates, sales reports, memoranda, handwritten or other notes, calendar or diary entries, agendas, bulletins, graphs, charts, maps, photographs, drawings, data, price lists, lists of accounts, summaries,

telegraphs, teletypes, computer printouts, magnetic tapes, discs, microfilm, and microfiche.

B. "Relate(s)" or "relating to" means constituting, defining, containing, embodying, reflecting, identifying, stating, referring to, dealing with or in any way pertaining to.

REQUESTS

1. Complete audited financial statements of Florida Cities Water Company for 1994, including balance sheets, income statements, cash flow statements, and all accompanying footnotes, schedules, and explanations.

2. Complete monthly financial statements of Florida Cities Water Company for year-to-date 1995, including balance sheets, income statements, cash flow statements, and all accompanying footnotes, schedules, and explanations.

3. All documents relating to the daily flow of effluent from the Barefoot Bay facility for each day from July 1, 1990 through and including October 31, 1991.

4. All documents relating to the daily flow of influent to the Barefoot Bay facility for each day from July 1, 1990 through and including October 31, 1991.

5. All documents relating to negotiations between Florida Cities Water Company and EPA on the Consent Agreement and Order Assessing Administrative Penalties, Docket No. CWA-IV 91-538, dated November 6, 1991, including, but not limited to, all documents referenced in paragraph 9 of the Declaration of Kathleen L. Blizzard, Esquire, dated September 8, 1995, all

documents which Ms. Blizzard reviewed in preparing her Declaration, and all documents in the files of Hopping, Green, Sams, & Smith, P.A., relating to said negotiations.

6. All documents relating to negotiations between Florida Cities Water Company and EPA to settle violations of discharging from the Carrollwood facility without a valid NPDES permit, including, but not limited to, all documents which Joseph W. Landers, Jr., Esquire reviewed in preparing his Declaration, dated September 7, 1995, and all documents in the files of Landers & Parsons relating to said negotiations.

7. All documents relating to methods of disposal of the effluent from the Carrollwood facility other than by discharge into the Sweetwater Creek, including, but not limited to, all documents relating to negotiations between Florida Cities Water Company and Hillsborough County and/or the City of Tampa.

8. All documents relating to methods of disposal of the effluent from the Barefoot Bay facility, other than by discharge into the Sebastian Creek, including, but not limited to, all documents relating to the investigation of deep well injection, purchase of surrounding citrus groves on which to spray effluent, negotiations with grove owners to receive effluent, and negotiations with golf courses to supply effluent for irrigation.

9. All documents relating to methods of disposal of the effluent from the Waterway Estates facility, other than by discharge into the Caloosahatchee River.

10. All documents relating to the test method for total residual chlorine at the Barefoot Bay facility.

11. All documents relating to actual or potential environmental impact resulting from the discharges from the Carrollwood facility into the Sweetwater Creek.

12. All documents relating to actual or potential environmental impact resulting from the discharges from the Barefoot Bay facility into the canal leading to the Sebastian Creek.

13. All documents relating to actual or potential environmental impact resulting from the discharges from the Waterway Estates facility into the Caloosahatchee River.

14. All documents relating to payments for professional services made by Florida Cities Water Company to Kathleen L. Blizzard, Esquire, or to Hopping, Green, Sams, & Snith, P.A.

15. All documents relating to payments for professional services made by Florida Cities Water Company to Joseph W. Landers, Jr., Esquire, or to Landers & Parsons.

16. All documents relating to the location of the Waterway Estates' discharge point to the canal, including but not limited to all measurements of that location.

17. All documents relating to the location of the Waterway Estates' present discharge point to the Caloosahatchee River, including but not limited to all measurements of that location.

DATED: September 15, 1995

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice

By: _____

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing UNITED STATES' FIFTH REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT FLORIDA CITIES WATER COMPANY, INC. were served by U.S. Mail (except as otherwise indicated) on September 15, 1995 on the following attorneys of record:

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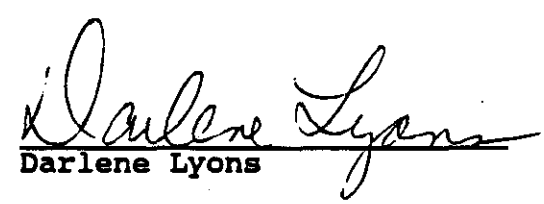


Darlene Lyons

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS INC., Defendants.	)	CIVIL ACTION NO.: 93-281-CIV-FTM-21

DEFENDANT FLORIDA CITIES WATER COMPANY'S
NOTICE OF DISPOSITIVE AUTHORITY

Defendant, Florida Cities Water Company, hereby notifies the Court of dispositive authority in favor of Defendants regarding Plaintiff's claims[1] at Barefoot Bay for unpermitted effluent discharges and interim effluent limitation violations of Administrative Order 90-106 and at Carrollwood for unpermitted effluent discharges. The authority is provided in the matter of *Borough of Ridgway, Pennsylvania, NPDES*

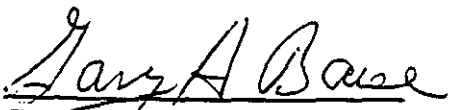
[1] Relevant documents are provided as exhibits in both Plaintiff's and Defendant's motions for summary judgment pending before the Court. DMRs for Barefoot Bay are supplied by Plaintiff's Exhibit D to its motion for partial summary judgment. The Administrative Complaint for Barefoot Bay dated September 25, 1991, and Consent Agreement and Order Assessing Administrative Penalties dated November 6, 1991 Bay are supplied by Defendant's Exhibits 8 and 9 to its motion for partial summary judgment. The Administrative Complaint dated September 25, 1990 for Carrollwood and Consent Agreement and Order Assessing Administrative Penalties dated April 19, 1991 are supplied as Defendant's Exhibits 36 and 37. Plaintiff has provided copies of the NPDES permits for Barefoot Bay and Carrollwood as Plaintiff's Exhibits B and E, respectively.

Permit No. PA0023213, CWA-III-127 and CWA-III-141, decided by a Regional Presiding Officer in EPA Region III on June 29, 1995. A copy is attached.

Borough of Ridgway, Pennsylvania, NPDES Permit No. PA0023213, CWA-III-127 and CWA-III-141 is dispositive authority in favor of Defendants for paragraphs 16, 17, 18, 19, 20, 21, 22, 23, and 30 of the Second Amended Complaint. Counsel has not been able to determine whether this matter has been appealed, but will apprise the Court as soon as it is able to do so.

Borough of Ridgway, a Clean Water Act case, stands for the proposition that Plaintiff is required to bring, pursuant to the "claim-splitting" and "claim-preclusion" doctrines, "all causes of action associated with a transaction or a series of related transactions in a single case in one forum." *Id.* at 16. The EPA administrative complaints against Florida Cities, allegedly covering one day for Barefoot Bay and 37 months for Carrollwood, represent a final determination by EPA which cannot be re-litigated in this forum. EPA had the knowledge and the opportunity to address all the claims in the paragraphs of the Second Amended Complaint listed above.at the time the administrative complaints were filed. Now EPA is attempting to re-visit its prior assessments against Barefoot Bay and Carrollwood, and according to this case, EPA cannot do so. EPA's own presiding officer has ruled against the agency in declaring that "once a transaction has been litigated between parties, those parties may not raise new causes of action involving that transaction in a new case in <u>any forum</u>." *Id.* (Emphasis added).

Respectfully submitted,



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October 30, 1995

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of "Defendant's Notice of Dispositive Authority" has this October 31, 1995 been sent to the following persons by United States first class mail, properly addressed and postage prepaid.

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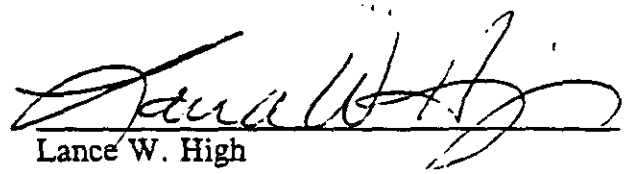

Lance W. High

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
841 CHESTNUT BUILDING
PHILADELPHIA, PENNSYLVANIA 19107

IN THE MATTER OF:	:	
	:	DOCKET NOS. CWA-III-127
Borough of Ridgway,	:	CWA-III-141
Pennsylvania,	:	
	:	Proceedings to Assess Class I
	:	Civil Penalties Under
NPDES Permit No. PA0023213	:	Section 309(g) of the Clean
	:	Water Act, 33 U.S.C. § 1319(g)
RESPONDENT	:	

ORDER ON MOTIONS FOR SUMMARY DETERMINATION AND ACCELERATED RECOMMENDED DECISION

These are unconsolidated proceedings for the assessment of Class I administrative penalties under Subsection 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g). The proceedings are governed by the Environmental Protection Agency's Proposed 40 C.F.R. Part 28--CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CLASS I CIVIL PENALTIES UNDER THE CLEAN WATER ACT, THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT, AND THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT, AND THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES UNDER PART C OF THE SAFE DRINKING WATER ACT, 56 Fed. Reg. 28,996 (July 1, 1991), issued October 29, 1991 as superseding procedural guidance for Class I administrative penalty proceedings under Subsection 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g) ("Consolidated Rules").

Under § 28.25(a) of the Consolidated Rules the parties have each moved for Summary Determination and Accelerated Recommended Decision in both cases. Each party opposes the other's motions. The Presiding Officer has permitted the parties to exceed the page limitations on documents set forth in § 28.8 of the Consolidated Rules. Because the parties are identical and the issues are closely similar in the cases, the Presiding Officer has allowed counsel to combine their respective filings and will rule on the motions together, indicating differences between the cases as appropriate. For example, Complainant first moved for Summary Determination and Accelerated Recommended Decision in Docket No. CWA-III-127; Respondent moved first in Docket No. CWA-III-141. In Docket CWA-III-141 Respondent has also filed a Second Motion for Summary Determination and Accelerated Determination, the grounds of which are inapplicable to Docket No. CWA-III-127. Complainant opposes this motion as well. The Presiding Officer held oral argument on this latter motion on June 19, 1995; all other motions are to be decided on the parties' briefs.

CLEAN WATER ACT LIABILITY

The Clean Water Act's basic prohibition against pollution is set forth in Subsection 301(a), 33 U.S.C. § 1311(a): "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful."

These two Administrative Complaints are brought under Subsection 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), which provides in relevant part: "Whenever on the basis of any information available the Administrator finds that any person has violated...any permit condition...in a permit issued under section 1342 of this title...by a State...the Administrator...may, after

consultation with the State in which the violation occurs, assess a Class I penalty...under this subsection."

Several of the elements of statutory liability were properly alleged by the Complainant and admitted by the Respondent, and these elements are therefore adopted as Recommended Findings of Fact and Conclusions of Law:

1. The Borough of Ridgway (Respondent), a person within the meaning of Section 502(5) of the Clean Water Act, 33 U.S.C. § 1362(5), owns and operates a wastewater treatment plant (Facility), located in Ridgway, Elk County, Pennsylvania, which discharges pollutants to the Clarion River. (Allegation 1. in the Administrative Complaints; Paragraph 1. in the Answers).

2. The Clarion River is a navigable water of the United States as set forth in Section 502(7) of the Act, 33 U.S.C. § 1362(7). Respondent is therefore subject to the provisions of the Act, 33 U.S.C. § 1251 et seq. (Allegation 2. in the Administrative Complaints; Paragraph 2. in the Answers).

3. On July 14, 1993, pursuant to Section 402 of the Act, 33 U.S.C. § 1342, and Pennsylvania's Clean Streams Law, as amended, 35 P.S. Section 691.1 et seq., the Pennsylvania Department of Environmental Resources (PADER) issued National Pollutant Discharge Elimination System Permit No., PA0221213 (Permit) to the Respondent for the discharge of pollutants from its Facility. The Permit expires on July 13, 1998. (Allegation 3. in the Administrative Complaints; Paragraph 3. in the Answers).

4. Part A, Page 2, of Respondent's Permit establishes certain specific effluent limitations for the discharge of pollutants from Outfall 001. (Allegation 4. in the Administrative Complaints; Paragraph 4. in the Answers).

5. Part B, Page 11, of the Permit requires Respondent to "...at all times maintain in good working order and properly operate all facilities and systems (and related appurtenances) for collection and treatment which are installed or used by the permittee for water pollution control and abatement to achieve compliance with the terms and conditions of the permit. Proper operation and maintenance includes but is not limited to effective performance based on designed facility removals..." (Allegation 5. in the Administrative Complaints; Paragraph 5. in the Answers).

Disputed Issues

Under § 28.25(a)(1) of the Consolidated Rules, summary determination as to liability allegations may be granted if there is no genuine issue of material fact presented by the administrative record and any exchange of information. There has been an information exchange in Docket No. CWA-III-121, but none has been ordered or conducted in Docket No. CWA-III-141. However, in both cases a good deal of relevant information has been introduced into the record in the form of exhibits attached to the parties' motions and responses.

An accelerated recommended decision may be granted if the Presiding Officer, having made a liability determination, also

determines that there is no compelling need for further fact-finding concerning remedy. If the Presiding Officer determines summarily some, but not all of the liability allegations, an interlocutory partial summary determination order may be issued with those determinations, narrowing the range of the issues in dispute for further proceedings. An accelerated recommended decision would not be appropriate under those circumstances.

COMPLAINANT'S CAUSES OF ACTION

In addition to the admitted elements of the Clean Water Act causes of action adopted above as recommended findings of fact and conclusions of law, the Administrative Complaints also contain allegations regarding Respondent's violations of the Permit and regarding Complainant's consultation with the Commonwealth of Pennsylvania sufficient to make out valid claims under § 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g). If Respondent had raised no defenses, Complainant would be entitled to judgment as to liability as a matter of law because there would be no material issue of fact to determine as to liability. In its responses to the Administrative Complaints and in its other filings, Respondent has raised a great many issues pertaining to liability and to the proposed penalty assessment:

Consultation with Pennsylvania:

The Administrative Record in each action contains a clear copy of Complainant's correspondence with the Commonwealth in which Pennsylvania's input on the proposed penalty actions was solicited.

There is no evidence that the Commonwealth ever responded to this correspondence. Complainant's letters satisfy the statutory requirement of state consultation, and since Respondent has presented no evidence on this issue, there is no genuine issue of material fact to be determined at hearing on this point.

Parameters are not pollutants

Respondent argues that the effluent parameters of Total Suspended Solids (TSS), Carbonaceous Biochemical Oxygen Demand-5 day measure ($CBOD_5$) and pH are not pollutants within the statutory definition of the term, and that the Administrative Complaints do not state proper Clean Water Act claims in alleging discharges in excess of the Permit limitations on these effluent parameters. Complainant has alleged, and Respondent has admitted, the discharge of pollutants to the Clarion River (Recommended Finding No. 1, above). The Administrative Complaints also allege that Respondent failed to comply with terms and conditions of the Permit (Allegation No. 7). It is well established that "to violate a NPDES permit is to violate the Act." Chesapeake Bay Foundation v Bethlehem Steel Corporation, 608 F. Supp. 440, 451 (D. MD. 1985). The next question is: in what manner, if any, did Respondent violate the Permit?

Discharge Monitoring Reports

The Administrative Records include legible copies of Respondent's Discharge Monitoring Reports (DMRs) for certain of the months during which Complainant alleges that Respondent discharged

pollutants in violation of terms and conditions of the Permit. Although a copy of the DMR for April, 1994 was not in the record of Docket No. CWA-III-127 at the time of Complainant's Motion for Summary Determination and Accelerated Recommended Decision, Complainant introduced a copy of the missing DMR into the record with its Second Prehearing Exchange. Respondent filed a Motion to Strike Complainant's Second Prehearing Exchange, citing §§ 28.24(e)(1)(i) and 28.2(b)(15)(ii) of the Consolidated Rules. Complainant indicated it would not respond to Respondent's Motion to Strike, and so the Presiding Officer has granted the Motion and Respondent's April, 1994 DMR is no longer part of the Administrative Record in Docket No. CWA-III-127. Accordingly, there is no evidence in the record supporting Complainant's Motion for Summary Determination as to the alleged April, 1994 violations, so Complainant is not entitled to summary determination as to that month. There remains a genuine issue of material fact as to this allegation, to be decided after further proceedings.

The DMRs that are in the record are clear evidence of Respondent's violations of the Permit, executed with required certifications as to accuracy by an authorized representative of the Respondent. In Clean Water Act enforcement proceedings, DMRs are usually treated as admissions of liability. In the Matter of Battelle Memorial Institute, Inc., EPA Docket No. CWA-IV 94-509 (CWA § 309(g) Presiding Officer's Order Granting Complainant's Motion for Summary Determination of Liability and Denying

Respondent's Cross Motion for Summary Determination of Liability, dated June 1, 1995); Student Public Interest Research Group v Chemwaste Pacific, 618 F. Supp. 1369, 1129 (D. N.J. 1985); Student Public Interest Research Group v PD Oil & Chemical Storage, 627 F. Supp. 1074, 1080 (D. N.J. 1986); Student Public Interest Research Group v New Jersey Central Power & Light, 662 F. Supp. 103 (D. N.J. 1986); Public Interest Research Group v Yates Ind. (D. N.J. 1991); Public Interest Research Group v Rice, 774 F. Supp. 317, 325 (D. N.J. 1991).

Even where, as here, an NPDES permitee proffers affidavits with opinions purporting to undercut the reliability of information presented in DMRs (Buesink and Grafton affidavits of March 3 and March 6, 1995, as they relate to pH value for March, 1994, attached to Respondent's March 6, 1995 memorandum of law), summary judgment on liability is appropriate unless EPA would not consider the DMR information as conclusively showing permit violations. New Jersey Student Public Interest Research Group v Tennece Polymers, 602 F. Supp. 1398, 1408 (D. NJ 1985). Respondent has introduced some evidence that an EPA inspector questioned TSS and CBOD, analytical procedures during a February 13, 1995 inspection of Respondent's facility. (Buesink affidavit of March 3, 1995, attached to Respondent's March 6 filing; Schuller supplemental affidavit of April 28, 1995, attached to Respondent's May 1, 1995 filing). Complainant has not addressed the February 13, 1995 EPA inspection in its subsequent filings. Although they are not very remote in

time from the alleged violations, and may be of some probative value. the inspector's statements do not constitute an adequate indication that EPA would not consider the information in the earlier DMRs as conclusively showing permit violations. To the contrary. Complainant's position is that the DMRs do conclusively show permit violations.

In some courts, a strong showing of prevent faulty analysis, direct or reliable circumstantial evidence of reporting inaccuracies, may allow the drawing of an inference in favor of a non-moving party sufficient to raise a genuine issue of fact and so to defeat a motion of for summary judgment. Public Interest Research Group v Elf Atochem, 817 F. Supp. 1168, 1178 (D. NJ 1993). In other courts, a permittee "...may not now refute its own reports on the results of its testing...If an entity reports a pollution level in excess of the Permit limits, it is strictly liable, as Congress has manifested an intention that courts not reconsider the effluent discharge levels reported." Connecticut Fund for the Environment v Upjohn Co., 660 F. Supp. 1397, 1417 (D. Conn. 1987). In the latter case, evidence of reporting inaccuracies, while rejected for purposes of determining liability, were relevent to remedy.

Respondent has cited a case in which the judge declined to grant plaintiff's motion for summary judgement based upon the defendants's DMRs. In Friends of the Earth v Facet Enterprises, 618 F. Supp. 532 (N.D. N.Y. 1984). the court found that the

defendant had "offered a multitude of justifications for the alleged violations, along with convincing arguments why many of the alleged violations should not actually constitute violations (e.g. typographical mistakes in the DMRs)," but gave no details of the "justifications" or of the "convincing arguments." 618 F. Supp. at 536. Here there are neither justifications nor convincing arguments about the reliability of the data in the DMRs in the record, and the law in the Third Circuit, as demonstrated in the PIRG cases, leads to a result different from that reached by the court in the Facet Enterprises case.

Given the nature and quality of the evidence already in the record, this stage of the enforcement proceedings is not the proper point at which to consider Respondent's claim regarding the inaccuracies of DMRs. Chesapeake Bay Foundation v Bethlehem Steel Corporation, 608 F. Supp. 440, 452. The DMRs in the record entitle Complainant to summary determination as to the Permit violations they indicate as a matter of law.

Excursion

The secondary treatment regulation, 40 C.F.R. Part 133, contains a provision apparently allowing for an excursion from the pH limts of 6.0-9.0 if the publicly owned treatment works demonstrates that: (1) Inorganic chemicals are not added to the waste stream as part of the treatment process; and (2) contributions from industrial sources do not cause the pH of the effluent to be less than 6.0 or greater than 9.0. 40 C.F.R.

§ 133.102(c). With regard only to Docket No. CWA-III-127, Respondent made such a demonstration in evidence submitted for the record, relevant to the March, 1994 DMR that shows a pH level of 3.7. (Grafton affidavit of March 6, 1995; Buesink affidavit of March 3, 1995, both attached to Respondent's memorandum of March 6, 1995). The Permit contains no provision for pH excursions, and the Permit's terms and conditions are controlling in these enforcement proceedings. The affidavits raise no genuine issue of material fact, although they may pose an interesting technical question.[1]

Trickling filters

Respondent's facility utilizes trickling filter technogy, which EPA has recognized as having limited treatment capability. The secondary treatment regulation, 40 C.F.R. Part 133, sets forth effluent limitations less stringent for "facilities eligible for treatment equivalent to secondary treatment," typically those with trickling filter or waste stabilization pond technology. 40 C.F.R. §§ 133.101(g), 133.105. These less stringent effluent limitations are not in Respondent's NPDES permit. Further, comparison of the table showing alleged violations of the Permit in Docket No. CWA-III-127 (Exhibit 2 to Complainant's January 31, 1995 memorandum of law) with the the less stringent effluent limitations for

[1] The Permit also requires Respondent to take effluent samples at "Outfall 001 (after the chlorine contact tank)." Respondent's evidence shows that there is no such tank. (Buesink affidavit of March 3, 1995, attached to Respondent's submission of March 6, 1995.) Another interesting technical question posed, but no genuine issue of material fact is raised.

"facilities eligible for treatment equivalent to secondary treatment" in 40 C.F.R. § 133.105 shows that every violation alleged in Docket CWA-III-127 (excluding the April, 1994 alleged violation) would also have been a violation of the less stringent effluent limitations.[2] Respondent's trickling filters may be considered among the circumstances of the violation, but the evidence about them in the record does not raise a genuine issue of material fact as to liability.

Pretreatment

Pennsylvania does not administer the Pretreatment Program established under § 307 of the Clean Water Act, 33 U.S.C. § 1317, and 40 C.F.R. Part 403. Instead, EPA-Region III, through its Water Management Division Director, the Complainant in these actions, is responsible for assuring that the waters of the United States and publicly owned treatment works are protected from toxic water pollutants that may damage, interfere with or pass through those treatment works. As the pretreatment Control Authority, Complainant has regulatory and enforcement authority over publicly owned treatment works and over local Industrial Users who discharge pollutants to the sewers that convey their wastewaters to publicly owned treatment works. Complainant coordinates with PADER to incorporate Pretreatment Program implementation requirements into the NPDES permits of publicly owned treatment works.

[2] No comparison was made with the violations alleged in CWA-III-141 because the record does not contain a summary table of violations.

It is not uncommon for disagreements and disputes to break out among the Control Authority, PADER, a publicly owned treatment works and one or more of local Industrial Users, especially during the initial imposition of Pretreatment Program requirements in NPDES permits, local Industrial User permits or agreements and intermunicipal service contracts. These disputes may be resolved in various forums by negotiation, litigation or other forms of dispute resolution. It appears that such a dispute has arisen among the parties to these actions and PADER, and that it is well advanced toward resolution by negotiation. The Respondent avers that these actions were initiated by Complainant in retaliation for Respondent's invocation of administrative review rights in connection with Complainant's actions as pretreatment Control Authority, pointing to the temporal proximity of actions in the pretreatment dispute and the initiation of Docket No. CWA-III-127. A cynic might conclude that coincidence is the only way these events could have happened in such temporal proximity, but the fact of temporal proximity alone does not raise a genuine issue of material fact regarding retaliatory enforcement.

The alleged inadequacy of Complainant's enforcement of the Pretreatment Program requirements against Industrial Users connected to Respondent's sewer system is a red herring in these proceedings. Respondent does not contend that Industrial User discharges have caused the violations of the Permit involved in these cases. Instead, Respondent relies on findings made by EPA in

the context of its process of imposing a Pretreatment Program upon Respondent long before the discharges that are involved in these cases, to build its argument that EPA's allegedly inadequate Pretreatment Program enforcement constitutes a defense to liability. Evidence in the record regarding the enforcement of the Pretreatment Program does not raise a genuine issue of material fact.

Joinder of Pennsylvania

Respondent argues that § 309(a) of the Clean Water Act, 33 U.S.C. § 1319(a), requires the joinder of the Commonwealth of Pennsylvania as a party to these cases, and that Complainant's failure to join the Commonwealth as a party is a fatal defect in the cases. This argument fails to recognize the distinction between Clean Water Act civil enforcement actions under § 309(b) and administrative penalty enforcement actions under § 309(g). In civil judicial Clean Water Act actions involving municipalities, states are to be joined as parties to actions brought by the United States so that they may be ordered to pay any part of a judgment that a municipality is unable to pay due to state law. This requirement of § 309(e) makes good sense in civil judicial actions where the United States often must seek very expensive capital improvements to complex sewage treatment plants as injunctive relief, in addition to significant civil penalties. Many states have constitutional municipal debt ceilings or other legal restrictions on municipalities' ability to raise capital. In

§ 309(g) administrative penalty proceedings injunctive relief is not available and penalties are limited by a statutory cap ($25,000 in Class I proceedings such as these). The state role contemplated in § 309(a) is therefor not present in § 309(g), and Pennsylvania is not a necessary party in these cases.

Preclusion

The Administrative Complaints allege violations of Permit effluent limitations in January, February, March, April (Docket No. CWA-III-127), May, June, July and August (Docket No. CWA-III-141) of 1994. They describe Respondent's 8-month continuous noncompliance with the Permit. The respective DMRs are a chain of documents (one link, the DMR for April, 1994, is missing from the record) that are evidence of the continuity of Respondent's Clean Water Act noncompliance. While the DMRs are discrete documents, the noncomplying discharge is a continuous event, or at least a regular series of connected similar events. There is no break in the continuity of the discharge from one month to the next.

Respondent has raised the defense of "claim-splitting" in Docket No. CWA-III-141, alleging that Complainant had the May DMR in hand when it filed the Administrative Complaint in Docket No. CWA-III-127 on July 14, 1994. Complainant has not challenged the allegation, forthrightly acknowledging its probable truth. The May, 1994 DMR was not date-stamped upon receipt by Complainant. Respondent's evidence (April 20, 1995 Affidavit of John Frederick) that the DMR was mailed more than five weeks before the filing of

Docket No. CWA-III-127, supports the allegation. Complainant asserts that at the time Docket No. CWA-III-127 was filed, Complainant was assessing Respondent's "trend" of discharges on a four-month periodic basis, and therefore was not at all focussed on the May DMR when it filed the administrative complaint in Docket No. CWA-III-127. The preponderence of the evidence in the record supports a finding that, focussed or not, Complainant had the May, 1994 DMR in hand when it filed the first Administrative Complaint.

The "claim-splitting" and "claim-preclusion" doctrines would preclude the initiation of a new action involving causes of action that could or should have been brought with a pending action. These doctrines operate to force litigants to bring all causes of action associated with a transaction or a series of related transactions in a single case in one forum. Thus, pending litigation in one forum precludes a new action involving the same parties and causes of action in the same forum or in a second forum, and once a transaction has been litigated between parties, those parties may not raise new causes of action involving that transaction in a new case in any forum.

Complainant overemphasizes the significance of the DMRs in suggesting that it would be allowable to have brought a separate action for each month of noncompliance: "EPA would have been perfectly within the realm of its enforcement discretion to file sequential penalty actions for each month's violations on a monthly basis." Complainant's May 12, 1995 Memorandum of Law in Response

to Respondent's Second Motion for Summary Determination etc. at 3. Complainant apparently assumes that the discreteness of the evidence supporting its claim, and the potential independence of its causes of action allow it to determine the scope of its claims as coterminous with its evidence. "One of the tests laid down for the purpose of determining whether or not the causes of action should have been joined in one suit is whether the evidence necessary to prove one cause of action would establish the other. Crimm v Talyandi, 4 McCord, 28." [Quoted in Stark v Starr, 94 U.S. 477, 485 (1876)]. DMR evidence is important in most NPDES cases, and DMRs can prove separately actionable claims of NPDES permit violations. But when consecutively filed DMRs show substantially similar effluent violations, they are also proving continuous noncompliance, a much larger cause of action than that evidenced by any single DMR. "A plaintiff's claim consists of all rights against a particular defendant with respect to all or any part of a transaction, or a series of connected transactions, out of which the action arose'." Alyeska Pipeline Service Co. v United States, 231 Ct. Cl. 560, 688 F.2d 765, 769 (1982), quoting Container Transportation International, Inc. v United States, 199 Ct. Cl. 713, 718, 488 F.2d 926, 929 (1970). New evidence of an ongoing release of a hazardous waste, known at the time the first action was initiated, does not support the initiation of a second action. Supporters to Stop Pollution v Heritage Group, 973 F. 2d 1320, 1326 (Seventh Cir. 1992). In an administrative penalty action under the

Toxic Substances Control Act, 15 U.S.C. § 2601 et seq., an EPA Administrative Law Judge rejected a respondent's claim-splitting argument, noting differences in the section of the statute, in the manner in which the alleged violations were discovered and in the manner in which the Complainant brought the claims. Kerr Chemical and Mineral Corporation, EPA Docket No. TSCA-8(a)-88-0228, Initial Decision dated April 15, 1991. On appeal to the Environmental Appeals Board, Judge Vanderheyden's decision was affirmed. [TSCA Appeal 92-4, Final Decision dated February 24, 1993].

Although caselaw cited by the parties in their briefs was instructive, neither counsel nor the Presiding Officer have been able to identify cases precisely on point. Counsel for Respondent has cited to Restatement (Second) Judgments § 24 (1988), which puts the issue in clearer perspective:

> (a) The present trend is to see claim in factual terms and to make it coterminous with the transaction...the transaction is the basic of the litigation unit or entity which may not be split...
>
> (d) When a defendant is accused of...acts which though occurring over a period of time were substantially of the same sort and similarly motivated, fairness to the defendant as well as the public convenience may require that they be dealt with in the same action...
>
> (g)...The rule stated in this section as to splitting a claim is applicable although the first action is brought in a court which has no jurisdiction to give a judgment for more than a designated amount...

In Restatement terms, the "transaction" in these cases was the noncomplying discharge, an ongoing event. The DMRs are evidence of

the several Permit violations alleged: monthly and weekly TSS and CBOD, loading and concentration limits, and, for March, 1994, a pH "excursion" below the minimum allowable. Respondent is accused of these violations, which though occuring over a period of time, are substantially of the same sort and similarly motivated, and thus constitute a "claim," so they ought all to have been brought in the same action.

Separate administrative complaints for different effluent limitation violations shown in the Nine DMR would not be allowed; neither should separate complaints for different, but connected, time periods in the same continuous or connected act of noncompliant discharge be allowed. Nor should Complainant be allowed to bring more than one action involving continuous noncompliance were it to exercise its enforcement discretion and allege only violations documented in DMRs for every other month during an extended period. Of course, Complainant *may* not successfully assert that the striking of the April, 1994 DMR from the record in Docket No. CWA-III-127 "breaks the chain" so as to allow a second action with all later-submitted DMRs. Where does the "claim" end? With Respondent's complying discharge the transaction is completed. The records in these matters do not indicate whether Respondent has come into compliance.

Complainant had knowledge that the transaction was not completed when it filed the Administrative Complaint in Docket No. CWA-III-127: the May, 1994 DMR showed the continuation of the

noncompliant discharge. Counsel for Complainant alludes to the "cumbersome internal approval process imposed by EPA" as if it were some form of unstoppable enforcement juggernaut that precluded any reevaluation of its strategy upon receipt of the May DMR. But no claim would have been lost by delaying and rethinking the filing of the Administrative Complaint. To the contrary, it is the juggernaut that caused the loss of a part of Complainant's claim.

Complainant must bring all its Clean Water Act penalty claims arising out of the Respondent's continuous noncompliance with the Permit in a single action. As Respondent points out, several options were available to Complainant: Class I administrative penalties, Class II administrative penalties and civil judicial penalties. It is not for the Presiding Officer to indicate a preferred forum: Agency guidance and the enforcement chain of command presumably determine the forum as a matter of strategy. As counsel for Respondent noted during oral argument, EPA policy addressed claim-splitting in the administrative penalty context:

> ...EPA will be on the strongest legal ground by avoiding simultaneous administrative penalty actions against a single violator. Should EPA initiate separate administrative penalty actions for different sets of past violations by one violator, EPA may have to rebut the argument that it has split its claims in order to circumvent the Act's $125,000 cap on administrative penalties...

GUIDANCE ON "CLAIM-SPLITTING" IN ENFORCEMENT ACTIONS UNDER THE CLEAN WATER ACT, EPA Offices of Water and Enforcement, August 28, 1987.

If Complainant discovers it has selected a forum that cannot accommodate its claims due to jurisdictional limitations, it may be procedurally possible to switch the forum, depending on the stage of the proceeding and the cooperation of the opposing party. But Complainant cannot force a switch, because Complainant was the one who selected the forum. Supporters to Common Pollution v Heritage Group, 973 F. 2d 1235.

In Docket No. CWA-III-141, Respondent's 12th affirmative defense cites Section 309(g)(6)(A) of the Clean Water Act, 33 U.S.C. § 1319(g)(6)(A), as a basis for precluding Complainant from filing an action. That provision operates to preclude civil (judicial) penalty actions under § 309(d) and § 505 (citizen suits), and civil or administrative penalties under § 311(b), (relating to oil and hazardous substance liabilities) for violations subject to diligently prosecuted enforcement under § 309(g). In light of the discussion regarding "claim-splitting," this affirmative defense appears moot; in any event counsel for Respondent has not adequately articulated a legal theory that would present an genuine issue of material fact, so it will not be considered further.

As a matter of law, Respondent is entitled to summary determination as to liability and an accelerated recommended decision in Docket No. CWA-III-141; the Presiding Officer will recommend that the Regional Administrator withdraw the Administrative Complaint with prejudice.

Equitable defenses

Respondent's estoppel, res judicata, laches and unclean hands equitable defenses hinge in large part on the relevance of a January, 1990 Consent Order and Agreement between Respondent and the Pennsylvania Department of Environmental Resources (PADER), which was based on Respondent's violation of the Pennsylvania Clean Streams Law, 35 P.S. §§ 691.1 et seq., during 1988 and 1989. That action involved a different NPDES permit, since the permit involved in these actions was issued in July of 1993. Presumably, there was Clean Water Act liability as well as Pennsylvania Clean Streams Law liability under the prior permit because violation of a NPDES permit is a violation of both Pennsylvania and Federal law. The Pennsylvania action involved some, but not all, of the effluent parameters involved in these cases. There is no identity of claims, an inadequate identity of issues and no identity of parties between the present cases and the 1990 PADER action. The Pennsylvania case, also based primarily upon Respondent's DMRs, involved TSS and Biochemical Oxygen Demand (BOD) violations in 1988 and 1989, fecal coliform violations in 1988, failure to submit DMRs in 1988 and 1989, and failure to submit lifestation operational reports in 1988 and 1989. Thus, the claims PADER pursued predated Complainant's claims by several years, were brought under different statutory authority, and involved different terms of a different NPDES permit. PADER obtained both injunctive relief and a civil penalty in its 1990 action; in these cases Complainant may seek

only penalties. While PADER does administer the NPDES in Pennsylvania under EPA oversight, PADER is not Complainant's agent in any sense; Complainant could not have become a party to the PADER action; and the Consent Order and Agreement was, by its own terms, an Order of the Department. It was not an adjudication that resulted from litigation but rather t e outcome of negotiation. The 1988 PADER action may be relevant to assessment of a penalty (the statute requires consideration of 'prior such violations' in assessing a penalty), but it gives rise to no defense in these Federal actions.

Respondent also argues that Complainant affirmatively misled Respondent in correspondence while Respondent was negotiating the Consent Order and Agreement with PADER during 1989, inducing Respondent to pursue an expensive, long-term upgrade of the sewage treatment plant rather than a less expensive, short-term fix that might have avoided the violations involved in these cases. An objective reading of this correspondence does not support this argument, however, this matter, too, may be considered in connection with a penalty assessment.

Respondent apparently never benefitted from an EPA construction grant under Title II of the Clean Water Act. The funds appropriated by Congess for Title II are allocated among the states according to legislative direction, and each state prioritizes projects in need on its own. Grant funding is not a consideration in determining liability under the Clean Water Act.

It may be a penalty consideration.

Respondent has also introduced evidence of its efforts to comply with the Permit, and evidence that the sewage treatment plant is well operated and maintained. These matters could not constitute a defense to liability because the Clean Water Act is a strict liability statute. They may be considered in connection with penalty assessment, however.

Finally, Respondent disputes the manner in which Complainant has calculated the number of alleged Permit violations. Complainant has countered with arguments and explanations regarding the proposed penalties. As a general matter, these matters do not raise a genuine issue of material fact, and are more appropriate for legal argument at a later stage of the proceeding. Several comments are in order, however.

First, Respondent is gravely mistaken in asserting that 'this matter addresses a maximum penalty liability of $ 200 per month of violation.' (Respondent's March 6, 1995 memorandum of law, at p. 27, footnote 30). The statutory maximum penalty in a Class I Clean Water Act action is $25,000. The 'per violation' maximum is $10,000. Accordingly, if three or more violations are alleged, maximum penalty liability is $25,000. Complainant has no power to limit liability except by limiting the number of violations alleged in the Administrative Complaint. The penalty proposal in the Administrative Complaint is not an assessment, regardless of its characterization by the Complainant ('EPA elects to assess a penalty

for violation of one monthly average limitation per parameter per month." Complainant's April 7, 1995 memorandum of law at p. 23). The penalty assessment, if there is to be one, will be performed by the Regional Administrator, following the submission of the Presiding Officer's recommendation. It will be based upon the record, and thus may be influenced by the arguments advanced by the parties, but it will not be limited by anything but the statute.

ORDER

Complainant's Motion for Summary Determination in Docket No. CWA-III-137 is GRANTED except as to the month of April, 1994; Respondent's Second Motion for Summary Determination and Accelerated Recommended Decision in Docket No. CWA-III-141 is GRANTED. All other aspects of these motions are DENIED.

Date: June 29, 1995

SIGNED
BENJAMIN KALKSTEIN
Presiding Officer

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CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

Plaintiff,

V.

AVATAR HOLDINGS, INC., and
FLORIDA CITIES WATER COMPANY,

Defendants.
_____/

CASE NO. 93-281-CIV-FTM-21

DENNIS J. GETMAN
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ORDER

This cause comes before the Court on three pending motions: (1) United States' Motion for Partial Summary Judgment (Dkt. 130) and Avatar Holdings Inc.'s and Florida Cities Water Company's responses (Dkts. 171 & 174) in opposition thereto; (2) Avatar Holdings, Inc.'s Motion for Partial Judgment on the Pleadings (Dkt. 169) and the United States' response (Dkt. 183) in opposition thereto; (3) Florida Cities Water Company's Motion for Partial Summary Judgment (Dkt. 173) and the United States' response (Dkt. 179) in opposition thereto.

BACKGROUND

This is a civil action brought on behalf of the Environmental Protection Agency (EPA) pursuant to section 309(b) of the Clean Water Act ("the Act"), 33 U.S.C. § 1319(b), for civil penalties for violations of section 301 of the Act, 33 U.S.C. § 1311, and for violations of the conditions and limitations of National Pollutant Discharge Elimination System (NPDES) permits issued by EPA pursuant to section 402 of the Act, 33 U.S.C. § 1342. The discharge of wastewater, or effluent, into the waters of the United States requires the authorization of, and

the compliance with the terms and conditions of an NPDES permit. Defendant Florida Cities Water Company ("Florida Cities") operates several wastewater treatment plants in Florida, and Defendant Avatar Holdings, Inc. ("Avatar Holdings") is Florida Cities' parent company.

Three wastewater treatment plants are the subject of this action. The alleged violations include the following: (1) discharging without an NPDES permit (Barefoot Bay, Carrollwood, and Waterway Estates); (2) violation of an EPA Administrative Order (Barefoot Bay); (3) discharging at an unpermitted location (Waterway Estates); (4) exceeding NPDES effluent limitations (all three facilities); and (5) failure of toxicity tests required by an NPDES permit (Barefoot Bay and Waterway Estates).

SUMMARY JUDGMENT STANDARD

The Court will enter summary judgment only if the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). On the issue of materiality, "the substantive law will identify which facts are material." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Material facts are those over which disputes "might affect the outcome of the suit under the governing law." Id. at 248.

The movant bears the burden of establishing the absence of dispute over material facts. Reynolds v. Bridgestone/Firestone, Inc., 989 F.2d 465, 469 (11th Cir. 1993). Where the party opposing the summary judgment motion has the burden of proof at trial, the moving party must either point out to the Court specific portions of the record which show that the nonmoving party cannot prevail at trial, or introduce affirmative evidence negating the opposing party's case. United States v. Four Parcels of Real Property, 941 F.2d 1428, 1438 (11th Cir. 1991). Where

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the moving party has the burden of proof at trial, "that party must show *affirmatively* the absence of a genuine issue of material fact: it 'must support its motion with credible evidence...that would entitle it to a directed verdict if not controverted at trial.'" United States v. Four Parcels of Real Property, 941 F.2d 1428, 1438 (11th Cir. 1991), citing Celotex Corp. v. Carrett, 477 U.S. 317, 331 (1986).

In determining whether the party seeking summary judgment has met its initial burden, the Court must view the evidence and factual inferences therefrom in the light most favorable to the opposing party. Clark v. Coats & Clark, Inc., 929 F.2d 604, 606 (11th Cir. 1991). Any reasonable doubts about the facts are to be resolved in favor of the party opposing the motion for summary judgment. Reynolds, 989 F.2d at 469. If the moving party does not meet its burden, the motion for summary judgment will be denied. Four Parcels of Real Property, 941 F.2d at 1437. Where the moving party meets its initial burden, the burden shifts "to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." Clark, 929 F.2d at 608.

DISCUSSION

I. Barefoot Bay

A. Unpermitted Discharges

Plaintiff asserts that in order to establish liability in this action, Plaintiff need only show that Florida Cities is (1) a person that, (2) discharged a pollutant into navigable waters, (3) from a point source, and that (4) Florida Cities had no permit for the discharge or, as applicable, that the discharge violated the terms of an NPDES permit or administrative order. Plaintiff indicates that it has established the first three prongs through Florida Cities' admissions on the record.

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Further, Plaintiff urges the Court to draw inferences that violations were committed as alleged and that Avatar Holdings actually controlled Florida Cities' environmental practices from the fact that several witnesses, including high-ranking past and present managers and officers of both Defendants,[1] have refused to testify on Fifth Amendment grounds. The Court notes, however, that as pointed out in Florida Cities' response, even where an inference is drawn from invocation of the Fifth Amendment, such an inference cannot form the sole basis of a judgment against the witness; rather, it is to be considered in conjunction with other evidence. See Baxter v. Palmigiano, 425 U.S. 308, 318 (1976)(holding that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them"); Director of Office of Thrift Supervision v. Lopez, 960 F.2d 958, 965 (11th Cir. 1992)(holding that the adverse inference cannot form the sole basis of a judgment against the witness).

Plaintiff asserts that it is entitled to summary judgment on the basis that Defendants discharged effluent from Barefoot Bay into the Sebastian River during the period on or about July 1, 1990 to October 31, 1991 even though Florida Cities did not have an NPDES permit. Because these discharges occurred daily, Plaintiff asserts they account for 488 violations.[2]

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[1]The Plaintiff refers here to the Depositions of: James Elder (former Florida Cities Engineering Manager), March 6, 1995); Lawrence Wilkov (former Avatar Holdings President), March 7, 1995; Gerald S. Allen (Avatar Utilities Executive Vice-President), March 27, 1995; Antone A. Reeves (former Florida Cities Executive Vice-President/General Counsel), May 1, 1995; Robert Gordon (Avatar Utilities President), May 1, 1995.

[2]Plaintiff explains in footnote 21 to its memorandum in opposition to Florida Cities' second motion for partial summary judgment that the number of unpermitted discharges at Barefoot Bay needed to be recalculated because the statute of limitations cutoff date was uncertain until the Court permitted the United States to file its Second Amended Complaint and ruled on whether its allegations would relate back to March 31, 1995, the date on which the the initial proposed Amended Complaint was received by the Court. Because the Second Amended Complaint was filed on June 27, 1995 (and in light of the fact that the Court denied the request that the allegations relate back), Plaintiff states that it has calculated unpermitted discharge days at Barefoot Bay dating back five years from that date, or July 1, (continued...)

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Florida Cities acknowledges the unpermitted discharges into Sebastian Creek. However, Florida Cities asserts that the matter was settled by the Consent Agreement and Order Assessing Administrative Penalties No. CWA-IV 91-538, dated November 6, 1991, and that EPA's administrative enforcement files and witnesses indicate that the Consent Agreement encompassed all the unpermitted discharges. Florida Cities asserts that the Clean Water Act precludes the EPA from seeking judicial or other enforcement of violations that have already been settled in EPA administrative enforcement proceedings that included payment of an administrative penalty.

In support of its argument, Florida Cities states that on July 12, 1991, EPA initiated an enforcement action to address the years of discharge without a federal NPDES permit by issuing a Notice of Show Cause for discharge without an NPDES permit for "the period from September 14, 1989 until the present." A Show Cause meeting was held on August 9, 1991. EPA enforcement officer Roy Herwig then drafted EPA's Administrative Complaint and the Consent Agreement with the accompanying "Notes on the Proposed Penalty Assessment" ("Notes"). Florida Cities asserts that a thorough review of the complete administrative record establishes that both parties intended to settle all violations for discharge without an NPDES permit at Barefoot Bay, and that the Consent Agreement with its attached Notes did in fact settle all such matters, even though the Consent Agreement specifically references only the day of EPA's inspection, September 14, 1989. Florida Cities points out various portions of the Notes, including a statement that the environmental harm resulting from unpermitted discharges from Barefoot Bay was not any greater than if Florida Cities had had an NPDES permit and a portion of the

[3](...continued)
1990. The number of total violations at Barefoot Bay has also been reduced to subtract prior alleged violations of testing method requirements.

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"Summary" stating that "the assessed penalty of $6,000 represents a fair and equitable application of the factors identified in § 309(g)(3) of the Act." Florida Cities further asserts that the only analysis of the factors in § 309(g)(3) in the administrative record is in the Notes, which, Florida Cities maintains, demonstrate that the EPA's intention was to settle all outstanding violations for discharge without an NPDES permit. Additionally, Florida Cities points out that Mr. Herwig testified that, at the end of the negotiations, he believed that the issue of discharge without a permit was fully resolved and "none of this would be revisited." Florida Cities states that Mr. Herwig's understanding is bolstered by the affidavit of Kathleen L. Blizzard, counsel for Florida Cities at the Show Cause meeting. In an affidavit she states that at the end of the Show Cause meeting, it was her understanding and EPA's understanding that all of the "discharge without a permit" violations were resolved.

Florida Cities also asserts that Mr. Kenneth Kwan, the EPA Environmental Engineer upon whose testimony Plaintiff relies, shows a lack of due diligence and recklessness in that Mr. Kwan did not reconcile his determinations with those of Mr. Herwig's EPA team. Florida Cities maintains that Mr. Kwan is not qualified to determine whether the "discharge without a permit" violations had been settled, because he was not present at the settlement negotiations and he made no inquiries of the persons who were present. Additionally, Florida Cities asserts that, from a practical perspective, Plaintiff's "one-day" theory would result in expenditure over several months of hundreds of man-hours and thousands of dollars by both EPA and Florida Cities to resolve only one day out of several hundreds of days of discharge without an NPDES permit.

Prior to the date on which the pending motions for summary judgment were ripe for decision by the Court, Florida Cities filed a Notice of Dispositive Authority (Dkt. 199) and

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submitted a copy of Borough of Ridgway, Pennsylvania, NPDES Permit No. PA0023213. Florida Cities asserts that this Clean Water Act case, decided by a Regional Presiding Officer in EPA Region III on June 29, 1995,[3] is dispositive authority in favor of Defendants for paragraphs 16, 17, 18, 19, 20, 21, 22, 23 and 30[4] of the Second Amended Complaint. Florida Cities asserts that Borough of Ridgway stands for the proposition that Plaintiff is required to bring, pursuant to the "claim-splitting" and "claim preclusion" doctrines, "all causes of action associated with a transaction or a series of related transactions in a single case in one forum." Id. at 16. Florida Cities thus argues that the EPA administrative complaints[5] against Florida Cities, allegedly covering one day for Barefoot Bay and 37 months for Carrollwood (discussed below), represent a final determination by EPA which cannot be relitigated in this forum. Florida Cities asserts that EPA had the knowledge and opportunity to address all the claims in the above referred paragraphs of the Second Amended Complaint at the time the administrative complaints were filed. Florida Cities therefore asserts that EPA's claims should have been raised in the administrative enforcement proceedings, and EPA is now precluded from asserting those claims.

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[3]Subsequent to filing its Notice of Dispositive Authority, Florida Cities filed a Notice (Dkt. 200) indicating that Borough of Ridgway, Pennsylvania, NPDES Permit No. PA0023213 was appealed to the Environmental Appeals Board (EAB) on July 19, 1995, and oral argument was heard by the EAB on September 27, 1995. Florida Cities further indicated that no decision had been issued by the EAB as of November 1, 1995.

[4]Paragraph 16 asserts the claim that Defendants discharged pollutants from Barefoot Bay without an NPDES permit from July 1, 1990 to October 31, 1991. Paragraphs 17-23 assert the claims that Defendants violated EPA Administrative Order 90-106. In paragraph 30, Plaintiff claims that from August 1990 to June 1991, Defendants discharged pollutants from Carrollwood without an NPDES permit.

[5]The Court assumes that Florida Cities seeks to incorporate the Consent Agreements.

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In a footnote, Florida Cities asserts, and the Court agrees, that this issue was not addressed in Florida Cities' first motion for partial summary judgment or in the Court's June 21, 1995 Order on the first motion for partial summary judgment (Dkt. 127). Florida Cities states that Plaintiff argued in its response to Florida Cities' Motion to Strike Paragraphs 15 through 39 of Plaintiff's Amended Complaint that the Consent Agreement is analogous to a contract and, therefore, that the Court may not look beyond the four corners of the document.[6] In a companion Order (Dkt. 126) to the above referenced Order of June 21, 1995, the Court denied Florida Cities' motion to strike. However, Florida Cities points out that the Court's ruling on the motion to strike was in the context of a Rule 12(f) motion on the sufficiency of the evidence. Florida Cities asserts that it had no knowledge of the Notes until after the Court's Order denying Florida Cities' motion to strike. It asserts that summary judgment is appropriate only after Defendant has had an opportunity to conduct discovery into important factual matters. It asserts, and the Court agrees, that Plaintiff cannot be granted summary judgment in the context of a motion to strike.

In its response to Florida Cities' motion for partial summary judgment,[7] Plaintiff maintains that the issue of whether Florida Cities has already been penalized administratively for discharges from Barefoot Bay and Carrollwood without an NPDES permit have already been briefed and adjudicated by the Court in its June 21, 1995 Order (Dkt. 126) and that the Court's ruling on this issue now constitutes the law of the case. Similarly, in its response to Florida

[6]The Court notes that it addressed Plaintiff's argument in the context of its Motion for Reconsideration of Court's Order on Amendment of Complaint, which the Court ruled upon in one of the June 21, 1995 Orders.(Dkt. 126).

[7]Plaintiff states that although all of the claims for which Florida Cities seeks summary judgment have already been fully briefed by Plaintiff in its own motion for partial summary judgment, it responded for the limited purpose of rebutting Florida Cities' arguments.

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Cities' Notice of Dispositive Authority, Plaintiff states that the Court rejected Florida Cities' argument in support of preclusion of the claims for unlawful discharges of pollutants from Barefoot Bay and Carrollwood in its June 21, 1995 Order (Dkt. 126). The Court disagrees, however, and finds that the parties' arguments and the Court's prior decision were in the context of whether certain paragraphs of the proposed Amended Complaint were futile and therefore should not have been allowed to be included in the Plaintiff's Amended Complaint and in the context of the Court's reconsideration of its prior decision not to permit the amendments to the Complaint. Because the Court ultimately decided to permit the amendments, but did not grant Plaintiff summary judgment on them, Plaintiff's argument that the Court's decision constitutes the law of the case is without merit.[8]

In its response to the substance of Florida Cities' argument on the effect of the EPA's administrative penalties, Plaintiff points out that, as noted in its earlier brief, it is axiomatic that "since consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts. . . .", citing United States v. ITT Continental Baking Co., 420 U.S. 223, 236 (1975). Further, Plaintiff asserts that, under contract law, the terms of an unambiguous contract are exclusively contained within the four corners of the document itself, and "the instrument must be construed as it is written," citing ITT Continental, 420 U.S. at 236.[9] Plaintiff also asserts that the Notes and testimony of EPA officials and the declarations

[8]The Court notes Plaintiff's request that if the Court considers the substantive merits of this issue, that the Court refer to Plaintiff's Memorandum in Support of its Motion for Reconsideration of Court's Order on Amendment of Complaint (Dkt. 87), which Plaintiff incorporates pursuant to Rule 10(c), Fed. R. Civ. P.

[9]Plaintiff argues that the language of the Consent Agreement makes clear that it only resolved the illegal discharge occurring on September 14, 1989. Paragraphs II.4, III.2, and IV.1 of the Consent Agreement provide:

(continued...)

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of Florida Cities' outside counsel who negotiated the agreements are irrelevant as a matter of law because the agreements themselves are unambiguous. Further, Plaintiff points out the absence of a reference to any express statement by EPA that it would not penalize Florida Cities further for the violations not covered by the agreements. Plaintiff maintains that, taken in its true light, the evidence tends to show how Florida Cities misled EPA into applying minimal administrative fines for the limited violations that were covered. Additionally, Plaintiff asserts that the Notes form no part of the agreements, but rather are simply routine explanations of the settlements written by the enforcement officer to internally document that the penalty being assessed conforms to the factors prescribed by the statute. Plaintiff asserts that the evidence indicates that the EPA intended to preserve its right in the settlement documents in the event it later determined that further enforcement action was warranted. It points to Mr. Herwig's statement in his deposition that "in case it didn't work out, the regional counsel had provided the language to allow us to revisit those things should it become necessary in the future." (Dkt. 174, Exh. 18).

Plaintiff also argues in response to Florida Cities' Notice of Dispositive Authority that claims for violations at Barefoot Bay are not precluded by the doctrine of res judicata or the

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[9](...continued)

> Respondent has violated Section 301(a) of the Act, 33 U.S.C. Section 1311(a), by discharging pollutants into waters of the United States without a valid NPDES permit issued pursuant to Section 402 of the Act (33 U.S.C. 1342), **on September 14, 1989** from its Barefoot Bay WWTP into a drainage canal leading to the Sebastian River. . .
>
> Florida Cities Water Company **shall pay $6,000.00 for its past violations** of the Clean Water Act **cited above** . . .
>
> **This Consent Agreement and Order represents full monetary settlement** of the proposed administrative penalties sought by EPA **for the underlying violations as alleged in the Complaint.**

(Dkt. 87, Exh. A, Emphasis added). Plaintiff argues that in light of the provision in Title 33 U.S.C. § 1319(d) for a civil penalty for each day of a violation, the above language indicates that the penalty assessed was limited to the violation cited in the Consent Agreement.

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holding in Borough of Ridgway. Plaintiff states that the doctrine of res judicata bars a subsequent suit if four elements are present: (1) a final judgment on the merits rendered in the previous suit; (2) the judgment was rendered by a court of competent jurisdiction; (3) the parties or those in privity with them are identical in both cases; and (4) the same cause of action is involved in both cases, citing Thomas v. Evans, 880 F.2d 1235, 1240 (11th Cir. 1989). To prove that the fourth element, the same cause of action, is not satisfied, Plaintiff relies upon its prior argument in the record that the claims in this action are different from those alleged in the prior administrative proceedings. Further, Plaintiff argues that section 309 authorizes the United States to enforce a federal or state permit through a variety of administrative, civil and criminal mechanisms and that section 309(g)(6), 33 U.S.C. § 1319(g)(6), only precludes subsequent civil action for violations already covered by an administrative order. Finally, Plaintiff asserts that the facts and procedural record of Borough of Ridgway are so different from the instant case that it is inapplicable herein. Plaintiff states that in Borough of Ridgway, EPA brought two consecutive administrative actions for similar NPDES permit violations occurring from January through April 1994 and then from May through August 1994. Plaintiff asserts that in contrast, in the instant case, the United States brought administrative actions which were settled and then filed a judicial action to recover penalties for violations not settled but rather expressly reserved.

The Court finds that Plaintiff's claim in paragraph 16 for discharge from Barefoot Bay without an NPDES permit could have been raised in the prior administrative proceeding and are now barred by the doctrine of res judicata. It is clear that the principle of res judicata applies to consent decrees as well as to ordinary judgments entered by a court. United States v. Jefferson County, 720 F.2d 1511, 1517 (11th Cir. 1983). Plaintiff has not argued or set forth

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any evidence indicating that the allegations of discharge without an NPDES permit could not have been raised in the prior administrative proceedings. In fact, the Notes indicate that at the time the Consent Agreement was entered, Plaintiff was fully aware of the claims it now seeks to assert. (Dkt. 174, Exh. 7).[10] Further, the Seventh Circuit has found, in considering alleged violations of the Resource Conservation and Recovery Act, that ongoing releases known at the time of the initial suit do not constitute "new wrongs" such that they are not barred by preclusion principles. Supporters to Oppose Pollution, Inc. v. Heritage Group, 973 F.2d 1320, 1326 (7th Cir. 1992). The Court stated, "[t]hat the size of the release is better known now than then takes us nowhere; new evidence of injury differs from a new wrong." Id. at 1326 (citations omitted). Thus, because the Court finds that Plaintiff could have asserted the claims for discharging from Barefoot Bay without an NPDES permit in the prior administrative proceeding, res judicata bars the assertion of those claims herein. Federated Dep't Stores v. Moitie, 452 U.S. 394, 398 (1981)(holding that res judicata bars parties from relitigating issues that were or could have been raised in the first action).

B. AO 90-106

On September 26, 1990, EPA issued an administrative order, AO 90-106, for discharging without a permit, requiring Florida Cities to meet prescribed interim effluent limitations while

[10]The Court does not agree with Florida Cities' argument, however, that the Notes are part of or should be incorporated into the Consent Agreement. As noted by the Eleventh Circuit, the "scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." Paradise v. Prescott, 767 F.2d 1514, 1525 (11th Cir. 1985)(citations omitted). Thus, viewing the Consent Agreement within its four corners, the Court finds there is no indication that the Notes are part of or are incorporated into the Consent Agreement. The mere fact that Section III of the Consent Agreement states that the EPA has taken into account the factors in § 309(g)(3) of the Clean Water Act does not constitute an express incorporation of the Notes which provide an analysis of the § 309(g)(3) factors. Further, because the Court looks at the four corners of the Consent Agreement and because the contract is not ambiguous, the opinions of counsel who negotiated the Consent Agreement regarding the scope of the Consent Agreement are not relevant.

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its permit application was pending. Plaintiff asserts that from September 26, 1990 until October 31, 1991, Florida Cities regularly exceeded the administrative order's effluent limits. Plaintiff further states that according to Florida Cities' Discharge Monitoring Reports ("DMRs"), there were twenty-nine violations of the administrative order. Additionally, Plaintiff argues that any notion that the limits in the administrative order were inappropriate is negated by the fact that they mirror the limits of the subsequent permit and by the fact that Florida Cities never objected to the limits in the administrative order or permit.

In its Notice of Dispositive Authority, Florida Cities asserts that the claims for violations of AO 90-106 in paragraphs 17-23 are barred by res judicata based on the arguments set forth above. The Court agrees that res judicata bars these claims which could have been raised in the prior administrative proceedings on the same basis as set forth in the Court's analysis above.[11]

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[11]The Court notes that Florida Cities' argument in its response to Plaintiff's motion for summary judgment on the AO 90-106 claims is without merit. Florida Cities asserts that neither § 309(b) of the Clean Water Act nor any other section authorizes administrative or judicial enforcement of violations of § 309(a) administrative orders, as such would result in double counting of all violations. Florida Cities asserts that § 309(b) limits the kinds of violations that EPA can refer to the Department of Justice as follows:

> The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance.

33 U.S.C. § 1319(b). Further, Florida Cities argues that the violation of a § 309(a) order cannot be the underlying basis for another § 309(a) order based on both the statutory structure and the EPA's internal guidelines, the Enforcement Management System (EMS). Florida Cities urges the Court to give a strict reading to the language of § 309(a)(3), which sets forth the types of violations that are proper for an administrative order to be issued and for a case to be the subject matter of civil referral under § 309(b). Section 309(a)(3) provides that a discharger must have violated "section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 . . . or is in violation of any permit condition or limitation implementing any of such sections in a permit under section 1342." 33 U.S.C. § 1319(a)(3)(emphasis added). Further, the EMS guidelines state:

> The Clean Water Act does not authorize the issuance of an AO for a violation of a previously issued AO nor may an administrative penalty order be issued for violation of an administrative (continued...)

C. NPDES Violations

Plaintiff next alleges that since November 1, 1991, the effective date of Barefoot Bay's NPDES Permit No. FL0042293, Florida Cities has repeatedly violated the permit's conditions and limitations. According to Florida Cities' DMRs, there were a total of 182 exceedances of the Total Residual Chlorine (TRC) limitation and three separate toxicity test failures.[12] Additionally, Plaintiff asserts that based on Florida Cities' manager's testimony, there were 79 violations of biochemical oxygen demand (BOD). Plaintiff asserts that Florida Cities is estopped from challenging the data it submitted on its DMRs. Further, Plaintiff argues that Florida Cities' argument that the permit limits were written for a more advanced plant and that it would have met the permit limits were it not for delays caused by regulatory agencies in issuing other permits necessary for making improvements is without merit. Plaintiff asserts that § 509(b) of the Clean Water Act, 33 U.S.C. § 1369(b), prohibits Florida Cities from challenging the permit limits in the context of an enforcement action.

Florida Cities acknowledges that the DMRs reported some exceedances for TRC toxicity and BOD. Florida Cities asserts, however, that it is unable to determine what appropriate legal

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[11](...continued)
order. Any successive AO issued must be based upon the underlying violations of the Act contained in the previous AO. . . .

EMS at 62 n.5. (Dkt. 174, Exh. 28). Based upon the above quoted passages, Florida Cities maintains that this Court does not have subject matter jurisdiction over a violation of an administrative order.

The Court finds, however, that § 309(d) provides a means by which the EPA can penalize for violations of its administrative orders. Title 33 U.S.C. § 1319(d) affords deterrent effect by explicitly providing for a civil penalty not to exceed $25,000 per day for violations of "any order issued by the Administrator under subsection (a) of this section." Subsection (d) therefore nullifies any ambiguity in 33 U.S.C. § 1319(b) regarding the ability to seek penalties for administrative order violations.

[12]The United States indicated in its response to Florida Cities' motion for partial summary judgment that it withdraws paragraph 28 of the Second Amended Complaint alleging TRC test method violations.

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defenses and mitigating circumstances are applicable until the government determines the exact number of violations being alleged. It asserts that summary judgment is premature until Plaintiff can state the charges against Florida Cities with particularity.

In response, Plaintiff asserts that it has repeatedly quantified all of the violations. First, it asserts that in its Second Amended Complaint, it alleged, based on Florida Cities' own DMRs, each of the permit violations by facility, by parameter, by month, and by year. Second, Plaintiff states that it supplied extensive tables of violations and numbers of days of the violations in discovery responses. Third, Plaintiff states that Mr. Kwan again tallied the violations in a sworn declaration, referencing slightly revised versions of the same tables which were submitted as exhibits to the Plaintiff's motion for partial summary judgment.

The Court finds that Florida Cities has not sustained its burden of establishing that a material issue of fact exists. Pursuant to 33 U.S.C. § 1369(b), Florida Cities is prohibited from challenging the permit limits in this Court in the context of an enforcement action.[13] Further, the Court finds that Plaintiff's violations have been clearly set forth. From the allegations in the Second Amended Complaint, the Responses to the Defendant's First Interrogatories, and Mr. Kwan's first calculation of the number of violations, Florida Cities had sufficient notice of the

[13]Title 33 U.S.C. § 1369(b)(1) and (2) provide in pertinent part:

> (1) Review of the Administrator's action . . . in approving or promulgating any effluent limitation or other limitation under section 1342(b) of this title, . . . in issuing or denying any permit under section 1342 of this title . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial. . . .
>
> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

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types of violations and the general numbers of each violation that the Plaintiff was alleging. On September 22, 1995, Plaintiff filed its response to Florida Cities' motion for partial summary judgment and the accompanying final calculation of the number of violations in the Amended Declaration of Kenneth Kwan. (Dkt. 179, Exh. K). Mr. Kwan's declaration sets forth a total of 264 NPDES violations, which Mr. Kwan states includes 182 TRC limitation violations and 3 toxicity test failures. From the Plaintiff's motion for partial summary judgment, it is clear that the remaining 79 violations of the alleged total 264 NPDES violations are BOD violations. Florida Cities has not set forth any evidence challenging the testimony of Mr. Kwan or his calculation of 264 total NPDES violations at Barefoot Bay. Therefore, the Plaintiff is entitled to summary judgment with respect to these NPDES violations.

II. Carrollwood

A. Unpermitted Discharges

Plaintiff asserts that it is uncontested that during the period August 1990 to June 30, 1991, Florida Cities did not have an NPDES permit to discharge from the Carrollwood Plant into Sweetwater Creek. Further, it asserts that it is uncontested that notwithstanding the absence of the permit, Florida Cities continued to discharge on a daily basis during that time. Plaintiff maintains that there are 334 violations for Florida Cities' daily discharges during the period of August 1990 to June 1991. Additionally, Plaintiff opposes Florida Cities' defense that it has already paid an administrative penalty for the unpermitted discharge in question on the same basis that Plaintiff asserted with respect to Barefoot Bay.[14]

[14]Plaintiff again asks the Court to view the Consent Agreement applicable to Carrollwood within its four corners and to find that it only resolved the illegal discharges occurring during the period of June 1987 through July 1990. Paragraphs II.4 and III.2 of the Consent Agreement provide:

(continued...)

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Although Florida Cities acknowledges that it discharged effluent into Sweetwater Creek between August 1990 and June 1991, it asserts that it settled that matter with the EPA in the Consent Agreement and Order Assessing Administrative Penalties, No. CWA-IV 90-542, dated April 19, 1991. It states that, as with the Barefoot Bay proceedings, the Carrollwood administrative record consists of the Notice of Show Cause, Notes, Administrative Complaint, and Consent Agreement. It asserts that the Consent Agreement settled any unpermitted discharge claims at Carrollwood pursuant to § 309(g)(3) of the Clean Water Act, and it relies upon arguments similar to those it asserted in connection with the alleged unpermitted discharges from Barefoot Bay. Additionally, in its Notice of Dispositive Authority, Florida Cities asserts, on the same basis as asserted with respect to unpermitted discharges from Barefoot Bay, that it is entitled to summary judgment on Plaintiff's claim that Defendants discharged pollutants from Carrollwood without an NPDES permit from August 1990 to June 1991. The Court agrees that the claims of unpermitted discharges could have been raised in the prior administrative proceedings and that Florida Cities is therefore entitled to summary judgment on those claims which are barred by res judicata.

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[14](...continued)

> Respondent has violated Section 301(a) of the Act, 33 U.S.C. Section 1311(a), by discharging pollutants into waters of the United States without a valid NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. Section 1342, **during the period of June 1987 through July 1990**.. . .
>
> Florida Cities Water Company **shall pay $15,000 for its past violations** of the Clean Water Act **cited above** . . . .

(Dkt. 87, Exh. C, Emphasis added).

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B. NPDES Violations

Plaintiff states that for the six months following July 1, 1991, the date on which NPDES Permit No. FL0029319 for Carrollwood took effect, Florida Cities violated nearly every one of the permit's effluent parameters. Plaintiff asserts that, based on Florida Cities' DMRs, there were a total of 234 separate violations of the Phosphorus, CBOD, Nitrogen, Chlorine, and Fecal Coliform limits. Plaintiff asserts that Florida Cities may not now challenge the permit limits, having failed to exercise that right at the appropriate time and in the appropriate forum.

Florida Cities acknowledges that exceedances of the Advanced Wastewater Treatment (AWT) standards did occur and that the DMRs reported exceedances during the relevant time period. Florida Cities asserts, however, that when EPA issued NPDES Permit No. FL0029319, it was fully aware that Carrollwood was incapable of meeting the stringent AWT standards without constructing new treatment facilities. Florida Cities further asserts that its efforts to improve the Carrollwood discharge situation support mitigation of any penalties for violations of the AWT provisions of the permit. Additionally, Florida Cities asserts that, as with Barefoot Bay, Mr. Kwan is still adding up the number of alleged violations, and summary judgment is therefore premature.

The Court finds, however, that Florida Cities has not demonstrated the existence of a material issue of fact. The Court incorporates its finding above that 33 U.S.C. § 1369(b) prohibits Florida Cities from challenging the permit limits in the context of an enforcement action. Further, the Plaintiff's allegations of Florida Cities' permit violations at Carrollwood are unambiguous. Mr. Kwan's estimation of the number of NPDES violations has remained

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constant: 234 violations. Because Florida Cities has not set forth any evidence challenging the existence of these 234 violations, Plaintiff is entitled to summary judgment.

III. Waterway Estates

A. Unpermitted Discharges

Plaintiff first points out that Florida Cities has admitted that it continued to discharge from the Waterway Estates Plant from January 9, 1987 until October 31, 1989 despite the EPA's final permit denial, which took effect on January 9, 1987. Plaintiff therefore alleges in paragraph 43 of the Second Amended Complaint that Defendants discharged without an NPDES permit during the period of October 1, 1988 to October 31, 1989,[15] which Plaintiff asserts, accounts for 396 violations.

Florida Cities asserts, as in its first motion for partial summary judgment, that the EPA erroneously rejected Florida Cities' 1986 application to renew the Waterway Estates' NPDES permit, thus creating by its own wrongful act the very absence of a federal permit that is now the subject of this case. Further, Florida Cities acknowledges that it discharged effluent from Waterway Estates into the Caloosahatchee River without an NPDES permit. Florida Cities asserts, however, that the government should not be permitted to profit by obtaining penalties from Florida Cities for its own mistake.

The Court has already considered Florida Cities' arguments, however, in Florida Cities' first motion for partial summary judgment and found them to be without merit. Florida Cities has not set forth any factual or legal basis for the Court to set aside its June 21, 1995 Order

[15]The United States explains that it has alleged violations beginning on October 1, 1988 because the Complaint in this action was filed on October 1, 1993, and the statute of limitations thus arguably bars claims before October 1, 1988.

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(Dkt. 127) ruling upon that issue. Therefore, the Court's prior determination in favor of Plaintiff is incorporated herein.

B. Discharges to Unpermitted Location

Plaintiff indicates that on November 1, 1989, EPA reissued permit No. FL0030325 for Waterway Estates. The permit required Florida Cities to discharge directly to the Caloosahatchee River rather than to a tributary canal of the Caloosahatchee River. Plaintiff asserts that Defendants continued to discharge to a canal with knowledge that it was an unpermitted location. Plaintiff alleges in paragraph 45 that Defendants discharged pollutants to an unpermitted location between November 1, 1989 and July 14, 1991. Plaintiff maintains that because each day of discharge is a separate violation, there were a total of 621 violations[16].

In response, Florida Cities points out that NPDES Permit No. FL0030325, effective November 1, 1989, states that Waterway Estates is authorized to discharge into "receiving waters named Caloosahatchee River." Florida Cities asserts that the relevant federal regulations establish that the plant's outfall was within the permitted area of discharge. Florida Cities notes that although Mr. Kwan has stated that the permit authorizes discharge "to a point at the six (6) foot contour line in the Caloosahatchee River," there is no reference in NPDES Permit No. FL0030325 specifying discharge to the six-foot contour line. It asserts that the only reference to a discharge point names the receiving waters simply as the "Caloosahatchee River." Further, Florida Cities points out that Dr. Abdul B. Ahmadi, Water Facilities Administrator of the Florida Department of Environmental Protection ("FDEP"), has testified by affidavit that FDEP was aware of the physical location of the discharge point from Waterway Estates into a canal, and

[16]Plaintiff relies upon the calculations and adjustments for mathematical errors of Mr. Kenneth Kwan, an EPA Environmental Engineer. (Dkt. 179, Exh. K).

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that "[t]his canal was considered part of the Caloosahatchee River." Florida Cities asserts that Plaintiff has presented no evidence to the contrary of Dr. Ahmadi's statement and that Florida Cities is therefore entitled to summary judgment.

In footnote 72 of its memorandum, Florida Cities sets forth its argument based on EPA's regulations. It states that EPA's regulations provide that the application form shall provide:

> (1) Outfall location. The latitude and longitude to the nearest 15 seconds [1500 feet] and the name of the receiving water.

40 C.F.R. 122.21(g). Florida Cities then states that the canal is within 15 seconds of the location of the present permitted Waterway Estates outfall.

Plaintiff replies that three critical documents clearly indicate that there was no ambiguity as to where Florida Cities was authorized to discharge. First, on page three and on a topographic map attached to Florida Cities' permit application, EPA Form 3510-1, the discharge point is the Caloosahatchee River at a specified latitude and longitude which corresponds to the six-foot contour line of the River. (Dkt. 179, Exh. K). Second, Attachment A to the Fact Sheet of the EPA's draft permit is the identical map submitted by Florida Cities with its permit application showing the location of the discharge at the six-foot contour line. Plaintiff notes that the first page of the Fact sheet under item 1.d lists the receiving water as the Caloosahatchee River and states, "For a sketch showing the location of the discharge, see Attachment A." (Dkt. 179, Exh. L). The third document is the final permit and the page entitled "Amendment to the Fact Sheet at the Time of Final Permit Issuance," on which the permit writer noted any changes to the permit from the draft to the final permit. (Dkt. 179, Exh. M). Plaintiff points out that on the amendment, the discharge point was not changed. Plaintiff argues that although the final permit designates the receiving waters as simply the Caloosahatchee River and does not contain

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the map, there can be no question that the permit was issued with the explicit understanding that the discharge point was the six-foot contour line of the River itself. Additionally, Plaintiff points out the Florida Cities' own Operations Manager, Jack Tompkins, has stated that he knew that the canal was an unpermitted location. (Dkt. 140). Plaintiff also asserts that the fact that an FDEP employee considered the canal part of the River is immaterial to this federal action to enforce a federal permit and that reliance on the FDEP employee's opinion is somewhat a contradiction in view of FDER's prior requirement that Florida Cities move the discharge from the canal to the six-foot control line.[17]

In response to Florida Cities' argument in footnote 72 based on EPA's regulations, Plaintiff first asserts that the regulation cited by Florida Cities, 40 C.F.R. § 122.21(g), is irrelevant for two reasons: (1) the regulation, by its own terms, relates only to "manufacturing, commercial, mining, and silvicultural dischargers," not to wastewater treatment plants; and (2) the regulation simply requires, for certain types of permits, the identification of the outfall location within a specified range and does not authorize a permittee to discharge anywhere within that range. Plaintiff further asserts that Florida Cities' argument is factually incorrect. It asserts that the distance from the actual discharge point (the old outfall location in the canal) to the permitted discharge point (the present outfall location) is approximately 2,650 linear feet.

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[17]Plaintiff points out that Dr. Ahmadi stated:

> FDEP granted on April 1, 1981 (DO36-7407) and on August 2, 1983 (DO36-72569) discharge operation permits for discharge of 1.08 MGD of effluent from the WWE facility "to a canal to the Caloosahatchee River." Neither of these two operation permits required "no discharge" from the facility, nor did either permit require relocating the outfall to the six foot contour line of the River. On September 23, 1988 FDEP granted the WWE [Waterway Estates] facility a temporary operation permit (DT36-152486), which did require relocation of the outfall to the six foot contour line of the river and upgrading of the facility to AWT.

(Dkt. 174, Exh. 43).

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Further, it points out that, based on Florida Cities' calculations, the distance from the old outfall location in the canal to the intersection with the River was 511 feet, which means that the distance from the intersection to the six-foot contour line was 2,139 feet (2,650 - 511), not 1500 feet or less. Additionally, Plaintiff asserts that written communications between Defendants and their counsel show that Florida Cities' counsel knew, or should have known, that the statement that "the canal is within 15 seconds of the location of the current permitted outfall" is untrue.

The Court agrees that the canal was not a permitted area of discharge and that Plaintiff is entitled to summary judgment on this issue. First, in none of the three documents cited by Plaintiff — the permit application, the draft permit, or the final permit — is discharge into a canal of the River mentioned. Rather, the documents provide for discharge into the River itself. Further, the fact that the amendment page to the final permit did not mention the discharge location is significant in light of the permitting process. Before the draft permit is made into a final permit, there is a public comment period during which any interested party may submit written comments on the draft permit and may request a public hearing. 40 C.F.R. § 124.11. After consideration of any comments, the EPA takes final action on the application. 40 C.F.R. § 124.15. Because there was no objection to or discussion regarding the discharge location at the six-foot contour line during the permitting process, and in light of the absence of the discharge location on the amendment page to the final permit, the Court finds that the final permit was issued with the understanding that the discharge point was at the six-foot contour line. Additionally, the FDEP employee's statement that he considered the canal to be part of the River is not sufficient evidence to support Florida Cities' burden in response to Plaintiff's motion for partial summary judgment, particularly in light of the Florida Cities manager's statement that he

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knew the canal was an unpermitted location. Moreover, the EPA regulation cited by Florida Cities is irrelevant to the facts of this case.

C. NPDES Violations

Florida Cities acknowledges that the DMRs reported some exceedances for nitrogen (concentration and loading) and toxicity tests during the relevant time period. It asserts, however, that as with Barefoot Bay and Carrollwood, Plaintiff still has not specifically identified the number of alleged violations. Florida Cities therefore asserts that summary judgment is premature.

Plaintiff indicates that based on Florida Cities' DMRs, there were 21 violations of the Total Nitrogen limitations (concentration and loading) and three toxicity test failures. Based on Mr. Kwan's calculations which contain an adjustment for a reporting error, however, Plaintiff maintains that there are 18 Total Nitrogen violations and three toxicity test failures. Plaintiff again asserts that Florida Cities' defense that delays in upgrading its plant resulted in its not beginning advanced water treatment until April 3, 1992 is not a valid defense. Further, Plaintiff maintains that because the particular violations of federal law alleged by Plaintiff in this action have never been the subject of a state administrative order or penalties, Plaintiff is not barred from bringing those claims.

The Court again finds that Florida Cities has failed to present any evidence challenging the evidence of Plaintiff which establishes the NPDES violations. Plaintiff is therefore entitled to summary judgment on this issue.

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II. Avatar Holdings

A. Parent Company Liability

Plaintiff argues that Avatar Holdings, Inc. ("Avatar Holdings") should be held directly liable as a parent company of Florida Cities based in large part upon the authority of Jacksonville Electric Auth. v. Bernuth Corp., 996 F.2d 1107 (11th Cir. 1993). In Bernuth, the Eleventh Circuit stated that a parent corporation may be held liable as an "operator" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) "only when it 'exercises actual and pervasive control of the subsidiary to the extent of actually involving itself in the daily operations of the subsidiary. Actual involvement in decisions regarding the disposal of hazardous substances is a sufficient, but not a necessary, condition to the imposition of operator liability.'" Id. at 1110, quoting Jacksonville Electric Auth. v. Eppinger & Russell Co., 776 F.Supp. 1542, 1547-47 (M.D.Fla. 1991). Plaintiff asserts that Judge Moore's analysis in Eppinger and Russell was based on three CERCLA cases which should apply to this Clean Water Act action: United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990), cert. denied, 498 U.S. 1046 (1991); Riverside Mkt. Dev. Corp. v. Int'l Bldg. Products, Inc., 931 F.2d 327, 330 (5th Cir. 1991), cert. denied, 502 U.S. 1004 (1991), and United States v. Kayser-Roth Corp., 910 F.2d 24, 26-27 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991). Plaintiff submits that based on facts developed in discovery, Avatar Holdings must be held directly liable under the Bernuth test for the violations alleged in this case on the basis of its actual and pervasive control of the environmental practices of Florida Cities. Plaintiff asserts that the evidence indicates that Avatar Holdings exercises tight control over both Florida Cities and other Avatar companies which are linked in a chain leading to Avatar Holdings.

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In response,[18] Avatar Holdings first points out that Plaintiff does not offer any precedent for parent corporate liability under § 309 of the Clean Water Act, 33 U.S.C. § 1319. Avatar Holdings asserts that, instead, Plaintiff improperly relies on case law construing "operator" liability under § 107(a) of CERCLA, 42 U.S.C. § 9607(a). Avatar Holdings states that § 107(a) of CERCLA imposes the obligation to pay for the cleanup of a release of a hazardous substance on a person who has the status of an operator of a facility, regardless of whether that person's action caused the release. By contrast, § 309(d) of the Clean Water Act imposes a penalty on "a person who violates" a Clean Water Act requirement. Avatar Holdings asserts that it is well established that § 309(d) requires a showing that the alleged violator actively directed or caused the violation, citing United States v. Lambert, 589 F.Supp. 366, 374 (M.D. Fla. 1984)(holding that the wife, as co-owner of the polluted property, was not an appropriate target of civil penalties because she had not "actively directed or caused" the violations). Thus, Avatar Holdings asserts that the Clean Water Act requires a demonstration that the defendant caused the violation.

Avatar Holdings further asserts that the limitation of § 309(d) civil penalties to persons actively causing a violation is evident on the face of the Clean Water Act in contrast to CERCLA. Avatar Holdings points out that the Clean Water Act contains two different provisions for monetary sanctions against violators: (1) § 309, 33 U.S.C. § 1319,[19] which authorizes punitive criminal and civil penalties against "[a]ny person who violates" certain sections of the Clean Water Act, including violation of the NPDES permit scheme, and (2) §

[18]Avatar Holdings states that its memorandum addresses solely the issue of corporate parent liability and that it relies on and incorporates by reference the Florida Cities' memorandum addressing the alleged underlying violations.

[19]33 U.S.C. § 1319 (c) and (d).

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311, 33 U.S.C. § 1321 (f), which authorizes remedial assessments of cleanup costs up to fifty million dollars against any "owner or operator" of a facility which discharges oil or other hazardous substances in violation of the Clean Water Act. Avatar Holdings asserts that by drawing this distinction, Congress evinced a desire to reserve § 309's punitive sanctions to persons, individual or corporate, who, in the Lambert court's terms, "actively directed or caused" the violation, and a desire to impose § 311's primarily cost-recovery liability on the broader basis of status on owners and operators of polluting facilities, regardless of whether they directly acted to cause the violation. Further, Avatar Holdings states that when CERCLA, a remedial statute, was enacted, Congress explicitly adopted the same owner or operator standard of liability as the standard under § 311 of the Clean Water Act, the predominantly remedial section of the Clean Water Act. Avatar Holdings asserts that by selecting for CERCLA the scope of liability provided by the remedial provisions of § 311 of the Clean Water Act, Congress opted out of the more limited scope of liability embodied in the penalty provisions of § 309(d). It therefore asserts that the scope of liability created under § 309 of the Clean Water Act cannot now be defined based on CERCLA "owner or operator" precedents without nullifying Congressional intent. Thus, it maintains that for the Plaintiff to prevail on its motion, it must show based on undisputed evidence that Avatar Holdings actively directed or caused the alleged Clean Water Act violations.

Additionally, Avatar Holdings asserts that even if the Bernuth CERCLA standard applied, that standard is narrowly construed. It refers to language in Bernuth indicating that a court must find "more than just indicia of a parent-subsidiary relationship," and "more than merely complete ownership and the concomitant general authority or ability to control that comes with

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ownership." 996 F.2d at 1110-1111, citing United States v. Kayser-Roth Corp., 910 F.2d 24, 27 (1st Cir. 1990). Parent corporation liability requires that the parent "exercise[] actual and pervasive control of the subsidiary to the extent of actually involving itself in the daily operations of the subsidiary." Id. at 1110. Further, Avatar Holdings asserts that as the parent company in Bernuth was found to be "in an entirely different business than that of the subsidiary" and not liable, Avatar Holdings is analogously a diversified holding company engaged in capital management, not a water treatment operating company. Avatar Holdings notes that all but one of the cases cited by Bernuth resulted in a finding of no parent company liability and the one exception is cited for the proposition that parent company liability is "not the usual case." Id. at 1110. It also notes that since the Eleventh Circuit's decision in Bernuth, the Sixth Circuit, in United States v. Cordova Chemical Co., 59 F.3d 584, 590-591 (6th Cir. 1995), rejected application of a nebulous control test which created a threat of unlimited liability and adopted a similarly narrow standard of parent company liability, holding that "a parent corporation incurs operator liability pursuant to section 107(a)(2) of CERCLA, only when the requirements necessary to pierce the corporate veil are met" by reference to the requirements imposed by state law.

The Court agrees with the analysis of Avatar Holdings. First, although the Eleventh Circuit recognized the possibility of parent company liability in Bernuth, the Court construed such liability narrowly and did not in fact find parent company liability in that case. Further, the Eleventh Circuit has not found that the parent company liability conceived of in Bernuth under CERCLA extends to the Clean Water Act, and this Court believes that the Eleventh Circuit would not likely do so. The Court finds that in light of the language with respect to a person

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liable under § 309(d) of the Clean Water Act ("[a]ny person who violates"), the mere fact of being a parent exercising control over a violating subsidiary does not properly subject the parent company to liability. As explained above, Congress did not use the same "operator or owner" language in § 309(d) of the Clean Water Act as Congress used in § 311 of the Clean Water Act and in § 9607(a) of CERCLA, and it was under that section of CERCLA that the Eleventh Circuit held that parent company liability was possible. Further, Plaintiff has not cited, nor has this Court found, any authority for parent company liability under the Clean Water Act on the basis of the parent's actual and pervasive control of the subsidiary. The Court therefore finds that, in order for Avatar Holdings to be held liable for a violation of the Clean Water Act by Florida Cities, Avatar Holdings itself must have acted in such a way that it may be considered a "person who violates" under § 309(d) of the Clean Water Act, through such actions as directing or causing the violations, or exercising actual and pervasive control of Florida Cities to the extent of actually being involved in the daily operations of Florida Cities. See Bernuth, 996 F.2d at 1110.

B. Avatar Holdings' Role

Plaintiff's memorandum discusses and relies upon evidence which Plaintiff asserts shows that Avatar Holdings, either directly or through Avatar Utilities, Inc. ("Avatar Utilities"), exercises tight control over Florida Cities. Plaintiff asserts that Avatar Holdings' Board members, referred to as "Senior Management in New York," actively manage Florida Cities. Plaintiff points out several facts concerning the relationship between the companies, such as that Florida Cities' executive vice-president, Paul Bradtmiller, reports directly to Gerald Allen, the executive vice-president of Avatar Utilities, whose office is upstairs from Mr. Bradtmiller's

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office. Plaintiff also sets forth evidence indicating that Florida Cities, Avatar Utilities, and Avatar Holdings communicate with each other regarding environmental compliance questions. Further, Plaintiff points out that Florida Cities relies on "Avatar's 'Environmental Assurance Plan'" and has relied on "Avatar" to conduct environmental audits.

With respect to Barefoot Bay, Plaintiff asserts that Robert Gordon, the Avatar Utilities president, was aware that the Barefoot Bay percolation ponds were improperly overflowing into the canal and that he notified Avatar Holdings officials of the problem and his intended solution. (Dkt. 142, Exh. 474).[20] Plaintiff notes that Larry Wilkov, Avatar Holdings' former president, was personally advised of the opportunity to buy more land which could have provided options for ending the unpermitted discharge from Barefoot Bay. (Dkt. 142, Exh. 475). Plaintiff asserts that the several memoranda show that Avatar Utilities and Avatar Holdings officials conducted various studies of alternative discharge options at Barefoot Bay. (Dkt. 146, Exh. 758; Dkt. 143, Exh. 541; Dkt. 145, Exhs. 704 & 706; Dkt. 142, Exhs. 476 & 477). Additionally, Plaintiff asserts that Florida Cities should be deemed Avatar Holdings' alter ego in light of the attempt in 1990-91 to acquire the Micco Groves adjacent to Barefoot Bay for disposal of Barefoot Bay effluent, an effort which Plaintiff states involved several Avatar Holdings' officials. Plaintiff maintains that Avatar Holdings developed and expanded Barefoot Bay and declined opportunities to eliminate the unpermitted discharges, thereby knowingly increasing their volume.

Although the above evidence relied upon by Plaintiff tends to show involvement by Avatar Holdings in decisions regarding disposal of pollutants, the Court finds that the evidence and argument set forth by Avatar Holdings demonstrate the existence of a genuine issue of

[20]In a footnote, Plaintiff states that testimony on Robert Gordon's memorandum has been limited by virtue of the fact that Mr. Gordon and two of its recipients have pled the Fifth Amendment and one of its recipients has died.

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material fact as to whether Avatar Holdings' actions are sufficient to satisfy the legal standard for parent company liability. Avatar Holdings first states that it is a diversified company with approximately 40 direct and indirect subsidiaries engaged in a variety of business operations including home construction, vacation ownership, resort operations, retail land sales, property management, as well as water and wastewater utilities operations, with the principal emphasis in the real estate industry. It asserts that in the utility arena, Avatar Holdings plays a very limited role, and that due to downsizing, Avatar Utilities is a subsidiary which is the parent for the two remaining utility subsidiaries: Florida Cities and Poinciana. Further, although Plaintiff uses the term "Avatar," Avatar Holdings contends there is a distinction between the subsidiaries and the more diverse parent corporation. Avatar Holdings points out that Florida Cities relies on Avatar Utilities' environmental audit program rather than an Avatar Holdings program and that Avatar Holdings does not have its own audit program. (Dkt. 172, Exh. U). Further, it emphasizes that neither Mr. Gordon nor Mr. Allen hold positions with Avatar Holdings, but rather with Avatar Utilities. Avatar Holdings also argues that the fact that its officials approved construction contract awards merely proves that it engaged in normal financial oversight of its subsidiaries. Additionally, it asserts that the testimony of Julie Karleskint, operations manager of Florida Cities, demonstrates that expenditures for purposes of regulatory compliance are authorized at the operations level of the subsidiary. (Dkt. 172, Exh. V). Particularly with respect to Barefoot Bay, Avatar Holdings argues that the correspondence and the memoranda cited by Plaintiff are advisory and that none of the evidence demonstrates that an Avatar Holdings official instructed, advised, or counseled Florida Cities not to apply for a federal permit or to discharge the pollutants at Barefoot Bay as described in the Second Amended Complaint.

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In light of the above evidence relied upon by Avatar Holdings, the Court finds that Avatar Holdings has raised a genuine issue of material fact as to whether its actions satisfy the legal standard for parent liability. The Court notes that it is unclear from the evidence herein whether it was Avatar Holdings or Avatar Utilities, if either, that controlled Florida Cities' environmental decisions. Further, Avatar Holdings has raised a valid argument that the actions, inactions, statements, and decisions of Avatar Holdings officials may be viewed as within the normal responsibilities of a parent to its subsidiary. The Court also notes that there is no clear evidence that Avatar Holdings has directly caused or directed the alleged violations at Barefoot Bay.

Next, Plaintiff asserts that with respect to Carrollwood, Avatar officials were aware that Florida cities was operating the Carrollwood plant without a permit. It cites an August 6, 1984 memorandum from Gordon to John Sladkus, Avatar Holdings executive vice-president, in which Gordon stated, "We intend to write the EPA and inform them of our negotiations with the County and attempt to have them reconsider their position. If they refuse, I believe our only alternative is to fight their mandate through the courts." (Dkt. 142, Exh. 489). Further, Plaintiff states that in 1989, a "conward"[21] was signed authorizing the advanced wastewater treatment plant, which prompted an exchange of memoranda between Gordon and Peter Sharp, a member of the executive committee of Avatar Holdings Board of Directors. (Dkt. 146, Exh. 762).

[21] Although it is not clear from the parties' pleadings what the meaning of "conward" is, the Court notes that Avatar Holdings has stated that the conward demonstrates that Avatar Holdings signed off on the finances for significant improvements and that it does not show that Avatar Holdings authorized or caused any of the violations. (Dkt. 171).

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The Court finds that the above evidence relied upon by Plaintiff, although perhaps probative, does not establish that there is no genuine issue of material fact regarding Avatar Holdings' directing or causing the alleged Clean Water Act violations. Further, the documents cited by Plaintiff pre-date the violations alleged in the Second Amended Complaint.

Finally, with respect to Waterway Estates, Plaintiff asserts that Avatar officials were aware of the violations pertaining to Waterway Estates and made critical decisions relating to compliance. Plaintiff first notes a letter from Gordon to several "Avatar" officials stating, "The EPA wants the company to either discontinue discharging effluent to a canal which ultimately goes to the Caloosahatchee River or to improve the treatment to AWT and seek a wasteload allocation to the Caloosahatchee." (Dkt. 145, Exh. 732). Plaintiff also notes other correspondence from Gordon to Avatar Holdings officials, including a copy of EPA's compliance order and a copy of an engineering report on the feasibility of disposing of wastewater at Waterway Estates. (Dkt. 145, Exh. 733; Dkt. 146, Exh. 765). Plaintiff states that ultimately "Avatar" decided to upgrade Waterway Estates rather than to contract with another private wastewater treatment company. Plaintiff asserts that in so doing "Avatar" knowingly decided to continue discharging from the Waterway Estates into the Caloosahatchee via the canal. Plaintiff asserts that said decision is memorialized in a letter from Gordon to the Avatar Chairman of the Board, Leon Levy. (Dkt. 146, Exh. 772). Additionally, Plaintiff cites a letter from Dennis Getman, "the Avatar Holdings Executive Vice-President/General Counsel," to Allen in which Mr. Getman suggested a strategy for EPA's enforcement actions resulting from violations. (Dkt. 139, Exh. 273).

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The Court again finds that the above evidence relied upon by Plaintiff, although perhaps probative, does not establish that there is no genuine issue of material fact regarding Avatar Holdings' directing or causing the alleged Clean Water Act violations.

C. Avatar Holdings' Motion for Partial Judgment on the Pleadings

Avatar Holdings moves the Court pursuant to Rule 12(c), Federal Rules of Civil Procedure for judgment on the pleadings and for the Court to bar all allegations against Avatar Holdings that date back more than five years. This action commenced on October 1, 1993 when Plaintiff filed the civil action against Florida Cities for alleged violations at Waterway Estates. On March 31, 1995, Plaintiff filed a motion (Dkt. 56) for leave to file an Amended Complaint to add a new party and a proposed Amended Complaint. On April 26, 1995, the Court considered the Plaintiff's motion and granted Plaintiff leave to file a Revised Amended Complaint not including two paragraphs in the proposed Amended Complaint (Dkt. 78). On May 5, 1995, Plaintiff filed the Revised Amended Complaint (Dkt. 82) which added allegations regarding two new sites, Barefoot Bay and Carrollwood, and added a new party, Avatar Holdings. On May 15, 1995, Plaintiff filed a motion for reconsideration of the Court's Order not permitting two paragraphs in the proposed Amended Complaint, and the Court ruled in favor of Plaintiff (Dkt. 126) and directed Plaintiff to file a Second Amended Complaint. On June 27, 1995, Plaintiff filed a motion (Dkt. 47) seeking to have the Clerk file its Second Amended Complaint (Dkt. 161) nunc pro tunc as of March 31, 1995, the date the Plaintiff first sought to amend the Complaint. The Court denied the Plaintiff's motion to file nunc pro tunc in its July 18, 1995 Order (Dkt. 158).

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Avatar Holdings first asserts that claims against it based on alleged discharges prior to May 5, 1990, the date the Revised Amended Complaint was filed, are barred by the five year limitations period under 28 U.S.C. § 2462. Avatar Holdings asserts that the statute of limitations in 28 U.S.C. § 2462 applies due to the absence of a relevant statute of limitations provision in the Clean Water Act. Title 28 U.S.C. § 2462 provides in part:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . .

Avatar Holdings notes that the court's decision in 3M Company (Minnesota Min. and Mfg.) v. Browner, 17 F.3d 1453 (D.C. Cir. 1994), indicates that, based on precedent from the Supreme Court and other federal courts, a claim first accrues under the statute at the date the violation occurred, rather than the date of the discovery of the violation. Thus, insofar as paragraphs 16, 43, and 45 of the Second Amended Complaint contain allegations occurring prior to May 5, 1990, see Paragraph 16 (referring to a period of alleged discharge "on or about April 1, 1990 to October 31, 1991"); Paragraph 43 (referring to a period of alleged discharge "on or about October 1, 1988 to October 31, 1989"); Paragraph 45 (referring to a period "on or about November 1, 1989 to July 14, 1991"), Avatar Holdings seeks partial judgment on the pleadings on the basis that those portions of the paragraphs are barred by the statute of limitations.[22]

[22]Additionally, Avatar Holdings argues, as it argued in its opposition to the motion to file the Second Amended Complaint nunc pro tunc, that the allegations in paragraphs 16, 43, and 45 against Avatar Holdings, a newly added party, do not relate back to the date of the original pleading under the "relation-back" doctrine of Rule 15(c), Federal Rules of Civil Procedure. It asserts that the overwhelming weight of federal authority establishes that relation back is not permissible where, as here, there has been no mistake of identification or misnomer of the added party. The Court notes that it denied the Plaintiff's motion to file the Second Amended Complaint nunc pro tunc in its July 18, 1995 Order (Dkt. 158).

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In response, Plaintiff asserts that all of its claims are timely and that Avatar Holdings' motion for judgment on the pleadings should be denied. Plaintiff asserts that the claims now at issue in the Second Amended Complaint are identical to those set forth in the Amended Complaint, which Plaintiff sought to have filed on March 31, 1995. Plaintiff asserts that although the Court denied its motion to file the Second Amended Complaint nunc pro tunc, because the Plaintiff was barred by Local Rule 3.01(b) from responding to Avatar Holdings' opposition to its motion, Plaintiff now requests the Court to consider its arguments which were not proffered in its very brief memorandum accompanying the motion to file nunc pro tunc. Further, Plaintiff requests the Court to hold that the Second Amended Complaint be deemed filed as of March 31, 1995 for claims relating to Barefoot Bay and Carrollwood and as of October 1, 1993 for claims relating to the Waterway Estates facility.

Plaintiff in essence requests that the Court reconsider its ruling on the Plaintiff's motion to file the Second Amended Complaint nunc pro tunc. Plaintiff now seeks to raise arguments in support of a nunc pro tunc filing which it had the full and fair opportunity to raise in connection with its motion, but chose not to raise. Nor did Plaintiff move the Court to permit it to file a reply to Avatar Holdings' response or move the Court to reconsider its denial of the motion to file nunc pro tunc. Further, in the Plaintiff's response to Avatar Holdings' motion for judgment on the pleadings presently before the Court, Plaintiff has not shown good cause for its failure to raise its arguments at the appropriate time. The Court also notes that Plaintiff has not opposed Avatar Holdings' motion for judgment on the pleadings on any basis other than that the Second Amended Complaint should be deemed to have been filed nunc pro tunc. Therefore, as this Court has not permitted the Second Amended Complaint to be filed nunc pro tunc, and

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because both the parties assert and the Court agrees that 28 U.S.C. § 2462 provides the applicable statute of limitations, Avatar Holdings is entitled to partial judgment on the pleadings as provided below.

Upon consideration of the foregoing, it is hereby **ORDERED and ADJUDGED** that:

(1) United States' Motion for Partial Summary Judgment (Dkt. 130) is **GRANTED IN PART and DENIED IN PART.** With respect to Defendant Florida Cities, the motion is **GRANTED** as to the claims for NPDES violations at Barefoot Bay and Carrollwood and all the claims at Waterway Estates; the motion is otherwise **DENIED** as to Florida Cities. With respect to Defendant Avatar Holdings, the motion is **DENIED.**

(2) Avatar Holdings, Inc.'s Motion for Partial Judgment on the Pleadings (Dkt. 169) is **GRANTED.** Avatar Holdings is entitled to judgment in its favor on the following allegations:

(a) Allegations against Avatar Holdings in Paragraph 16 based on alleged discharges during the period on or about April 1, 1990 to May 5, 1990.

(b) All allegations against Avatar Holdings in Paragraph 43.

(c) Allegations against Avatar Holdings in Paragraph 45 based on alleged discharges during the period on or about November 1, 1989 to May 5, 1990.

(3) Florida Cities Water Company's Motion for Partial Summary Judgment (Dkt. 173) is **GRANTED IN PART and DENIED IN PART.** The motion is **GRANTED** as to the allegations in paragraphs 16-23 and 30 of the Second Amended Complaint. The motion is otherwise **DENIED.**

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DONE AND ORDERED, at Tampa, Florida, this 22nd day of November, 1995.

RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of record

Exhibit_____(GHB-62)

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°Admitted only in the District of Columbia

December 4, 1995

T. Anthony Quinn, Esq.
Trial Attorney, Environment
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U.S. Department of Justice
Environmental Enforcement Section
P.O. Box 7611
Washington, DC 20044-7611

Re: U.S. v. Florida Cities Water Company and Avatar Holdings Inc.
Package of Exhibit list, deposition designations, and counter-stipulations.

Dear Mr. Quinn:

Enclosed with this package please find:

1) Florida Cities' exhibit list;

2) Florida Cities' deposition designations;

3) Florida Cities counter-proposals regarding Plaintiff's proposed stipulations.

We have forwarded hard copies of the exhibit list and of the deposition designations. We have enclosed both a hard copy (in the form of a letter) and a copy on a Word Perfect 5.1 disk. I left a voice-mail message for you earlier today to discuss whether you wished the other documents on disk but I have not heard any response from you or anyone from your office. Please also note that although Florida Cities has offered deposition designations, it still reserves the right to present these witnesses in person at trial.

This package is being hand delivered to you and a copy of this letter is being faxed. Receipt of this fax indicates that the courier is in the process of delivering the hard copies.

Thank you for your attention in this matter. Please telephone if you need any additional information in this matter.

With kind personal regards I am,

Sincerely,

Alexander M. Bullock

December 4, 1995

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U. S. Department of . Exhibit_____(GHB-63)

JCC:DSJ
90-5-1-1-3965

Washington, D.C. 20530

November 30, 1995
BY FEDERAL EXPRESS

Gary Baise
Gabeler, Baise & Miller
1320 Old Chain Bridge Road
Suite 200
McLean, VA 22101

David R. Berz
Weil, Gotshal & Manges
1615 L Street, NW
Washington, DC 20036

RECEIVED
DEC 0 7 1995
GHB

Re: United States v. Avatar Holdings, Inc. and Florida Cities Water Co., Inc.
No. 93-281-CIV-FTM-21 (M.D. Fla.)

Dear Counsel:

Pursuant to our agreement, enclosed please find a copy of the United States' Deposition Exhibit List.

Sincerely,

Assistant Attorney General
Environment and Natural Resources Division

By: _____
Daniel S. Jacobs
Trial Attorney

RECEIVED
DEC 0 1 1995

UNITED STATES' DEPOSITION EXHIBIT LIST

GHB

Exh #	Description
1	Notice of Deposition Upon Oral Examination: Julie Karleskint 04/12/94
2	Letter from Susan Hollingsworth, Lee County Board of County Commissioners to Neale Montgomery, attorney for Florida Cities Water Company (FCWC) 08/04/88
3	Letter from FCWC to Office of General Counsel, FDER, re: request for extension of time to file petition undated
4	FCWC Customer Complaint Summary Log various dates
5	Facsimile from R. Ytterberg to Reeves, Tompkins and Karleskint re DER conference 02/15/91
6	Memo from R. Ytterberg to Tony Reeves re: DER conference 02/15/91
7	Memo from Julie Karleskint to Gerald Allen re: Impact of regulations on FCWC 11/18/91
8	Memo from Julie Karleskint to FCWC employees re: Sampling and reporting protocol 11/18/91
9	Letter from R. Ytterberg to Harley Young, FDER, re: Bringing Waterway Estates in to compliance 09/08/92
10	Minutes of managers meeting FCWC 09/10/92
11	Letter Julie Karleskint to Ken Kwan re: Amended Consent Order and Final order for Waterway Estates 02/20/92
12	Memo from Julie Karleskint to Bradtmiller re: Meeting with FDER concerning Waterway Estates 04/01/92
13	Letter from Julie Karleskint to Ken Kwan re: Biological treatment Unit No. 2 04/21/92
14	Letter from Paul Bradtmiller to Philip Edwards, FDER, re: Extension of time for information submittal 04/22/92
15	Letter from Julie Karleskint to Richard Redemann, Florida Public Service Commission, re: Application for amendment of certificate 06/12/92
16	Memorandum from Susanne G. to Julie Karleskint re: Waterway Estates AWWTP test results 07/07/92
17	Work Order from Florida Cities for installation of fan 9/92

Exh #	Description
18	Letter from Julie Karleskint to Philip Edwards re: fluctuations in effluent TSS 12/22/92
19	Memorandum from Robert Dick to Julie Karleskint re: deficiencies found during EPA and DER compliance inspection 06/30/93
20	Amended Notice of Deposition for Larry Good 09/30/94
21	Letter from Jack Ravan, EPA, to Garrison Long, FCWC, re: Forwarding the NPDES permit for Carrollwood facility 06/30/75
22	Chart of Carrollwood Village capacity alternatives 1978-1985
23	Letter from Bruce Kennedy, Dept. of Waste Water to A. A. Reeves, FCWC re: Connection of Carrollwood WWTP to County WW System 06/28/83
24	Memorandum from A. A. Reeves, FCWC to file re: Modification of the conditions to FCWC's Temporary Operating Permit 08/23/83
25	Letter from W. K. Hennessey, DER to A. A. Reeves, FCWC, re: Modification of permit conditions 08/08/83
26	Letter from Larry Good, FCWC to Elton Smith, City of Tampa, re: Possibility of connecting Carrollwood Sewer System to the City's 08/23/83
27	Letter from Larry Good, FCWC to Jeff Hayden re: Spray Irrigation for Auila Golf & Country Club 12/07/83
28	Memorandum from Larry Good, FCWC to File re: connection of FCWC sewer system with the City's 12/12/83
29	Letter from William Schafer, City of Tampa, to Larry Good, FCWC re: Three possible locations for FCWC to hook up to the city's sewer system 12/29/83
30	Letter from Larry Good, FCWC to William Schafer, City of Tampa, re: Requesting reason for submitting company financial information to the city 09/09/84
31	Report-Preliminary Review and Evaluation of Existing Percolation Ponds and Off-Site Disposal Areas For Carrollwood Wastewater Treatment Facility 01/24/84
32	Letter from Kathryn Cowdery, Esq. to Edwin Copeland, Division of Public Works, re: FCWC hook-up with the Hillsborough County system 03/01/84

Exh #	Description
56	Letter from Kathryn Cowdery, Esq. to Larry Good, FCWC re: Status of FCWC's connection to the county for wastewater treatment 09/05/86
57	Letter from Kathryn Cowdery, Esq. to Tony Cleveland, DER, re: Unreasonable time deadlines which is the subject of Florida Cities Water Company v DER 10/30/86
58	Letter from Kathryn Cowdery, Esq. to Ken Kwan, EPA re: The status of FCWC's efforts to connect the Carrollwood facility to the County of Hillsborough 02/24/87
59	Letter from Paul Bradtmiller, FCWC to Roger Stewart, Hillsborough County EPA, re: Forwarding the final agreement for the transfer of wastewater flow from Carrollwood to Hillsborough County 06/24/91
60	Letter from Paul Bradtmiller, FCWC to Michael McWeeny, Hillsborough County Public Utilities, re: Demand for payment of stipulated penalties for violations of the Consent Order from EPA and FDER 02/28/92
61	Letter from Michael Spence, Dyer, Riddle, Mills & Precourt, to Rick Garrity, FDER re: Forwarding the plan for the abandonment of the Carrollwood WWTP 04/09/92
62	Letter from Julie Karleskint, FCWC to Sandi Brooks, Hillsborough County EPA, re: Forwarding the contract for sludge hauling from the polishing ponds 12/03/92
63	FCWC Balance Sheet: Capital Investment Differential Between Construction of an AWT Plant at Carrollwood and the Interconnection With the County undated
64	Letter From Michael Acosta, FCWC to Bruce Goldstein, Esq. re: Summary of costs incurred by FCWC for removal of residuals and cleaning of tanks 06/28/93
65	Memorandum from Johnnie Overton, FCWC re: Errors in Monthly Operating Reports 03/28/94
66	Letter from Larry Good, FCWC, to Lee Miller, FDER, re: Recommendations for a solution for effluent disposal at Barefoot Bay 01/20/84
67	Sequence of Events for the Barefoot Bay WWTP Effluent Disposal 08/13/91
68	FCWC Barefoot Bay Division Chart of Wastewater and Canal Discharge undated

Exh #	Description
33	Letter from Larry Good, FCWC to Edwin Copeland, Division of Public Works, re: Forwarding an application for waste water service and franchise map 04/12/84
34	Letter from Larry Good, FCWC to Edwin Copeland, Division of Public Works, re: FCWC hook-up to City's sewer system 06/04/84
35	Letter from Edwin Copeland, Division of Public Works, to Larry Good, FCWC, re: Connection of the Carrollwood Sewer System into the Hillsborough County System 06/07/84
36	Letter from Larry Good, FCWC to Edwin Copeland, Division of Public Works, re: Status of the connection location and time frame of the hook-up of FCWC to the City sewer system 08/07/84
37	Letter from Bruce Kennedy, Hillsborough County, to Larry Good, FCWC, re: Necessity of a formal agreement between the County and FCWC for FCWC's tie-in to the County's system 09/06/84
38	Letter from A. A. Reeves, FCWC to Bruce Kennedy, Hillsborough County re: Request for information regarding connection to the County's system 10/16/84
39	Letter From Larry Good, FCWC to Bruce Kennedy, Hillsborough County, re: Connection of the Carrollwood Wastewater system to the Hillsborough County system 12/07/84
40	Letter from A. A. Reeves to Kathryn Cowdery, Esq. re: Problem with the EPA compliance schedule 12/20/84
41	Letter from Kathryn Cowdery, Esq. to Paul Traina, EPA, re: Modification to Administrative Order No. 85-044(wsss) 09/09/85
42	Letter from A. A. Reeves, FCWC to Paul Traina, EPA, re: Possible cessation of FCWC discharge into the Sweetwater Creek by June, 1987 09/29/85
43	Letter from Larry Good, FCWC to Bruce Kennedy, Hillsborough County, re: Status of application to connect to the county system and inquiry in the status of the study of FCWC's system 03/19/85
44	Letter from Kathryn Cowdery, Esq. to Larry Good, FCWC, re: Notices of public hearings related to the DER priority list 07/30/85

Exh #	Description
45	Letter from Kathryn Cowdery, Esq. to Larry Good, FCWC, re: 1986 priority list for wastewater treatment works as it relates to Carrollwood transmission facility project 08/09/85
46	Memorandum from Larry Good to file re: Moratorium on new sewer connections in the Carrollwood area 08/14/85
47	Memorandum from KGWC (Kathryn Cowdery) to file re: Meeting with Hillsborough County Utilities Department to discuss connection agreement terms 08/21/85
48	Letter from Kathryn Cowdery, Esq. to Robert Alban, Hillsborough Co. Utilities Department re: August 19th meeting to discuss the connection of the Carrollwood facility to Dale Mabry Plant 08/21/85
49	Letter from Kathryn Cowdery, Esq. to Onci Kelada, Hillsborough Co. Dept of Wastewater Utilities, re: The taking out of service of the Carrollwood plant, payment for construction and facility appraisal 09/05/85
50	Letter from Kathryn Cowdery, Esq. to Michael McWeeny, Utilities Department, re: Alternative hook-up ideas for the Carrollwood plant 09/24/85
51	Letter from Kathryn Cowdery, Esq. to Larry Good, FCWC re: Connecting to the County, EPA deadline to cease discharging to Sweetwater Creek and the FCWC administrative case 11/13/85
52	Letter from Kathryn Cowdery, Esq. to Scott Stevens, Hillsborough County Dept. of Water and Wastewater Utilities, re: FCWC application for connection to County 03/25/86
53	Letter from Kathryn Cowdery, Esq. to Scott Stevens, Hillsborough County Department of Water and Wastewater Utilities, re: Procedure to be used in the review of the FCWC Application for Water and/or Wastewater Service 04/17/86
54	Letter from Kathryn Cowdery, Esq. to Larry Good , FCWC, re: Review of the request for wastewater service from the county 04/24/86
55	Letter from Kathryn Cowdery, Esq. to Larry Good, FCWC re: Status of the application for Wastewater treatment at Hillsborough County 05/14/86

Exh #	Description
69	FCWC Work Order for Clearing, minor regrading and berm repairs 02/24/93
70	Newspaper editorial entitled, "Sewage Problems" undated
71	Letter from Ray Cunningham, EPA to Paul Bradtmiller, FCWC, re: Forwarding NPDES Permit for Barefoot Bay WWTP 09/16/91
72	Letter from Leslie Shannon, Chem Hill, to Gerald Allen, Avatar, re: Summary of the Barefoot Bay Status Report, estimate of construction costs 05/31/89
73	Memorandum from Gerald Allen to file re: Meeting with manager of Brevard Groves to discuss using effluent discharge for irrigation of orange groves 08/01/89
74	Amended Notice of Deposition Upon Oral Examination: William Sansbury 09/30/94
75	Attachment 2A Existing Treatment Units, Barefoot Bay Wastewater Treatment Plant
76	Map of Barefoot Bay WWTP Modifications
77	Map of FCWC Barefoot Bay Spray Irrigation Alternatives
78	FCWC Barefoot Bay Division Wastewater and Canal Discharge
79	Facsimile from Johnnie Overton to Gerald Allen re: attached letter to Kathleen Blizzard, Gerald Allen, Larry Good, and Doug Young about effluent discharge figures at the Barefoot Bay canal 12/21/92
80	Letter from Roosevelt Childress, EPA to A. A. Reeves, FCWC re: Forwarding an application for an NPDES permit 05/30/90
81	Memorandum from William Sansbury, FCWC, to Paul Bradtmiller re: Sand Dragon proposal 04/25/91
82	Memorandum from Jack Tompkins, FCWC, to Bill Sansbury re: Barefoot Bay Water and Wastewater Operations, visit report 06/28/91
83	Hand drawing of ponds and pond drain lines undated
84	Fax from Paul Bradtmiller to Bill Sansbury, forwarding memorandum from Julie Karleskint to Bradtmiller, FCWC, re: comments to Barefoot Bay draft NPDES permit 08/20/91
85	FCWC/BFB Wastewater daily DO readings Jan.-July 1994

Exh #	Description
86	Wastewater Treatment Plant Operations Manual undated
87	Memorandum from William Sansbury, FCWC, to Paul Bradtmiller re: telephone conversation with Peter Dentice about permit for spray irrigation site 10/31/91
88	Hand drawing of swell at grade undated
89	Memorandum from William Sansbury, FCWC, to Paul Bradtmiller re: DER, BCMC inspection visit to spray irrigation site 10/29/91
90	Memorandum from William Sansbury to Barefoot Bay Operators and Field Crew, FCWC, re: spray site irrigation practice procedures 10/15/92
91	Handwritten memorandum from Glen Siler to Bill Sansbury re: Mr. Good's visit to SIS and plant 01/05/93
92	Handwritten memorandum from Glen Siler to Bill Sansbury re: Mr. Good's visit to SIS and plant undated
93	Memorandum from William Sansbury, FCWC, to file re: Spray Irrigation Site Discharge incident on April 17 04/27/92
94	Hand drawing of overflows at 40 acre SIS and storm water pond in 1992 undated
95	Letter from William Sansbury, FCWC, to Peter Dentice, FDER, re: Spray Irrigation Site overflow incident on April 17 04/29/92
96	Memorandum from W. Michael Sansbury, FCWC, to Julia Karleskint re: overflow incident from the 40 acre Spray Irrigation Site on October 11 10/15/92
97	Letter from William Sansbury, FCWC, to Christine Ferraro, FDER, re: minor overflow incident at the 40 acre spray site of the Barefoot Bay Wastewater Treatment Facility on October 11 10/14/92
98	Letter from Johnnie M. Overton, FCWC, to James Scarborough, EPA Region IV, re: enclosing monthly Discharge Monitoring Report for May 1993 for Barefoot Bay Wastewater Treatment Plant, plus results of toxicity testing for January-June 1993 06/28/93
99	Letter from Johnnie M. Overton, FCWC, to James Scarborough, EPA Region IV, re: enclosing monthly Discharge Monitoring Report for January 1993 for Barefoot Bay Wastewater Treatment Plant 02/26/93

Exh #	Description
100	Letter from Johnnie M. Overton, FCWC, to James Scarborough, EPA Region IV, re: enclosing monthly Discharge Monitoring Report for February 1993 for Barefoot Bay Wastewater Treatment Plant 03/24/93
101	Letter from Johnnie M. Overton, FCWC, to James Scarborough, EPA Region IV, re: enclosing monthly Discharge Monitoring Report for February 1994 for Barefoot Bay Wastewater Treatment Plant 03/22/94
102	Letter from Susan M. Rodgers L., Bio Lab of Florida, to Bill Sansbury, FCWC, re: summary of results of bioassay testing for the Barefoot Bay Wastewater Treatment Plant required by NPDES permit 07/09/92
103	Letter from Johnnie M. Overton, FCWC, to James Scarborough, EPA Region IV, re: enclosing monthly Discharge Monitoring Report for March 1993 for Barefoot Bay Wastewater Treatment Plant 04/26/93
104	Letter from Johnnie M. Overton, FCWC, to James Scarborough, EPA Region IV, re: enclosing monthly Discharge Monitoring Report for June 1993 for Barefoot Bay Wastewater Treatment Plant 07/27/93
105	Memorandum from William Sansbury, FCWC, to Johnnie Overton and Larry Good re: summary of meeting on 40 acre spray irrigation site operation procedure (attached memo from William Sansbury to Barefoot Bay Operators and field crew, re: spray site irrigation practice procedures) 01/05/93
106	Test results, parameters, permit limits, and explanations for testing done at Barefoot Bay, Golden Gate, Gulf Gate, Southgate, Waterway Estates for various months from 1988 to 1993 undated
107	Meeting Agenda re: company policy pertaining to compliance with environmental regulations and permits 01/13/93
108	Warning Letter from A. Alexander, FDER, to Paul Bradtmiller, FCWC, re: warning of violation of Florida Statutes at the Barefoot Bay Mobile Home Park, STP 12/18/92
109	Memorandum from William Sansbury, FCWC, to Johnnie Overton and Larry Good re: 40 acre spray irrigation flows and enclosed Flow Analysis Report 10/29/93

Exh #	Description
110	Letter from A. Alexander, FDER, to Johnnie Overton, FCWC, re: enforcement action through issuance of warning letter is rescinded 02/11/93
111	Letter from Carlos Rivero-deAguilar, FDER, to Paul Bradtmiller, FCWC, re: FDER's position on necessity of Class I reliability for public access spray irrigation of the proposed Herndon Golf Course 03/22/93
112	Memorandum from Paul Bradtmiller, FCWC, to Gerald Allen re: Historical Wastewater Flows at Barefoot Bay WWTP, attached Table 4-D, discharge of 90 degree V-notch weirs 01/09/92
113	Letter from Julie Karleskint, FCWC, to Christine Ferraro, FDEP, re: requesting a temporary increase in design capacity for the Barefoot Bay 40 Acre Spray Irrigation System Permit 11/12/93
114	Letter from Julie Karleskint, FCWC, to Yvonne Martin, EPA Region IV, re: actions taken in response to Performance Audit Inspection Report 11/15/93
115	there is no Exhibit 115
116	Memorandum from William Sansbury, FCWC, to Johnnie Overton and Larry Good re: EPA PAI response 11/01/93
117	Memorandum from William Sansbury, FCWC, to Julie Karleskint re: attached calculations for BOD effluent 12/15/93
118	Fax from Paul Bradtmiller to Larry Good and William Sansbury re: chart of Barefoot Bay Wastewater Treatment and Disposal Options, 10/21/93 11/18/93
119	Memorandum from Julie Karleskint, FCWC, to Gerald Allen re: Reuse of Reclaimed Water on Citrus Groves, attached Recommended Limits for Constituents in Reclaimed Water for Irrigation 01/07/94
120	FCWC Wastewater Treatment Plant Upsets/Sewage Spills, overflow from excessive rainfall at BFB 06/20/94
121	Notice of Deposition Upon Oral Examination: Glen Siler 09/30/94
122	FCWC Barefoot Bay Wastewater Treatment Plant, Plant Flow Diagram, Existing Treatment Units, with markings by deponent undated

Exh #	Description
123	FCWC Barefoot Bay Wastewater Treatment Plant, Plant Flow Diagram, Existing Treatment Units, with markings by deponent undated
124	Barefoot Bay Wastewater Treatment Plant diagram of digestors and aerations, capacities undated
125	FCWC Wastewater Plant Barefoot Bay, Observation of Process Problems (handwritten) 03/12/92
126	Handwritten notes by Glen Siler re: reasons for sampling and suggestions undated
127	FCWC Barefoot Bay Wastewater Plant Flow Meter Readings, MLSS readings, CL2 SO2 Weights and Feed, Equipment Hour Meter Readings and Run Hours, Lab Bench Sheet Raw South Aerator Pre SO2, DO readings, and Maintenance Check List February 1994
128	FCWC Wastewater Plant Flow, CL2, and PH Readings, Canal Discharge and Irrigation, MLSS readings, Lab Bench Sheet Raw South Aerator Pre SO2, Plant Flow, Equipment Hour Meter Readings and Run Hours, DO readings, CL2 SO2 Weights and Feed, Maintenance Check List June 1994
129	FCWC Wastewater Plant Flow, CL2, and PH Readings, Canal Discharge and Irrigation, MLSS readings, Lab Bench Sheet Raw South Aerator Pre SO2, Plant Flow, Equipment Hour Meter Readings and Run Hours, DO readings, CL2 SO2 Weights and Feed, Maintenance Check List July 1994
130	Memorandum from William Sansbury, FCWC, to Glen Siler re: items discussed during meeting concerning the plant operations at Barefoot Bay WWTP 04/01/93
131	Handwritten memorandum from Glen Siler to Bill Sansbury re: wind socks, supply and cost undated
132	Handwritten memorandum from Glen Siler to Bill Sansbury re: cost figures for CL2 titrator undated
133	Handwritten memorandum from Glen Siler to Bill Sansbury re: June activities report 06/30/93
134	Handwritten memorandum from Glen Siler to Bill Sansbury re: April activities report 05/03/93
135	Memorandum from William Sansbury, FCWC, to Johnnie Overton and Julie Karleskint re: attached memorandum from Glen Siler about DO's and potential violation of permits 03/09/93

Exh #	Description
136	Handwritten memorandum from Glen Siler to Bill Sansbury re: irrigation field, 12-month rolling average 10/28/93
137	Notice of Deposition Upon Oral Examination: Johnnie Overton 11/01/94
138	FCWC Sarasota Division EAP - Key Personnel Chart 03/04/91
139	EPA Region IV Authorization to Discharge Under NPDES, permit granted to Barefoot Bay WWTP 09/16/91
140	EPA Region IV Authorization to Discharge Under NPDES, modification to permit granted to Barefoot Bay WWTP 03/28/94
141	Letter from Antonio Quinones, EPA Region IV, to Johnnie Overton, FCWC, re: enclosed Performance Audit Inspection report conducted at Barefoot Bay Wastewater Treatment Plant on June 10 1993
142	Discharge Monitoring Reports for Barefoot Bay WWTP for September-October 1992
143	Discharge Monitoring Reports for Barefoot Bay WWTP for October 1992
144	Discharge Monitoring Reports for Barefoot Bay WWTP for November 1992
145	Discharge Monitoring Reports for Barefoot Bay WWTP for December 1992
146	Discharge Monitoring Reports for Barefoot Bay WWTP for January 1993
147	Discharge Monitoring Reports for Barefoot Bay WWTP for February 1993
148	Discharge Monitoring Reports for Barefoot Bay WWTP for March 1993
149	Discharge Monitoring Reports for Barefoot Bay WWTP for May 1993
150	Discharge Monitoring Reports for Barefoot Bay WWTP for February 1994
151	Memorandum from Johnnie Overton, FCWC, to H. Bohnsack, B. Dick, L. Good, L. Griggs, D. Horak, B. Sansbury, and R. Ytterberg re: procedures for submission of correct FDEP/NPDES monthly reports 03/28/94

Exh #	Description
152	Memorandum from Johnnie Overton, FCWC, to Paul Bradtmiller re: document signature responsibilities 06/02/94
153	EPA Region IV Authorization to Discharge Under NPDES, permit granted to FCWC for Waterway Estates WWTP 09/29/89
154	Discharge Monitoring Report for Waterway Estates WWTP for May-June 1992
155	EPA Region IV Authorization to Discharge Under NPDES, permit granted to FCWC for South Gate WWTP 04/92
156	Discharge Monitoring Report for South Gate WWTP for September-October 1992
157	Discharge Monitoring Report for South Gate WWTP for October 1992
158	Discharge Monitoring Report for South Gate WWTP for October 1992
159	Discharge Monitoring Report for South Gate WWTP for October 1992
160	Discharge Monitoring Report for South Gate WWTP for November 1992
161	Discharge Monitoring Report for South Gate WWTP for November 1992
162	Discharge Monitoring Report for South Gate WWTP for November 1992
163	Discharge Monitoring Report for South Gate WWTP for November 1992
164	EPA Region IV Authorization to Discharge Under NPDES, permit granted to FCWC for Gulf Gate WWTP 04/13/92
165	Discharge Monitoring Reports for Gulf Gate WWTP for June 1992
166	Discharge Monitoring Reports for Gulf Gate WWTP for August 1992
167	Discharge Monitoring Reports for Gulf Gate WWTP for November 1992
168	Discharge Monitoring Reports for Gulf Gate WWTP for January 1993
169	Discharge Monitoring Reports for Gulf Gate WWTP for April 1993

Exh #	Description
170	Memorandum from Johnnie Overton, FCWC, to Georgia Metcalf re: Barefoot Bay UGST Closure/Contamination Report 09/15/92
171	Memorandum from Dennis Getman, Avatar, to Georgia Metcalf re: attached draft letter responding to Brevard County Utilities/County Commission Request for Information 10/02/92
172	Letter from Johnnie Overton, FCWC, to A. Alexander, FDER, re: requesting an informal conference to discuss allegations made in warning letter regarding exceedances of the discharge levels 12/22/92
173	Letter from James E. Christopher, Hartman & Associates, Inc., to Johnnie Overton, FCWC, re: revised proposal for plant AWT upgrades to the Barefoot Bay WWTP 11/19/93
174	Memorandum from Gerald Allen, Avatar Utilities, to Johnnie Overton re: potential land application opportunity to dispose of a limited amount of reclaimed water generated at the Barefoot Bay WWTP on the Hearndon Tract 12/23/92
175	Letter from Johnnie Overton, FCWC, to Alvin Castro, FDER, re: providing additional data and flow information from the Barefoot Bay WWTP in response to warning letter 01/21/93
176	Letter from Johnnie Overton, FCWC, to Alvin Castro, FDER, re: enclosed spreadsheet consolidating information from the Monthly Operating Reports for October 1991 through September 1992 02/08/93
177	Letter from Kathleen Blizzard, Hopping Boyd Green & Sams, to Johnnie Overton, FCWC, re: enclosing Wastewater Disposal Alternatives to Deep Well Injection at Barefoot Bay and a letter to FCWC from SJRWMD regarding notice of board consideration of permit application, which includes reuse feasibility report 07/14/93
178	Letter from Johnnie Overton, FCWC, to John E. Potts, Hutcheon Engineers, re: future invoices must include a contract recap broken down by task, amount spent to date by task, and hourly billing information 07/14/93
179	Letter from Johnnie Overton, FCWC, to Carlos Rivero-deAguilar, FDER, re: providing responses to comments made by FDEP to the Barefoot Bay Reuse Feasibility Study 07/26/93

Exh #	Description
180	State of Florida legislature enacted relating to the Indian River Lagoon System and Basin 1990
181	Reuse Feasibility Study for Barefoot Bay WWTP undated
182	Letter from James E. Christopher, Hartman & Associates, Inc., to Michael Acosta, FCWC, re: enclosing drawings for Barefoot Bay Wastewater Treatment Plant expansion and a list of items to discuss for review meeting 01/21/94
183	Letter from James E. Christopher, Hartman & Associates, Inc., to Christianne Ferraro, FDEP, re: responses to requests concerning Barefoot Bay WWTP Upgrade/Reuse Service Area Wastewater Facility Construction Permit Application 02/04/94
184	Study to Determine the Feasibility of Using Effluent from the Barefoot Bay WWTP to Irrigate Sebastian Groves near Micco, Florida; prepared by Frazier Engineering, Inc. 02/14/94
185	Memorandum from Georgia Metcalf, Barefoot Bay Development Corp., to Johnnie Overton re: irrigation records for the past 12 months for Barefoot Bay Golf Course 03/10/94
186	Memorandum from Johnnie Overton, FCWC, to Wayne Schiefelbein re: Barefoot Bay Reuse Service Area 03/23/94
187	Letter from Johnnie Overton, FCWC, to Rich Burklew, Jr., St. Johns River Water Management District, re: technical comments to Sebastian Groves Reuse Feasibility Study Parrish Brothers Partnership 03/11/94
188	Memorandum from Johnnie Overton, FCWC, to Gerald Allen re: comments to attached draft memorandum concerning the Effluent Reuse Agreement for the Barefoot Bay Golf Course 04/12/94
189	Memorandum from J. Overton, FCWC, to M. Acosta, L. Good, and B. Sansbury re: Hearndon Division and Effluent Reuse Issues, fact sheet and map attached 04/22/94
190	Memorandum from Johnnie Overton, FCWC, to Gerald Allen and Paul Bradtmiller re: review of meeting to discuss the proposed Barefoot Bay reuse system, charge for agricultural consumption, and use of golf course pond for storage 05/26/94

Exh #	Description
191	Letter from Douglas Young, FCWC, to John Denninghoff, Bussen-Mayer Engineering Group, Inc., re: feasibility of using the stormwater ponds and canals in Barefoot Bay for storage of reclaimed water from the WWTP 06/17/94
192	Letter from Richard Obadiah, Stone & Webster Engineering Corp., to Paul Bradtmiller, FCWC, re: third formal demand for payment on delinquent account at Waterway Estates WWTP 06/01/92
193	Confidential memorandum from Dennis Getman to Gerald Allen re: comments to Overton's memo (8/5/92) concerning Stone & Webster Engineering Corp.'s Claim for Additional Services 08/13/92
194	Supplemental (#1400) to Conward No. 1284, approved for services for the Waterway Estates WWTP Expansion project 11/23/92
195	Conward project proposal (# 1594), approved for services for the Gravity Main Replacement into North Fort Myers Manhole #16-42 10/25/93
196	Conward project proposal (# 1553), approved for purchase of RBC Covers for Gulf Gate WWTP 08/09/93
197	Letter from Johnnie Overton, FCWC, to James Scarborough, EPA Region IV, re: requesting testing under permit from BOD5 to CBOD5 at the Waterway Estates WWTP 09/01/93
198	Letter from Floyd Wellborn, EPA Region IV, to Johnnie Overton, FCWC, re: intent to modify NPDES permit for Waterway Estates WWTP 10/28/93
199	Fax from Sarasota County Utilities Franchise to Johnnie Overton, FCWC, re: attached memo from Larry Turner to Wayne Derr, Utilities Department, concerning reported sewage problems at Forest Lakes 02/02/94
200	Conward project proposal to replace Final Waste Magnetic Flow Meter at South Gate WWTP 08/04/93
201	FCWC Incident Report, broken sewer line at South Gate plant 03/13/93
202	Notice of Deposition Upon Oral Examination: Paul Bradtmiller 11/01/94
203	EPA General Information Form for Barefoot Bay WWTP and EPA NPDES Form 2E, Facilities Which Do Not Discharge Process Wastewater 03/01/90

Exh #	Description
204	EPA General Information Form for Barefoot Bay WWTP and EPA NPDES Form 2E, Facilities Which Do Not Discharge Process Wastewater 06/08/90
205	Letter from Paul Bradtmiller, FCWC, to Bridget Crawford, EPA Region IV, re: comments to draft NPDES permit for Barefoot Bay WWT Facility 03/12/91
206	EPA Region IV Administrative Order Pursuant to Section 309 of the Clean Water Act (Barefoot Bay) 09/26/90
207	EPA Region IV Consent Agreement and Order Assessing Administrative Penalties Under Section 309(g) of the Clean Water Act (Barefoot Bay) 11/06/91
208	Letter from Paul Bradtmiller, FCWC, to Kathleen Blizzard, Hopping Boyd Green & Sams, re: enclosed EPA letter concerning revised draft permit and public notice of tentative decision on the permit 06/26/91
209	Letter from Paul Bradtmiller, FCWC, to Bridget Crawford, EPA Region IV, re: finding the requirements in draft permit acceptable 07/08/91
210	Letter from Dennis Getman, FCWC, to Kathleen Blizzard, Hopping Boyd Green & Sams, re: FCWC Spray Field Permit Application with FDER 07/16/91
211	Memorandum from Dennis Getman, FCWC, to Gerald Allen, Paul Bradtmiller, Robert Gordon, and A.A. Reeves, III re: agreement with EPA for penalties concerning the Barefoot Bay WWT Facilities 10/04/91
212	Facsimile from Bill Sansbury to Paul Bradtmiller re: chlorination of Waste Water Plant Pond Discharge into Micco Ditch at Barefoot Bay WWTP 08/16/91
213	Letter from Paul Bradtmiller, FCWC, to Rick Levin, St. Johns River Water Management District, re: withdrawal of Artificial Recharge Permit for Barefoot Bay 08/06/92
214	Barefoot Bay WWTP Reclaimed Water Reuse/Disposal Alternatives prepared by FCWC November 1992
215	Letter from Paul Bradtmiller, FCWC, to A. Alexander, FDER, re: summary of reassessment of alternatives to the planned land application of reclaimed water on the 300 acre site at Barefoot Bay 12/14/92

Exh #	Description
216	Memorandum from Dennis Getman to Georgia Metcalf re: enclosed draft letter which responds to Brevard County Utilities/County Commission's Request for Information 10/02/92
217	Letter from Carlos Rivero-deAguilar, FDER, to Paul Bradtmiller, FCWC, re: issues concerning Amended Consent Order for Barefoot Bay WWTP 02/02/93
218	Memorandum from Paul Bradtmiller, FCWC, to Johnnie Overton re: schedule for Reuse Feasibility Study at Barefoot Bay 02/24/93
219	Fax from G. Allen to P. Bradtmiller re: Barefoot Bay WWT and Disposal Options 10/21/93
220	Memorandum from Dennis Getman, Avatar, to Paul Bradtmiller re: comments on Reuse Agreement for Barefoot Bay WWTP 11/15/93
221	Avatar Utilities Inc. Organizational Chart 06/06/91
222	FCWC Organizational Chart 04/13/93
223	Memorandum from Paul Bradtmiller, FCWC, to M. Acosta, J. Karleskint, M. Lowry, J. Overton, and J. Schifano, re: enclosed 1994 Company Goals 01/28/94
224	Newspaper article entitled, "State Officials to Decide on Barefoot Bay Sewage" undated
225	Memorandum from Paul Bradtmiller, FCWC, to Gerald Allen re: Barefoot Bay WWTP upgrade 03/10/94
226	Letter from Carlos Rivero-deAguilar, FDER, to Paul Bradtmiller, FCWC, re: disposal of sludge at unapproved sites under Agricultural Use Plan 06/29/94
227	Memorandum from Gerald Allen to Paul Bradtmiller re: transmittal of legal notices and documents 02/18/94
228	Memorandum from Gerald Allen to Paul Bradtmiller re: requesting list of compliance inspections by Sarasota County at FCWC facilities 01/28/94
229	Revised Agenda for FCWC meeting with Operating Personnel - Southern Region 12/09/93
230	Fax memorandum from Gerald Allen to Paul Bradtmiller re: Barefoot Bay - Renewal of Parrish Water Use Permit 03/08/94

Exh #	Description
231	Memorandum from Gerald Allen to Johnnie Overton re: storage analysis performed by CH2M Hill for citrus irrigation at Barefoot Bay 02/17/93
232	Memorandum from Gerald Allen to Georgia Metcalf re: Prospective Wastewater Capacity Fees at Hearndon PUD 07/07/93
233	Memorandum from Robert Gordon to Gerald Allen, Paul Bradtmiller, Dennis Getman, Tony Reeves, Peter Sharp, and Larry Wilkov, re: remediation hearing to settle condemnation proceedings relating to FCWC Barefoot Bay's acquisition of 300 acres of Micco Grove 03/13/91
234	Fax memorandum from Gerald Allen to Georgia Metcalf re: concerns about Proposed Ordinance for Hearndon PUD 03/07/94
235	Letter from W. Ray Cunningham, EPA Region IV, to Paul Bradtmiller, FCWC, re: enclosed final issuance of NPDES permit for Carrollwood WWTP 05/28/91
236	EPA Region IV Authorization to Discharge Under the NPDES, permit granted to FCWC for Gulf Gate WWTP 03/27/87
237	EPA Region IV Authorization to Discharge Under the NPDES, permit granted to FCWC for South Gate WWTP 03/27/87
238	Discharge Monitoring Report for Barefoot Bay WWTP for March 1991
239	Discharge Monitoring Report for Barefoot Bay WWTP for April 1991
240	Discharge Monitoring Report for Barefoot Bay WWTP for May 1991
241	Discharge Monitoring Report for Barefoot Bay WWTP for June 1991
242	Discharge Monitoring Report for Barefoot Bay WWTP for October 1991
243	Discharge Monitoring Report for Carrollwood WWTP for April 1991
244	Discharge Monitoring Report for Carrollwood WWTP for May 1991
245	Discharge Monitoring Report for Carrollwood WWTP for June 1991

Exh #	Description
246	Discharge Monitoring Report for Carrollwood WWTP for July 1991; NPDES Violation Report; Letter from Paul Bradtmiller, FCWC, to Michael Hom, EPA Region IV, re: enclosing corrected DMR for July 1991 at the Carrollwood WWTP 08/21/91
247	there is no Exhibit 247
248	there is no Exhibit 248
249	there is no Exhibit 249
250	Discharge Monitoring Report for Carrollwood WWTP for August 1991; NPDES Violation Report; Letter from Paul Bradtmiller, FCWC, to John Marlar, EPA Region IV, re: enclosing DMR for August 1991 at the Carrollwood WWTP 09/25/91
251	Discharge Monitoring Report for Carrollwood WWTP for September 1991; NPDES Violation Report; Letter from Paul Bradtmiller, FCWC, to John Marlar, EPA Region IV, re: enclosing DMR for September 1991 at the Carrollwood WWTP 10/25/91
252	Discharge Monitoring Report for Carrollwood WWTP for October 1991; NPDES Violation Report; Letter from Paul Bradtmiller, FCWC, to John Marlar, EPA Region IV, re: enclosing DMR for October 1991 at the Carrollwood WWTP 11/27/91
252-A	Discharge Monitoring Report for Carrollwood WWTP for November 1991; NPDES Violation Report
253	Discharge Monitoring Report for Carrollwood WWTP for December 1991; NPDES Violation Report
254	Discharge Monitoring Report for Waterway Estates WWTP for July 1991
255	Discharge Monitoring Report for Waterway Estates WWTP for August 1991
256	Discharge Monitoring Report for Waterway Estates WWTP for September-October 1991
257	Discharge Monitoring Report for Waterway Estates WWTP for October 1991
258	Discharge Monitoring Report for Waterway Estates WWTP for November 1991
259	Discharge Monitoring Report for Waterway Estates WWTP for December 1991

Exh #	Description
260	Discharge Monitoring Report for Waterway Estates WWTP for March 1992
261	Discharge Monitoring Report for Waterway Estates WWTP for February 1992
262	Discharge Monitoring Report for Waterway Estates WWTP for January-February 1992
263	Discharge Monitoring Report for Waterway Estates WWTP for January 1992
264	Discharge Monitoring Report for Waterway Estates WWTP for March-April 1992
265	Discharge Monitoring Report for South Gate AWTP for February-July 1991
266	Discharge Monitoring Report for Gulf Gate AWTP for August 1991 - January 1992
267	Discharge Monitoring Report for South Gate AWTP for February-July 1991
268	Discharge Monitoring Report for South Gate AWTP for August 1991 - January 1992
269	Discharge Monitoring Report for South Gate AWTP for March 1992
270	Memorandum from Dennis Getman, Avatar, to Gerald Allen re: validity of Lee County Reuse Ordinance and proposed action 04/15/91
271	Memorandum from Dennis Getman, Avatar, to Gerald Allen re: response to EPA's actions regarding the Waterway Estates WWTP 05/09/91
272	Memorandum from Dennis Getman, Avatar, to file re: telephone conference to discuss pending meeting with EPA about the NPDES permit for Waterway Estates WWTP 06/07/91
273	Memorandum from Dennis Getman, Avatar, to Gerald Allen re: comments on consent decree in U.S. v. City of Cape Coral and State of Florida 05/18/92
274	Conward project proposal (# 1343), approved for construction of North Ft. Myers force main improvements (Waterway Estates AWWTP) 08/24/92

Exh #	Description
275	Conward project proposal (# 1342), approved for construction of effluent/reuse line at Waterway Estates AWWTP 08/24/92
276	Memorandum from Dennis Getman, Avatar, to Gerald Allen re: comments on claim for additional services for Stone & Webster Engineering Corp. 08/13/92
277	Memorandum from Gerald Allen, Avatar, to Dennis Getman re: response EPA's Notice of Violation, Waterway Estates WWTP Discharges 09/29/92
278	Memorandum from Dennis Getman, Avatar, to Gerald Allen re: questions concerning EPA's Notice of Violation for NPDES permit discharges at Waterway Estates WWTP 10/01/92
279	Memorandum from Gerald Allen, Avatar, to Dennis Getman re: EPA agreed to modify the NPDES permit for the Waterway Estates WWTP 10/14/92
280	Supplemental to Conward project proposal # 1284, approved for Waterway Estates WWTP expansion 11/30/92
281	Facsimile from Paul Bradtmiller, FCWC, to Gerald Allen re: attached letter from 1988 responding to EPA about the Waterway Estates WWTP upgrade and expansion 08/10/93
282	Conward project proposal (# 1594), approved for gravity main replacement into North Fort Myers manhole #16-42 10/25/93 and project proposal (# 1553), approved for purchase of RBC covers for Gulf Gate AWTP 08/09/93
283	Facsimile from Paul Bradtmiller, FCWC, to Don Scroggin re: enclosing information concerning permits to extend an existing outfall structure at Waterway Estates WWTP 12/23/93
284	Memorandum from Paul Bradtmiller, FCWC, to Mike Acosta, Larry Dyszynski, Larry Good, Julie Karleskint, Marcia Lowry, Johnnie Overton, Joe Schifano, and Roger Ytterberg, re: agenda items for Regional Managers meeting 02/02/94
285	EPA Region IV Administrative Order Pursuant to Section 309 of the Clean Water Act (Carrollwood) 09/27/90
286	Discharge to Hillsborough County - Capital Cost Estimate and Direct Expenditures Made to Date, Engineering undated

Exh #	Description
287	FCWC Capital Investment Differential Between Construction of an AWT Plant at Carrollwood and the Interconnection with the county undated
288	Fax memorandum from Paul Bradtmiller, FCWC, to Robert Gordon and Gerald Allen re: cost estimate comparison between construction of an AWT plant at Carrollwood and connecting to the Hillsborough County WWT system 03/20/91
289	Letter from Paul Bradtmiller, FCWC, to Leslie Schaugaard, Hillsborough County Environmental Protection Commission, re: EPA consent order requires FCWC to submit a report on maximum flow into the Carrollwood WWTP 03/18/91
290	Letter from Clerk of Circuit Court of Hillsborough County to A.A. Reeves, III, FCWC, re: attached approved agreement between Hillsborough County and FCWC to provide wastewater treatment services in Northwest Hillsborough County 06/13/91
291	Conward project proposal (# 1181), approved for construction of force main and repumping facility at Carrollwood Collection System 08/09/91
292	Memorandum from Paul Bradtmiller, FCWC, to Gerald Allen re: enclosed summary of flow meter surveys and draft action plan for calibration/upgrade program 09/30/91
293	Letter from Paul Bradtmiller, FCWC, to Michael McWeeny, Hillsborough County Public Utilities Department, re: disagreement concerning language in the Agreement about adjustment of FCWC rates 12/06/91
294	Letter from Michael McWeeny, Hillsborough County Board of County Commissioners, to Paul Bradtmiller, FCWC, re: rates to be charged to FCWC's customers; letter faxed to Larry Good 12/13/91
295	Letter from Paul Bradtmiller, FCWC, to Jim Roberts, Hillsborough County Public Utilities Department, re: application for an increase in wastewater rates for customers of the Carrollwood Division 12/20/91
296	Letter from Michael McWeeny, Hillsborough County Board of County Commissioners, to Paul Bradtmiller, FCWC, re: suggested points for consideration concerning user charges to wastewater customers; letter faxed to Durwood Horak 12/20/91

Exh #	Description
297	Memorandum from Paul Bradtmiller, FCWC, to Gerald Allen re: attached documents relating to sale of Carrollwood WWTP site 01/14/93
298	Letter from Paul Bradtmiller, FCWC, to John Marlar, EPA Region IV, re: enclosing final DMR for Carrollwood WWTP, which has ceased discharging into Sweetwater Creek 02/10/92
299	Letter from Dennis McDowell, FCWC, to DER, re: abandonment of Carrollwood WWTP, which has been shut down 02/03/92
300	Letter from Michael McWeeny, Hillsborough County Board of County Commissioners, to Paul Bradtmiller, FCWC, re: start-up date for flow through 12-inch FCWC Force Main 12/31/91
301	Letter from Elvin Phillips, Williams, Parker, Harrison, Dietz & Getzen, to Ed Turanchik, Hillsborough County Board of County Commissioners, re: construction of the FCWC Carrollwood Pump Station 01/04/93
302	Memorandum from B. Kenneth Gatlin, Gatlin, Woods, Carlson & Cowdery, to Paul Bradtmiller, FCWC, re: Hillsborough County Board of County Commissioners' Findings of Fact, Conclusions of Law and Recommendation concerning FCWC's application for increased water rates 03/17/93
303	Notice of Deposition Upon Oral Examination: Jack Tompkins 12/08/94
304	Letter from John Marlar, EPA Region IV, to A.A. Reeves, III, FCWC, re: enclosed Administrative Order issued for violations at Waterway Estates WWTP 09/26/89
305	Memorandum from Jack Tompkins, FCWC, to Chuck Williamson re: required monthly monitoring reports for Waterway Estates WWTP under EPA's Administrative Order 10/09/89
306	Letter from William Sundstrom, Rose, Sundstrom & Bentley, to Anthony Reeves, FCWC, re: possibility of North Fort Myers Utilities, Inc. providing wholesale central sanitary wastewater transmission, treatment and disposal services for Waterway Estates district 09/25/89

Exh #	Description
307	Letter from Robert French, FCWC, to James Elliott, Source, Inc., re: instructing Source, Inc. to provide a complete permit application to FDER regarding the Waterway Estates WWTP in accordance with existing Engineering Services Agreement 06/26/89
308	Facsimile from Jack Tompkins, FCWC, to William Harrop, Jr., Source, Inc., re: enclosed letter concerning response to DER 07/25/89
309	Facsimile from Bill Harrop, Source, Inc., to Jack Tompkins, FCWC, re: enclosed set of responses to FDER concerning the permit application for the Waterway Estates WWTP 08/09/89
310	Letter from Philip Edwards, FDER, to Robert French, FCWC, re: FDER's letter is unanswered and permit application for the Waterway Estates WWTP is incomplete 11/17/89
311	Memorandum from Jack Tompkins, FCWC, to files re: issues discussed at meeting with FDER on the pending construction application for Waterway Estates WWTP 08/15/89
312	Memorandum from Jack Tompkins, FCWC, to files re: discussion with FDER about new "Antidegradation Rule" dealing with the permit application for the Waterway Estates WWTP 10/11/89
312-A	Letter from Peter McGarry, EPA Region IV, to A.A. Reeves, III, FCWC, re: monitoring of discharges at the Waterway Estates WWTP as required by the new permit 02/01/90
313	Letter from Jack Tompkins, FCWC, to Peter McGarry, EPA Region IV, re: discharge monitoring for new parameters will begin at Waterway Estates WWTP 02/20/90
314	Letter from William Harrop, Jr., Source, Inc., to James Elder, FCWC, re: proposal for additional engineering services at Waterway Estates WWTP 04/26/90
315	Letter from James Elder, FCWC, to Philip Edwards, FDER, re: schedule for construction bids under the temporary operating permit for the Waterway Estates WWTP 05/17/90

Exh #	Description
316	Letter from Robert James, Stone & Webster Environmental Services, to James Elder, FCWC, re: attached Agreement for Engineering Services and Scope of Services for expansion and upgrades at the Waterway Estates WWTP 05/18/90
317	Letter from Philip Edwards, FDER, to James Elder, FCWC, to FCWC's failure to submit timely applications as agreed to in the Consent Order for the Waterway Estates WWTP 05/21/90
318	Letter from Jack Tompkins, FCWC, to EPA Region IV Compliance Unit, re: enclosing Discharge Monitoring Report for April 1990, including new permit parameters 05/22/90
319	Letter from James Elliott, Source, Inc., to James Elder, FCWC, re: need to change construction services portion of agreement for the Waterway Estates WWTP 05/25/90
320	Letter from W. Ray Cunningham, EPA Region IV, to Jack Tompkins, FCWC, re: Amendment to Administrative Order and compliance schedule for Waterway Estates WWTP 07/24/90
321	Letter from Jack Tompkins, FCWC, to W. Ray Cunningham, EPA Region IV, re: Notice of Award for construction at Waterway Estates WWTP 08/06/90
322	Letter from Don Haumann, Stone & Webster Environmental Services, to Donald Mullaney, Cardinal Contractors, Inc. and James Elder, FCWC, re: Request for Change Order Time Extension based on Notice of Commencement 10/01/90
323	Letter from Jack Tompkins, FCWC, to John Marlar, EPA Region IV, re: request for modification of EPA Administrative Order due to new completion dates for construction negotiated with FDER 12/11/90
324	Memorandum from J. Tompkins, FCWC, to J. Elder, A. Reeves, G. Allen, and D. Getman re: compliance with EPA's Administrative Order for construction at Waterway Estates WWTP 02/08/91
325	Memorandum from Dennis Getman, Avatar, to G. Allen, J. Elder, R. Gordon, A.A. Reeves, III, and J. Tompkins re: need to start extensively documenting the files to prevent possible penalties and negative government public relations 02/19/91

Exh #	Description
326	Letter from Jack Tompkins, FCWC, to John Marlar, EPA Region IV, re: progress report for work at Waterway Estates Advanced Wastewater Treatment Facility 02/21/91
327	Letter from Jack Tompkins, FCWC, to Donald Mullaney, Cardinal Contractors, Inc., re: summary of meeting to discuss schedule for completion of items related to compliance with Final Effluent Limitations at Waterway Estates WWTP 02/26/91
328	Letter from Jack Tompkins, FCWC, to Donald Mullaney, Cardinal Contractors, Inc., re: summary of meeting to discuss schedule for completion of items related to compliance with Final Effluent Limitations at Waterway Estates WWTP, with note to Gary "See me ASAP" and attached progress schedule and budget report 02/26/91
329	Letter from Jack Tompkins, FCWC, to Donald Mullaney, Cardinal Contractors, Inc., re: summary of meeting to discuss schedule for completion of items related to compliance with Final Effluent Limitations at Waterway Estates WWTP, with note to Bob "See me ASAP" 02/26/91
330	Letter from Donald Mullaney, Cardinal Contractors, Inc., to Jack Tompkins, FCWC, re: revised schedule for chemical feed activities at the Waterway Estates WWTP 03/01/91
331	Letter from Jack Tompkins, FCWC, to Kenneth Kwan, EPA Region IV, re: enclosed detailed chronology of the Waterway Estates Advanced WWTP Project 03/01/91
332	Letter from Paul Bradtmiller, FCWC, to Peter McGarry, EPA Region IV, re: corrective actions taken in response to EPA's notice of violation 03/14/91
333	Letter from Jack Tompkins, FCWC, to Donald Mullaney, Cardinal Contractors, Inc., re: summarize meeting to discuss schedule for projects prepared by Cardinal Contractors 04/01/91
334	Memorandum from Jack Tompkins to file re: meeting with EPA to discuss Waterway Estates Advanced WWT Facility construction project and permitting requirements as modified by Administrative Order 04/08/91
335	Memorandum from J. Tompkins, FCWC, to P. Bradtmiller re: Waterway Estates WWTP Outfall line is near completion, installation of sulfunator, price proposal, draft letter to DER 05/17/91

Exh #	Description
336	Memorandum from Jack Tompkins, FCWC, to Paul Bradtmiller re: comments to draft letter to DER concerning construction at Waterway Estates WWTP 05/31/91
337	Memorandum from Jack Tompkins to Paul Bradtmiller re: responding to Section 308 Information Request for Waterway Estates WWTP 05/29/91
338	Sequence of Events for the Waterway Estates WWTP Expansion 06/03/91
339	Letter from James Elder, FCWC, to Don Mullaney, Cardinal Contractors, Inc., re: comments to items discussed at meeting concerning Waterway Estates WWTP expansion 06/10/91
340	Memorandum from Jack Tompkins to Paul Bradtmiller re: meeting the nutrient removal requirements under the NPDES permit at Waterway Estates WWTP 06/28/91
341	Letter from Jack Tompkins, FCWC, to Dan Broome, Dyer, Riddle, Mills and Precourt, Inc., re: enclosed information to assist in completion of Waterway Estates WWTP expansion 07/29/91
342	Letter from Paul Bradtmiller, FCWC, to Kenneth Kwan, EPA Region IV, re; enclosing documents concerning costs and completion schedule for Waterway Estates WWTP upgrade project 08/26/91
343	Discharge Monitoring Report for Barefoot Bay WWTP for October 1990
344	Discharge Monitoring Report for Barefoot Bay WWTP for November 1990
345	Discharge Monitoring Report for Barefoot Bay WWTP for January 1991
346	Discharge Monitoring Report for Barefoot Bay WWTP for February 1991
347	Memorandum from Gerald Allen, Avatar Utilities, to file re: summary of FCWC/FDER meeting to discuss alternatives to deep well injection of wastewater effluent at Barefoot Bay 09/07/89
348	Facsimile from James Christopher, Dyer, Riddle, Mills & Precourt, Inc., to Jack Tompkins, FCWC, re: attached schedule and cost estimates for alternative pumping to a restricted access spray irrigation site 09/22/89

Exh #	Description
349	Letter from Francis Cheung, Ardaman & Associates, Inc., to Jack Tompkins, FCWC, re: preliminary findings for proposed spray irrigation site for reclaimed water in Brevard County 09/22/89
350	Fax copy of letter from Francis Cheung, Ardaman & Associates, Inc., to Jack Tompkins, FCWC, re: preliminary findings for proposed spray irrigation site for reclaimed water in Brevard County, unsigned 09/22/89
351	Letter from James Christopher, Dyer, Riddle, Mills & Precourt, Inc., to Jack Tompkins, FCWC, re: findings and recommendations for required modifications to Barefoot Bay WWTP in order to provide treated effluent for restricted public access spray irrigation 09/25/89
352	there is no Exhibit 352
353	Memorandum from Jack Tompkins, FCWC, to G. Allen re: alternatives for reuse of Barefoot Bay WWTP effluent, cost estimates 09/25/89
354	Letter from Jack Tompkins, FCWC, to John Burnett, Brevard Groves, Inc., re: flow and volume requirements to provide freeze protection for crops 10/11/89
355	Memorandum from Jack Tompkins, FCWC, to file re: proposed reuse options presented to Brevard Groves 11/08/89
356	Memorandum from Jack Tompkins, FCWC, to Gerald Allen and A.A. Reeves re: Barefoot Bay spray irrigation status and other project concerns 10/12/89
357	Letter from James Christopher, Dyer, Riddle, Mills & Precourt, Inc., to Jack Tompkins, FCWC, re: information about proposed irrigation sites for the Barefoot Bay effluent disposal system 11/03/89
358	Memorandum from Jack Tompkins, FCWC, to A.A. Reeves and G. Allen re: cost estimates for transportation of wastewater from the Hearndon Tract to Barefoot Bay WWTP and back, upgrades for public access disposal, restricted access disposal, and deep well injection 11/08/89
359	Memorandum from Jack Tompkins, FCWC, to A.A. Reeves and G. Allen re: summary of meeting with St. John's River Water Management District to discuss various options for effluent disposal of wastewater 11/14/89

Exh #	Description
360	Letter from James Christopher, Dyer, Riddle, Mills & Precourt, Inc., to Jack Tompkins, FCWC, re: water balance analyses performed for various alternatives for the Barefoot Bay effluent disposal system expansion 11/30/89
361	Letter from Jack Tompkins, FCWC, to Richard Levin, St. John's River Water Management District, re: request for extension of time to complete technical and economic analysis on use of reclaimed water at Barefoot Bay facilities 12/04/89
362	Letter from A.A. Reeves, III, FCWC, to A. Alexander, FDER, re: events which have caused problems for FCWC in acquiring the 300-acre tract of property in Brevard County 02/27/90
363	Memorandum from Steve Rosenbaum, FCWC, to Jack Tompkins re: flow cycles in the Barefoot Bay water and wastewater systems 12/10/90
364	Facsimile of memorandum from J. Tompkins, FCWC, to G. Allen re: draft response to the Administrative Order for the Barefoot Bay WWT Facility 10/09/90
365	Facsimile of memorandum from J. Tompkins, FCWC, to D. Getman and G. Allen re: revised draft response to Administrative Order for the Barefoot Bay WWT Facility 10/15/90
366	Letter from Jack Tompkins, FCWC, to James Christopher, Hartman and Associates, re: enclosed analysis of water and wastewater flows at Barefoot Bay from 1/86 to 11/90 12/19/90
367	Letter from Roger Pfaff, EPA Region IV, to Jack Tompkins, re: Notice to Show Cause for violations at the Barefoot Bay WWTP 07/16/91
368	Facsimile from Bridget Crawford, EPA Region IV, to Jack Tompkins re: enclosed letter from Joseph Carroll, Fish and Wildlife Service (DOI), to Roosevelt Childress, EPA Region IV, re: comments to proposed permit for the Barefoot Bay WWTP 07/31/91
369	Memorandum from Dennis Getman, Avatar, to Gerald Allen, A.A. Reeves, III, Jack Tompkins, and Jay Landers re: meeting at EPA to discuss the Carrollwood WWTP and pending construction 08/01/90

Exh #	Description
370	Memorandum from Jack Tompkins, FCWC, to A. Reeves, R. French, G. Allen, D. Getman, and J. Landers re: enforcement action by FDER for the Carrollwood facilities, draft Consent Order Agreement 09/14/90
371	Memorandum from Jack Tompkins, FCWC, to G. Allen, A. Reeves, R. French, J. Landers, and D. Getman re: discussion with EPA about draft permit and enforcement action for the Carrollwood facilities 10/10/90
372	Letter from G.J. Thabaraj, FDER, to Jack Tompkins, FCWC, re: requested extension of the construction permit for the Carrollwood WWTP will not be processed while a Consent Order for negotiated settlement of violations are in progress 10/22/90
373	Memorandum from J. Tompkins to G. Allen, J. Landers, D. Getman, A. Reeves, and R. French re: discussion with EPA about Carrollwood NPDES Permit Application and need to modify the permit 11/05/90
374	Letter from Jack Tompkins, FCWC, to Michael McWeeny, Hillsborough County Public Utilities Department, re: proposed fees for connection of Carrollwood Wastewater System to Hillsborough County's system 12/26/90
375	Letter from Jack Tompkins, FCWC, to John Marlar, EPA Region IV, re: progress report on the Carrollwood Advanced WWT Project 12/27/90
376	Letter from Jack Tompkins, FCWC, to Leslie Schaugaard, Hillsborough County Environmental Protection Commission, re: proposed Consent Order and possibility of connecting the Carrollwood Wastewater System to Hillsborough County's system 01/24/91
377	Letter from Jack Tompkins, FCWC, to Leslie Schaugaard, Hillsborough County Environmental Protection Commission, re: signed Consent Agreement and continuing negotiations to connect the Carrollwood Wastewater System to Hillsborough County's system 01/30/91
378	Amended Notice of Deposition Upon Oral Examination: James Elder 02/23/95
379	Notice from James Elder, declining to answer and invoke 5th Amendment rights upon advice of counsel 03/06/95
380	Affirmation of James A. Elder re: discussions with DOJ about this case 07/14/94

Exh #	Description
381	Letter from O.H. Moss, Moss-Kelley, Inc., to James A. Elder, FCWC, re: review and comments to the denitrification filter for Waterway Estates WWTP 02/20/90
382	Letter from James A. Elder, FCWC, to Philip Edwards, FDER, re: attached prints showing changes made to drawing by Source, Inc. for the Waterway Estates WWTP 03/29/90
383	Letter from Keith A. Pickle, Cardinal Contractors, Inc., to Jim Elder, FCWC, re: bid clarification for the Waterway Estates WWTP expansion project 04/17/90
384	Letter from Philip Edwards, FDER, to James Elder, FCWC, re: response to proposed changes to original design prints for construction permit for expansion of Waterway Estates WWTP 04/17/90
385	Letter from Philip Edwards, FDER, to James Elder, FCWC, re: response to request for modification of Consent Order and permits for the Waterway Estates WWTP 05/21/90
386	Letter from James Elder, FCWC, to James Elliot, Source Inc., re: concerns with attached letter from Source Inc. to FDER and the status of the project at Waterway Estates WWTP 05/22/90
387	Memorandum from Robert French, FCWC, to Waterway Estates WWTP file re: summary of June 1st meeting with FDER to discuss potential compliance action by FDER to the consent order for the Waterway Estates WWTP 06/06/90
388	Handwritten notes from telephone conference with Jim Elder re: schedule and status of projects 06/25/90
389	Letter from James Elder, FCWC, to Kenneth Kwan, EPA Region IV, re: reasons for not meeting the construction start date and requesting a new construction start date for the Waterway Estates WWTP modifications 07/03/90
390	Letter from James Elder, FCWC, to R.G. James, Stone & Webster Environmental Services, re: setting a construction cost negotiating meeting and intent to retain the firm for engineering services at the Waterway Estates WWTP facility 07/12/90

Exh #	Description
391	Letter from Donald T. Mullaney, Cardinal Contractors, Inc., to Jim Elder, FCWC, re: portions of the Waterway Estates WWTP project will be in operation by projected dates 08/06/90
392	Letter from Don Haumann, Stone & Webster Environmental Services, to FCWC, re: schedule for completion of design review for Waterway Estates WWTP 08/15/90
393	Letter from James Elder, FCWC, to Bill McDevitt, Cardinal Contractors, Inc., re: official notice to proceed on Waterway Estates WWTP expansion 08/24/90
394	Letter from William J. McDevitt, Cardinal Contractors, Inc., re: attached executed contracts and Payment Bond for the Waterway Estates WWTP expansion and modifications 08/24/90
395	Letter from Donald T. Mullaney, Cardinal Contractors, Inc., to James Elder, FCWC, re: bond must be posted and the Notice of Commencement issued before Notice to Proceed is accepted; attached Lee County Commercial Plans Review Packet 08/28/90
396	Letter from Donald T. Mullaney, Cardinal Contractors, Inc., to James Elder, FCWC, re: FCWC must fill out and return the attached concurrency application to obtain the Building Permit from Lee County for the Waterway Estates WWTP project 09/05/90
397	Draft letter from James Elder to Don Haumann, Stone & Webster Engineering Corp., re: requesting Stone & Webster to send a response letter to Cardinal Contractors based on certain facts concerning the Waterway Estates WWTP project 09/10/90
398	Letter from Keith A. Pickle, Cardinal Contractors, Inc., to James Elder, FCWC, re: FCWC's need to file a Notice of Commencement for the Waterway Estates WWTP expansion 09/13/90
399	Letter from Donald T. Mullaney, Cardinal Contractors, Inc., to Don Haumann, Stone & Webster Engineering, re: events which transpired in pursuing the building permit for the Waterway Estates WWTP expansion 09/14/90
400	Letter from Donald T. Mullaney, Cardinal Contractors, Inc., to Don Haumann, Stone & Webster Engineering, re: requesting investigation of status of concurrency approval and the Notice of Commencement for the Waterway Estates WWTP expansion 09/20/90

Exh #	Description
401	Letter from James Elder, FCWC, to Keith Pickle, Cardinal Contractors, Inc., re: not recommending the proposed request for an extension of the contract start date for the Waterway Estates WWTP modifications 09/20/90
402	Letter from Keith Pickle, Cardinal Contractors, Inc., to James Elder, FCWC, re: disagreeing with FCWC on validity of time extension claims concerning the Notice of Commencement for the Waterway Estates WWTP expansion project 09/24/90
403	Letter from Donald T. Mullaney, Cardinal Contractors, Inc., to James Elder, FCWC, re: status of the review by Lee County Concurrency Management Division for the Waterway Estates WWTP expansion project 09/25/90
404	Letter from James Elder, FCWC, to Don Haumann, Stone & Webster Engineering, Inc., re: requesting advise concerning disagreement with Cardinal Contractors on validity of time extension claim on the Waterway Estates WWTP project 09/26/90
405	Letter from James Elder, FCWC, to Pat McAlister, Department of Concurrency Management, re: attached South Florida Water Management District permit exemption for the Waterway Estates WWTP project and concurrency review application 09/26/90
406	Letter from James Elder, FCWC, to Mike Carrol, Department of Concurrency Management, re: confirming that FCWC has the available capacity to supply wastewater and water service to the Waterway Estates WWTP 10/08/90
407	Letter from Donald T. Mullaney, Cardinal Contractors, Inc., to Don Haumann, Stone & Webster Engineering, re: receipt of Lee County Concurrency Department's approval letter and plan to proceed with the building permit application process for the Waterway Estates WWTP 10/10/90
408	Letter from Donald T. Mullaney, Cardinal Contractors, Inc., to Don Haumann, Stone & Webster Engineering, re: disagreeing with Stone & Webster's determination that any claim is unfounded concerning the Notice of Commencement for the Waterway Estates WWTP project 10/10/90

Exh #	Description
409	Letter from Michael Carroll, Lee County Board of Commissioners, to A.A. Reeves, FCWC, re: operating permit for the Waterway Estates WWTP is about to expire 10/10/90
410	Letter from James Elder, FCWC, to Don Haumann, Stone & Webster Engineering Corp., re: requesting advise concerning points of disagreement between FCWC and Cardinal Contractors on the Notice to Proceed date and request for time extension 10/11/90
411	Letter from Donald T. Mullaney, Cardinal Contractors, Inc., to Don Haumann, Stone & Webster Engineering, re: confirming position on certain issues concerning permits for the Waterway Estates WWTP project 10/11/90
412	Letter from Donald T. Mullaney, Cardinal Contractors, Inc., to James Elder, FCWC, re: requesting FCWC address the items listed in attached letter from Lee County Code Enforcement and furnish sets of drawings in order to resubmit for the building permit for the Waterway Estates WWTP 10/29/90
413	Letter from Don Haumann, Stone & Webster Environmental Services, to James Elder, FCWC, and Don T. Mullaney, Cardinal Contractors, Inc., re: reasons for determination that Cardinal Contractors' request for time extension is not valid 10/29/90
414	Letter from Donald T. Mullaney, Cardinal Contractors, Inc., to Don Haumann, Stone & Webster Engineering, re: items pending review and request for additional information on other items concerning the Waterway Estates WWTP 10/29/90
415	Letter from Keith A. Pickle, Cardinal Contractors, Inc., to FCWC, re: status of delay in starting the Waterway Estates WWTP project and plans to proceed 11/02/90
416	Handwritten memo from James Elder to file re: phone conversation with Keith Pickle of Cardinal Contractors requesting meeting to discuss the contract date and price for the Waterway Estates WWTP project 11/07/90
417	Letter from Keith A. Pickle, Cardinal Contractors, Inc. to Tony Reeves, FCWC, re: review of issues and major problems discussed at Nov. 12th meeting concerning the Waterway Estates WWTP expansion project 11/14/90

Exh #	Description
418	Cardinal Contractor, Inc. Meeting Minutes, recapping discussion of Waterway Estates WWTP expansion 11/19/90
419	Letter from James Elder, FCWC, to James P. Elliot, Source Inc., re: attached signed copies of proposal for services at the Waterway Estates WWTP 11/20/90
420	Letter from Keith A. Pickle, Cardinal Contractors, Inc., to Tony Reeves, FCWC, re: claim for extended overhead costs for the Waterway Estates WWTP project 11/28/90
421	Letter from Joseph H. Burgess, Anchor Engineering, to James Elder, FCWC, re: electrical questions to the information received concerning the Waterway Estates WWTP 11/30/90
422	Letter from Joseph H. Burgess, Anchor Engineering, to James Elder, FCWC, re: proposal for professional engineering services and scope of project for electrical designs for revisions to the Waterway Estates WWTP (signed and accepted by James Elder on 12/04/90) 11/30/90
423	Memorandum from Jim Elder to file re: synopsis of meeting with Lee County Building and Codes concerning the Waterway Estates WWTP 12/06/90
424	Change Order Request, extending overhead and additional time for obtaining building permit for the Waterway Estates WWTP 12/20/90
425	Letter from Donald T. Mullaney, Cardinal Contractors, Inc., to James Elder, FCWC, re: concern over slowness in review of shop drawings 02/06/91
426	Letter from Don Haumann, Stone & Webster Environmental Services, to James Elder, FCWC, re: recommending approval of the enclosed shop drawing package for ultraviolet disinfection systems 03/16/91
427	Billing invoice from Stone & Webster Engineering Corp. to James Elder, FCWC, re: construction engineering services for Waterway Estates WWTP upgrade 05/24/91
428	Letter from Donald T. Mullaney, Cardinal Contractors, Inc., to James Elder, FCWC, re: discrepancies in contract drawings from those approved by Lee County, plans to be conformed 04/12/91

Exh #	Description
429	Letter from Geoffrey K. Hart, Stone & Webster Environmental Services, to James Elder, FCWC, re: Kelly Brother, Inc.'s request for additional compensation is not allowed under the contract 04/12/91
430	Letter from Donald T. Mullaney, Cardinal Contractors, Inc., to James Elder, FCWC, re: cost quotations for Waterway Estates WWTP project 04/19/91
431	Letter from Donald T. Mullaney, Cardinal Contractors, Inc., to James Elder, FCWC, re: requesting status reports for unreturned submittals 04/22/91
432	Letter from Donald T. Mullaney, Cardinal Contractors, Inc., to James Elder, FCWC, re: delay in completing work due to no response from FCWC concerning change orders 04/22/91
433	Letter from Donald T. Mullaney, Cardinal Contractors, Inc., to James Elder, FCWC, re: requesting immediate return of shop drawings for the Waterway Estates WWTP 05/06/91
434	Letter from Donald T. Mullaney, Cardinal Contractors, Inc., to James Elder, FCWC, re: review of items discussed at meeting concerning submittals for the Waterway Estates WWTP 05/07/91
435	Letter from James Elder, FCWC, to Don Mullaney, Cardinal Contractors, Inc., re: comments in response to recent phone conversation and letters concerning modifications at the Waterway Estates WWTP 05/21/91
436	Letter from Donald T. Mullaney, Cardinal Contractors, Inc., to James Elder, FCWC, re: delays and recover time for the Waterway Estates WWTP project, requesting information 07/22/91
437	Letter from Thomas Hempstead, Stone & Webster Engineering Corp., to James Elder, FCWC, re: additional questions for FCWC on the Waterway Estates WWTP expansion project 07/22/91
438	Letter from Donald T. Mullaney, Cardinal Contractors, Inc., to James Elder, FCWC, re: requesting status of certain submittals 10/10/91
439	Facsimile from Jim Elder, FCWC, to Mark Kaiser, Limno-Tech, re: attached FDER memorandum concerning recommendations about the AWT effluent discharge at Carrollwood WWTP 11/17/89

Exh #	Description
440	Letter from James Elder, FCWC, to Ed Snipes, FDER, re: awaiting an answer to FCWC's request for a wasteload allocation for discharge into Sweetwater Creek at Carrollwood WWTP 11/15/89
441	Letter from James Elder, FCWC, to J. Thabaraj, FDER, re: submitting construction permit application and fee for upgrade project at Carrollwood WWTP 11/15/89
442	Letter from Michael S. Hickey, FDER, to Robert H. French, FCWC, re: determination that reasonable assurances have not been provided as to minimum negative impact from discharges at Carrollwood WWTP 11/20/89
443	Memorandum from Jim Elder, FCWC, to file re: review of meeting to discuss Minimal Negative Impact Study by Limno-Tech for discharges into Sweetwater Creek 11/20/89
444	Letter from James E. Christopher, Dyer, Riddle, Mills & Precourt, Inc., to Jim Elder, FCWC, re: requesting sampling on wastewater to obtain values for design purposes for project at Carrollwood WWTP 12/18/89
445	Letter from James E. Christopher, Dyer, Riddle, Mills & Precourt, Inc., to Jim Elder, FCWC, re: invitation to contractor bidders for upgrade project at Carrollwood WWTP 07/26/90
446	Letter from Daniel L. Allen, Dyer, Riddle, Mills & Precourt, Inc., to Bob French, FCWC, re: construction plans and specifications for the Carrollwood Advanced WWTP 09/10/90
447	Letter from James Elder, FCWC, to John T. Marlar, EPA Region IV, re: submitting discharge monitoring report and progress report on bids for the project at Carrollwood 11/20/90
448	Conward project proposal (# 1058), approved for construction of modifications at Carrollwood WWTP 12/11/90
449	Facsimile from Jim Elder, FCWC, to Gerald Allen re: attached cost estimate for connection to Hillsborough County 12/13/90
450	Letter from Randy Mears, Hillsborough County Environmental Protection Commission, to James Elder re: site plans submitted for Carrollwood WWTP upgrade disapproved 12/26/90

Exh #	Description
451	Letter from James Elder, FCWC, to Chuck Hammett, Dyer, Riddle, Mills & Precourt, re: attached check and signed EPC Wetland Delineation Application form 01/04/91
452	Letter from James Elder, FCWC, to Roger P. Stewart, Hillsborough County Environmental Protection Commission, re: delay in start of construction date at the Carrollwood WWTP due to wetlands on the site, which are required to be field delineated 01/07/91
453	Letter from Charles E. Hammett, Jr., Dyer, Riddle, Mills & Precourt, to Patricia Frantz, Environmental Protection Commission, re: transmitting items requested concerning upgrade project and wetlands delineation at Carrollwood WWTP 01/07/91
454	Facsimile from Jim Broome, Dyer, Riddle, Mills & Precourt, Inc., to Jim Elder re: wetlands proposal and EPC site development review for Carrollwood WWTP, fire department project review 01/14/91
455	Letter from James N. Broome, Dyer, Riddle, Mills & Precourt, Inc., to James Elder, FCWC, re: revised Change Order #1 with modifications from Wharton-Smith, Inc. for the AWT upgrade at Carrollwood WWTP 01/21/91
456	Letter from James Elder, FCWC, to John T. Marlar, EPA Region IV, re: interim progress report, options considered 02/19/91
457	Facsimile from Jim Broome, Dyer, Riddle, Mills & Precourt, Inc., to Jim Elder re: enclosed bid proposals for the Carrollwood WWTP AWT upgrade 02/22/91
458	Memorandum from Durwood (Horak), FCWC, to file re: review of meeting with Hillsborough County Utility to discuss time frame for a hook-up 02/22/91
459	Memorandum from Jim Elder, FCWC, to A.A. Reeves and P. Bradtmiller re: review of meeting with Dyer, Riddle, Mills & Precourt concerning right-of-way construction permit for Carrollwood Wastewater Collection System connection to Hillsborough County 06/06/91
460	FDER Domestic Wastewater Collection/Transmission Systems Certification of Completion of Construction of Carrollwood wastewater booster pump station and force main approved 12/13/91

Exh #	Description
461	Letter from Travis Williams, Travis Williams Construction Company, Inc., to James Elder, FCWC, re: proposed construction and completion of wastewater 12" force main and booster pumping station at Carrollwood 09/24/91
462	Letter from James Elder, FCWC, to Michael R. Spence, Dyer, Riddle, Mills & Precourt, Inc., re: formal Notice to Proceed with the Carrollwood WWTP Abandonment Plan 11/12/91
463	Memorandum from Durwood (Horak), FCWC, to file re: postponement of start-up of repump station and interconnection 01/03/92
464	Letter from James E. Christopher, Hartman & Associates, Inc., to Jim Elder, FCWC, re: wastewater flow projections for the Barefoot Bay development based on historical wastewater flow data and historical active residential customer data 01/02/91
465	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to J. Elder, D. Getman, R. Gordon, and A. Reeves, re: permit application for wastewater effluent disposal at Barefoot Bay and analysis of alternatives 02/19/91
466	Memorandum from Jim Elder, FCWC, to Gerald Allen re: decision to submit a five-year construction permit for the land application system and storage ponds for Barefoot Bay effluent disposal 02/26/91
467	Letter from James E. Christopher, Hartman & Associates, Inc., to Jim Elder, FCWC, re: enclosed summary of bids received for the Barefoot Bay Spray Irrigation System project 07/08/91
468	Amended Notice of Deposition Upon Oral Examination: Lawrence Wilkov 02/23/95
469	Avatar Utilities Inc., Written Consent of Sole Shareholder, electing Lawrence Wilkov as director company 09/13/84
470	Written Consent in Lieu of Meeting of the Sole Stockholder of Avatar Utilities Inc., removing Lawrence Wilkov as director of company 02/02/94
471	Stockholder's Consent to Corporate Action without a Meeting, electing Lawrence Wilkov as director of FCWC and other corporations 09/13/84

Exh #	Description
472	Written Consent in Lieu of Meeting of the Sole Stockholder of Florida Cities Water Company, removing Lawrence Wilkov as director of FCWC; Written Consent in Lieu of Meeting of the Board of Directors of Florida Cities Water Company 02/02/94
473	Avatar Holdings Inc. SEC Quarterly Report Form 10-Q for period ending June 30, 1994
474	Memorandum from Robert B. Gordon, Avatar Utilities Inc., to John Sladkus re: disposal of effluent leaching from the percolation ponds at the Barefoot Bay WWTP 06/22/84
475	Memorandum from Granville R. Ramsey, Avatar, to Larry Wilkov re: offer to sell bulk land adjacent to Barefoot Bay 06/13/85
476	Memorandum from John Sladkus to Larry Wilkov re: meeting to review qualifications of companies to perform engineering services at the Hearndon property 07/27/89
477	Memorandum from Robert B. Gordon, Avatar Utilities Inc., to Peter Sharp and Larry Wilkov re: updates of several Avatar projects, including the Barefoot Bay deep well injection process 08/16/89
478	Memorandum from Gerald S. Allen, Avatar Utilities Inc. to file re: review of meeting with FDER staff to discuss alternatives to deep well injection of wastewater effluent at Barefoot Bay 09/07/89
479	Letter from Dennis J. Getman, Avatar Properties Inc., to Pan American Bank, re: interest in making offer to acquire property in Brevard County covered by the Trustee, attached Purchase and Sale Agreement 01/02/90
480	Letter from Dennis J. Getman, Avatar, to Jeff Barrow, Ben Hill Griffin Inc., re: purchase offer for Micco Grove property in Brevard County 04/02/90
481	Memorandum from Auldith Jordan, Avatar, to Lawrence Wilkov re: wastewater disposal alternatives to deep well injection at Barefoot Bay, cost analyses 05/15/90
482	Memorandum from Auldith Jordan, Avatar, to Lawrence Wilkov re: wastewater disposal alternatives to deep well injection at Barefoot Bay, cost analyses 05/15/90

Exh #	Description
483	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to R. French, D. Getman, R. Gordon, A.A. Reeves, III, P. Sharp, J. Sladkus, and L. Wilkov, re: summary of meeting with FDER to discuss wastewater disposal alternatives to deep well injection at Barefoot Bay 07/06/90
484	Review of Telephonic Board of Directors Meeting of FCWC re: deep injection and land application options 09/24/90
485	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Larry Wilkov re: review of options for wastewater treatment and disposal for the Hearndon PUD 11/20/92
486	Memorandum from Barefoot Bay Development Corporation to Larry Wilkov re: attached report from Brevard County Board of County Commissioners on effluent disposal study 01/18/93
487	Memorandum from Gerald Allen, Avatar Utilities Inc., to Larry Wilkov and Georgia Metcalf re: proposal to FDER for construction of a part of the Hearndon Wastewater Plant was unacceptable, preliminary cost estimates 02/08/93
488	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Ed Jacobson and Larry Wilkov re: present value analysis of options for wastewater treatment at Barefoot Bay 10/22/93
489	Memorandum from Robert Gordon, Avatar Utilities Inc., to John Sladkus re: EPA's denial of FCWC's application for an extension of Temporary Operating Permit for the Carrollwood WWTP 08/06/84
490	Conward project proposal (# 995-4-096), approved for Waterway Estates WTP expansion and improvements, add raw water main 05/20/84
491	Conward project proposal (# 995-5-067), approved for Waterway Estates WTP Filter Backwash Piping Modification 06/85
492	Conward project proposal (# 995-4-071), approved for WWTP Percolation Ponds at Barefoot Bay 06/18/85
493	Conward project proposal (# 046), approved for WWTP Rapid Infiltration Basins Load Test at Barefoot Bay 04/28/86
494	Conward project proposal (# 190), approved for Waterway Estates WWTP engineering study 02/27/87

Exh #	Description
495	Conward project proposal (# 193), approved for Hearndon Site Golf Course Effluent Irrigation Study 03/02/87
496	Conward project proposal (# 347), approved for Renovation of Wastewater Pumping Station Nos. S-27, S-31, and N-2 12/22/87
497	Conward project proposal (# 351), approved for 0.5 MG Ground Storage Reservoir and Booster Pumping Station at Barefoot Bay 12/29/87
498	Conward project proposal (# 363), approved for South Gate/Gulf Gate AWTs Dechlorination System 01/27/88
499	Conward project proposal (# 366), approved for Waterway Estates WWTP Expansion 01/27/88
500	Conward project proposal (# 373), approved for Moody Road Waterline Extension - NFM 02/11/88
501	Conward project proposal (# 393), approved for Well Nos. 7 and 8 Raw Water Main at Barefoot Bay 04/14/88
502	Conward project proposal (# 425), approved for Cypress Lake Drive Water and Wastewater Main Relocations 05/23/88
503	Conward project proposal (# 387), approved for Fort Myers Beach 16" Water Main Extension Phase I 03/29/88
504	Conward project proposal (# 388), approved for Fort Myers Beach Water Main Replacements - Phase VI 03/29/88
505	Conward project proposal (# 415), approved for Water Main Extensions in Iona Area - South Fort Myers 04/03/88
506	Conward project proposal (# 441), approved for South Estero Blvd. 16" Waterline Extension Phase II - South Fort Myers 06/14/88
507	Conward project proposal (# 470), approved for 16" Water Main Extension on S. Estero Blvd. 08/11/88
508	Conward project proposal (# 540), approved for Engineering Service for Gulf Gate Drive Force Main and Five Lift Stations 12/07/88
509	Conward project proposal (# 534), approved for Installation Pump, Motor, and Raw Water at Green Meadows Well Nos. 8 and 8A 12/05/88

Exh #	Description
510	Conward project proposal (# 542), approved for College Parkway Utility Relocations U.S. 41 to South Point Boulevard 12/13/88
511	Conward project proposal (# 567), approved for Gulf Gate/South Gate AWT Plants Emergency Generators 01/24/89
512	Conward project proposal (# 584), approved for College Parkway Force Main Relocation 02/10/89
513	Conward project proposal (# 589), approved for College Parkway Water Main and Force Main Relocation 02/10/89
514	Conward project proposal (# 616), approved for Fort Myers Beach Water Main Replacements - Phase VII 03/08/89
515	Conward project proposal (# 630), unsigned, for Replacement of Lighting Mixer In Flow Equalization Tank at Sarasota 03/29/89
516	Conward project proposal (# 636), approved for engineering and hydrogeologic services at Proposed Landfill Site H in Lee County 04/11/89
517	Conward project proposal (# 647), approved for Fort Myers Beach Water Main Replacements - Phase VI 04/25/89
518	Conward project proposal (# 645), approved for Renovate Wastewater Pumping Station No. 1190 (Bispham) 04/24/89
519	Conward project proposal (# 708), approved for Replacement of Grit Removal Equipment at Gulf Gate and South Gate AWT plants 08/07/89
520	Conward project proposal (# 709), approved for Emergency Power Generators for Gulf Gate and South Gate AWT plants 08/07/89
521	Conward project proposal (# 720), approved for Construction of Fort Myers Beach Water Main Replacements - Phase VII 08/17/89
522	Conward project proposal (# 728), approved for Waterway Estates WTP Upgrade and Expansion - Engineering Services 09/20/89
523	Conward project proposal (# 729), approved for Renovation of Wastewater Pumping Station Nos. 3690 (Zayre) & 3640 (Riviera) 09/08/89

Exh #	Description
524	Conward project proposal (# 730), approved for Construction of South US 41 Gravity Sewer System and Pumping Station 09/07/89
525	Conward project proposal (# 802), approved for Gulf Gate Drive Force Main Replacement, budget reports 01/10/90
526	Conward project proposal (# 831), approved for Barefoot Bay Effluent Disposal System Expansion, budget report 02/01/90
527	Conward project proposal (# 875), approved for Renovation of Wastewater Pumping Stations Nos. N-21, S-40, and S-48, budget report 03/12/90
528	Conward project proposal (# 966), unsigned, for engineering services at Waterway Estates Wastewater Treatment Facility, budget report 07/23/90
529	Conward project proposal (# 995), unsigned, for boundary survey at Barefoot Bay WWTP 09/05/90
530	Conward project proposal (# 1020), approved for Water Treatment Plant Improvements at Barefoot Bay 10/23/90
531	Conward project proposal (# 1031), approved for Toxicity Reduction Evaluation at South Gate and Gulf Gate AWT Plants, budget report 11/07/90
532	Conward project proposal (# 1220), unsigned, for Effluent Disposal System Expansion at Barefoot Bay; Conward project proposal (# 1205), approved for Effluent Disposal System Expansion at Barefoot Bay, budget report 10/21/91
533	Conward project proposal (# 1111), approved for Gulf Gate and South Gate AWT Plants Toxicity Reduction Evaluation Phase I, budget report 08/22/91
534	Conward project proposal (# 1343), approved for North Fort Myers Force Main Improvements 08/18/92
535	Conward project proposal (# 1379), approved for BTU #2 Diffuser Drop Pipe Modification at Waterway Estates WWTP 10/21/92
536	Conward project proposal (# 1385), approved for Lime Slurry System for Sludge Stabilization at Gulf Gate and South Gate AWT Plants, budget report 10/30/92

Exh #	Description
537	Conward project proposal (# 1400), unsigned, for additional engineering and construction services for the Waterway Estates WWTP Expansion 11/30/92
538	Conward project proposal (# 1607), unsigned, for Waterway Estates WTP Backwash Storage and Recovery Tank construction 11/19/92
539	Notice from Lawrence Wilkov, declining to answer and invoke 5th Amendment rights upon advice of counsel 03/06/95
540	Notice of Deposition Upon Oral Examination: Gerald S. Allen 03/13/95
541	Letter from Leslie B. Shannon, CH2M Hill, to Robert C. French, FCWC, re: additional services provided for the Barefoot Bay Reuse Plan 06/29/89
542	Facsimile from Robert French, FCWC, to Gerald Allen, re: enclosed notes on proposed modifications at Barefoot Bay WWTP 06/08/89
543	Memorandum from Gerald S. Allen to John Sladkus re: summary of CH2M Hill presentation on the deep well injection system at Barefoot Bay 06/09/89
543-A	Facsimile from Gerald Allen, Avatar Utilities Inc., to Tony Reeves re: enclosed draft Deep Well Injection Alternatives 09/05/89
544	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to A.A. Reeves, III re: summary of overall plan for developing an alternative wastewater effluent disposal proposal to FDER 09/07/89
544-A	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to A.A. Reeves re: concerns about wastewater land application proposal for Barefoot Bay 10/26/89
545	Wastewater Disposal Alternatives to Deep Well Injection, Barefoot Bay; prepared by Gerald S. Allen 11/22/89
546	Facsimile from Jim Elder, FCWC, to Gerald Allen, re: cost breakdown for the Barefoot Bay effluent disposal system expansion engineering increase 09/10/91
547	Memorandum from Robert French, FCWC, to Gerald Allen, re: proposed schedules for alternatives suggested for disposal of Barefoot Bay WWTP effluent 09/04/90

Exh #	Description
548	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Bob French, re: revisions to schedule for the Barefoot Bay Land Application Project 10/04/90
548-A	Memorandum from Gerald S. Allen to J. Elder, D. Getman, R. Gordon, and A. Reeves re: permit application for wastewater effluent disposal at Barefoot Bay and analysis of alternatives 02/19/91
549	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Dennis J. Getman re: proposed acquisition of easements from Brevard Groves for the Barefoot Bay Land Application System 07/29/91
550	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Paul Bradtmiller re: Expert Testimony, HSWMR, Barefoot Bay Permit Hearing Proceedings 09/24/91
551	Letter from Gerald S. Allen, Avatar Utilities Inc., to Kathleen Blizzard, Hopping, Boyd, Green & Sams, re: newspaper article - Barefoot Effluent Disposal proposal 10/01/91
552	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to A.A. Reeves re: historical wastewater flows at Barefoot Bay WWTP and the malfunctioning totalizer on the Stevens Float Recorder 10/03/91
553	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to A.A. Reeves re: water quality monitoring procedures 10/03/91
554	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Paul Bradtmiller re: comments to the draft action plan for meter calibration 10/07/91
555	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Dennis J. Getman re: completion of the Sanitary Sewer Service Capacity Reservation Certificate for the Hearndon PUD 10/24/91
556	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Paul Bradtmiller re: effort to locate the phosphorus analysis records for the Sarasota Division and keeping them on file as required by EPA 11/21/91
557	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to H. Bennetts, P. Bradtmiller, L. Bultman, J. Harrison, L. Hensley re: evaluation of regulatory impact on capital and operating expenditures 11/22/91

Exh #	Description
558	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Paul Bradtmiller re: returning Conward proposal for resubmittal for miscellaneous painting and repair at Gulf Gate WWTP 12/09/91
559	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Jim Elder re: protection of electronic equipment enclosures at the Waterway Estates WWTP 12/09/91
560	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Paul Bradtmiller re: proceed with the redrafted amendment - FDER/Hillsborough County Consent Order No. 6571 12/13/91
561	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Paul Bradtmiller and Kathleen Blizzard re: Eminent Domain Petition refiling schedule, Barefoot Bay 08/19/92
562	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Paul Bradtmiller re: current status of engineering contract with Hartman & Associates for the Barefoot Bay WWTP Effluent Disposal System 09/29/92
563	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Paul Bradtmiller re: comments to draft scopes of work for master plans for capital improvements 09/30/92
564	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Doug Young re: cost options for the development plans for the Hearndon PUD permitting wastewater treatment at Barefoot Bay WWTP 11/09/92
565	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Dennis J. Getman re: comments on the draft reclaimed water use contract for Barefoot Bay 09/01/93
566	Fax memorandum from Gerald S. Allen, Avatar Utilities Inc., to Julie Karleskint re: draft inserts to contract form for reuse of reclaimed water on citrus groves 01/06/94
567	Conward project proposal (# 629), approved for engineering services to design Carrollwood Advanced WWTP, cost proposal summary 03/31/89
567-A	Memorandum from Robert B. Gordon, Avatar Utilities Inc., to John Eckart and Tony Reeves re: enclosed Summary of Rate Case Activity 11/03/89

Exh #	Description
568	Conward project proposal (# 915), approved for providing additional stream modeling and information to FDER to demonstrate "Minimal Negative Impact" for the Carrollwood AWTP discharge into Sweetwater Creek, budget report 05/03/90
569	Letter from A.A. Reeves, III, FCWC, to Leanne Moore, EPA Region IV, re: offering information on the Carrollwood WWT Facility as requested at the 07/31/90 meeting 08/24/90
570	Letter from Jack W. Tompkins, FCWC, to Martha Hunter, EPA Region IV, re: comments on the proposed permit for the Carrollwood WWTP 10/08/90
571	Memorandum from Julie Karleskint, Avatar Utilities Inc., to Gerald Allen re: summary of visit to Carrollwood WWTP and responses to recommendations 12/26/90
571-A	Memorandum from Julie Karleskint, Avatar Utilities Inc., to Gerald Allen re: summary of follow-up visit to Carrollwood WWTP and progress 12/28/90
572	Memorandum from Paul H. Bradtmiller, FCWC, to A.A. Reeves, III re: available options to construction of force main at Carrollwood AWT plant 03/26/91
572-A	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to file re: summary of meeting with Hillsborough County officials to discuss proposed agreement for the treatment and disposal of wastewater effluent from the Carrollwood Wastewater System 03/28/91
573	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Paul Bradtmiller re: unacceptable points and options for the Carrollwood Settlement Proposal 07/07/92
574	Memorandum from Gerald Allen, Avatar Utilities Inc., to Robert B. Gordon re: comments to the proposed Consent Order for the Waterway Estates WWTP 05/16/88
575	Memorandum from Peter Sharp to John Sladkus re: concerns about costs for upgrades and expansion of the Waterway Estates WWTP; attached memorandum from Gerald S. Allen, Avatar Utilities Inc., to John Sladkus, dated 10/06/89, re: improvements to the Waterway Estates water system 10/02/89
576	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to John Sladkus re: comments on Conward proposal #940 for improvements at Waterway Estates WWTP 06/05/90

Exh #	Description
577	Memorandum from Robert French, FCWC, to Gerald Allen re: Special Reporting Requirements for filing of Waterway Estates WWTP monthly reports with FDER and EPA 06/07/90
578	Memorandum from Alan DeBoy, Avatar Utilities Inc., to Gerald Allen and Julie Karleskint re: EPA regulations published in the Federal Register 07/10/90
579	Letter from Larry E. Griggs, FCWC, to John T. Marlar, EPA Region IV, re: progress report for construction done by Cardinal Construction Company at Waterway Estates WWTP, Notice of Permit 01/22/91
580	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Dennis J. Getman re: enclosed Information Request letter from EPA and show cause hearing 05/20/91
581	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to files re: summary of FCWC/EPA Show Cause Hearing on Waterway Estates WWTP NPDES permit violations 06/19/91
582	Memorandum from Gerald Allen, Avatar Utilities Inc., to Peter Sharp re: status report on rebuilding the Waterway Estates WWTP and the Show Cause Hearing with EPA 07/02/91
583	Letter from Paul Bradtmiller, FCWC, to Peter T. McGarry, EPA Region IV, re: authorization from FDER to place the new outfall into service at Waterway Estates WWTP 07/17/91
584	Supplemental Direct Testimony of Gerald S. Allen, Exhibit GSA-1, Milestone Dates Relative to Upgrading Waterway Estates WWTP undated
585	Supplemental Direct Testimony of Gerald S. Allen, Exhibit GSA-2, Excerpts from ESE's Preliminary Engineering Report, Waterway Estates WWTP August 1987
586	Letter from Cindy L. Bartin, Landers & Parsons, to Gerald Allen, Avatar Utilities, re: enclosed copy of the Clean Water Act Penalty Policy for Civil Settlement Negotiations 05/07/92
587	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Dennis J. Getman re: material submitted to EPA by Alston and Bird on the plant reconstruction project at the Waterway Estates WWTP 05/27/92

Exh #	Description
588	Letter from Roger B. Ytterberg, FCWC, to Tony Pellicer, Lee County Division of Water Resources, re: revised draft permits for wastewater effluent discharge permit for Waterway Estates AWTP 07/22/92
589	Memorandum from Gerald S. Allen to Paul Bradtmiller re: review of preliminary engineering design reports for Waterway Estates and Golden Gate WWTPs 07/23/92
590	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Paul Bradtmiller re: further analysis to be completed on claim for additional services by Stone and Webster Engineering Corporation 08/19/92
591	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Robert B. Gordon re: compliance with EPA regulations governing the discharge of treatment wastewater effluent to streams requiring chronic toxicity evaluations 09/28/92
592	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to files re: summary of issues discussed at meeting with EPA and DOJ officials concerning violations and penalties at the Waterway Estates WWTP 12/22/92
593	Facsimile from Don G. Scroggin, Jenner & Block, to Gerald S. Allen, Avatar Holdings, re: attached memorandum regarding suggested conference call to discuss the status of Waterway Estates EPA matter and evidence undermining EPA's denial of the permit renewal 08/09/93
594	Notice from Gerald Allen, declining to answer and invoke 5th Amendment rights upon advice of counsel undated
595	Subpoena and Notice of Deposition Upon Oral Examination: Anthony Reeves 03/13/95
596	Conward project proposal (# 995-3-108), unsigned, for investigation and design of land application effluent disposal systems for Golden Gate and Barefoot Bay WWTPs, cost estimate 09/01/83
597	Memorandum from A.A. Reeves III, Avatar Utilities Inc. of Florida, to R.B. Gordon re: investigation of alternatives for disposal of effluent for the Barefoot Bay WWTP, cost estimates 06/18/84
598	Conward project proposal (unnumbered), unsigned, for investigation of soil and hydrogeologic conditions on the Barefoot Bay Percolation Ponds 08/13/84

Exh #	Description
599	Memorandum from P.J. Lehman, Avatar Utilities Inc. of Florida, to R.B. Gordon re: summary of effluent disposal alternatives at Barefoot Bay WWTP and construction cost estimates 03/04/85
600	Letter from Patrick J. Lehman, Avatar Utilities Inc. of Florida, to W.M. Bostwick, Jr., St. John's River District Department of Environmental Regulation, re: investigation of alternative effluent disposal methods at the Barefoot Bay WWTP, cost summary 04/19/85
601	Letter from Gerald C. Hartman, Dyer, Riddle, Mills & Precourt, Inc., to A.A. Reeves, III, Avatar Utilities of Florida, Inc., re: project milestone dates for use in land closing activities at Barefoot Bay 07/09/85
602	Letter from James E. Christopher, Dyer, Riddle, Mills & Precourt, Inc., to A.A. Reeves, III, Avatar Utilities of Florida, Inc., re: enclosed preliminary engineering design for Barefoot Bay WWTP, scope of services 08/05/85
603	Letter from James E. Christopher, Dyer, Riddle, Mills & Precourt, Inc., to A.A. Reeves, III, Avatar Utilities, Inc. of Florida, re: status of construction permit application for the Barefoot Bay WWTP expansion submitted to FDER 09/19/85
604	Letter from James E. Christopher, Dyer, Riddle, Mills & Precourt, Inc., to A.A. Reeves, III, Avatar Utilities Inc. of Florida, re: status report of Barefoot Bay WWTP expansion project 01/13/86
605	Letter from A. Alexander, FDER, to A.A. Reeves, Avatar Utilities, Inc. of Florida, re: Warning Notice for presently operating in violation at Barefoot Bay 01/29/86
606	Letter from James E. Christopher, Dyer, Riddle, Mills & Precourt, Inc., to A.A. Reeves, III, Poinciana Utilities Inc., re: bi-weekly project status report for Barefoot Bay WWTP 03/03/86 attached weekly project update letter from 02/04/86
607	Consent Order entered between FDER and FCWC for payment of penalties for violations at the Barefoot Bay sewage treatment plant 10/18/88
608	Letter from Kathryn G.W. Cowdery, Gatlin, Woods, Carlson & Cowdery, to Pat Lehman, FCWC, re: comments regarding FCWC's potential liability and EPA action as a result of Show Cause Meeting 06/22/88

Exh #	Description
609	Memorandum from Robert French, FCWC, to Robert Gordon re: enclosed projected schedule dates for Carrollwood AWT discharge into Sweetwater Creek and the Barefoot Bay deep well injection system 11/23/88
610	Conward project proposal (unnumbered), unsigned, for removal of existing trees, brush, weeds, and sludge from percolation ponds at Barefoot Bay 10/25/89
611	Letter from Patrick J. Lehman, FCWC, to Alex Alexander, FDER, re: engineering report for construction of deep injection well at Barefoot Bay WWTP 02/15/89
612	Memorandum from Robert H. French, FCWC, to file re: follow-up analysis to the bioassay prepared by FDER on the Barefoot Bay WWTP effluent sample 04/26/89
613	Facsimile from Leslie B. Shannon, CH2M Hill, to A.A. Reeves, III, FCWC, re: enclosed letter concerning cost estimate for irrigating the golf course with reclaimed water from the Barefoot Bay WWTP 06/06/89
614	Letter from Leslie B. Shannon, CH2M Hill, to A.A. Reeves, III, FCWC, re: status of Barefoot Bay water reuse and conservation plan, work outside of scope 06/08/89
615	Memorandum from Paul Cadieu, FCWC, to A.A. Reeves, III re: summary of meeting with manager of Cavalier Groves to discuss reuse water from wastewater plant for their orange groves 06/14/89
616	Letter from A.A. Reeves, III, FCWC, to D.E. "Bleu" Wallace, Hillsborough County Public Utilities Department, re: response to customer inquiry about rate increase 07/26/89
617	Letter from Robert H. French, FCWC, to George Gionis, FDER, re: notice of delay in schedule of construction of the injection well system at Barefoot Bay, target completion dates 08/01/89
618	Letter from Leslie B. Shannon, CH2M Hill, to John Armstrong, FDER, re: responses to request for additional information on items concerning the test injection well at Barefoot Bay WWTP 09/12/89
619	Letter from A.A. Reeves, III, FCWC, to Carlos Rivero De Aguilar, FDER, re: proposal for effluent disposal at the Barefoot Bay wastewater facilities 09/25/89

Exh #	Description
620	Memorandum from Jack W. Tompkins, FCWC, to file re: proposed reuse options presented to Brevard Groves 11/08/89
621	Letter from A.A. Reeves, III, FCWC, to Carlos Rivero De Aguilar, FDER, re: proposed modified schedule for the Barefoot Bay land application system 11/02/89
622	Memorandum from Jack Tompkins, FCWC, to A.A. Reeves and G. Allen re: cost estimates for transportation of wastewater from the Hearndon Tract to Barefoot Bay WWTP and back, upgrades for public access disposal, restricted access disposal, and deep well injection 11/08/89
623	Letter from A. Alexander, FDER, to A.A. Reeves, FCWC, re: notice to re-establish compliance with the Consent Order by explaining progress made toward deep well injection implementation at Barefoot Bay 03/19/90
624	Letter from A.A. Reeves, III, FCWC, to A. Alexander, FDER, re: pursuit of land acquisition for reuse of reclaimed water and continuing efforts on the deep well injection project at the Barefoot Bay WWTP 03/29/90
625	Letter from Dannise T. Kemp, St. John's River Water Management District, to A.A. Reeves, III, FCWC, re: notice of intent to recommend denial of permit application for Barefoot Bay WWTP 06/04/90
626	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to R. French, D. Getman, R. Gordon, A.A. Reeves, III, P. Sharp, J. Sladkus, and L. Wilkov, re: summary of meeting with FDER to discuss wastewater disposal alternatives to deep well injection at Barefoot Bay 07/06/90
627	Letter from A.A. Reeves, III, FCWC, to A. Alexander, FDER, re: activities undertaken to assure continued compliance with the Consent Order regarding the deep injection well permit and land application alternative 07/26/90
628	Letter from Kathleen Blizzard, Hopping, Boyd, Green & Sams, to Richard Levin, St. Johns River Water Management District, re: request to amend the technical staff report for the water conservation and reuse permit application 09/07/90

Exh #	Description
629	Letter from John T. Marlar, EPA Region IV, to A.A. Reeves, III, FCWC, re: notice of violation and Administrative Order Pursuant to Section 309 of the Clean Water Act for Barefoot Bay Mobile Home Park 09/26/90
630	Memorandum from Julie Karleskint, Avatar Utilities Inc., to Gerald Allen re: review of visit to Barefoot Bay WWTP to evaluate compliance with the FDER consent order and the EPA Administrative Order 02/06/91
631	Letter from James E. Christopher, Hartman & Associates, Inc., to Christianne Ferraro, FDER, re: submitting the permitting package for proposed expansion of the Barefoot Bay WWTP effluent disposal system 03/18/91
632	Letter from Pamela J. Fetterman, Sarasota County Government, to A.A. Reeves, III, FCWC, re: notice of violation at the sludge land application site 07/08/91
633	Handwritten notes of telephone conference with Tony Reeves re: status of bypass of percolator ponds at Barefoot Bay 06/21/91 attached handwritten notes of telephone conference with Tony Reeves re: discharges into the canal at Barefoot Bay 07/02/91
634	Memorandum from W.G. Lee, FCWC, to file re: Carrollwood WWTP Treatment Requirements as a result of not being able to connect to the Hillsborough County Northwest Regional STP 07/12/79
635	Letter from C.A. Osborne, FCWC, to E.G. Snipes, FDER, re: application to renew the Temporary Operating Permit for the Carrollwood Sewage Treatment Plant 03/06/80
636	Memorandum from A.A. Reeves, III, FCWC, to file re: response to FDER's modifying conditions to the Carrollwood WWTP Temporary Operating Permit 08/23/83
637	Letter from Kathryn G.W. Cowdery, Madigan, Parker, Gatlin, Swedmark & Skelding, to Charles Gary Stevens, FDER, re: proposed modifications to conditions of permit for the Carrollwood plant 02/22/84
638	Letter from Robert F. McGhee, EPA Region IV, to A.A. Reeves, III, FCWC, re: tentatively concluding that the application for an NPDES permit should be denied, Statement of Basis for this decision, and proposal of an Administrative Order 07/30/84

Exh #	Description
639	Letter from Paul J. Traina, EPA Region IV, to A.A. Reeves, III, FCWC, re: notification of denial of the NPDES permit application 09/27/84
640	Draft letter from Kathryn G.W. Cowdery to Michael McWeeny, Utilities Department, re: negotiations for a connection agreement with Hillsborough County for the Carrollwood facility 04/24/86
641	Letter from Michael W. McWeeny, County of Hillsborough, to A.A. Reeves, III, FCWC, re: review of application for wastewater service for the Carrollwood facility, conditions for approval 06/03/86
642	Letter from Michael W. McWeeny, County of Hillsborough, to A.A. Reeves, III, FCWC, re: review of application for wastewater service for the Carrollwood facility, conditions for approval; Attachment "Y" 06/03/86
643	Memorandum from Dennis J. Getman, Avatar, to Robert Gordon re: comments to the proposed "Amended Franchise Ordinance" 10/05/87
644	Letter from B. Kenneth Gatlin, Gatlin, Woods, Carlson & Cowdery, to A.A. Reeves, III, FCWC, re: review of meeting with Hillsborough County staff to discuss proposed revision of the County water and sewer regulatory ordinance 02/16/88
645	Letter from B. Kenneth Gatlin, Gatlin, Woods, Carlson & Cowdery, to A.A. Reeves, III, FCWC, re: adopted water and sewer utilities Ordinance by the Board of Commissioners of Hillsborough County 08/19/88
646	Letter from Patrick J. Lehman, FCWC, to Dr. Richard D. Garrity, FDER, re: initiating minimal impact studies on Sweetwater Creek in order to obtain a surface water discharge permit for the Carrollwood WWTP 11/01/88
647	Memorandum from Robert French, FCWC, to Robert Gordon re: enclosed projected schedule dates for Carrollwood AWT discharge into Sweetwater Creek and the Barefoot Bay deep well injection system 11/23/88
648	Letter from B. Kenneth Gatlin, Gatlin, Woods, Carlson & Cowdery, to D.E. Wallace, Public Utilities Department, re: comments to the proposed standard utility franchise agreement provisions 01/19/89

Exh #	Description
649	Letter from Patrick J. Lehman, FCWC, to Peter T. McGarry, EPA Region IV, re: deficiencies listed as a result of the EPA Compliance Evaluation Inspection at the Carrollwood WWTP have been remedied 02/10/89
650	Letter from Byron W. Bartlett, Hillsborough County Environmental Protection Commission, to A.A. Reeves, III, re: review of monthly operating reports reveals violations of the permit 02/22/89
651	Notices of Alleged Violation from Hillsborough County Environmental Protection Commission, sent to A.A. Reeves, III 02/22/89
652	Conward project proposal (# 156), approved for engineering design and preparation for connection of Carrollwood WWTP force main to Hillsborough County 12/16/86
653	Memorandum from Robert B. Gordon, Avatar Utilities Inc., to John Eckart and Tony Reeves re: enclosed Summary of Rate Case Activity 11/03/89
654	Letter from Michael W. McWeeny, Hillsborough County Board of County Commissioners, to A.A. Reeves, FCWC, re: flow cannot be accepted until Florida Cities accepts the point of connection and connection costs established by the County 07/27/90
655	Letter from Susan J. Rollins, EPA Region IV, to A.A. Reeves, FCWC, re: Notice of Proposed Assessment of a Civil Penalty and Administrative Complaint for various violations 09/25/90
656	Letter from John T. Marlar, EPA Region IV, to A.A. Reeves, FCWC, re: notice of violation and Administrative Order Pursuant to Section 309 of the Clean Water Act for Carrollwood Subdivision 09/27/90
657	Memorandum from J. Tompkins to G. Allen, A. Reeves, R. French, J. Landers, and D. Getman re: response to NPDES draft permit for Carrollwood 10/10/90
658	Memorandum from A.A. Reeves, III, to Jack Tompkins and Durwood Horak re: attached EPA Diagnostic Evaluation report of Carrollwood WWTP 11/30/90
659	Hillsborough County Board of County Commissioners Agenda Item Cover Sheet from Management Team/Municipal Services to the Board of County Commissioners re: bulk wastewater services, FCWC, recommending amendment to County Ordinance 02/14/91

Exh #	Description
660	Memorandum from Durwood (Horak), FCWC, to file re: review of meeting with Hillsborough County Utility to discuss time frame for a hook-up 02/22/91
661	Fax memorandum from Paul Bradtmiller, FCWC, to Robert Gordon and Gerald Allen re: cost estimate comparison between construction of an AWT plant at Carrollwood and connecting to the Hillsborough County WWT system 03/20/91
662	Memorandum from A.A. Reeves, III, FCWC, to Gerald Allen, Durwood Horak, Joe Schifano, and Larry Dasynski re: enclosed copy of original executed agreement between Hillsborough County and FCWC for wastewater treatment services 06/17/91
663	Letter from Mohammad Nozari, Hillsborough County Environmental Protection Commission, to A.A. Reeves, III, FCWC, re: certificate of completion of construction final approval for Carrollwood Wastewater Pump Station and Forcemain 01/02/92
664	Letter from Kathryn G.W. Cowdery, Gatlin, Woods & Carlson, to Scott Stevens, Hillsborough County Department of Water and Wastewater Utilities, re: sending a copy of the application for water and/or wastewater service 03/25/86
665	Letter from A.A. Reeves, III, FCWC, to Connie A. Kagey, EPA Region IV, re: requesting extension of time to answer EPA's questions concerning necessary engineering studies for the NPDES permit for Waterway Estates 07/09/86
666	Memorandum from P.J. Lehman, FCWC, to A.A. Reeves, III re: summary of meeting with FDER to discuss EPA's denial of the NPDES permit for Waterway Estates WWTP 08/10/86
667	Letter from Bruce R. Barrett, EPA Region IV, to A.A. Reeves, III, FCWC, re: notification of denial of the NPDES permit application at the Waterway Estates WWTP 12/08/86
668	Letter from Martin S. Friedman, Myers, Kenin, Levinson & Richards, to A.A. Reeves, III, FCWC, re: outline of agreement with North Fort Myers Utility, Inc., to provide bulk sewer service to FCWC 02/02/87

Exh #	Description
669	Memorandum from Robert B. Gordon, Avatar Utilities Inc., to A.A. Reeves and Robert French re: questions regarding items from the Waterway Estates WWTP Preliminary Engineering Report 08/31/87
670	Memorandum from Robert French, FCWC, to Tony Reeves re: review of Waterway Estates WWTP expansion Preliminary Engineering draft report 09/23/87
671	Memorandum from Robert French, FCWC, to Tony Reeves re: review of Waterway Estates WWTP expansion Preliminary Engineering draft report 09/23/87
672	Memorandum from Robert French, FCWC, to Tony Reeves re: review of Waterway Estates WWTP expansion Preliminary Engineering draft report 10/27/87
673	Memorandum from A.A. Reeves, III, FCWC, to R.B. Gordon re: review and recommendations of the various alternatives to wastewater treatment plant discharge problem at Waterway Estates WWTP 11/05/87
674	Letter from Patrick J. Lehman, FCWC, to Ron Blackburn, FDER, re: best alternative for effluent disposal at Waterway Estates WWTP is to discharge into the Caloosahatchee River 12/01/87
675	FDER Permit for operation of the Waterway Estates STP 09/23/88
676	Letter from Philip R. Edwards, FDER, to A.A. Reeves, III, FCWC, re: enclosed permit to temporarily operate the Waterway Estates sewer treatment facility 09/29/88
677	Letter from William E. Sundstrom, Rose, Sundstrom & Bentley, to Tony Reeves, FCWC, re: construction of the advance wastewater treatment unit at the Waterway Estates plant and cost concerns 11/17/88
678	Letter from William D. Harrop, Jr., Source, Inc., to Anthony A. Reeves, III, FCWC, re: need for a change order to the engineering services contract for the expansion of the wastewater treatment and disposal facilities at Waterway Estates 11/22/88
679	Letter from James P. Elliott, Source, Inc., to A.A. Reeves, III, re: update on design status of Waterway Estates WWTP project 02/15/89
680	Letter from Robert H. French, FCWC, to James P. Elliott, Source, Inc., re: review of analysis and authorization to proceed with foundation designs at Waterway Estates WWTP 03/02/89

Exh #	Description
681	Letter from William D. Harrop, Jr., Source, Inc., to Anthony A. Reeves, III, FCWC, re: items of concern with the plan review comments which need to be resolved 03/07/89
682	Letter from James P. Elliott, Source, Inc., to Robert H. French, FCWC, re: proposal of engineering services to complete construction of friction piling at Waterway Estates WWTP 03/07/89
683	Letter from Robert H. French, FCWC, to William Harrop, Jr., Source, Inc., re: information requested from Tetra Engineering Systems for completion of construction plans at Waterway Estates WWTP 03/08/89
684	Letter from Robert H. French, FCWC, to William D. Harrop, Jr., Source, Inc., re: itinerary for resolving issues after reviewing documents on the Waterway Estates WWTP 03/08/89
685	Letter from William D. Harrop, Jr., Source, Inc., to A.A. Reeves, FCWC, re: preliminary site plan for the Waterway Estates WWTP project 03/10/89
686	Letter from Robert H. French, FCWC, to William Harrop, Jr., Source, Inc., re: responding to correspondence concerning the Waterway Estates WWTP upgrade project and guidance for how to proceed 03/13/89
687	Letter (first page only) from FCWC to William Harrop, Jr., Source, Inc., re: compromise resolution to request for additional engineering services for Waterway Estates WWTP 03/14/89
688	Letter from James P. Elliott, Source, Inc., to Robert H. French, FCWC, re: additional engineering services to be provided at Waterway Estates WWTP 03/21/89
689	Letter from William D. Harrop, Jr., Source, Inc., to Robert H. French, FCWC, re: forwarding outfall sewer dredge and fill permit application package for review and signature 03/31/89
690	Letter from Bruce R. Barrett, EPA Region IV, to A.A. Reeves, III, FCWC, re: continuing non-compliance of Clean Water Act and Administrative Order at the Waterway Estates facility, request for information 03/30/89

Exh #	Description
691	Conward project proposal (unnumbered), unsigned, for engineering services for subaqueous outfall sewer easement and flow equalization at Waterway Estates WWTP 03/31/89
692	Letter from Peter T. McGarry, EPA Region IV, to A.A. Reeves, FCWC, re: notice of violation of NPDES permit at Waterway Estates WWTP 05/16/89
693	Letter from Priscilla Oliver, EPA Region IV, to A.A. Reeves, FCWC, re: deficiencies noted during EPA-State Compliance Evaluation Inspection at Waterway Estates WWTP 06/21/89
694	Letter from William D. Harrop, Jr., Source, Inc., to Philip R. Edwards, FDER, re: plans and specifications for the Waterway Estates WWTP project have been revised and will be submitted for review 08/14/89
695	Letter from William D. Harrop, Jr., Source, Inc., to Philip R. Edwards, FDER, re: submitting copies of revised plans and specifications for the Waterway Estates WWTP project for review 08/16/89
696	Letter from William D. Harrop, Jr., Source, Inc., to Robert French, FCWC, re: attached FDER permit to install the outfall sewer line into the Caloosahatchee River at the Waterway Estates WWTP 09/14/89
697	Letter from A.A. Reeves, III, FCWC, to Jack Shenkman, North Fort Myers Utilities, Inc., re: studies and analysis show that upgrades and expansion of the Waterway Estates WWTP serves the best interests of customers 10/05/89
698	FDER Permit for operation of the Waterway Estates STP 01/22/90
699	Letter from William E. Sundstrom, Rose, Sundstrom & Bentley, to A.A. Reeves, FCWC, re: summary of key issues discussed at meeting concerning the possible interconnection of Waterway Estates sewage treatment collection system and the North Fort Myers Utility treatment and disposal system 02/05/90
700	Letter from A.A. Reeves, III, FCWC, to Phillip Edwards, FDER, re: requesting extension of expiration date for construction permit for the new Advanced WWTP at Waterway Estates 10/25/90

Exh #	Description
701	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to A.A. Reeves re: requesting course of action to be taken concerning the EPA Administrative Order for the Waterway Estates WWTP 02/15/91
702	Notice from Tony Reeves, declining to answer and invoke 5th Amendment rights upon advice of counsel undated
703	Notice of Deposition Upon Oral Examination: Dennis Getman 03/01/95
703-A	Notice from Dennis Getman, declining to answer and invoke 5th Amendment rights upon advice of counsel undated
704	Handwritten notes of Utility meeting involving L. Wilkov, P. Kleinerman, B. Gordon, J. Sladkus, Rod, and D. Getman 06/13/89
705	Memorandum from Robert B. Gordon, Avatar Utilities Inc., to Peter Sharp and Larry Wilkov, re: Avatar Utilities - General, Barefoot Bay Deep Well Injection 08/21/89
706	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Dennis Getman, Peter Kleinerman, Leon Levy, David Rosso, Peter Sharp, John Sladkus, and Larry Wilkov re: Wastewater Disposal Alternatives - Barefoot Bay 11/27/89
707	Letter from Dennis J. Getman, Avatar, to Nancy Hargadon, Sun Bank Trust Department, re: Purchase Offer - Property in Trust 02/26/90
708	Letter from Dennis J. Getman, Avatar, to Jeff Barrow, Ben Hill Griffin Inc., Purchase Offer - Micco Grove Acreage in Brevard County, Florida 05/10/90
709	Memorandum from Dennis J. Getman, Avatar, to file re: Avatar Properties Inc./Avatar Utilities Inc. - Possible Purchase of Micco Grove Acreage in Brevard County, Florida 06/14/90
710	Memorandum from Robert B. Gordon, Avatar Utilities Inc., to Dennis Getman re: Avatar Properties/Avatar Utilities Inc. - Possible Purchase of Micco Grove Acreage in Brevard County, Florida 06/15/90
711	Memorandum from John Sladkus to Bob Gordon re: Possible purchase of Micco Grove Acreage 06/18/90

Exh #	Description
712	Memorandum from Dennis J. Getman, Avatar, to Robert B. Gordon re: Avatar Properties Inc./Avatar Utilities Inc. - Possible Purchase of Micco Grove Acreage in Brevard County, Florida 06/18/90
713	Memorandum from Robert B. Gordon, Avatar Utilities Inc., to John Sladkus, re: Possible purchase of Micco Grove Acreage 06/19/90
714	Letter from Dennis J. Getman, Avatar, to Jeff Barrow, Ben Hill Griffin Inc., re: Purchase Offer - Micco Grove Acreage in Brevard County, Florida 07/25/90
715	Letter from Dennis J. Getman, Avatar, to George Edward Mills, IV, Florida Development of Regional Impact Section, re: review of telephone conversation, Barefoot Bay Development Corporation will be utilizing separate wastewater treatment plant facilities for the Avatar P.U.D. proposed project and the Barefoot Bay project 07/25/90
716	Letter from Dennis J. Getman, Avatar, to Jeff Barrow, Ben Hill Griffin Inc., re: Purchase Offer - Micco Grove Acreage in Brevard County, Florida 08/24/90
717	Memorandum from Robert B. Gordon, Avatar Utilities Inc., to Peter Sharp re: Barefoot Bay - Wastewater Effluent Disposal 02/26/91
718	Letter from Kathleen Blizzard, Hopping, Boyd, Green & Sams, to Kenneth G. Oertel, Oertel, Hoffman, Fernandez & Cole, re: enclosed final summary tables of constituents of treated effluent from the Barefoot Bay plant 10/31/91
719	Letter from Dennis J. Getman, Avatar, to Robert G. Nave, Resource Planning and Management, Department of Community Affairs, re: Avatar Properties Inc. Application for a Binding Letter of Vested Rights for a development of Regional Impact, Barefoot Bay 01/30/92
720	Memorandum from Georgia Metcalf, Barefoot Bay Development Corporation, to Dennis J. Getman re: FCWC - Spray Effluent Fields, Alternate Proposal 02/06/92
721	Letter from Dennis J. Getman, Avatar, to Dorsy Foster, State of Florida Department of Community Affairs, re: Avatar Properties Inc. Application for a Binding Letter of Vested Rights for a development of Regional Impact, Barefoot Bay 02/27/92

Exh #	Description
722	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Dennis J. Getman re: Reclaimed Water Agreement - Barefoot Bay Golf Course, enclosed modified contract 05/25/94
723	Memorandum from Paul Bradtmiller, FCWC, to Dennis Getman re: Offer to Purchase H&S Groves 03/15/95
724	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Robert B. Gordon re: H&S Groves, Inc. - Barefoot Bay, cost estimate 03/22/95
725	Letter from Paul H. Bradtmiller, FCWC, to Edwin F. Schaeffer, Jr., Esq., re: Offer to Purchase Land of H&S Groves, Inc., Brevard County 03/23/95
726	Memorandum from Robert B. Gordon, Avatar Utilities Inc., to Dennis Getman re: FCWC - Proposed Consent Order - Hillsborough County 11/18/86
727	Memorandum from Dennis J. Getman, Avatar, to Robert B. Gordon re: FCWC - Proposed Consent Order - Hillsborough County 11/21/86
728	Letter from Kathryn G.W. Cowdery, Gatlin, Woods, Carlson & Cowdery, to Seymour Honig, Hillsborough County Attorneys Office, re: FCWC Hillsborough County Franchise Extension/Renewal 08/19/87
729	Memorandum from Dennis J. Getman, Avatar, to Robert Gordon re: FCWC - Hillsborough County Franchise/Ordinance 02/25/88
730	List of meeting participants, FCWC Show Cause meeting at EPA Region IV re: Carrollwood plant, attached notes from meeting 07/31/90
731	Memorandum from J. Tompkins to D. Getman, J. Landers, A. Reeves, and G. Allen re: attached Legal Notice of Proposed Administrative Penalty Assessment at Carrollwood, published by EPA 11/15/90
732	Memorandum from Robert B. Gordon, Avatar Utilities Inc., to John Sladkus re: Florida Cities - Waterway Estates WWTP, EPA's intent to deny NPDES permit for plant 08/14/86
733	Memorandum from Robert B. Gordon, Avatar Utilities Inc., to John Sladkus re: FCWC - Waterway Estates Compliance Schedule 06/08/87

Exh #	Description
734	Memorandum from Robert B. Gordon, Avatar Utilities Inc., to Dennis J. Getman re: FCWC - Proposed Consent Order Waterway Estates WWTP 05/13/88
735	Memorandum from Robert B. Gordon, Avatar Utilities Inc., to Dennis J. Getman re: Waterway Estates - Proposed Consent Order 07/05/88
736	Memorandum from Robert B. Gordon, Avatar Utilities Inc., to John Sladkus re: FCWC - Waterway Estates Facility, enclosed data request from EPA 04/10/89
737	Draft memorandum from Robert French to Dennis Getman re: Waterway Estates WWTP compliance schedule and consent order 10/30/90
738	Letter from Dennis J. Getman, Avatar Utilities Inc., to W. Neil Phinney, Lee County Electric Cooperative, Inc., re: FCWC/Waterway Estates WWT Facility - Easement 01/03/91
739	Memorandum from A.A. Reeves III, FCWC, to Jack Tompkins, Nick Court, Roger Ytterberg, Paul Cadieu, Durwood Horak, Jim Elder, Larry Griggs, Don Baker, and Larry Good re: Distribution of Avatar's "Pipeline" 01/07/91
740	Letter from Dennis J. Getman, Avatar, to Jay Landers, Esq., Landers & Parsons, re: North Fort Myers Homeowners Association, Inc. vs. FDER and FCWC - Petition for Administrative Hearing (Waterway Estates WWTP) 01/07/91
741	Memorandum from Paul Bradtmiller, FCWC, to Dennis Getman re: notes from telephone conference with environmental engineer concerning Waterway Estates WWTP 03/20/91
742	Facsimile memorandum from Robert Dick, FCWC, to Larry Griggs re: EPA compliance sampling inspection at Waterway Estates AWWTP 06/23/93
743	Memorandum from Paul Bradtmiller, FCWC, to Dennis Getman re: CONWARDs for Engineering Services for Expansion of FCWC's Sarasota Division WWTPs 06/04/93
744	Notice of Deposition Upon Oral Examination: Robert Gordon 03/01/95
745	Conward project proposal (# 995-4-6), approved for Barefoot Bay WWTP groundwater monitoring program and percolation ponds - preparation of drawings, specifications and inspection services 02/27/84

Exh #	Description
746	Letter from W.E. Burnett, Jr., WHS Groves, Inc., to Robert B. Gordon, Avatar Utilities, Inc., re: right of entry - 40-acre parcel adjacent to Barefoot Bay Community in Brevard County, Florida 07/25/84
747	Conward project proposal (# 995-4-136), approved for Barefoot Bay percolation ponds, investigate soil and hydrogeologic conditions on the 40 acre site north of the WWTP 08/29/84
748	Letter from Robert B. Gordon, Avatar Utilities Inc., to William Burnett, Jr., re: Offer to Purchase 40 acres, more or less, in Brevard County, Florida 05/02/85
749	Conward project proposal (# 995-5-071), approved for WWTP percolation ponds, preparation of design documents and construction services 06/18/85
750	Memorandum from P.J. Lehman, FCWC, to R.B. Gordon, A.A. Reeves, III, L. Good, J. Christopher, G. Hartman, and S. Haverl re: Barefoot Bay WWTP meeting with FDER to discuss effluent load test program and Notice of Violation 03/18/87
751	Conward project proposal (# 040), approved for 8" sewer main - Haven Green 05/26/87
752	Conward project proposal (# 290), approved for installation of Lime Sludge Recirculation System Barefoot Bay WWTP 08/17/87
753	Conward project proposal (# 385), approved for Barefoot Bay WWTP Effluent Deep Well Injection engineering services 03/13/88
754	Conward project proposal (# 390), approved for Barefoot Bay WWTP Effluent Disposal - 40-Acre Irrigation 03/23/88
755	Conward project proposal (# 412), approved for Electronic Meter Reading Devices to be installed 04/25/88
756	Memorandum from Georg W. Koszulinski, Avatar, to Georgia Metcalf and Robert Gordon re: Spray Irrigation with Treated Waste Water Effluent 09/08/88
757	Memorandum from Robert B. Gordon, Avatar Utilities Inc., to Georgia Metcalf re: Barefoot Bay Corporation - Board of Directors Meeting November 1st 10/19/88

Exh #	Description
758	Memorandum from Robert B. Gordon, Avatar Utilities Inc., to John Sladkus re: FCWC - Barefoot Bay Injection Well 04/13/89
759	Memorandum from Robert Gordon, Avatar Utilities Inc., to John Sladkus re: Barefoot Bay Effluent Disposal Alternative 09/29/89
760	Memorandum from Peter Sharp to Robert Gordon re: Micco Grove Acreage 06/25/90
761	Letter from William G. Lee, FCWC, to P.C. Talley, II, County of Hillsborough Division of Public Utilities & Safety, re: connection of FCWC's Carrollwood Facility to the Northwest Hillsborough County Regional Plant 07/03/79
762	Memorandum from Robert B. Gordon, Avatar Utilities Inc., to Peter Sharp re: FCWC - Carrollwood Advanced WWTP construction budget and Operating Summary 04/14/89
763	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to Doug Harrison re: Carrollwood Rate Case Testimony 05/29/92
764	Testimony of Robert B. Gordon, FCWC, Lee County Division, North Fort Myers Wastewater undated
765	Memorandum from Robert B. Gordon, Avatar Utilities Inc., to John Sladkus re: FCWC - Waterway Estates WWTP engineering report on feasibility of disposing wastewater 08/31/87
766	Memorandum from Robert B. Gordon, Avatar Utilities Inc., to John Sladkus re: FCWC - Waterway Estates WWTP various options for upgrading 11/19/87
767	Memorandum from P.J. Lehman, FCWC, to R.B. Gordon re: Waterway Estates WWTP Proposed Consent Order 07/01/88
768	Memorandum from Gerald S. Allen, Avatar Utilities, Inc., to John Sladkus re: Conward 728 - Waterway Estates Water System Improvement 09/18/89
769	Letter from A.A. Reeves III, FCWC, to Jack Shenkman, North Fort Myers Utilities, Inc., re: FCWC - North Fort Myers Sewer Operation 10/10/89
770	Memorandum from John Sladkus to Gerald Allen re: Conward #940, Waterway Estates WWTP Improvements 06/11/90

Exh #	Description
771	Memorandum from Robert B. Gordon, Avatar Utilities Inc., to file re: FCWC - North Ft. Myers Wastewater Rate Case 10/04/91
772	Memorandum from Robert B. Gordon, Avatar Utilities Inc., to Leon Levy re: North Fort Myers Utilities Inc. 11/27/91
773	Letter from James A. Elder to Johnnie M. Overton, FCWC, re: Waterway Estates WWTP Aeration System 09/09/92
774	Letter from Lee H. DeHihns, III, Alston & Bird, to Robert B. Gordon, Avatar Utilities, Inc., re: outline of settlement issues 12/18/92
775	Letter from Robert B. Gordon, FCWC, to Becky Liner re: FCWC's negotiations with EPA 03/04/93
776	Letter from Robert B. Gordon, FCWC, to Senator Bob Graham re: FCWC's negotiations with EPA concerning operations at Waterway Estates WWTP, enclosed synopsis of events 03/04/93
777	Letter from Robert B. Gordon, FCWC, to Sharon Thierer re: FCWC's negotiations with EPA 03/04/93
778	Letter from Robert B. Gordon, FCWC, to Sheryl Wooley re: FCWC's negotiations with EPA 03/04/93
779	Memorandum from Larry Coel, FCWC, to Paul Bradtmiller re: FCWC & Poinciana Utilities Inc. - Update of Stats & Graphs 07/14/94
780	Notice of Deposition Upon Oral Examination: Edwin Jacobson 04/21/95
781	Amended Notice of Deposition Upon Oral Examination: Edwin Jacobson 06/08/95
782	Amended Notice of Deposition Upon Oral Examination: John Sladkus 08/01/95
783	Subpoena for Deposition of John Sladkus 06/29/95
784	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to John Sladkus, re: Injection Well System - Barefoot Bay WW Effluent Disposal, attached FDER office information 02/10/89
785	Memorandum from Robert B. Gordon, Avatar Utilities Inc., to John Sladkus, re: enclosed articles dealing with problems that the City of Melbourne is having with their deep well injection system 03/22/89

Exh #	Description
786	List of FCWC Officers and Directors as of 06/19/90
787	Memorandum from Gerald S. Allen, Avatar Utilities Inc. to files, re: review of meeting to discuss the water and wastewater system facilities for the Hearndon property (Avatar PUD) 05/23/90
788	Memorandum from Gerald S. Allen, Avatar Utilities Inc. to files, re: review of meeting with FDER staff to discuss the consent order for wastewater disposal at Barefoot Bay 05/31/90
789	Memorandum from Gerald S. Allen, Avatar Utilities Inc., to D. Getman, G. Metcalf, J. Sladkus, and L. Wilkov, re: preliminary field investigation assessment of Hearndon property 06/28/90
790	Notice from John Sladkus, declining to answer and invoke 5th Amendment rights upon advice of counsel undated
791	Amended Notice of Deposition Upon Oral Examination: Leon Levy 08/01/95
792	Business card for Leon Levy at Odyssey Partners
793	Curriculum vitae of Leon Levy
794	FDER Application to Construct a Domestic Wastewater Facility at Waterway Estates RWF 08/31/93
795	Memorandum from Julie Karleskint, Avatar Utilities Inc., to Gerald Allen re: review of visit to Barefoot Bay WWTP to evaluate compliance with the FDER consent order and the EPA Administrative Order 02/06/91
796	Memorandum from P.J. Lehman to A.A. Reeves, III, re: Barefoot Bay WWTP Effluent Deep Well Injection Engineering Proposal, preliminary cost estimates, conward 385 03/07/88
797	Letter from James R. Patrick, Jr., EPA Region IV, to Patrick J. Lehman, FCWC, re: acknowledging receipt of NPDES Permit Renewal Application for Waterway Estates WWTP 05/21/86
798	Letter from Patrick J. Lehman, FCWC, to Connie A. Kagey, EPA Region IV, re: actions initiated at Waterway Estates WWTP 09/16/86

Exh #	Description
799	Letter from Robert A. Cannarella, Environmental Science and Engineering, Inc., to Patrick J. Lehman, FCWC, re: proposal for engineering services at Waterway Estates WWTP, fee proposal 11/10/86
800	Preliminary Engineering Draft Report for Waterway Estates WWTP prepared by Environmental Science and Engineering, Inc. August 1987
801	Memorandum from Robert French, FCWC, to Tony Reeves re: review of Waterway Estates WWTP expansion Preliminary Engineering draft report 10/27/87
802	EPA Region IV Administrative Order Pursuant to Section 309 of the Clean Water Act (Waterway Estates) 05/11/87
803	Letter from Patrick J. Lehman, FCWC, to Peter T. McGarry, EPA Region IV, re: progress report on upgrading the Waterway Estates WWTP 01/26/88
804	Letter from Patrick J. Lehman, FCWC, to Gordon Romeis, FDER, re: proposed compliance schedule for the Waterway Estates WWTP 03/01/88
805	Letter from Patrick J. Lehman, FCWC, to Priscilla Oliver, EPA Region IV, re: progress report on the upgrading at Waterway Estates WWTP 03/10/88
806	EPA Region IV Amendment to Administrative Order Pursuant to Section 309 of the Clean Water Act (Waterway Estates) 08/31/88
807	Notice of Depositions Upon Oral Examination: Julie Karleskint and others 09/15/95
808	Amended Notice of Depositions Upon Oral Examination: Julie Karleskint and others 10/11/95
809	Notes of telephone conference with Julie Karleskint re: comprehensive audit performed by Karleskint at Barefoot Bay 06/20/91
810	Facsimile from Paul Bradtmiller, FCWC, to Gerald Allen, re: enclosed memorandum from Julie Karleskint, dated 08/16/91, concerning her comments on the Barefoot Bay Draft NPDES Permit; draft response by Bradtmiller to Roy Herwig, EPA Region IV, regarding Show Cause meeting for the Barefoot Bay WWTP NPDES Permit Application 08/20/91
811	Memorandum from Julie Karleskint, Avatar Utilities Inc., to Paul Bradtmiller, re: review of monthly operation reports from the Barefoot Bay WWTP 08/28/91

Exh #	Description
812	Memorandum from Paul Bradtmiller, FCWC, to Gerald Allen, re: Historical Wastewater Flows at Barefoot Bay WWTP; discharge table; letter from William Sansbury, FCWC, to Christine Ferraro, FDER, re: Barefoot Bay WWTP Spray Irrigation Site overflow incident 01/09/92
813	Draft letter from BS (Sansbury) to Ms. Ferraro, re: Barefoot Bay WWTP Spray Irrigation Site overflow incident undated
814	Memorandum from Julie Karleskint, FCWC, to Gerald Allen, re: enclosed lab analysis for contamination assessment of the Barefoot Bay wells 10/23/92
815	Letter from Julia Karleskint, FCWC, to James Scarborough, EPA Region IV, re: progress report in compliance with the cease discharge schedule included in the Barefoot Bay WWTP NPDES permit 12/22/92
816	Memorandum from Julie Karleskint, FCWC, to file, re: discussion with J.J. Parrish of Sebastian/Atico Groves about the use of reclaimed water from Barefoot Bay on his groves 04/12/93
817	Memorandum from Doug Young, FCWC, to distribution, re: summary of meeting to discuss concerns concerning reuse of reclaimed water on nearby orange groves at Barefoot Bay WWTP 12/14/92
818	Letter from Julie Karleskint, FCWC, to James Scarborough, EPA Region IV, re: progress report in compliance with the cease discharge schedule included in the Barefoot Bay WWTP NPDES permit 12/28/93
819	Letter from Julia Karleskint, FCWC, to Alex Alexander, FDER, re: Quarterly Progress Report of activities at the Barefoot Bay WWTP 01/04/94
820	Letter from Kathleen Blizzard, Hopping, Boyd, Green & Sams, to Julie Karleskint, FCWC, re: Parrish Consumptive Use Permit and Draft DEP Reuse Rule, Barefoot Bay WWTP (Privileged) 06/24/94
821	Avatar Holdings Inc. & Subsidiaries Policy & Procedure Manual 10/20/82
822	Facsimile from Larry Griggs to Julie Karleskint, re: memorandum from Gary King summarizing meeting with Jacobs Group and temporary and permanent fixes to the air header 08/27/92

Exh #	Description
823	Letter from Julia Karleskint, FCWC, to Kenneth Kwan, EPA Region IV, re: explanation for delays encountered during dewatering at the Waterway Estates WWTP site 08/27/92
824	Conward project proposal (# 1400), approved for additional engineering for design and construction services to expand the Waterway Estates WWTP 11/30/92
825	Letter from Julia Karleskint, FCWC, to David York, FDER, re: reuse system being proposed at the Waterway Estates WWTP 03/03/93
826	Letter from Julie Karleskint, FCWC, to Don Scroggin, Jenner and Block, re: issues concerning the Waterway Estates WWTP and Summary of FDER File on Injection Well for North Fort Myers Utilities 07/01/93
827	Facsimile from Julie Karleskint, FCWC, to Gerald Allen, re: memorandum from Don Scroggin, Jenner & Block, to Karleskint, concerning time chart for Waterway Estates WWTP 07/20/93
828	Facsimile from Julie Karleskint, FCWC, to Gerald Allen, re: draft privileged Proposed Agenda for 07/21/93 meeting between FCWC and DOJ/EPA Region IV, attached letters regarding the NPDES permit for the Waterway Estates WWTP 07/20/93
829	Letter from Julia Karleskint, FCWC, to Ron Bishop, Lochmoor Country Club, re: availability of reuse water from the Waterway Estates AWTP, attached Reclaimed Water Use Agreement 08/06/93
830	Facsimile from Julie Karleskint, FCWC, to Gerald Allen, re: toxicity testing performed at Waterway Estates AWTP and Barefoot Bay WWTP undated
831	Memorandum from P.J. Lehman, FCWC, to R.H. French, re: call from Donna Seadler of EPA inquiring about the status of construction and compliance schedule at Waterway Estates WWTP 03/17/89
832	Letter from William Harrop, Jr., Source, Inc., to Pat Lehman, FCWC, re: requesting input on equipment selections for the final design stage of the Waterway Estates WWTP project, attached permit exemption request and drainage calculations 01/23/89

Exh #	Description
833	Letter from William J. Conlon, Post, Buckley, Schuh & Jernigan, Inc., to Patrick Lehman, FCWC, re: Waterway Estates WWTP Engineering Study Fee Proposal Request 12/03/86
834	Letter from Patrick Lehman, FCWC, to Peter McGarry, EPA Region IV, re: summary of efforts to cease discharge at Carrollwood WWTP and chronology of significant correspondence 07/14/88
835	Memorandum from P.J. Lehman, FCWC, to File, re: summary of meeting with Hillsborough County Utilities to discuss the Carrollwood WWTP proposed effluent force main connection 08/12/86
836	Letter from Patrick Lehman, FCWC, to Alexander MacEwan, FDER, re: construction plans for the pumping station and force mains at Hillsborough County Utilities for connection with Carrollwood WWTP, TOP Application 04/20/87
837	Letter from Patrick Lehman, FCWC, to Dale Ernsberger, Reynolds, Smith & Hills, Inc., re: concerns with time and the Carrollwood Wastewater Pumping Station project 04/27/87
838	Letter from Patrick Lehman, FCWC, to Reynolds, Smith & Hills, Inc., re: invitation to submit an engineering fee proposal for the Carrollwood Main Wastewater Pumping Station and Force Main Design project 11/10/86
839	Letter from Kathryn G.W. Cowdery, Gatlin, Woods, Carlson & Cowdery, to Kennith Kwan, EPA, re: information regarding status of FCWC's attempts to connect the Carrollwood facility to the County of Hillsborough 02/24/87
840	Letter from Michael McWeeny, Hillsborough County Board of County Commissioners, to Dale Ernsberger, Reynolds, Smith & Hills, re: water and wastewater service request file for the Carrollwood Subdivisions has been reactivated and the application reviewed 03/08/88
841	Memorandum from P.J. Lehman, FCWC, to File, re: discussion with Ed Snipes of FDER about the potential for permitting the Carrollwood WWTP to discharge into Sweetwater Creek 06/24/88

Exh #	Description
842	Letter from Mark S. Kieser, LTI, Limno-Tech, Inc., to Patrick Lehman, FCWC, re: preliminary findings and recommendations regarding Carrollwood WWTP discharge impacts on Sweetwater Creek 11/23/88
843	Letter from Patrick Lehman, FCWC, to Ed Snipes, FDER, re: enclosed memorandum providing the current status of the minimal impact study of Carrollwood WWTP's discharge into Sweetwater Creek 11/28/88
844	Letter from Mark S. Kieser, LTI, Limno-Tech, Inc., to Patrick Lehman, FCWC, re: Phase II Interim Memorandum of preliminary study findings for water quality data 03/03/89
845	Letter from Patrick Lehman, FCWC, to James E. Christopher, Dyer, Riddle, Mills & Precourt, Inc., re: invitation to submit engineering proposal for Carrollwood AWTP project 02/24/89
846	Testimony of Patrick J. Lehman, FCWC, re: engineering and technical decisions regarding the Carrollwood Division wastewater system during the June 1984 to April 1989 time period undated
847	Notice of Deposition Upon Oral Examination: Charles McNairy 10/06/95
848	Avatar Holdings Inc.'s Quarterly Report SEC Form 10-Q for period ended June 30, 1995 08/14/95
849	1994 Annual Report for Avatar Holdings Inc., selected pages re: Management's Discussion and Analysis of Financial Condition and Results of Operations undated
850	1994 Annual Report for Avatar Holdings Inc., selected pages re: Notes to Consolidated Financial Statements undated
851	FCWC's Audited Financial Statements for the period ended December 31, 1993, by Ernst & Young 01/21/94
852	FCWC's Audited Financial Statements for the period ended December 31, 1994, by Ernst & Young 02/10/95
853	missing
854	Review of Water Quality Data, Caloosahatchee River Estuary, Florida, prepared by Randall L. Armstrong, The Phoenix Environmental Group, Inc. 07/20/95

Exh #	Description
855	Typical Water Quality Values for Florda's Lakes, Streams and Estuaries, prepared by Mark Friedemann and Joe Hand, FDER July 1989
856	Water Quality Data for Caloosahatchee River, SDSF Output Display 06/15/94
857	Analysis of Historical Water Quality Data, Caloosahatchee River Estuary, Florida, prepared by Randall L. Armstrong, The Phoenix Environmental Group, Inc. 07/13/94
858	Caloosahatchee River Intensive Survey Documentation, prepared by Bruce D. DeGrove, Bureau of Water Analysis July 1980
859	Water Quality Assessment for the Caloosahatchee River, prepared by Bruce DeGrove and Frank Nearhoof, Bureau of Surface Water Management December 1987
860	Final Caloosahatchee River Documentation Intensive Survey Documentation, prepared by Frank Nearhoof, Bureau of Surface Water Management May 1988
861	Southeast and South Florida District Water Quality Assessment 1994 305(b) Technical Appendix, prepared by Joe Hand, Jana Col, and Eric Grimison, Bureau of Surface Water Management, FDEP November 1994
862	Curriculum vitae of Randall L. Armstrong
863	Confidential Memorandum from Randall L. Armstrong to Lance High, re: Report for Trial, listing of testimony given over past five years, attached report (same as Exhibit 854) 10/11/95
864	Facsimile from Alexander M. Bullock, Gabeler, Baise & Miller, to Randy Armstrong, re: attaching a copy of the report of plaintiff's expert (Mark Klingenstein) 10/17/95
865	Handwritten notes re: statistical summaries of parms for the Caloosahatchee River Estuary undated
866	Map of Fort Myers and the Caloosahatchee River undated
867	Study Area map including geographical boundaries of Fort Myers and the Caloosahatchee River undated
868	Caloosahatchee River Estuary water data for December 1982 through March 1994 undated
869	Handwritten chart of water data for December 1982 through March 1994 undated

Exh #	Description
870	Handwritten chart of water data for December 1982 through March 1994 undated
871	Stationary envelope from The Phoenix Environmental Group, Incorporated, with partial computer printout on it regarding SPSS/PC+ Studentware+ undated
872	Caloosahatchee River Wasteload Allocation Documentation Lee County, prepared by Bruce D. DeGrove, Bureau of Water Analysis January 1981
873	Memorandum from Al Bishop, FDER, to Dr. Abdul Ahmadi, re: attached draft copy of Caloosahatchee River Water Quality Based Effluent Limitations Documentation (Lee County) for review and comments 08/28/90
874	missing
875	FCWC Barefoot Bay WWTP Review of Plant Treatment Capability and Effluent Quality, prepared by Black & Veatch October 1995
876	FCWC Carrollwood WWTP Review of Plant Treatment Capability and Effluent Quality, prepared by Black & Veatch October 1995
877	FCWC Waterway Estates WWTP Review of Plant Effluent Quality and Sequence and Schedule of 1992 Modifications, prepared by Black & Veatch October 1995
878	Standard Biography for Douglas G. Smith July 1995
879	Report on Barefoot Bay Development's Results of Operations from James A. Miller, E&Y Kenneth Leventhal Real Estate Group, to Gabeler Baise & Miller undated
880	Basic schedule backup of computations; analysis of other operating income of Barefoot Bay; calculation of the effective tax rate by year; financial statements from the 10-K of Avatar Holdings, Inc.; and footnote disclosure of the effective tax rates
881	Allocation of G & A, schedule summarizing the calculation of overhead allocation
882	Summaries of calculations of Four Factor Allocation of G & A, 1981-1994
883	Compilation of gross wages of Avatar Holdings, Inc. and subsidiaries, gross wages of Barefoot Bay Development, U.S. federal tax returns, unemployment tax returns, state tax returns, 1981-1994
884	10-K's of Avatar Holdings, Inc., 1981-1994

Exh #	Description
885	Avatar Utilities Inc. and Subsidiaries Rent Expense, 1981-1994, and backup material for property calculations
886	Summary of Debt and Equity, Avatar Holdings Inc. Barefoot Bay Development, 1981-1994 undated
887	Barefoot Bay Development Corporation Comparison of Allocation Methods, Stand Alone General & Administrative Costs, and Home Office Administrative & General Expense undated
888	Summary of business experience of James A. Miller, Ernst & Young undated
889	Letter from James A. Miller, Ernst & Young, to Alex Bullock, Gabeler, Baise & Miller, re: enclosed report on Barefoot Bay Development and change on Federal Income Tax Form 1120 10/16/95
890	missing
891	missing
892	missing
893	missing
894	missing
895	missing
896	missing
897	missing
898	missing
899	missing
900	Comparison of Actual vs. Pro Forma Earnings for North Ft. Myers Division - Wastewater (10/01/88-06/30/92), Carrollwood Division - Wastewater (11/84-12/31/91), and Barefoot Bay Division - Wastewater (04/90-10/31/91) of FCWC, prepared by Keith Cardey October 1995
901	Work papers/cost summaries for North Ft. Myers
902	Work papers/cost summaries for Barefoot Bay
903	Work papers/cost summaries for Carrollwood
904	Summary of business experience of Keith Cardey (missing)

Exh #	Description
905	Notice of Deposition Upon Oral Examination: Gerald Allen 11/06/95

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Dept./Floor/Suite/Room

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Exhibit_____(GHB-64)

U.S. Department of Justice

Environment and Natural Resources Division

JCC:TAQ
90-5-1-1-3965

Environmental Enforcement Section
P.O. Box 7611
Washington, D.C. 20044-7611

Tel: (202) xxx-xxxx
Fax: (202) xxx-xxxx

December 6, 1995

BY FEDERAL EXPRESS

Honorable George T. Swartz
United States Magistrate Judge
United States District Court
2301 First Street
Ft. Myers, Florida 33901

Re: United States v. Avatar Holdings, Inc. and Florida Cities Water Co.
Civil Action No.: 93-281-CIV-FTM-21

Dear Judge Swartz:

Pursuant to Paragraph 8 of the Court's Order Limiting Time for Completion of Discovery and Scheduling of Final Pretrial Conference and Trial (Dk# 50), enclosed please find a "courtesy copy" of the Joint Pretrial Statement and attachments in the above-captioned matter.

Sincerely,

T. Anthony Quinn
Trial Attorney

Enclosure

cc: Gary Baise, Esquire (By U.S. Mail)
David Berz, Esquire (By Hand)
Daniel S. Jacobs, Esquire
Gwendolyn Fitz-Henley, Esquire
Nadine Steinberg, Esquire

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC. and FLORIDA CITIES WATER COMPANY, INC., Defendants.	)	CIVIL ACTION NO. 93-281-CIV-FTM-21

JOINT PRETRIAL STATEMENT

a. Basis of federal jurisdiction

This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1345, and 1355, and section 309(b) of the Clean Water Act, 33 U.S.C. § 1319(b).

b. Nature of the case

This is a civil action brought on behalf of the Administrator of the U.S. Environmental Protection Agency ("EPA") pursuant to section 309(b) of the Clean Water Act ("the Act"), 33 U.S.C. § 1319(b), for civil penalties for violations of section 301 of the Act, 33 U.S.C. § 1311, and of the conditions and limitations of National Pollutant Discharge Elimination System ("NPDES") permits issued by EPA pursuant to section 402 of the Act, 33 U.S.C. § 1342.

Defendant Florida Cities Water Company ("Florida Cities") is currently the NPDES permit holder for a total of six wastewater treatment plants in operation in Florida. Defendant Avatar Holdings, Inc. is Florida Cities' parent company. Defendants

collect and treat wastewater from their customers and discharge the treated wastewater ("effluent") on a daily basis into the waters of the United States. The wastewater discharges contain pollutants which may not be discharged into waters of the United States unless authorized by, and under the terms and conditions of, an NPDES permit.

Three of Defendants' plants, one of which is no longer in operation, are the subject of this law suit. The violations alleged include the following: (1) discharging without an NPDES permit (Barefoot Bay, Carrollwood, and Waterway Estates); (2) violation of an EPA Administrative Order (Barefoot Bay); (3) discharging at an unpermitted location (Waterway Estates); (4) exceeding NPDES effluent limitations (all three facilities); (5) failure to monitor specified effluent parameters as required by an NPDES permit (Barefoot Bay); and (6) failure of toxicity tests required by an NPDES permit (Barefoot Bay and Waterway Estates).

The Court has granted the United States summary judgment on liability as to Defendant Florida Cities on all of the United States' claims for violations at Waterway Estates, as well as the claims for NPDES permit violations at Barefoot Bay and Carrollwood. The Court has granted Florida Cities summary judgment on the claims for unpermitted discharges at Barefoot Bay and Carrollwood and for EPA Administrative Order violations at Barefoot Bay. The Court has denied the United States summary judgment on all claims as to Defendant Avatar Holdings, and has

granted Avatar Holdings' Motion for Judgment on the Pleadings for claims (or parts of claims) for violations which took place prior to May 5, 1990.

c. Statement of each party's case

United States

As noted above, the Court has already found Florida Cities to be liable for all of the NPDES permit violations alleged at all three plants, as well as for unpermitted discharges and discharges to an unpermitted location at Waterway Estates. Avatar Holdings should be held liable for all of these violations as well as the unpermitted discharges at Barefoot Bay and Carrollwood, because, as Florida Cities' parent company, Avatar either directed or caused these violations or directly and pervasively controlled Florida Cities' environmental practices.

The penalty provisions of the Clean Water Act are set out in section 309(d) of the Act, 33 U.S.C. § 1319(d). The seminal case interpreting section 309(d) is a recent Eleventh Circuit opinion, Atlantic States Legal Foundation v. Tyson Foods, 897 F.2d 1128 (11th Cir. 1990). Applying the section 309(d) penalty factors as required by Tyson Foods leads to the following conclusions: the violations were serious, Avatar derived a substantial economic benefit from the violations although Florida Cities itself did not; there is a long history of such violations; there were limited good-faith efforts to comply; and each Defendant can afford to pay a substantial civil penalty.

Avatar Holdings

Avatar Holdings Inc. ("Avatar Holdings"), the indirect corporate parent of Florida Cities Water Company ("Florida Cities"), is not liable for any of the remaining violations alleged in the government's Second Amended Complaint. Avatar Holdings has not directed or caused any of the alleged violations nor has it ever exercised actual or pervasive control over the daily operations of Florida Cities. As the ultimate corporate parent, Avatar Holdings has engaged solely in the normal financial oversight of its subsidiaries, as is required of a publicly held company.

Avatar Holdings' diverse corporate picture demonstrates that it is not involved in the daily operations of its indirect utility subsidiary. Avatar Holdings is a diversified company which now has approximately 40 direct and indirect subsidiaries engaged in a variety of business operations including home construction, vacation ownership, resort operations, retail land sales, property management, commercial and industrial development as well as water and wastewater utilities operations. The principal emphasis in Avatar Holdings' business has always been the real estate industry. The utility business is only a minor part of Avatar Holdings' affairs, in which it plays a very limited role.

Moreover, there are a chain of intermediary companies between Avatar Holdings and Florida Cities. Avatar Holdings is the parent of Avatar Utilities Inc. ("Avatar Utilities") which in

turn is the parent of Consolidated Water Company ("Consolidated"). Consolidated is the parent of FCWC Holdings Inc. ("FCWC Holdings") which in turn is the parent of Florida Cities. Avatar Utilities manages the utilities operations, including the operations of Florida Cities. Avatar Utilities, Consolidated, and FCWC Holdings have not been made parties to this case.

With respect to the allegations regarding unpermitted discharges at the Barefoot Bay Wastewater Treatment Plant, in particular, Avatar Holdings will present facts that refute the government's contentions that Avatar Holdings "caused" the unpermitted discharges as part of a plot to expand homes and reap profits through its indirect subsidiary, Barefoot Bay Development Corporation. Barefoot Bay Development Corporation (which is not a party to this case) is a subsidiary of Avatar Properties Inc. (which is not a party to this case) which in turn is a subsidiary of Avatar Holdings. There is no link between the modest home sales of the Barefoot Bay Development Corporation with the alleged Clean Water Act violations.

Even if the government could prove that Avatar Holdings directed or caused the alleged violations, Avatar Holdings is still not liable for the government's allegations of unpermitted discharges at Barefoot Bay or Carrollwood. Avatar Holdings is entitled to the benefit of the prior settlements and agreements between the government and Florida Cities and would be in privity with Florida Cities for the purposes of the doctrine of res

judicata. The Court, in its Order dated November 22, 1995, found that the doctrine of res judicata barred the government's claims in Paragraphs 16-23 and 30 of the Second Amended Complaint against Florida Cities by virtue of prior governmental actions, orders, and consent agreements.

Further, even if the government could prove that Avatar Holdings is liable for the remaining allegations in the Second Amended Complaint, the government would be entitled (if at all) to a minimal penalty because there has been no economic benefit to Avatar Holdings as a result of the alleged violations nor has there been, as the government admitted, any actual environmental harm.

Florida Cities

Following the Court's November 22, 1995 Order, the only issues to be decided at trial relevant to Florida Cities are the amounts of any civil penalty which may be assessed by the Court for Florida Cities' violations of the Clean Water Act ("CWA"). Florida Cities Water Company ("Florida Cities") is prepared to go forward with the mitigation phase of this trial. Florida Cities will present evidence, pursuant to 33 U.S.C. § 1319(d), (CWA § 309(d)), which establishes that any violations of the CWA at issue were minor and any penalty assessed by the Court should be minimal.

Three categories of violations will be discussed at trial.

a) Discharge without a permit at the Waterway Estates wastewater treatment plant ("Waterway Estates");

b) Discharge into an unpermitted location at Waterway Estates from November 1, 1989 to July 14, 1991;

c) Permit exceedances at Waterway Estates, Barefoot Bay wastewater treatment plant ("Barefoot Bay") and Carrollwood wastewater treatment plant ("Carrollwood").

Section 309(d) of the CWA lists the following factors which the Court shall consider in determining the amount of a civil penalty:

a) the seriousness of the violation or violations;

b) the economic benefit (if any) resulting from the violation;

c) any history of such violations;

d) any good-faith efforts to comply with the applicable requirements;

e) the economic impact of the penalty on the violator;

f) and such other factors as justice may require.

Plaintiff has already acknowledged that it has no evidence that any of Florida Cities' actions caused environmental harm at any of the three facilities. Each of these facilities was authorized to discharge secondarily treated effluent pursuant to rigorous regulation by the state of Florida. The evidence will also establish that, as a publicly regulated utility, Florida Cities received no economic benefit from any CWA violations. The EPA's own documents demonstrate that Florida Cities cooperated in good faith in attempting to resolve any problem or dispute with the Agency. The evidence will also establish that even a modest

penalty would cause a severe economic impact upon Florida Cities.

Under the category of "such other factors as justice may require" Florida Cities will also demonstrate that this entire action is the result of the Environmental Protection Agency's failure to follow its own regulations in that EPA improperly rejected the permit renewal application for Waterways Estates. Once EPA's mistake was discovered, Plaintiff sought to include the Barefoot Bay and Carrollwood facilities, in an attempt to bolster its case, even though EPA had already either settled these prior violations or determined not to undertake any enforcement actions. In light of the total circumstances surrounding this case, Florida Cities has acted in an environmentally responsible manner and should only be assessed a minimum penalty.

d. Exhibit Lists

Due to the volume of their exhibits, the United States and Florida Cities have appended their exhibit lists hereto, and request the Court's permission to submit revised lists with notations of all objections on December 22, 1995.

United States

The United States' exhibit list was compiled largely prior to the Court's November 22, 1995 Order. The United States anticipates that, as a result of that order, it will reduce substantially the number of exhibits. Further, because Defendants declined to identify their witnesses until November 17, 1995 (when ordered to do so by the Court) the United States

has been unable to date to depose these witnesses, with the result that some additional exhibits may need to be added to the list.

Avatar Holdings

With respect to a list of deposition exhibits, Avatar Holdings incorporates the list provided by Florida Cities on December 1, 1995.

As to other exhibits, Avatar Holdings incorporates the list of exhibits provided by Florida Cities on December 4, 1995 and hereby supplements that list as follows:

Defendant Avatar Holdings Exhibit 1: 1994 Annual Report of Avatar Holdings Inc.

Defendant Avatar Holdings Exhibit 2: By-Laws of Avatar Holdings Inc. (As Amended and Restated-March 24, 1994)

Defendant Avatar Holdings Exhibit 3: Three Page Memorandum from Robert B. Gordon to Leon Levy Re: North Fort Myers Utilities Inc. dated November 27, 1991 (Bates ##LL000244-246); One Page Memorandum from Peter Sharp to Lawrence Wilkov Re: North Fort Myers Utilities dated November 20, 1991 (Bates#LL000247) Enclosing One Page Letter from Martin Baker to Peter Sharp Re: Purchase of Water Utility Lee County, Florida (Bates#LL00249).

Defendant Avatar Holdings Exhibit 4: United States' Supplemental Responses to Defendant Avatar Holdings' First Set of Interrogatories to Plaintiff United States of America dated November 17, 1995.

Defendant Avatar Holdings Exhibit 5: One Page Chart from Barefoot Bay Development Corporation Re: Housing Contracts Closed 1971-1994 and Average Prices 1971-1994.

Defendant Avatar Holdings Exhibit 6: One Page Chart Entitled Net Income (Deficit) Barefoot Bay Development Corporation 1988-1994.

Avatar Holdings may also use at trial the following documents:

AH 97-98: Excerpt Avatar Holdings Inc. Meeting of the Audit Committee of the Board of Directors July 26, 1989.

AH 99-100: Excerpt Avatar Holdings Inc. Meeting of the Audit Committee of the Board of Directors May 24, 1989.

AH 105-107: Excerpt Avatar Holdings Inc. Meeting of the Audit Committee of the Board of Directors September 28, 1988.

AH 108-110: Excerpt Avatar Holdings Meeting of the Audit Committee of the Board of Directors July 27, 1988.

AH 111-113: Excerpt Avatar Holdings Inc. Meeting of the Audit Committee of the Board of Directors ("AHI Mtg. of Audit Comm. of Bd. of Dir.") July 25, 1990

AH 114-115: Excerpt AHI Mtg. of Audit Comm. of Bd. of Dir. Jan. 24.

AH 116-118: Excerpt AHI Mtg. of Audit Comm. of Bd. of Dir. Sept. 25, 1991; AUI Report to the Audit Committee Sept. 19, 1991; AUI Status Report as of Sept. 19, 1991.

AH 119-121: Letter from Gerald Allen to J. Edward Houston Dated June 8, 1992 Re: Status Report AUI Environmental

Assurance Program; AUI Report to the Audit Committee dated June 8, 1992; AUI Status Report as of June 8, 1992.

AH 122-124: Excerpt AHI Mtg. of Audit Comm. of Bd. of Dir. March 25, 1992; AUI Report to the Audit Committee 3/20/92; AUI Status Report 3/20/92

AH 125-128: Excerpt AHI Mtg. of Audit Comm. of Bd. of Dir. 1/29/92; Letter from Gerald Allen to J. Edward Houston Re: Status Report AUI EAP Jan 24, 1992, AUI Report to the Audit Committee 1/24/92; AUI Status Report 1/24/92.

AH 129-141: Excerpt from AHI Mtg. of the Audit Comm. of Bd. of Dir. 11/20/91 w/attachments

AH 142-146: Excerpt from AHI Mtg. of the Audit Comm. of Bd. of Dir. 3/25/92 w/attachments

AH 147-151: Excerpt from AHI Mtg. of the Audit Comm. of Bd. of Dir. 1/29/92 w/attachments

AH 152-153: Excerpt AHI Mtg. of the Audit Comm. of the Bd. of Dir. June 15, 1992

The following excerpts from Avatar Holdings' Meetings of the Audit Committee of the Board of Directors as well:

AH 162: 1/27/93

AH 163-164: 9/23/92

AH 170-171: 11/17/93

AH 172-173: 6/3/93

AH 174-175: 3/24/93

AH 176-177: 9/25/91

AH 184-185: 5/26/94

AH 186-188: 7/27/94

AH 189-190: 3/23/94

AH 191-192: 2/1/94

AH 198: 11/10/94

e. Witness Lists

United States

Kenneth Kwan
Water Management Division, Water Permits & Enforcement Branch,
Enforcement Section
United States Environmental Protection Agency
Region IV
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Atlanta, GA 30365

Roger O. Pfaff
Water Management Division
Chief, Enforcement Section
Water Permits & Enforcement Branch,
United States Environmental Protection Agency, Region IV
345 Courtland Street, NE
Atlanta, GA 30365

Leon Levy
Chairman of the Board
Avatar Holdings, Inc.
31 West 52nd Street
New York, NY 10019

Jack Schenkman
North Fort Myers Utilities, Inc.
P.O. Box 561928
Miami, FL 33156

William Schafer
Department of Sanitary Service
City of Tampa
306 East Jackson Street, 6E
Tampa, Florida 33602

Patrick Lehman
9113 Cypress Wood Circle
Tampa, Florida 33647

Ronald D. Blackburn
South District
Florida Department of Environmental Protection
2295 Victoria Avenue
Fort Myers, FL 33901

Custodian of Records
Florida Cities Water Company

Custodian of Records
Avatar Holdings, Inc.

Custodian of Records
Florida Department of Environmental Protection

Custodian of Records
Hillsborough County Environmental Protection Commission

(Note: The United States' witness list does not include rebuttal witnesses, and excludes witnesses the United States would call who have asserted the Fifth Amendment at deposition. See section h infra. Also, the United States reserves the right to call as a witness any person identified as a witness by either of the Defendants.)

Avatar Holdings

Avatar Holdings incorporates by reference the revised witness list provided by Florida Cities on November 29, 1995. Avatar Holdings supplements that list with the following names and addresses:

Edwin Jacobson
Avatar Holdings Inc.
255 Alhambra Circle
Coral Gables, Florida 33131

Charles McNairy
Avatar Holdings Inc.
255 Alhambra Circle
Coral Gables, Florida 33131

Juanita Kerrigan
Avatar Holdings Inc.
255 Alhambra Circle
Coral Gables, Florida 33131

Georgia Metcalf
Barefoot Bay Development Corporation
P.O. Box 780097
Sebastian, Florida 32978-0097

Gerald Allen
Avatar Utilities Inc.
4837 Swift Road
Sarasota, Florida 34231

Avatar Holdings may call Leon Levy once his deposition is completed and John Sladkus if he chooses to waive his Fifth Amendment right not to testify.

Leon Levy
Odyssey Partners, Ltd.
31 West 52nd Street
17th Floor
New York, New York 10019

John Sladkus
380 Long Hill Road
Briancliff Manor, New York 10510

Florida Cities

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Executive Vice President
Avatar Utilities, Inc.
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4837 Swift Road
Sarasota, FL 34231

Paul H. Bradtmiller
Executive Vice President & Chief Operating Officer
Florida Cities Water Company
Suite 100
4837 Swift Road
Sarasota, FL 34231

Julie L. Karleskint
Operations Manager
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Sarasota, FL 34231

Larry Good
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Kissimmee, FL 34759

William Sansbury
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Barefoot Bay, FL 32976

Glen Siler
Florida Cities Water Company
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Barefoot Bay, FL 32976

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Fort Myers, FL 33905

Charles L. McNairy
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Coral Gables, FL 33134

Michael E. Murphy
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4837 Swift Road
Sarasota, FL 34231

Michael Acosta
Florida Cities Water Company
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4837 Swift Road
Sarasota, FL 34231

Patrick J. Lehman
Peace River Manasota Regional Water Supply Authority
1451 Dam Road
Bradenton, FL 34202

Randy Armstrong
The Phoenix Environmental Group
2916 East Park Ave.
Tallahassee, FL 32301

Abdul Ahmadi
Florida Department of Environmental Protection, South District
Suite 364, 2295 Victoria Ave.
Fort Myers, FL 33901

Roy Herwig
U.S. Environmental Protection Agency, Region IV
345 Courtland Street, N.E.
Atlanta, GA 30365

Thomas Plouff
U.S. Environmental Protection Agency, Region IV
345 Courtland Street, N.E.
Atlanta, GA 30365

John Marlar
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Environmental Services Division, Environmental Compliance Branch
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Connie Kagey
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Roosevelt Childress
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Roger Pfaff
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Atlanta, GA 30365

Michael Hom
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Atlanta, GA 30365

Bruce Barrett
Barrett & Associates
223 The South Chace
Atlanta, GA 30328

Kenneth Kwan
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345 Courtland Street, N.E.
Atlanta, GA 30365

Peter T. McGarry
2565 Drew Valley Road
Atlanta, GA 30319

Byron W. Bartlett
Environmental Protection Commission of Hillsborough County
1900 9th Ave.
Ybor City
Tampa, FL 33605

Michael W. McWeeny
Hillsborough County Public Utilities
925 East Twigg Street
Public Utilities Building
2nd Floor
Tampa, FL 33602

William Schafer
City of Tampa, Department of Sanitary Sewers
306 East Jackson Street, 6E
Corner of FL & Jackson
Tampa, FL 33602

Chuck Hill
Florida Public Services Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0873

f. Expert Witnesses

United States

Mark Klingenstein
SAIC
255 West Spring Valley Avenue
Maywood, NJ 07607

Mr. Klingenstein is expected to testify, without limitation, regarding 1) the purpose of the National Pollutant Discharge Elimination System (NPDES); 2) the seriousness of the violations; 3) Defendants' history of non-compliance; 4) Defendants' good-faith efforts (or lack thereof) to comply with the applicable requirements, including the failure to pursue courses of action available to Defendants which would have permitted them to have complied with the applicable requirements, including alternative wastewater treatment and disposal options.

1. The substance of Mr. Klingenstein's expected testimony relating to the first category will include, without limitation, his opinion of the following:

The National Pollutant Discharge Elimination System (NPDES) was designed to restore the quality of the Nation's waterways by reducing, if not eliminating, pollution of these waters. The system requires every facility which discharges wastewater to obtain a permit that covers each discharge location. These permits include various numerical effluent limitations which limit the amounts and concentrations of pollutants that a facility may discharge to a permitted receiving water. In determining whether a permit should be issued and, if so, what limitations if should contain, the system considers the effect of the discharge of pollutants at a designated location to a given waterbody, taking into account the conditions and characteristics of the waterbody itself as well as any other discharges to it.

2. The substance of Mr. Klingenstein's expected testimony relating to the second category will include, without limitation, his opinion of the following:

> Defendants have committed serious violations of the Clean Water Act and NPDES permits issued thereunder. Defendants' wholesale failure to even apply for an NPDES permit at Barefoot Bay, and their failures to cease discharges at Carrollwood and Waterway Estates upon the revocation of their permits, particularly in view of available alternative treatment and disposal options, are particularly serious. The discharge from the Waterway Estates plant at an unpermitted location is also very serious. The other violations range from moderately serious to serious.
>
> Defendants' violations had the potential to cause environmental harm to aquatic life in the water bodies to which their plants discharged in violation of the Act and/or NPDES permits.

3. The substance of Mr. Klingenstein's expected testimony relating to the third category will include, without limitation, his opinion of the following:

> Defendants have a significant history of non-compliance both with respect to federal and state requirements. The unpermitted discharges, in particular, date back to at least the early 1980s at Barefoot Bay, 1984 at Carrollwood, and 1987 at Waterway Estates.

4. The substance of Mr. Klingenstein's expected testimony relating to the fourth category will include, without limitation, his opinion of the following:

> Options were available which would have allowed Defendants to comply with the applicable requirements at all three of the facilities. Yet, they failed to avail themselves of those options, and continued instead to operate while in violation for extended periods of time. Available options included the following:
>
> Land disposal options were available at Barefoot Bay dating back to the early 1980s when the percolation ponds began to overflow.
>
> The City of Tampa was prepared to accept the wastewater from the Carrollwood customers as early as 1984, when the permit was revoked.
>
> North Fort Myers Utilities was prepared to accept the wastewater from the Waterway Estates Plant as early as August 1989, i.e., before the period of unpermitted discharges alleged in the Second Amended Complaint.
>
> There were also extended delays in taking measures to comply with permit requirements at all three facilities. At Carrollwood, Defendants were issued a permit in 1991 with the understanding that the facility would be upgraded to an advanced wastewater treatment system. Yet, because Defendants never upgraded the plant, they were incapable of meeting the permit requirements. At Waterway Estates, Defendants delayed implementing changes in a timely manner to the plant

and discharge location which were required in order to comply with the permit.

Eileen Zimmer
U.S. Department of Justice
600 E Street, N.W.
Washington, D.C. 20530

Ms. Zimmer is expected to testify, without limitation, regarding the economic benefit resulting from the Defendants' violations and the economic impact of penalties on the violators.

The substance of Ms. Zimmer's testimony is expected to focus, without limitation on two areas: 1) the profits realized by Defendants through their operation of unpermitted facilities and/or facilities operating in violation of their permits and 2) the financial ability of each of Defendants to pay a civil penalty for the violations. The substance of Ms. Zimmer's expected testimony relating to the first category will include, without limitation, her opinion of the following:

1. The profits realized at Barefoot Bay through the sale and/or development of lots during the period when Defendants discharged from the Barefoot Bay plant without an NPDES permit (i.e., approximately November 1, 1981 to October 31, 1991) and the profits realized through the operation of the Barefoot Bay treatment plant during the same period of time;

2. The profits realized through the operation of the Carrollwood treatment plant during the period when Defendants discharged without an NPDES permit (i.e., approximately November 1, 1984 to June 30, 1991); and

3. The profits realized through the operation of the Carrollwood treatment plant during the period when Defendants discharged without an NPDES permit (i.e., approximately January 9, 1987 to October 31, 1989), discharged at an unpermitted location (i.e., approximately November 1, 1989 to July 14, 1991) and discharged in violation of its NPDES permit (July 1991 to April 1992 and June 1992);

The substance of Ms. Zimmer's expected testimony relating to the second category will include, without limitation, her opinion of the following:

> Based on her review of its financial records, Florida Cities is able to afford a penalty of $7.5 million.
>
> Based on her review of its financial records, Avatar Holdings is able to afford a penalty of $15.2 million.

The expert reports of Mr. Klingenstein and Ms. Zimmer are being filed herewith.

Avatar Holdings

Avatar Holdings will use and rely on the expert witnesses identified by Florida Cities. Avatar Holdings hereby incorporates the list of expert witnesses and summaries provided by Florida Cities.

Florida Cities

1. **James A. Miller**
   Audit Partner
   Ernst & Young LLP.
   Suite 3900
   200 S. Biscayne Blvd.
   Miami, FL 33131

Mr. Miller is expected to testify, without limitation, regarding 1) the profitability realized at Barefoot Bay Development Corporation("Barefoot Bay") through the sale and development of lots from approximately November 1, 1981 to October 31, 1991 and 2) the appropriateness of the income and expense components included in Avatar's accounting and financial measurements of Barefoot Bay's profitability.

The substance of Mr. Miller's expected testimony relating to the second category will include, without limitation, his opinion of the following:

> Based upon his review of financial records, the appropriateness of Barefoot Bay's profitability related to the sale and development of lots as presented in its financial statements for the period November 1, 1981 to October 1, 1991.
>
> The appropriateness of accounting and financial measurement procedures used by Avatar in determining the aforementioned profitability of Barefoot Bay with respect to accepted industry and accounting practices.

2. **Roger C. Hartung**
Weston & Associates
2692 Gravel Dr.
Ft. Worth, Tx. 76118-6904

Mr. Hartung's testimony will address EPA's general practices and procedures and internal Agency guidance regarding permitting and enforcement matters under the Clean Water Act. His testimony will address the relationship and interactions between environmental regulatory authorities of non-delegated states and EPA. It will also address wasteload allocation approvals, TMDL development and approvals, permitting requirements and permit writing, enforcement of administrative orders, enforcement of federal NPDES permits, and interpretations of EPA's permitting and enforcement guidance documents and memoranda.

3. **Douglas G. Smith, P.E.**
Senior Partner
Regional Environmental Manager
Black & Veatch
Suite 960
2701 North Rocky Point Drive
Tampa, Florida 33607-5924

Mr. Smith is expected to testify, without limitation, regarding 1) Historical effectiveness and compliance of the Waterway Estates Wastewater Treatment Plant; 2) Actual environmental effect of the violations involving the Waterway Estates Plant; and, 3) The timeliness of the schedule by which Defendant pursued compliance with the regulations involving the Waterway Estates Plant, including the appropriateness of the compliance alternative selected by defendant. The substance of Mr. Smith's testimony relating to the first category will include, without limitation, his opinion on his assessment of Defendant's consistency in maintaining and operating Waterway Estates in an effective and environmentally responsible manner - particularly as demonstrated by the plant's historical record regarding compliance with NPDES requirements both before and after the upgrade constructed in 1992.

The substance of Mr. Smith's testimony relating to the second category will include, without limitation, his opinion on the occurrence of environmental damage suffered by the Caloosahatchee River as a result of the alleged violations.

The substance of Mr. Smith's testimony relating to the third category will include, without limitation, his opinion of the prudence of Defendant's evaluation and selection of a compliance alternative. The assessment will consider the Defendant's multiple responsibilities as a privately owned utility. Additionally, Mr. Smith will assess the schedule by which Defendant pursued compliance with EPA regulations through

successful completion of the selected compliance alternative.

Mr. Smith is expected to testify, without limitation, regarding 1) wastewater treatment plant performance; 2) the characteristics and typical performance of secondary wastewater treatment plants; 3) the characteristics and typical performance advanced wastewater treatment (AWT) plants; and 4) the characteristics and typical performance of the Barefoot Bay wastewater treatment plant.

The substance of Mr. Smith's expected testimony relating to the first category will include, without limitation, his opinion on the following:

> Engineers can design wastewater treatment plants to provide virtually any level of treatment, and the level of treatment provided at any particular location is normally established by permit limitations.

The substance of Mr. Smith's expected testimony relating to the second category will include, without limitation, his opinion on the following:

> Secondary wastewater treatment plants are designed to remove common sewage pollutants (biochemical oxygen demand, total suspended solids, bacteria), and a number of treatment processes are available for these purposes. The typical performance results in effective and reliable removal of a high percentage of these pollutants.

The substance of Mr. Smith's expected testimony relating to the third category will include, without limitation, his opinion on the following:

> Advanced wastewater treatment (AWT) plants are designed to remove common sewage pollutants as well as nutrients (biochemical oxygen demand, total suspended solids, bacteria, nitrogen,

> phosphorous), and a number of treatment processes are commonly used for these purposes. The typical performance results in effective and reliable removal of a high percentage of these pollutants.

The substance of Mr. Smith's expected testimony relating to the fourth category will include, without limitation, his opinion on the following:

> The Barefoot Bay wastewater treatment plant was initially designed, constructed and operated as a secondary treatment plant; and its performance was consistent with its design. The holding ponds which received the plant effluent were not intended to be part of the treatment process.

Mr. Smith is expected to testify, without limitation, regarding 1) wastewater treatment plant performance; 2) the characteristics and typical performance of secondary wastewater treatment plants; 3) the characteristics and typical performance of advanced wastewater treatment (AWT) plants; and 4) the characteristics and typical performance of the Carrollwood wastewater treatment plant.

The substance of Mr. Smith's expected testimony relating to the first category will include, without limitation, his opinion on the following:

> Engineers can design wastewater treatment plants to provide virtually any level of treatment, and the level of treatment provided at any particular location is normally established by permit limitations.

The substance of Mr. Smith's expected testimony relating to the second category will include, without limitation, his opinion on the following:

> Secondary wastewater treatment plants are designed to remove common sewage pollutants (biochemical

> oxygen demand, total suspended solids, bacteria), and a number of treatment processes are available for these purposes. The typical performance results in effective and reliable removal of a high percentage of these pollutants.

The substance of Mr. Smith's expected testimony relating to the third category will include, without limitation, his opinion on the following:

> Advanced wastewater treatment (AWT) plants are designed to remove common sewage pollutants as well as nutrients (biochemical oxygen demand, total suspended solids, bacteria, nitrogen, phosphorous), and a number of treatment processes are commonly used for these purposes. The typical performance results in effective and reliable removal of a high percentage of these pollutants.

The substance of Mr. Smith's expected testimony relating to the fourth category will include, without limitation, his opinion on the following:

> The Carrollwood wastewater treatment plant was initially designed, constructed and operated as a secondary treatment plant; and its performance was consistent with its design.

Mr. Smith will also address any issues not covered by the above list of topics that Mr. Klingenstein is expected to address.

4. **Keith Cardey**
460 Oriole
Elmhurst, Illinois 60126

Mr. Cardey is expected to testify that the defendant did not profit from the delay in the construction of the Advanced Wastewater Treatment processes or from alleged noncompliance at the Waterways Estates, Carrollwood, or Barefoot Bay facilities.

The substance of the testimony is that Florida Cities Water Company is a public utility under the jurisdiction of the Florida Public Service Commission (FPSC) that exercises authority on, among other things, rates, accounting, area served, and quality of service. In setting rates, the FPSC includes as one element of cost a fair return on the investment in utility plant providing the service as shown by the following formula:

Return (operating income) = Rate Base (Investment) x Rate of Return (%)

With the delay in construction of the Advanced Wastewater Treatment facilities, there is no investment in such facilities during the delay, thus no increase in operating income. The increase in operating income only materializes once the AWT facilities are providing service and the Florida Public Service Commission authorizes the Company to increase its rates. If advanced wastewater treatment facilities had been constructed earlier, net operating income would have risen.

Mr. Cardey is also expected to address any issues not addressed by the above list of topics that Ms. Zimmer addresses.

5. **Randall L. Armstrong**
The Phoenix Environmental Group, Inc.
2916 E. Park Avenue
Tallahassee, FL 32301

Mr. Armstrong is expected to testify, without limitation, regarding 1) the historical water quality of the Caloosahatchee River and 2) the existence (or lack thereof) of water quality data indicating any impact of any discharges to surface waters from the Waterway Estates wastewater treatment plant.

With respect to the first category, Mr. Armstrong is expected to testify, without limitation, that a review of water quality data contained in the Environmental Protection Agency Storage and Retrieval System (STORET) was conducted by him. The STORET computer system, which in Florida is operated by the Florida Department of Environmental Protection (DEP), is generally recognized (and has been designated by the State Legislature) as the primary repository for all such data on water quality in Florida. A review of data contained in the STORET system for the period of record December 7, 1982 to March 14, 1994 revealed that water quality in the Caloosahatchee River in the vicinity of the Waterways Estates wastewater treatment facility for four (4) key parameters that are indicative of the overall "health" of an estuary was generally good. Furthermore, no significant trends for those key parameters were evident which would indicate that water quality was either declining or improving during that period.

Mr. Armstrong also analyzed data in intensive survey documents prepared by DEP, and will express his opinions on the significance of that data.

Mr. Armstrong's testimony with regard to the second category will include, without limitation, his opinion relating to the lack of available data concerning water quality impacts directly attributable to the Waterway Estates discharge of treated effluent. Mr. Armstrong is expected to testify that, for the data sources described above, no data were located which resulted

from sampling in or around the previous Waterway Estates discharge. Therefore, no conclusions can be reached concerning the impacts of such discharge on adjacent waters.

g. Penalty Amount sought by United States

Based on the penalty factors set out in section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), and the guidance set forth in Tyson Foods, the United States respectfully requests that the Court impose a penalty not to exceed $25,000 per day for each violation. Under the rationale se forth in Tyson Foods, it is the defendants' duty to establish that the maximum penalty authorized by the statute is warranted through application of the Statutory factors. The United States believes that: the violations were serious, Avatar derived a substantial economic benefit from the violations (although Florida Cities itself did not); there is a long history of such violations; there were limited good-faith efforts to comply; and each defendant can afford to pay a penalty of $7,500,000.

h. Depositions to be offered in evidence at trial

United States

Jack W. Tompkins
162 3rd Avenue North
Nashville, TN 37201

Pages and lines being offered: 14:14-15:17; 36:17-21; 40:12-17; 41:5-15; 42:19-23; 43:11-25; 44:1-6, 16-25; 45:1-6; 53:13-25; 54:1; 55:17-57:16; 64:13-80:1; 84:14-25; 89:22-90:8; 94:9-95:1; 96:17-102:6; 105:14-19; 116:17-117:17; 119:9-16; 120:10-14; 122:18-124:2; 132:12-133:23; 134:19-135:4; 135:9-137:3; 139:12-143:9; 144:14-145:11; 146:3-8, 16-19; 149:17-152:7; 153:7-154:11; 155:8-156:11; 158:6-8, 17-20; 174:5-15; 176:19-179:19; 182:19-24; 199:16-200:22; 201:8-19; 207:10-208:7; 208:21-209:2; 210:20-211:1; 220:5-18; 222:24-223:8; 236:7-11.

James Elder
6625 Mauna Loa Boulevard
Sarasota, Florida 34241

Pages and lines being offered: 4:22-23:24

Dennis Getman
13471 Southwest 62nd Avenue
Miami, Florida 33156

Pages and lines being offered: 3:21-13:18

Robert B. Gordon
15505 Southwest 78th Place
Miami, Florida 33157

Pages and lines being offered: 4:12-11:13

Antone A. Reeves, III
6730 Ashley Court
Sarasota, Florida 34241

Pages and lines being offered: 4:3-11:21

John K. Sladkus
380 Long Hill Road East
Briarcliff Manor, New York 10510

Pages and lines being offered: 5:2-14:9

Lawrence Wilkov
4510 Filmore Street
Hollywood, Florida 33021

Pages and lines being offered: 4:21-16:5

Avatar Holdings

Avatar Holdings incorporates the list of depositions to be offered provided by Florida Cities on December 4, 1995. Avatar Holdings supplements that list as follows:

Avatar Holdings may offer excerpts from Mr. Leon Levy's deposition testimony from August 24, 1995 if he is unavailable for trial:

Pages 26-30, 34, 38-46, 47-49, 54, 64-66, 70-73, 86-89, 98.

Avatar Holdings reserves the right to use excerpts from Mr. Leon Levy's deposition testimony from December 6, 1995 if he is unavailable for trial.

Florida Cities

Florida Cities has appended its list of deposition designations hereto. Although Florida Cities has offered deposition designations, it still reserves the right to present these witnesses in person at trial.

i. Admitted Facts

The United States and Florida Cities agree to the following:

1. As of 1983, there were approximately 2,000 units in the Barefoot Bay development, resulting in a flow of approximately 200,000 gallons of wastewater per day to the Barefoot Bay wastewater treatment plant.

Avatar Holdings does not agree to the foregoing.

j. Applicable Principles of Law on which there is agreement

The United States and Florida Cities agree to the following:

1. Under the Clean Water Act and Atlantic States Legal Foundation v. Tyson Foods, each defendant is subject to a civil penalty not to exceed $25,000 per day for each violation. Under the Clean Water Act and Atlantic States Legal Foundation v. Tyson Foods, the Court shall consider each factor listed in § 309(d) in assessing the civil penalty.

Avatar Holdings does not agree to the foregoing.

k. Issues of fact remaining to be litigated

United States

The factual issues that remain to be litigated are those relating to Avatar Holdings' liability and penalty for the violations alleged in the Second Amended Complaint (excluding those barred by the Court's November 22, 1995 Order), and those relating to Florida Cities' penalty for the violations for which the Court has found Florida Cities to be liable.

Avatar Holdings

The following facts remain to be litigated: (1) whether Avatar Holdings directed or caused the remaining alleged violations; (2) whether Avatar Holdings received an economic benefit from the alleged violations; and (3) whether Avatar Holdings has an ability to pay a substantial penalty.

Florida Cities

The only issues of fact remaining to be litigated is what mitigating factors are present and how these factors will reduce the imposition of maximum statutory penalties for these Clean Water Act violations.

l. Issues of law remaining for the Court's determination

United States

The United States urges the Court, in the context of the evidence to be introduced at trial, to reconsider the standard it has articulated for imposing liability on a parent company under the Clean Water Act. In particular, the United States respectfully submits that it is necessary and sufficient either

for the parent to have directed or caused the violations or for there to have been pervasive control by the parent company of environmental matters directly related to the violations alleged, but not that such control have been exercised on a daily basis.

Avatar Holdings

* It is Avatar Holdings' understanding that it is entitled to the benefit of the Court's order dated November 22, 1995 with respect to the holding that certain claims against Florida Cities are barred by the doctrine of res judicata. To the extent the government disagrees with this understanding, it is an issue to be determined by the Court.

* Another issue to be determined by the Court relates to the inadmissibility of testimony regarding alleged "wrongful profits" as inconsistent with an economic benefit analysis mandated by the applicable case law, the regulations, and the Clean Water Act.

Florida Cities

1. Whether the calculation of economic benefit should be limited by the allegations in the complaint and the applicable statute of limitations.
2. Whether a "wrongful profits" analysis is relevant to a civil enforcement action under the Clean Water Act.
3. Whether penalties for Clean Water violations can be imposed on the discharger's parent company instead of on the discharger itself.
4. Whether penalties for Clean Water Act violations can be imposed both on the discharger and again on the discharger's

parent company, thus producing double the statutory maximum for any such violation.

m. Disagreements as to the Federal Rules

The parties have not identified any such disagreements at this time.

n. Motions or other matters which require action by the Court

The following motions are pending at this time: Avatar Holdings' Objection to the Order of the Magistrate Judge; United States' Motion for an Order Permitting Discovery of Late-Named Witnesses.

United States

The United States identifies the following additional matters requiring action by the Court at this time.

1. In view of the Court's November 22, 1995 Order adjudicating many of the issues in this case, the United States proposes that the Court limit the trial of this action to one week by imposing the following limitations on the Plaintiff and Defendants (in the aggregate):

Opening and closing	1 hour (total)
Direct examination of witnesses:	10 hours
Cross examination of witnesses:	5 hours

2. The United States calls to the Court's attention that the Defendants are in violation of the Court's November 13, 1995 Order by 1) failing to serve full and complete answers to the United States' interrogatories; 2) failing to produce responsive documents from the Getman, Wilkov, and Jacobson files; 3) failing

to produce the documents reviewed or relied upon by its expert Douglas Smith; and 4) failing to supply an affidavit from the company which stores Mr. Levy's files.

Avatar Holdings

As of the date of the filing of this Statement, the only outstanding motion is Avatar Holdings' Objection to the Order of the Magistrate Judge filed on November 17, 1995.

Florida Cities

Florida Cities knows of one pending motions for the Court's attention at this time: Avatar Holding's Objection to the Order of the Magistrate Judge filed on November 17, 1995.

Florida Cities and Avatar Holdings responds to the two issues raised above by the United States as follows:

1. Neither defendant agrees to any of the United States' proposed restrictions given in the United States' response to paragraph 1 regarding length of trial or division of time at trial among the three parties. Plaintiff has brought an action which involves three separate wastewater treatment plants covering a combined total of over forty years of Florida Cities' history. Under CWA § 309(d) defendants have the right to offer and will offer extensive mitigation evidence which will place any violations in context. Given Plaintiff's contention that it may still litigate all issues against Avatar Holdings and given the large number of years involved, and defendants' statutory right to present a full and complete evidence of mitigation Plaintiff's proposed limitations are unreasonable.

2. Defendants have fully complied with the Court's November 13, 1995 Order and responds to the issues raised by the United States in paragraph 2 above as follows:

(1) Defendants have served extensive and complete answers to Plaintiff's interrogatories. At the November 28, 1995 Pretrial Meeting, attended by all parties, and by letter Florida Cities requested that counsel for Plaintiff identify which interrogatory responses it believed to be inadequate. Plaintiff's counsel refused to identify any allegedly inadequate responses.

(2) Mr. Wilkov and Mr. Jacobson have never been officers, directors, or employees of Florida Cites. In response to Plaintiff's previous Request for Production, Florida Cites requested that Avatar Holdings search the files of Mr. Wilkov, Mr. Jacobson, and Mr. Getman. Avatar Holdings has searched the files of these individuals. Mr. Wilkov is no longer employed by Avatar Holdings. All responsive, non-privileged documents from the available files of these individuals were produced. Although it believes that it has produced all responsive documents, Avatar Holdings has offered to search again the files of Mr. Getman and Mr. Jacobson and any files of Mr. Wilkov remaining in Avatar Holdings' possession. Avatar Holdings has not agreed to search Mr. Jacobson's files present in his Chicago offices. Mr. Jacobson testified that he does not keep Avatar Holdings files in his Chicago offices. Mr. Jacobson uses his Chicago offices in connection with his duties as CEO of three unrelated companies.

Florida Cities has no additional documents which are responsive to these requests.

(3) Douglas Smith documents - All of the documents reviewed by Florida Cities' expert witnesses in preparation of their expert reports have been provided to Plaintiff. By letter dated July 14, 1995, Florida Cities produced hundreds of pages of documents which Mr. Smith and his associates used in preparation of his report. Any other documents which Mr. Smith or his associates reviewed had previously been produced to Plaintiff.

DATED: December 6, 1995

Respectfully submitted,

FOR PLAINTIFF,
THE UNITED STATES OF AMERICA

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural
Resources Division

By:

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FOR DEFENDANT,
FLORIDA CITIES WATER COMPANY

Gabeler, Baise & Miller

By:

GARY BAISE
DON G. SCROGGIN
1320 Old Chain Bridge Road
McLean, Virginia 22101
(703) 790-5244

Florida Cities has no additional documents which are responsive to these requests.

(3) Douglas Smith documents - All of the documents reviewed by Florida Cities' expert witnesses in preparation of their expert reports have been provided to Plaintiff. By letter dated July 14, 1995, Florida Cities produced hundreds of pages of documents which Mr. Smith and his associates used in preparation of his report. Any other documents which Mr. Smith or his associates reviewed had previously been produced to Plaintiff.

DATED: December 6, 1995

Respectfully submitted,

FOR PLAINTIFF,
THE UNITED STATES OF AMERICA

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural
Resources Division

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FOR DEFENDANT,
AVATAR HOLDINGS, INC.

Weil, Gotshal & Manges

By:

DAVID R. BERZ
DAVID B. HIRD
1615 L Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 682-7190

Exhibit_____(GHB-65)

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	)	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' MOTION FOR AN ORDER PERMITTING DISCOVERY OF DEFENDANTS' LATE-NAMED WITNESSES AND FOR EXPEDITED CONSIDERATION

Plaintiff, the United States of America, pursuant to Rule 26, Fed. R. Civ. P., and for the reasons set forth in the accompanying memorandum, moves this Court for an order (in the form attached) permitting discovery of Defendants' late-named witnesses.

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

DATED: November 29, 1995 By: _____

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC. and FLORIDA CITIES WATER COMPANY, INC., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

ORDER

The United States having moved for an order permitting discovery of Defendants' late-named witnesses, and the Court having carefully considered the motion and finding good cause therefor, it is hereby ORDERED that the United States may take the depositions of Larry Griggs, Mike Acosta, Michael McWeeny, Chuck Hill, Juanita Kerrigan, and Georgia Metcalf on five days notice, and may issue subpoenas to command the attendance and production of relevant documents at the depositions of Messrs. Griggs, McWeeny, and Hill.

DONE AND ORDERED at Ft. Myers, Florida, this ___ day of _____, 1995.

_____
George T. Swartz
United States Magistrate Judge

CERTIFICATE OF SERVICE

I certify that copies of the United States' Motion for an Order Permitting Discovery of Defendants' Late-Named Witnesses and for Expedited Consideration (with proposed order attached) were served by U.S. Mail on November 29, 1995 on the following attorneys of record:

Gary Baise
Don G. Scroggin
Gabeler, Baise & Miller
Suite 200
1320 Old Chain Bridge Road
McLean, VA 22101

David R. Berz
David B. Hird
Weil, Gotshal & Manges
1615 L Street, NW
Washington, DC 20036

John Noland
Russell P. Schropp
Henderson, Franklin, Starnes & Holt
Post Office Box 280
Fort Myers, FL 33902-0280

John Moore
JOHN MOORE

Florida Cities Water Company
Docket No._____
Rate Application for Recovery
of Legal Expenses
Exhibits____(GHB-66 thru GHB-76)
Gary H. Baise
Volume 4 of 7

PUBLIC SERVICE COMMISSION
971663-WS EXHIBIT NO 6-Vol. 4
WITNESS: Baise
DATE: 8-12-98

FLORIDA CITIES WATER COMPANY

RATE APPLICATION FOR RECOVERY OF LEGAL EXPENSES

EXHIBITS____(GHB-1 THRU GHB-110) OF

GARY H. BAISE

Exhibit List for Testimony of Gary H. Baise

Exhibit	Document
1	Player's List
2	TIME LINE, *U.S. v. Florida Cities Water Company*
3	Resume of Gary H. Baise
4	List of Gary H. Baise's reported cases
5	Court's Standard Interrogatories
6	United States' Answers to Court's Standard Interrogatories
7	Defendant Florida Cities Water Company's Answers to Court's Standard Interrogatories
8	Motion for Extension of Time in Which to File Motion to Strike Affirmative Defenses
9	United States' Motion to Strike Affirmative Defenses
10	Memorandum in Support of United States' Motion to Strike Affirmative Defenses
11	United States' First Request for Production of Documents
12	Deposition digest of Julie Karleskint Deposition
13	Defendant's Motion for a Protective Order
14	Order re: Florida Cities Water Company's Motion for Protective Order (dated April 18, 1994)
15	Letter to Mr. Jacobs from Mr. Scroggin (dated April 19, 1994)
16	Letter to Mr. Scroggin from Mr. Jacobs (dated April 20, 1994)
17	Memorandum in Support of United States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees
18	Memorandum in Opposition to Plaintiff's Motion for an Order Allowing

Ex Parte Contacts with Former Employees

19	Motion and Memorandum for Permission to File Reply Memorandum in Support of United States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees
20	Order re: Defendant's Emergency Motion for a Temporary Protective Order (dated Feb. 13, 1995)
21	Order re: Plaintiff's Motion for an order allowing ex parte contacts (dated March 16, 1995)
22	Deposition digest of John Marlar deposition
23	Deposition digest of Peter McGarry deposition
24	Defendant's Motion to Disqualify Counsel
25	Transcript of February 15, 1995 hearing before U.S. District Judge Swartz
26	Order re: Motion to Allow Ex-Parte Contacts and Motion to Disqualify Counsel
27	United States' Second Request for Production of Documents
28	Deposition digest of Connie Kagey deposition
29	Deposition digest of Bruce Barrett deposition
30	Defendant Florida Cities Water Company's Motion for Partial Summary Judgment and Request for Oral Argument
31	Deposition digest of Paul Bradtmiller deposition
32	Deposition digest of Johnnie Overton deposition
33	Deposition digest of Jack Tompkins deposition
34	Letter to Mr. Baise from Mr. Jacobs (dated Jan. 30, 1995)
35	United States' Reply to Defendant's Emergency Motion for a Temporary Protective Order and Defendant's Request for Oral Argument in Connection with Defendant's Motion to Disqualify Counsel

36	*United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994)
37	United States' First Set of Interrogatories to Defendant Florida Cities Water Company
38	Defendant's Second Request for Production of Documents to Plaintiff United States of America
39	Defendant's Offer of Judgment
40	Defendant's Notice of Intention to Oppose Constructive Motion by United States for Leave to File Amended Complaint
41	Defendant's Memorandum in Partial Opposition to Plaintiff's Motion for Leave to Amend Complaint
42	Order re: United States' Revised Amended Complaint (dated April 26, 1995)
43	Revised Amended Complaint
44	Defendant Florida Cities Water Company's Motion to Strike
45	United States' Motion for Reconsideration of Court's Order on Amendment of Complaint
46	Defendant Florida Cities Water Company's Answer to Revised Amended Complaint
47	United States' Opposition to Defendant Florida Cities Water Company's Motion to Strike
48	United States' Third Request for Production of Documents
49	Defendant's Motion for Partial Summary Judgment
50	United States' Opposition to Defendant Florida Cities Water Company's Motion for Partial Summary Judgment
51	Order Denying FCWC's Motion for Partial Summary Judgment
52	United States' Motion for Partial Summary Judgment (exhibits omitted)
53	United States' Second Set of Interrogatories and First Request for Admissions

54	Research Memos
55	FCWC Motion for Partial Summary Judgment and Request for Oral Argument
56	Deposition Summaries
57	Deposition Summaries
58	FCWC's Fourth Request for Production of Documents and Third Request for Interrogatories
59	United States' Fifth Request for Production of Documents
60	FCWC's Notice of Dispositive Authority
61	Order re: Summary Judgment Motions
62	FCWC Exhibit List and Stipulations
63	DOJ Exhibits
64	Joint Pretrial Statements
65	United States' Motion for an Order Permitting Discovery of Defendant's Late-Named Witnesses
66	FCWC Memorandum in Opposition to Plaintiff's Motion for an Order Admitting Discovery of Defendant's Late-Named Witnesses and for Expedited Consideration
67	Order re: Discovery of Late-Named Witnesses
68	United States' Motion for Expedited Reconsideration of the Court's Ruling on Res Judicata and in Reply to Avatar Holdings' Motion for Clarification of the Court's Order
69	Order re: Motion for Reconsideration on Res Judicata and Motion for Clarification
70	FCWC Proposed Findings of Fact and Conclusions of Law
71	FCWC's Pretrial Brief

72	Defendant's Joint Motion in Limine to Exclude the Testimony and Report of Mark J. Klingenstein.
73	United States' Motion in Limine
74	Defendant's Joint Motion in Limine to Exclude the Testimony and Report of Eileen Zimmer
75	Berz Settlement Proposal
76	Trial Transcript
77	United States' Offer of Proof in Lieu of the Testimony of Witnesses who Plead the Fifth Amendment
78	Defendants' Joint Memorandum of Law Addressing the Invocation of the Fifth Amendment
79	FCWC's Witness List
80	Plant Effluent Quality Report (Black & Veatch)
81	FCWC Motion to Strike the Deposition Testimony of Jack Williams Tompkins
82	Parties' Proposals for Post-Trial Submissions
83	Order Regarding Fifth Amendment and Request Court Draw Inferences from Refusal to Testify
84	United States' Post-Trial Memorandum
85	United States' Post-Trial Proposed Findings of Fact and Conclusions of Law
86	FCWC Post-Trial Brief
87	FCWC Proposed Findings of Fact and Conclusions of Law
88	United States' Motion for Reconsideration on Adverse Inferences and Extension of Page Limits
89	FCWC Memorandum in Opposition to Motion for Reconsideration
90	Order Granting in Part and Denying in Part Motion for Reconsideration

91	United States' Citation of Additional Authority
92	Defendants' Joint Response to Plaintiff's Citation of Additional Authority
93	Order Directing Parties to File Memorandums on Borough of Ridgeway
94	United States' Reply Memorandum in Support of Reinstatement of Res Judicata
95	Defendants' Joint Response to Memorandum Seeking Reinstatement of Res Judicata
96	Order Reaffirming Res Judicata Effects
97	Opinion
98	FCWC Verified Motion for Attorney Fees
99	FCWC Motion for Bill of Costs
100	United States' Memorandum in Opposition to Attorney Fees
101	Order Denying Attorney Fees
102	United States' Notice of Appeal
103	FCWC Notice of Cross Appeal
104	Order Granting Motion to Dismiss with Prejudice
105	Pleadings Table
106	Depositions Table
107	Correspondence re: Fees
108	Billing Chart
109	Cover Letter to Bills
110	Letter to Avatar on Fees

Exhibit_____(GHB-66)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS INC., Defendants.	)	CIVIL ACTION NO.: 93-281-CIV-FTM-21

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR AN ORDER PERMITTING DISCOVERY OF DEFENDANTS' LATE-NAMED WITNESSES AND FOR EXPEDITED CONSIDERATION

Plaintiff has moved to reopen discovery in this action to depose the following witnesses: Larry Griggs, Mike Acosta, Juanita Kerrigan, Georgia Metcalf, Chuck Hill, and Michael McWeeny. Florida Cities Water Company ("Florida Cities") objects to Plaintiff's motion to reopen discovery, except for Mr. McWeeny . Plaintiff either itself identified or was on notice during the discovery period that each of these individuals were knowledgeable persons. Plaintiff elected not to depose these individuals during the appropriate time period. Given the length of time that Plaintiff has known of these individuals and the impending trial date, Plaintiff should not be allowed to profit from its own delay and have additional discovery less than one month before trial.[1]

[1] As the Court is aware, this is Plaintiff's second attempt to reopen deposition discovery. At the November 3, 1995 motion hearing, the Court granted Plaintiff the right to depose Florida Cities' expert witness Roger Hartung on or before November 27, 1995. In compliance with the Court's order Florida Cities delivered a copy of Mr. Hartung's report to Plaintiff's counsel on November 10, 1995 and made Mr. Hartung available for deposition.

In its "Answers to Defendant's Interrogatories", dated April 28, 1995, Plaintiff identified three of these witnesses (Griggs, Acosta, and Kerrigan) as "persons who have knowledge of facts which support any allegation of the Complaint . . . ." Mr. Griggs is a former employee of Florida Cities. During the summer Plaintiff's counsel discussed deposing Mr. Griggs but never made any further attempt to notice his deposition.[2]

Mr. Acosta is employed by Florida Cities as Manager, Engineering and Construction. During the discovery period Plaintiff noticed the deposition of Mike Acosta. Subsequently Plaintiff withdrew voluntarily Mr. Acosta's deposition notice. Plaintiff should not now be allowed to claim surprise or allege that Mr. Acosta was a "late named" witness.

On October 5, 1995 -- 30 days before the end of discovery -- Florida Cities supplemented its "Disclosure of Core Information" listing Chuck Hill as a knowledgeable person. Despite this notice, Plaintiff has made no effort to depose Mr. Hill until this current motion. Plaintiff had full opportunity to depose Mr. Hill, but without explanation failed to do so during the appropriate period.

Florida Cities also objects to reopen discovery to depose Ms. Kerrigan (an employee of Avatar Holdings Inc.) and Ms. Metcalf (an employee of Barefoot Bay Development

---

Plaintiff scheduled a tentative deposition date of November 27, 1995, but Plaintiff failed to actually go forward with the deposition.

[2] Between May 3, 1995 and October 3, 1995 Plaintiff conducted only two days of affirmative deposition discovery. On June 26, 1995 Plaintiff deposed Edwin Jacobson, Chief Executive Officer of Avatar Holdings Inc.. On August 24, 1995 Plaintiff deposed Leon Levy, Chairman of the Board of Avatar Holdings Inc. and Leonard Sladkus. Plaintiff made no serious effort to take other depositions until October 2, 1995, thirty-four days before the cut-off for deposition discovery. Given its failure to and delay in conducting deposition discovery during the period covered by Judge Nimmons' scheduling order, Plaintiff should not now be given the opportunity for additional discovery that it should have conducted at the proper time.

Corporation) and joins in the arguments raised by Avatar Holdings in its responsive brief. In addition, Florida Cities notes that Plaintiff's April 28, 1995 Interrogatory Responses listed Ms. Kerrigan as a "person with knowledge", indicating that Ms. Kerrigan is by no means a surprise witness. Ms. Metcalf executed an affidavit which was served upon Plaintiff on September 9, 1995, giving Plaintiff ample notice if it wished to depose Ms Metcalf during the discovery period.

Finally, Florida Cities has no objection to going forward with the depositions of Mr. McWeeny, provided that the depositions are scheduled at a time and place convenient to the witnesses and to all counsel.

CONCLUSION

Florida Cities respectfully requests that this Court enter an order allowing Plaintiff motion to depose Mr. McWeeny but denying Plaintiff's motion to depose any additional witnesses. Plaintiff was on sufficient notice as to the remaining witnesses that it should have undertaken discovery as to these witnesses during the discovery period. Plaintiff should not now be allowed to profit from its delay more than one month after discovery has closed and less than one month before trial.

Respectfully submitted,

Don G. Scroggin

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December 7, 1995

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of Florida Cities Water Company's Memorandum in Opposition to Plaintiff's Motion to Depose Late Named Witnesses has this 7th day of December, 1995, been sent to the following persons by United States Mail and by facsimile:

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T. Anthony Quinn, Esq.
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Environment and Natural Resources Division
U.S. Department of Justice
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Alexander M. Bullock

Exhibit_____(GHB-67)

FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION 95 DEC -8 AM 9:46

CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT MYERS, FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

vs. CASE NO. 93-281-CIV-FTM-21D

AVATAR HOLDINGS, INC., et al.,

Defendants.
_____/

O R D E R

This Cause is before the Court on the United States' Motion for an Order Permitting Discovery of Defendants' Late-Named Witnesses and for Expedited Consideration (Doc. 213). The Court has carefully reviewed the motion and the responses thereto. The Government is requesting that this Court re-open discovery so that the Government may take the deposition of certain late-named witnesses, namely Mike Acosta, Michael McWeeny, Chuck Hill, Juanita Kerrigan, and Georgia Metcalf. According to the defendants' responses, all of these witnesses with the exception of Michael McWeeny were known to the Government well before the discovery cut-off.

Therefore, it is hereby ORDERED:

That the Motion for an Order Permitting Discovery of Defendants' Late-Named Witnesses (Doc. 213) is hereby GRANTED to the extent that the Government may take the deposition of Michael McWeeny at a time and place that is convenient to the

deponent and opposing counsel but no later than December 31, 1995. In all other respects, the motion is DENIED.

That the Motion for Expedited Consideration (Doc. 213) is moot.

DONE and ORDERED in Chambers, Port Myers, Florida, this 8th day of December, 1995.

GEORGE T. SWARTZ
UNITED STATES MAGISTRATE JUDGE

DATE: 12-8-95

TIME: 10:05

TO: Don Scroggin

FROM: Al Clayton

U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
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DOCUMENT DESCRIPTION:
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CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT MYERS, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CASE NO. 93-281-CIV-FTM-21D

AVATAR HOLDINGS, INC., et al.,

Defendants.

ORDER

This Cause is before the Court on the United States' Motion for an Order Permitting Discovery of Defendants' Late-Named Witnesses and for Expedited Consideration (Doc. 213). The Court has carefully reviewed the motion and the responses thereto. The Government is requesting that this Court re-open discovery so that the Government may take the deposition of certain late-named witnesses, namely Mike Acosta, Michael McWeeny, Chuck Hill, Juanita Kerrigan, and Georgia Metcalf. According to the defendants' responses, all of these witnesses with the exception of Michael McWeeny were known to the Government well before the discovery cut-off.

Therefore, it is hereby ORDERED:

That the Motion for an Order Permitting Discovery of Defendants' Late-Named Witnesses (Doc. 213) is hereby GRANTED to the extent that the Government may take the deposition of Michael McWeeny at a time and place that is convenient to the

deponent and opposing counsel but no later than December 31, 1995. In all other respects, the motion is DENIED.

That the Motion for Expedited Consideration (Doc. 213) is moot.

DONE and ORDERED in Chambers, Fort Myers, Florida, this 8th day of December, 1995.

GEORGE T. SWARTZ
UNITED STATES MAGISTRATE JUDGE

Exhibit_____(GHB-68)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' MOTION FOR EXPEDITED RECONSIDERATION OF THE COURT'S RULING ON RES JUDICATA AND IN REPLY TO AVATAR HOLDINGS' MOTION FOR CLARIFICATION OF THE COURT'S ORDER

Plaintiff, the United States of America, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, respectfully moves this Court for expedited reconsideration of its November 22, 1995 Order. As grounds for this Motion, the United States respectfully refers the Court to the Memorandum in Support of the United States' Motion for Expedited Reconsideration of the Court's Ruling on Res Judicata and in Reply to Avatar Holdings' Motion for Clarification of the Court's Order, which is filed herewith.

DATED: December 18, 1995 Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General

By: _____

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CERTIFICATE OF SERVICE

I certify that I caused copies of the UNITED STATES' MOTION FOR EXPEDITED RECONSIDERATION OF THE COURT'S RULING ON RES JUDICATA AND IN REPLY TO AVATAR HOLDINGS' MOTION FOR CLARIFICATION OF THE COURT'S ORDER, and MEMORANDUM IN SUPPORT, to be served by facsimile transmission (except as otherwise indicated) on December 18, 1995 on the following attorneys of record:

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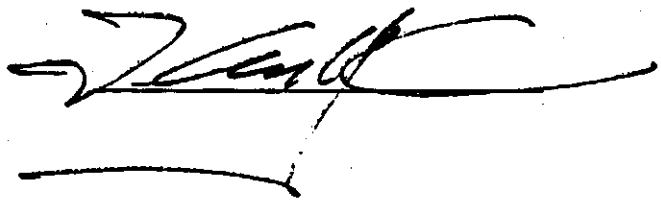

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' MEMORANDUM IN SUPPORT OF ITS MOTION FOR EXPEDITED RECONSIDERATION OF THE COURT'S RULING ON RES JUDICATA AND IN REPLY TO AVATAR HOLDINGS' MOTION FOR CLARIFICATION OF THE COURT'S ORDER

INTRODUCTION

In its November 22, 1995 Order, the Court held that the United States' claims against Florida Cities for unpermitted discharges from the Barefoot Bay and Carrollwood wastewater treatment plants, as well as the Administrative Order violations at Barefoot Bay, are barred by the doctrine of res judicata. The United States moves for reconsideration of that holding, while Avatar Holdings moves for clarification of the order. Both parties also move for expedited consideration.

The United States contends that the claims in question are not barred by res judicata and that it is entitled to summary judgment on those claims as against Florida Cities. If the Court agrees, there is no need to reach Avatar's motion.

DISCUSSION

I. Res Judicata

The question of whether res judicata applies to bar the claims in question is a complicated question of law which

requires close examination.[1] While the United States does not take issue with the general principles the Court articulates in its November 22, 1995 Order, under applicable case law, those general principles must be limited in their specific application to the facts of this case. In the final analysis, that application should result in a finding that the claims are not precluded.

In order for the doctrine of res judicata to apply to preclude a future claim, all of the following four elements must be satisfied: (1) a final judgment on the merits was rendered in the previous suit; (2) the judgment was rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, are identical in both cases; and (4) the same cause of action is involved in both cases. Migra v. Warren City School District Board of Education, 465 U.S. 75, 77 n. 1 (1984). (Citations omitted). Thomas v. Evans, 880 F.2d 1235, 1240 (11th Cir. 1989). See also Lowe v. Telesat Cablevision Inc., 825 F. Supp. 1000, 1002 (M.D. Fla. 1993). The party asserting res judicata bears the burden of establishing that it applies. American Federation of Gov't Employees v. Federal Labor Relations Authority, 835 F.2d 1458, 1463 (D.C. Cir. 1987).

First, res judicata does not apply in this case because there was no final judgment on the merits by a court of competent

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[1] Because Florida Cities failed to raise res judicata in its summary judgment brief, and raised it only in cursory terms in a subsequent "Notice of Dispositive Authority," the Court received limited briefing on this complex issue.

jurisdiction. While an administrative order, under some circumstances, can be the basis for future claim preclusion, those circumstances are not present in the instant case. As the Eleventh Circuit noted in Texas Employers' Insurance Association v. Jackson, 862 F.2d 491, 501 (11th Cir. 1988) quoting at length with approval the Restatement (Second) Judgments § 26(1)(c), a distinction must be made between proceedings in courts and administrative agencies, and particularly between the authority of the different tribunals.[2] As the Third Circuit has noted, in order to constitute a "court of competent jurisdiction," the administrative "tribunal must have the power to accord relief which is the substantial equivalent to that available to the EPA in federal courts." Baughman v. Bradford Coal Co., Inc., 592 F.2d 215 (3rd Cir. 1979) (Clean Air Act).

The distinction between EPA's authority and the Court's is vital in this case, because under its administrative authority under the Clean Water Act, 33 U.S.C. § 1319(g)(2)(A), EPA can only impose a penalty of up to $10,000 per violation, with a maximum of $25,000,[3] whereas in a civil judicial action, it can

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[2] "'Section 26(1)(c) provides that preclusion is inapplicable to that part of a claim that is a possible basis for a second action where 'the plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of limitations on the competency of the [tribunal].'" Jackson, 862 F.2d at 502 quoting Restatement (Second) Judgments.

[3] These are the statutory limits for "Class I" administrative penalties, the type of penalties sought in the respective administrative complaints for the Barefoot Bay and Carrollwood violations. See Exhibits B and D to United States' earlier Motion for Reconsideration.

seek penalties of up to $25,000 per day for each violation, 33 U.S.C. § 1319(d), with no maximum. In other words, the total statutory maximum in an administrative action is equivalent only to the statutory maximum for only one violation in a civil judicial action. EPA simply does not administrative authority even remotely equivalent to the Court's.

Furthermore, the discovery procedures in an EPA administrative proceeding are vastly different from those available in a civil judicial action. This distinction is of particular significance in the instant case because, as the United States has previously argued, this case was expanded to include the Barefoot Bay and Carrollwood facilities after extensive discovery revealed an ongoing pattern and practice of Clean Water Act violations, including unpermitted discharges at three facilities, as well as the role of the parent company in those violations. Such discovery simply was not available under the earlier administrative proceedings.[4]

In short, because of the vast limits on the nature of administrative proceedings under the Clean Water Act, EPA should not be considered a "court of competent jurisdiction" for res judicata purposes. Moreover, to hold that it is, and that its orders have preclusive effect on future civil judicial actions, would be directly contrary to the intent of Congress in granting the limited authority to EPA to proceed administratively under

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[4] For example, there is no deposition authority in Clean Water Act administrative proceedings.

narrowly prescribed conditions, and thereby reduce the number of civil judicial actions brought in the federal district courts. In this case, the Act worked as it should in the sense that EPA brought limited administrative actions against Florida Cities, reserving at all times it right to bring a full-blown civil action if the circumstances so warranted. When its graduated approach proved ineffective in curbing Florida Cities' violations, it resorted, as it should, to federal district court.[5] When that action finally revealed the full nature and extent of Florida Cities' violations, as well as Avatar's involvement, the case was expanded to include violations for which they had not previously been penalized.

Second, the claims brought in the instant action simply do not constitute the same cause of action for res judicata purposes because the consent judgments in the two administrative proceedings unambiguously state the precise claim being settled. "The preclusive effect of a settlement is measured by the intent of the parties to the settlement." Greenberg v. Board of Governors of the Federal Reserve System, 968 F.2d 164, 168 (2d Cir. 1992). As previously held by this Court, the settlements

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[5] Such a graduated approach to enforcement is entirely consistent with the discretion that the United States has to employ a wide range of mechanisms to enforce the Act. The flexible enforcement scheme includes criminal remedies, civil injunctions, civil judicial penalties, two classes of administrative penalty orders, administrative compliance orders, and emergency powers. See United States Environmental Protection Agency v. City of Green Forest, Arkansas, 921 F.2d 1394, 1399 (8th Cir. 1990), cert. denied, 502 U.S. 956 (1991). See generally 33 U.S.C. §§ 1319 and 1364.

unambiguously encompassed only the unpermitted discharges on the days specified in the agreements themselves, and their scopes are to be discerned within their four corners.[6]

Because the consent judgment are unambiguous as to what claims are being settled, the United States contends that there can be no preclusive effect other than with respect to the violations which were expressly settled. Moreover, under Eleventh Circuit law, the only additional claims that arguably

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[6] In its Order of June 21, 1995 on this issue, the Court held as follows:

> Upon careful review of the relevant pleadings and exhibits, the Court finds....Section 1319(g)(6)(A)(iii) provides that only violations that are expressly resolved in a final administrative order, and for which the violator has paid a penalty, may not be the subject of a subsequent judicial proceeding for civil penalties. 33 U.S.C. § 1319(g)(6)(A)(iii). Each day that illegal conduct continues constitutes a separate day of violation and may be penalized separately. 33 U.S.C. § 1319(d); Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1138-39 (11th Cir. 1990)....Further, the Court finds unpersuasive Florida Cities' argument that the timing of the Consent Agreements indicates that they were in complete settlement of all past alleged violations. **The language of the Consent Agreement is clear as to which violations are covered: those on September 14, 1989 at Barefoot Bay and June 1987-July 1990 at Carrollwood. Had the parties intended the Consent Agreements to reflect a full settlement of all claims, then the specific paragraphs in the Consent Agreement should have indicated those claims were covered.**

Order, June 21, 1995, pp 5-6 [emphasis added]; Order, November 22, 1995, p. 12 n.10.

Pursuant to Rule 10(c), Fed. R. Civ. P., the United States incorporates herein the arguments it made on this issue in its Memorandum in Support of its Motion for Reconsideration of Court's Order on Amendment of Complaint, as well as its Opposition to Florida Cities' Second Motion for Summary Judgment.

can be considered precluded by the earlier administrative proceedings in addition to those specified in the consent judgment are those that occurred before the administrative complaints were filed:

> [W]e do not believe that the res judicata preclusion of claims that 'could have been brought' in earlier litigation includes claims which arise after the original pleading is filed in the earlier litigation. Instead we believe that, for res judicata purposes, claims that 'could have been brought' are claims in existence at the time the original complaint is filed or claims actually asserted by supplemental pleadings or otherwise in an earlier action.

Manning v. City of Auburn, 953 F.2d 1355, 1360 (11th Cir. 1992) [emphasis original]. The Administrative Complaint relating to the Barefoot Bay unpermitted discharges was filed on September 25, 1991. See Exhibit B to United States' Motion for Reconsideration of Court's Order on Amendment of Complaint. Thus, at a minimum, the part of United States' claim in the instant action that alleges unpermitted discharges after that date must survive.[7] The Administrative Complaint relating to the Carrollwood unpermitted discharges was filed on September 15, 1990. See Id., Exhibit D. Thus, at a minimum, the part of United States' claim in the instant action that alleges unpermitted discharges after that date must survive.[8]

Finally, because, under the Clean Water Act, each day of an unpermitted discharge or effluent violation is a separate

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[7] Paragraph 16 of the United States' Second Amended Complaint alleges that these violations continued through October 31, 1991.

[8] Paragraph 30 of the United States' Second Amended Complaint alleges that these violations continued through June 1991.

violation, 33 U.S.C. § 1319(d), Atlantic States Legal Foundation v. Tyson Foods, 897 F.2d 1128, 1139-40 (11th Cir. 1990), each violation constitutes a separate cause of action. Moreover, the administrative penalty provisions of the Act itself clearly provide for a limited preclusive effect: "Action taken by the Administrator ... under this subsection shall not affect or limit the Administrator's ... authority to enforce any provision of this chapter" except for any violation which has been the subject of an administrative order. 33 U.S.C. § 1319(g)(6).[9] Thus, the express language of the Clean Water Act, as construed by the Eleventh Circuit, must preempt common law res judicata notions to the extent that they are otherwise found to apply. See Restatement (Second) Judgments § 83 ("An adjudicative determination of a claim by an administrative tribunal does not preclude relitigation in another tribunal of the same or a related claim based on the same transaction if the scheme of remedies permits assertion of the second claim notwithstanding the adjudication of the first claim.")

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[9] The legislative history of the 1987 amendments to the Clean Water Act make clear the limited nature of the preclusion:

> [Section 309(g)(6) does not apply] to an action for civil penalties for a violation of the same requirement of the Act that is not being addressed administratively for a past violation of another pollutant parameter (even one resulting from the same discharge which is the subject of the administrative civil penalty proceeding).

Conference Report 99-1004, 99th Cong., 2d Sess. (October 15, 1986).

II. Privity

Because res judicata does not bar the claims at issue, it is not necessary for the Court to reach Avatar Holdings' argument that, on the basis of its alleged privity with Florida Cities, it too is immune from these claims. In any event, the irony of Avatar's argument should be addressed. Having vigorously denied liability for the violations alleged in the Second Amended Complaint by distancing itself from Florida Cities, Avatar now seeks to benefit by its status as parent company to avoid liability.

In its November 22, 1995 Order, the Court set the standard that the United States must meet to demonstrate parent company liability in the instant case as follows:

> [I]n order for Avatar Holdings to be held liable for a violation of the Clean Water Act by Florida Cities, Avatar Holdings itself must have acted in such a way that it may be considered a "person who violates" under § 309(d) of the Clean Water Act, through such actions as directing or causing the violations, or exercising actual and pervasive control of Florida Cities to the extent of actually being involved in the daily operations of Florida Cities.

Order, November 22, 1995, p. 29.

As noted in its Motion for Summary Judgment, the United States' theory of the case against Avatar Holdings is that it continued to develop its Barefoot Bay property by selling and marketing lots knowing that each new home would strain the treatment plant's capacity and contribute to an unpermitted discharge into the Sebastian River. The United States alleges that Avatar Holdings thereby violated the Clean Water Act by

directly causing the violations alleged in the Second Amended Complaint with respect to Barefoot Bay.[10] Because the United States' theory with respect to Avatar Holdings' liability for the Barefoot Bay violations is based on direct liability and the United States does not rely on Avatar Holdings' status as Florida Cities' parent company, there can be no privity with respect to these claims.

The United States' claims against Avatar Holdings for the unpermitted discharge claims at Carrollwood, on the other hand, are based on Avatar's pervasive control of Florida Cities. Thus, if the Court finds that the Carrollwood unpermitted discharge claims against Florida Cities are barred by res judicata, sufficient privity may exist to bar those claims against Avatar Holdings as well.

CONCLUSION

The Court should reinstate the Barefoot Bay and Carrollwood unpermitted discharge claims as well as the Administrative Order violations at Barefoot Bay against Florida Cities because they are not barred by res judicata. Summary judgment should be entered in favor of the United States on those claims, at least

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[10] It was apparent from the deposition testimony of Avatar Holdings' Chairman of the Board, Leon Levy, on December 6, 1995 [transcript pending], that Avatar Holdings was well aware in 1980 when it first acquired the Barefoot Bay property that its previous developers were known for developing land without proper sewage. The unpermitted discharges appear to have begun at about the same time, and continued for over a decade.

with respect to Florida Cities.

DATED: December 18, 1995

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice

By: _____

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

AVATAR HOLDINGS, INC., and
FLORIDA CITIES WATER COMPANY, INC.,

Defendants.

CIVIL ACTION NO.
93-281-CIV-FTM-21

UNITED STATES' MOTION AND MEMORANDUM FOR CONTINUANCE OF TRIAL AND EXTENSIONS OF TIME IN LIGHT OF LAPSE IN APPROPRIATIONS

Counsel for Plaintiff, United States of America, acting at the request and on behalf of the Administrator of the United States Environmental Protection Agency, hereby moves for a continuance of the trial, set to commence during the Court's January 2, 1996 Trial Term, and extension of other deadlines. The reasons for this request are as follows:

(1) Pursuant to the Court's Order of July 18, 1995, the trial is set for the January 1996 trial term.

(2) Pursuant to the Order Limiting Time for Completion of Discovery and Scheduling of Final Pretrial Conference, entered February 27, 1995, as amended by the Court's Order of July 18, 1995, the parties are required to file and serve a Trial Brief or Trial Memorandum and Proposed Findings of Fact and Conclusions of Law not later than December 28, 1995.

(3) As set forth in paragraph (d) of the Joint Pretrial Statement, the United States and Florida Cities requested the

Court's permission to submit revised exhibit lists with notations of all objections on December 22, 1995.

(4) As the Court is aware, on December 18, 1995, the Office of Management and Budget directed Executive Agencies including the Department of Justice to modify their operations in response to a lapse of appropriations as of midnight on December 15, 1995. Agencies without current appropriations are nonetheless authorized to conduct certain activities, such as those necessarily implied by statute, those necessary for the President to discharge his Constitutional duties, and those necessary to protect life and property.

(5) We are committed to meeting all applicable court deadlines. However, in light of the budget situation, we believe that it is appropriate for the Court to grant a reasonable extension of time for the upcoming deadlines. If this budget situation persists for an extended period, we may seek an additional extension of time.

(6) We therefore move the Court to modify the scheduling orders as follows:

(a) Continue the Trial currently set for the January 1996 trial term until the February 1996 trial term.

(b) Extend the deadline for submission of the Trial Briefs or Trial Memoranda and Proposed Findings of Fact and Conclusions of Law from December 28, 1995 to January 26, 1996.

(c) Extend the deadline for submission of revised exhibit lists with notations of all objections to January 12, 1996.

(7) We regret the inconvenience to the Court caused by the lapse in appropriations.

DATED: December 18, 1995

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

By: _____

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CERTIFICATE OF SERVICE

I certify that I caused copies of the foregoing UNITED STATES' MOTION FOR EXTENSION OF TIME IN LIGHT OF LAPSE IN APPROPRIATIONS and proposed ORDER to be served by facsimile transmission (except as otherwise indicated) on December 18, 1995 on the following attorneys of record:

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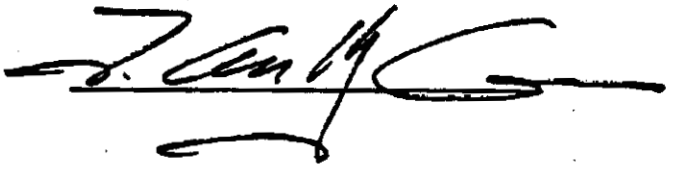

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21 ORDER

This matter is before the Court upon the United States' Motion for Continuance of Trial and Extensions of Time in Light of Lapse in Appropriations. Upon consideration of the Motion, IT IS HEREBY ORDERED that the Motion is GRANTED. The schedule for this action is modified as follows:

(1) Trial currently set for the January 1996 trial term is continued until the February 1996 trial term.

(2) The deadline for submission and service of Trial Briefs or Trial Memoranda and Proposed Findings of Fact and Conclusions of Law is continued until January 26, 1996.

(3) Revised exhibit lists with notations of all objections shall be filed on or before January 12, 1996.

DONE AND ORDERED this ____ day of _____, 1995.

RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

FILED

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CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

Plaintiff,

V.

CASE NO. 93-281-CIV-FTM-21

AVATAR HOLDINGS, INC., and
FLORIDA CITIES WATER COMPANY,

Defendants.

ORDER

This cause comes before the Court on several motions: (1) Avatar Holdings' Motion for Clarification of the Court's Order (Dkt. 225) and Plaintiff's reply (Dkt. 230) thereto; (2) Avatar Holdings' Motion for Emergency Consideration (Dkt. 227); (3) United States' Motion for Expedited Reconsideration of the Court's Ruling on Res Judicata (Dkt. 230); and (4) United States' Motion for Continuance of Trial and Extension of Time in Light of Lapse in Appropriations (Dkt. 232), and Defendants' Joint Response in opposition thereto.

I. Motion for Reconsideration

Plaintiff requests this Court to reconsider that portion of the Court's November 22, 1995 Order (Dkt. 212) finding that the allegations in paragraphs 16-23 and 30 of the Second Amended

Complaint are barred by res judicata.[1] Plaintiff first argues that res judicata does not apply to this case because the second element of the doctrine of res judicata, that the previous judgment was rendered by a court of competent jurisdiction, is lacking in this case.[2] Plaintiff argues that a distinction must be made between the administrative agency's authority and the Court's authority to adjudicate Clean Water Act claims due to differences in maximum penalties that may be ordered and differences in discovery procedures for the two proceedings. The Court notes that, prior to ruling on the parties' motions for summary judgment, it directed Plaintiff to file a response to Defendant's Notice of Dispositive Authority. In its response, Plaintiff did not indicate that the second element was lacking but rather argued that the fourth element, that the same cause of action is involved in both cases, was lacking; however, the Court rejected Plaintiff's argument. Secondly, Plaintiff reiterates its argument, which was set forth in its response to Defendant's Notice of Dispositive Authority, that the claims at issue do not constitute the same cause of action for res judicata purposes because the consent judgments in the two administrative proceeds clearly state the specific claims that were settled.

Although the Federal Rules of Civil Procedure make no mention of a motion for rehearing or reconsideration, such a motion finds some support in federal practice and may in some circumstances perform a valuable function. A motion to reconsider is:

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[1]Paragraph 16 asserts the claim that Defendants discharged pollutants from Barefoot Bay without an NPDES permit from July 1, 1990 to October 31, 1991. Paragraphs 17-23 assert the claims that Defendants violated EPA Administrative Order 90-106. In paragraph 30, Plaintiff claims that from August to June 1991, Defendants discharged pollutants from Carrollwood without an NPDES permit.

[2]The doctrine of res judicata bars a subsequent suit if four elements are present: (1) a final judgment on the merits; (2) the judgment was rendered by a court of competent jurisdiction; (3) the parties or those in privity with them are identical in both cases; and (4) the same cause of action is involved in both cases. Thomas v. Evans, 880 F.2d 1235, 1240 (11th Cir. 1989).

> appropriate where, for example, the court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the court by the parties, or has made an error not of reasoning but of apprehension. A further basis for a motion to reconsider would be a controlling or significant change in the law or facts since the submission of the issue to the court. Such problems rarely arise and the motion to reconsider should be equally rare. . . [A] motion for reconsideration does not provide an opportunity simply to reargue an issue the Court has once determined.

Times Newspapers, Ltd. v. Times Publishing Co., 1993 WL 120614 at *9 (M.D. Fla. Feb. 16, 1993)(citations omitted). Further the Eleventh Circuit has stated, "A district court's denial of reconsideration is especially soundly exercised when the party has failed to articulate any reason for the failure to raise an issue at an earlier stage in the litigation." Lussier v. Dugger, 904 F.2d 661, 667 (11th Cir. 1990)(citation omitted). The Plaintiff's motion for reconsideration is an attempt to reargue the same issues that the Court already has considered. The Court finds that the Plaintiff's memorandum, in large part, is a reargument of Plaintiff's position as set forth in its response to the Notice of Dispositive Authority and, further, that Plaintiff has not contended and cannot contend that the other proffered arguments were not available for use in opposing the Defendant's Notice of Dispositive Authority and accompanying memorandum. Notwithstanding the above, the Court has reviewed the Plaintiff's additional arguments and finds them unpersuasive regarding the Court's previous ruling on the applicability of res judicata to the claims at issue.

II. Motion for Clarification

Avatar Holdings requests that the Court clarify its November 22, 1995 Order to indicate that the doctrine of res judicata, which the Court held applies to the claims against Florida Cities in paragraphs 16-23 and 30 of the Second Amended Complaint, applies with equal force to Avatar Holdings. Avatar Holdings asserts that the language of the Court's Order concerning the

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res judicata issue encompasses Avatar Holdings, as the Court stated that the Plaintiff "has not argued or set forth any evidence indicating that the allegations [in paragraphs 16-23 and 30] could not have been raised in the prior administrative proceedings," which proceedings were against only Florida Cities. Avatar Holdings points out that the Court noted in its Order that "Avatar Holdings . . . relies on and incorporates by reference the Florida Cities' memorandum addressing the alleged underlying violations." Further, Avatar Holdings points out that the Court found that all four elements of res judicata were present, including the third element that the parties or those in privity with them are identical in both cases. Thomas v. Evans, 880 F.2d 1235, 1240 (11th Cir. 1989)(Emph. added). Avatar Holdings thus argues that, by relying on Thomas and acknowledging that Avatar Holdings relied upon Florida Cities' memorandum, the Court implicitly recognized that Avatar Holdings, as a party in privity with Florida Cities, was also protected by the res judicata doctrine. Moreover, Avatar Holdings asserts that the overwhelming weight of federal authority supports its position that a party cannot allege that a parent corporation is liable for the actions of its subsidiary under a theory that the parent controlled the subsidiary and, at the same time, deny that the parent corporation is in privity with the subsidiary for the purpose of res judicata.

In response, Plaintiff states for the first time that its theory of the case against Avatar Holdings is that Avatar Holdings violated the Clean Water Act by its efforts to develop Barefoot Bay and that its theory with respect to Avatar Holdings' liability for the Barefoot Bay violations is based on direct liability rather than parent company liability. Plaintiff further states, however, that the claims against Avatar Holdings for the alleged violations at Carrollwood are based on Avatar Holdings' pervasive control of Florida Cities and, therefore, if the Court upholds its

ruling that the Carrollwood claims are barred by res judicata as to Florida Cities, said claims are likely barred against Avatar Holdings as well.

With respect to the claims at issue at Barefoot Bay, the Court finds that at no time prior to the Plaintiff's instant response to the motion for clarification has the United States asserted that the claims against Avatar Holdings were based on direct liability, such as in the Second Amended Complaint or in its Motion for Reconsideration of the Court's Order on Amendment of Complaint. Significantly, in its memorandum in support of its motion for summary judgment, Plaintiff clearly states that liability is asserted against Avatar Holdings as a "parent," and Plaintiff further argues that Avatar Holdings should be held liable under the Jacksonville Electric test[3] for parent company liability. (Dkt. 164, p. 18). Further, Plaintiff indicates in said memorandum that its examples of Avatar Holdings' actions "serve[] to illustrate that Florida Cities Water Company is merely Avatar Holdings' alter ego." (Dkt. 164, p. 27). The Court finds that in its motion for summary judgment and throughout this case, Plaintiff has argued that Avatar Holdings should be held liable as a parent. The Court therefore agrees with Avatar Holdings' position that Plaintiff may not now be permitted to argue that Avatar Holdings is liable for the actions of its subsidiary under a theory of parent control of its subsidiary and, at the same time, assert that although it is a parent corporation, it is not in privity with the subsidiary for the purpose of res judicata. See Mercer v. Honda Motor Co., 551 F.Supp. 233, 235 (M.D.Fla. 1982); Robinson v. Volkswagenwerk AG, 56 F.3d 1268, 1275 (10th Cir. 1995); Fontura Dev. Corp. v. Centex, 761 F.2d 33, 43-44 (1st Cir.), cert. denied, 474 U.S. 850 (1985). Further, the Court agrees with Avatar Holdings' analysis that the Court's November 22, 1995 Order

[3]Jacksonville Electric Authority v. Eppinger and Russell Co., 996 F.2d 1107 (11th Cir. 1993).

implicitly found that the claims barred by res judicata were barred as against Avatar Holdings.

III. Motion for Continuance of Trial

Plaintiff moves the Court to continue the Trial, currently set for the January 1996 trial term, to the February 1996 trial term and to extend the deadline for submission of Trial Briefs or Trial Memoranda and Proposed Findings of Fact and Conclusions of Law. Plaintiff states that on December 18, 1995 the Office of Management and Budget directed Executive Agencies, including the Department of Justice, to modify their operations in response to a lapse of appropriations as of midnight on December 15, 1995. Plaintiff nevertheless states that "We are committed to meeting all applicable deadlines." Plaintiff does not indicate that the lapse of appropriations in any way hinders Plaintiff from being ready for a January trial, nor does Plaintiff set forth any other good cause for a continuance of the trial date. Nevertheless, it appears that, based upon the Court's calendar and other commitments and time constraints, this case cannot be reached sooner than January 16, 1996.

Upon consideration of the foregoing, it is hereby **ORDERED** and **ADJUDGED** that:

(1) Avatar Holdings' Motion for Clarification of the Court's Order (Dkt. 225) is **GRANTED**, and the Court's November 22, 1995 Order is **CLARIFIED** insofar as the doctrine of res judicata bars Plaintiff from pursuing the claims in paragraphs 16-23 and 30 of the Second Amended Complaint against Avatar Holdings.

(2) Avatar Holdings' Motion for Emergency Consideration (Dkt. 227) is **GRANTED**.

(3) United States' Motion for Expedited Reconsideration of the Court's Ruling on Res Judicata (Dkt. 230) is **DENIED**.

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(4) United States' Motion for Continuance of Trial and Extension of Time in Light of Lapse in Appropriations (Dkt. 232) is DENIED; except, however, that the trial of this case shall not commence prior to January 16, 1996.

DONE AND ORDERED, at Tampa, Florida, this 21st day of December, 1995.

RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of record

Exhibit_____(GHB-70)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION NO.:**
	)	**93-281-CIV-FTM-21**
FLORIDA CITIES WATER COMPANY	)	
and	)	
AVATAR HOLDINGS INC.,	)	
	)	
Defendants.	)	
	)	

Defendant Florida Cities Water Company's
Proposed Findings of Fact and Conclusions of Law

Defendant, Florida Cities Water Company hereby submits its Proposed Findings of Fact and Conclusions of Law pursuant to the Court's February 27, 1995 order. Florida Cities believes that trial in the matter will demonstrate that the Court should substantially mitigate the statutory maximum penalty, and should impose a nominal monetary penalty on Florida Cities for the violations of the Clean Water Act.

I. Florida Cities Water Company's Proposed Findings of Fact

The Parties

1. Defendant, Florida Cities Water Company, is a utility monopoly, incorporated in the State of Florida. Florida Cities owns and operates six wastewater treatment plants in Florida. Three of Florida Cities' wastewater treatment plants are subjects in this case: Barefoot Bay, Carrollwood, and Waterway Estates.

2. The pending action was born out of a citizen's suit styled North Fort Myers Homeowner's Association v. Florida Cities Water Company, brought in United States District Court in the Middle District of Florida for violations of the Clean Water Act at Waterway Estates. Notice of the citizen's suit was provided to EPA under provisions of the CWA. The citizen's suit against Waterway Estates was eventually dismissed for lack of prosecution. Although alleging violations of the CWA, the underlying gravamen was to prevent Waterway Estates from providing wastewater treatment service to the HUD-sponsored Barrett Park development project. There were several contacts between counsel for the North Fort Myers Homeowner's Association and EPA enforcement officer Ken Kwan.

3. The Barefoot Bay, Carrollwood, and Waterway Estates plants provide necessary wastewater treatment service to residential areas. Without this wastewater treatment, human health and the environment would become endangered.

4. Florida Cities Water Company is a utility monopoly providing investor-owned utility service within a protected franchise area. Being a monopoly, Florida Cities' rates and service are regulated by the Florida Public Service Commission ("FPSC"). FPSC insures

that Florida Cities' revenue and profit level is reasonable. If Florida Cities Water Company's profits exceed the FPSC's authorized level, the FPSC will order a rate reduction.

5. Florida Cities does not have the freedom to increase its service rates at will. Whenever an increase in rates is required, it must petition the FPSC to do so. Florida Cities will petition when profits have decreased to an unacceptable level. FPSC will determine whether an increase in rates is justified.

6. The only way that Florida Cities can increase its profits is to make capital investments and build plant. However, Florida Cities cannot capitalize on its investments until construction is completed because Florida Cities has to incur financing costs as the plant is being built. Extending the construction time increases financing costs without allowing for a rate increase from the FPSC. Therefore, there is no economic incentive to delay construction projects.

7. Increased costs are always accompanied by an application to the FPSC for a rate increase. However, the FPSC will only allow pass through to rate payers of those costs that have been prudently incurred. The FPSC does not allow the pass through of environmental penalties into the rate base. Therefore, there is no incentive to avoid environmental compliance and no economic benefit for delaying capital expenditures necessary to come into compliance.

8. Prior to May 1, 1995, dischargers were required to be permitted by both the EPA and the Florida Department of Environmental Protection (formerly "Florida Department of Environmental Regulation"). At all times relevant to this action, Florida Cities complied

with the requirements and authorizations of the FDEP.

Waterway Estates

9. The Waterway Estates Wastewater Treatment Plant is owned and operated by Florida Cities Water Company and is located in Lee County, Florida. Since July 14, 1991, Waterway Estates has discharged treated effluent to the Caloosahatchee River, a class III water of the State of Florida. Prior to July 14, 1991, Waterway Estates discharged treated effluent into a canal which led to the Caloosahatchee River 500 feet away. Until April 1992, Waterway Estates provided secondary wastewater treatment. On April 1992, Waterway Estates began providing advanced wastewater treatment. Waterway Estates discharges approximately 1,000,000 gallons per day.

10. This Court's Order of November 22, 1995 finds that Waterway Estates has exceeded NPDES permit FL0030325 in the following respects for a total of 1038 Clean Water Act violations:

    a. 396 violations for discharge without a NPDES permit between October 1, 1988 and October 31, 1989;

    b. 621 violations for discharging into a canal, a previously permitted discharge location, instead of to the 6-foot contour line of the Caloosahatchee River, between November 1, 1989 and July 14, 1991;

    c. 18 violations of total nitrogen loading and concentration; and

    d. 3 toxicity test violations.

11. In 1981 EPA granted Waterway Estates a NPDES for the surface water discharge of treated effluent to the Caloosahatchee River. Waterway Estates applied for a renewal of

that permit in May 1986.

12. On January 7, 1987, EPA denied Waterway Estates NPDES permit renewal application based upon a 1981 technical document prepared by the FDER. According to EPA, the 1981 FDER technical document represented that Waterway Estates had a zero discharge wasteload allocation, i.e. Waterway Estates would not be allowed to continue its discharge to the Caloosahatchee River. On May 9, 1986, FDER sent a letter to EPA informing EPA that Waterway Estates did in fact have a wasteload allocation. Even with this letter in its possession, EPA denied the permit application in January 1987.

13. The 1981 technical document was a planning document and was not intended to designate the Caloosahatchee River as a water quality limited stream segment. Therefore, EPA's basis in denying the 1986 NPDES permit renewal application is improper.

14. The FDER has declared the wasteload allocation for Florida Cities Waterway Estates was for planning purposes and never incorporated into any state operating permit.

15. The code of federal regulations sets fourth four specific criteria upon which EPA can terminate or refuse to renew a NPDES permit. These criteria were not met.

16. The improper permit denial directly caused Waterway Estates to be in violation of the CWA for discharge without a NPDES permit. Had EPA properly renewed the 1986 permit application, Waterway Estates would not have been in violation. Florida Cities did not challenge the permit denial.

17. In 1986, Waterway Estates possessed a FDER operating permit which authorized the discharge of pollutants to a canal which empties into the Caloosahatchee River.

18. Immediately after EPA's 1987 denial of the NPDES permit application, EPA issued

administrative order 87-085 which was subsequently replaced by administrative order 89-109. Administrative orders 87-085 and 89-109 contained compliance schedules and interim effluent limitations.

19. In December 1987, Florida Cities applied to FDER for a wasteload allocation at the 6-foot contour line of the Caloosahatchee River. The wasteload allocation was granted in early 1989. Once the wasteload allocation was granted, Florida Cities applied to EPA for a NPDES permit. NPDES permit number FL0030325 was issued September 29, 1989 and became effective November 1, 1989. For the first time, EPA was imposing nitrogen limitations and toxicity testing requirements on the Waterway Estates facility.

20. In 1988, FDER issued temporary operating permit DT36-152486 which contained construction deadlines and effluent limitations. These effluent limitations would require Waterway Estates to upgrade its facility to advanced wastewater treatment. However, FDER did not issue a construction permit for the construction upgrade until March 1, 1990, and the Army Corps of Engineers did not issue their construction permit until April 1990. In October 1990, the FDER construction permit was extended to September 1992.

21. The outfall to the six-foot contour line of the Caloosahatchee River was operational on July 14, 1991, ahead of the deadlines established in both the state construction permit and EPA administrative order 89-109.

22. Administrative Order 89-109 set a final compliance date of October 1, 1991 for meeting the effluent limitations in the 1989 NPDES permit.

23. Waterway Estates began providing advanced wastewater treatment in April 1992. AWT removes nitrogen from the effluent and provided capability to meet the nitrogen limits in

the permit. Between November 1, 1989 and April 1992, Waterway Estates was meeting the effluent limitations contained in the 1981 NPDES permit, as was required by Administrative Order 89-109.

24. Once construction began, the Waterway Estates upgrade took less than 2 years to complete. A project of this type normally takes between 2 and 3 years to complete.

25. Between 1989 and 1992, Florida Cities had provided status reports and updates to EPA on a regular basis. Whenever EPA requested information, Florida Cities supplied it in a timely and candid fashion. Florida Cities did not hide any information from EPA.

Carrollwood

26. The Carrollwood Wastewater Treatment Plant was owned and operated by Florida Cities Water Company, until the plant was demolished on late 1992. Carrollwood was located in Hillsborough County, Florida. The Carrollwood Plant discharged treated effluent into Sweetwater Creek, a class III water of the State of Florida. Roughly 40,000 feet from Carrollwood, Sweetwater Creek empties into Old Tampa Bay. Until January 1992 when the facility was removed from operation, Carrollwood provided secondary wastewater treatment to a residential community and discharged approximately 450,000 gallons per day of secondarily treated effluent.

27. This Court's Order of November 22, 1995 finds that Carrollwood has exceeded NPDES permit FL0029319 for a total of 234 Clean Water Act violations for phosphorous, chlorine, nitrogen, CBOD, and fecal coliform.

28. In August 1983, the Carrollwood plant was required by the State of Florida to interconnect with the Hillsborough County system. However, at that time, Hillsborough

County was not projected to have available capacity until late 1985.

29. Even though Florida Cities was required by its FDEP permit to connect with Hillsborough County, Florida Cities investigated options for re-use at a nearby golf course and for interconnection with the City of Tampa wastewater system. Neither of these options were available or reasonable for Florida Cities to pursue, and the options were not approved by the FDEP permit.

30. Over the course of the next eight years, Hillsborough County repeatedly extended its projections of available capacity for Florida Cities' Carrollwood service area.

31. Hillsborough County did not have capacity to treat Carrollwood's service area and did not make capacity available until 1991.

32. On June 5, 1991, Florida Cities and Hillsborough County reached an agreement whereby Hillsborough County would treat the wastewater from Carrollwood's service area.

33. Between 1982 and 1991, Florida Cities continually pursued Hillsborough County for an interconnection agreement for the treatment of wastewater from Carrollwood's service area, pursuant to the requirements of the 1983 and 1988 FDEP operating permits.

34. In late 1988, the state of Florida passed the Grizzle-Figg bill which created an exception to the no new discharge policy of the Wilson-Grizzle Act of 1972 (repealed in 1981) upon a showing of "minimal negative impact." In 1989, Florida Cities commissioned Limno-Tech, Inc. to perform an environmental impact study of the Carrollwood discharge on Sweetwater Creek. The Limno-Tech study indicated that Carrollwood's discharge would have a minimal negative impact on Sweetwater Creek. The study was completed in late 1989, and amended from time to time until mid-1990. This study

would act as the basis for the state to certify a NPDES permit for the Carrollwood facility.

35. In April 1988, FDER issued Carrollwood an operating permit to the Carrollwood facility. The April 1988 operating permit required Florida Cities to connect to the Hillsborough County system or construction and advanced wastewater treatment facility by October 1, 1990. This state operating permit would expire by its terms on October 1, 1990.

36. As a result of the Limno-Tech minimal impact study, Florida Cities sought bids from outside contractors for construction of an AWT facility at Carrollwood. The FDER issued Florida Cities a construction permit for an AWT facility at Carrollwood in July 1990. About the same time in July 1990, Hillsborough County indicated that it would make capacity available for Carrollwood, but that Florida Cities would have to accept Hillsborough County's connection point and connection cost. The state imposed October 1, 1990 deadline for interconnection or AWT construction was imminent, and Florida Cities re-applied for another operating permit. The permit application was denied, but Florida Cities and FDER entered into a consent order in January 1991 re-incorporating the effluent limitations of the April 1988 operating permit.

37. The January 1991 state consent order extended until April 1992 the construction schedule deadline for interconnection to Hillsborough County or completion of AWT. The consent order also required Florida Cities to continue to operate the wastewater treatment plant in accordance with the 1988 effluent limitations.

38. Florida Cities notified EPA of a tentative interconnection agreement with Hillsborough County on April 1, 1991. In its April 1 letter to EPA, Florida Cities requested that the

effluent limitations in the January 1991 FDER consent order be incorporated as interim limits in the soon to be issued NPDES permit.

39. Another formal notification of the interconnection agreement with Hillsborough County was given to EPA on June 24, 1991. On June 24, 1991, Florida Cities requested relief from the terms of the NPDES permit and alternatively requested that the sampling and monitoring terms of EPA Administrative Order 90-100 remain in effect until the discharge to Sweetwater Creek ceased. Florida Cities continued to make the same request regarding the terms of AO 90-100 for each month between June 1991 and January 1992.

40. As a result of the interconnection agreement with Hillsborough County, Florida Cities abandoned its plans to pursue the construction of an advanced wastewater treatment facility at Carrollwood. The facility would have cost Florida Cities customers $4.4 million and would have taken a significant period of time to construct. By contrast, interconnection with Hillsborough County would cost customers only $1.5 million and would take less time to construct.

41. Between July 1, 1991 and January 6, 1992, Carrollwood complied with the sampling and monitoring requirements of Administrative Order 90-100.

42. Carrollwood's discharge to Sweetwater Creek ceased on January 6, 1992 as a result of the interconnection with Hillsborough County, which connection had been required since 1983.

43. On March 6, 1992 Administrative Order 90-100 was inactivated for compliance therewith.

44. Between July 1, 1991 and January 6, 1992 the Carrollwood facility routinely met or exceeded the performance standards for conventional pollutants and met the effluent limitations and monitoring requirements of the active administrative orders. The level of treatment required by the July 1, 1991 NPDES permit FL0029319 reflected increased treatment requirements for phosphorous and nitrogen which were unattainable by the existing plant.

45. In late 1990, EPA Region IV determined that the Carrollwood discharges had caused "a lack of severe environmental harm" to Sweetwater Creek.

46. Florida Cities was required to interconnect to Hillsborough County but was delayed by forces outside of its control.

Barefoot Bay

47. The Barefoot Bay Wastewater Treatment Plant ("Barefoot Bay") is owned and operated by Florida Cities Water Company. Barefoot Bay is located in Brevard County, Florida. Barefoot Bay discharges treated effluent into an agricultural drainage canal which leads to the Sebastian River, a Class III water of the State of Florida, approximately 1 mile downstream. Barefoot Bay provides secondary wastewater treatment to a residential community and is currently undergoing a plant modification to provide advanced wastewater treatment. Barefoot Bay discharges approximately 600,000 gallons per day.

48. This Court's Order of November 22, 1995 finds that Barefoot Bay has exceeded NPDES permit FL0042293 in the following respects for a total of 264 Clean Water Act violations:

a. 182 violations of the total residual chlorine limitation between September

1992 and March 1993;

b. 3 chronic toxicity test failures in September-October 1992, May 1993, and February 1994;

c. 79 violations for failure to report biochemical oxygen demand on a weekly basis between November 1991 and June 1993, and twice in November 1993.

49. The Barefoot Bay plant utilizes two holding/percolation ponds which have capacity to store a volume equivalent to 20 days of treatment plant operations.

50. In September 1992, Barefoot Bay purchased and put into use a new Hach DPD DR-100 chlorine tester. Prior to September 1992, Barefoot Bay had been testing for total residual chlorine with an older Hach colorimeter.

51. The DPD DR-100 is a C.F.R./EPA approved method for testing chlorine limits of 0.01milligrams per liter ("mg/l"). 40 C.F.R. § 136.3, Table 1B. However, EPA guidance acknowledges that the DPD DR-100 colorimeter is inaccurate below levels of 0.1 mg/l. To account for this inaccuracy, EPA guidance allows dischargers who test for total residual chlorine with the DPD DR-100 colorimeter to report measurements below 0.1 mg/l as "ND" or non-detectable. Between September 1992 and March 1993, Florida Cities reported chlorine residuals at or below 0.1 mg/l. Had Florida Cities reported "ND" instead of an actual number, Florida Cities would have been in compliance with the Clean Water Act.

52. Once Florida Cities reported chlorine residuals at Barefoot Bay, Florida Cities took immediate action to investigate and eliminate the chlorine by installing a sulfur dioxide

feed. Sulfur dioxide (SO_2), when combined with the chlorine residual, reacts immediately to eliminate chlorine. However, an SO_2 feed system must be approved and permitted by the FDER. After initial reporting of chlorine in September 1992, Florida Cities applied to FDER for an SO_2 construction permit around November 15, 1992. The SO_2 feed system was eventually constructed, permitted, and placed into service by March 3, 1993.

53. The SO_2 feed system cost Florida Cities approximately $1500.00.

54. Chronic toxicity is a test parameter that is applied when there exists no low-flow dilution of effluent under critical conditions. Chronic toxicity measures both the rate of survival as well as the growth rate of a particular test species. Acute toxicity measures only the rate of survival. Chronic toxicity is a more stringent test than acute toxicity, and is very difficult to pass.

55. The most common result of chronic toxicity failures is the result of ammonia in the effluent. Ammonia is made of nitrogen and hydrogen (NH_3). When organic matter decomposes, ammonia is produced. Ammonia can be toxic to other organisms, unless the treatment plant has the capability to remove nitrogen from the effluent.

56. Secondary treatment does not provide for nitrogen or phosphorous (collectively known as "nutrients") removal from effluent. Advanced wastewater treatment does provide for nutrient removal from effluent.

57. No evidence establishes that failure to pass the chronic toxicity test is a direct result of Barefoot Bay's failure to implement wastewater treatment processes. Rather, Barefoot Bay was not designed to remove nitrogen, and Barefoot Bay plant was able to pass the

chronic toxicity test without being upgraded to advanced wastewater treatment.

58. Barefoot Bay has been able to pass some chronic toxicity tests because the plant began super-aerating and nitrifying the effluent in 1992. Although this process cannot accurately predict nutrient removal levels, super-aeration and nitrification has worked at least part of the time at Barefoot Bay. Barefoot Bay has continued to super-aerate and nitrify since 1992

59. The Code of Federal Regulations acknowledges that a carbonaceous biochemical oxygen demand parameter ("$CBOD_5$") may be substituted for a regular biochemical oxygen demand ("BOD_5") parameter. 40 C.F.R. § 133.102.

60. BOD_5 and $CBOD_5$ are closely related. However, $CBOD_5$ is a more accurate indicator of wastewater treatment plant performance.

61. Florida Cities realized as a result of a compliance inspection performed on June 10, 1993 by EPA that Florida Cities had been reporting $CBOD_5$ levels instead of BOD_5 levels. Florida Cities should have been reporting BOD_5 levels on its DMRs to EPA as required in the permit.

62. Between November 1991 and November 1993 FDER required Barefoot Bay to monitor $CBOD_5$.

63. At all times between November 1991 and November 1993, Barefoot Bay was complying with state-imposed CBOD levels. In addition at all times between November 1991 and November 1993, Barefoot Bay would have been in compliance with the CBOD levels imposed in March 1994. The EPA imposed CBOD levels of 30 mg/l monthly average and 60 mg/l daily maximum.

64. In October 1993, Barefoot Bay applied to EPA for a modification of NPDES permit FL0042293 to allow monitoring for $CBOD_5$ instead of BOD_5. EPA granted the modification request for permit FL0042293 on March 28, 1994. At all times between November 1991 and November 1993, Barefoot Bay would have been in compliance with the subsequent modification of the Barefoot Bay permit for $CBOD_5$ testing.

EPA Guidance

65. EPA has extensive guidance on enforcement of the Clean Water Act. EPA uses an enforcement response hierarchy ranging from a mere telephone call to civil or criminal judicial actions. Administrative orders fall in the middle of the enforcement hierarchy. Administrative orders are issued under some conditions when a facility is not in compliance with the Clean Water Act. Administrative orders are injunctive in nature and provide dates by which a discharging facility must come into compliance. When a NPDES permit and an administrative order exist concurrently, the administrative order takes precedence for purposes of measuring a facilities compliance. Legally, an administrative order is an enforcement action, but in practical terms, EPA uses administrative orders as de facto modifications of permit limits. In essence, administrative orders act to lessen the seriousness of a particular violation.

66. Administrative orders are ended in one of three ways: either by an inactivation letter from EPA or by the issuance of a subsequent administrative order or by an administrative order's own terms.

67. EPA must assure that state water quality standards are maintained. EPA's National

Pollutant Discharge Elimination System ("NPDES") permit program uses effluent limitations in each NPDES permit to limit the pollutants from causing water quality standards violations. Effluent limitations are developed by three methods approved by EPA. The three methods are: effluent limitations guidelines, water quality considerations, and best professional judgment.

68. Effluent limitation guidelines are scientifically derived and when used in an NPDES permit are called technology-based limits. If these effluent limitations are deemed sufficient to protect approved state water quality standards then EPA does not need a more stringent limitation in the NPDES permit.

69. If the effluent limitation guideline is insufficient to protect state water quality standards, then more specific limits, more stringent than effluent limitations, must be developed by the NPDES permit writer to protect water quality standards. This water quality based limitation must then be used in the discharger's NPDES permit.

70. EPA's water quality based limitation must be based on an EPA and state approved wasteload allocation for the receiving water. EPA and Florida entered into an agreement as to the approval process of wasteload allocations for Florida waters. Allowable wasteload discharges for streams in Florida must be approved or disapproved, pursuant to the agreement, not later than 30 days after submission from Florida to EPA's Region IV. EPA admits it never approved or disapproved the wasteload allocation for Florida Cities' Waterway Estates facility. Such inaction by EPA Region IV constitutes a violation of the agreement which follows the requirements of the Clean Water Act.

71. Wasteload allocations are allocations of a receiving water's capacity to handle pollution

to a particular discharger. Individual states establish total maximum daily loads ("TMDL") that will be used for a develop particular discharger's wasteload allocation ("WLA"). TMDLs and WLAs are required to go through a formal administrative approval process so that they may be made into requirements, not merely recommendations.

72. The NPDES permitting system allows a point source to discharge any pollutant without limit, save for those pollutants expressly limited by a NPDES permit. To determine the exact particular requirements imposed upon a discharger, a Court must look only so far as the NPDES permit.

73. NPDES permit writing is restrained in certain respects. EPA must give deference to the judgment of a state regulatory agency unless EPA determines the state has committed clear error or where a state overlooks applicable state water quality standards.

74. EPA Region IV's agreement with the State of Florida requires EPA to impose in its NPDES permits the interpretation of state law which Florida has embodied in FDER permits unless FDER's interpretations are clearly erroneous or EPA has strong scientific or technological support for a different interpretation.

75. If EPA disagrees with Florida's permit requirements and interpretations, EPA must write into the NPDES permit the reason(s) why the FDER permit is clearly in error. No NPDES permit in this case contains any determination that an FDER permit is clearly in error.

II. Florida Cities Water Company's Proposed Conclusions of Law

1. Any and all conclusions of law included in the foregoing findings of fact are adopted herein.

2. This Court has subject matter jurisdiction over the claims for relief set forth in the Second Amended Complaint pursuant to 33 U.S.C. § 1319(b) and 28 U.S.C. §§ 1331, 1345, 1355.

3. Venue is proper in this judicial district, and Defendants do not dispute venue. See Defendants' answers to Second Amended Complaint.

4. The Clean Water Act ("CWA") was enacted by Congress in 1972 with the express objective of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a); Hawaii's Thousand Friends v. City and County of Honolulu, 821 F.Supp. 1368, 1391 (D. Haw. 1993).

5. Defendants, Florida Cities Water Company and Avatar Holdings Inc., qualify as "person[s]" under the CWA, 33 U.S.C. § 1362.

6. As to all matters of liability alleged in the Second Amended Complaint, the Court has previously decided liability matters in an order dated November 22, 1995, 93-281-CIV-FTM-21 (Dkt. 232) and in a clarification dated December 21, 1995, 93-281-CIV-FTM-21 (Dkt. 234).

7. Pursuant to 33 U.S.C. § 1319(d) of the CWA, Florida Cities is liable for civil penalties under the Clean Water Act. In determining the amount of a civil penalty the court is required to consider each of the following factors:

    a. the seriousness of the violation or violations;

b. the economic benefit (if any) resulting from the violation;
c. any history of such violations;
d. any good-faith efforts to comply with the applicable requirements;
e. the economic impact of the penalty on the violator;
f. and such other matters as justice may require.

33 U.S.C. § 1319(d); Atlantic States Legal Foundation v. Tyson Foods, Inc., 897 F.2d 1128, 1140-41 (11th Cir. 1990). The existence of any one of these factors can mitigate against the imposition of the statutory maximum penalty.

8. First, the Court needs to determine the maximum fine for which Florida Cities may be liable. Tyson Foods at 1142. The Court determines the maximum civil penalty in a CWA case by (1) determining the categories of violations, (2) adding up the number of daily violations in each category, (3) totaling the violations in each category, and (4) multiplying this total by $25,000. Hawaii's Thousand Friends at 1395. Second, if the Court decides to reduce the maximum fine, it should reduce the fine in accordance with the factors spelled out in 33 U.S.C. § 1319(d), and the Court should clearly indicate the weight it gives to each of the factors in the statute and the factual findings that support its conclusions. Tyson Foods at 1142.

9. The court may refer to EPA's internal penalty policy for guidance to interpret and assess penalties, but the Court's primary focus should be on the statutory framework of 33 U.S.C. § 1319(d). Tyson Foods at 1142; see also Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125, 84 L.Ed.2d 90, 105 S.Ct. 1102 (1985) ("[the] view of the agency charged with administering the statute is entitled to considerable deference"); Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 890 F.Supp 470 (D. S.C. 1995).

10. The final determination of the appropriate civil penalty is within the sound discretion of the trial court. Hawaii's Thousand Friends at 1395.

11. In evaluating the seriousness of the violations, the Court may evaluate several indicators, including the number of violations, the duration of noncompliance, the significance of the violation (the degree of exceedance and the relative importance of the provision violated), and the actual or potential harm to human health and the environment. Hawaii's Thousand Friends at 1383.

12. Large violations or exceedances do not necessarily mandate that a Court cannot reduce the maximum penalty. United States v. Roll Coater, Inc., 1991 U.S. Dist. Lexis 8790 at 10. "Serious," as used in the CWA, means more than the amount of pollutant over that authorized by regulations, and lack of environmental damage significantly mitigates the seriousness of the violation when calculating penalties. Roll Coater at 11; Atlantic States Legal Foundation v. Universal Tool & Stamping Co., Inc., 786 F.Supp. 743 (N.D. Ind. 1992).

13. The purpose of the economic benefit is to quantify the economic benefit received as a result of delaying capital expenditures necessary to come into compliance with the CWA. Hawaii's Thousand Friends at 1387. The implication of the economic benefit component is that unless the discharger is fined an amount at least as great as the economic gain in not complying with the regulations, the statute serves little deterrent value, but the Court's consideration of the other 309(d) factors can reduce the imposed penalty below the calculated economic benefit. Roll Coater at 12.

14. In determining economic benefit due to delayed compliance, it is unjust to penalize a

discharger for a time period not considered by the Court when calculating the maximum statutory penalty. Roll Coater at 14. In addition, the Court should not penalize a Company for incurring more costs than those necessary to come into compliance with the Act. Roll Coater at 15.

15. The history of violations refers to previous violations not related to the instant litigation. Roll Coater at 16. Florida Cities has paid penalties to EPA for discharge without a permit at Barefoot Bay and Carrollwood. The total of the Barefoot Bay and Carrollwood penalties amounted to $21,000 dollars and covered an aggregate of over 8 years of discharge without a permit violations, approximately 2900 days. These penalties average to be roughly $7.00 per day.

16. Good faith efforts to comply with the CWA includes matters such as the difficulty of compliance and actions of a state environmental agency. Roll Coater at 18; United States v. Edison Co., 725 F.Supp. 928, 933 (N.D. Ohio 1989)(good faith adherence to Ohio EPA's directives and guidance as well as possible lack of effective communication between Ohio EPA and the United States EPA mitigates against a substantial penalty). Moreover, the CWA takes into consideration that if a defendant can demonstrate that it has been proceeding in a good faith attempt to come into compliance with the CWA, then credit is given under the "good faith" mitigation factor. Universal Tool & Stamping Co. at 751-52.

17. A discharger's good faith reliance on EPA interim standards must be a significant mitigation factor in assessing a penalty. Hawaii's Thousand Friends at 1396. Compliance with interim effluent limitations and construction schedules will significantly

mitigate a penalty.

18. Interim measures taken by a discharger geared towards pollution control are evidence of good faith. Roll Coater at 22; Universal Tool & Stamping at 753.

19. Such other matters as justice might require is a catch-all consideration for the court. "The fact that a violator is 'without fault' in committing violations of the CWA does not absolve the violator from penalties, although it may mitigate the amount of penalties assessed." Hawaii's Thousand Friends v. City and County of Honolulu, 821 F.Supp. 1368, 1391 (D. Haw. 1993) (citations omitted).

Waterway Estates

20. The violations of the CWA at Waterway Estates are not serious. Plaintiff admits that it has no evidence of any environmental harm as a result of the Waterway Estates discharges. The violations of discharge without a permit were directly caused by EPA's own mistake. Absent EPA's mistake, no violation of discharging without a permit at Waterway Estates would have occurred. Likewise, Waterway Estates' discharge to the canal is not serious. By its own Administrative Order 89-109, EPA indicated that Waterway Estates could continue to discharge to the canal until August 1, 1991. Waterway Estates ceased discharge to the canal on July 14, 1991, two weeks ahead of the schedule in the administrative order. The nitrogen exceedence are not serious. Waterway Estates was constructing an advanced wastewater treatment facility, and failed to meet the construction deadline by 6 months. Since AWT has been operational at Waterway Estates, no further nitrogen exceedences have occurred. Because the violations are not serious at Waterway Estates, Florida Cities is entitled to significant

mitigation of any penalty.

21. Florida Cities has not derived any economic benefit from the delayed capital expenditures at Waterway Estates. As the statute implies, there is no requirement that an economic benefit exist in conjunction with violations of the CWA. Florida Cities is a fully regulated utility that derives economic benefit from making capital expenditures, not from delaying them. Therefore, Florida Cities is entitled to significant mitigation of the penalty due to lack of economic benefit derived from these violations at Waterway Estates.

22. Florida Cities does not have any history of violations for discharge without a permit, or discharge at the wrong location, or nitrogen or toxicity exceedances at Waterway Estates. Therefore, Florida Cities is entitled to significant mitigation of any penalty due to this factor.

23. Florida Cities has made considerable good-faith efforts to comply with the applicable requirements at Waterway Estates. Upon denial of their NPDES permit in 1987, Florida Cities sought a wasteload allocation from FDER. FDER did not approve the new WLA until late 1988. Florida Cities applied for and received their new NPDES permit by late 1989. The discharge to the canal required several permits and caused several logistical problems. Yet, Florida Cities completed the construction of the new outfall by July 1991, ahead of the schedule in EPA's Administrative Order 89-109.

24. At all times between October 1, 1988 and June 1992, Waterway Estates was complying with the directives of the FDER. FDER had extended the Waterway Estates construction deadline until September 1992 and the compliance deadline until June 1993. Florida

Cities easily met these construction criteria and their reliance on FDER directives will substantially mitigate the penalty.

Carrollwood

25. The NPDES violations at Carrollwood are not serious. The Plaintiff admits that it has no evidence of any environmental harm as a result of the Carrollwood discharges to Sweetwater Creek. In 1988 and 1989, Florida Cities commissioned an environmental study that demonstrated the discharges would have a minimal impact on Sweetwater Creek. Carrollwood achieved the same level of performance between July 1991 and January 1992. The only reason a violation occurred is a direct result of the issuance of an AWT permit for a facility that was designed to provide secondary treatment. However, EPA had issued an administrative order that provided relief from the permit's limits. Although the administrative order is not legally a modification of a permit, EPA Region IV uses administrative orders as modifications of permits for purposes of tracking compliance with the CWA. Carrollwood did not violate the terms of administrative order. Due to the seriousness of the violations Florida Cities is entitled to significant mitigation of the penalty.

26. Florida Cities has not derived any economic benefit from the delayed capital expenditures at Carrollwood. As the statute implies, there is no requirement that an economic benefit exist in conjunction with violations of the CWA. Florida Cities is fully regulated utility that derives economic benefit from making capital expenditures, not from delaying them. Therefore, Florida Cities is entitled to significant mitigation of the penalty due to lack of economic benefit derived from these violations at Carrollwood.

27. Florida Cities does not have a history of effluent limit violations. Carrollwood was designed to provide secondary wastewater treatment and performed at that level. Between July 1991 and January 1992 Carrollwood routinely met secondary treatment levels and often met AWT treatment levels, even though the plant was not designed for that level of treatment. Because Carrollwood does not have a history of effluent limit violations, the penalty will be substantially mitigated.

28. Florida Cities has engaged in numerous good-faith efforts to comply with the requirements of the CWA. Since 1983, Carrollwood was required to interconnect its facility with Hillsborough County pursuant to state permit requirements. Hillsborough County could not provide wastewater treatment service to the Carrollwood franchise area until 1991. Florida Cities engaged environmental studies to determine whether an alternative existed to the interconnection requirement. Once it was determined that an alternative existed and Florida Cities could construct an AWT facility, Florida Cities pursued that option in conjunction with their pursuit of Hillsborough County. Florida Cities expended great time and resources to pursue two options that would protect the environment. Due to Florida Cities great efforts to comply with the CWA, the penalty will be substantially mitigated.

29. At all times between July 1991 and January 1992, Carrollwood was in compliance with state directives. FDER authorized Carrollwood to operate at secondary treatment levels until April 1992, at which time Carrollwood would raise its treatment to AWT. Florida Cities' reliance on state directives will substantially mitigate any penalty.

Barefoot Bay

30. The NPDES violations at Barefoot Bay are not serious. There is no showing that any environmental harm has resulted from the Barefoot Bay chlorine, toxicity, or BOD violations, and indeed the Plaintiff admits that it has no evidence of any environmental harm. The violations were of short duration, and were not of a type that should pose any great risk to the environment. The Barefoot Bay outfall is located more than a mile from class III waters, and environmental pollution, if any, would dissipate over that distance. In addition, EPA's own inspection officer, Roy Herwig, determined that no actual environmental harm had occurred as a result of the Barefoot Bay's discharges prior to November 1, 1991. The discharges after Mr. Herwig's assessment did not change, and this Court should not substitute its assessment in place of Mr. Herwig's. Therefore, Florida Cities is entitled to significant mitigation of the penalty due to the seriousness of the violations.

21. Florida Cities has not derived any economic benefit from the delayed capital expenditures at Barefoot Bay. As the statute implies, there is no requirement that an economic benefit exist in conjunction with violations of the CWA. Florida Cities is fully regulated utility that derives economic benefit from making capital expenditures, not from delaying them. Therefore, Florida Cities is entitled to significant mitigation of the penalty due to lack of economic benefit derived from these violations.

22. Florida Cities does not have a history of TRC, toxicity, or BOD violations at Barefoot Bay. Therefore, Florida Cities is entitled to significant mitigation of the penalty due lack of history for these violations.

23. Florida Cities has repeatedly engaged in good-faith efforts to comply with the applicable requirements of the CWA and has engaged in good-faith dealings with EPA. Florida Cities has promptly notified EPA of effluent violations in their DMRs. Upon first report of a TRC violation, Florida Cities notified EPA and undertook an investigation of the problem. Each month, Florida Cities provided a progress update in their DMR cover letters. A solution to the TRC violation was implemented within a matter of months even though there might not have been any actual problem with TRC to begin with. Regarding the toxicity problem, the Barefoot Bay plant was not originally constructed to remove nitrogen from the effluent, but has been able to meet some of the toxicity requirements. For the BOD/CBOD problem, Barefoot Bay applied for an NPDES permit modification to allow testing for CBOD once it was discovered that CBOD had been reported to EPA. Barefoot Bay would have been meeting the CBOD limitations between November 1991 and November 1993; conversely, had Barefoot Bay been reporting BOD values, Barefoot Bay would have been in compliance with the BOD limitations contained in the permit. Therefore, Florida Cities is entitled to significant mitigation of the penalty due to their good faith efforts to comply with the requirements of the CWA.

24. At all times relevant to this action, Barefoot Bay has been under stringent state environmental regulation and has pursued the ultimate elimination of discharges to the agricultural canal. Florida Cities' reliance on and compliance with state directives further mitigates the penalty.

25. Any substantial penalty would significantly impact Florida Cities on-going efforts to protect the environment. Florida Cities budgets large amounts of resources for capital

improvements to upgrade and maintain their wastewater treatment plants. In addition, Florida Cities must finance all construction projects before those costs can be passed through to the ratepayer. Because a significant penalty would impact necessary capital improvements geared towards protecting the environment, the penalty will be mitigated.

26. Upon consideration of the factors enumerated in § 309(d) fort all three Florida Cities facilities in this case, this Court will impose only a nominal penalty for the violations of the Clean Water Act.

Respectfully submitted,

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December 28, 1995

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of "Defendant Florida Cities Water Company's Proposed Findings of Fact and Conclusions of Law" has this December 28, 1995 been sent to the following persons by United States first class mail, properly addressed and postage prepaid.

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Exhibit_____(GHB-71)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION 96 JAN -2 AM 10: 03

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS INC., Defendants.	)	CIVIL ACTION NO.: 93-281-CIV-FTM-21

PRETRIAL BRIEF OF FLORIDA CITIES WATER COMPANY

At trial Florida Cities Water Company ("Florida Cities" or "FCWC") will present extensive evidence of mitigation regarding all violations of the Clean Water Act ("CWA") at issue. During all relevant time periods Florida Cities cooperated with and was within the regulatory regime of both the United States Environmental Protection Agency ("EPA") and the Florida Department of Environmental Protection ("FDEP").[1/] None of the violations at issue caused any environmental harm or placed Florida's surface waters at risk. The evidence to be presented at trial will prove that Florida Cities consistently cooperated in good faith with EPA, FDEP, and local regulators. When viewed in accordance with the CWA's penalty mitigation factors, this evidence will establish that any penalty assessed by this Court should be de minimis.

[1/] Prior to 1991, the Florida Department of Environmental Protection ("FDEP") was known as the Florida Department of Environmental Regulation ("FDER"). Throughout this brief FDEP should be read to mean either FDEP or its predecessor agency, FDER, depending on the relevant time period.

STATEMENT OF THE LAW

Congress set forth a specific procedure to determine the amount of any civil judicial penalty assessed under the CWA. As articulated in Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc. 897 F.2d 1128, 1142 (11th Cir. 1990):

> [The Court] should first determine the maximum fine for which [a defendant] may be held liable. If it chooses not to impose the maximum, it must reduce the fine in accordance with the factors spelled out in section 1319(d), clearly indicating the weight it gives each of the factors in the statute and the factual findings that support its conclusions.

Thus, the amount of the penalty is within the discretion of the trial court. Id.; Hawaii's Thousand Friends v. City and County of Honolulu, 821 F. Supp. 1368 (D. Haw. 1993).

Section 1319(d), (CWA § 309(d)), sets forth the following factors which the Court shall consider:

a) the seriousness of the violation or violations;
b) the economic benefit (if any) resulting from the violation:
c) any history of such violations;
d) any good-faith efforts to comply with the applicable requirements;
e) the economic impact of the penalty on the violator;
f) and such other factors as justice may require.

As discussed more fully below, applying each of these factors to the violations at issue establishes that Florida Cities should be subject to only a minimum fine.

STATEMENT OF THE FACTS

This litigation concerns events at three wastewater treatment plants ("WWTPs") owned and operated by Florida Cities: Waterway Estates (near Fort Myers), Carrollwood (near Tampa), and Barefoot Bay (near Sebastian). Wastewater treatment plants are typically classified by the level of treatment applied to the incoming sewage. EPA and the state of

Florida have established the minimum (and most common) level of treatment as "secondary," meaning, inter alia, removal of at least 85% of conventional pollutants (total suspended solids. biochemical oxygen demand, fecal coliform, pH, and oil and grease) as well as removal of most bacteria.[2/]

All discharges to surface waters of the U.S. require a NPDES[3/] permit issued either directly by EPA or by a state to which EPA has delegated NPDES permitting authority (a "delegated" state). Between 1975 and 1995 Florida was one of the few "non-delegated" states under the CWA, which means Florida had not yet reached a formal agreement with EPA to administer the CWA permitting or enforcement functions for Florida waters. The practical impact of Florida's non-delegated status was that dischargers were required to undergo dual permitting and dual enforcement processes for each discharge: first a stringent permitting program administered by FDEP pursuant to state law, and second a largely duplicative (and frequently less stringent) NPDES permitting program administered by EPA's regional office in Atlanta, Georgia. EPA acknowledges that Florida maintains rigorous oversight of discharges into the state's surface waters and, in most instances, Florida's regulations are more strict than EPA's own regulations.

[2/] Such secondary treatment also removes approximately one half of total nitrogen and total phosphorus, which may act as nutrients in the receiving water. "Tertiary" treatment plants typically remove from 90 to 95 percent of conventional pollutants, and advanced wastewater treatment ("AWT") plants remove 97 percent of conventional sewage pollutants, as well as over 90 percent of nitrogen and phosphorous.

[3/] The CWA prohibits discharges to waters of the United States without a permit, the most common of which is granted under the National Pollutant Elimination Discharge System ("NPDES"), for which EPA is ultimately responsible. 33 U.S.C. § 1342, CWA § 402.

WATERWAY ESTATES

A) Discharge Without a Permit

Florida Cities has operated its Waterway Estates wastewater treatment plant ("Waterway Estates") under an NPDES permit since 1975, shortly after passage of the CWA first required such permits. At all times relevant to this case, discharges from Waterway Estates have been fully authorized by FDEP. Further, at all relevant times, both EPA and FDEP have overseen the operations at Waterway Estates with the full-blown regulatory regimes each agency imposes on a regulated facility. These regulatory regimes include requiring the submission by FCWC of monthly discharge monitoring reports ("DMRs") to EPA and monthly operating reports ("MORs") to FDEP giving detailed analyses of the effluent from Waterway Estates; regular inspections by each regulatory agency; and regular and routine contact between both regulatory agencies and the persons responsible for operating the facility. Indeed, except for the formality of having a document entitled "NPDES" permit in FCWC's files, there was no substantive difference in the facility's operations under EPA's authority or under FDEP's, nor did the day-to-day relationship of FCWC's operators differ in dealing with EPA or FDEP. Always, there were stringent and detailed regulatory requirements (such as interim effluent limitations) from each agency regarding the facility's operations, and at all relevant times the facility was in substantial compliance with those requirements.

EPA granted an NPDES permit for Waterway Estates effective August 15, 1975 (NPDES Permit No. FL0030325) and renewed this permit effective September 24, 1981 (FL0030325). Florida Cities applied for what should have been a routine renewal of this

NPDES permit on May 9, 1986. However, EPA Region IV permit writer Connie Kagey improperly denied the Florida Cities application, based on her erroneous and careless determination that FDEP had required, by issuing a "no discharge" waste load allocation ("WLA")[4/] in a 1981 FDEP planning document, that Waterway Estates cease discharging effluent into the Caloosahatchee River. Once the existing federal NPDES permit expired in January 1987 Florida Cities entered into Administrative Order 87-085 whereby EPA authorized Waterway Estates to continue discharging effluent under the terms of the now expired NPDES permit. Moreover, during this period Florida Cities continued to submit DMRs to EPA (and MORs to FDEP) and to work closely with both EPA and FDEP to find alternatives to discharge. During this period Waterway Estates was fully authorized by Florida to discharge into the Caloosahatchee River via a canal, and the facility was in substantial compliance with all of its state requirements.

Florida Cities received NPDES permit No. FL0030325 for Waterway Estates on September 29, 1989. The effluent limitations in this permit were for an AWT facility, whose more stringent effluent limitations EPA fully understood Waterway Estates could not physically satisfy until Waterway Estates upgraded its facility by constructing a new AWT plant. Such construction by necessity occurred while Waterway Estates continued to operate the existing secondary plant on the same small construction site where the AWT plant was being built. This complex feat was accomplished while remaining in substantial compliance

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[4/] A waste load allocation is defined as that portion of a receiving water's loading capacity allowed to one of its present or future dischargers. "Loading Capacity" is the amount of pollution that a water body can receive and still maintain water quality standards. 40 C.F.R. §§ 130.2(f), 130.2(h) (1993).

with the secondary requirements throughout the construction period. At the same time EPA issued another administrative order, AO 89-109, which contained a construction schedule for construction of an AWT facility, a construction schedule for moving the plant outfall to the six foot contour line in the Caloosahatchee River, and interim secondary treatment effluent limits until the AWT construction was completed.

As noted above, CWA 309(d) lists six mitigation factors which this Court shall consider in determining any penalty. At trial, Florida Cities will present evidence addressing each of these factors, as summarized below.

1) Seriousness of the Violations

Plaintiff has already admitted that it has no evidence of environmental harm which occurred from discharge without a permit at Waterway Estates. (Plaintiff's Responses to Avatar Holdings' Second Set of Interrogatories, Number 3.) Additionally, Plaintiff has presented no credible evidence of any risk of harm which might have resulted from the discharge without a permit. This lack of risk of harm is further bolstered by the following factors.

First, EPA issued two administrative orders which authorized Florida Cities to continue to discharge secondarily treated effluent from January 1987 to October 1991. Although EPA could have placed higher limitations on the effluent, both of these administrative orders mandated that Waterway Estates meet the same effluent limitations as were contained in the facility's 1981 NPDES permit. EPA neither sought to enjoin Florida Cities from discharging secondarily treated effluent from Waterway Estates nor demanded that Florida Cities reduce the volume of its discharge. There is no indication in EPA's administrative record pointing to

any concern about the possibility of increased risk of environmental harm from the continuing secondarily treated discharges during the construction period.

Second, the secondary discharge from Waterway Estates was continuously authorized at all relevant times under FDEP permits and consent orders, which also contained strict effluent guidelines. At trial, FDEP officials Dr. Abdul Ahmadi (Administrator of Water Facilities, FDEP South District) and Ronald Blackburn (District Manager, FDEP South District) will testify that FDEP has no evidence that the treated effluent discharged from Waterway Estates caused any violations of Florida's water quality standards for the Caloosahatchee River.

2) Economic Benefit

The rates charged for treatment of wastewater by Florida Cities' are regulated by the Florida Public Services Commission ("PSC") or in certain jurisdictions within Florida by the county equivalent of the PSC. In order for a publicly regulated utility to obtain any return on its capital investments, the cost of these investments must be included in the utility's rate base. Any change in the rate base must be approved by the PSC which insures that FCWC's revenue and profit level are reasonable and "prudent." The PSC rate approval process mandates that any capital expenditure to be included in the utility's rate base must be reasonable. Until a capital improvement is "used and useful," a utility cannot include the cost of the capital improvement in the company's rate base.

The PSC's regulation of Florida Cities rates and profit margin sharply distinguishes this case from CWA cases involving private manufacturing or other industrial dischargers. In those cases, a defendant can receive immediate economic benefit from non-compliance with

the CWA by such methods as delayed capital expenditure or other costs of compliance. In contrast, a regulated utility such as Florida Cities will be guaranteed no return on its investment until improvements are included in the utility's rate base. Under this arrangement an investor-owned, private monopoly utility such as Florida Cities has no incentive to delay capital expenditures for environmental compliance. Unlike the majority of the private sector, a regulated private utility is guaranteed a return on its investment in environmental compliance but it must demonstrate to the PSC that its expenditures were reasonable.

In the present case Florida Cities will demonstrate that it did not receive any economic benefit as a result of discharging without an NPDES permit. During the 1987-1989 period at issue, Waterway Estates continued to discharge pursuant to the same effluent limitations and operated the plant in the same manner as when the NPDES permit was fully in effect. When it received its 1989 NPDES permit and accompanying AO, the facility was allowed to discharge at the same treatment levels as under the previous permit. Given that it could not include any costs of upgrading to AWT until these costs were included in the rate base, Florida Cities did not benefit from discharge without a permit.[5/]

3) History of Violations

There is no history of violations at the Waterway Estates facility which would support the imposition of any penalties. EPA's denial of Florida Cities' 1986 renewal application was

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[5/] EPA's own calculations found in the Notes on Proposed Penalty Assessment at Barefoot Bay and Carrollwood demonstrate the Agency's valuation of discharge without a permit. Using its own economic benefit computer model ("BEN model"), EPA valued the discharge without a permit violations at Barefoot Bay to be $73.00 and $203.00 at Carrollwood. Given the facts surrounding Ms. Kagey's denial of the 1986 permit application, any economic benefit derived from the period between 1987 and 1989 should be de minimis.

based solely on EPA's misinterpretation of the 1981 WLA planning document issue and not on any history of violations. Additionally, the DMRs for Waterway Estates demonstrate that the facility consistently met and exceeded its treatment requirements. In contrast to the misleading image Plaintiff paints of Waterway Estates's discharging without a permit as a wanton disregard for the environmental authorities, Waterway Estates was always within the regulatory framework of both EPA's NPDES program and FDEP's stringent regulatory program. Florida Cities submitted monthly DMRs to EPA and worked closely with EPA and with FDEP during all relevant periods. During this time, EPA never raised any concerns about the manner in which Florida Cities had been operating Waterway Estates. Nor did EPA point to any history of violations during the 1986 permit denial process or during the 1988-1989 application process.

4) Good Faith Efforts To Comply with the Regulations

Once Florida Cities received the denial of its renewal application, it immediately began working with EPA in an attempt to find alternatives to discharging. Both Florida and EPA officials have testified and will testify that Florida Cities acted in good faith in finding alternatives to discharge.

5) Economic Impact of a Penalty upon Florida Cities

At trial Florida Cities will demonstrate that the company does not have the ability to pay a large penalty. As noted above, Florida Cities' rates, profit margin, and rate of return is regulated by the Florida PSC. Over the last several years the company has expended large amounts of capital to upgrade several of its facilities to AWT status. Until these improvements are completed the financial costs cannot be included in the rate base. The cost

of carrying these long-term capital improvements has placed a significant drain on the company's resources. Even Plaintiff's financial expert witness, Eileen Zimmer, acknowledges that Florida Cities has a negative net income for the last several years. The evidence which supports these factors will demonstrate that Florida Cities is unable to withstand a large penalty.

6) Other Factors which Justice May Require.

EPA's own regulations list only four reasons why the agency may terminate an NPDES permit:

1) noncompliance by the permittee with any condition of the permit;

2) the permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time;

3) a determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination; or

4) a change in any condition that requires either a temporary or permanent reduction or elimination of any discharge or sludge use or disposal practice controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW).

EPA failed to base its permit denial on any of these factors. In her deposition Ms. Kagey testified that she determined that Florida Cities did not have a wasteload allocation to discharge into the Caloosahatchee River. She based this determination on her review of a January 1981 FDEP study entitled "Caloosahatchee River Wasteload Allocation Documentation, Lee County, Water Quality Technical Series: Volume 2, Number 52" ("1981 WLA study"). But the 1981 study was merely a planning document which contained several

scenarios for future discharges to the Caloosahatchee River, and the "no discharge" scenario for Waterway Estates was never incorporated into a legal requirement in the facility's federal or state permits until EPA's mistaken 1986 denial of the NPDES permit renewal. To the contrary, for several years after 1981 Florida Cities had express authorization from both EPA and FDEP to discharge effluent from its Waterway Estates facility to the Caloosahatchee River via a canal. The fact that both FDEP and EPA granted discharge permits to Waterway Estates after publication of the 1981 WLA study demonstrates conclusively that neither EPA nor FDEP considered the 1981 WLA study to be a legal requirement.

In the 30(b)(6) deposition of the United States, both James Greenfield (EPA Region IV Wasteload Allocation\TMDL coordinator) and Roosevelt Childress (EPA Region IV Permit Section Chief) testified that Ms. Kagey improperly denied Florida Cities' permit renewal application and that she failed to follow EPA's regulations and guidelines as set forth in the Permit Writers' Guidelines. In her own deposition Ms. Kagey admitted that she never checked any other documentation or discussed the wasteload allocation with anyone else in Region IV. Instead, she recklessly denied Florida Cities application and set off a chain of events which have ultimately resulted in this lawsuit. Because Florida Cities lost its permit through no fault of its own, was completely regulated by EPA and FDEP during the entire time it did not have a permit, and received another discharge permit in 1989, the company should not be assessed any more than a de minimis penalty for these purely technical violations for which there is no risk of environmental harm.

B) **Discharge to an Unpermitted Location**

When Waterway Estates was constructed, the plant's outfall discharged to a tidally influenced canal adjacent to the Caloosahatchee River. This outfall was approved as the discharge point in both the 1975 and 1981 NPDES permits and the 1981, 1983, and 1988 FDEP permits. During the 1980s, FDEP began to require facilities which were discharging into the Caloosahatchee River and which were seeking to expand their capacity to move their outfalls to the middle of the river. In order to approve Florida Cities' 1989 NPDES permit, FDEP required that the plant outfall be moved to the six foot contour line in the Caloosahatchee River. (NPDES Permit FL0030325 was the first order which required Florida Cities to move the plant outfall.)

As discussed supra, EPA issued AO 89-109 on September 26, 1989. This AO authorized Florida Cities to continue to discharge into the canal until the outfall was relocated and set a construction schedule which mandated that the plant outfall must be operating at the six foot contour line by August 1, 1991. Despite construction delays caused by unexpected problems with rock in the river bottom, the outfall was in place and operating on July 14, 1991, over two weeks ahead the construction schedule contained in AO 89-109. Now Plaintiff seeks to recover $15,750,000.00 in penalties for discharge into the canal during the time when the AO 89-109 contemplated construction of the new outfall and authorized discharge at the old location in the canal. However, applying the CWA's six mitigation factors demonstrates that at best the Court should assess a minimal penalty.

1) Seriousness of the Violation

These violations are, at most, minor paper violations of NPDES Permit FL0030325. This permit, along with AO 89-109, contained the first EPA requirement for Florida Cities to move the outfall. As noted above, AO 89-109 contained a construction schedule for relocating the outfall. EPA, which had full control over the contents of the AO, never raised any concerns about the length of the construction schedule and was aware that Florida Cities completed, ahead of the construction schedule's deadline, the extension of the outfall to change the discharge location. Indeed, EPA never expressed any concerns at all about the process of moving the outfall until this lawsuit was brought.

2) Economic Benefit Caused by Non-compliance

At trial, Florida Cities will demonstrate that it gained no economic benefit from these violations. While there was technical non-compliance with the permit's implied discharge location, the company was discharging in accordance with EPA's AO 89-109. Once the company received NPDES Permit FL0030325 it immediately sought to begin construction of the new outfall. As noted above, Florida Cities exceeded EPA's construction schedule, placing the new outfall in service over two weeks ahead of schedule. Because Florida Cities met the requirements of AO 89-109, it received no economic benefit from these permit violations.

3) History of Violations, and 4) Good Faith Efforts To Comply with Regulations

Florida Cities does not have any history of such violations at this facility. The first requirement to move the outfall was contained in the 1989 NPDES # FL0030325. Both the 1975 and the 1981 NPDES permits allowed the facility to discharge into the drainage canal.

When it granted the 1989 permit, EPA was aware that the outfall must be moved from the drainage canal to the six foot contour line and provided a corresponding construction schedule, which was met by Florida Cities. This effort conclusively demonstrates Florida Cities' good faith.

CARROLLWOOD

A) Permit Exceedances

Florida Cities' Carrollwood wastewater treatment plant, which was located in Hillsborough County, began operation in the mid-1960s and was taken out of service on January 6, 1992. The plant was constructed as a secondary treatment facility and it discharged secondarily treated effluent into Sweetwater Creek. The violations at issue occurred between July 1991 and January 1992, during a period of time when the facility was being taken out of service. In order to place these violations into perspective, it is necessary to briefly review the facts surrounding Carrollwood's permit history.

In 1972 Hillsborough County ordered that Carrollwood be upgraded to achieve a treatment level of at least 90 percent of most pollutants, a treatment standard higher than ordinary secondary treatment facilities.[6/] Florida Cities completed this upgrade in 1975 and received an EPC permit which was valid until 1978. (Florida Cities also received its initial federal NPDES permit in 1975.) The EPC renewed the Carrollwood permit in 1978, but ordered Carrollwood to cease discharge by 1980 and connect with a county-owned regional

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[6/] The Hillsborough County Environmental Protection Commission ("EPC") has responsibility to act in the place of FDEP for issuing and enforcing the state's permitting program for discharges to surface waters.

wastewater facility. However, when Florida Cities applied to the Hillsborough County Public Utilities Commission to connect with a county facility, the County responded that it would not have capacity to accept the Carrollwood influent until 1983.

The County's inability to allow Carrollwood to connect with a county facility left Florida Cities in a regulatory dilemma. Carrollwood's NPDES permit was set to expire in 1980. Florida Cities submitted a timely renewal application.[7/] As part of the permit approval process, EPA was required to seek state certification of the permit. Hillsborough County had ordered Carrollwood to connect with one of its facilities but at that time in 1980 the county could not provide capacity to treat Carrollwood's influent. Additionally, FDEP could not certify the permit. To further complicate matters, in 1972 the Florida legislature enacted the Wilson-Grizzle Act which barred future discharges into water bodies such as Sweetwater Creek. As a result, FDEP could not grant a wasteload allocation to Carrollwood to discharge into Sweetwater Creek and could not certify for EPA the 1980 NPDES permit application. In September of 1984 EPA denied Florida Cities NPDES permit renewal application.[8/] After EPA denied Carrollwood's renewal permit application, EPA issued AO 85-044 which authorized Florida Cities to continue to discharge into Sweetwater Creek until June 1987. Florida Cities also received FDEP authorizations to continue discharge to Sweetwater Creek until an alternative could be found.

[7/] EPA's regulations state that filing a timely permit renewal application allows the applicant to continue to discharge in accordance with the previous permit limitations until the application is accepted or rejected.

[8/] Between the date of the renewal application in 1980 and the date of the denial of the renewal application in September 1984, the terms of the 1975 NPDES applied under 40 C.F.R. § 122.6.

During the 1980s Florida Cities explored several options to the proposed connection with a Hillsborough County facility. For example, in 1983 Florida Cities negotiated with the City of Tampa and explored nearby reuse options to provide discharge alternatives, even though the 1983 and 1988 FDEP permits specifically required interconnection with Hillsborough County. The evidence presented at trial will demonstrate that an interconnection with the Tampa treatment plant was not economically feasible and would not have been considered reasonable by the PSC. Interconnection with Tampa would have required that Florida Cities' construct a 2.5 mile "forced main" pipeline and add capacity fees to the rate base. Florida Cities determined that these charges would not have been in the best interest of its customers, even in the unlikely event that the PSC approved them. Florida Cities also explored irrigation reuse on golf courses and in residential subdivisions. Neither of these options proved to be viable. Florida Cities pursued these other options even though it was unclear that any alternative would be approved other than what was expressly written into the state permit.

In 1987, the Florida legislature enacted the Grizzle-Figg act, which created an exception to FDEP's no-discharge policy.[9/] While Florida Cities continued to request connection with Hillsborough County which would completely eliminate any discharge, it also began the process of seeking approval to construct an AWT facility at Carrollwood, in order to preserve the new option of discharging under Grizzle-Figg. The Grizzle-Figg Act required potential dischargers to perform a study to determine the impact of AWT discharge on the

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9/ Even though the statutory requirement for no discharge contained in the Wilson-Grizzle Act had been rescinded in 1980, FDEP retained a strong policy preference that discouraged surface water discharges and encouraged reuse.

designated receiving waters and to prove that the discharge would have a "minimal negative impact" upon the receiving waters if continued discharge were to be allowed.

Florida Cities hired Limno-Tech, Inc. to perform the environmental study on Sweetwater Creek. Limno-Tech received approval from FDEP for its plan, conducted the survey, and submitted the results to FDEP in June of 1989. FDEP asked for additional studies to be performed. Limno-Tech performed the supplemental studies and forwarded them to FDEP. FDEP approved the study on October 20, 1989 but informed Florida Cities that the final approval must come from Hillsborough County. Florida Cities applied for a state-granted AWT permit on November 9, 1989. FDEP, in conjunction with Hillsborough County, did not issue the construction permit for the AWT upgrade until July 30, 1990. (Florida Cities had already placed the project out for construction bids on July 26, 1990.) The company received the final bids on February 20, 1991. Once Florida Cities finally received its state approval the company was able to reapply for an NPDES permit.

Meanwhile, during the time that Florida Cities pursued AWT discharge, it continued to seek a connection agreement with Hillsborough County. In June of 1986, Hillsborough informed Florida Cities that it would not have capacity at any of its available facilities until at least the spring of 1988. On March 8, 1988 Hillsborough County informed the company in writing that it would not have capacity at any of its facilities until 1990.[10/] The county also gave notice for the first time that it would assess a capacity (connection) fee of $5 million.

[10/] Hillsborough's master wastewater treatment plan changed periodically throughout the 1980s as a result of changes in construction funding. During this period the county designated at least three different facilities for potential connection before finally choosing the Dale Mabry as the receiving facility.

For the 1000 customers at Carrollwood, this would have meant a charge of $5000 each, which would have translated into approximately $100 per month. Despite Florida Cities continued negotiations and objections to this extraordinarily high fee, Hillsborough County refused to drop the fee. In addition to the capacity fee, Florida Cities would be required to bear the cost of constructing the forced main pipeline to the Hillsborough facility. Together, these significant costs made the deal unacceptable to Florida Cities, particularly since it was unlikely that the PSC would have approved the extraordinary capacity fee.

In February of 1991 Hillsborough contacted Florida Cities about connection at the Dale Mabry station. After negotiations and intervention from the Hillsborough County Commission the county agreed to drop the $5 million connection fee. The county also agreed to pay for the majority of the costs of the force main pipeline which would connect Carrollwood to the designated Hillsborough facility. Once the significant obstacles of the capacity fee and construction costs were removed by Hillsborough County, the lengthy negotiations concluded within two months. An agreement in principle was reached by April 1991, and a formal interconnection agreement was signed with Hillsborough County on June 6, 1991. The forced main pipeline was constructed and became operational by January 6, 1992.

Throughout the 1980s, EPA was aware of Florida Cities' ongoing efforts to find alternatives to discharge. After the Carrollwood NPDES permit expired in 1984, EPA issued AO 85-044 which authorized continued secondary treatment discharge until June 1987. Pursuant to the administrative order, Florida Cities continued to file DMRs, and the facility was subject to regular EPA inspections, just as if it were under an NPDES permit. Florida Cities also continued to keep EPA apprised of the company's progress in finding a solution.

On July 30, 1990 FDEP issued a construction permit for an AWT facility, which permit was required if Florida Cities were to pursue the option of building an AWT facility in compliance with Grizzle-Figg. Florida Cities applied for an NPDES permit the next day. Recognizing Florida Cities' progress and its good faith efforts to resolve the problem, EPA issued AO 90-100 in September 1990, which authorized Carrollwood to continue to discharge secondary effluent from the facility.

Finally, recognizing that FDEP would only certify a permit for an AWT facility, in April 1991 EPA issued NPDES permit #FL0029319 which became effective on July 1, 1991 and required AWT. EPA issued this permit for an AWT facility even though the agency knew that it was physically impossible for Carrollwood to comply with AWT treatment standards until AWT construction was completed. EPA also knew that Florida Cities was discharging secondarily treated effluent, preparing to construct an AWT facility, and negotiating to connect with Hillsborough County. As early as April 1, 1991 -- immediately after an agreement had been reached with Hillsborough County -- Florida Cities requested relief from the effluent limitations of the forthcoming NPDES permit. Florida Cities repeatedly requested that the interim effluent limits and monitoring requirements of the AO remain in effect during the interconnection construction period. EPA's response to these repeated requests was to leave AO 90-100 (which authorized secondary treatment) active until March 1992, two months after the interconnection with Hillsborough had occurred and the discharge had ceased.

As discussed below, when the CWA's mitigation factors are applied to these facts, Florida Cities is confident that the Court will find any penalty to be de minimis.

1) Seriousness of the Violation

As with the other violations at issue, EPA admits that it has no evidence of environmental harm for these violations. Significantly, these violations are of the AWT standards in the new AWT permit, not violations of the secondary standards in AO-90-100. Although the plant was able to meet the AWT treatment levels in some instances, in general the plant was unable to meet these levels consistently. Had either EPA, FDEP, or EPC been concerned about any increased risk of harm from these discharges, any of these agencies could have withheld authorization to discharge. However, from July 1990 through January 6, 1991 each of these agencies continued to authorize Carrollwood to discharge secondarily treated effluent into Sweetwater Creek, which demonstrates that these regulatory agencies saw no risk of harm from the discharges.

2) Economic Benefit

Florida Cities respectfully refers the Court to its discussion of economic benefit contained in the Waterway Estates section which addresses regulated private utilities and rate base issues. Additionally, at trial Florida Cities will establish that it spent hundreds of thousands of dollars seeking alternatives to discharge at Carrollwood which it will never be able to recover through the rate base. These costs include the various Limno-Tech studies and associated costs as well as other engineering costs for these various alternatives. Thus, not only did Florida Cities fail to benefit from any noncompliance, it actually lost money in its vigorous efforts to respond to the regulatory dilemma created not by Florida Cities, but by the complex interactions of the various federal and state agencies.

3) History of Violations

The evidence is clear that there is no history of violations of AWT standards at the Carrollwood facility prior to the issuance of the AWT NPDES permit for the secondary treatment facility in 1991.

4) Good Faith Efforts To Comply with the Regulations

Florida Cities made good faith efforts to comply with the requirements of its NPDES permit and was able to meet the effluent limitations on some occasions. Moreover, at all times Florida Cities complied with the requirements of AO 90-100, which EPA kept active during the time that EPA knew the secondary treatment facility could not possible meet the new permit's AWT limits. EPA kept AO 90-100 in effect until March 6, 1992 when it informed Florida Cities that the company had fully complied with the administrative order and the Agency was "inactivating" the order.

5) Economic Impact of a Penalty upon Florida Cities

Florida Cities respectfully refers the Court to the discussion of this factor contained in the Waterway Estates section of this brief.

6) Other Factors which Justice may Require

The history of Carrollwood demonstrates that Florida Cities made every effort to resolve problems resulting from the discharge. As noted above, the actual NPDES violations were for a level of treatment beyond the physical capacity of the plant. No environmental harm occurred, EPA never sought to enjoin and discharge, and the plant was taken out of service six months after the NPDES permit was granted. Significantly, Plaintiff raised these

violations for the first time only in 1995 and now seeks to recover millions of dollars in penalties. The evidence will demonstrate that any penalty assessed should be de minimis.

BAREFOOT BAY

Florida Cities has operated the Barefoot Bay Wastewater Treatment Plant ("Barefoot Bay") since the early 1980's. Barefoot Bay has been fully authorized by the FDEP to discharge pollutants into an agricultural drainage ditch that leads to the Sebastian River roughly one mile downstream. On November 1, 1991 EPA issued to Barefoot Bay NPDES permit FL0042293 with certain effluent limitations. This Court has determined a total of 264 CWA violations at Barefoot Bay for violating the total residual chlorine limits (TRC"), toxicity failures, and reporting carbonaceous biochemical oxygen demand ("CBOD") instead of biochemical oxygen demand ("BOD"). Looked at in light of the CWA's mitigation factors, any penalty for these violations should be minimal.

1) Seriousness of the Violations

Plaintiff admits that it has no evidence of environmental harm which occurred from the violations at Barefoot Bay. (Plaintiff's Answers to Avatar's Second Set of Interrogatories, Number 3). Additionally, Plaintiff has presented no evidence of any risk of harm which might have resulted from the discharges at Barefoot Bay.

None of the violations at Barefoot Bay are serious. Beginning in September, 1992 the Barefoot Bay plant replaced its old DPD colorimeter with a new DPD colorimeter. Although the DPD colorimeter is approved by the Code of Federal Regulations and specifically allowed in the NPDES permit by EPA, the method is not accurate at levels below 0.1 milligrams per liter (mg/l). Indeed, in its own guidance, EPA recognizes the fact that the DPD colorimeter is

inaccurate below 0.1 milligrams per liter. Thus, compliance with the NPDES permit's limit of 0.01 mg/l could not physically be determined with accuracy by the very test method EPA had approved. To address this inconsistency, EPA has provided guidance instructing the discharger in these circumstances to report any measurements at or below 0.1 mg/l as "non-detect" or "ND." Thus, measurements using the DPD colorimetric method at or below 0.1 mg/l could have been properly reported as "ND" and been in full compliance with the NPDES permit limit of 0.01 mg/l. Significantly, during the period of time at issue (between September 1992 and April 1993), Barefoot Bay's measured values using this test method were at or below 0.1 mg/l. Had Florida Cities been informed by the EPA regulators of the Agency's own guidance, this guidance would have rendered these TRC "violations" as full compliance with the permit. For whatever reasons, EPA failed to communicate to Florida Cities this critical information regarding how to report such low readings on the DPD colorimeter, and Florida Cities' conscientious reporting of the numerical reading of this device resulted in its reporting incorrectly on its DMRs that TRC violations had occurred. Had Florida Cities been in possession of the EPA guidance, it would have reported "ND" for each of the TRC violations, and the TRC violations would not be before this court. The fact that Barefoot Bay could have reported "ND" or "non-detect" and been in compliance with its permit and the CWA demonstrates the minimal nature of these violations.

Likewise, the chronic toxicity violations are not serious. The chronic toxicity failures frequently occur as a result of nitrogen in the effluent in the form of either ammonia, nitrates or nitrites. Barefoot Bay's secondary treatment facility was not designed to remove any nitrogen, nor did EPA require nitrogen limits in the facility's NPDES permit. Thus, there is

some conflict between allowing nitrogen in the effluent, but limiting the consequent toxicity. Additionally, the chronic toxicity test is an extremely rigorous test, measuring both growth rate and mortality in the test species. What is surprising is the fact that Barefoot Bay was able to pass the toxicity test on several occasions, which is a testament to Barefoot Bay's diligent operations.

The BOD/CBOD violations are also not serious. The Code of Federal Regulations allows a facility to report CBOD instead of BOD. 40 C.F.R. § 133.102. The FDEP had required CBOD to be reported instead of BOD. The laboratory hired by Barefoot Bay measured CBOD, but mistakenly reported the results as "BOD." Both EPA and FDEP agreed that the CBOD results were in fact more appropriate, even though EPA's permit required the older measurement. After the mistaken reporting came to light, Barefoot Bay applied for a modification to its permit to report CBOD instead of BOD, just as FDEP required. EPA granted this modification in March 1994, thus recognizing that the CBOD numbers reported all along by Barefoot Bay were in fact the appropriate measurement parameter for this facility. Had the modified permit limits been in place earlier than March 1994, Barefoot Bay would have been in compliance with those limits. Thus, Barefoot Bay was at all times in full compliance with the CBOD limits that EPA determined, upon examination, were appropriate to have been imposed in the first place. There was no environmental harm from these violations. EPA just brought the requirements of its NPDES permit into conformity with those already in place from FDEP.

2) Economic Benefit

Florida Cities received no economic benefit as a result of the violations at Barefoot Bay for the same reasons stated above. The PSC retains full authority to regulate Florida Cities' rates and rates of return because Florida Cities is a utility monopoly. Free market industry is not regulated in this manner and may benefit from delaying compliance expenditures. Because the PSC will not include costs in the rate base until after a construction project is completed, there is no economic benefit for the delay of construction projects.

3) History of Violations

There is no history of violations for TRC, toxicity, or misreporting of CBOD measurements at Barefoot Bay. Barefoot Bay has paid penalties to EPA for discharge without a permit at Barefoot Bay. The fine was $6000 for roughly 5-years of discharge without a permit. In assessing this penalty, EPA indicated that the discharges had not caused any environmental harm and would have been in compliance with an NPDES permit, had one been in effect..

At all times since the mid-1980's, the Barefoot Bay plant has had authority from the State of Florida to discharge pollutants to the agricultural drainage canal. The state has required Barefoot Bay to investigate many options to cease the discharge, and Florida Cities has complied with those requirements. However, no option has proven feasible, and Florida Cities is now constructing an AWT facility at Barefoot Bay until the planned cessation of discharge through total reuse occurs by the required date of 1997.

4) Good Faith Efforts to Comply with the Regulations

Florida Cities has always dealt in good faith to comply with the CWA. For example, upon discovery of the TRC exceedance, Barefoot Bay identified and solved the problem within a matter of months. Likewise, upon discovery of a toxicity failure, Barefoot Bay has been super-aerating ("nitrifying") the effluent in a frequently successful effort to eliminate the nitrogen, even though the plant is not designed with that capability. Finally, upon discovery of the misreporting of CBOD, Barefoot Bay applied for a modification to the NPDES permit, which was granted in March 1994.

Not only has Florida Cities always dealt openly and in good faith with EPA, Florida Cities has also expended significant efforts and resources to investigate options so that all discharge to the canal can cease. Florida Cities has always been open and candid with EPA about the requirements imposed by the State of Florida.

5) Economic Impact of the Penalty upon Florida Cities

As stated above, Florida Cities does not have the ability to pay a significant penalty because of its recent capital improvements to its wastewater treatment plants. Because many of these capital improvements are not completed, the costs have not been passed through to the rate-payers. Florida Cities has had to finance large construction costs without reimbursement. Any further drain on the economic resources would hamper the company's ability to invest in capital improvements designed to protect the environment.

6) Other Factors which Justice Might Require

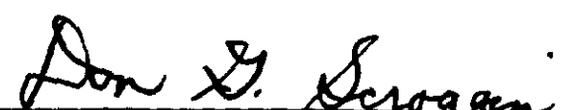
Throughout the relevant time periods, Barefoot Bay has been in compliance with the directives and authorizations of the FDEP. These authorizations have imposed effluent

limitations and protected the environment. Moreover, Florida Cities has expended great sums of money investigating the possibility of alternative disposal options in order to cease the discharge. In each instance, an approved alternative became hindered by sources outside of Florida Cities' control. Florida Cities should not be penalized for pursuing an option that was hampered by third party interference.

CONCLUSION

Although this Court has found Florida Cities liable for various violations of the Clean Water Act, the evidence at trial will demonstrate that at each facility in question, mitigating circumstances will significantly reduce the imposition of monetary penalties.

Respectfully submitted,



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December 29, 1995

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of Defendant Florida Cities Water Company's "Pre-Trial Brief" 29th day of December, 1995, been sent to the following persons by United States Mail:

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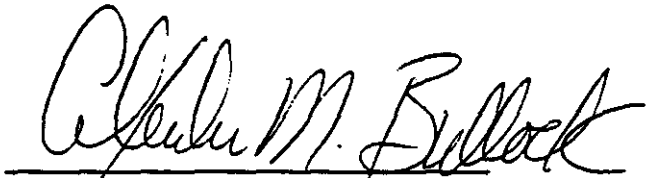

Alexander M. Bullock

Exhibit_____(GHB-72)

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS INC., Defendants.	)	CIVIL ACTION NO.: 93-281-CIV-FTM-21

DEFENDANTS FLORIDA CITIES WATER COMPANY'S AND AVATAR HOLDINGS INC.'S JOINT MOTION IN LIMINE TO EXCLUDE THE TESTIMONY AND REPORT OF MARK J. KLINGENSTEIN

Please take notice that the Defendants Florida Cities Water Company ("Florida Cities") and Avatar Holdings Inc. ("Avatar Holdings") hereby file this motion in limine to exclude the report and testimony of Plaintiff's expert witness, Mark Klingenstein. Mr. Klingenstein's opinions, as expressed in his October 13, 1995 report and as set forth in his October 23, 1995 deposition, fail to meet the standard for expert opinions as set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993), in that these opinions are not stated to a reasonable degree of scientific certainty, are based upon flawed premises, and lack any factual or evidentiary bases. These opinions do not serve to assist the Court in understanding the evidence at trial. Therefore, the defendants respectfully request

that this Court grant this joint motion and exclude Mr. Klingenstein's report and any testimony based upon this report from the evidence presented at trial.

Respectfully submitted,

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January 5, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS INC., Defendants.	)	CIVIL ACTION NO.: 93-281-CIV-FTM-21

DEFENDANTS FLORIDA CITIES WATER COMPANY'S AND AVATAR HOLDINGS INC.'S MEMORANDUM IN SUPPORT OF THEIR MOTION IN LIMINE TO EXCLUDE THE TESTIMONY AND REPORT OF MARK J. KLINGENSTEIN

Introduction

Defendants Florida Cities Water Company ("Florida Cities") and Avatar Holdings Inc. ("Avatar Holdings") submit this memorandum of law in support of their joint motion in limine to exclude the testimony and report of Mark J. Klingenstein. Mr. Klingenstein's report and his testimony fail to meet the standard for admissible expert testimony under the Federal Rules of Evidence and caselaw. Mr. Klingenstein is unable to state his opinions to a reasonable degree of scientific or engineering certainty, his opinions are based upon flawed and circular logical premises, and his opinions lack any factual or evidentiary basis. Consequently, Mr. Klingenstein's report and testimony fail the fundamental, threshold test required of expert testimony in that they do not serve to assist the Court in understanding the

evidence at trial. Mr. Klingenstein's report and his testimony are inherently unreliable and therefore this evidence should be barred.

Background

This case was brought by Plaintiff against Florida Cities and Avatar Holdings for Clean Water Act ("CWA") violations at three wastewater treatment facilities: Waterway Estates, Barefoot Bay, and Carrollwood. Plaintiff seeks civil penalties for the CWA violations under 33 U.S.C. § 1311(d) (CWA § 309(d)). In its orders of November 22 and December 21, 1995, this Court barred under the doctrine of res judicata all claims against both defendants for unpermitted discharges at Barefoot Bay and Carrollwood and for violations of the administrative order at Barefoot Bay. Additionally, the Court ruled that all claims against Avatar Holdings arising prior to May 5, 1995 are barred against Avatar Holdings by the applicable statute of limitations.

Mr. Klingenstein, who is an environmental engineer with the consulting firm of Science Applications International Corporation in Maywood, New Jersey, was retained by EPA to provide expert testimony in the present case. Mr. Klingenstein's report ("Report," produced to Defendants on October 13, 1995 and attached as Exhibit 1) contains opinions addressing 1) "the history and causes of that history, of FCWC's violation of the CWA and its NPDES permits at each facility; 2) the seriousness of FCWC's violations; and 3) the efforts made by FCWC, and those that should have been made by FCWC, to comply with the CWA and applicable NPDES permit limitations and requirements." Report at 1. The report concludes that Florida Cities operated the three wastewater treatment plants without valid NPDES permits for a "cumulative total" of "almost two decades." Report at 22. These violations are called "egregious" and "entirely avoidable." Id. Mr. Klingenstein

similarly finds the alleged NPDES permit violations to be "serious" and "largely avoidable." Id. Ultimately, Mr. Klingenstein concludes that "the only plausible explanation for FCWC's violations" is its "lack of respect for the CWA and the environment." Id. (emphasis added). However, as set forth below, Mr. Klingenstein's opinions fail to meet the requisite standard for expert opinions and are based solely upon shallow, conclusory analysis.

Legal Analysis

A. Standard for Admission of Expert Testimony

Pursuant to Fed. Rule Evid. 702, expert testimony is admissible to the degree it is helpful to the trier of fact in understanding the evidence. As Rule 702 states:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2795 (1993), the Supreme Court held that expert testimony must be both reliable and relevant for it to be deemed admissible, and it is the trial court's responsibility to screen such evidence.[1] Contrary to the standard set forth in Daubert, Mr. Klingenstein's report and testimony contain irrelevant or baseless opinions that serve no useful purpose for the trier of fact. Large portions of his report address CWA allegations that have been dismissed and are no longer relevant to the issues in question. Moreover, Mr. Klingenstein's purported opinions

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[1] In terms of reliability, an expert opinion must be supported by appropriate validation. Id. In terms of relevance, an expert opinion must "assist the trier of fact to understand the evidence or to determine a fact in issue" and must be able to be properly applied to the facts in issue. Id. The Eleventh Circuit has ruled that the admissibility of expert testimony is to be determined under the standards articulated in Daubert. Christopher v. Cutter Laboratories, 53 F.3d 1184 (11th Cir. 1995); U.S. v. Lee, 25 F.3d 997 (11th Cir. 1994).

on matters still at issue are unreliable because his opinions: 1) are not stated to the testimonial standard required for expert testimony. 2) are dubious because they are based on conjecture, erroneous, or unproven facts, and 3) are dubious because they are based on either unreliable scientific methodology or no methodology at all.

In sum, Mr. Klingenstein's testimony consists of a multitude of individually unreliable or irrelevant opinions that together form the basis of his ultimate opinion. When viewed in its totality, his opinions are especially misleading to the trier of fact and fail to meet the standard of admissibility for expert testimony.

B. Questionable Scientific Method

Under the standard articulated in Daubert, 113 S. Ct. at 2795, to the degree an expert's opinion is "scientific," the opinion must be based on reasoning or methodology underlying the testimony that is scientifically valid and that has in fact been properly applied to the facts in question. Moreover, scientific opinions must "speak in terms of probabilities instead of possibilities." Thomas v. Fag Bearings Corp., 846 F.Supp. 1382, 1394 (W.D. Mo. 1994) ("A scientific opinion that cannot establish a probability cannot be the basis on which a reasonable juror can find in favor of a proposition").

Mr. Klingenstein's testimony falls far short of this standard for scientific opinions. Overall, the testimony includes different kinds of opinions. Some are opinions of Florida Cities' operating procedures and, while within the scope of expert testimony, are not scientific in nature. Other opinions estimate the amount of environmental damage caused by the waste streams in question and are scientific in scope. Yet these opinions state mere possibilities rather than probabilities, and the bases for such opinions, if mentioned at all, are

dubious. At his deposition, and in his report, Mr. Klingenstein was unable to testify as to a reasonable degree of scientific certainty with regard to these opinions. Because such statements are inherently unreliable, and do not include an explanation of how the possibilities were derived, these statements should be excluded.

Examples of such statements include:

> • "FCWC's violations of the residual chlorine limits in its [Barefoot Bay] permit are particularly significant in light of the concern of the U.S. Fish and Wildlife regarding the endangered wood stork." Report at 12.

When questioned about the relationship between the Barefoot Bay permit exceedences and the wood stork, Klingenstein conceded he could not say with any reasonable degree of certainty that such a relationship existed. Kling. Dep. Tr. at 108.

> • "FCWC's exceedances of the toxicity limits likewise indicates that the plant's effluent had a toxic characteristic; this by definition increases the likelihood that the discharge negatively impacted organisms in the receiving water." Report at 12.

This statement speaks only to possibilities and not to any opinion to a reasonable degree of scientific certainty. Mr. Klingenstein's opinion is not based on any specific analysis of the relevant effluent data but rather it is merely a conclusion based upon circular reasoning.

> • "If FCWC had upgraded the Barefoot Bay plant to AWT status the toxicity violations might have been eliminated. Improvements in operation and maintenance . . . would have reduced the likelihood of the residual chlorine violations." Report at 18.

As with other sections of his opinion, Mr. Klingenstein states these opinions as mere possibilities and not probabilities. He points to no evidence which indicates that poor plant performance caused these violations. These statements are at best mere speculation which

does not meet the standards of scientific validity and certainty. Moreover, Florida Cities' permit did not require upgrade to AWT. Mr. Klingenstein's speculation that some hypothetical plant other than the plant which was permitted by EPA and FDEP might have satisfied the toxicity standard is therefore wholly irrelevant.

C. No Support or Misleading Support for Opinions

Mr. Klingenstein's report and accompanying testimony should also be barred because many of his opinions are not based on any identifiable methodology, analytical support, or logical reasoning. In order to determine the reliability of Mr. Klingenstein's opinions the Court must know the underlying basis of his opinions and what reasoning processes were used in forming the opinion. See U.S. v. 0.161 Acres of Land, more or less, 837 F.2d 1036, 1040 (11th Cir. 1988) ("An expert's testimony as to the value of condemned property is admissible provided the expert states the assumptions on which his opinion is based") (emphasis added).

Other courts have typically excluded expert testimony where the opinion is merely conclusive and lacks any basis in evidence. See Carrol v. Litton Systems, Inc., 1995 U.S. App. LEXIS 2015 (4th Cir. 1995) (upholding the exclusion of expert evidence when an expert failed to offer support for his conclusion); Viterbo v. The Dow Chemical Co., 826 F.2d 420, 422 (5th Cir. 1987) ("If an opinion is fundamentally unsupported, then it offers no expert assistance to the jury"); Thomas v. Fag Bearings Corp., 846 F.Supp. at 1393 ("Opinions of an expert need not be accepted when they are based on nothing more than personal opinion or belief").

Additionally, this Court should exclude elements of the Klingenstein testimony under Fed. R. Evid. 403 as being unfairly prejudicial, causing confusion, and being misleading. "Evidence is prejudicial under Rule 403 where it appeals to an illegitimate basis for persuasion, and thereby goes beyond proving the fact or issue it is offered to prove." 0.161 Acres, 837 F.2d at 1041. Following this line of thought, this Court must be skeptical of expert opinion not only where there is no support demonstrating the basis of that opinion, but also where the reasoning process is demonstrably illogical.

Mr. Klingenstein's opinion and testimony are also unreliable because of their transparent bias. "Without more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible." Viterbo, 826 F.2d at 423 (citing Perry v. U.S., 755 F.2d 888 (11th Cir. 1985).

The following examples demonstrate the inherent unreliability of Mr. Klingenstein's opinion.

> • "It appears that the Whole Effluent Toxicity Violations may have been partially due to pesticides in the plants [sic] effluent, and to the plant's disinfection practices." Report at 6.

This statement does not state its basis; moreover, at deposition Mr. Klingenstein conceded that he did not know if a laboratory had ever in fact detected pesticides at the plant in issue. Kling. Dep. Tr. at 76.

> • "FCWC's exceedances [at Waterway Estates] . . . appear to have been largely due to . . . construction-related factors. Incomplete nitrogen removal is a possible specific cause." Report at 10.

Mr. Klingenstein offers no basis for this statement: he does not identify what "construction-related factors" caused the delay, and he does not state any opinion to a reasonable degree of scientific certainty.

> • "FCWC's violation of the [Barefoot Bay] permit limits is significant in that the limits were intended to minimize the harm caused by the discharge into threatened water bodies until its termination by July 1995." Report at 12.

The conclusion that the violation at issue is "significant" is based purely on circular reasoning in that the goal of the permitting process and the individual limits contained in the permit limits justify Mr. Klingenstein's conclusion. Mr. Klingenstein does not rely upon any scientific data regarding the effluent itself or the receiving waterbody.

> • "The violation of the NPDES permit limits demonstrates that the continued discharge from the Carrollwood plant was not of sufficient quality to have a 'minimum negative impact.'" Report at 13.

This conclusion is also based on circular reasoning in that Mr. Klingenstein adopts a goal of the permitting process to rationalize his conclusion. Moreover, the next sentence is unsupported: "In particular, the frequent violations of the phosphorous and nitrogen limits resulted in the plant being an unacceptable nutrient load on the Upper Sweetwater Creek." Mr. Klingenstein ignores the fact that Carrollwood was also discharging pursuant to a corresponding EPA administrative order and FDEP consent orders which allowed secondary treatment. He identifies no specific data which supports this statement by linking the effluent from Carrollwood to any negative impact upon the receiving waters or quantifying the term "unacceptable nutrient load."

> • "This failure led to the plant performing below its capability . . ." Report at 13.

Mr. Klingenstein fails to identify how Carrollwood's failure to meet AWT effluent limitations is linked to the performance capability of a secondary treatment plant. In fact, he fails to define the phrase "below its capability." At his deposition Mr. Klingenstein used the term vaguely and admitted that he had not reviewed the plant's performance against its own design criteria. Kling. Dep. Tr. at 112.[2/] Therefore, the statement is confusing and misleading.

> • "Violation of the NPDES total nitrogen limit [at Waterway Estates] is significant in that even though the outfall had moved as of July 1991, the nutrient load to the receiving water was still above that determined by FDEP to be necessary for the protection of the Caloosahatchee." Report at 15.

Mr. Klingenstein categorizes these violations as "significant" only because these were violations of AWT standards, and not based upon any objective review of the effluent data or data regarding the river's water quality. Additionally, he fails to consider that Waterway

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[2/] The deposition transcript cited reads as follows:

Q. What do you mean by the plant performing below its capability there in that paragraph?

A. I mean its capability of operating as best it possibly could have been.

Q. Was it being operated so as to comply with secondary treatment standards, to your knowledge?

A. At what point in time?

Q. During the ten years prior to its decommissioning?

A. Not having carried out in the sense of analysis, if memory serves me, that it had a history of noncompliance over the course of that ten years.

Q. Do the words below its capability mean less than secondary treatment?

A. Not in all cases.

Q. What else does it mean besides less than secondary treatment?

A. It means as taken at face value below the capability of the plant as operated. Even if that capability is better than secondary treatment, being operated as best it can be.

Q. In your judgment, did the Carrollwood facility perform worse that it was designed to perform?

A. I have not carried out an analysis of the plant's performance against the original designed criteria of that plant.

Estates was still authorized by FDEP to discharge secondarily treated effluent during this period of time. Mr. Klingenstein's circular reasoning provides no substantive information that would assist the Court in understanding the issues at trial. At his deposition Mr. Klingenstein testified that it was "possible," not probable, that the level of nutrient loading acceptable to FDEP had been exceeded. Because he was unable to testify to a probable violation of Florida's nutrient loading levels, his opinion regarding the seriousness of the violations is, at best, speculative. Kling. Dep. Tr. at 122.

> • "Overall, FCWC's unpermitted discharges and discharge at an unpermitted location [at Waterway Estates] constituted extremely serious violations of the CWA, in that those violations entirely circumvented the intent of the NPDES program." Report at 15.

This conclusion is not based upon any scientific analysis but merely upon Mr. Klingenstein's circular reasoning that because these NPDES violations exist, they are, therefore, "extremely serious" violations. A violation of the CWA is not "serious" simply because it is a violation--if that were true the CWA's requirement that this Court must consider the "seriousness of the violations" would be meaningless. The factual circumstances of the violation, not the mere existence of the violation, are to be considered to evaluate the seriousness of the violation. But this Mr. Klingenstein's report does not do. Mr. Klingenstein fails to take into account the fact that Waterway Estates was always authorized to discharge by FDEP and discharged under EPA administrative orders between 1987 and 1989. Mr. Klingenstein also ignores the fact that EPA did not order Florida Cities to move the outfall until 1989 and that the company met EPA's construction schedule as contained in the corresponding administrative order. Mr. Klingenstein's selective reading of the facts further demonstrates the pervasive bias present in his report and in his testimony.

* "FCWC operated three wastewater treatment plants without valid NPDES permits for a cumulative total of almost two decades. These egregious violations were entirely avoidable." Report at 22.

Mr. Klingenstein's use of the phrase "cumulative total" is misleading. Each of these facilities has its own distinct history. A "cumulative total" which does not explain or take into account the individual facility's history does not, in and of itself, support the conclusion that the violations were "egregious." This conclusion is patently subjective. It is followed by the factually incorrect overstatement that all violations were "entirely" avoidable. The entire statement demonstrates Mr. Klingenstein's bias in his analysis.

* "The only plausible explanation for FCWC's violations is that FCWC lacked respect for the CWA and the environment." Report at 22.

This conclusory statement is not the proper subject of an expert opinion. It is purely argumentative language which offers no guidance for the Court, but merely reflects the level and caliber of objective, scientific analysis which Mr. Klingenstein undertook in formulating his opinions.

In sum, the examples discussed above demonstrate that because the Klingenstein report contains statements that lack support and thereby do not provide the Court with a means for evaluating their reliability, these statements should be inadmissible. Moreover, because the report contains numerous instances of illogical reasoning, the opinions based on such reasoning are inherently unreliable and should be deemed inadmissible. Finally, because the report is obviously biased--an analysis that merely affirms a preconceived opinion--the report as a totality should be held to be inadmissible.

D. Opinions based on Erroneous Factual Assumptions

The Eleventh Circuit has ruled that when an expert opinion is based on erroneous facts it is to be excluded. U.S. v. 0.161 Acres of Land, more or less, 837 F.2d at 1040 ("Where an expert's testimony amounts to no more than a mere guess or speculation, a court should exclude his testimony . . . [b]ut where the expert's testimony has a reasonable factual basis, a court should not exclude it"). Because the Klingenstein report contains numerous factual assertions that are either erroneous or speculative, the opinions drawn from these facts are inherently unreliable and should be found inadmissible. The following examples demonstrate the unfounded and conclusory nature of Mr. Klingenstein's report.

> • "FCWC's Carrollwood Plant violated its permit limits, following the issuance of the NPDES permit in May 1991, largely due to the inadequacy of the technology in place at the plant." Report at 8.

This conclusion fails to take into consideration the fact that the permit was specifically written for an AWT facility, even though the permit writers knew that Carrollwood was a secondary treatment facility and even though EPA has acknowledged it fully understood that Carrollwood was a secondary treatment plant which would not be able to meet the AWT permit limits. Kling. Dep. Tr. at 82-83.

> * "In my opinion, the unpermitted discharge [at Waterway Estates] took place because FCWC failed to take seriously the requirement that it cease discharging at the Caloosahatchee River by the effective date of the permit denial." Report at 9.

This statement assumes erroneously the fact that FCWC was somehow aware of EPA's reasons for denial of the 1986 NPDES permit renewal application before the denial actually occurred such that FCWC could have taken action ahead of time to avoid the discharging at issue. Additionally, Mr. Klingenstein fails to explain how Florida Cities could

have developed alternatives to discharge between the time of the tentative permit denial and the final permit denial. Kling. Dep. Tr. at 86-87.

> • "The limitations in the permit which became effective on November 1, 1989 were as follows . . ." Report at 9.

This section of Mr. Klingenstein's analysis erroneously assumes that the permit limitations were the only federal CWA limitations imposed on the facility and fails to include consideration of the administrative order in effect at this time. Kling. Dep. Tr. at 93-94.

> • "FCWC needed to upgrade its treatment facility if it was to meet the limitations of its May 1991 permit [relating to Carrollwood]. It should have begun its upgrade in a timely fashion, so that it could comply with the permit when it became effective." Report at 20.

This statement demonstrates Mr. Klingenstein's failure to consider the impact of Florida law on Florida Cities' discharge alternatives, his failure to consider that Carrollwood was required by state permit to connect with a Hillsborough County facility, and his failure to consider the company's ongoing efforts to pursue alternatives to discharge.

> • "[North Fort Myers Utilities] indicated that it was willing to accept FCWC's flow and that it would have the capacity to do so by mid-1988. Furthermore, its letters also indicate that cost should not have prevented FCWC from connecting to NFMU. Had this option been seriously pursued by FCWC I believe that the transfer of flow and the cessation of canal discharge would have been possible in 1988, even given negotiations starting in 1987.
>
> Following receipt of EPA's permit denial in December 1986, FCWC carried out limited talks with NFMU, but FCWC rejected this option, in spite of continued interest and incentives from NFMU. Report at 21.

Mr. Klingenstein did not undertake any analysis of the actual costs to Florida Cities, or to its customers, associated with connecting to the North Fort Myers treatment facility. He does not offer any analysis of whether the Florida Public Service Commission (PSC) would have found these costs to be prudent. Mr. Klingenstein failed to make any

comparison between the costs of upgrading Waterway Estates and the cost to connect to North Fort Myers. At his deposition, Mr. Klingenstein admitted that he did not know whether the North Fort Myers' deep injection well was permitted--a requirement for this option to be viable. Kling. Dep. Tr. at 128-129. Additionally he relied only upon North Fort Myers' representations that it had the capacity to accept influent from Waterway Estates, rather than any independent analysis. Id.

* "FCWC could have avoided discharge to an unpermitted location [at Waterway Estates] by extending the outfall in a timely manner." Report at 21.

This statement fails to acknowledge the fact that such an extension would have required meeting numerous federal, state, and local regulatory requirements authorizing such an extension, and that such regulatory requirements would have taken a significant period of time to fulfill. Kling. Dep. Tr. at 132. Moreover, the statement fails to account for the fact that Florida Cities met the construction schedule as set forth in EPA's administrative order 89-109, which authorized discharge into the canal until August 1, 1991.

E. Irrelevant Opinions

In its Orders of November 22 and December 21, 1995, this Court ruled that Plaintiff's claims against Florida Cities and Avatar Holdings for unpermitted discharges at Barefoot Bay and Carrollwood, and for violations of the administrative order at Barefoot Bay, were barred by the doctrine of res judicata. The Klingenstein report, which was submitted prior to the Court's orders, contains numerous opinions addressing these dismissed allegations. See Klingenstein Report at 3-5, 6-7, 11-13, 16-18, 19-20. These opinions are irrelevant to the remaining violations at issue. More importantly, however, because these

opinions form part of the basis for Mr. Klingenstein's ultimate opinion, that opinion is inherently unreliable.

F. Overall Effect and Ultimate Opinion

In large part Mr. Klingenstein's testimony does not consist of helpful objective opinions, as required of a legitimate expert witness, but misleading, subjective statements. The overall effect is nothing short of telling the Court what conclusion to reach in this case, without setting forth the methodology upon which the Court might rely to reach any particular conclusion. Such a tactic, however, is precluded under the Federal Rules of Evidence. As the comments to Rule 704 make clear, an opinion that is tantamount to a verdict is inadmissible. The comment states:

> Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury [or court] what result to reach, somewhat in the manner of the oath-helpers of an earlier day.

The Klingenstein report amounts to his "telling the [court] what result to reach." The report attempts to substitute expert testimony for the Court's own analytical process. As the comment notes, such opinions are merely a waste of the Court's time.

Conclusion

Mr. Klingenstein's report is biased, based upon shallow, suspect, or simply nonexistent analysis, and does not serve to assist the trier of fact. As demonstrated above, Mr. Klingenstein's opinions are frequently based on wrong, incomplete, or speculative facts. Moreover, the report repeatedly fails to demonstrate how Mr. Klingenstein has established the cause and effect relationships he asserts. Rather, he seeks to establish such relationships

through the use of illogical reasoning or through sheer speculation. When the cumulative effect of the individual statements is considered, together with the irrelevance of much of the report, the helpfulness of the testimony diminishes further. For all these reasons, Florida Cities and Avatar Holdings respectfully request that this Court grant their motion to exclude the expert report and testimony of Mark. J. Klingenstein.

Respectfully submitted,

By: _____

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January 5, 1996

CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of Florida Cities Water Company and Avatar Holdings Inc.'s Motion in Limine and supporting Memorandum has this 5th day of January, 1996, been sent to the following persons by United States Mail and by facsimile:

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IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FLORIDA CITIES WATER COMPANY,
and AVATAR HOLDINGS INC.,

Defendants.
---/

Original

701 Brickell Avenue
Miami, Florida
Monday, October 23, 1995
10:00 A.M.

DEPOSITION OF MARK J. KLINGENSTEIN

Taken before Elsie Eaton, Notary Public for the State of Florida at Large, pursuant to Notice of Taking Deposition filed in the above cause.

EXHIBIT 2

option is needed.

Q. In determining whether or not an option is viable, do you consider the state or local permitting that might be required in order to implement an option?

A. I would consider that part of the technical viability.

Q. I direct your attention to Page 8 of your report, and after discussion of the exceedance at the Carrollwood facility, listing of them, the statement is made that the violations of permit limits following issuance of the NPDES permit in May of 1991 was largely due to the inadequacy of the technology in place at the plant; is that correct?

A. I believe that is a correct reading.

Q. What do you mean by inadequacy of the technology in place at the plant?

A. Of course, the Carrollwood plant was not there at the time I visited the site. So based on available records, my understanding of what the Carrollwood plant consisted of was basically a secondary plant with followed by a pond, and that, in my opinion, a plant of that general design would be unlikely to consistently achieve compliance with the limits that were included in the 1991 permit.

Q. That is because the limits in the 1991 permit applicable to the AWT facilities, rather than one that is secondary treatment?

MR. JACOBS: Objection to the extent the question calls for a legal conclusion by use of the word applicable. Also, I object to use of that term as vague and ambiguous.

A. I would certainly characterize those limits as being of a nature, of a magnitude or of a level, and for parameters such that I would expect a different configuration treatment plant would be necessary in order to consistently meet them.

Q. Would the AWT facilities, in your judgment, be expected consistently to meet these standards in the 1991 permit?

A. Assuming it was properly designed and depending on how you characterize AWT in the common use of the parlance for AWT, I would say that it would certainly be much more likely.

Q. The next section in this report deals with the Waterway Estates facility. I direct your attention to the last paragraph on Page 8, which discussed the denial of the NPDES permit renewal for the Waterway Estates facility in 1986, and states in the second sentence the basis for this denial was

Q. Could you tell me please what Florida Cities Water Company should have done when it was notified by the EPA in July of 1986 of the EPA's intent to deny the permit that would have reflected its taking seriously to the requirement it cease discharge?

A. Given that the wasteload allocation study had taken place in 1981, the fact that that was released following its completion, if I was in Florida Cities' position, I would have begun moving sometime prior to that to begin addressing the problem, based on the fact that stated wasteload allocation study, which is necessary for renewal of the permit clearly indicated there was not going to be a wasteload allocation for plants at the time it was discharging.

Q. Is it your opinion that Florida Cities was aware of this 1981 wasteload allocation prior to July of 1986?

A. I would expect they would have been.

Q. Can you tell me what the basis of that speculation is?

A. I would assume that they would have been aware that the survey was being carried out and would have been informed that the wasteload

allocation that was going to be carried out.

Q. Can you tell me the basis of your assumption that Florida Cities would have been aware that a survey was being carried out?

A. Simply that it would be in their best interest to maintain awareness of that sort of thing.

Q. Assuming for purposes of my question that Waterway Estates was not aware of the 1981 wasteload allocation until it was notified by the EPA of the agency's intent to deny the permit in July of 1986, what were the options, in your judgment, of Florida Cities, in other words, to take seriously the requirement that it cease discharge to the Caloosahatchee River?

A. Using that assumption, which was the Florida Cities, assuming that Florida Cities had no prior knowledge of that wasteload allocation that its first notification was intended denial notification from EPA, I would assume that they would make all possible efforts, immediately and aggressively investigate and pursue all available discharge options.

Q. Can you tell me what those alternatives might include?

entitled Violations of Permit Limits. It says limitations in the permit became effective November 1st, 1989. Are you aware of the administrative order that was in effect in 1989 for the Waterway Estates facility?

A. Whose administrative order?

Q. EPA's administrative order.

A. I am aware there were administrative orders.

Q. Did you review those administrative orders in determining when the limitations of the permit became effective?

MR. JACOBS: Read that question back.

(Whereupon, the pending question was read back by the court reporter.)

MR. JACOBS: Objection. Call for a legal conclusion.

A. No, Mr. --

MR. JACOBS: Assumes facts not in evidence.

BY MR. SCROGGIN:

Q. Have you, in fact, reviewed the administrative orders --

MR. JACOBS: Objection. Asked and answered.

BY MR. SCROGGIN:

Q. -- at the Waterway Estates facility?

MR. JACOBS: Objection. Asked and answered.

A. Yes, I have seen those administrative orders. I have not reviewed them in that context.

BY MR. SCROGGIN:

Q. On Page 10 of this report there are listed whole effluent toxicity. I am referring to the Waterway Estates facility and referring to violation of permit limits. There are listed violations of whole effluent toxicity for January, February, March, April, May, and June of 1992; is that correct?

A. Yes.

Q. That is of violations?

A. Yes. Well, six months, yes.

Q. Are you aware of testing requirements for whole effluent toxicity at the Waterway Estates facility?

A. That it is a requirement specified that the degrees that are lethal to 50 percent of the test organisms, in effect, must be greater than 100 percent concentration.

Q. Are you aware of how often testing for whole effluent toxicity is required in the NPDES

Q. And the second?

A. As well.

Q. All three of these, in your judgment, could be due either to ponds or the plant or both?

A. All three of these would contribute to the improvement of the performance of the plant and a reduction in problems that might have been the result of either problems in the mechanical plant or the pond.

Q. Now I will refer you to Page 21, which deals with Waterway Estates, and the section of Discharge Without a Permit.

MR. JACOBS: Counselor, if we go to a new section, I request we take just a quick break.

(Whereupon, a recess was had off the record.)

BY MR. SCROGGIN:

Q. I would like to direct your attention to Page 20 of the report, the section dealing with Waterway Estates and the options available that would allow Waterway Estates number of options to cease its discharge. The top page, 21, first part, deals with the connection with Fort Meyers utilities. Are you aware what kind of treatment system the North Fort Meyers facility had that would

have accepted the flow from the Waterways Estates facility?

A. I am not aware of the specific characteristics of that, other than, I believe, it disposed of most of its waste water by reuse, with a deep well as a back-up.

Q. Do you know when the deep well was permitted at the North Fort Meyers?

A. I don't specifically know when the deep well was permitted, no.

Q. Would it have been required that a deep well be permitted at the time of the hookup in order for this to be a viable option?

MR. JACOBS: Objection to the extent that question calls for a legal conclusion.

A. I don't know about that, Counselor. I do know North Fort Meyers characterizes that they had the capacity available in mid 1988.

BY MR. SCROGGIN:

Q. In your judgment, would that mean they have acquired all the amicable permits that would be required for the operation of the treatment facility to accept the flow from Waterway Estates?

A. That would certainly be the indication.

Q. Another option listed is spray irrigation;

Discharge to an Unpermitted Location, and the bottom of Page 21, the statement, "FCWC could have avoided discharge to an unpermitted location by extending the outfall in a timely manner."

Are you familiar with the regulatory approvals that are required in order to construct and extend the outflow of the Waterway Estates facility?

A. I am aware that permitting was required by the State of Florida, permitting was required from the U.S. Army Corp. Permitting was required, ultimately, from U.S. OPA, as well. If I recall correctly, some County permitting was required, construction related permitting was required.

Q. Is it your conclusion, based upon your review of all those requirements, that Florida Cities could have complied with all of those regulatory requirements in a more timely manner in order to move the outflow?

A. The records seem rather consistently to indicate Florida Cities could have initiated the processes earlier, and in making submissions, and perhaps they had could have been more complete or more careful in making those submissions, or if their consulting engineers were more careful, they

A. That actually would go to two pockets. One, if in fact there was a pesticide component, I would expect there would be partial association of that with solids in the plant's AWT status, I would expect further removal of solids might very well have had a corresponding impact and pesticides, therefore, toxicity.

Likewise, if toxicity was related to, for instance, ammonia in the plant's effluent, I would expect to upgrade to AWT if incorporated nitrogen removal would have had an impact on toxicity.

Q. Do you know if a laboratory, in fact, ever detected pesticides in this plant's influent?

A. I don't recall whether the document specifically referred to influent or -- I cannot recall the context.

Q. Can you tell me what experience you had with respect to whole effluent toxicity from such facilities?

A. The whole effluent toxicity tests has been incorporated into NPDES, and the State performs sometime now. And for a number of years, I have been directly and indirectly responsible for a program whereby we carry out inspections, as my company carries out inspections at the NPDES

Q. What do you mean by the plant performing below its capability there in that paragraph?

A. I mean its capability of operating as best it possibly could have been.

Q. Was it being operated so as to comply with secondary treatment standards, to your knowledge?

A. At what point in time?

Q. During the ten years prior to its decommissioning?

A. Not having carried out in the sense of analysis, if memory serves me, that it had a history of noncompliance over the course of that ten years.

Q. Do the words below its capability mean less than secondary treatment?

A. Not in all cases.

Q. What else does it mean besides less than secondary treatment?

A. It means as taken at face value below the capability of the plant as operated. Even if that capability is better than secondary treatment, being operated as best it can be.

Q. In your judgment, did the Carrollwood facility perform worse than it was designed to perform?

A. I have not carried out an analysis of the

mischaracterized the Witness' statement in the report.

BY MR. SCROGGIN:

Q. I will reword. Can you tell me the basis for the statement that the nutrient loads to the receiving water was still above that determined by the FDEP to be necessary for the protection of the Caloosahatchee

A. In carrying out wasteload allocations, the FDER had, in effect, determined what portion of each discharge, what portion of the available load was to be allocated to each discharge, and in making that determination, came up with the load factors that were ultimately used to develop the permit limits.

Q. Does this statement mean that, in your judgment, the load of nutrients to the Caloosahatchee River considered acceptable by the FDER had been exceeded?

A. Certainly when you exceed your permit limits, there is that possibility.

Q. But is that your interpretation with respect to the load of the river itself, not permit limits? Does the statement mean the nutrient load to the receiving water determined to be acceptable

Q. Let me read it again. This is with reference to the total residual chlorine limitation, sentence 23, "Failure to comply with this limitation certainly increased the risk of continued discharge impacting the endangered wood stork, as well as other aquatic organisms."

Have I read it correctly, now?

A. Yes.

Q. Can you say with a reasonable degree of scientific certainty there was, in fact, an impact on endangered wood storks posed by TRC exceedances at the Barefoot Bay facility?

A. Not with certainty.

Q. I will move on to Page 13, if I might. I am referring to the section that deals with Carrollwood and the subsection of discharge without a permit, and the last paragraph before the section labeled NPDES Permit Violations, FCWC discharge contributed to the depletion of oxygen levels and increased nutrients levels in the Sweetwater Creek downstream of discharge."

Given the condition of the Sweetwater Creek, is it likely that the Carrollwood plant effluent negatively impacted the creek? I will ask you, again, a similar question: Can you state with

ANALYSIS OF CLEAN WATER ACT VIOLATIONS BY FLORIDA CITIES WATER COMPANY, INC.

Mark J. Klingenstein, P.E.
Science Applications International Corporation
255 West Spring Valley Road
Maywood, New Jersey 07607

October 13, 1995

RECEIVED
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DGS

EXHIBIT 1

I. INTRODUCTION

I am a Senior Environmental Engineer with Science Applications International Corporation, located in Maywood, New Jersey. A copy of my current resume is attached to this report (Attachment A).

I have been retained by the United States to provide expert opinions on Clean Water Act (CWA) and National Pollutant Discharge Elimination System (NPDES) permit violations at three Florida Cities Water Company (FCWC) facilities: the Barefoot Bay Wastewater Treatment Plant in Barefoot Bay, Brevard County, Florida; the former Carrollwood Wastewater Treatment Plant in Tampa, Hillsborough County, Florida; and the Waterway Estates Wastewater Treatment Plant in North Ft. Myers, Lee County, Florida. I have been asked to offer opinions on 1) the history, and the causes of that history, of FCWC's violation of the CWA and its NPDES permits at each facility; 2) the seriousness of FCWC's violations; and 3) the efforts made by FCWC, and those that should have been made by FCWC, to comply with the CWA and applicable NPDES permit limitations and requirements.

My time in this case has been billed to the Government at an hourly rate of $97.80. I receive a straight salary from SAIC, and my personal compensation does not vary with the hours that I bill to this matter.

Cases on which I have provided testimony under deposition or in court in the preceding four years are as follows: U.S. vs. Weitzenhoff, et al (9/91), U.S. vs. TARACORP (1/93), and U.S. vs. Gulf Chemical (5/94).

In developing my opinions and in preparing this report, I reviewed various documents from US Environmental Protection Agency (EPA) , Florida Department of Environmental Protection (FDEP) (formerly the Department of Environmental Regulation or FDER), Hillsborough County Environmental Protection Commission (HCEPC), and AVATAR and FCWC files (Attachment B presents a listing of the files and documents reviewed). I also carried out inspections of the three FCWC facilities during the week of December 20, 1994; photographs (Attachment C) and a videotape taken during those inspections are attached to my report. Some of the opinions offered in this report may change, and additional opinions may be offered if additional information and data is reviewed.

II. BACKGROUND

Wastewater treatment plants use a variety of technologies to remove pollutants from wastewater so that it can be safely discharged to surface water, groundwater, or be reused. To ensure that human health and the environment are protected, and that each discharger treats its wastewater appropriately prior to discharge to surface waters, the CWA established the NPDES permit system. Under the NPDES system, every potential discharger must apply for and receive a permit prior to discharging. By requiring receipt of a permit prior to discharge, the NPDES system allows EPA to determine whether a receiving water has the capacity to assimilate a pollutant discharge, and if so, at what particular point in the water body and for what quantities of particular pollutants.

FCWC, a subsidiary of Avatar Holding, Inc., owns and operates eleven wastewater collection and treatment systems in Florida. FCWC discharged to surface waters for years without a permit at three of these facilities (See Exhibits 1,2, and 3 for the general location of these facilities), and when its discharges were permitted, those discharges often exceeded the limitations contained in the applicable

NPDES permits.

Barefoot Bay

The Barefoot Bay Development is a 5,000 lot mobile/modular home residential community which was developed by Avatar in the early 1970s. The original wastewater treatment plant consisted of an activated sludge system (a form of treatment which uses bacteria to breakdown and remove pollutants), with chlorine disinfection and disposal to on-site percolation ponds.

Percolation ponds are large unlined basins into which the treated wastewater is discharged. The treated wastewater percolates down through the bottom of the basin into the earth. Percolation pond disposal ordinarily does not require an NPDES permit because it does not result in a surface water discharge. At Barefoot Bay the two percolation ponds appear to have been designed to overflow via a pipe to a nearby drainage canal. This canal flows to the North Prong of the Sebastian River, which in turn discharges to the Indian River Lagoon. Both are considered to be threatened water bodies.

As development of Barefoot Bay took place and wastewater flow consequently increased, the capacity of the percolation ponds was exceeded. This led to regular, and soon continuous discharge from the ponds to the canal. These discharges to the canal (and hence to the Sebastian River and Indian River Lagoon) began no later than 1980, and continued unpermitted until 1991. In addition to its unpermitted discharge of wastewater, FCWC also violated the limitations in an AO and the NPDES permit. It is my understanding that at the present time, FCWC continues to discharge approximately one half million gallons per day to the canal.

Carrollwood

FCWC acquired the Carrollwood service area in 1965. As of 1990, the Carrollwood Service Area included between 3,500 and 3,900 residents.

Wastewater from the residences in this area was treated at the Carrollwood Wastewater Treatment Plant and discharged to the Sweetwater Creek until January 1992, when the wastewater was routed to the Hillsborough County collection system for treatment at the County's treatment plant. FCWC held a NPDES permit for this discharge until October 1984, when EPA denied the Company's NPDES permit. FCWC then discharged daily without a permit until July 1, 1991 when a NPDES permit was again issued. From July 1, 1991 until the tie-in to the Hillsborough County collection system in January 1992, FCWC regularly violated a number of the permit limitations.

Waterway Estates

The Waterway Estates Service Area was acquired by FCWC in 1967. The population served has increased from approximately 3,000 in the mid-1970s to approximately 9,000 in the early 1990's.

Until 1991, the Waterway Estates plant discharged to a canal which is tributary to the Caloosahatchee River, at a point approximately 800 feet from the mouth of the canal on the Caloosahatchee River. In 1991 FCWC undertook an upgrade of the plant, and extended its outfall some 2,600 feet into the Caloosahatchee River to the 6 foot mean depth contour line. The outfall extension was put in service in July 1991, and the upgrade was completed by early 1993.

From January 9, 1987 until November 1, 1989, 1989, FCWC discharged daily from the Waterway Estates treatment plant without a NPDES permit. From the issuance of a NPDES permit effective November 1, 1989, until July 1991, FCWC discharged at an unpermitted location. Furthermore, FCWC violated the limitations contained in the NPDES permit.

III. OPINIONS:

At each of the three plants which are the subject of this report, FCWC has failed to comply with the CWA requirement that all discharges to surface water must be permitted; also, FCWC frequently violated the conditions and limitations in its NPDES permits (when obtained) and in an AO.

1. HISTORY AND CAUSES OF CWA, AO AND NPDES PERMIT VIOLATIONS

Barefoot Bay

FCWC discharged wastewater from the Barefoot Bay Wastewater Treatment Plant to surface water without a permit, and violated the conditions and limitations contained in an EPA Administrative Order (AO) and in the NPDES permit.

i) ***Discharge Without a Permit:***

FCWC discharged to surface waters without a NPDES permit from the Barefoot Bay Wastewater Treatment Plant beginning no later than 1980 and continuing to November 1, 1991. A chronology developed by FCWC for Barefoot Bay indicates that FCWC was aware of problems in the percolation ponds operation as early as 1981, and in deposition, L. Good of FCWC indicated that overflows to the canal were occurring daily by 1983. Furthermore, a purchase request dated 9/1/83 for engineering studies of land application disposal at Barefoot Bay noted that "the existing percolation ponds in Barefoot Bay are not adequate to accommodate existing and future discharge". Sewage flow from the Barefoot Bay Development to FCWC's Treatment Plant increased through the 1980s. In his deposition, L.Good indicated that flow to the canal in 1983 was 100,000 to 150,000 gallons per day. A 1985 Barefoot Bay Effluent Disposal Study noted that **"effluent is being discharged from the ponds to surface waters in violation of existing permits"**. As that study shows, the population in Barefoot Bay grew throughout the 1980's; flow to the treatment plant, and discharge to the canal both grew as well.

Based on FCWC's own information, the average discharge to the canal, by year, was as follows:

Year	Average Flow, gallons per day
1987	502,000(August through December)
1988	348,000
1989	375,000
1990	421,000
1991	518,000

In spite of having a known, unpermitted discharge to surface water since the early 1980's, FCWC failed to apply for an NPDES permit for the discharge to the canal, as required by EPA regulations (40 CFR Part 122.21), until 1990.

EPA issued an NPDES permit for FCWC's discharge which became effective on November 1, 1991 and required cessation of discharge to the canal by June 30, 1995.

ii) **Violations of Administrative Order Limits:**

On September 26, 1990, USEPA issued an AO, which included the following interim limits:

Parameter	Mo. Average (mg/l)	Daily Max.(mg/l)
BOD	20 mg/l	30 mg/l
TSS	20 mg/l	30 mg/l
Fecal Coli.	200 /100 ml	400 /100 ml
pH 6 - 8.5		
D.O minimum 5 mg/l		

A summary of FCWC's violations of the AO limits is as follows:

BOD, Monthly Average Limit:October 1990

BOD, Daily Maximum Limit: October 1990

TSS Daily Maximum: November 1990, January 1991, February 1991, March 1991, April 1991, May 1991, June 1991

Fecal Coliform Daily Max.: October 1990, November 1990, October 1991

D.O. Minimum Limit: May 1991

pH Range: November 1990

As can be seen from above, FCWC experienced at least one violation of the AO in 9 of the 12 months the AO limits were in effect.

The Barefoot Bay Wastewater Treatment Plant's AO limit exceedances appear to have been the result of poor operations and inadequate staffing. FDEP inspections in the late 1980's noted poor operations, including solids loss from the clarifier, treatment units in need of maintenance, and no certified operator at plant (as required by FDEP). Solids loss is often the result of inadequate control of the activated sludge process, and directly results in TSS and BOD violations. A December 10, 1989 Brevard County inspection noted sludge carryover from the clarifier, solids accumulated in the chlorine contact tank, and weeds and dirt at the top of the chlorine contact tank.

An April 25, 1991 FCWC internal memo described the accumulation of sand in the bottom of the treatment units. The memo notes that in some spots the sand was 5 feet deep. Furthermore,

the memo estimated total loss of treatment unit volume of "20%", and opined that this condition "contributed to short circuiting and loss of aeration detention time".

Shortcomings in FCWC's attention to proper operations and staffing of the plant were also described in a memo from J. Karleskint to G. Allen, dated April 22, 1991 following a visit to the Barefoot Bay Plant. Karleskint found that "the wastewater treatment plant is not consistently meeting the effluent limits the past month" (apparently March 1991). This was attributed to staffing difficulties. "The Division has been utilizing the water operators at the wastewater plant due to insufficient staffing." In that same memo, Karleskint also noted a "need to optimize the treatment process and develop a standard operating procedure for the treatment plant."

Lack of a standard operating procedure is a significant failing for an activated sludge treatment system. Any plant so operated may experience intermittent loss of biological solids (the mass of bacteria in the activated sludge process). These solids are directly reflected in the effluent TSS concentrations, and in the BOD_5 concentrations as well (solids exert a biological oxygen demand). Likewise, solids accumulations in the chlorine contact chamber will negatively impact disinfection, resulting in violations of the fecal coliform limits.

FCWC appears to believe that many of the AO violations were the result of pond operating characteristics. To the extent that was true, it likewise reflects poor operation of the ponds.

In summary, the violations of the AO could have been eliminated if plant operations and maintenance had been improved. Overall, the violations of the AO were the result of FCWC's failure to cease discharging in a timely manner.

iii) **Violations of NPDES Permit Limits:**

The NPDES permit which became effective on November 1, 1991, included the following limitations on the discharge to the canal:

Parameter	Annual Avg.	Mo. Avg.	Daily Max.
BOD	20 mg/l	30 mg/l	60 mg/l
TSS	20 mg/l	30 mg/l	60 mg/l
Fecal Coli.	200 /100 ml	-	800 /100 ml
Tot. Res. Cl			0.2*/0.01
pH 6 - 8.5			
Whole Effluent Toxicity: NOEC > 100%			

* During first 3 months the permit was in effect

A summary of FCWC's exceedances of the NPDES permit limits is as follows:

Whole Effluent Toxicity: September 1992, October 1992, May 1993, February 1994

Total Residual Chlorine

Daily Max.: September 1992, October 1992, November 1992, December 1992, January 1993, February 1993, March 1993

FCWC also failed to report BOD_5 as required by its permit. Instead, FCWC incorrectly reported $CBOD_5$ data as BOD_5 data on its DMRs from November 1991 through June 1993, and in November 1993.

As can be seen from above, FCWC experienced at least one violation of its NPDES permit in 9 of the first 17 months the permit was in effect.

It appears that the Whole Effluent Toxicity Violations may have been partially due to pesticides in the plants influent, and to the plant's disinfection practices. If the plant been upgraded to Advanced Wastewater Treatment (AWT) status, compliance with the toxicity limits might have been achieved (AWT treatment provides for higher levels of removal of certain pollutants).

Total residual chlorine limitation violations were likely at least in part the result of either limitations in the chlorination and/or dechlorination chemical feed systems, the manner in which those systems were operated, or delays in the installation of such systems.

Overall, the violations of the permit were also the result of FCWC's failure to cease discharging in a timely manner.

Carrollwood

FCWC operated the Carrollwood Wastewater Treatment Plant for years without an NPDES permit. When such a permit was obtained, FCWC then violated the specific limitations contained in that permit.

i) **Discharge Without a Permit:**

FCWC operated the Carrollwood Wastewater Treatment Plant with a surface water discharge, without an NPDES permit from November 1, 1984 until July 1, 1991. Throughout this period, FCWC discharged to the Upper Sweetwater Creek on a daily basis.

EPA issued FCWC a NPDES permit in 1975. In October 1979, FDEP informed FCWC that there was zero wasteload allocation for the Carrollwood Plant in Sweetwater Creek. Despite having knowledge that Sweetwater Creek had no capacity to accept its discharge, in May 1980 FCWC applied to EPA for an NPDES permit for its surface water discharge. In a July 30, 1984 letter to FCWC, EPA tentatively denied the permit. The basis for the denial was the 1979 FDEP finding of no wasteload allocation at the point of discharge. EPA formally denied the permit in a letter dated September 27, 1984.

State legislation, known as Grizzle-Figg, took effect in 1987, allowing dischargers to certain water bodies with limited or no wasteload allocation to petition for discharge permits if a "Minimum Negative Impact" (MNI) could be demonstrated and if AWT treatment was provided. FCWC submitted an MNI Report in June 1988 to FDEP. FDEP initially notified FCWC of its intent to deny FCWC's petition for MNI status, but later agreed to grant such status following the submission of additional information.

In July 1990, FCWC applied again to EPA for an NPDES permit. On May 28, 1991, EPA issued

a NPDES Permit for the Carrollwood Plant, which became effective July 1, 1991. The Carrollwood plant discharged under this permit (but not in compliance with its limits, as is discussed below) until January 1992 when the plant was taken off line and all flow was diverted to Hillsborough County's wastewater treatment plant. FCWC discharged without a permit at its Carrollwood Wastewater Treatment Facility for so long because FCWC refused to make suitable arrangements to cease its discharge. Instead, FCWC was determined to connect to Hillsborough County, but failed to obtain a firm commitment from the County to accept the Carrollwood wastewater until 1991.

FCWC had viable options available that would have allowed it to cease the Carrollwood surface water discharge, but FCWC failed to seriously pursue those options.

ii) **Violations of Permit Limits:**

EPA issued a NPDES Permit for the Carrollwood Plant which became effective July 1, 1991. This permit included the following discharge limitations:

Parameter	Annual Avg.	Mo. Avg.	Daily Max.
CBOD,	-	3.0 mg/l	4.8 mg/l
TSS	5 mg/l	6.25 mg/l	10.0 mg/l
Tot. Phos.	1.0 mg/l	1.25 mg/l	2.0 mg/l
Tot. Nitrogen	3.0 mg/l	3.75 mg/l	6.0 mg/l
Ammonia Nitrogen	-	-	0.3 mg/l*
Fecal Coli.	-	0/100 ml**	25 /100 ml
Tot. Res. Cl			0.01 mg/l

pH 6 - 8.5
D.O minimum 6.0 mg/l

* After February 1, 1993
** No more than 25 % may exceed in a 30 day period.

A summary of FCWC's exceedances of the NPDES permit limits is as follows:

CBOD, Monthly Average Limit:	October 1991
CBOD, Daily Maximum Limit:	July 1991, October 1991
TSS Monthly Average:	October 1991, November 1991, December 1991
TSS Daily Maximum:	October 1991, November 1991, December 1991
Tot. Nitrogen Monthly Average Limit:	July 1991, September 1991, October 1991, November 1991
Tot. Nitrogen Daily Maximum Limit:	July 1991, September 1991, November 1991

Tot. Phosphorus Monthly Average Limit:	July 1991, August 1991, September 1991, October 1991, November 1991
Tot. Phosphorus Daily Maximum Limit:	July 1991, August 1991, September 1991, October 1991, November 1991
Fecal Coliform Daily Max.:	July 1991, August 1991, October 1991
Tot. Residual Chlorine Daily Max.:	July 1991, August 1991, September 1991, October 1991, November 1991, December 1991

As can be seen from above, FCWC experienced at least one violation of its NPDES permit in every month the permit was in effect, prior to cessation of discharge.

FCWC's Carrollwood Plant violated its permit limits, following the issuance of the NPDES permit in May 1991, largely due to the inadequacy of the technology in place at the plant. The Carrollwood WWTP was an activated sludge plant with a polishing pond. A plant of this general design would be unlikely to consistently achieve the limits for $CBOD_5$ and TSS contained in the May 1991 permit. Furthermore, plants of this type are not designed to effect phosphorus and nitrogen removal; thus it is equally unlikely that the plant could have met the limits for those parameters.

Overall, the violations of the permit were the result of FCWC's failure to cease discharging in a timely manner.

Waterway Estates

FCWC discharged from the Waterway Estates Plant for almost 3 years without a NPDES permit. Once FCWC obtained a permit, it continued to discharge at an unpermitted location, and committed a number of permit violations.

i) **Discharge Without a Permit:**

USEPA issued FCWC an NPDES Permit for the Waterway Estates Plant; effective from September 24, 1981 to September 24, 1986. During this period of time the effluent from FCWC's plant was discharged to a canal leading to the Caloosahatchee River. This permit named the Caloosahatchee River as the receiving waters.

On May 9, 1986 FCWC applied for renewal of the Waterway Estates NPDES Permit. On June 30, 1986 EPA responded with a tentative denial. The basis for this denial was the 1981 Wasteload Allocation Study by FDEP which had concluded that no discharge allocation existed for the canal. On December 8, 1986 EPA issued a formal denial of the Waterway Estates permit which was effective January 9, 1987. In spite of the denial, FCWC continued to discharge without a permit on a daily basis from the Waterway Estates Plant to the canal until a new NPDES permit authorizing it to do so took effect November 1, 1989.

In my opinion, the unpermitted discharge took place because FCWC failed to take seriously the requirement that it cease discharging to the Caloosahatchee River by the effective date of the permit denial. FCWC did not aggressively pursue a solution, even though at least two solutions were available. Rather, FCWC seems to have assumed that it would fail to meet deadlines and that extensions would be granted by the regulatory agencies.

Furthermore, FCWC failed to avail themselves of the opportunity to connect to the North Fort Myers Utility Company (NFMU), an available option which would have allowed cessation of discharge prior to August 1988. Correspondence after this date indicates that FCWC decided that plant upgrade and relocation of the outfall were the best choice, nominally for cost reasons; however, the assertion that cost prevented FCWC from connecting to NFMU is not consistent with the record. NFMU indicated that it could provide service to Waterway Estates for $3.6 million or less (competitive with FCWC's actual costs on the upgrade and outfall extension). A November 27, 1991 FCWC memo from Gordon to Levy provides an indication of another possible motivation for FCWC's rejection of NFMU's offer. NFMU's financial health and need to sell capacity was discussed, and a recent balance sheet for the utility was attached. It appears that FCWC did not want to yield its customers to its competitor.

ii) **Discharge at an Unpermitted Location:**

From the effective date of the permit, November 1, 1989, until July 1991, FCWC discharged at an unpermitted location. The permit provided for discharge at the 6 foot contour line in the Caloosahatchee River from its effective date, and FCWC's discharge continued into the canal until the new outfall was put in service in July 1991. The two points are approximately one half mile apart, the old point was approximately 800 feet up a relatively narrow canal, while the new point is over 500 yards out in the broad Caloosahatchee River. The continued discharge at an unpermitted location was the result of FCWC's failure to act in a timely fashion.

FCWC could have extended its outfall in a more timely fashion. FCWC's failure to do so was the result of its apparent reluctance to press forward to a solution with all possible speed. FCWC moved too slowly in accomplishing virtually all necessary aspects of the project.

As noted above, EPA tentatively denied the permit in June 1986, and formally denied the permit in December 1986. A FCWC consultant recommended upgrade and extension of the outfall as the best alternative in August 1987. In spite of all this, FCWC didn't select a contractor to carry out the extension until 1990, and didn't complete the extension of the outfall until July 1991.

iii) **Violations of Permit Limits:**

The limitations in the permit which became effective on November 1, 1989 were as follows:

Parameter	Annual Avg.	Mo. Avg.	Daily Max.
BOD_5	20.0 mg/l	30.0 mg/l	60.0 mg/l
TSS	20.0 mg/l	30.0 mg/l	60.0 mg/l
Tot. Phosphorus	-	0.5 mg/l / 4.2 lb/d	-
Tot. Nitrogen	-	3.0 mg/l / 25.0 lb/d	-
Fecal Coliform	200/100 ml		800/100 ml
pH 6 - 8.5			
D.O minimum 5.0 mg/l			
Whole Effluent Tox: LD_{50} - > 100%			

A summary of FCWC's exceedances of the NPDES permit limits is as follows:

Whole Effluent Toxicity: January 1992, February 1992, March 1992, April 1992, May 1992, June 1992

Total Nitrogen Mo. Avg.: July 1991, August 1991, September 1991, October 1991, November 1991, December 1991, January 1992, February 1992, March 1992

FCWC's exceedances of the Whole Effluent Toxicity limits appear to have been largely due to less-than-optimal treatment caused by construction-related factors (during construction only one biological unit was online for a period of time). Incomplete nitrogen removal is a possible specific cause.

The cause of the total nitrogen limit violations was FCWC's failure to complete the plant upgrade in a timely fashion. The second biological treatment unit went online in March 1992, and while other construction continued after that date, it is apparent that construction-related plant limitations played a major role in FCWC not meeting the nitrogen permit limit.

2. SERIOUSNESS OF FCWC's VIOLATIONS:

FCWC's violations were serious both from the standpoint of general disregard for compliance with the CWA and the NPDES system, and for the site-specific threat posed by each individual discharge.

The CWA specifically requires the permitting of all point discharges so that EPA can limit pollutant loads to levels that the water body can assimilate without suffering unacceptable degradation. Discharge without a permit totally precludes EPA's control of a pollutant load to the receiving waters. For this reason, the requirement to permit is a very important component of the CWA. Likewise, if dischargers exceed the limitations in their permits, unacceptable degradation of the receiving waters is also possible. In either case, the goal of the CWA, to protect and restore the Nation's waters, is compromised.

Barefoot Bay

i) Discharge Without a Permit:

FCWC's discharge at Barefoot Bay without a permit posed a threat to water quality on general grounds for the reasons described above. However, the Barefoot Bay unpermitted discharge was made even more serious by the sensitive nature of the receiving waters.

The Florida legislature enacted the Surface Water Improvement and Management Act in 1987 to address the degradation of a number of surface water systems in the State of Florida; one of the threatened water bodies identified within the Act was the Indian River Lagoon system.

To provide guidance for efforts to restore the Indian River Lagoon, the Indian River Lagoon Surface Water Improvement (SWIM) Plan (updated September 1994) was developed. This Plan rated the various sub-basins in the system as to "criticality" on the basis of degradation and environmental significance. The Sebastion River Watershed, to which Barefoot Bay WWTP discharges, was ranked as one of the three (out of 19) most critical areas in the Indian River Lagoon System. This is an indication of the sensitivity of Barefoot Bays' receiving waters, and the likelihood that Barefoot Bays' unpermitted discharge contributed to the degradation of its receiving waters.

In fact, the state of the Indian River Lagoon was such that in 1990, a bill was passed which both prohibited new sewage treatment discharges into the Indian River Lagoon system, and required the elimination of existing sewage discharges by July 1, 1995. The elimination of all sewage discharges into the Lagoon System was deemed important enough that only three limited exceptions were allowed.

In Barefoot Bay's case, its receiving water , the North Prong of the Sebastian River, is identified by the September 1994 Plan (in Appendix B) as not meeting its designated water quality (Class III) standards. The Plan assumes that all wastewater treatment plants discharging to the Indian River System will be halted, and it specifically identifies the Barefoot Bay WWTP discharge as contributing to the nutrient load problem, and as being halted as part of the solution to that problem.

The Barefoot Bay unpermitted discharge was, in light of the above considerations, a serious violation of the CWA. It contributed pollutants of concern to water bodies recognized as seriously threatened, and therefore contributed to the degradation of those water bodies.

ii) Administrative Order Violations:

FCWC's violations of the BOD_5 and TSS limits means that not only was the Barefoot Bay a discharge into an overloaded water body, but that discharge was of poor quality as well. As such, it contributed more pollutant load to the North Prong of the Sebastian River, and to the Indian River Lagoon than it would if it had met those limits. Likewise violations of pH and minimum D.O. can have significant impacts on aquatic organisms in the receiving waters.

Violations of the fecal coliform limits are always a concern in that these limits exist primarily to protect human health. The Indian River Lagoon system is used for recreational purposes, and

discharges into it which are improperly disinfected pose a threat to human health.

FCWC's violation of the AO limits is significant in that the AO limits were intended to minimize the harm caused by an unpermitted discharge into threatened water bodies.

iii) **NPDES Permit Violations:**

FCWC's violations of the residual chlorine limits in its permit are particularly significant in light of the concern of U.S. Fish and Wildlife regarding the endangered wood stork, which was identified by U.S. Fish and Wildlife as frequenting the Barefoot Bay area. A June 7, 1991 memo by the U.S. Fish & Wildlife Service, commenting on the Barefoot Bay WWTP NPDES Permit, recommended no direct discharge. The Fish & Wildlife Service noted that the endangered wood stork favors the Barefoot Bay area, and was of the opinion that any chlorinated discharge into the canal would negatively impact fisheries in the canal, and thus the wood stork. It appears that Barefoot Bay's discharge to the canal was chlorinated from is inception until sometime after 1990, when dechlorination was instituted.

The NPDES permit issued in September 1991 (which it should be remembered included a requirement that the Barefoot Bay discharge be halted by July 1995) included a Total Residual Chlorine limitation. FCWC's failure to comply with this limitation certainly increased the risk of the continued discharge impacting the endangered wood stork, as well as of other aquatic organisms. FCWC's exceedances of the toxicity limits likewise indicates that the plant's effluent had a toxic characteristic; this by definition increases the likelihood that the discharge negatively impacted organisms in the receiving waters.

FCWC's violation of the permit limits is significant in that the limits were intended to minimize the harm caused by the discharge into threatened water bodies until its termination by July 1995 (as specified by the permit) .

Carrollwood

The Carrollwood Plant posed a serious threat to Sweetwater Creek both in a general sense (again due to its disregard for the CWA) and because of the nature of its receiving waters and the discharge's own characteristics.

i) **Discharge Without a Permit:**

The Upper Sweetwater Creek is a small, slow moving water body. The critical low flow used to assess assimilative capacity was identified by FDEP as zero (0) cubic feet per second. This means that under the minimum flow conditions considered in determining a water body's assimilative capacity, the stream is virtually still. This makes the stream very sensitive to any discharge into it, since there is no flow to disperse the discharge and its pollutant load.

In fact, a 1979 Intensive Survey conducted by FDEP in March of 1979 showed measurable total phosphorus and total nitrogen concentration increases downstream of the Carrollwood outfall. Furthermore, this survey was carried out under less than worst case conditions. It is likely that the Carrollwood discharge nutrient load (nitrogen and phosphorous) negatively impacted

Sweetwater Creek.

Given the Creek's limited flow, and considering the small size of the creek at the Carrollwood discharge point, it is very likely that any discharge having any significant BOD_5 load would result in a decrease in dissolved oxygen in the creek (by definition, BOD_5 includes any pollutant which acts as a food for bacteria and results in biochemical use of oxygen in the receiving water). It is significant that in considering FCWC's petition, FDEP considered dropping effluent BOD_5s for a hypothetical, upgraded Carrollwood Plant from 5 mg/l to 3 mg/l was viewed by FDEP as significant in discharge's ability to have "no significant impact".

The monitoring carried out as part of the LTI "Minimum Negative Impact" Study revealed D.O. concentration decreases, and phosphorus and nitrogen concentration increases downstream of the Carrollwood outfall.

FCWC's discharge contributed to the depletion of oxygen levels and increased nutrient levels in the Sweetwater Creek downstream of the discharge. Given the condition of the Sweetwater Creek, it is likely that the Carrollwood Plant's effluent negatively impacted the creek.

ii) **NPDES Permit Violations:**

The violation of the NPDES permit limits demonstrates that the continued discharge from the Carrollwood Plant was not of sufficient quality to have a "minimum negative impact" on the receiving stream. In particular, the frequent violations of the phosphorous and nitrogen limits resulted in the plant being an unacceptable nutrient load on the Upper Sweetwater Creek.

FCWC also failed to properly operate and maintain the plant during the ten years prior to its decommissioning. This failure led to the plant performing below its capability, exacerbating the impact of its discharge into a threatened surface water. Evidence of these failures is provided by numerous inspection reports detailing the findings of HCEPC inspectors. Examples of their findings include:

- HCEPC inspections in 1973, 1974, 1975, 1976, 1979, 1980, and 1983 noted operational deficiencies, problems with record keeping, and a lack of process control.

- A May 7, 1987 inspection found the plant's condition, and FCWC's operations "unacceptable". The plant was described as "in disrepair".

- On March 27, 1990 HCEPC carried out an inspection of the plant and once again sewage overflow was evident. HCEPC rated operation and maintenance of the facility unsatisfactory.

- In August 1990, HCEPC again found poor operations.

In December of 1990, FCWC Engineer J. Karleskint inspected the Carrollwood Plant. Her memo report describing her finding noted that the plant failed to report all monitoring data, that an unapproved analytical method was used for residual chlorine testing, and that the plant was lacking effective process control.

Poor process control directly and negatively impacts the consistency of effluent $CBOD_5$ and TSS concentrations in an activated sludge treatment plant's effluent. Furthermore, even in a plant not designed to remove nutrients, proper operation will generally result in lower effluent phosphorus and nitrogen levels. FCWC's failure to properly operate and maintain the Carrollwood plant therefore directly contributed to its violations of its NPDES permit. I believe that FCWC allowed these conditions to persist because they had long before considered the plant to be "abandoned".

An August 1990 inspection by HCEPC also noted that FCWC had significantly dropped the pond level. In addition to impacting pond performance, HCEPC also was concerned that this action would result in the scouring of accumulated solids and the release of large amounts of solids (TSS) to Sweetwater Creek. In a slow-moving body of water such as Sweetwater Creek, these solids would accumulate on the bottom around the outfall, where they would exert oxygen demand (lowering oxygen levels) and directly impact bottom-dwelling and bottom-feeding organisms.

FCWC's numerous violations of the permit limits are significant; until it was taken out of service in January 1992, the plant's discharge continued to negatively impact Sweetwater Creek.

Waterway Estates

i) Discharge Without a Permit:

The unpermitted discharge from the Waterway Estates Plant had a negative impact on the canal into which it discharged and the Caloosahatchee River in the immediate area of the canal's mouth into the River.

FDEP's January 1981 Caloosahatchee River Wasteload Allocation Documentation presents the results of a detailed modelling effort which utilized data collected during an intensive survey effort carried out on the river by FDEP in March 1980. The 1981 WLA focused on what impact, if any, effluent discharge would have on the concentration of total nitrogen and total phosphorus both within the entire system and in the vicinity of each discharger. The 1981 WLA found that as a whole, the River was unacceptably impacted by nutrients from dischargers, and that upgrades to AWT were necessary to prevent unacceptable nutrient build up in the estuary.

The 1981 WLA also found that "The Waterway Estates STP, although discharging only about 10% of the flow of the Fort Myers Central STP, still demonstrated localized buildups". This is the result of the low long term net flow from the estuary, and the configuration of the river in the area of the Waterway Estates discharge (the river averages less than one meter deep for almost 1000 feet out from the mouth of the canal).

The July 1990 Draft Caloosahatchee River Wasteload Allocation Documentation presents the results of a detailed modelling effort which utilized data collected during an intensive survey effort carried out on the river by FDEP in 1987 - 1988. This second WLA resulted in findings and conclusions consistent with those of the 1981 WLA. In particular, Section 5.0 Conclusions noted:

> "Maps of localized effects show that the areas around the City of Cape Coral and

> Waterway Estates outfalls as being heavily impacted by their discharge. Higher nutrient concentrations and resultant increases in chlorophyll-a concentrations occur within the area of the present discharges. Design runs which relocate the existing discharges to beyond the six foot contours alleviate these problems. Thus, the City of Cape Coral and Waterway Estates should relocate their point(s) of discharge to beyond the six foot contour line."

From the above, it is clear that the Waterway Estates discharge had a negative impact on its receiving waters.

ii) **Discharge at an Unpermitted Location:**

Even after FCWC received an NPDES permit in 1989, its Waterway Estates discharge continued to negatively impact the canal and the Caloosahatchee by the mouth of the canal, because the discharge point was not timely relocated. As summarized by the 1981 WLA:

> "For present design flows, nutrient removal to AWT levels of 3 mg/l total nitrogen and 1 mg/l total (phosphorus) is required to prevent excessive nutrient loading to the estuary. Additionally, only the Ft. Myers South outfall is located in an area that did not result in localized build-up of nutrients. The other dischargers (Ft. Myers Central, Cape Coral, and Waterway Estates) besides needing to upgrade to nutrient removal, would also need to relocate their outfalls."

Thus, the 1981 WLA clearly identified the need to relocate the outfall to protect the river. FCWC's failure to do so was a serious violation.

iii) **NPDES Permit Violations:**

Violation of the NPDES total nitrogen limit is significant in that even though the outfall had been moved as of July 1991, the nutrient load to the receiving water was still above that determined by FDEP to be necessary for protection of the Caloosahatchee.

Exceedance of the toxicity limit by Waterway Estates resulted in the discharge of wastewater with toxic characteristics into the Caloosahatchee River. Given the esturine nature and low flow through the River, this would make these exceedances of the toxicity limit more likely to negatively impact aquatic life in the proximity of the outfall.

Overall, FCWC's unpermitted discharges and discharge at an unpermitted location constituted extremely serious violations of the CWA, in that those violations entirely circumvented the intent of the NPDES program. Likewise, FCWC's numerous violations of AO and permit limitations constitute serious violations, as they are the result of discharges which repeatedly failed to be of sufficient quality to protect FCWC's receiving waters.

3. EFFORTS REQUIRED FOR COMPLIANCE

FCWC had the means to eliminate its unpermitted surface water discharges at each of the three plants discussed in this report in a timely fashion. Furthermore, FCWC also had the means to eliminate its other violations. FCWC simply failed to take the necessary measures to insure timely compliance. Three timelines (Attachment D) present FCWC's efforts to pursue various available options.

Barefoot Bay

i) Discharge Without a Permit:

FCWC had a number of viable options available that could have been implemented to address the unpermitted discharge at Barefoot Bay. These were:

i) Build Sufficient Percolation Ponds - FCWC could have purchased sufficient acreage to have constructed additional percolation ponds to accommodate the entire plant flows. Detailed investigations and load tests would have been necessary to evaluate the loadings possible on any one site, or a combination of sites, but with over 3,000 acres of orange groves within 1.5 miles of the plant, sufficient land could certainly have been acquired to construct ponds of sufficient size to accommodate the entire plant flow.

Ponds offered FCWC several advantages. FCWC could have purchased the necessary land as early as 1984 (the record clearly indicates that land was available). As noted by FCWC's November 1992 report "Reclaimed Water Reuse: Disposal Alternatives, Barefoot Bay Wastewater Treatment Plant", the pond option was both "technically and environmentally feasible".

FCWC's attempts to improve its existing ponds, and its efforts to utilize additional ponds were limited. After initial investigations in the early 1980's of means to improve the performance of the existing ponds, FCWC began, in 1985, to investigate the possibility of building larger percolation ponds, but gave up on the concept after investigating the capacities of a limited number of potential sites. An August 20, 1987 FDEP memo from M. Swearingen to File noted that P. Lehman of FCWC had indicated to him that ponds were not pursued for cost reasons.

ii) Construct a Deep Well - FCWC could have constructed a deep injection well for disposal of its effluent. In spite of FCWC's concerns regarding well reliability, there were seven deep wells in operation in the Barefoot Bay area in the late 1980's. Deep well injection therefore constituted a feasible option for FCWC. In fact, a paper examining deep well use at Barefoot Bay by CH_2M-Hill noted that:

> "Barefoot Bay does have certain advantages. The site is in southern Brevard, closer to the area of the state where there is a proven track record [with deep wells]. The site is also situated between two existing sites (GPU-Port Malabar and Hercules) with good operational histories. No nearby faults have been reported in the literature, that might be a cause for concern with the regulatory

agencies".

In spite of deep wells offering a possible solution, FCWC failed to aggressively pursue deep well injection. In March 1988, FCWC began to pursue permits for the construction of a deep well injection system. FCWC never got beyond the preliminary evaluation stage with deep wells, due to concerns about potential well failures, and cost. In spite of these concerns, I can find little evidence of FCWC investigating the reports of problems with local deep wells, or any indication that studies had revealed any likelihood of problems with FCWC's proposed well site.

iii) Develop Spray Irrigation Capability - I believe that FCWC could have instituted spray irrigation on property owned by others or on property purchased by FCWC. I believe that by assuming a substantial portion of the costs of on-site improvements necessary for effluent reuse, by providing grove owners some relief from liability associated with effluent use, and by dropping the issue of effluent valuation (fees), FCWC would have found grove owners more receptive to the use of effluent. Alternately, if FCWC had moved expeditiously, and with less fixation on cost saving, to acquire land, spray irrigation could have provided the means to dispose of all of the Barefoot Bay effluent.

FCWC's efforts to implement spray irrigation were hampered by FCWC's concentration on cost minimization. In March 1988, FCWC began to study the possibility of using a 40 acre site adjacent to the plant as a spray field. A January 1989 report by Ardaman & Assoc. determined the capacity of the 40 acre field was less than plant flow.

In 1989, FCWC appears to have contacted the major grove owners in the Barefoot Bay area regarding the possibility of reuse. At first, FCWC appears to have concentrated on the possibility of providing treated effluent to the groves rather than on land acquisition. Apparently this effort was not well received by the grove owners due to reluctance on FCWC's part to address the grove owners' financial and liability issues. It appears that FCWC attempted to have the grove owners bear all costs for the onsite modifications needed to accommodate effluent reuse, and that FCWC was unwilling to assume much liability related to effluent use on crops.

FCWC's initial efforts to purchase land were similarly unsuccessful due to ineffective negotiation with the land owners. Nonetheless, local properties were for sale. For example, when FCWC met with Brevard Groves in August 1989, Brevard wanted FCWC to purchase land and then lease the land back to Brevard. Also, Micco Groves was reportedly for sale in August 1989. I believe that FCWC would have been much more likely to have negotiated reuse agreements with one or more grove owners, had it been willing to assume more liability regarding the issue of treated effluent, and more of the cost to modify irrigation systems, and if it had not pressed for compensation for the effluent.

A FCWC memo from A. Reeves to G. Allen dated September 7, 1989, noted that a 100 acre tract owned by Cavalier Properties was available, and that Cavalier had indicated possible interest in selling 360 acres on the north side of Micco Road. By September 1989 FCWC was considering a 300 acre site (part of Micco Groves) just north of the Barefoot Bay Wastewater Treatment Plant. In February 1990, FCWC made an offer to

Micco Groves on the 300 acre site, and in March 1990 FCWC began operation of the 40 acre site as a spray field. In September 1990, FCWC began to pursue eminent domain proceedings to acquire the Micco 300 acre site. In February 1992, FCWC became aware of a 300 acre site owned by H & S Groves which was available; FCWC ultimately entered into a contract to purchase this property in June 1995.

I believe that FCWC's attempts to address its unpermitted discharge were entirely inadequate. FCWC failed to apply for an NPDES permit for the discharge until early 1990, years after the discharge had commenced. FCWC's attempts to eliminate the discharge were similarly inadequate, both in terms of timeliness, and in FCWC's failure to follow such efforts it did make through to completion. FCWC wasted years by indecision, and by placing financial concerns above elimination of the unpermitted discharge, and by failing to take timely advantage of available alternatives.

ii) **AO Violations:**

FCWC could have reduced or eliminated its violations of the AO at Barefoot Bay due to operational deficiencies as follows:

- Provide improved operational control. Activated sludge plants are a complex and sophisticated treatment systems which do not run themselves. A process control strategy geared to the specific plant's characteristics is a must.

- Improve maintenance. Wastewater treatment plants are extremely tough on equipment, even that designed for use in such a severe environment. As such, adequate maintenance is absolutely necessary if treatment reliability is to be maintained.

- Provide adequate, qualified staff. Adequate numbers of certified staff should have been in place to accommodate normal workforce fluctuations. This is particularly important at remote locations such as Barefoot Bay.

Finally, FCWC could have eliminated all AO violations by the timely cessation of discharge.

Not until 1991 is there any sign of FCWC recognizing that problems existed at the plant, and there is little evidence of efforts on FCWC's part to address those problems.

iii) **Permit Violations:**

If FCWC had upgraded the Barefoot Bay Plant to AWT status the toxicity violations might have been eliminated. Improvements in operation and maintenance, as detailed above, would have reduced the likelihood of the residual chlorine violations. Again, FCWC could have eliminated all permit violations by the timely cessation of discharge.

FCWC did not upgrade the Barefoot Bay Plant in a timely fashion, and was likewise slow to implement meaningful improvements in operations. When an FCWC audit finally identified shortcomings in the Barefoot Bay operation, many of the identified problems were not followed up on for over a year.

Carrollwood

I) **Discharge Without a Permit:**

FCWC had several options available which would have allowed it to cease discharge in a timely manner. These options were as follows:

- FCWC could have pursued a connection to the Tampa collection system. Unlike Hillsborough County, which was a highly uncertain option, Tampa in December 1983 indicated that it had available capacity, and identified three points of connection, one of which was available at that time. Furthermore, FCWC was aware of the "Tampa" option since the late 1970s. Thus, FCWC could have connected to Tampa before it lost its permit, thereby avoiding all the violations.

  In spite of receiving a positive response from Tampa, FCWC failed to follow through on this option. This may have been due to the need to construct a force main of between 10,000 and 15,000 feet (depending on which point of connection to Tampa's system would be used), as compared to the approximately 3000 feet of forcemain actually constructed by FCWC to connect to Hillsborough County.

  Instead, FCWC elected to rely on the possibility of connection to Hillsborough County, even though FCWC could not secure either an agreement or a firm date on which capacity would be available from Hillsborough County.

- Spray irrigation was also an option available to FCWC. FCWC appears to have carried out only preliminary evaluations of this option.

- FCWC could have constructed sufficient percolation pond capacity to handle the Carrollwood flow. A study conducted by Jammal & Associates in 1984 considered the capacity of the plant's existing percolation pond, and of 6 other potential pond sites located in the general area of the Carrollwood Plant. Jammal & Associates estimated that one of the sites considered was large enough to accommodate all of the plant flow and it appeared likely that any two of the remaining sites would have handled the total plant flow.

- Deep well injection was also an option for disposing of the Carrollwood flow. There is no indication in the record of FCWC seriously considering this option.

- Upgrade to AWT was not a viable option until the Grizzle-Figg legislation took effect in 1987. If, however FCWC had aggressively pursued this option, it is my estimate that they could have made a first submission to FDEP for Minimum Negative Impact status as early as mid 1988 (instead of June 1989). Furthermore, if that first effort had been more complete, it is possible that FCWC could have been in a position to begin construction in 1989.

FCWC responded slowly to this opportunity, so that at the time diversion to Hillsborough County took place in January 1992 (4 years and 6 months later), FCWC had not begun construction on a plant upgrade.

FCWC was well aware in 1979 that they needed to halt the Carrollwood discharge. In October 1979, FCWC received Wasteload Allocation information from FDEP, including a cover memo which noted "the WLA provides for no discharge to the receiving waters". This should have provided FCWC with ample time to assure that the discharge was halted prior to the denial of the permit; however, FCWC's efforts to halt its unpermitted discharge were not timely.

ii) **NPDES Permit Violations:**

FCWC needed to upgrade its treatment facility if it was to meet the limitations of its May 1991 permit. It should have begun its upgrade in a timely fashion, so that it could comply with the permit when it became effective. FCWC was well aware that upgrade of its plant would be required when it applied for the permit. Alternately, had FCWC halted its discharge in a timely fashion, it would have avoided all NPDES permit violations.

Waterway Estates

FCWC had options available which would have allowed the cessation of the unpermitted discharge into the canal, the discharge at the unpermitted location and the discharge in violation of the permit limits.

i) **Discharge Without a Permit:**

FCWC had several options available that would have allowed it to cease its unpermitted discharge in a timely manner. These are as follows:

- Extension of Outfall and AWT upgrade. FCWC demonstrated the viability of this option by actually carrying it out. Given that FDEP's 1981 Wasteload Allocation Study determined that the Waterway Estates plant needed to be upgraded and its outfall relocated, if discharge to the Caloosahatchee River was to be continued, these measures should have been completed prior to application for permit renewal. It is clear that had FCWC begun to take positive steps earlier than 1988, the upgrade and outfall extension could have been completed earlier.

  FCWC elected to pursue the AWT upgrade and outfall extension, and did that in a less than expeditious manner. In November 1987, FCWC (A. Reeves) recognized the need to begin to implement a solution; a November 5, 1987 internal memo notes the need to select an approach, request a Wasteload Allocation from FDEP, and begin obtaining necessary permits and approvals. In December 1987, FCWC finally requested the WLA, and in 1988, FCWC retained an engineer and began design of the plant upgrade and outfall extension. The extension of the outfall was finally put in service in July 1991 and the plant upgrade completed by February 1993.

- Connection to North Fort Myers Utilities. NFMU indicated that it was willing to accept FCWC's flow and that it would have capacity to do so by mid-1988. Furthermore, its letters also indicate that cost should not have prevented FCWC from connecting to NFMU. Had this option been seriously pursued by FCWC I believe that transfer of flow and cessation of the canal discharge would have been possible in 1988, even given negotiations starting in 1987.

  Following receipt of EPA's permit denial in December 1986, FCWC carried out limited talks with NFMU, but FCWC rejected this option, in spite of continued interest and incentives from NFMU.

- Spray Irrigation. When, in 1989 FCWC was required to evaluate reuse under the "Anti-Degradation Rule", FCWC appears to have readily identified two golf courses capable of accepting AWT treated effluent. Presumably, similar opportunities for reuse existed earlier; these might have been discovered had FCWC seriously investigated the use of spray irrigation as a means of halting the canal discharge, however FCWC never seriously pursued spray irrigation as an option.

- Percolation Pond Discharge. FCWC could have constructed adequately sized percolation ponds to handle the Waterway Estates flow. Upgrade to AWT would not have been required, and permitting should not have been overly burdensome. Sufficient land to accommodate the necessary ponds and to provide buffer zones from neighbors would have been needed. The exact acreage needed would depend on both the flow and the hydrogeology of the site, or sites, considered.

- Deep Well Injection. FCWC could have installed a deep injection well. FCWC did briefly consider such an option, but failed to pursue it, on the basis of cost relative to the AWT/outfall extension option. It should be noted that North Fort Myers Utility has a deep injection well which it developed as a backup disposal options; this demonstrates that FCWC would have been likely to have been technically successful in developing a well.

FCWC had several options available that would have allowed the timely cessation of its unpermitted discharge. FCWC failed to seriously pursue most of these options, and those efforts it did make were not timely.

ii) Discharge To An Unpermitted Location:

FCWC could have avoided discharge to an unpermitted location by extending the outfall in a timely manner. By failing to even begin the construction of the outfall extension until December 1990, FCWC ensured that it would continue to discharge to the canal after the effective date of the permit. Finally, in July 1991 the new outfall was completed and discharge diverted to the new outfall.

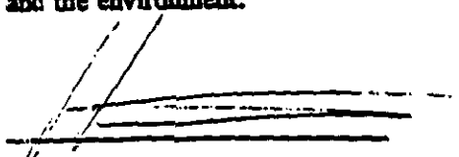
iii) **Permit Violations:**

Similarly, permit violations at the Waterway Estates Plant could have been avoided by timely completion of the upgrade of the plant to AWT status. Not only did FCWC fail to complete the upgrade by the effective date of the permit, but meaningful startup of the upgrade construction did not begin until after February 1991.

4. CONCLUSION

FCWC operated three wastewater treatment plants without valid NPDES permits for a cumulative total of almost two decades. These egregious violations were entirely avoidable. Similarly, FCWC committed AO and NPDES permit violations at these three plants which spanned a total of four years. These serious violations were also largely avoidable.

FCWC is a sophisticated company which operates in a heavily regulated industry. Such a firm should have had knowledge, resources, and the sense of responsibility to comply with the CWA and its NPDES permits. The only plausible explanation for FCWC's violations is that FCWC lacked respect for the CWA and the environment.



10-13-95

Mark J. Klingenstein, P.E. Dated

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' MOTION IN LIMINE

Both in the interests of fairness and expediency, and for the reasons set forth in the accompanying memorandum, the United States moves the Court for an order limiting the trial of this matter in the following respects:

1. The trial of this action is subject to the following limitations on each side (i.e., on the Defendants in the aggregate):

Opening and closing	1/2 hour each
Direct examination of witnesses:	10 hours
Cross examination of witnesses:	5 hours

2. Evidence relating to the Waterway Estates permit denial may not be introduced at trial, and the testimony by Connie Kagey, Bruce Barrett, James Greenfield, and Roosevelt Childress is excluded.

3. Evidence relating to the terms of the following EPA administrative orders issued by EPA to Florida Cities may not be introduced at trial: 1. Consent Agreement and Order Assessing Administrative Penalties No. CWA-IV 91-538 (Barefoot Bay); 2.

Administrative Order AO 90-106 (Barefoot Bay); 3. Consent Agreement and Order Assessing Administrative Penalties, No. CWA-IV 90-542 (Carrollwood). Testimony from Thomas Plouff and Roy Herwig of EPA concerning their calculation of administrative penalties for the violations set forth in those Orders may not be introduced at trial.

4. Douglas Smith and Roger Hartung are disqualified as expert witnesses.

5. Juanita Kerrigan, Georgia Metcalf, Michael Acosta, and John Sladkus are barred from testifying at trial.

5. Evidence that seeks to blame third parties for the violations may not be introduced at trial.

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

By: _____

Dated: January 4, 1996

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing "United States' Motion in Limine" and memorandum in support thereof were served by U.S. Mail on the 4th day of January, 1996, to the following attorneys of record:

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' MEMORANDUM IN SUPPORT OF ITS MOTION IN LIMINE

By Order of November 22, 1995, the Court granted the United States summary judgment on liability as to Defendant Florida Cities on all of the United States' claims for violations at Waterway Estates, as well as the claims for NPDES permit violations at Barefoot Bay and Carrollwood.[1] The issues remaining for trial are Avatar's liability for those violations as Florida Cities' parent company, and the amount the Defendants should be penalized for the violations. As a result of the limited issues of fact and law remaining in this bench trial, as well as certain Florida Cities tactics which would result in prejudice to the United States, the trial should be limited in the following ways.

[1] The Court has granted the Defendants summary judgment on the claims for unpermitted discharges at Barefoot Bay and Carrollwood and for EPA Administrative Order violations at Barefoot Bay. The Court has denied the United States summary judgment on all claims as to Defendant Avatar Holdings, and has granted Avatar Holdings' Motion for Judgment on the Pleadings for claims (or parts of claims) for violations which took place prior to May 5, 1990.

I. Limitation on Length of Trial

Trial time should not exceed more than five court days. Because Florida Cities' liability has already been established and the United States' proof of Avatar Holdings' liability rests primarily on documentary evidence as a result of the unavailability of knowledgeable and high-ranking past and present Avatar Holdings officials to testify on the basis of their assertion of their Fifth Amendment rights, trial testimony on liability issues is expected to be very limited. Furthermore, as the United States noted in its Trial Memorandum, there are no genuine issues of material fact which would preclude the Court from assessing a civil penalty against Florida Cities based on the present record. The United States respectfully proposes that the Court limit the trial of this action to five court days by imposing the following limitations on each side (i.e., on the Defendants in the aggregate):

Opening and closing	1/2 hour each
Direct examination of witnesses:	10 hours
Cross examination of witnesses:	5 hours

II. Limitations on Evidence and Witnesses

Based upon its Pretrial Brief, it is clear that Florida Cities intends to raise arguments at trial that are immaterial to any issues remaining in the case. These arguments can only serve to confuse the issues and waste the Court's time. Accordingly, the United States requests that this Court issue an order excluding any evidence on such issues, and excluding the testimony of the witnesses who will testify to them. It is also

readily apparent at this time that Florida Cities has engaged in unfair tactics designed to result in a trial by surprise. The Court should eliminate the prejudice by excluding the witnesses whose testimony is intended to be a surprise.

A. Waterway Estates Permit Denial

It is clear that Florida Cities intends to argue, for the third time, that EPA improperly denied the company's request for a renewal of its NPDES permit in June 1986. Florida Cities contends that EPA's actions in denying the permit are appropriately considered under the "history of violations" and "other factors" criteria set forth in Section 309(d) of the Act, 33 U.S.C. § 1319(d).

This Court has already considered Florida Cities' arguments on this issue twice previously, and should exclude any evidence or testimony on this issue during the penalty assessment phase of the trial. Florida Cities first raised this argument in its Motion for Partial Summary Judgment, in which it argued that EPA's permit denial was void ab initio because of its allegedly erroneous conclusion that a wasteload allocation did not exist for the plant. On June 21, 1995, this Court denied Florida Cities' Motion on this issue, declining to permit it to circumvent the statutory bar set forth in section 509(b)(1) of the Clean Water Act, 33 U.S.C. § 1369(b)(1), holding as follows:

> Section 509(b)(1) contains a ninety-day "statute of limitations" for challenging any action of the Administrator that falls within its terms. Complementing this provision, section 509(b)(2), 33 U.S.C. § 1369(b)(2) (1976), provides that "[a]ction of the Administrator with respect to which review could

> have been obtained under [section 509(b)(1)] shall not be subject to judicial review in any civil and criminal proceeding for enforcement." Under these two provisions, one who wishes to challenge an action of the Administrator must, if the action is held to be within the categories of section 509(b)(1), do so within ninety days or lose forever the right to do so, even though that action might eventually result in the imposition of severe civil or criminal penalties.

Order, June 21, 1995, at 5 (emphasis in original), citing Natural Resources Defense Council v. Environmental Protection Agency, 673 F.2d 400, 406 (D.C. Cir. 1982). Florida Cities had ample opportunity to challenge EPA's permit denial, but failed to do so.

Notwithstanding the Court's June 21, 1995 Order, Florida Cities then sought to raise this argument again in its defense to the United States' Motion for Summary Judgment on the related unpermitted discharge claims from Waterway Estates, and the Court again held that there was no merit to Florida Cities' position. See Order of November 22, 1995, at 19.

Florida Cities clearly intends to raise still new arguments about the permit denial at trial. See Florida Cities Pretrial Brief at 10-11. These are precisely the kind of arguments that Florida Cities could have raised in a timely permit challenge. Allowing Florida Cities to put EPA's permit denial "on trial" almost a decade later would fly in the face of the section 509 bar to judicial review.[2] As this Court previously recognized,

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[2] Nor should Florida Cities be permitted to take vengeance at trial on the staff level EPA permitting official assigned to review the permit renewal application, as Florida Cities' Pretrial Brief suggests it will. Its brief is riddled with

(continued...)

Florida Cities has lost "forever" its ability to challenge EPA's decision. The Court should not allow Florida Cities to obtain through the back door review of an issue that is clearly precluded by statute.[3]

Accordingly, the United States respectfully requests that this Court issue an Order precluding Florida Cities from raising the permit denial at trial. If the Court grants this request, then it should also exclude any testimony by Connie Kagey, Bruce Barrett, James Greenfield, and Roosevelt Childress, the EPA permitting officials whom Florida Cities has listed as witnesses.

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[2](...continued)
claims that Ms. Kagey behaved "carelessly" and "recklessly" in denying the permit, while also sanctimoniously claiming that it lost the permit "through no fault of its own." Brief at 11. The blame is misplaced. Ms. Kagey herself gave Florida Cities five months notice, before forwarding the official denial to the duly delegated EPA officials for final agency action. Florida Cities neither objected then, or after the final denial, and, as a matter of law, simply cannot be heard to object now. Moreover, as the United States has previously argued, the permit denial was entirely appropriate.

[3] Florida Cities argues that the facts surrounding EPA's permit denial are appropriately considered under the "catch-all" criterion in Section 309(d), i.e., "such other factors as justice may require." There is no "injustice" to precluding an issue that is expressly precluded by the statute itself, particularly in a situation such as this. Florida Cities got not one, but two separate notices from EPA that permit denial was imminent, but failed to act. These notices clearly explained the consequences of not challenging a permit denial. Moreover, this is not a situation in which an unrepresented individual was caught unawares by an obscure provision of the statute. Florida Cities was at all times represented by sophisticated legal counsel.

In short, there is no injustice to excluding evidence on EPA's permit denial. Indeed, allowing such evidence at this time represents an injustice to the statute, as well as to EPA.

B. Administrative Orders at Barefoot Bay and Carrollwood

This Court has already granted summary judgment to Florida Cities and Avatar on the United States' unpermitted discharge claims at Barefoot Bay and Carrollwood, and claims for violations of interim effluent limits set forth in an administrative order at Barefoot Bay. The Court held that principles of res judicata prevented the United States from relitigating any issues that were actually resolved, or that could have been resolved in the above referenced administrative orders. Because the Court has ruled that all claims affected by these administrative orders have been resolved, any evidence concerning the terms of the orders is immaterial to any issue remaining in the case. This includes testimony that goes to the issue of why EPA assessed the administrative penalties that it did in those settlements. Accordingly, Florida Cities should be precluded from introducing testimony from Thomas Plouff and Roy Herwig of EPA concerning their calculation of administrative penalties for the violations set forth in the Orders.

C. Florida Cities' Expert Witnesses

Florida Cities has named five expert witnesses in this case, two of whom the United States requests be disqualified.[4]

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[4] See Joint Pretrial Statement filed December 7, 1995. The United States has named two expert witnesses. Avatar Holdings states that it "will use and rely on the expert witnesses identified by Florida Cities."

1. Douglas Smith

The United States moves to disqualify Douglas Smith as an expert witness in this case for several reasons. First, on January 3, 1996, after the trial term in which trial of this case is set had already begun, Florida Cities provided notice to the United States that its primary engineering expert witness, Douglas Smith, had significantly expanded the bases of his testimony. The January 3, 1996 notice provided, in pertinent part, as follows:

> Florida Cities hereby informs Plaintiff that since his deposition Douglas Smith has further reviewed documents forming the basis of his expert report and expert opinion in this litigation and has also personally visited the Waterway Estates Wastewater Treatment Plant and the Barefoot Bay Wastewater Treatment Plant, the location of the former Carrollwood Wastewater Treatment Plant, and the environs of each of these facilities. His observations and further analysis may form a further basis for his testimony at trial.

Letter from Don G. Scroggin to Daniel S. Jacobs, January 3, 1996.

Florida Cities' actions clearly violate Rule 26(a)(2) Fed. R. Civ. P., which governs the disclosure of expert testimony. Rule 26(a)(2)(B) provides that "[e]xcept as otherwise stipulated or directed by the court," a party that intends to rely on an expert shall produce a report that contains "a complete statement of all opinions to be expressed and the basis and reasons therefor." (emphasis added). Mr. Smith's report was submitted to the United States on October 13, 1995, and he was deposed on October 30, 1995 at the United States' expense. Under Rule 26(a)(2), Florida Cities is simply not entitled to expand or revise at will after that time, the bases for his testimony.

Moreover, Florida Cities has not even suggested, let alone demonstrated, that there are extraordinary circumstances or new information not known at the time of Mr. Smith's report and deposition that justify a deviation from the rule. Nor can it make such a suggestion since Florida Cities had ample opportunity to prepare Mr. Smith for deposition, and to ensure that he reviewed the appropriate documents and made the necessary site visits to testify.

The timing of Florida Cities' notice is also particularly suspect. Discovery closed in this matter on November 4, 1995, (see Order, July 18, 1995) and trial has been set for the Court's January 1996 term (although not to begin before January 16, 1996). Florida Cities failed to advise counsel for the United States of these new circumstances at the November 28, 1995 meeting of counsel to discuss preparation of the Joint Pretrial Statement mandated by the Court's scheduling order, failed to raise the matter in the Joint Pretrial Order itself, filed December 7, 1995, and failed to raise the matter at the December 12 and December 28, 1995 Pretrial Conferences before Magistrate Judge Swartz.[5]

Florida Cities' good faith is making this last-minute disclosure is also particularly questionable since it has been

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[5] Notwithstanding an immediate request by the United States upon receipt of the January 3, 1995 notice, Florida Cities has not disclosed when Mr. Smith reviewed the documents or travelled to three different counties to inspect the plants/environs. Nor has Florida Cities given any reason for Mr. Smith's additional work or any indication of what additional materials Mr. Smith has reviewed and what additional opinions he has reached.

apparent for some time that documents Mr. Smith and his staff reviewed and relied upon in preparation of his report and testimony had not been produced in advance of his deposition, as required by a document request. Indeed, notwithstanding the Magistrate Judge's November 13, 1995 Order requiring Florida Cities to produce by November 17, 1995, "all documents reviewed or relied upon by its designated expert witnesses for purposes of expert discovery," not until January 4, 1996, did Florida Cities produce many of these documents, and it is readily apparent to the United States that it is still withholding some such documents.

There is yet another reason to disqualify Mr. Smith as an expert witness in this matter. Both in his expert reports and in his resume submitted to the United States pursuant to Rule 26(b)(2)(B), Mr. Smith represented himself as a "Professional Engineer." In fact, while Mr. Smith at one time was a Registered Professional Engineer in the State of Florida, the United States has learned that his registration lapsed in October 1994 for failure of payment of dues, and had not been reinstated by the time of his report. Accordingly, Mr. Smith's signature on his expert reports in this case constitutes a violation of section 471.003(1) F.S.A. which provides that "[n]o person other than a duly registered engineer shall . . . use the name or title of 'registered engineer' or any other title [or] designation . . .

tending to indicate that such person holds an active registration as an engineer in this state." [emphasis added].[6]

Such tactics clearly should not be countenanced and warrant disqualifying the expert witness, as the Court held in disqualifying an expert witness for untimely disclosure in Simplex, Inc. v. Diversified Energy Systems Inc., 847 F.2d 1290 (7th Cir. 1988):

> Our rules of civil procedure are designed to facilitate the complete disclosure of all relevant information before trial in order to eliminate unfair surprise and ultimately promote accurate and just decisions.

847 F.2d at 1291.

While Florida Cities has offered that the United States may redepose Mr. Smith, discovery closed long ago, and should not drag on at the eleventh hour due to Florida Cities' unexplained violation of the rule.[7] Hence, he should be disqualified.

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[6] Moreover, Smith's deposition testimony on the subject of the status of his registration was less than forthcoming. First, he testified that he was registered in the State of Florida. After being presented with his resume in which he represents he is registered in Florida and Colorado, he testified that the information in it was accurate, but upon further questioning stated that he was "inactive" in the State of Colorado. When pressed about the status of his Florida registration, he finally conceded that he didn't know if it was current. See attached pages of transcript and resume (Exhibit 878).

[7] Even if the Court grants Defendants' unopposed motion for a continuance based on a key witness' unavailability due to sudden illness, discovery should not be reopened to accommodate Florida Cities' malfeasance. As the Court held in Harris v. Steelweld Equipment Co. Inc., 869 F.2d 396, 399 (8th Cir. 1989), "[a]lthough it may appear that appellees would not be prejudiced by disclosure of this expert witness at such a late date because the case was taken off the trial docket and rest for trial, ... discovery was completed and the case was to remain in the same posture when it would ultimately be reached for trial."

2. Roger Hartung

This Court should also strike Roger C. Hartung as an expert witness in this matter. In the Joint Pretrial Statement, Florida Cities summarized the substance of Mr. Hartung's testimony as follows:

> Mr. Hartung's testimony will address EPA's general practices and procedures and internal Agency guidance regarding permitting and enforcement matters under the Clean Water Act. His testimony will address the relationship and interactions between environmental regulatory authorities of non-delegated states and EPA. It will also address wasteload allocation approvals, TMDL development and approvals, permitting requirements and permit writing, enforcement of administrative orders, enforcement of federal NPDES permits, and interpretations of EPA's permitting and enforcement guidance documents and memoranda.

None of this proposed testimony is the least bit relevant to the penalty Florida Cities must pay in this case. Because Mr. Hartung cannot opine authoritatively upon any issue remaining in the case, he should be disqualified as an expert witness. Daubert v.Merrell Dow Pharmaceuticals, 113 S. Ct. 2786 (1993).

D. Company witnesses

In the Joint Pretrial Statement, the United States lists a total of six witnesses whom it expects to call at trial: two EPA officials, one Avatar official, one former Florida Cities official, and two non-party witnesses (exclusive of record custodians whom the United States will only need to call if Defendants fail to stipulate to the authenticity of documents). Avatar Holdings lists five Avatar officials, as well as one additional "possible" Avatar official, and one "possible" former Avatar official who has previously declined to testify on Fifth

Amendment grounds. Florida Cities lists a total of 28 witnesses, but has subsequently notified the United States that it intends to actually call 18 of these at trial. The United States respectfully requests that the Court bar from testifying any of Defendants' employees whom the United States has not had the opportunity to depose, and bar from testifying the former Avatar official who declined to testify at his deposition on Fifth Amendment grounds.

The Defendants have had the opportunity to take the depositions of all of the United States' witnesses: four of these witnesses have actually been deposed, and Defendants have declined to take the other two who are non-party witnesses. The United States has not had the opportunity to depose two of the Avatar officials listed because they were not disclosed to the United States as witnesses until after discovery had closed.[8] Similarly, the United States has not had the opportunity to depose one of the Florida Cities officials because he was not disclosed to the United States as a witness until after discovery had closed.[9]

The United States is prepared to go forward at trial not having deposed non-party witnesses because they presumably will be available for interviews. Both Avatar and Florida Cities have

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[8] These individuals are Juanita Kerrigan, an Avatar Holdings officer, and Georgia Metcalf, a Barefoot Bay Development Corporation (Avatar subsidiary) officer.

[9] This individual is Michael Acosta, a Florida Cities vice-president.

expressly declined to make the three employee-witnesses in question available for depositions or interviews. The United States went to some effort to attempt before the discovery deadline to determine which employees Defendants would call at trial, only to have the efforts rebuffed.[10] If the United States is not to be afforded the opportunity to speak with these individuals, in fairness, Defendants ought not to be able to call them as witnesses, since their testimony will be a surprise, through no fault of the United States.[11]

Avatar Holdings states in the Joint Pretrial Statement that it intends to call John Sladkus, a former Avatar Holdings official, if he chooses to waive his Fifth Amendment rights. Now that discovery has closed, no witness who previously declined to

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[10] See attached transcript of meeting of counsel memorializing that the United States sought specifically to determine whether Michael Acosta would be a witness, and cancelled his deposition after Florida Cities declined to provide that information.

[11] The United States notes that the Magistrate Judge has already ruled that notwithstanding the notice of the witnesses after the close of discovery, the United States could not depose any individuals whom it was previously aware had knowledge of facts relating to the case. In all fairness, however, there were over 100 potential witnesses in this action, and the United States simply could not be expected to predict who would be Defendants' witnesses, and certainly not which of Defendants' own employees they would chose to call at trial. Moreover, Defendants declined subsequent to the Magistrate Judge's ruling to make their employee-witnesses available for interviews. Thus, there are additional grounds at this point in time to cure the prejudice. If the United States is to be deprived of access to their testimony before trial, Defendants should be deprived of their testimony at trial.

testify on Fifth Amendment grounds should be permitted to give surprise testimony at trial.[12]

E. Delays in Compliance Caused by Third Parties

Florida Cities has repeated argued in this case that its violations were beyond its control, placing the blame on its own contractors, as well as federal, state, and local government officials. Any such argument should be precluded as a matter or law. The Clean Water Act is a strict liability statute. See, e.g., Connecticut Fund for Environment, Inc. v. Upjohn Co., 660 F. Supp. 1397, 1409 (D. Conn. 1987); United States v. Town of Lowell, 637 F. Supp. 254, 258 (M.D. Pa. 1986). Moreover, as one Court has noted, "[t]he burden is on the polluter to comply with the Clean Water Act", not on the contractors it hires or some governmental entity. United States v. City of Menominee, 727 F. Supp 1110, 1122 (W.D. Mich. 1989).

Under this case law, Florida Cities had a duty to retain qualified contractors to perform necessary remedial measures. It also had a duty to ensure that any contractual disputes were resolved immediately so as to minimize any period of noncompliance. Finally, it had a duty to ensure that it allowed the responsible government agencies sufficient time in which to act on the company's proposals. Florida Cities alone is responsible for its violations and should not be allowed to "point the finger" at others in an attempt to mitigate the

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[12] One of Defendants' witnesses, Gerald Allen, declined to testify on Fifth Amendment grounds, but prior to the close of discovery changed his mind and was deposed without objection.

penalty.[13] Accordingly, the Court should exclude any evidence that seeks to blame third parties for the violations.

CONCLUSION

Both in the interests of fairness and expediency, the Court should enter an order limiting the trial of this matter in the following respects:

1. The trial of this action is subject to the following limitations on each side (i.e., on the Defendants in the aggregate):

Opening and closing	1/2 hour each
Direct examination of witnesses:	10 hours
Cross examination of witnesses:	5 hours

2. Evidence relating to the Waterway Estates permit denial may not be introduced at trial, and the testimony by Connie Kagey, Bruce Barrett, James Greenfield, and Roosevelt Childress is excluded.

3. Evidence relating to the terms of the following EPA administrative orders issued by EPA to Florida Cities may not be introduced at trial: 1. Consent Agreement and Order Assessing Administrative Penalties No. CWA-IV 91-538 (Barefoot Bay); 2. Administrative Order AO 90-106 (Barefoot Bay); 3. Consent Agreement and Order Assessing Administrative Penalties, No. CWA-IV 90-542 (Carrollwood). Testimony from Thomas Plouff and Roy Herwig of EPA concerning their calculation of administrative

[13] There has been no counterclaim or third-party claims filed in this action.

penalties for the violations set forth in those Orders may not be introduced at trial.

4. Douglas Smith and Roger Hartung are disqualified as expert witnesses.

5. Juanita Kerrigan, Georgia Metcalf, Michael Acosta, and John Sladkus are barred from testifying at trial.

5. Evidence that seeks to blame third parties for the violations may not be introduced at trial.

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

By: _____

Dated: January 4, 1996

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IN THE UNITED STATES DISTRICT COURT
OF THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	Civil Action No. 93-281-CIV-FTM-21

DEPOSITION OF:	DOUGLAS G. SMITH
TAKEN:	Pursuant to Notice on behalf of Plaintiff
DATE:	October 30, 1995
TIME:	9:30 A.M. to 6:15 P.M. (Actual: 9:40 to 6:15)
PLACE:	United States Attorney's Office 500 Zack Street Tampa, Florida
REPORTER:	CARLA S. RAAB Court Reporter Notary Public State of Florida at Large

ORIGINAL

worked for Black & Veatch since that time.

Q And what is his position with Black & Veatch?

A He's what we would call a project engineer. Both he and Mr. Jernigan are registered engineers in the State of Florida.

Q What about you, sir, are you a registered engineer in the State of Florida?

A Yes, I am.

(WHEREUPON, Exhibit 878 is marked for identification purposes.)

Q (By Mr. Jacobs) I'm handing you Exhibit 878, sir. Do you recognize that?

A Yes, I do.

Q Would you identify it for the record, please.

A It's an abbreviated resume or biodata for me.

Q You say it's abbreviated. Is there a more complete version?

A Yes. We create several versions from time to time. This has an abbreviated number of projects for which I've been responsible. It does list most of my -- it lists all of my educational credentials and most of my publications.

Q Do you know why an abbreviated version was submitted to us?

A No. Just other than we have a number of

different versions and it appears that this was the one that was given.

Q Would you review that, please, sir, and tell me if it's accurate.

A For the information here it's certainly accurate, yes.

Q You said you were a registered engineer in the State of Florida. What other professional licenses do you have?

A I was formerly registered in the State of Colorado as a professional engineer. It's on inactive status now.

Q But your Florida license is current?

A It's generally current. I'm not -- you know, I don't know exactly what -- if my dues are paid up or exactly where that stands.

Q You do or you don't know, Mr. Smith?

A I don't know.

Q Do you know that your license expired in October 1994?

A No, I didn't know that.

Q You know your license number in the State of Florida?

A I think it's 43782, something like that.

Q Do you have a license number PE0043134?

A Could be. I'm not certain.

Q Mr. Smith, you said that these reports were prepared under your general supervision or direction and that you personally signed them. Had you, before you signed them, reviewed a draft of each of these reports?

A Yes, I had.

Q Did you comment on the drafts?

A I did.

Q Were changes then made according to those comments?

A Yes, they were.

Q And during the course of the preparation of any of the drafts for the final versions of these three reports -- Exhibits 875 and 876 and 877 -- did you have occasion to review any documents?

A I believe that I reviewed just compilations of information that was compiled by my staff as part of the reports. I did review the Complaint, reviewed -- I'm trying to think if there's any other documents. Nothing sticks out in my mind of any particular documents I reviewed.

Q You are sure, though, that you reviewed what you've characterized as compilations of information compiled by your staff; is that correct?

A That's correct.

DOUGLAS G. SMITH, P.E.
PARTNER-IN-CHARGE

EXPERIENCE:

Mr. Smith is a Senior Partner and the Southeast Regional Manager for Environmental Services for Black & Veatch. Since joining Black & Veatch in 1980, Mr. Smith's duties have focused on management of facilities, financial studies, and major capital improvements in connection with solid waste, wastewater and water treatment, and conveyance systems. In addition to his training as a professional engineer, Mr. Smith holds a Juris Doctor from the University of Denver, College of Law.

As Partner-In-Charge of Black & Veatch Environmental Enterprises, he is responsible for all engineer-construct projects of the firm undertaken in the environmental disciplines.

RELATED PROJECT EXPERIENCE

Project, Client, and Location	Position	Responsibilities
WASTEWATER		
Southwest Regional WWTP, Manatee County Public Services, Bradenton, FL.	Partner-In-Charge	Evaluated and prepared a report on a digester foaming problem at the plant site. Determined sludge gas mixing technique and existing sludge gas compressors to be inadequate for optimal operation. Recommended modifications to rectify the situation and provide for future monitoring of sludge gas distribution.
Western Regional Wastewater Treatment Plant Modifications, City of Daytona Beach, Daytona Beach, FL.	Partner-In-Charge	Evaluated and designed modifications to provide nitrogen and phosphorus removal to meet new effluent limits of 3 mg/L nitrogen and 1 mg/L phosphorus. Conversion from mechanical aeration system to a diffused aeration system.
SW 137 Avenue Force Main, Miami-Dade Water and Sewer Department, Miami, FL.	Partner-In-Charge	Performed route selection, design, permitting, and construction phase services for 11 miles of 36- to 72-inch PCCP force main.
Southwest, North, and Southeast WWTPs, Manatee County Public Services, Bradenton, FL.	Partner-In-Charge	Developed sludge management plan to ensure continued compliance with EPA 40 CFR Part 503 and Chapter 17-640, F.A.C. regulations. The long-term alternative evaluated for further treatment included composting and alkaline stabilization.

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Douglas G. Smith, P.E.

University of Colorado	Adjunct Professor	Taught undergraduate courses in sanitary engineering and directed research related to nitrification/denitrification systems, rapid infiltration basins, and aerobic treatment of wastewater sludge.

PERSONAL DATA:

J.D., University of Denver, 1989
MSCE, University of Colorado, 1974
BSCE, Kansas State University, 1971

Member: WEF, AWWA, American Bar Association

Registered Professional: Florida, Colorado

Diplomate: American Academy of Environmental Engineers

Joined Black & Veatch: 1980

PUBLICATIONS/PRESENTATIONS:

Smith, Douglas G., "Alternative Delivery System Works for Pine Hills Water Plant," AWWA National Conference, June 1995, Anaheim, California.

Smith, Douglas G., "Alternative Approaches to Public Works Contracting," Florida Section of APWA, May 1995, Fort Myers, Florida.

Smith, Douglas G., "Design/Build and the Changing Face of Engineering," ACEC National Conference, May 1995, New Orleans, Louisiana.

Smith, Douglas G., "Alternative Project Delivery Approaches for Public Works Owners," Florida Water Resources Journal, January 1995.

Smith, Douglas G., "Alternative Project Delivery Approaches for Public Works Owners", Florida Water Resources Conference, August 1994, Tampa, Florida.

Smith, Douglas G., "Delivering Public Works Projects - Different Approaches", Public Works, March 1994.

Smith, Douglas G., "Environmental and Power Projects in Eastern Europe & Developing Countries," National Council for Public-Private Partnerships Conference, May 1993.

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Douglas G. Smith, P.E.

Minns, R.O. et. al., "Nutrient Removal Using A Modified Pure Oxygen Process", Florida Water Resources Conference, November 1992, Daytona Beach, Florida.

Burnmaster, Wren-Jarvis, Smith, "Nitrogen Removal Design at the Clark County Central Plant", Nevada Water Pollution Control Association Annual Conference, March 26 1992.

Minns, R.O. and D.G. Smith, "Innovative Biological Nutrient Removal Facilities", Florida Water Resources Conference, November 1990, Orlando, Florida.

Smith, Michael, Holst, and Johnson, "Evaluation of a Full Scale Nitrification Denitrification Demonstration Facility", Water Pollution Control Federation, October 1988.

Smith and Gallagher, "Feasibility Study for a Unified Grand Valley Water System", Rocky Mountain Section AWWA/WPCA, September 1988.

Smith, Douglas G., "Cogeneration Alternatives in Wastewater Treatment", McGraw-Hill Wastes to Energy Conference, September 1987.

Kuchenrither, Martin, Smith, and Williams, "Design and Operation of an Aerated Windrow Composting Facility", Journal: Water Pollution Control Federation, March 1985.

Hartman and Smith, "Startup and Operation of a Major Cogeneration Facility", Rocky Mountain Section AWWA/WPCA, September 1985.

Kuchenrither, Martin, Smith, and Pearis, "An Economic Comparison of Composting and Dual Utilization," Biocycle, July-August 1984.

Smith, Linstedt, and Bennett, "Treatment of Secondary Effluent by Infiltration/Percolation", EPA 600/2-79-174, August 1979.

Hartman, Bennett, Linstedt, and Smith, "Sludge Stability through Aerobic Digestion", Journal Water Pollution Control Federation, September 1979.

Martin, Benefield, Bennett, and Smith, "The Coupled Trickling Filter - Rotating Biological Contactor Process: Nitrification Considerations", Water Pollution Control Federation, October 1979.

Tamborini, Linstedt, Bennett, and Smith, "Pilot Plant Evaluation of Infiltration/Percolation System for Boulder, Colorado", International Symposium on the State of Knowledge on Land Treatment of Wastewater, Cold Region Engineering Labs, Hanover, New Hampshire, August 1978.

SAIC DRS
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Douglas G. Smith, P.E.

Harremoes, Bennett, Linstedt, and Smith, "Stability Determination for Aerobically Digested Sludges", Water and Sewage Works, September 1977.

Harremoes, Bennett, Linstedt, and Smith, "Process Modifications of Aerobic Digestion for Sludge Stability and Nitrogen Control", National Conference on Environmental Engineering Research and Design, July 1976.

Smith, Douglas G., "Evaluation of Weak Acid Cation Exchange for Ammonia Removal from Wastewater", Masters Thesis, University of Colorado 1974.

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ORIGINAL

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

Plaintiff,

v.

AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY

Defendant.

Case No.: 93-281-CIV-FTM-21

Washington, D.C.

Tuesday, November 28, 1995

The COURT-ORDERED MEETING OF COUNSEL was held at the law offices of Weil, Gotshal & Manges, P.C., 1615 L Street, Suite 700, Room 8/B, Northwest, Washington, D.C. 20036, commencing at 10:36 a.m.

witnesses?

MR. JACOBS: I'm not going to have those discussions with you now, sir.

MR. BULLOCK: So you're refusing to answer that question. I'm just putting on the record that I asked the question and you refused to answer.

MR. JACOBS: You know this is a meeting of counsel. It's not a deposition, Mr. Bullock and Mr. Baise, but you can put whatever you want on the record. It's here for you to do that if you want to use it that way.

MR. HIRD: May I ask one additional question? I noticed the name of Mr. Acosta. My understanding is Mr. Acosta's deposition was noticed by the government and then withdrawn; is that correct?

MR. JACOBS: Are you asking me?

MR. HIRD: Yes.

MR. JACOBS: Oh, I had a discussion with Mr. High. I said, "Well, I only need to take his deposition if he's going to be a witness. Can you tell me?" And Mr. High said, "I can't tell you that." So, Mr. High, please feel free to speak up if I'm misrepresenting the conversation.

MR. HIRD: But did you not withdraw a previous

notice of this deposition?

MR. JACOBS: I believe, based on the fact that no one would tell me that he was going to be a witness, we said no, we're not going to go forward. And if what you're asking me, Mr. Hird, is does that position still hold --

MR. HIRD: I'm not asking for your position. I'm just asking for the fact whether he was noticed as a deponent and then the government withdrew the notice, that's all I'm asking for.

MR. JACOBS: I believe that you're correct in that regard. And I'm explaining that, based on the discussion with Mr. High, I had no way of knowing he would be a witness.

MR. HIRD: And, at the time you had no way of knowing he would be a witness, you made the decision to withdraw the notice.

MR. JACOBS: That is, to the best of my recollection, correct, Mr. Hird, that based on Mr. High's representation that he could not represent whether Mr. Acosta would be a witness or not, that I withdrew the notice.

Mr. High.

MR. HIGH: I believe that to be correct.

MR. JACOBS: Thank you, sir.

Exhibit_____(GHB-74)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY, et al., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

DEFENDANTS' JOINT MOTION IN LIMINE TO EXCLUDE THE TESTIMONY AND REPORT OF EILEEN ZIMMER

Defendants Avatar Holdings Inc. ("Avatar Holdings") and Florida Cities Water Company ("Florida Cities") hereby submit this motion in limine to exclude the testimony and report of the government's expert witness, Ms. Eileen Zimmer, on the grounds that her testimony and report regarding penalty assessment are clearly inadmissible.

Under the evidentiary standards enunciated by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993), Zimmer's testimony and report must be excluded, on five separate bases. First, Zimmer calculates the alleged wrongful profits associated with the government's claims for which the Court has already granted judgment in favor of the defendants -- the alleged unpermitted discharges at

the Barefoot Bay and Carrollwood treatment plants. Second, Zimmer bases her penalty recommendations on the profits earned by Avatar Holdings and Barefoot Bay Development Corporation, rather than the costs that Florida Cities allegedly avoided, as required by the Clean Water Act. Third, Zimmer includes in her calculation profits earned by Barefoot Bay Development Corporation, an entity that is not a party to this lawsuit. Fourth, Zimmer primarily analyzes profits allegedly associeated with purported violations that occurred beyond the statute of limitations. Fifth, Zimmer makes methodological errors and improper assumptions that make her testimony misleading and unhelpful to this Court.

In support of this motion, defendants submit the attached memorandum and two exhibits. Exhibit A is a copy of Zimmer's expert witness reports, Exhibit B consists of relevant excerpts from Zimmer's deposition, and Exhibit C is an excerpt from the deposition of Kenneth Kwan.

For the foregoing reasons and the reasons stated in the attached memorandum, Eileen Zimmer's testimony and report should be excluded.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY, et al., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

DEFENDANTS' JOINT MEMORANDUM IN SUPPORT OF THEIR MOTION IN LIMINE TO EXCLUDE THE TESTIMONY AND REPORT OF EILEEN ZIMMER

Defendants Avatar Holdings Inc. ("Avatar Holdings") and Florida Cities Water Company ("Florida Cities") hereby submit this memorandum of law in support of their motion in limine to exclude the testimony and report of the government's expert witness, Ms. Eileen Zimmer, on the grounds that her testimony and report regarding penalty assessment are clearly inadmissible.

Under the evidentiary standards enunciated by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993), Zimmer's testimony and report must be excluded, on five separate bases. First, Zimmer calculates the

alleged wrongful profits associated with the government's claims for which the Court has already granted judgment in favor of the defendants -- the alleged unpermitted discharges at the Barefoot Bay and Carrollwood treatment plants. Second, Zimmer bases her penalty recommendations on the profits earned by Avatar Holdings and Barefoot Bay Development Corporation, rather than the costs that Florida Cities allegedly avoided, as required by the Clean Water Act. Third, Zimmer includes in her calculation profits earned by Barefoot Bay Development Corporation, an entity that is not a party to this lawsuit. Fourth, Zimmer primarily analyzes results allegedly related to purported violations that occurred beyond the statute of limitations. Fifth, Zimmer makes numerous methodological errors and improper assumptions that make her testimony misleading and unhelpful to this Court.

I. Background

On October 31, 1993, the government instituted this action against Florida Cities for the alleged Clean Water Act violations at one Florida Cities' facility, Waterways Estates Wastewater Treatment Plant ("Waterways Estates"). On May 5, 1995, the government added allegations regarding two other Florida Cities' facilities, Barefoot Bay Wastewater Treatment Plant ("Barefoot Bay") and Carrollwood Wastewater Treatment Plant ("Carrollwood"), and added Avatar Holdings, Florida Cities' indirect corporate parent, as a party, alleging that Avatar Holdings "directly controls" the environmental compliance practices of Florida Cities, and is therefore liable for the acts or omissions of its subsidiary. See Second Amended Complaint ¶ 6 ("Complaint").

The government seeks penalties for the alleged violations under section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d). This Court has previously ruled that the government's claims against both defendants with respect to unpermitted discharges at Barefoot Bay and Carrollwood are barred by the doctrine of res judicata. Orders of November 22 and December 21, 1995. This Court has also ruled that all claims against Avatar Holdings arising prior to May 5, 1995 are barred against Avatar Holdings by the applicable statute of limitations. Order of November 22, 1995.

II. Ms. Zimmer and her Report

On October 13, 1995, the government's expert witness regarding penalty assessment, Eileen Zimmer, a Senior Financial Analyst for the Corporate Financing Unit (Antitrust Division) of the Department of Justice, submitted a Report entitled "Analysis of Wrongful Profits and Ability to Pay in U.S. v. Florida Cities Water Co." (the "Report"), attached as Exhibit A. The stated goal of this Report is "to quantify wrongful profits realized by Avatar Holdings, Inc. (Avatar) through its Barefoot Bay Development Corporation (Barefoot Development) operations and by Florida Cities Water Company [Florida Cities or FCWC] . . . ; and to determine the ability of Avatar and [Florida Cities] to pay a civil penalty for alleged violations of the Clean Water Act."

The Report analyzed the "wrongful profits" allegedly realized by Avatar Holdings "through its Barefoot Bay Development Corporation and by Florida Cities Water Company." Zimmer Report at i. The Report first analyzes the so-called "wrongful profits"

realized by these entities by (1) taking the pre-tax income of Florida Cities at each facility and of Barefoot Bay Development Corporation; (2) estimating the post-tax income of these entities by assuming that each facility was liable for income taxes levied at the same rate as paid by Florida Cities; and (3) determining the "net present value" of these profits by determining how much these profits would be worth in constant 1995 dollars if one assumed that the funds were invested at three different interest rates: 6% ("which is represented to be FCWC's after tax average cost of debt assuming a 100% debt capitalization"); 11.3% ("which is the rate recommended by E.P.A. to be used in economic benefit calculations"); and 15% ("which approximates FCWC's cost of equity assuming a 100% equity capitalization"). Zimmer Report at 1-2.

The Zimmer Report concludes that the total profits earned by these entities between 1981 and 1991, expressed in constant 1995 dollars, ranged from approximately $7.1 to $15.2 million, depending upon the interest rate used to derive the net present value of the allegedly wrongful profits. Id. at 7. Most significantly, all of these profits derive from the mobile home development by Barefoot Bay Development Corporation;[1] if the profits from this land development were not included, Florida Cities' utility operations actually lost money at these facilities throughout the period-- $159,538 (at an assumed discount rate of 6%),

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1. Id.; see Zim. Dep. Tr. at 93 ("Q. If you exclude Barefoot Bay Development Corporation from these numbers, can you tell me whether there would be a wrongful profit realized at Florida Cities Water Company? A. There would be a negative wrongful profit.") (answer by Zimmer). Relevant excerpts from the transcripts of the deposition of Eileen Zimmer are attached as Exhibit B.

$169,086 (at an assumed discount rate of 11.3%), or $158,247 (at an assumed discount rate of 15%).

The Report next analyzes whether Florida Cities and Avatar Holdings can pay "the maximum amount of estimated alleged wrongful profits calculated in [this report]." Id. at 10. Based upon her analysis of the balance sheets of each company, Zimmer concludes that Florida Cities could afford to pay a fine of as much as $7.5 million, spread over five years, id. at 9, and that Avatar Holdings could pay a fine of $7.1 to $15.2 million, payable in one year. Id.

As demonstrated more fully below, this Report and any testimony relating to this Report are clearly inadmissible.

III. Zimmer's Testimony and Report are Inadmissible Under the Standards Established by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

A. The Legal Framework Established by *Daubert* and Rule 702

In Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993), the Supreme Court established new rules detailing when expert testimony should be excluded. The issue in Daubert was the proper standard for the acceptance of expert testimony and reports under Rule 702 of the Federal Rules of Evidence, which provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," then an expert "may testify thereto." Fed. R. Evid. 702. As numerous courts subsequently have noted, the Supreme Court's reasoning applies to

expert testimony in general, including economic testimony and reports.[2] Accordingly, the principles established in Daubert provide the relevant framework to determine whether the Zimmer Report and the testimony of Zimmer herself are admissible.

The Daubert Court identified two concerns that must be satisfied before expert testimony can be submitted to the trier of fact. First, the methodology underlying the proposed testimony must be rigorous enough that its conclusions will be helpful to the trier of fact; that is, the "[p]roposed testimony must be supported by appropriate validation -- i.e., 'good grounds.'" Id. at 2795. The trial court accordingly must conduct "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid." Id. If the expert testimony proffered is "not based on reliable foundations and thus would be of no aid to the finder of fact," then the evidence is inadmissible.[3]

Second, the proposed testimony must "'assist the trier of fact to understand the evidence or to determine a fact in issue.'" Daubert, 113 S.Ct. at 2795 (quoting Fed. R. Evid. 702). The primary purpose of this second inquiry is to ensure that there is a good "fit"

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2. See, e.g., In re Aluminum Phosphide Antitrust Litig., 893 F. Supp. 1497 (D. Kan. 1995) (applying Daubert principles to an economic report of pricing practices); Lieu v. Korean Air Lines Co., Ltd., No. 84 Civ. 0690 (PNL), 1993 WL 478,343 (S.D.N.Y. Nov. 16, 1993), (applying Daubert principles to estimates of future growth of Taiwanese economy and estimates of future wages); Newport Ltd. v. Sears, Roebuck & Co., Civ. Act. No. 86-2319, 1995 WL 328,158 (E.D. La. 1995) (applying Daubert factors to analysis of lost profits).

3. United States v. 14.38 Acres, 884 F. Supp. 224, 227 (N.D. Miss. 1995); accord Pomella v. Regency Coach Lines, Ltd., 899 F. Supp. 335, 340 (E.D. Mich. 1995) (ruling expert testimony inadmissible because the expert had not adequately established the coefficient of friction between the tires and the road under the conditions in question).

between the testimony offered and a relevant issue in the case, id., and that "the reasoning properly can be applied to the facts in issue." The testimony is not admissible unless it provides helpful insight into a fact that is legally relevant to the case; "[e]xpert testimony which does not relate to any issue in the case is not relevant and, ergo, nonhelpful."[4]

In short, the trial court is to act as a "gatekeeper,"[5] determining "at the outset"[6] of the trial whether the proffered expert testimony is methodologically sound and relevant.[7] If the proffered testimony fails to satisfy either of these tests, then the court must exclude it. Daubert, 113 S.Ct. at 2796.

B. Zimmer's Testimony and Report Are Not Admissible Because They Do Not Relate to Any Issue in This Case"

1. Zimmer Calculates the Alleged "Wrongful Profits" Related to Claims Barred by the Doctrine of Res Judicata

In her Report, Zimmer calculates the alleged "wrongful profits" of Avatar Holdings and Florida Cities with respect to the alleged unpermitted discharges at Barefoot Bay (from November 1, 1981 to October 31, 1991) and at Carrollwood (from November 1,

4. Id. (quoting 3 Weinstein & Berger ¶ 702[02], pp. 708-12).

5. Id.; see also, In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 748 (3d Cir. 1994) ("Daubert makes clear for the first time at the Supreme Court level that courts have to play a gatekeeping role with regard to experts.").

6. Id. at 2796.

7. Id. at 2798 (Rehnquist, C.J., concurring in part and dissenting in part); see also Bradley v. Brown, 42 F.3d 434, 437 (7th Cir. 1994) ("the Court specifically recognized the 'gatekeeping function' of the district court").

1984 to June 30, 1991).[8] Report at pp. 3, 5-6. Moreover, in calculating the "wrongful profits" at Barefoot Bay, Zimmer does not limit her calculation to the profits of Florida Cities -- actually a loss ranging between $259,414 and $436,915, depending on the interest rate applied. Rather, Zimmer also includes the profits realized by the Barefoot Bay Development Corporation selling lots and mobile homes during the same period, which she calculates between $7.1 and $15.2 million. Report, at pp. 5-6.

The Court has previously ruled in its Orders of November 22, 1995 and December 21, 1995, that these claims are barred by the doctrine of res judicata. Therefore, Zimmer's testimony about the "wrongful profits" associated with these claims does not relate to any issue in this case. Accordingly, Zimmer's testimony and her report should be excluded on these issues.

2. Zimmer's "Wrongful Profits" Analysis is Not Relevant to the Calculation of Economic Benefit

Section 309(d) of the Clean Water Act states that "[a]ny person who violates" certain provisions of the Clean Water Act is subject to a civil penalty. 33 U.S.C. § 1319(d). One of the factors the court must consider when assessing a civil penalty is "the economic benefit (if any) resulting from the violation." Id.

The Zimmer Report analyzes the "wrongful profits" earned by Florida Cities, Avatar Holdings, and Barefoot Bay Development Corporation, ostensibly to determine this

8. See Zim. Dep. Tr. at 22 ("A wrongful profit is in this particular case profits earned by the three facilities at Florida Cities and the Barefoot Bay Development Corporation during the period where they did not have the proper permits in place.")

economic benefit. This Report, the government asserts, is relevant because these companies could not have operated but for the alleged Clean Water Act violations, and, hence, would not have earned any profits. Thus, according to the government's position, the economic benefit of the alleged violations is equal to any profits that these companies earned while they were operating in violation of the Clean Water Act.

The government's current position flies in the face of two decades of consistent government policy and judicial decisions. Both the government and the courts have always defined "economic benefit" as being equal to the present-day value of the avoided costs, not the profits earned during the period of non-compliance. EPA's manual for its BEN Computer Model, which EPA developed to determine the economic benefit of a Clean Water Act violation,[9] EPA's RCRA Civil Penalty Releases,[10] and EPA's Enforcement Policy Releases all have calculated economic benefit in terms of costs avoided or delayed during non-compliance, not profits earned. EPA's Enforcement Policy Releases expressly state that "the economic advantage to be derived from noncompliance is the ability to delay making the

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9. Environmental Protection Agency, Guidance for Calculating the Economic Benefit of Noncompliance for a Civil Penalty Assessment 2-4 (1984); see Student Public Interest Research Group of New Jersey, Inc. v. Monsanto, Civ. No. 83-2040, 1988 WL 156,691 (D.N.J. Mar. 24, 1988) (noting that the parties agreed that the EPA normally used the BEN programs estimate of costs avoided to determine the "economic benefit" of noncompliance).

10. Environmental Protection Agency, 1990 Revised RCRA Civil Penalty Policy 26-30 (1990).

expenditures necessary to achieve compliance."[11] Indeed, Kenneth Kwan, the EPA enforcement officer for this case, testified at his deposition that the method for calculating economic benefit involved determining "the captial cost . . . required to meet the permit or the Clean Water Act requirements." Kwan Dep Tr. at 161 (attached as Exhibit C).

More significantly, numerous courts, have analyzed economic benefit" under the Clear Water Act to be the present-day value of any costs avoided by noncompliance.[12] Thus, there is no support in the case law for the government's assumption that any profits earned by these companies are an economic benefit under the Clean Water Act. As the Eleventh Circuit held in Atlantic States Legal Foundation v. Tyson Foods, the economic benefit under the Clean Water Act is the present-day value of the costs avoided by any

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11. Environmental Protection Agency, Policy on Civil Penalties: EPA General Enforcement Policy #GM-21 (1984).

12. For example, in Friends of the Earth v. Laidlaw Envtl. Servs., 890 F. Supp. 470 (D.S.C. 1995), the court cited the EPA's BEN User's Manual as stating that the "concept of alternative investment; that is, the amount the violator would normally expect to make by not investing in pollution control, is the basis for calculating the economic benefit of noncompliance." The court accordingly concluded, based upon this authority, that "[e]conomic benefit is the after-tax present value of avoided or delayed expenditures on necessary pollution control measures." Id.; see also Proffitt v. Lower Bucks County Joint Mun. Auth., 1988 U.S. Dist. LEXIS 4381 (May 12, 1988) (approving the use of BEN, "the computer software package used by EPA or civil penalty calculations," in which "[t]he economic benefit was calculated as the difference in the net present value of cash flows if compliance had been achieved on time, and the cash flows resulting from delayed compliance."); Student Public Interest Research Group of New Jersey, Inc. v. Monsanto, Civ. A. No. 83-2040, 1988 WL 156,691 (D.N.J. Mar. 24, 1988) (disallowing testimony of expert witness, in part because "no witness attempted to utilize the BEN computer program which plaintiffs conceded would be utilized by the EPA");

untimely compliance.[13] This holding is well within the mainstream of Clean Water Act jurisprudence, which defines

> [e]conomic benefit [as] the after-tax present value of avoided or delayed expenditures on necessary pollution control measures. Economic benefit represents the opportunity a polluter had to earn a return on funds that should have been spent to purchase, operate, and maintain appropriate pollution control devices. To determine a company's economic benefit from noncompliance with its permit, one must compare the company's cash flows associated with the delayed permit compliance measures to what those cash flows would have been if the company had obtained the necessary pollution control equipment on time.

Friends of the Earth v. Laidlaw Envtl Servs., 890 F. Supp. 470 (D.S.C. 1995).

Virtually every other court that has considered the issue has concurred in this analysis of the economic benefit component of a penalty.[14] In fact, the courts have stated

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13. Atlantic States Legal Found. v. Tyson Foods, 897 F.2d 1128, 1141 (11th Cir. 1990) (noting that "economic benefit" is equal to savings "in operation and maintenance expenses by operating without utilizing the technology and employees necessary to comply with its permit"); see Atlantic States Legal Found. v. Universal Tool, 796 F. Supp. 743, 751 (N.D. Ind. 1992).

14. See, e.g., Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 79 (3d Cir. 1990) (estimating economic benefit not as profits during period of violation, but rather as avoided cost of hauling tainted wastewater to treatment facility); Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc., 1995 WL 461,252 at *12 (D.N.J. 1995) (upholding testimony of plaintiffs' economics expert "that economic benefit should be calculated by determining the after-tax present value of the expenditures the company avoided or delayed by not complying"; court also noted that the expert had "testified that that methodology is virtually identical to the methodology used by the EPA"; Proffitt v. Lower Bucks County Joint Mun. Auth., Civ. Act. No. 86-7220, 1988 U.S. Dist. LEXIS 4381, at *15 (May 12, 1988).

that even in cases in which the offending facility did not hold the required permit -- and hence was not entitled to operate at all -- the proper measure of damages still was the avoided costs of complying with the Act.[15] The case law, in other words, uniformly rejects the Government's current position that the economic benefit of noncompliance is every dollar of profits earned during the period of noncompliance.[16]

The only contrary authority to this consistently applied definition of "economic benefit" is found in the recently issued "Revised Interim Clean Water Act Settlement Penalty Policy" (Interim Settlement Policy), which the EPA issued on February 28, 1995. The Interim Settlement Policy generally embraces the BEN Model and the long-standing EPA policy of defining economic benefit as the costs of noncompliance. The policy does, however, state that "[i]n some cases, the BEN model may not be an appropriate methodology

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15. See, e.g., United States v. Roll Coater, Inc., Cause No. IP 89-828 C, 1991 U.S. Dist. LEXIS 8790 (S.D. Ind. Mar. 22, 1991) (calculating economic benefit, where company exceeded average monthly limits by more than one thousand percent, as costs of avoided compliance); United States v. Confederate Acres S. & S. Drainage System, 767 F. Supp. 834, 839 (W.D. Ky. 1990) (holding that the economic benefit of operating without a permit was equal to the amount saved).

16. So far as defendants are aware, there are no cases in which a court has allowed the EPA to calculate the amount of the economic benefit based upon "wrongful" profits. This also appears to be the same conclusion that Zimmer has reached. See Zim. Dep. Tr. at 84 ("Q. . . . [H]ave you ever seen a wrongful profits analysis done before in an environmental law context? A. No, I don't think so."). In an early case, United States v. Reserve Mining Co., 412 F. Supp. 705, 709 (D. Minn.), aff'd, 543 F. 2d 1210 (8th Cir. 1976), the court referred to the defendant's "profits" in considering a penalty under the Clean Water Act, but described those profits as the money saved by choosing a "less costly" but illegal discharge alternative, not as the money made by the company during the period of non-compliance. Thus, Reserve Mining is consistent with the later cases defining economic benefit.

for estimating economic benefit or will not capture the full scope of the economic benefit." Interim Settlement Policy at 5. The Interim Settlement Policy only provides one example in which it would be appropriate to use a "wrongful profits analysis" -- a "privately-owned regulated utility." Id.

This Interim Settlement Policy does not provide sufficient support to rehabilitate Zimmer's analysis. First, the reference to a "wrongful profits analysis" is contrary to over two decades of EPA practice and court decisions, which have consistently defined economic benefit to mean the costs saved or delayed due to noncompliance, not the profits made during the period of noncompliance. Indeed, in the single sentence mentioning a "wrongful profits analysis," the Interim Settlement Policy provide no legal or economic support for this approach. Second, the only utility involved in this case, Florida Cities, actually lost money during the period of noncompliance. There is no support in this policy for applying the wrongful profits analysis to a land sales company such as Barefoot Bay Development Corporation.

In short, the overwhelming weight of authority is that the economic benefit of noncompliance is the costs avoided by that noncompliance. Despite the weight of this authority, Zimmer admitted that she never made "any attempt . . . to quantify the costs of bringing this facility into compliance with the Clean Water Act." Zim. Dep. Tr. at 26-27. Zimmer also admitted that she never calculated the costs of compliance or considered whether there were alternative facilities that could have been used to comply with the Act. Id. at 43-

44. Rather, the Report instead attempts to quantify a figure that is irrelevant to the litigation -- the amount of profits earned by Barefoot Bay Development Corporation -- while ignoring the true issue -- the absence of any economic benefit to the defendants from the alleged violations of the Clean Water Act.

The irrelevance of this Report and Zimmer's testimony to any real issue in this case mandates their exclusion. As the Supreme Court stated in Daubert, "[e]xpert testimony which does not relate to any issue in the case is not relevant and, ergo, nonhelpful."[17] Zimmer's testimony and Report are not relevant "for purposes of the case,"[18] and therefore this must be excluded at the "outset"[19] for failing to "advance the trier of fact's understanding of a material issue in the case."[20]

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17. Id. (quoting 3 Weinstein & Berger ¶ 702[02], pp. 708-12); see id. at 2796 ("'An additional consideration under Rule 702 -- and another aspect of relevancy -- is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.'") (quoting United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985)).

18. See, e.g., In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 743 (3d Cir. 1994) ("even if an expert's proposed testimony constitutes scientific knowledge, his or her testimony will be excluded if it is not scientific knowledge for purposes of the case"); Cavallo v. Star Enter., 892 F. Supp. 756, 761 (E.D. Va. 1995) (same).

19. Daubert, 113 S.Ct. at 2796.

20. Cavallo v. Star Enter., 892 F. Supp. 756, 761 (E.D. Va. 1995) ("not only must the opinion be scientifically valid, or reliable, but it must also advance the trier of fact's understanding of a material issue in the case.").

C. The Methodological Flaws in Zimmer's Testimony and Report Make Her Analysis Unreliable

1. Zimmer Improperly Includes "Wrongful Profits" with Respect to Violations Alleged to Occur Beyond the Statute of Limitations

This Court in its November 22, 1995 order ruled that all allegations against Avatar Holdings based on alleged discharges from Florida Cities' facilities occurring prior to May 5, 1990, are barred by the five year statute of limitations under 28 U.S.C. § 2462. Similarly, the statute of limitations protects Florida Cities from claims relating to Barefoot Bay and Carrollwood before May 5, 1990, and from claims relating to Waterways Estates before October 31, 1988.

Zimmer's "wrongful profits" analysis, however, reaches far beyond the statute of limitations, and even the Complaint, and calculates the profitability of three facilities and the Barefoot Bay Development Corporation during the following periods:

(1) Carrollwood Wastewater Treatment Plant, from November 1, 1984, through June 30, 1991;

(2) the Waterway Estates Wastewater Treatment plant, from January 9, 1987 through June 1992;

(3) the Barefoot Bay Wastewater Treatment plant, from November 1, 1981, through October 31, 1991;

(4) the Barefoot Bay Development Corporation, from November 1, 1981, through October 31, 1991.[21]

21. Zimmer Report at i; see Zim Dep. Tr. 19.

With respect to Carrollwood, Zimmer's calculation period included almost six years beyond the applicable statute of limitations. For Waterways Estates, Zimmer included three years beyond the limitations period applicable to claims against Avatar Holdings. Astonishingly, with respect to the Barefoot Bay facility and the Barefoot Bay Development Corporation, Zimmer's calculations included almost nine years beyond the limitations period.

As Zimmer acknowledged, if these erroneously included periods were removed from the analysis, the purported "wrongful" profits calculated in the Report "would be reduced." Zim. Dep. Tr. at 91-93. Because the vast majority of the time period analyzed by the Zimmer Report falls beyond the statute of limitations, the Report is inherently incapable of providing any meaningful insight into the economic benefit that accrued to the defendants.[22]

2. Zimmer Improperly Includes Profits Earned by a Company that Did Not Discharge Pollutants and is Not Named in the Complaint

Section 309(d) of the Clean Water Act imposes a penalty on "a person who violates" the Act. 33 U.S.C. § 1319(d). As this court has stated, this requirement cannot be read to impose liability on someone who has not "actively directed or caused the illegal [act]." United States v. Lambert, 589 F. Supp. 366, 374 (M.D. Fla. 1984).

22. See, e.g., Hein v. Merck & Co., Inc., 868 F. Supp. 230, 233 (M.D. Tenn. 1994) (rejecting expert testimony in part because "[t]here are . . . critical errors in the assumptions and methodology of the three models used" that made it impossible to extract useful information).

Plaintiff's Second Amended Complaint only names Florida Cities and Avatar Holdings as defendants,[23] and nowhere alleges any Clean Water Act violations on the part of Barefoot Bay Development Corporation, id. at ¶¶ 15-48. Accordingly, there is no rational basis to connect the profits earned by that company to the conduct complained of in this case. The only connection between Barefoot Bay Development Corporation and the alleged violations is that both Barefoot Bay Development Corporation and Florida Cities are indirect subsidiaries of Avatar Holdings. Barefoot Bay Development Corporation neither owns, nor is owned by, Florida Cities, and Barefoot Bay Development Corporation does not "direct" or "control" the discharges of Florida Cities. Barefoot Bay Development Corporation is not a party in this case and there are no facts, or even allegations in the Complaint, that Avatar Holdings is the alter ego of Barefoot Bay Development Corporation. Thus, the amount of profits earned by Barefoot Development Corporation, regardless of their level, simply is irrelevant to this case.[24]

By submitting this Report, the government has attempted to make an end run around the Federal Rules of Civil Procedure and the Due Process Clause, in effect making Barefoot Bay Development Corporation a party to this case without ever filing a complaint against it. As the Act establishes, however, Barefoot Bay Development Corporation cannot be

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23. The Complaint names Avatar as a defendant solely in its capacity as an overseer "acting through" Florida Cities. Id. at ¶ 6.

24. For additional reasons why these entities are not part of this case, see Defendant Avatar Holdings Inc.'s Memorandum of Law in Opposition to Motion for Summary Judgment dated Sept. 9, 1995.

held liable for any alleged discharges unless it is demonstrated to have "actively directed or caused" the discharges. Because the Government has failed to allege, let alone prove, that Barefoot Bay Development Corporation caused Florida Cities' discharges, it would be improper for this Court to allow the government to implicate that company under the guise of allowing Zimmer to calculate its "wrongful profits."

3. Zimmer Improperly Calculates the Profits Allegedly Attributed to Barefoot Bay Development Corporation

Finally, even if it were correct to include in the analysis the profits from Barefoot Bay Development Corporation (which constitutes the entire net profit calculated by Zimmer), the Zimmer Report does not properly account for these profits, further undermining whatever credibility it may have.

Zimmer attributes all profits earned by Barefoot Development between November 1, 1981, through October 31, 1991, as being "wrongful."[25] What Zimmer's analysis ignores, however, is that Barefoot Bay Development Corporation earned money by the one-time sale and development of a fixed supply of land; if Barefoot Bay Development Corporation had simply held onto its lots until November 1, 1991, after the Barefoot Bay Treatment plant had received its permit, it could have sold its lots at that time without incurring any "wrongful profits." In other words, even if the wrongful profit analysis were valid any "wrongful profit" made was not equal to the total profits made, but rather to the

25. See Zim. Dep. Tr. at 37 ("What this [Report] assumes is that without the proper permits in place that these operations should not have been operating during the time periods, so that all profits earned were wrongful profits.").

incremental profit that Barefoot Bay Development Corporation received by selling land prior to November 1, 1991. See Zim Dep. Tr. at 37-38. Obviously this amount is far less than the total profits made by Barefoot Bay Development Corporation prior to that time, which Zimmer uses in her report.

This fundamental error makes it impossible to determine what portion of the profits that the analyzed entities earned by not delaying land sales. Thus, even if it were proper to calculate the amount of "wrongful" profits involved in this case, Zimmer's report and testimony still would not be admissible.

Conclusion

The limitations of the Zimmer's analysis render her testimony and report incapable of playing an informative role in this case. Zimmer calculates "wrongful profits" with respect to claims that are barred by the doctrine of res judicata and the statute of limitations. Zimmer equates "wrongful profits" with purported economic benefit, while ignoring consistent judicial decisions and EPA policies of defining economic benefit to mean delayed or avoided costs. Zimmer includes profits made at companies that had no connection with the alleged violations. Even if one were, contrary to all authority, to accept the scope of her analysis, the Court still would have to exclude her testimony and report because Zimmer improperly calculates the "wrongful" profits that she purports to analyze.

Any one of these errors is sufficient to mandate the exclusion of Zimmer's testimony and report, for "Daubert's requirement that the expert testify to scientific knowledge

-- conclusions supported by good grounds for each step in the analysis -- means that any step that renders the analysis unreliable under the Daubert factors renders the expert's testimony inadmissible."[26] Zimmer's analysis which includes significant errors and omissions at well nigh every step along the way, accordingly is inadmissible under the Federal Rules of Evidence.

In light of the above, Defendants respectfully request that Eileen Zimmer's testimony and Report be excluded.

Respectfully submitted,

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26. In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 745 (3d Cir. 1994) (emphasis in original); accord Cavallo v. Star Enter., 892 F. Supp. 756, 762 (E.D. Va. 1995).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY, et al. Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

PROPOSED ORDER

The Court having considered Defendants' Joint Motion in Limine to Exclude the Testimony and Report of Eileen Zimmer, and memorandum of law in support thereof, and the government's memorandum of law in opposition thereto, it is hereby ORDERED that the Defendants' motion is GRANTED, and the testimony of Eileen Zimmer and her expert witness report are hereby excluded as inadmissible evidence.

United States District Judge
Ralph W. Nimmons, Jr.

Date: January ___, 1996.

Exhibit_____(GHB-75)

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March 7, 1996

THIS COMMUNICATION IS FOR SETTLEMENT PURPOSES ONLY
TO BE TREATED ACCORDINGLY UNDER THE FEDERAL RULES OF EVIDENCE

VIA HAND DELIVERY

Robert Homiak
Environmental Enforcement Section
Environmental and Natural Resources Division
U.S. Department of Justice
1425 New York Avenue, N.W.
Room 11007
Washington, D.C. 20005

RE: United States v. Florida Cities Water Company, et al. No. 93-281-CIV-FTM-21

Dear Bob:

I have been authorized to forward to you the following settlement proposal with respect to the above-captioned case. Defendants are prepared to offer $600,000 for a complete settlement of all matters raised in the complaint, as amended. The payment would be made in three annual installments of $200,000, with the first payment due within 30 days of entry of a notice of settlement and order of dismissal by the Court.

We would appreciate your response at the earliest possible time. I can be reached today in our New York Office at 212-310-8019, and I will be in the Washington office all day tomorrow.

Based on your last voice mail message to me, of course, feel free to discuss this proposal with the appropriate department officials.

Very truly yours,

David R. Berz

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,) Case No. 93-281-CIV-FTM-21
Plaintiff,)
vs.) Monday, March 25, 1996
) Tampa, Florida
FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS, INC.,)
Defendants.)

TRANSCRIPT OF NON-JURY TRIAL
BEFORE THE HONORABLE RALPH W. NIMMONS, JR.,
UNITED STATES DISTRICT JUDGE

Appearances of Counsel:

For the Plaintiff: Mr. Daniel S. Jacobs
Mr. T. Anthony Quinn
Ms. Gwendolen Fitz-Henley

For Defendant Avatar: Mr. David B. Hird
Ms. Joanne Tsotsos

For Defendant Florida Cities: Mr. Gary H. Baise
Mr. Alexander M. Bullock
Mr. Lance High
Mr. Don G. Scroggin

Reported by: Dennis Miracle
Official Court Reporter

PROCEEDINGS

THE DEPUTY CLERK: Case Number 93-281, Civil, Fort Myers, 21(D), United States of America versus Florida Cities Water Company and Avatar Holdings, Incorporated.

Counsel, please state your names for the record.

THE COURT: Just a moment.

Let me have lead counsel to introduce themselves, and lead counsel can introduce the other people at counsel table with him.

MR. JACOBS: Good morning, Your Honor. Daniel Jacobs, U.S. Department of Justice, representing the United States.

With me today is my co-counsel Tony Quinn also with the U.S. Department of Justice and Gwen Fitz-Henley, Associate Regional Counsel, United States Environmental Protection Agency, Region 4.

THE COURT: All right. Now, my Courtroom Deputy wrote down the name Robert Homiak and John Moore as well.

MR. JACOBS: They are present, Your Honor. Mr. Moore is right over here. He's a paralegal. Mr. Homiak is right over here. He's an attorney.

THE COURT: All right. Thank you.

MR. BAISE: Good morning, Your Honor. My name is Gary Baise. I represent the Defendant Florida Cities Water Company, and I am accompanied by Mr. Alex Bullock, who will

be assisting me, Mr. Lance High and Mr. Donald Scroggin on the defense team for Florida Cities Water Company.

THE COURT: Thank you.

MR. BAISE: Also we have with us the general counsel, Mr. Dennis Getman.

THE COURT: All right. Just a moment.

G-E-T-M-A-N?

MR. BAISE: Yes, sir.

THE COURT: All right.

MR. BAISE: And Mr. Gerald Allen, executive vice-president of Florida Cities Water Company.

THE COURT: Gerald Allen --

MR. BAISE: Allen, yes.

THE COURT: -- A-L-L-E-N.

Vice-president?

MR. BAISE: Executive vice president.

THE COURT: President?

MR. BAISE: Yes, sir, executive vice-president.

THE COURT: All right. Thank you.

MR. HIRD: Good morning, Your Honor. I'm David Hird representing Avatar Holdings, Inc. With me is Joanne Tsotsos.

THE COURT: All right. Thank you.

All right. This case is scheduled for trial commencing this morning. The Court has allotted 30 minutes

for the Plaintiff and 30 minutes for the Defendants for opening statements.

Counsel for Plaintiff ready to proceed?

MR. JACOBS: Yes, Your Honor.

THE COURT: Counsel for the Defendants ready to proceed?

MR. BAISE: Yes, Your Honor, for Florida Cities.

MR. HIRD: Yes, Your Honor.

THE COURT: All right. Then who will be presenting the opening statement for the United States?

MR. JACOBS: With your permission, I will, Your Honor.

THE COURT: All right. You may proceed, Mr. Jacobs.

MR. JACOBS: May it please the Court.

THE COURT: Yes, sir.

MR. JACOBS: Your Honor, unlike my diminutive co-counsel Mr. Quinn, I'm not lucky enough to come from the State of Florida. And where Mr. Quinn and I both hail from now, Washington, D.C., there are more pigeons than gators, more Red Skins than Seminoles and Buccaneers, for that matter. But whether it's been to visit family, work on this case, or to flock south like birds to get away from the harsh winter we have had up north, I have been lucky enough to spend a considerable amount of time in Florida.

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On one of my trips, I accompanied Mr. Klingenstein, our wastewater treatment expert, on visits to the three wastewater treatment plants that are the subject of this case.

We flew into Tampa, coming in across the Tampa Bay. We started at the site of the old Carrollwood plant from which you can see the Sweetwater Creek.

We then drove down to Fort Myers, crossing the Caloosahatchee River to get to the Waterway Estates plant.

Finally, we crossed the state and the Indian River to get to Barefoot Bay.

Your Honor, we'd like to invite you to take that same trip. You won't even have to leave the bench because we have it all right here in a video and photos which we'd like to introduce during Mr. Klingenstein's testimony.

Your Honor, as you know, the Court has already found that the Florida Cities Water Company has unlawfully polluted the Sebastian River at a point just a couple of miles from the Indian River; has unlawfully polluted the Sweetwater Creek a short distance from where it leads into Tampa Bay and has unlawfully polluted the Caloosahatchee River.

As you also know, the purpose of this trial is solely to determine how much the Florida Cities Water Company should be fined for polluting those water bodies and

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whether, if so -- and if so, how much its parent company, Avatar Holdings, should be fined for those same violations.

Thus, there are, I dare say, two fairly straightforward issues at this trial: Florida Cities' penalty and Avatar Holdings' liability and penalty.

Your Honor, when Congress passed the Clean Water Act in 1972, it issued a report that said, and I quote, No one has the right to pollute.

Since that time, Federal Judges have referred to that edict in decisions rendered in cases brought both by the Federal Government and private citizens to enforce the Act.

THE COURT: Mr. Jacobs, let me stop you just a moment. Did I say 20 minutes or 30 minutes to the side?

MR. JACOBS: You said 30, Your Honor.

THE COURT: All right. I meant 30. But somehow or the other, I was thinking I said 20. It is 30 minutes. Go ahead.

MR. JACOBS: Despite the fact that Congress and the courts have made it clear that no one has the right to pollute, the evidence will show that the Defendants have acted as if they have that right.

The Eleventh Circuit, in Atlantic States Legal Foundation versus Tyson Foods, has essentially said that if someone is unable to operate in compliance with the law, it

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should not operate until it is prepared to do so in compliance with the law. The evidence will show that the Defendants have ignored that mandate as well.

Your Honor, the Environmental Protection Agency, represented by the Department of Justice, is charged with enforcing the Act. The agency enforces the Act under its own administrative authority and, in the most serious cases, asks the Justice Department to bring a civil action in Federal Court. The vast majority of these are settled. You are presiding over one of the important exceptions.

In determining the amount of the civil penalty to be imposed for violations of the Clean Water Act, the Act itself provides that the Court shall consider the seriousness of the violations, the economic benefit, if any, resulting from the violations; any history of such violations; any good faith efforts to comply with the applicable requirements; the economic impact of the penalty on the violator, and such other matters as justice may require.

Your Honor, Mr. Klingenstein will address three of these factors. Ms. Zimmer, our financial expert, will address, as I understand the Court's ruling from this morning, just one of the other factors.

Based on over 15 years of experience in the field of wastewater treatment, Mr. Klingenstein will testify about

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the seriousness of the violations, the history of past violations and the efforts, or lack thereof, to comply with the law.

Based on over 12 years of experience in the field of financial analysis, Ms. Zimmer will discuss the economic benefit -- well, forgive me. She will not discuss the economic benefit, as I understand the Court's order from this morning, but she will discuss the economic impact of the penalty on the violators.

As an introduction to his testimony, Mr. Klingenstein will offer some brief background about the National Pollutant Discharge Elimination System, the NPDES, as it is known, and how the system is designed to prevent harm to the environment, and he will then narrate the video tour, if you will, of the three plants.

Next, Mr. Klingenstein will describe the violations themselves. He will address three of the statutory penalty factors: Seriousness, history and compliance efforts.

There were four types of violations in this case. There were 396 days of unpermitted discharges; that is, 396 days on which the Waterway Estates plant discharged pollutants into the Caloosahatchee River without an NPDES permit at all.

There were 621 days of discharges at an

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unpermitted location; that is, 621 days on which the Waterway Estates plant discharged pollutants into a boat canal which leads to the Caloosahatchee River instead of into the middle of the river itself.

And there were the equivalent of 1,042 days, cumulatively, on which a plant violated its NPDES permit by discharging pollutants in excess of an effluent limitation.

I say "equivalent" because some of the violations were monthly average violations for which the penalty legally, under Tyson Foods, is the equivalent of the number of days in the month in which they were committed.

And finally, there were 79 days on which the Barefoot Bay plant failed to monitor its effluent as required by its NPDES permit.

Mr. Klingenstein will explain how each of these violations was serious with the exception of the monitoring violations, which in this case were less serious, and will explain each of the serious -- excuse me -- will explain how each of the serious violations had the potential, at least, of harming the environment.

Next, Mr. Klingenstein will describe the history of past violations explaining their seriousness and the relationship between the past violations and the present violations.

The unpermitted discharges date from 1980 to 1991

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at Barefoot Bay, over a decade; from 1984 to 1992 at Carrollwood, and from 1986 to 1989 at Waterway Estates, a cumulative total of over two decades of unlawful pollution.

Finally, Mr. Klingenstein will testify about the various alternatives that were available to Defendants to comply with the law if they chose to do so.

The evidence will show that at each of the plants, there was at least one alternative that was readily available, reasonable and viable that would have afforded immediate compliance with the law.

The evidence will show that at each of the plants, the Defendants chose not to avail themselves of at least one readily available, reasonable and viable alternative and instead to operate in violation of the law.

At the Barefoot Bay plant, which serviced Barefoot Bay, an Avatar development, the discharge into the Sebastian River could have been completely eliminated by any one of three means: Percolation ponds, spray irrigation and deep well injection. Alternatively, Defendants could have constructed an advanced wastewater treatment plant so that they could meet the limits in their permit.

At Carrollwood, the discharge into the Sweetwater Creek could have been completely eliminated by connecting the wastewater to the nearby City of Tampa system.

Mr. Bill Schafer, the Director of Planning for

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Tampa's Department of Sanitary Sewers, will testify that the City was ready and willing to have that connection.

Alternatively, Defendants could have constructed an advanced wastewater treatment plant to meet the limits of their NPDES permit.

At Waterway Estates, the discharge to the canal and to the Caloosahatchee River could have been completely eliminated by connecting the system to the nearby North Fort Myers system.

Mr. Jack Schenkman, the chief executive officer of North Fort Myers Utilities, will testify that he was ready and willing to have that connection.

Alternatively, Defendants could have timely constructed an advanced wastewater treatment plant and timely moved the discharge point from the canal to the six foot contour line of the river itself as required by the permit that was later issued.

One question the Government will seek to address at trial is why these Defendants did not avail themselves of the alternatives that would have resulted in compliance with the law. Why didn't they do the right thing?

And, Your Honor, the Government has been hearing excuses for roughly a decade on this subject, and I rather suspect that during the course of trial, these same excuses will come up again.

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I will also note that six individuals who could perhaps best explain why have all pled the Fifth Amendment, including Mr. Getman, who is here today, I understand, as a general counsel, but also serves as a vice-president of Avatar Holdings.

While these individuals have all pled the Fifth Amendment, they have left a trail, a long paper trail, which in their absence must speak for them.

The documentary evidence will show that these companies either did not want to make the necessary investment it would take to comply with the law, or did not want to lose an investment by shutting down a plant.

At Barefoot Bay, they wanted the plant not only to service existing lots connected to the system, they wanted it to service additional connections and even wanted it to be available, if necessary, to service another development they intended to build right next door.

At Carrollwood, they were reluctant to shut the plant down whether by connecting to the Tampa or, for that matter, the Hillsborough County system. These were, after all, their competitors in a sense; and connecting to these systems meant turning over profits to the competitors.

At Waterway Estates, shutting down the plant also meant connecting to a competitor, in this case a privately-owned system with no surface water discharge.

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In addition to not wanting to lose their investments, the Defendants had additional overriding concern that any additional investments they made in the form of improvements to their plants could be recovered through the rate making process, that is, passed through to their customers. The evidence will show that these two investment concerns trumped all other considerations.

Now, the investment concerns lead to the second issue in the case: The liability of Avatar Holdings for the violations. The Court will recall that in its November summary judgment ruling, the Court held that while there was evidence which, and I quote, tends to show involvement in decisions regarding disposal of pollutants, unquote, and which is, and I quote again, perhaps probative, unquote, there was at that time a genuine issue of material fact as to Avatar Holdings' liability.

The evidence at the time, in addition to new evidence in the form of documents from the files of Avatar Holdings' past and present officers, produced only in and after November when the Court ruled and after the close of discovery and after Avatar Holdings was ordered by the Magistrate Judge in this case to produce these documents, this evidence, Your Honor, will demonstrate that Avatar Holdings was pervasively involved in the environmental affairs of Florida Cities, including critical

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decision-making relating to the violations for which Florida Cities has already been held liable. This critical decision-making is directly linked to Avatar's concern over its investments.

One Avatar Holdings witness with relevant knowledge is available, and the United States will call him to testify as an adverse witness. Leon Levy, the chairman of the board of Avatar Holdings, will provide important historical background about Avatar dating back to its inception in 1980.

There are a number of key witnesses, however, with critical knowledge relating to Avatar Holdings' liability whom the United States would call to testify but for the fact that these witnesses are unavailable because they have asserted their Fifth Amendment right against self-incrimination.

While the documentary evidence now available, standing alone, should establish Avatar Holdings' liability by a preponderance of the evidence, adverse inferences may be drawn from the missing evidence and together with the available evidence establish Avatar Holdings' liability.

As for the ability to pay, Ms. Zimmer will testify that while neither Defendant made much of a profit from operating the three wastewater treatment plants -- I'm sorry. You have excluded, I understand, Your Honor, the

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profits --

THE COURT: Correct.

MR. JACOBS: -- at Barefoot Bay. I'll skip over that part.

Ms. Zimmer will testify to the Defendants' ability to pay a penalty, and she will testify that each of the Defendants can afford to pay a penalty in excess of $7.5 million without adverse impact.

Your Honor, in the Tyson Foods case, the Eleventh Circuit has spelled out the methodology to be followed in calculating penalties. The point of departure is the statutory maximum penalty, which in this case is $53,450,000. That's roughly $6.7 million for the Barefoot Bay violations, $14.7 million for the Carrollwood violations, and $32 million, roughly, for the Waterway Estates violations. Under Tyson Foods, the Court then takes into consideration the other listed factors as well as any other factors the Court deems appropriate.

Now, $53,450,000 is an astronomical sum. And it is rare, although not unheard of, for a court to award the statutory maximum. Just last year, the statutory maximum was awarded in a Clean Water Act case in New Jersey: Public Research Group of New Jersey versus Magnesium Electron, 40 ERC 1917, Federal District Court of New Jersey, 1995.

The United States respectively suggests, when the

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Court applies the Clean Water Act penalty factors, as well as the principles enunciated in Tyson Foods to the facts of this case, that the following fines are both appropriate and fair: A fine of $5,000 per day for the unpermitted discharges for a total of $1,980,000; a fine of $3,000 per day for the discharges at an unpermitted location for a total of $1.8 million; a fine of $1,000 per day for the permit effluent violations for a total of $937,000; and a fine of $500 per day for the permit monitoring violations for a total of $39,500.

Your Honor, in Tyson Foods, the Eleventh Circuit made clear that the penalties to be imposed on violators of the Clean Water Act are designed in part to punish them for their non compliance and to serve the goal of retribution; to impose a sufficiently high penalty that polluters will see that they must follow the law and cannot consider a penalty just another business cost, a cost to be weighed against investment concerns. We respectfully suggest that the penalty we propose is needed to serve the important goal of deterrence.

Your Honor, I began my opening statement by referring to the Clean Water Act, the NPDES system, the Sebastian and Indian Rivers, the Sweetwater Creek, the Tamp Bay and the Caloosahatchee River, and I will close on the same note.

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This case is about the violation of laws and regulations designed to protect water bodies such as these, water bodies the Defendants have unlawfully polluted, apparently with little fear of punishment or only the fear of a little punishment.

On behalf of the United States, I hope that we can demonstrate to the Court's satisfaction that they were wrong.

Thank you, Your Honor.

THE COURT: Mr. Hird.

MR. HIRD: Your Honor, before I begin, during the course of the trial, Florida Cities will go first before Avatar Holdings, but we would ask your indulgence in the opening statement to reverse the order.

THE COURT: Yes, sir.

MR. HIRD: I will go for approximately ten minutes and my colleague, Mr. Baise, will go for 20 minutes.

THE COURT: All right.

MR. HIRD: Good morning, Your Honor.

In this case, the Government is asking this Court to be the first in the country to hold a parent corporation liable under the Clean Water Act for the acts of the subsidiaries.

In essence, what the Government is asking the Court to do --

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THE COURT: The first time they have asked, or the first time it's been done?

MR. HIRD: I don't know if they have asked before, but no other court has done it. And I haven't seen any other cases. There may have been cases settled that I'm not aware of. I asked the Government for information about this, and they did not provide it.

In essence, what the Government is asking this Court to do is to double count penalties by considering Avatar Holdings and Florida Cities as if they were one person for liability and two people for penalties so that the Government can collect twice on the same claims.

But the evidence in this case will not support the finding that Avatar Holdings is liable under the Clean Water Act, let alone justify the unprecedented result of double counting penalties.

At the outset, let's consider what's left of the Government's original case against Avatar Holdings. Gone from the Government's case are the claims of unpermitted discharges at Barefoot Bay or at Carrollwood; and with respect to Avatar Holdings, gone is also the claim of unpermitted discharge at Waterway Estates.

What's left is the Government's claim that Avatar Holdings somehow caused or directed Florida Cities to violate certain very technical parameters in its permit and

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to claim that somehow Avatar Holdings was involved in the selection of the discharge location for the Waterway Estates plant after the statute of limitations cutoff date of May 4th, 1990.

The Court has ruled that for the Government to prevail on any of these claims, it must shows that Avatar Holdings caused or directed Florida Cities to violate the Clean Water Act, or that Avatar Holdings exercise actual and pervasive control of Florida Cities on a daily basis.

Evidence presented at this trial will not make those showings. Indeed, the Government has already admitted as much in its pretrial brief. In its brief, the Government stated that it would ask this Court to reconsider the standard of parent corporation liability. In essence, Your Honor, the Government's case against Avatar Holdings here today is one extended motion for reconsideration.

What is Avatar Holdings? What does it do and who runs it? Avatar Holdings, as the name suggests, is a holding company. It has officers and directors but no employees. Each of its major subsidiaries has its own management.

As the parent corporation, Avatar Holdings only exercises the normal oversight of its subsidiaries that a public company is required to do to satisfy its obligations to its shareholders.

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Avatar Holdings' officers approve major expenditures by its subsidiaries and are consulted when its subsidiaries face major business issues.

As you will hear from Edwin Jacobson, Avatar Holdings' president, Avatar Holdings is a diversified company with over 60 subsidiaries. Each of these subsidiaries is separately established.

There is no evidence of improper transfers of funds or assets among the different companies. Rather, the Government's case is based merely on routine communications between parent and subsidiary on business and financial matters. But this routine business and financial oversight is completely consistent with the parent corporation's responsibilities to its shareholders and does not constitute actual and pervasive control, certainly not on a daily basis.

Avatar Holdings' principal business is real estate. Through its real estate subsidiaries, Avatar Holdings builds homes, sells developed lots, operates resorts and time-share properties, and generally manages and sells real estate.

In contrast to its extensive real estate activities, Avatar Holdings' utilities subsidiaries represent a much smaller part of its business. In fact, Avatar Holdings sold off most of its utility operations in

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1993. This is not consistent with Mr. Jacobs' statement that Avatar Holdings was interested in preserving its investments.

In the utility group, Florida Cities Water Company is a fourth tier subsidiary separated from Avatar Holdings by three intervening subsidiaries. One of these companies, Avatar Utilities, has the responsibility to supervise the other utility companies.

Throughout this trial, the Government will attempt to obscure the distinction between Avatar Holdings and Avatar Utilities, but this is a red herring. Avatar Holdings is a separate company from Avatar Utilities, and its chief officers, the chief officers of Avatar Utilities, president Robert Gordon and vice-president Gerald Allen, have never been officers, directors or employees of Avatar Holdings.

Your Honor, Avatar Holdings came into existence in 1980 when a company formerly known as General Acceptance Corporation emerged from bankruptcy with a new name, new owners, new directors, new executives. The new name was Avatar Holdings.

The new owners included Leon Levy and Peter Sharp who invested in the new company because they believed in the future of real estate in Florida.

Leon Levy served as the chairman of the board of

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Avatar Holdings since 1981. Mr. Levy's involvement in the company's affairs is primarily focused on strategic financial planning.

Mr. Levy was a partner in the investment firm of Oppenheimer and Company. He created the Oppenheimer Fund which was the first mutual fund in the country and now has assets of over $40 billion. He is now chairman of the board of the Oppenheimer Fund.

In addition, Mr. Levy is extensively involved in major scholarly and philanthropic organizations, but he is not involved in the day-to-day operations of Florida Cities Water Company. And he didn't do anything to cause or direct any of Florida Cities' wastewater treatment plant to violate the Clean Water Act.

The Government plans to call Mr. Levy and make him its star witness in the case against Avatar Holdings. We welcome the opportunity for the Government -- for the Court to hear Mr. Levy testify and learn just how wrong the Government is.

Your Honor, Peter Sharp served as chairman of the executive committee of Avatar Holdings' board of directors. He was a respected and highly successful real estate investor. He owned numerous buildings in New York, including the Carlisle Hotel.

The Court will not hear from Mr. Sharp and that's

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not because he took the Fifth Amendment. Mr. Sharp died in April 1992 after a long bout with cancer. In his absence, the Government will try to paint Mr. Sharp as a corporate villain.

However, the evidence will show that although Mr. Sharp was interested in all aspects of Avatar Holdings' business and was a meticulous businessman, he did not cause or direct Florida Cities to exceed any permit limits, and he did not involve himself in Florida Cities' operations on a daily basis.

There is no basis for the Government's accusations against this highly respected man who was dying from cancer while many of the alleged violations are supposed to have occurred.

The original board of directors of Avatar Holdings were appointed in 1980 by Bankruptcy Judge Britton who oversaw the reorganization of General Acceptance Corp.

Judge Britton appointed some very distinguished men to the board, and other distinguished men joined later: Jeffrey Hazard, a nationally known expert on legal ethics, who has taught at Yale and the University of Pennsylvania, appointed by Judge Britton; J. Edward Houston, a former Federal Bankruptcy Judge appointed by Judge Britton; Henry King Stanford, the former president of the University of Miami and the University of Georgia, appointed by Judge

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Britton; Martin Myerson, the former president of the University of Pennsylvania; and Leon Candle, a distinguished professor at Northwestern University.

Some of these directors, including Jeffrey Hazard, J. Edward Houston, Martin Myerson and Leon Candle, served on the audit committee of Avatar Holdings' board of directors.

The Government will ask this Court to infer that Avatar Holdings caused violations of the Clean Water Act because its utility subsidiaries implemented environmental audit program and made reports about that program to the parent corporation's board of directors.

In essence, the Government would ask this Court to hold the parent corporation liable if it encourages its subsidiary to create and implement an environmental audit program but hold blameless the parent corporation that simply ignores these issues.

What makes the Government's position particularly absurd in this case is that the utility company reports to the parent company's audit committee concerned the progress of the audit program generally, not specific findings relating to any facility.

In other words, the audit committee was told that environmental audits were underway and when they would be completed, but the audit committee was not told about any of the audit findings concerning compliance at Barefoot Bay,

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Carrollwood, Waterway Estates or any other plant. These matters were for the subsidiaries' responsibility.

Your Honor, Mr. Jacobs has alluded to the Fifth -- to the taking of the Fifth Amendment, and I think he will probably try to make his case against Avatar Holdings exclusively on that basis.

There were only three witnesses associated with Avatar Holdings who have taken the Fifth Amendment in this case: One, Mr. Lawrence Wilkov, had not only resigned from Avatar Holdings at the time the deposition was taken, but had started a lawsuit against Avatar Holdings. Moreover, Mr. Wilkov was deposed prior to the Government's adding Avatar Holdings to the case.

Another, Mr. John Sladkus, had retired in 1991 and was deposed in mid 1995; had no association with Avatar Holdings or no employment with Avatar Holdings at that time.

The third was Mr. Dennis Getman. Mr. Dennis Getman has also a role in Florida Cities. And Mr. Getman was an attorney. No specific questions were asked. Many of the questions would have been objected to on the grounds of attorney/client privilege.

In the face of this, the Government has taken the deposition for two days of Leon Levy, has taken the deposition of Edwin Jacobson, the president of the company, and Charles McNairy, the vice-president. And Juanita

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Kerrigan, the secretary of the company, was originally identified as a witness to testify at this trial.

There is no basis for the Government to use the Fifth Amendment inference in exchange -- in lieu of evidence that it was unable to get through massive document discovery and extensive depositions. There is no basis to hold Avatar Holdings liable in this case.

Thank you, Your Honor.

THE COURT: Mr. Baise.

MR. BAISE: Thank you, Your Honor.

Good morning. My name is Gary Baise. I'm a partner in the law firm of Baise and Miller in Washington, D.C., and I represent the Defendant Florida Cities Water Company.

We are pleased to be here this morning, Your Honor, to talk about a Clean Water Act case. As Government counsel has pointed out, the Clean Water Act does have a strict liability portion of the statute that makes virtually any violation of the Clean Water Act strictly liable and up to $25,000 a day. The fact is, that's not what we're here to talk about in this case.

The Clean Water Act also addresses the point of mitigation. This case is simply about applying common sense to a penalty under the Clean Water Act, common sense.

The Government has alleged in its interrogatories

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that this case is worth up to $104 million. It also said just this morning that it's worth $53 million. Again, we think this demonstrates the Government's inability to be able to get its facts straight.

With regard to what the Court has already found with regard to liability, the number is still a staggering number, $38 million, but not $53 million, as stated by Mr. Jacobs.

In the Government's pretrial brief, they said they wanted $4.8 million in fines with respect to this company. The fact is, as the Court might expect, there have been numerous settlement discussions trying to bring this matter to a close.

But given the record and the fact that this company has an outstanding record with regard to dealing with environmental issues in the State of Florida, has met exceedingly stringent environmental standards in the State of Florida and for the United States, we felt that number is much too high. Therefore, we want the Court to hear our views with regard to the six penalty factors that Mr. Jacobs has already laid out.

There are two stories here, Your Honor: One of a polluter; the other of a company trying to meet exceedingly stringent and meeting exceedingly stringent water quality standards that were applied by both the Federal Government

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and EPA.

The point is, Your Honor, there was no actual environmental harm here. The Government admits this. They talk about polluting, a loaded word. No one likes polluters in our society, but the fact is, we're talking about human waste sewage treatment plants. We're talking about facilities that, if they are shut down, create public health hazards. This is a company that's in the business of protecting the environment, Your Honor, not shutting down facilities and creating environmental problems.

Two stories: One of a polluter, one of a company that is dealing with standards, dealing with numerous regulatory agencies both at the Federal and State and local level; and at all times, Your Honor, at all times during the time in question here, these three facilities were under the very strict control of the State of Florida's environmental department.

There are six factors that this Court is going to have to weigh in terms of assessing the fine against this company. They have been laid out for Your Honor. One is seriousness. And in the seriousness component, you look at the number of violations -- and we will address the number of violations both at Waterway Estates, Carrollwood and Barefoot Bay -- and you look at the duration: How long did those violations continue to occur? And what was the actual

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public health or environmental harm? Obviously, we feel about this point very strongly, and the Court should take that into considerable consideration with regard to levying any particular penalty in this case.

History. Waterway Estates, this is a facility that we'll point out in just a moment that always had NPDES permits up until 1986 until the mistake that we allege occurred.

The same at Carrollwood. It had permits until the permit was denied by EPA in 1984.

So, there is a period of time, but there are reasons, there are explanations with regard to what was going on in the complicated world of statutes and regulations and how this company was trying to comply with those in the 1980's, Your Honor.

You're going to find, as the Government has admitted, no actual environmental harm. This is not a company, Your Honor, these are not three facilities, Your Honor, that were discharging raw, untreated human waste.

They were not discharging chemical substances into the water of the State of Florida that were hazardous to your health, hazardous to drinking, hazardous to recreation. That's not what we are talking about.

The Government uses the word "polluted." I think the Court is going to be surprised to find out how well run

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the three facilities in question were all during this period.

Good faith. This company has undertaken enormous efforts in working with the State of Florida and also with EPA in keeping it apprised with respect to what it was doing at all three of these facilities all during this period of time in question.

Economic benefit. The Court has already ruled on that issue to some extent, but the Government also admits there was no economic benefit derived by not complying with the law here, Your Honor.

In fact, with a regulated utility, the sooner you can spend the money, the sooner you can get it into the rate base.

Economic impact, any economic impact, in terms of a fine would be substantial, and you will hear testimony and evidence with respect to the impact of a fine on a regulated utility's borrowing capacity. Utilities live on their ability to borrow money. Fines make it difficult for them to borrow that money.

And such other factors as justice may require.

This Court has read from the very first time I filed a motion for summary judgment here on void ab initio that we believe that the Government made a mistake, and this whole case was started on the basis of a mistake made by an

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EPA employee in 1986.

We believe that very strongly. We think the evidence will demonstrate that a mistake was made; that EPA did not follow its own statute. It didn't follow its on regulation. And it didn't even follow a contract, Your Honor, that we will introduce into evidence between the State of Florida and EPA with regard to how these waste load allocations that Your Honor has read about are incorporated into law.

So, Your Honor, we believe on the basis of fact that there is no actual environmental harm here and the fact that there was due diligence and good faith exercised by this company, that the fine should be exceedingly small, and I will come up with a number with respect to what that fine should be in just a moment.

A word about the Clean Water Act. You're going to hear a great deal about acronyms, like water quality standards, WQS's, or NPDES permits, or administrative orders.

Just a short summary on the Clean Water Act and what we're talking about here today. The Government says we are a polluter. The Clean Water Act starts out with a touchstone, something called water quality standards. The State and EPA get together and they determine what should be the water quality standard for the waters of the State of

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Florida, or any other state, for drinking capacity, for recreation, for a number of other uses. Water quality standards are developed by the State, approved by the State and they go off to EPA.

EPA then reviews these water quality standards and approves those water quality standards, and that's the touchstone. Are you in compliance with water quality standard of the State? Number two: How do you enforce that water quality standard? You do it through a permit system, the NPDES permit system that Mr. Jacobs mentioned a moment ago. That permit assures that those water quality standards are met.

That permit then has three different methods by which it may be enforced. You have a technology base limit that will go in that permit. You will have a water quality base limit that will go in that permit, or you can use what's called a best professional judgment, which is not applicable here.

The technology base limit, which goes into most permits, is just end of the pipe technology. You put that on the end of the pipe at a sewage treatment plant and you assume that that will meet that water quality standard.

In some water bodies that's not good enough. You have to say to all of the dischargers on that water body: If we put on technology, we still have a water quality

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standard violation, or problem, or potential problem, so we ask all of the dischargers on that water body to agree to a waste load allocation, or limit the load you're putting in to that stream segment. That's the water quality based waste load allocation that is the subject and what we believe started this whole case.

Then those permits are written, public noticed and then enforced. They can be enforced and administered both by the State and by the Federal Government.

In Florida Cities' situation, we had a two track system because the State of Florida and EPA could not agree on delegation of this program. So, this company had to have an EPA permit and had to have a State permit with both of them enforcing that water quality standard, both of them. That's how the program is inextricably linked.

So, you had to have two pieces of paper to protect the water quality of the State of Florida. And that's what the -- in one case we always had the State of Florida piece of paper, or authorization, to discharge. We didn't always have the piece of paper from the Federal Government, and there are reasons for that.

Waterway Estates, over a thousand violations, as pointed out by counsel here, the fact is, those started, we believe, on the basis of a mistake, Your Honor.

Starting in 1975, this particular facility had a

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waste load allocation and it had an NPDES permit. In 1980, it reapplied to EPA and it got an NPDES permit based on a waste load allocation.

In 1986, Ms. Kagey, an EPA employee, picks up a document that was a planning document the Court will hear a great deal about. This planning document was developed in 1981. It was developed even before EPA granted them an NPDES permit. This particular planning document was for a regional sewage treatment facility. This facility was never built, but it did say in that document, No waste load allocation for Waterway Estates. But it's a planning document.

The State of Florida, after that, never applied that planning document. The State of Florida issued a permit in 1981, again in 1983, and again in 1988. They always said this particular facility had a waste load allocation. The Government, in its findings of fact and law, say there was no waste load allocation here. That is just patently wrong, Your Honor.

There will be State of Florida officials testifying that there was a waste load allocation for the permit in 1981, '83 and '86, in the permit for Waterway Estates.

The Government says that we didn't have one based on a 1981 document. They are just wrong. That waste load

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allocation has to go through a very specific approval process at EPA. It can't just be plucked out of a planning document in '81 and put into a permit in '86.

Think about it, Your Honor. We're talking about a public health facility here that the Government is saying shut it down, cease discharging. That makes no common sense. And that's what this case is about is common sense.

In 1986, after this permit is taken away -- in fact, there are only four reasons you can take a party's permit away, Your Honor, four reasons -- not one of them was met in this case.

So, we don't think the Government can come in at this point and say, Just because we made a mistake and you guys didn't appeal, that we can fine you millions of dollars. We think that's just patently wrong. That's why we're here today. That's why, frankly, we're pleased to be here today.

It's just not proper for the Government to take its mistake and say because you didn't catch us, we're going to fine you millions of dollars for that.

That's why we want to bring all the facts to the Court's attention with regard to mitigation on this fact, that there was no environmental harm here, and you had good faith in trying to come into compliance with the fact that the Government took our NPDES permit away.

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It started in 1986. You're going to hear a great deal about, Well, it took them too long even after we took their permit away. And we think we can demonstrate conclusively, Your Honor, that they broke the law.

Let's set that aside for a moment. Let's look at our good faith efforts in trying to get our NPDES permit back. While all at the same time the State of Florida is issuing us a permit enforcing the same water quality standard, at the same time, 1986, they take our permit away in December. It's effective in January of 1987.

In 1987, this company goes out and hires an engineering firm to look at the alternatives. Mr. Klingenstein is going to address the fact we didn't choose the alternatives he would have chosen, but the fact is, this company, being a small company, Florida Cities, went out and hired an expert to tell us what to do. We've lost our permit. The Government says we can't discharge anymore.

Florida Cities goes and talks to the State. The State says, Well, you've got to figure out something. And what they did is they looked at alternatives and said, Okay, we will move our discharge pipe from the canal out into the Caloosahatchee River.

So, in '87, you have a contractor looking at the alternatives, turns in a report in about September of 1987.

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The company looks at those alternatives, makes a decision at the end of 1987, says, Okay, we will build an advanced waste treatment facility. We will go up one notch; we will take phosphorous and nitrogen out of the water, as the Government wants.

So, in 1988, another contractor is hired to do the final plans and specifications. What the Government does not seem to recognize, Your Honor, is when you build something today, you have to go through an enormous permitting process. One of those permitting levels was Lee County.

Within about four months after the engineering firm is hired in 1988, it comes up with its preliminary plans. It takes them to Lee County, or Florida Cities takes them to Lee County.

Lee County takes approximately ten months, Your Honor, to approve a number of variances and development orders. We're talking about 1988, and it takes ten months. It goes over to April of 1989, until Lee County signs off on this.

Then at the same time, the engineering firm has been hired -- now, remember in 1988, about February of 1988 -- it also has to get approvals from the State of Florida, Florida's Department of Environment. It does so. That takes almost 20 months, 20. From July of 1988 to March

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of 1990, we're trying to come into compliance.

At the same time, water quality standards are not being violated, Your Honor. We're in compliance with the old permit that we had. We're in compliance with the Florida permits. And the Government is accusing us of being sort of a blatant polluter? That's not fair. That's not common sense, Your Honor.

Then -- but you will never hear the Government talk about this -- we had a third level of permitting we had to go through, the Army Corps of Engineers.

Again, in 1989, the engineering firm has finished with its plans. You have to go get a permit to put this pipe out into the middle of the Caloosahatchee River. It takes one year and four days, Your Honor, to get that permit. It only took us 16 months to build this whole project. One year and four days.

Did the EPA do anything to help us out there? You bet your boots they didn't. In fact, they even wrote letters questioning whether or not the pipe should go out in the river.

So, one year and four days the Army Corps of Engineers held this particular project up, Your Honor. In April of 1990, finally, the Army Corps of Engineers grants a permit. This company immediately hires -- or goes out and seeks bids for a contractor to build this facility. It

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reviews the contracts, hires a contractor in August of 1990.

The contractor, once again, has to get permits from Lee County. It goes in, gets the permits, and finally in December of 1990, December, we're able to start construction.

The pipeline was put in in six months, Your Honor. It took 16 months to build the facility. There's deposition testimony that says it takes three to five years to build these advanced waste treatment plants.

So, instead of being fined a huge amount when the environment was not harmed, no actual harm to the environment, and always meeting Florida's very strict secondary treatment standards -- in fact, Your Honor, those standards set by the State of Florida are more strict than the ones set by EPA. The EPA would want 85 percent of the material taken out of the sewage that comes in the sewage treatment plant. The State of Florida says, No, we want better, 90 percent.

And the evidence will show, Your Honor, that this company not only was doing 90 percent, like at Carrollwood, Waterway Estates, oftentimes they were taking out 91, 95, 97 percent of the human waste that was in the sewage and in the effluent going back into the waters of the United States.

So, this is not a polluter as suggested by Mr. Jacobs, Your Honor. This is a company that knew its

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environmental obligations, a company that has to build homes, and a company, when it does build these homes, knows that it has to protect the environment, and it did so.

Carrollwood. It's interesting that Mr. Jacobs would say, Your Honor, that they should have gone ahead and built advanced waste treatment facilities earlier at Carrollwood, should have done it earlier.

Then there was a period of time we did not have an NPDES permit there when the EPA turned us down in 1984 because of some State reasons. In 1979, Your Honor, there will be testimony from this company that it asked the State of Florida to build an advanced waste treatment facility at Carrollwood. You know what? The State of Florida said no, we want you to hook up to Hillsborough County. And they said that in '79.

In 1983, this company says, Say, we have an NPDES permit that's going to run out. We filed for a renewal, but we don't think the Government is going to renew it. We need to hook up. Hillsborough County says, We will take you, but we can't take you now.

In fact, you heard Mr. Jacobs say this morning, the City of Tampa had an alternative available. You could have hooked up 15,000 feet away, roughly three miles.

The only problem, Your Honor, is the Government, once again, hasn't checked its fact like its earlier number

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here this morning. The fact is, we had a State of Florida permit requiring us to hook up to Hillsborough County at the very time, the very time the Government is telling us, Oh, you've got to go hook up to City of Tampa. That requirement continues up until 1988. There's a State statute passed which says, Well, in these waters you may be able to put in an advanced waste treatment plant. The company says okay, we'll try to build an advanced waste treatment facility. Immediately goes out and starts doing the studies. Gets up until July 1990 and says, Okay, we think we can build this new plant. It applies for an EPA permit in July of 1990. In July of 1991, EPA finally issues them a permit. And lo and behold, Hillsborough County, in about February of 1991, says, Well, we think maybe, we think maybe you can finally hook up.

I mean, Your Honor, here's a company that was having to deal with State and local requirements. EPA and the Department of Justice do not seem to either want to recognize that, accept the facts as what they are. That's why we're here to talk about mitigation. That's why we're here to talk about good faith. That's why we're here to talk about seriousness.

You're going to have State of Florida officials, Your Honor, coming in here and testifying with regard to Waterway Estates and telling you there were no -- there was

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no environmental harm; that this facility always had a waste load allocation.

You're going to have former Florida officials saying that there was no environmental impact with regard to these discharges at Carrollwood. In fact, here was a facility that was taking out about 95 to 97 percent of its pollutants. That doesn't strike us, Your Honor, as a gross polluter.

Carrollwood. The Government knew we didn't have a permit there, and Your Honor has already ruled with regard to liability on past violations. But the fact is, it's instructive. In fact, it's instructive to look at their witness list and who they do not have here. Do they have the enforcement people here who actually looked at Carrollwood? Do they have the enforcement people here who looked at Barefoot Bay and the fact that there were not permits there? This is not a surprise to these folks, Your Honor.

At Carrollwood, the Government knew from June of 1987 until April of 1991 we didn't have an NPDES permit. They knew what the reasons were from the State of Florida, but they also knew the lack of environmental harm, environmental impact. So, we had, Your Honor, 37 months, 1,125 days when we did not have an NPDES permit at Carrollwood.

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And EPA's own people, the people who were closest to this, Your Honor, wrote up an order -- and it was attached to our motion for summary judgment -- $15,000 for that period of time, or $13 a day. That's what people at EPA felt the harm was.

And in terms of economic benefit the company derived by not having this permit at the time, what did EPA say that the economic benefit was for all of that period of time for this company? $270. $13 a day for not having the permit, $270 economic benefit. And they don't even have that person coming down here to testify because they know what that person would say. They know they can't make their case with regard to Carrollwood or Barefoot Bay, for that matter, Barefoot Bay.

The remaining charges --

THE COURT: Your time has expired, Mr. Baise. You're a couple of minutes over, as a matter of fact. Go ahead and wrap up.

MR. BAISE: Okay. Barefoot Bay, Your Honor, three charges. Even there, the Government didn't pay attention to what the facts are. We have a memorandum we will introduce into evidence that will point out that on chlorine, which is the issue in question here, if the Government would just follow its own rules, we would not have any chlorine violations at Barefoot Bay. And with the BOD, CBOD issue,

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they have already acknowledged that that is not a problem.

So, in the final analysis, we appreciate the opportunity to be here and we believe the evidence will show no environmental harm.

Thank you.

THE COURT: All right, sir.

Mr. Jacobs, you may call your first witness.

MR. JACOBS: Yes, Your Honor.

Before we do, the Government would like to invoke Rule 615 to bar all fact witnesses from the courtroom during testimony.

THE COURT: All right. The witness exclusionary -- yes, sir.

MR. BULLOCK: Your Honor, good morning. I'm Alex Bullock.

Mr. Gerald Allen is here this morning as the designated corporate representative, and we would respectfully request he be allowed to stay in his role as corporate representative.

Additionally, Mr. Randall Armstrong has been designated as an expert witness in this case. He has been deposed as such. We would respectfully request under the rules that he be allowed to remain as well.

MR. JACOBS: Your Honor, I have no problem with excepting the expert witnesses, but I understand that

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Mr. Armstrong is both an expert witness and a fact witness, based on Mr. Baise's reference to Mr. Armstrong as a fact witness in his opening statement. I'm not sure how the Court would like to handle that. But if he's a fact witness, I don't think he's allowed to be exempted.

THE COURT: That's Mr. Armstrong?

MR. BULLOCK: Mr. Armstrong. The vast majority of Mr. Armstrong's testimony is going to be as an expert witness on the water quality issues and water quality standards at the Waterway Estates facility.

He will be a limited fact witness because he was an employee of the Florida Department of Environmental Regulation during the time where the 1981 alleged waste load allocation was written. But the vast majority of his testimony will be as an expert.

THE COURT: Well, if we get to any particularly sensitive fact portion of the evidence, I might entertain a request by Mr. Jacobs to ask that he be excused, but I'm going to permit Mr. Armstrong to remain in the courtroom and to not be excluded.

All right. Except for --

MR. HIRD: Your Honor, although there is not a designated representative for Avatar Holdings present today, during certain portions of the trial, either Mr. Leon Levy or Mr. Edwin Jacobson will be sitting and present as a

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designated representative, and I would designate the one at the time that that occurs. Both have been --

THE COURT: At the time that --

MR. HIRD: -- that they are present.

MR. JACOBS: Just for clarification, you're going to designate one or the other, or both?

MR. HIRD: One or the over, not both. We recognize that under the rules I can only have one.

THE COURT: All right. There will come a time, then, where one of them will be here, and you're going to designate which one.

MR. HIRD: That's correct.

THE COURT: All right.

MR. JACOBS: Your Honor, we will designate just one; and when he arrives, we'll advise him accordingly.

THE COURT: All right.

All right. Are there any witnesses in the courtroom other than those the Court has excluded from the rule of witness sequestration?

All right. Then, counsel, it will be up to the -- up to counsel to inform their respective witnesses that except for the time that they are in the courtroom testifying, they will be required to remain outside and available to be called to testify.

And also, of course, it means that the witnesses

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must not discuss their testimony or the facts of the case with each other. And the sole exception to that is, of course, that they may discuss their testimony with any of the attorneys involved in this case.

All right. Call your first witness.

MR. JACOBS: Your Honor, the United States calls Mark Klingenstein.

Your Honor, while Mr. Klingenstein is taking the stand, I'd like to ask the Court's permission to move in a PVN and VCR unit.

THE COURT: Yes, sir.

By the way, who is Mr. Armstrong?

(Mr. Armstrong stood briefly.)

THE COURT: Okay.

MR. JACOBS: Your Honor, while we are setting up, I may raise another procedural matter.

With the Court's permission, rather than hand each witness each exhibit, since the exhibits are so voluminous, we have taken the liberty of making a complete set both for the Court and the witness.

THE COURT: Yes, sir.

THE DEPUTY CLERK: Come forward and be sworn. Raise your right hand.

Do you solemnly swear that the testimony you shall give in this cause shall be the truth, the whole truth, and

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nothing but the truth, so help you God?

THE WITNESS: Yes, I do.

THE DEPUTY CLERK: Take the witness stand.

State your name for the record and spell your last name.

THE WITNESS: My name is Mark James Klingenstein, K-L-I-N-G-E-N-S-T-E-I-N.

MR. BAISE: Your Honor, may I address a point while counsel is setting up?

I don't believe we have been served with their exhibit list at this point.

THE COURT: Okay.

MR. JACOBS: I'm sorry, Your Honor. I didn't hear counsel --

MR. BAISE: The exhibit list, you --

THE COURT: He says he hasn't been served with your exhibit list.

MR. BAISE: The exhibit list this morning --

MR. JACOBS: I think we intended to give you not only an exhibit list but a complete set of your own exhibits.

THE COURT: Well --

MR. JACOBS: Did you not receive them?

THE COURT: All right. Have you got an exhibit list for counsel?

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MR. BAISE: We do not have it.
(Pause.)
MR. BAISE: Thank you, Your Honor.
MR. JACOBS: Where would the Court prefer to have the television set up? There's no jury so --
THE COURT: Probably about right where you are.
Now, is that the only monitor you have? Counsel is going to need to see it also.
MR. BULLOCK: Your Honor, would you have any objection if I stand and watch it?
THE COURT: You can position yourselves anywhere that you can see. If we can place that where everybody can see it from where they are sitting, all the better. I don't know whether we can do that or not. You'll have to go back farther with that, I suppose, that way.
MR. BAISE: Your Honor, may I address the Court?
THE COURT: Yes.
MR. BAISE: One thing would be helpful in terms of glare, which you do not probably have, is if these drapes could be unloosened and just come across. Is that possible?
THE COURT: I don't know that they can be.
MR. BAISE: That would take the glare off.
THE COURT: We can try it. Ms. Cole, please see if you can take care of that.
Let me pause for just a second and see where we

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are procedurally as far as the order of proof here. The Government is going to be going first, and then we'll proceed with what, Florida Cities and then Avatar? Have you all discussed --
MR. HIRD: Yes, Your Honor.
THE COURT: -- how you want to proceed?
MR. HIRD: That's our intended order of proof.
THE COURT: All right. Okay.

- - -

Thereupon,

MARK JAMES KLINGENSTEIN,

a witness, having been duly sworn to speak the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JACOBS:

Q. Mr. Klingenstein, would you state your full name for the record, please?
A. Mark James Klingenstein.
Q. How are you employed, sir?
A. I'm employed by Science Applications International Corporation, or SAIC. SAIC is a large technical consulting firm, a major portion of which provides environmental engineering and environmental science consulting services.
Q. What's your title at SAIC?

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A. I actually have two titles: I'm an assistant vice-president and a senior environmental engineer.
Q. How long have you been employed with SAIC?
A. Approximately 15 years.
Q. And would you tell the Court, please, what kind of work you have done there?
A. Most of the work that I have done at SAIC has involved environmental engineering and environmental science projects and, in particular, has involved NPDES and Clean Water Act technical issues for a variety of different clients.
Q. You have done some work, have you, in the field of wastewater treatment and water pollution control?
A. Yes. And in particular, I am in charge of a portion of SAIC that provides Clean Water Act and other -- primarily Clean Water Act case support and litigation support activities.
THE COURT: You need to pull that microphone closer to your lips, if you would, Mr. Klingenstein.
THE WITNESS: Surely, Your Honor.
BY MR. JACOBS:
Q. Now, Mr. Klingenstein, did you attend college?
A. Yes. I have a degree in civil engineering from Drexel University that was awarded in 1979 and a masters in civil as well from Stevens Institute of Technology that was awarded in 1989.

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Q. Just for clarification's sake, when you say a "masters in civil," you mean masters in civil engineering?
A. Yes, indeed.
Q. Are you a licensed professional engineer?
A. Yes, I am. I'm licensed in the states of New Jersey, Indiana and Arizona.
Q. Approximately how many wastewater treatment plants have you personally visited?
A. I have been to -- over the last 15 years, I have personally visited -- certainly in the low hundreds number of wastewater treatment plants that I have been to.
Q. And approximately how many inspections have you either personally conducted of these wastewater treatment plants or personally supervised?
A. Under an EPA work assignment that I used to manage -- and it's now managed by one of my subordinates -- I have had either direct involvement in or oversight on literally -- I don't know -- 700, 800 wastewater inspections.
Q. Are you familiar with the National Pollutant Discharge Elimination System, otherwise known as the NPDES?
A. Yes, indeed. Under the Clean Water Act, the NPDES system provides for control of facilities that discharge pollutants into surface waters.
The NPDES program in particular requires that a facility obtain an NPDES permit prior to beginning to

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discharge wastewater into a surface water.
This system provides for control of these discharges and allows the regulatory agencies, be that EPA or the State agencies, to exercise control in the amounts of pollutants that are discharged into any given water body so as to protect the quality of that water body.
Q. Do you serve as an instructor for SAIC's training program for EPA and State NPDES compliance inspectors?
A. Yes, I do. SAIC has had a work assignment under one of its contracts with the U.S. EPA for the last several years under which we provide instruction to NPDES compliance inspectors, both EPA and State, and I have served as an instructor in a number of different training sessions that we provide under that contract.
Q. Do you have any experience with designing wastewater treatment plants or upgrading wastewater treatment plants?
A. Yes, I have. I have been involved in the design and upgrade of a number of plants.
Q. Have you previously testified as an expert in the field of wastewater treatment?
A. Yes. I have provided testimony on something between, I would say, six and 12 different cases.
Q. And have these been Federal cases?
A. Yes, they have.
Q. I'd like to refer you at this time to Government

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Exhibit 597-A.
MR. JACOBS: May I approach, Your Honor?
THE COURT: Yes, sir.
By the way, I know that our rules of protocol require that any time a lawyer wants to approach the witness that you specifically each time ask the Court for permission. You won't need to do that, none of the attorneys.
MR. JACOBS: Thank you, sir.
And we will set up, with the Court's permission, notebooks for the witnesses as well to cut down on the time.
BY MR. JACOBS:
Q. Mr. Klingenstein, I've handed you Exhibit 597. If you would flip to 597-A, would you tell the Court if you recognize that, please, sir?
A. Yes, I do. This is the expert report that I prepared as part of my support on this matter.
Q. 597 is the expert report, is that correct?
A. Yes, it is.
Q. And 597-A is what, sir? That would be Attachment A.
A. That would be a copy of my resume.
Q. And would you tell the Court whether that copy of your resume is accurate? Does it accurately reflect your credentials, your qualifications and your background, sir?
A. Yes, it does, with the exception of the fact that, as

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I mentioned, I'm also now licensed in the State of Arizona, a license of which was just granted in the last several weeks.
Q. So, that would be in addition to --
A. That would be in addition to on Page 6 of 7 of that exhibit.
Q. Thank you.
MR. JACOBS: Your Honor, at this time I would respectfully move the Court to accept Mr. Klingenstein as an expert witness in the field of wastewater treatment.
THE COURT: Any objection?
MR. BULLOCK: If the Court please, Your Honor, we would have no objection to his designation as -- from a technical point of view in wastewater treatment.
However, as I understand from Mr. Jacobs' opening statement, Mr. Klingenstein is also going to offer opinions about the history of the violations and the compliance history of Florida Cities.
Mr. Klingenstein was not designated as any of the 30(b)(6) witnesses from the Environmental Protection Agency who would provide testimony on that issue.
Also, we would object from a technical -- as a technical background, he should be limited to engineering and technical testimony as opposed to motivations of Florida Cities for the decisions that it made, its business

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judgment, anything related to regulatory issues other than NPDES issues.
Mr. Klingenstein has not been a Region 4 of EPA or any EPA employee. He was not involved in the actual enforcement matters before this Court. He never actually investigated the alleged violations at the time, and now he's attempting to speak after the fact on investigations which he did not personally participate in.
MR. JACOBS: Your Honor, it's my understanding, if I may respond at this time, that the Court ruled in this morning's order that the witness could address the history of the violations.
THE COURT: The objections will be overruled. He'll be permitted to testify as an expert as tendered.
BY MR. JACOBS:
Q. Mr. Klingenstein, did you have occasion to visit the wastewater treatment plants that are the subject of this case?
A. Yes, I did. In the week of December 20, 1994, I had the opportunity to pay a visit to the Barefoot Bay wastewater treatment plant in Brevard County; the site of the former Carrollwood wastewater treatment plant, and the Waterway Estates plant in North Fort Myers.
Q. Did you make a videotape and take photographs during these visits?

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A. Yes, I did, the photographs of which are attached to my expert report and video as well.
Q. And did you have occasion as well to review documents that relate to the three plants?
A. Yes, I did. I had the opportunity to review a rather substantial amount of documents that related to the situation at each of these plants.
Q. It does include documents from the files of the United States Environmental Protection Agency?
A. Yes, it did.
Q. Did these documents include documents from the files of Avatar Holdings?
A. Yes.
Q. And the files of Florida Cities Water Company?
A. Yes.
Q. And the files of the Florida Department of Environmental Protection or, as it was previously known, Regulation?
A. Yes.
Q. The Hillsborough County Environmental Protection Commission files?
A. Yes.
Q. And files from the City of Tampa?
A. Yes.
Q. Any others that you can think of that I have not

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touched upon?
A. None that come to mind.
Q. Okay. Now, making reference to the Government's exhibit list, are you able to identify the documents on that list that you reviewed?
A. Yes, I can.
Q. Would you, for the record, review or, rather, read into the record the Government exhibits that appear on that list that you personally reviewed and relied upon in forming your opinions here today, sir?
A. Surely. And these are Government Exhibit list numbers 1 through 8, 11 through 20, 22, 23, 24, 26 through 37, 39 through 41, 43 through 47, 49, 50, 54 through 57, 59 through 61, 63, 64, 66 through 74, 76 through 79, 84 through 119, 122 through 126, 128 through 155, 157 through 170, 172 through 195, 198 through 200, 202, 204 through 252, 254 through 272, 274 through 282, 284 through 289, 291 through 302, 304 through 345, 348 through 350, 353 through 355, 357, 358, 361 through 363, 365 through 382, 384, 385, 388 through 402, 402 through 419, 421 through 461 --
Q. I'm sorry. Let me stop you for a minute. Did you say 402 through 419?
A. No. I'm sorry. That was 388 through 402, 404 through 419, 421 through 461, 463, 464, 466 through 482, 484 through 495, 498 through 501, 503, 504, 507, 509 through 512, 516

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through 520, 523 through 525, 529, 530, 534, 536,538 through 541, 543 through 545, 549, 550, 556, 559,561 through 567, 569, 570, 572 through 575, 577, 580 through 582, 586 through 592, 597.
Q. Thank you.
Now, Mr. Klingenstein, could you tell me, did you personally review these documents before you prepared your report?
A. Yes.
Q. Did you also have the opportunity before you prepared your report to conduct any interviews of persons with knowledge relating to the violations at the three plants?
A. Yes, I did.
Q. Did you also before preparing your report have the opportunity to attend the depositions of any fact witnesses with knowledge relating to the violations at the three plants?
A. Yes. I attended the depositions of a number of individuals.
Q. And did you have the opportunity before preparing your report to review the transcripts of depositions of persons with knowledge relating to the violations at the three plants?
A. Yes. I had that opportunity as well.
Q. Now, we've made reference a couple of times so far to

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your report, Mr. Klingenstein. Did you personally prepare that report?
A. Yes, I did.
Q. And does that report state your personal opinions relating to the violations at the three plants and the other matters that you have addressed therein?
A. Yes, it does.
Q. And again, for the record, is Government Exhibit 9 -- I'm sorry -- 597 that report?
A. Yes, it is.
Q. In forming the opinions that you have formed in this case and in that report, have you relied upon the information that you have just described in response to my questions?
A. Yes, I did.
Q. Mr. Klingenstein, would you be good enough to explain in brief the NPDES system and particularly the significance of the NPDES permitting process?
A. Well, the NPDES – as I mentioned previously, the NPDES system was put in place under the auspices of the Clean Water Act in order to provide for the control of discharges to surface waters. It's in my mind sort of the keystone of the entire Clean Water Act in terms of the ability to control pollutant discharges into surface waters.
The NPDES permit system allows the regulatory bodies

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to specifically control and monitor the amounts of various pollutants that are discharged into each individual surface water body.

By doing this, it allows for the proper control of the amounts of pollutants that are discharged into these surface waters so that the quality of the surface waters can be protected.

Q. Thank you.

What are effluent parameters?

A. Effluent parameters, or effluent pollutant parameters, are specific typically chemical parameters -- but in some cases other measures of effluent quality -- that are included into an NPDES permit in which the permittee is typically required to monitor and report to the regulatory body, be that EPA or the State.

Q. And what other conditions and limitations are characteristically found in these NPDES permits?

A. There may be specific requirements to carry out certain measures, to implement certain measures, to upgrade a plant, for instance. In the case of the Barefoot Bay plant, the 1991 permit specifically required, in fact, that the discharge be ceased by a date certain. So, there can be that sort of specific requirement as well included in a permit.

Q. And what about point of discharge, is --

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A. Oh, very specifically. The point of discharge is typically identified on the cover page of the NPDES permit.

Q. And in the application process, is the point of discharge also, generally speaking, described?

A. Yes. The permittee is required to identify where they are going to discharge, because the NPDES permit process and the control of pollutant discharge to a surface water not only requires that the regulatory agency know what body of water the facility intends to discharge to, but very often needs to know very specifically within that water body where the discharge is intended since that may have bearing on the ability of the water body to assimilate the discharge at that particular point.

Q. Okay. Would you describe in layman's terms what assimilation of a discharge means? Why is it so important that a discharge be at a particular point in a particular water body?

A. Well, a particular water body, for instance, may have portions of the water body that are well mixed and that, therefore, have the ability to receive a certain amount of pollutant load and, in effect, deal with that pollutant load, whereas other parts of that water body that might not be very well mixed, that might be stagnant, that might be sort of off to the side, so to speak, as far as circulation in that water body would go -- those portions of the water

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body wouldn't necessarily have the ability to receive the same amount of pollutant load as the previously described better mixed part of the water body.

Q. Okay. Would you describe in layman's terms what you mean when you say "mixed"?

A. Well, if you have got a -- if you have got a large, relatively deep, fast-flowing river, it's going to be a well mixed body of water. Anything that's discharged into it is going to be pretty rapidly dissipated throughout the entire body of water.

On the other hand, if you have, say, a very shallow area of a very broad, slow-flowing river, a discharge into that area might be, in fact, very poorly mixed, and so you would tend not to dissipate pollutants. They would tend to stay at the point of discharge.

Q. And is it possible to have a river that is, say, relatively deep in the middle and well mixed in the middle but -- and, therefore, relatively able to assimilate a discharge in the middle at the points where there are relatively strong flow, but the opposite is true, say, along the banks of the river?

A. Certainly.

Q. Now, NPDES permits, are these always issued by EPA, or are they sometimes issued by a state agency?

A. They can be issued by either EPA or by a state agency

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or in some cases by both.

Q. And under what circumstances does a state issue a Federal NPDES permit?

A. A state will issue an NPDES permit as opposed to a state permit when it's been granted what's known as delegation. This is when the agency has delegated the authority to carry out this function to the state agency.

Q. And can you tell the Court whether at any point in time the Federal agency, that is to say, EPA delegated the NPDES permitting responsibility to a State of Florida agency?

A. Yes. I believe they did last year, 1995.

Q. Okay. And prior to that time, it was exclusively the function of the U.S. EPA to issue Federal NPDES permits in the State of Florida, is that correct, sir?

A. Yes, that is correct.

Q. How does a potential discharger obtain an NPDES permit?

A. The discharger will fill out an application form and submit it to U.S. EPA. This application will require the potential discharger to provide certain information, and then the agency will take that under consideration.

There is a process that provides for public notice and allows for the potential discharger to take exception to a draft permit such as that's issued by the agency.

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Q. And typically in the application form, does the discharger have to specify with some specificity, in fact, where exactly in a particular water body the discharge will take place?
A. Yes. They are required to provide coordinates and to describe the location of the discharge.
Q. And once the application has been submitted, does the potential discharger generally continue to have contact with EPA prior to final action on the permit based on your experience?
A. Yes. That's been my experience.
Q. And are there a set of regulations that govern this interaction and the rights of the various parties?
A. Yes, and they are incorporated within the Code of Federal Regulations, 40 C.F.R., Part 124.
Q. And does EPA generally under those regulations, in fact, prepare a draft of the permit conditions or denial, as the case might be?
A. I'm sorry. Make that available to the potential permittee? Yes.
Q. In draft form.
A. Yes.
Q. And then does the permittee, or potential permittee, as you have described it, have the opportunity to comment on the draft permit?

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A. Yes.
Q. And then assuming that the draft proceeds to a final action, does the permittee or any interested party subsequently again have the opportunity to make its comments known to the agency?
A. Yes.
Q. And do you know whether a potential permittee can, in fact, request a public hearing?
A. Yes, they certainly can.
THE COURT: Did you say a potential permittee can request a public hearing? Is that what you said?
THE WITNESS: I believe, in response to the question, was that an individual -- a facility that has applied for a permit has the ability and it's -- and one has been issued that they take exception to, the ability is there to request a hearing.
THE COURT: To request a hearing --
THE WITNESS: Yes.
THE COURT: -- not a public hearing?
MR. JACOBS: I would have to check, honestly. I think it would --
THE COURT: Well, go ahead. Go ahead. That's --
MR. JACOBS: It might well be open to the public.
The cite is 40 C.F.R., Section 124.74: Following EPA's final action, any interested party may request an

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evidentiary hearing. That's following the final action.
And 40 C.F.R., Section 124.13: Any person, including an applicant, who wishes to contest the draft permit or denial is obliged to raise such issues during the public comment period.
THE COURT: All right. Well, go ahead.
MR. JACOBS: Thank you, sir.
BY MR. JACOBS:
Q. Mr. Klingenstein, what is a waste load allocation?
A. A waste load allocation is the result of a process whereby the ability of a body of water to receive pollutants is analyzed and, if you would, divvied up between the various dischargers and potential dischargers into that body of water and on some basis of typically fairness and equitable distribution of that ability to discharge across the various dischargers, and then that waste load allocation becomes typically the basis for the limitations that are incorporated in the various dischargers' permits.
Q. And what is the importance of the waste load allocation in terms of the NPDES permitting process?
A. Well, the waste load allocation determines what pollutant parameters and what pollutant -- what amounts of each pollutant parameter can be put into a permit and still provide for the protection of the quality of the water body.
Q. And again, does the location of the discharge point

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play a role in the waste load allocation process?
A. Yes.
Q. And what is a zero waste load allocation?
A. Much as the name implies, that's a determination that for this particular -- or a particular discharger at a particular point of discharge, there is -- a determination has been made that there is no ability to assimilate or receive pollutant load at that point.
Q. Mr. Klingenstein, I'd like to now direct your attention to the Barefoot Bay plant itself. And with any luck, I'm going to start the video, and I'll ask you, if you would, both to narrate the video and describe the plant, the surroundings of the plant, and the discharge means, as well as highlight anything else that you see that you think the Court might be interested in.
A. Surely.
THE COURT: Yes, sir?
MR. BULLOCK: Your Honor, we would object to any kind of narrative presentation unless there's some -- first of all, some format as to it, whether or not it separates liability, environmental harm.
I am given the impression from Mr. Jacobs' question to Mr. Klingenstein that he's basically just going to spend a couple of hours narrating the tape. We would object to that.

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MR. JACOBS: It's 15 minutes. I'm not –
THE COURT: Well, I think the tape needs to be identified. Has it been identified as yet?
MR. JACOBS: It is an exhibit, and forgive me if I haven't identified it.
THE COURT: Yes. I don't know what I'm about to see here. I know he's going to narrate it if I overrule the objection, but I think the witness ought to identify what it is here and –
MR. JACOBS: I apologize. We will, Your Honor.
It's Government 505, Your Honor.
THE COURT: Well, you want to have the witness identify what Government 505 is?
(The videotape started to play.)
BY MR. JACOBS:
Q. Mr. Klingenstein, can you identify this video that's been playing for a moment now?
A. Yes. Government 505 is a videotape that was made during my week of December 20 visit to both the Barefoot Bay and the Waterway Estates treatment plants.
MR. BULLOCK: Your Honor, the videotape itself had no narrative and so, therefore, we in our – have no objections filed on our objection list. However, there is no foundation that's been laid that this actually goes to the amount of the penalty there should be on the violations

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which are still at issue here today.
We would request the Court limit the narration, or whatever testimony that Mr. Klingenstein is providing, to those issues such as BOD, CBOD reporting, the TRC issues and toxicity issues at Barefoot Bay, not as to some broad, general liability issues of whatever site –
MR. HIRD: Your Honor, we join in the objection.
THE COURT: All right. Well, your objection will be overruled. Proceed.
THE WITNESS: This is the entrance to the Barefoot Bay plant. We had previously just seen a few shots as we were driving through the Barefoot Bay development which is, I believe, about a 5,000 unit modular home development, as I had also previously mentioned, located in Brevard County.
The Barefoot Bay plant is what's typically described as a package type plant. This is, again, at the time of my December 20, 1994, inspection. I do understand the plant may have undergone over the past year modification.
Nonetheless, in this type of plant –
THE COURT: "The past year," you mean since that time?
THE WITNESS: Since this time that there has been some modification at the plant.
THE COURT: All right. Go ahead.

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THE WITNESS: This is a type of plant whereby all of the -- or the most of the major functions, treatment functions, take place within one consolidated unit. This would be what was known as -- what is known as a secondary wastewater treatment plant that provides for the removal of pollutants primarily through biological treatment, biological treatment being, in effect, an acceleration of what happens in nature, by providing a large mass of microorganisms and providing sufficient aeration, sufficient oxygen to those microorganisms.
In effect, what happens in nature is greatly accelerated and the pollutant load is removed from the wastewater. These are views taken down into the wastewater treatment plant from a catwalk up on the top of it.
This is a fairly commonly used type of treatment system found throughout the United States. And looking out from the -- looking out from the top of the treatment plant, we're looking at some of the areas surrounding the plant. The plant is surrounded by, I want to say, in the neighborhood of three to 4,000 acres of citrus groves in the immediate area surrounding the plant.
Again, these are just views down within this consolidated treatment unit, different portions of the plant. It's pretty typical of what one would expect to see in a secondary treatment plant.

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This plant, however, unlike many plants, was not originally intended to discharge its wastewater to a body of water, to a surface water. This plant was originally intended to discharge all of its wastewater into two large permeable bottom ponds known as percolation ponds. The wastewater would be discharged into these ponds and would then percolate down into the water table.
This plant also was equipped with an overflow from those percolation ponds and was using that overflow as its primary point of discharge at the time that we carried out this inspection.
These are the portions of the system that deal with the waste microorganisms that are generated as a result of this treatment process.
BY MR. JACOBS:
Q. Mr. Klingenstein, you mentioned the design of the plant. Was it also designed to be a spray irrigation disposal system?
A. I've seen mention of some -- these, by the way, are the percolation ponds themselves. I've seen mention of some original inclination to look to spray irrigation, and there may have been a pipe originally installed that may have been intended to connect to some spray irrigation site, but I see no record of any spray irrigation being in place up until the relatively recent past. And that, in fact, would be

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that 40-acre spray irrigation field that we're looking at behind those microwave antennas.

This is one of the plant operators just carrying out some routine work, routine maintenance at the plant.

Those two black devices sitting there behind him are what are known as automatic samplers. These are the types of devices that are typically used to collect the wastewater samples both from a process control standpoint and specifically to collect the samples that are necessary in order to carry out the monitoring that's required under an NPDES permit.

This is looking down at the -- at one of the flow measuring devices within the treatment plant. This would be what's known as a V-notch weir that utilizes a device known as a flow recorder, in this case I believe one made by a company -- a firm by the name of Stevens, that utilizes a float to measure the level in that well behind that weir and, therefore, generates information regarding both instantaneous flow and total amounts of flow that have come out of a particular plant. These are, again, pretty widely used.

It's a storage tank and -- water storage tank, and here we're looking out at some of the grove land out beyond the plant site; quite an extensive bit of grove property completely surrounding the plant.

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Actually, that is grove that is immediately adjoining the plant. I believe that's looking to the west in this view.

This is the final contact tank, aeration tank, where wastewater is passing through prior to flow through the overflow line, which is coming from the far right-hand corner, is where the overflow from that -- from the plant is going, out to the -- out to the receiving stream.

And this is also where dechlorination would be taking place. And, in fact, I believe that small hut there is labeled SO-2, which is a chemical used by many facilities to remove chlorine residual prior to its discharge.

And also that pump, I believe, that we've just panned across takes the wastewater that's pumped out to the 40-acre site.

This is a view looking back from across the road outside the plant following basically the track of the line that discharges out from the plant into the canal, then panning down the bank to the point of discharge.

And that's looking down directly on the discharge. That's the line jutting out that the discharge is taking place through. If I recall, that's probably eight to ten -- perhaps a ten-inch line discharging.

Q. About how much flow is coming out at one time, can you tell, Mr. Klingenstein?

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A. Well, at the point where we carried out the inspection, the plant average daily flow is probably in the neighborhood, if I recall correctly, of about a half a million gallons a day.

Q. That's the rate of this flow at this point, 500,000 gallons a day, roughly?

A. Roughly, give or take. It might actually be a bit more given that it was in midday. You tend to have flow be a bit higher during the middle part of the day.

And that's just a view through the underbrush out into the canal. We should have another view in just a moment taken from a little bit farther down looking down along the canal.

Again, this would have been originally intended to be an overflow from the ponds rather than a primary point of discharge for this plant.

Q. Are you climbing down the hill now?

A. Actually, I think I'm climbing back up, as I recall. I almost didn't make it back up.

And that's trying to look out through the underbrush across the canal. You see it's a relatively narrow canal at that point.

This is just a large borrow pit on the site that I suspect was used as a source of material during the construction of -- in the local area, and then looking out

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now towards the entrance to the 40-acre site.

Q. And again, that 40-acre site was --

A. This is a spray irrigation site that was originally purchased, I want to say, in the mid '80's, but was put into service, I believe, in March 1990 as a spray irrigation site and handles, if I recall correctly, something in the neighborhood of 90,000 gallons a day of wastewater flow. This is a view out -- these are views out on the 40-acre site.

Q. Now, it looks very wet. Is it actually in use during wet weather?

A. Wet weather will limit your ability to utilize spray irrigation sites. The capacity of the site to accept the wastewater is obviously reduced by the load from the rain fall.

That's part of the irrigation system. There are a number of hydrants located along the center line in the field.

Q. So, if you used the ponds that we've seen and you used the spray irrigation site and you have enough of both, then do you need a surface water discharge?

A. Assuming they are adequately sized, no, no, you would not.

And this is the entrance to one of the groves that immediately adjoins the plant site. Again, quite extensive

acreage that surrounds this site.

And then this just pans back looking at the plant itself.

And this was taken down a bit east of the plant, I believe, looking back up towards the west, looking towards the -- looking towards the point of discharge into the canal, which is not really visible, terribly visible in this shot, but would be up along the upper or the right-hand bank.

Q. That's roughly how far from the Sebastian River and the Indian River?

A. Several miles.

And, again, looking back up that canal.

THE COURT: Let's take a 15-minute recess.

(A recess was taken.)

MR. JACOBS: Thank Your, Honor.
BY MR. JACOBS:
Q. Mr. Klingenstein, during your inspection of the Barefoot Bay Plant, did you also have occasion to take photographs?
A. Yes, I did. These photographs are included as an attachment to my expert report and I believe they are included as Attachment C to that report.
Q. And are they numbered within your report, sir?
A. Yes, they are.
Q. And would you identify the ones that relate to the Barefoot Bay Plant?
A. Yes. That would be back starting with photograph number 91 and running all the way through 130, the Barefoot Bay Plant, and the surrounding area, the canal.
Q. And are there additionally photographs of the outfall?
A. Yes, indeed, there are. Photographs of the outfall would be in, I believe, the beginning with 118, 119 and 120 and 121.
Q. And what about of the canal leading to the Sebastian River?
A. There would be photographs of the canal 129 and 130, are both photographs of the canal itself.
MR. JACOBS: Your Honor, I'd like to proffer the original photographs at this time.

THE COURT: All right. You can offer those in evidence.
MR. JACOBS: What we thought we would do is move the evidence all in at one time, since there are very, very few of the exhibits are objected to, if that suits the Court.
THE COURT: Well, all at one time?
Are you talking about subsequently or now?
MR. JACOBS: Subsequently, Your Honor.
What I wanted to do now is make sure the Court had the pictures.
THE COURT: All right.
BY MR. JACOBS:
Q. Mr. Klingenstein, could you identify the location of Barefoot Bay Plant on the topographical map?
A. Yes.
If I might approach that, Your Honor?
THE COURT: Yes, or we do have a pointer, if you prefer to stay at the microphone.
THE WITNESS: Whichever you prefer.
THE COURT: Would you get the pointer for him, please?
BY MR. JACOBS:
Q. For the record, Mr. Klingenstein, that topographical map is an exhibit to your report; is that correct?

A. Yes, that is correct.
Q. Would you identify it for the record?
A. That is included as an attachment to my report and that would be included as the first listed exhibits preceding the attachments to the report, one of three topographical maps.
Q. Thank you, sir.
A. The Barefoot Bay Plant is located in this general area and down here, and see the surrounding area and the Indian River Lagoon up to the northeast.
Q. Is there a scale on the map so you could actually address exactly or within reason how many miles the point of discharge is from the Sebastian River and the Indian River?
A. Yes, there is. The scale -- the scale would be roughly two inches -- a little over two inches to a mile.
Q. From the Sebastian?
A. I'm sorry. The actual scale of distance for anyone looking at the map, a mile and a half, two miles.
Q. From the Sebastian River?
A. I'm sorry. No. From the Indian River Lagoon.
Q. I see. Okay.
About how far is the outfall from the Sebastian River?
A. Again, several miles, although the Sebastian River, the flow is down, is to the south off the map.
Q. Mr. Klingenstein, as you know, the Court has already

found that there were a total of 264 NPDES permit violations at the Barefoot Bay Plant.
I'd like to focus you first on the toxicity violations.Now, we've alleged, and the Court has held that there were three toxicity violations.
Your Honor, subsequently the Defendant's did their own count and came up with eight toxicity violations, some of which occurred, not most of which occurred subsequently to the filing of the complaint, as well as subsequent to the filing of the summary judgment motion, and for the purposes of the case, we will stipulate that there were eight.
THE COURT: Just a moment.
MR. BULLOCK: Objection, Your Honor, if the Court please, we believe there are three violations at issue here, and we object to any stipulation or indication that there are other than three.
THE COURT: All right. There's no stipulation.
MR. JACOBS: One moment, Your Honor.
THE COURT: Yes, sir.
MR. JACOBS: We'll be moving into evidence certain of the Defendant's discovery responses, but at this point in time I'd like to direct the Court's attention to the Defendant Florida Cities Water Company's Amended Revised Responses to Plaintiff's First and Second Interrogatories, page 19, question 26, the number of days of toxicity

violations, eight. If it's not a stipulation, it's an admission.

MR. BULLOCK: Your Honor, I believe that the question is answered with the number of exceedences. The second thing is the complaint has only pled three violations. Your Honor's only found three violations. And when we answered the interrogatories the question was whether or not we objected to using the term "violations" and said that we would refer to them as exceedences. The Second Amended Complaint reads, and Your Honor found in summary, September, October, '92, May '93 —

THE COURT: What are you reading from now?

The order?

MR. BULLOCK: Page six of the Second Amended Complaint, paragraph 26.

MR. BIRD: Your Honor, just so it's fair, no violations have been found against Avatar Holdings and, therefore, we will not stipulate to any.

MR. JACOBS: There's no finding of liability as opposed to Avatar.

THE COURT: Right.

MR. JACOBS: I'll read the question into the record.

State the number of days of each type of violation. Answer: No objection, eight. And there wasn't

any reference to exceedences.

I'm happy to share it with counsel. I didn't think this would be a point of issue. I apologize to take the Court's time at this point.

We can get back to this, if you prefer. We decided to use their numbers.

I think Mr. Klingenstein could testify that there were a couple of dozen. We didn't want to start having an issue about liability when everything was already bound in terms of liability, so we used their number.

THE COURT: Well, you put in evidence whatever supports — if it's an answer to interrogatory, you put that in evidence. And if there's a dispute as to the number, I'll deal with it.

MR. JACOBS: Thank you, Your Honor.

BY MR. JACOBS:

Q. Now, focusing on the toxicity violations, Mr. Klingenstein, and without respect to the number for the moment, could you tell the Court, first of all, what is toxicity?

A. Toxicity in this case, or whole effluent toxicity, is a means of measuring or monitoring whether or not an effluent has a toxic effect, without specifically looking at the cause of that toxic effect, rather than monitoring particular pollutant parameters. The whole effluent

toxicity provides for the taking an effluent and in a testing situation subjecting test organisms to that effluent to see if, in fact, either acute or chronic toxic effects, which would be very short term, various serious or perhaps less serious, but longer term effects occur in those organisms and it, therefore, provides a way to look at whether or not an effluent poses a danger to creatures in the receiving waters without requiring a facility to test for every possible chemical compound that might cause a toxic reaction since that would be prohibitive.

Q. Now, based on Florida Cities' own tests, their own toxicity tests, what percentage of time would you say that the discharge from the Barefoot Bay Plant to the Sebastian River has had toxic characteristics?

A. Well, Florida Cities, at least as expounded in my expert report, we showed whole effluent toxicity exceedances during three separate periods. Given the period of time for which that pollutant parameter was in effect — certainly three, in effect. It would be the ratio three to the entire number of months that the permit limit was in effect, assuming we're not counting the violations that occurred in 1995 or at least the exceedances that occurred in 1995.

Q. Well, since we haven't quite resolved that issue yet, give me a percentage based on three and a percentage based on eight.

A. Well, certainly three and, again, at the time we looked at these, I believe it was out of 17 months, so certainly say 20 percent of the time.

Q. Based on three?

A. Based on three.

Q. And based on eight?

A. Based on eight, obviously, of course, that would be for more than the 17 — the original 17-month period that I looked at the exceedences, but that would, nonetheless, that would certainly increase it probably more to like 25 percent or so.

Q. Okay. To what do you attribute these violations?

A. These violations were certainly possibly the result of a — what I'll call an outside chemical compound. For instance, pesticides could have been present in the Barefoot Bay effluent, but given the nature of the treatment plant, that being basically a secondary treatment plant, I would certainly say there's a fair chance that it was the effect of ammonia in the plant's effluent.

Q. Do you consider these, in your professional opinion, to be serious violations?

A. Yes, I do.

Q. Why?

A. The plant discharge to canal that leads to the Sebastian River, ultimately that leads to the Indian River

Lagoon, Indian River Lagoon in particular was addressed as part of the Surface Water Improvement and Management Act that was passed by Florida in order to, in fact, address concerns about degradation and threats to significant water bodies within the State. In fact, what's known as the SWIM Plan that was developed for the Indian River Lagoon System specifically identified both the Sebastian and the Indian River Lagoon as being threatened water bodies that were being negatively impacted by nutrient load and, therefore, could be considered stressed water systems.

Q. Let me focus you in on a few of the terms you've used, sir.

First of all, the SWIM Plan, what is that?

A. Surface Water Improvement and Management Act.

Q. And that plan or study was conducted by whom?

A. It was put together by a number of different organizations that are involved in the oversight of the Indian River Lagoon System, Water Management Districts, the State, et cetera.

Q. And you did refer and rely upon that data, did you, in forming your conclusion relating to environmental harm?

A. Yes, I did.

Q. What exhibit is that, sir?

A. That would, in fact, be Exhibit 249, and perhaps if we could refer to that?

Q. By all means.

A. In particular, referring to Exhibit 249, chapter 2, identified as Major Problems and Major Issues Within the System, the next to last paragraph on the page indicates because of its physical characteristics the Indian River Lagoon System is naturally susceptible to nutrient over-enrichment in turbid conditions --

THE COURT: Go slower for the Court reporter, please, when you are reading.

THE WITNESS: Surely.

Continued high nutrient and suspended matter loadings from anthropogenic sources threatens to transform the microphyte-based system through a phytoplankton-based system with damaging effects on estrin resources. There are indications that nutrient over-enrichment and excessive turbidity are already occurring in portions of the lagoon system. The most profound of these indications is the apparent loss of sea grass beds near urbanized watersheds.

MR. BULLOCK: If the Court please, Your Honor, I'm not sure exactly how to approach an objection on this exhibit, if the Government is not yet moving to put it into evidence, but the document is a 1994 document occurring long after the vast majority of all violations at issue, so we would raise the objection to the relevancy as to time of the document and relevancy to the issues that he's testifying

to.

THE COURT: All right. Well, he's read from the document. It's not in evidence. So, I'll sustain the objection at this point since it's not in evidence.

Well, now wait a minute.

Are you basing the testimony that you've elicited from this witness upon the document?

MR. JACOBS: Yes, Judge.

THE COURT: Well, why are you not required to have the document in evidence before you can have him read from it?

MR. JACOBS: I'll be happy to move it into evidence at this time, Your Honor.

THE COURT: Okay. Well, you want to address his objection to it?

MR. JACOBS: Your Honor, I think the fact that it came out in '94, doesn't mean it doesn't cover the prior 10 or 15 years worth of information, but I'll be happy to voir dire the witness on the subject of the study.

THE COURT: All right. Briefly.

BY MR. JACOBS:

Q. Mr. Klingenstein, could you outline the study and the period of time that it covers, please, in terms of the water quality of the Sebastian River and the Indian River?

A. Well, as I mentioned, the actual act was passed, I

believe, in 1987. I believe the first version of this was put out in 1990, and the 1994 is, in effect, a revision or an update of the previous version of the SWIM Plan, and in general, what it's talking about is the overall condition of the Indian River Lagoon System and the problems that exist in that system. Certainly, some of the references -- specific references to problems in the system go back to the mid 80's.

THE COURT: All right.

Anything further, counsel?

MR. BULLOCK: I'll renew the objection on that basis, Your Honor.

THE COURT: All right. I'll overrule the objection. It will be received as Exhibit 249.

All right. Let's move on.

BY MR. JACOBS:

Q. Now, Mr. Klingenstein, any other portions of the report that you relied upon and would like to call to the Court's attention with respect to the conditions of these water bodies?

A. One particular, on page 11, the second bulleted reference, Domestic and industrial wastewater treatment plants discharge fresh water and pollutants in potentially harmful qualities into the Indian River Lagoon, which is a reference to Hand, et al, in 1986.

And then from, I believe, one of the appendices, page 29, which is table 5, and that follows in chapter 4, the ranking of targeted Indian River Lagoon problem areas. It's, I think, particularly significant to note that the Sebastian River watershed, which shows two sub-basin numbers 2H and 3A, that would be the two prongs of the Sebastian River, particularly notes that the watershed is listed as a critical highest level of concern watershed.

So, not only is the Indian River lagoon overall of concern, and of enough concern that this quite complex plan and program has been put in place to try and protect it and protect and restore its integrity, but that the Sebastian River watershed is particularly singled out as being a critical watershed within the overall system.

Q. Is the canal that the Barefoot Bay Plant discharges into, does that canal lead into this Sebastian River watershed which you've said has received this highest critical ranking?

A. Yes, it does.

Q. Now, moving back for a moment to your testimony relating to the toxic characteristics of the discharge, would you tell the Court which Government exhibits you relied upon in drawing your conclusions with respect to the toxic characteristics of the discharge?

A. That would be with regard to, I believe it is US

Exhibit number 1, which is the summary of violations and all of the DMR's for Barefoot Bay which support that summary.

Q. Okay. Now, these DMR's are 142, 230, 240 and 254; is that correct, sir?

A. I believe so, yes.

MR. JACOBS: I'd like to move those into evidence. These are admissions by the — these are the Defendant, Florida Cities', own reports, qualify as admissions.

THE COURT: Exhibit 1 and what?

MR. JACOBS: 142, 230, 240, and 254.

THE COURT: All right. They'll be received without objection.

MR. BULLOCK: Your Honor, the only objection we will note for the record is that the versions of the discharge volume reports that were provided as Plaintiff's exhibits, we would contend are incomplete. The company was under a duty to provide a cover letter with the discharge volume reports. Those are included in our copies of those reports, which we have also listed, and we would stipulate to the admissibility, assuming that the cover letter which went with the discharge report is substituted as an exhibit.

MR. JACOBS: Your Honor, the forms themselves are stand-alone exhibits. I would certainly not object to counsel's introducing the cover letters during his part of the case, but I don't need them during my part of the case.

THE COURT: All right. I'll overrule the objection,

They will be received. That's 142, 230, 240 and 254.

BY MR. JACOBS:

Q. Moving on, now, Mr. Klingenstein, to the total residual chlorine violations or TRC violations. Would you describe those, please, for the Court?

A. Well, one of the requirements for a wastewater treatment plant in order to protect human health is to affect disinfection; that is, to kill any pathogenic organisms that might exist in the wastewater prior to its discharge, and the most commonly used disinfectant is chlorine, certainly across the United States at this point, and in order to protect the receiving water, it has been realized one needs to limit the amount of this material that's discharged out into the receiving water since its very qualities that make it a good disinfectant also make it quite toxic. These are violations of the limit that was in the Barefoot Bay permit for total residual chlorine.

Q. To what do you attribute these violations, sir?

A. In particular, to the lack of a system or mechanism to effectively control the residual chlorine in the plant's discharge. And, in fact, such a system was put in place, I believe, in about — in or about March, 1993.

Q. So you're saying the absence of the system was the cause of the violations?

A. Certainly it's technically possible to try and control chlorine without such a system, but barring either effective control or the installation of such a system, yes.

Q. And after the system was installed, were there such violations?

A. Not to my knowledge.

Q. Now, would you describe the seriousness of these violations, please, sir?

A. I think they were, likewise, quite serious. These were taking place into, again, the Sebastian River and ultimately into the Indian River Lagoon, but what's potentially at least as significant from the standpoint of these discharges is they were taking place into an area that had been identified as being a habitat for an endangered species known as the Wood Stork and, in fact, US Fish and Wildlife had particularly identified concerns about the impact of a chlorinated discharge on this habitat.

Q. On what date are you relying in this respect, sir?

A. That was a — that was on with regard to a letter that is included as US Exhibit 179, which was a letter from, I believe, Bridgett Crawford. And that covered a memo that covered a letter from Mr. Joseph Carol from the Fish and Wildlife surface to USEPA.

MR. JACOBS: I'd like to move 179 into evidence, Your Honor.

THE COURT: It will be received.

MR. JACOBS: Thank you.

BY MR. JACOBS:

Q. Now, this letter, does it make reference to an endangered species, sir?

A. Yes, it does.

Q. And does that data — the data upon which you based your conclusion in part that these violations were serious, that an endangered species might have been affected by the excess chlorine in the discharge?

A. Yes. What would have happened would have been that the — its habitat would have been impacted, i.e., smaller organisms in the receiving stream would have potentially been impacted and perhaps reduced available feeding opportunities for the endangered species.

Q. I'd like next to move on to the monitoring violations, but before I do, I'd like to make sure we've covered all of the exhibits that you have relied upon in any way in drawing your conclusions with respect to the seriousness of the harm, or potential seriousness of the harm caused by both the TRC violations and the toxicity violations. Were there any additional documents, sir, that you relied upon at all?

A. Well, 224, US 224, Government 224 was a, in fact, a

discharge monitoring report for the Barefoot Bay Plant for, I believe, January 1993. And it specifically notes that a — the ongoing installation of the SO2 feed system that, in fact, we observed when we took the video tour of the plant.

Q. So, it's on that exhibit that you relied on your opinion that prior to that time the company had not installed the necessary system to address these TRC problems; is that correct?

A. That's correct.

MR. JACOBS: Move 224 into evidence, Your Honor.

THE COURT: It will be received.

BY MR. JACOBS:

Q. We've traced on the map, I think, the route of the discharge. Did you use Exhibit 76 to trace the drainage into the Indian River Lagoon, Mr. Klingenstein?

A. Yes, I did.

MR. JACOBS: Move that into evidence, Your Honor.

THE COURT: What was that; 76?

MR. JACOBS: Yes, sir.

THE COURT: All right. It will be received.

BY MR. JACOBS:

Q. Any other exhibits that you've relied upon, sir, in any way in drawing these conclusions?

A. Those would be the main ones.

Q. Thank you.

Let's move on briefly to the monitoring violations which the Court has held Florida Cities liable for. Would you describe these, sir?

A. Florida Cities, for a period of time, reported CBOD as BOD. BOD is — or biochemical oxygen demand subscript 5 is a measure of the oxygen demand exerted by a wastewater or any sample, and it's meant to provide a measure for how much oxygen demand that wastewater will exert when it's discharged out into a receiving stream.

CBOD is a measure of what's known as carbonaceous BOD, and it is a modification of the BOD test. A material is added to preclude the exertion of the oxygen demand by a certain class of organisms, particularly those that are, in fact, in effect exerting that demand by breaking down ammonia. During a period of time, Florida Cities reported this information incorrectly.

Q. And do you consider these — let me ask you first, to what do you attribute these violations?

A. Failure to correctly report — to monitor as required and as required by the permit, and then to report accurately the data that was being reported.

Q. So, the data values didn't match the permit parameters; is that fair to say?

A. Yes.

Q. Is that a serious violation in general?

A. In general, it's — I take that to be —

MR. BULLOCK: Objection.

THE COURT: Just a moment, please.

MR. BULLOCK: Your Honor, there's no indication in the section of Mr. Klingenstein's report that deals with the seriousness of violations of Barefoot Bay to address BOD and CBOD.

MR. JACOBS: Probably because he's about to conclude that they were —

THE COURT: Wait, wait.

MR. JACOBS: I'm sorry.

THE COURT: He's not through yet.

MR. BULLOCK: I object to any testimony at all from this witness on that basis.

THE COURT: On the basis that his report does not address the seriousness of violations?

MR. BULLOCK: At all.

THE COURT: Sir?

MR. BULLOCK: It does not address the seriousness of those violations at all.

THE COURT: Of those violations?

MR. BULLOCK: CBOD, BOD reporting issue that counsel just asked Mr. Klingenstein.

THE COURT: Now you can talk. Yes, sir.

MR. JACOBS: I'm establishing it. In this case

these violations were not considered to be serious, so —
THE COURT: Apparently he's objecting.
MR. BULLOCK: Based on counsel's representation, I will withdraw the objection.
THE COURT: Okay. I thought you would.
Go ahead.
BY MR. JACOBS:
Q. Now, Mr. Klingenstein, did you draw a conclusion whether in this particular case these types of violations were serious?
A. In this case, I think these were less serious violations.
MR. BULLOCK: Your Honor, again —
THE COURT: Less serious as opposed to non-serious; is that your objection?
MR. BULLOCK: That's correct.
THE COURT: I'll, also, sustain your objection.
MR. BULLOCK: Thank you, Your Honor.
MR. JACOBS: It's come to my attention, Your Honor, that Mr. Roger Pfaff has entered the Courtroom, and in strict compliance with the Court's earlier instructions, Mr. Pfaff is our designated representative of the EPA, he's Chief of Compliance for the United States EPA Region 4. I'd like to introduce him at this time.
THE COURT: His name again is what?

MR. JACOBS: Mr. Roger Pfaff, P-F-A-F-F.
THE COURT: He's the designated representative for the Government?
MR. JACOBS: Yes, Your Honor.
THE COURT: All right. Thank you.
BY MR. JACOBS:
Q. Mr. Klingenstein, did you have occasion to review the history of the Clean Water Act violations at the Barefoot Bay Plant?
A. Yes, I did.
Q. And based on your review of the relevant data, when did the Barefoot Bay Plant begin discharging to the Sebastian River?
A. Based on —
MR. HIRD: I'd like to render an objection at this time. I think the Government is getting into claims that have already been resolved by the Court's Order res adjudicata and I think we should be focused on the remaining alleged violations.
MR. JACOBS: Judge, I think you already ruled this morning that Mr. Klingenstein could —
THE COURT: I believe I did. I believe I did. Where in my order?
MR. JACOBS: Bottom of page 6, sir.
THE COURT: Yes, sir. I'll overrule the

objection.
BY MR. JACOBS:
Q. Mr. Klingenstein, just to recap, you did have the occasion to review the history of the Clean Water Act violations at the Barefoot Bay Plant?
A. Yes, I did.
Q. And based on that review, sir, relevant data, when did the Barefoot Bay Plant begin discharging to the Sebastian River?
A. Based on the review of the available data, I would estimate in the time frame of 1980, would have been when overflows would have started to have occurred on the Barefoot Bay Plant.
Q. What data, sir, did you look at to draw this conclusion?
A. If we could, in fact, refer to US Government Exhibit number 30?
Q. By all means.
(Pause.)
MR. JACOBS: Your Honor, while this exhibit is coming to the witness's attention, I'd like to move it into evidence.
THE COURT: It will be received.
MR. JACOBS: Excuse me, sir.
Counsel just wanted to make sure he had the right

exhibit and he does.
THE COURT: All right.
MR. JACOBS: Now, could you — Your Honor, you have 30 in front of you? If not, we'll get it to you.
THE COURT: No, I don't. Am I supposed to have a notebook with exhibits?
MR. JACOBS: Yes. I apologize. I thought we had —
THE COURT: I've got a notebook of Avatar's trial exhibits.
No, I don't have a notebook with your exhibits.
MR. JACOBS: I apologize.
May I have a moment, sir?
THE COURT: Yes, sir.
(Pause.)
MR. JACOBS: We could stack them here and deliver them one-by-one.
THE COURT: Good. Do that.
What do I need right now?
MR. JACOBS: 30.
THE COURT: Volume 30 or Exhibit 30?
MR. JACOBS: Exhibit 30, sir.
THE COURT: What volume is that?
MR. JACOBS: Should be 1. Right here, sir.
MR. HIRD: Your Honor, the Government has given

Counsel for Florida Cities a copy of the exhibits in binders, but has given us a whole set in boxes, so it will be difficult for us to locate the Government's exhibit of a particular exhibit. We'll try to make our best effort.

MR. JACOBS: I apologize. If that's the case, and if we get ahead of you, Mr. Hird, let me know and I'll slow down.

MR. HIRD: Okay.

THE COURT: I don't want to slow down for that.

If you need to — if you need to provide the mechanics of getting this case tried in the time that has been allotted for it, then you all need to put your heads together and let's make the arrangements that are necessary to do that.

MR. JACOBS: I apologize. I didn't understand. I thought we had given them both loose-leaf. Perhaps they could look on with one another in the meantime.

THE COURT: I'll put this with those others.

BY MR. JACOBS:

Q. Now, Mr. Klingenstein — thank you, Your Honor.

Mr. Klingenstein, would you explain the significance of the flow data and how you relied upon it in forming your conclusion that the unpermitted discharges at Barefoot Bay actually started in 1980?

A. Well, if you look at Table 1, which is entitled,

Barefoot Bay WWTP Historical Flow Data, that chart provides data for years 1980 through 1984, and in looking at the fifth column over, which is entitled, Annual Average WW Flow, Wastewater Flow, that's in MGD or million gallons per day, you can see that in 1980 we look at a flow of 126,000 gallons per day or .126 million gallons per day. Likewise, in 1983, we're looking at a flow of .214 or 214,000 gallons per day. And in deposition testimony, Mr. Larry Good had explained that by 1983, overflow was in the range of 100 to 150 gallons per day. And based on that testimony, and based on the ratio of the flows between 1983 and 1980, it's, I think, a very logical conclusion by 1980 we were experiencing at least some overflows from the Barefoot Bay Plant.

Q. Could you explain, please, Mr. Klingenstein, the connection between the service connections and the discharges starting in '80?

A. Well, as you can see, in 1980, we had approximately 1,144 service connections and the flow was 126,000 per day, and as those service numbers — number of service connections increases the magnitude of the discharge, likewise, increases or in this case the magnitude of the overall wastewater plant flow increases and there is, obviously, a direct connection between the number of service connections, as you add service connections you add

wastewater flow to the plant and, therefore, would, likewise, add to the overflow from the plant.

Q. And where did the percolation ponds that we saw in the video fit in at this point in time?

A. Well, Mr. Good had characterized them as having a capacity of probably less than 50,000 gallons per day at this point in time. Certainly later data that we've seen has indicated they did not accept very much flow at all. And so, in effect, they were constituting probably a relatively small portion of the overall plant discharge.

Q. So, using as an example, again, 1980, the far right column, maximum flow, wastewater flow, that's 285,000 gallons per day; is that correct?

A. Yes, that would be the maximum flow on any one day within the year.

Q. And what is your opinion as to how much of that flow the percolation ponds could accommodate at that point in time?

A. Well, it's difficult to say with certainty exactly how much. As I said, Mr. Good had characterized them as being able to accept less than 50,000, but even if we were generous and said they could accept 100,000 gallons at that point in time, you would still have had on a given day 185,000 gallon discharge of wastewater to the canal and ultimately to Sebastian and the Indian River lagoon.

Q. And, then, as we look down the chart from 1980 to 1984 do the connections increase?

A. Yes.

Q. And the flow concomitantly increases; is that correct?

A. Yes.

Q. And is it, also, fair to say, then, that these unpermitted discharges to the Sebastian River are increasing?

A. Yes.

Q. Now, do you know, sir, at what point in time, if any, an NPDES permit was first issued which allowed discharges to the Sebastian River from the Barefoot Bay Plant?

A. Yes, I believe a permit was issued in 9/91, that provided for — became effective, rather, in, I believe, November, 1991.

Q. Became effective in November, 1991?

A. I believe.

Q. And I believe you noted this earlier in the course of the background information that you provided on permitting, but were there any special conditions or contingencies in the Barefoot Bay permit that you know of?

A. Yes, that permit required the cessation of discharge by 1995 from the Barefoot Bay Plant.

MR. JACOBS: A moment, Your Honor?

THE COURT: Yes, sir.

(Pause.)
BY MR. JACOBS:
Q. Directing your attention to Exhibit 185, do you recognize that, sir, as the permit?
A. Yes, I do.
Q. Would you point out the specific condition that related to ceasing the discharge from this plant?
A. That would be on page Roman Numeral I-4 under B, Schedule of Compliance, second item, Discharge 001, Cease Discharge Schedule and shows a series of reports of progress each on December 31st of years '91, '92, '93 and '94.
THE COURT: What page are you on?
THE WITNESS: I'm sorry, sir. This is on page Roman Numeral I-4.
MR. JACOBS: Should be the fifth page of the exhibit.
THE COURT: I got it. Go ahead.
THE WITNESS: And finally the last line, Cease Discharge, June 30, 1995.
BY MR. JACOBS:
Q. Is this an unusual permit condition, to your experience, sir?
A. To specifically require the cessation of discharge, yes, that is somewhat unusual.
Q. Do you have an opinion as to why such a condition

would be put in the permit of this nature?
MR. HIRD: Objection, calls for speculation on decisions of other persons.
THE COURT: Do you have an opinion?
THE WITNESS: I have an opinion, Your Honor.
THE COURT: You do have an opinion? That was his question as to whether or not you have an opinion.
THE WITNESS: Yes.
THE COURT: What is the opinion based on?
MR. JACOBS: His experience, sir.
THE COURT: I'm asking him.
MR. JACOBS: Excuse me.
THE WITNESS: My knowledge of the circumstances surrounding the situation at the Barefoot Bay Plant.
THE COURT: I'll overrule the objection.
Go ahead.
THE WITNESS: My belief is that it was put in place because the discharge had existed for some time as an unpermitted discharge and that given the specific requirements to eliminate, by State of Florida law, to eliminate discharges to the Indian River Lagoon System, that it was an appropriate inclusion in the permit.
BY MR. JACOBS:
Q. In your opinion, would the cease discharge provisions essentially enable the permittee to find alternatives to his

surface water discharge? Would that be the purpose?
A. Certainly, yes, to encourage them to do that.
Q. Encourage or require?
A. Well, require.
Q. Now, in your opinion, sir, based on the data that we spoke about and the date of issuance of the permit, for how many years were there unpermitted discharges from the Barefoot Bay Plant?
A. It would be appear to be about 11 years.
Q. How serious is that?
A. I think that's very serious.
Q. Now, sir, to your knowledge, at any point in time did EPA issue an administrative order to Florida Cities to require it to monitor its discharge and comply with certainly effluent limitations?
A. Yes, I believe in 1990, such an order was issued.
Q. Do you recognize Government Exhibit 145 as that administrative order?
A. Yes.
MR. JACOBS: Your Honor, I'd like to move 145 and 185 into evidence at this time.
THE COURT: They will be received.
BY MR. JACOBS:
Q. Now, in your opinion, Mr. Klingenstein, what was the purpose of the administrative order?

A. In my opinion, the purpose of the administrative order was to begin monitoring of the plant's discharge and to provide a mechanism to oversee the transition to a status where ultimately the permit would be issued that would require cessation of discharge.
Q. Mr. Klingenstein, does an administrative order substitute for a permit in terms of authorizing the discharge?
A. No, it does not.
Q. In fact, does this particular permit contain or — sorry — does this particular administrative order contain language that it is not, in fact, a permit?
A. Yes. Page 4 at the bottom, under item number 9, this order does not operate an NPDES permit and nothing contained herein shall be construed as preventing prosecution for the violations cited in this order, for violations of the order itself, or for any other violations of the Act.
Q. Now, did you have occasion to review whether the administrative order was violated?
A. Yes, I did.
Q. And what was your conclusion, sir?
A. That, yes, it was violated, as well.
Q. And on what data did you base those conclusions?
A. Likewise, the summary violations and DMR's for the Barefoot Bay Plant.

MR. JACOBS: Your Honor, all of these DMR's are located in these light-blue covered volumes that we presented for summary judgment purposes, and I believe we might have an extra set. We don't have an extra set, so I'll have to ask another moment to give you the Government Exhibit numbers for those, if I may.

(Pause.)

THE COURT: We'll be in recess until 1:15.

THE MARSHAL: All rise.

The Court will be in recess until 1:15.

(Thereupon, a luncheon recess was taken, after which the following proceedings were had:)

THE COURT: All right, Mr. Jacobs, you may proceed.

MR. JACOBS: Good afternoon, Your Honor.

I apologize about the confusion with the exhibits this morning. We did a little more homework over lunch. I have one correction to make, with the Court's permission.

THE COURT: All right.

MR. JACOBS: We'd ask the Court to admit Exhibit 76, the map of the drainage to the Indian River Lagoon basin. 76 was the deposition number. The trial exhibit number is 4. So, we'd ask that you admit 4, please sir.

THE COURT: All right. Exhibit 4 will be introduced instead of 76, did you say?

MR. JACOBS: Yes, sir.

THE COURT: All right.

MR. JACOBS: Secondly, I now have at my fingertips the exhibit numbers for the discharge monitoring reports commonly known as DMR's for Barefoot Bay. Those are 146, 151, 154, 157, 163, 166, 169, 170, 187.

THE COURT: What?

MR. JACOBS: 187. 207, 208, 210, 213, 218, 220, 224, 225, 226, 227, 230, 232, 244. And I'd like to move those into evidence at this time, as well, sir.

THE COURT: All right. They'll be received.

BY MR. JACOBS:

Q. Now, Mr. Klingenstein, did you have occasion to review these discharge monitoring reports for the Barefoot Bay facility?

A. Yes, I did.

Q. Did you come to a conclusion as to whether the administrative order that we earlier discussed was violated?

A. Yes, I did.

Q. And what conclusion was that, sir?

A. That it was violated.

Q. And for what effluent parameters?

A. It was violated for BOD monthly average and daily maximum limit for TSS, and for fecal coliform, for DO, the minimum limit, and PH range.

Q. And can you tell me how serious those violations are, please, sir?

A. I view those as serious, as well.

Q. What do you base that opinion, sir?

A. Well, the administrative order was placed on the facility that was — had been previously discharging without a permit to bodies of water that were considered to be threatened, and so violation of these limits by definition means that an excessive amount of pollutants is going out into bodies of water that are of concern.

Q. Now, Mr. Klingenstein, can you tell me, in your opinion, whether there is any relationship between what I'll call the past violations, that is to say, the unpermitted discharge violations and the administrative order violations and what I'll call the present violations, that is to say, the NPDES permit effluent violations?

A. Yes, there is a connection. The connection, in my mind, would be that if, in fact, the discharge had been halted sometime prior to those violations taking place, no violations would have occurred. If the facility had found an alternative discharge mode, those violations would not have taken place.

Q. In your opinion, sir, with the exception of the monitoring violations which we've described as being less serious, did the violations past and present, all have the

potential for causing environmental harm to the Sebastian and Indian Rivers?

A. Yes, I believe so.

Q. Now, is there anything that could have been done to insure that the present violations did not take place?

A. Well, as I've mentioned, if, in fact, an alternative discharge mode had been identified, the discharge would have been halted, and by definition, no violations would have been possible. In fact, there were a number of different options that were available to Florida Cities, and if we could refer to the exhibit that's up on the easel, a number of different options presented themselves.

The first of these would be percolation ponds. In about 1985, Florida Cities was looking at both the need to potentially improve the performance of their existing pond — ponds, I'm sorry, and potentially to secure all additional percolation pond capacity.

MR. JACOBS: Let me interrupt you for a moment, as long as you're referring to the exhibit.

For the record, that would be Exhibit 597-D as in David, 1.

BY MR. JACOBS:

Q. Now, was this exhibit compiled either by you or under your supervision, sir?

A. Yes, it was.

MR. JACOBS: Move that into evidence at this time, sir.

THE COURT: It will be received.

BY MR. JACOBS:

Q. Go ahead, Mr. Klingenstein.

A. As you can see, looking at the exhibit, in fact, in late 1985, Florida Cities did secure a 40-acre site, and that would be the 40-acre site we saw that's now in use as a spray irrigation field. They investigated the possibility of putting percolation ponds on that site. I believe two different trials were run to evaluate the capacity of that site. Florida Cities, I believe, also, looked at at least one other site as a possibility for accepting percolation ponds.

The sites that were evaluated did not have the capacity to accept the entire plant flow, and so no percolation ponds were ever built or put into service.

Another opportunity that presented itself was spray irrigation.

Q. Let me stop you for a moment, if I may, with the Court's permission, before we move on to a different alternative.

The first line of 597-D-1 represents the percolation pond options; is that correct, sir?

A. Yes, it is.

Q. And how would this option or alternative have solved the problem?

A. Well, if adequate percolation ponds had been constructed, large enough percolation ponds had been constructed to accept the entire plant flow, the plant discharge would have been halted, and by definition, the violations could not have taken place.

Q. And there would have been no discharge?

A. Would have been no discharge to the river, so there would have been no violations.

Q. Would you tell me, sir — you said that two options or two different pieces of land or parcels of land were looked at. Could you tell me whether there were any other parcels or pieces of land in these, what you've described as the 3,000 or so acres roughly in the area that were looked at, for the purpose of percolation ponds, at this particular point in time that you've described?

A. There's, as you've alluded to, there's something in the neighborhood of 3,000 to 4,000 acres of grove land surrounding the Barefoot Bay Plant. Documents that I've reviewed in the course of looking at the Barefoot Bay situation, had indicated that a number of different parcels at different points in time were available for sale or at least talked about as potentially being available for sale and that possibly could have provided adequate acreage to

install percolation ponds.

Q. Can you tell me, sir, whether there was any technical or technological reason why additional percolation ponds could not have been used to dispose of the effluent?

A. As long as a site of sufficient size to accommodate a sufficiently large pond or series of ponds was procured and sufficient ponds were put in place, no, I can't see any reason that ponds could not have been used to dispose of the effluent.

Q. If your opinion, was there sufficient acreage in the vicinity to provide sufficient land capacity for such ponds?

A. Yes.

Q. How much land, in your opinion, would have been required to construct adequate ponds?

A. It certainly would depend on the individual percolation characteristics of a particular piece of property, but just by way of example, the two tests that were run on the 40-acre site, as I recall, showed capacities of — first test showed a rather low capacity, and I believe the second test showed a somewhat higher capacity, in the range of perhaps 300,000 gallons, but certainly a site of probably 250 to 300 acres would have provided more than adequate capacity, assuming decent perc and characteristics.

Q. Okay. What other options were available, sir?

A. Well, spray irrigation. This is where the — rather

than putting the plant's effluent into a pond with a permeable bottom and allowing it to percolate down, an irrigation system is put in place. That's, in fact, what we saw a video of and have looked at photos of at the Barefoot Bay Plant on the 40-acre site.

By procuring a large enough parcel of land and putting in place an irrigation system, the entire plant flow could be disposed of through irrigation, rather than through discharge to the receiving stream.

And, likewise, back in the '84, '85 time frame, Florida Cities, also, was aware of the possibility of spray irrigation and did begin to look into that option, particularly through starting in about 1987, they started looking into what parcels of land might be available to utilize for spray irrigation, but it was not until rather recently that a parcel, to my understanding, was secured, and at this point my understanding is that the plant is now on track to be into a spray irrigation site in 1997.

Q. Let me take you back for a moment to the percolation ponds. Did Florida Cities ever acquire any additional or ever construct any additional percolation ponds beyond the two that were in existence at the time that the plant was designed?

A. No.

Q. And when was the first time that spray irrigation was

introduced as a means of effluent disposal at Barefoot Bay?
A. It was in March of 1990.
Q. At that point, what was the capacity of the spray irrigation site that was introduced?
A. I believe, based on a investigation of the site by one of their consultants, it was determined that the site had a capacity of about 90,000 gallons a day.
Q. And in order to eliminate the unpermitted surface discharge in March of 1990, how much capacity did they need?
A. Roughly, give or take, about a half a million gallons.
Q. So, they were about 400,000 gallons a day short?
A. Give or take, yes.
Q. How much land would have been required to use spray irrigation to dispose of all of the effluent at that point in time?
A. Probably, again, in the range of about 300 acres and I believe 300 -- slightly over 300 acres is the size of the site that has been procured to put in place the spray irrigation system.
Q. And instead they bought a parcel that was how many acres?
A. About 320, roughly.
Q. No, I'm sorry. I'm going back to the previous site.
A. Oh, the smaller site is a 40-acre site.
Q. 40 acres. Okay.

Please continue, sir.
A. Another possibility is deep well injection. Deep well injection is a system whereby a deep well is drilled down into a permeable layer and in order for this to be approved, this permeable layer has to be confined or separated from any other layers, geologic layers, which might include or contain drinking water. And the wastewater is injected down this well into this layer and is disposed of in that manner.
Florida Cities was, likewise, aware of that option back in 1984, but seems to have really seriously begun to look at deep wells in the 1989 time frame. Review of documents indicated that there were some concerns about performance of wells in the area, but these appear -- these concerns appear not to -- these concerns appear not to have been researched in great detail, and at no time was the well ever constructed.
Q. Could you tell me, sir, was there any technological or technical reason why a deep well could not have been constructed, in your opinion?
A. No.
Q. Could you tell me, sir, whether there was any technical or technological reason why, in your opinion, spray irrigation could not earlier have been fully implemented as a disposal means to eliminate the unpermitted discharge?

THE COURT: Are you talking about spray or are you talking about deep well now?
MR. JACOBS: I switched, because I --
THE COURT: Okay.
MR. JACOBS: I'm sorry, sir. I went back to --
THE COURT: Okay.
MR. JACOBS: -- spray.
THE COURT: I just wanted to make sure I knew what you were talking about.
THE WITNESS: No, I can see no reason it couldn't have been.
BY MR. JACOBS:
Q. Now, let me ask you, what documentation you relied upon in forming your conclusions about all three of these alternatives that would have resulted, as you say, in total cessation of the unpermitted discharge?
A. These documents included Government Exhibits numbers 16, 180, 34, 16, 30, 79, 102, 16, 63, 137.
MR. JACOBS: Your Honor, I'd like to move all those exhibits into evidence at this time.
THE COURT: They'll be received.
BY MR. JACOBS:
Q. Now, Mr. Klingenstein, focusing on the permit effluent violations, aside from totally eliminating the discharge, what other means was there, if any, to comply with the

permit effluent limitations?
A. Certainly upgrade of the plant to what's known as AWT or Advanced Wastewater Treatment standards would have most likely eliminated those violations, as well.
Q. Do you know whether the Defendants made any efforts to build such a plant?
A. It's my understanding that, in fact, upgrade to AWT may have taken place subsequent to my inspection of the plant in December of 1994.
Q. But not before?
A. No.
Q. Could you tell me, sir, in your opinion, whether there was either any technical or technological reason that the Defendants could not have built an advanced wastewater treatment plant in time to comply with the limits in their NPDES permit?
A. No.
Q. I'd like to direct your attention now, sir, to the Carrollwood plant.
MR. JACOBS: Your Honor, we don't have a video of the plant because it no longer exists, but we do have some photos of the site itself.
And Mr. Klingenstein, I wonder if you could, using those photographs, references to those photographs, describe the plant as it existed?

A. The photographs are numbers 2 through 14 that deal with Carrollwood and the Carrollwood site and its collection system.

Photographs 2 and 3 provide a -- are just an overview of the pump station that has been built on site that now conveys wastewater from the Carrollwood system to the Hillsborough County system; 4 is a view, as are 5 and 6, of the mechanical equipment in that pump station; 7 and 8 provide a view of the former plant site, and 7 with a bit of a view of the Sweetwater Creek, as well; and 9 and 10, 11 and 12 provide views of the Sweetwater Creek itself as it passes through the site; 13 and 14 are of a small pump station in the Carrollwood collection system.

MR. JACOBS: With the Court's permission, I'm going to put the topographical map up that has the Carrollwood area on it. This map is an attachment to Mr. Klingenstein's report, which is exhibit 597.

Mr. Klingenstein, I wonder if you can identify the location of the old Carrollwood plant on the topographical map?

A. Yes. It would have been in that general area.

Q. The record will reflect the witness is identifying the right hand side of the map, roughly 50 to 55 percent down from the bottom, all the way to the far right.

A. And, of course, as you mentioned, the Carrollwood

plant was not in existence at the time of our inspection, however, my understanding, for the record, is the Carrollwood plant was a secondary-type wastewater treatment plant.

Q. As opposed to an advanced wastewater treatment plant?

A. Yes. Followed by a pond with discharge from the pond through a chlorine content chamber.

Q. Discharged where?

A. To the Sweetwater Creek.

Q. And from there the Sweetwater Creek flows to where?

A. Ultimately to Tampa Bay.

Q. Now, Mr. Klingenstein, the Court has already held that there were 234 NPDES permit violations at the Carrollwood plant. Would you describe these violations, please?

A. There were violations of the BOD and TSS limits, both monthly and daily, monthly average and daily maximums; there were violations of the total nitrogen, monthly and average -- I'm sorry -- monthly average and daily maximum limits, and the total phosphorous, monthly average and daily maximum limits; violations of the fecal coliform limits and violations of the total residual chlorine daily max.

Q. Did you have occasion to review the NPDES permit for the Carrollwood plant?

A. Yes, I did.

MR. JACOBS: Your Honor, that's Exhibit 326. We

move that into evidence at this time.

THE COURT: It will be received.

BY MR. JACOBS:

Q. Mr. Klingenstein, did you, also, have occasion to review the discharge monitoring reports for the Carrollwood plant?

A. Yes, I did.

MR. JACOBS: Your Honor, these are exhibits 331, 332, 335, 336, 337 and 338 -- and 338. I'd like to move these into evidence at this time.

MR. BULLOCK: If the Court please, we would renew our objection to the DMR's, unless they contain the cover letter that was required to go with the DMR.

THE COURT: Okay. You have those, I assume?

MR. BULLOCK: That's correct.

THE COURT: Okay. I'll overrule the objection, deny your request.

They'll be received.

Did you say -- what was the last number; 338 or 339?

MR. JACOBS: 338, Your Honor.

THE COURT: All right.

BY MR. JACOBS:

Q. Mr. Klingenstein, to what do you attribute these violations?

A. Primarily to the technology that was in place at the plant.

Q. Could you be more specific?

A. Well, in particular, looking at the nitrogen and phosphorous limits, that a plant that was not an AWT plant would be very unlikely to be able to consistently meet the limits that were included in the Carrollwood permit.

Q. In your opinion, are these violations serious?

A. Yes, I believe they were. These were discharges to a small stream, the quality of which was of concern, and that ultimately led to Tampa Bay, a body of water that was, also, of concern from a quality standpoint, and particularly with regard to nutrient load.

Q. You've mentioned nutrient load a couple times. I wonder if you could describe what that means in layman's terms, please?

A. Well, in particular, the pollutant parameters, nitrogen and phosphorous are considered to represent nutrients, if you will, to water bodies that allow for the growth of certain types of organisms and allow for the exertion of oxygen demand by various organisms in the water body.

A commonly heard term in laymen's circles is eutrophication, and in particular, these pollutants are limited in order to prevent degradation of water bodies.

Q. Now, did you review any data that led you to the conclusion that the Sweetwater Creek and Tampa Bay were potentially seriously impacted?
A. Yes, I did.
Q. And what data was that, sir?
A. One particular, the Government Exhibit 294, which was the Minimum Negative Impact Report by Florida Cities consultant LTI or Limno-Tech supported the position that upgrade to AWT was necessary in order to avoid more than a minimum negative impact on the receiving stream.
MR. JACOBS: Move 294 into evidence, sir. That's the Limno-Tech Report prepared by the Florida Cities Water Company's contractor.
THE COURT: It will be received.
BY MR. JACOBS:
Q. Now, Mr. Klingenstein, did you have occasion to review whether there was a history of Clean Water Act violations at the Carrollwood plant?
A. Yes, I did.
Q. What was your conclusion?
A. That, in fact, there had been violations, that the facility had operated for some time without a permit, since 1984, until a permit was issued for the facility in 1991.
And, then, that there were a series of violations until the plant was taken off line and flow was transferred

to the Hillsborough County system.
Q. At what record or records did you rely upon in terms of drawing your conclusions with regard to the history of past violations at Carrollwood?
A. The things that I reviewed and relied upon included Government Exhibits numbers 269, 270, 272, 326 and 341.
MR. JACOBS: With the Court's permission, I would move those exhibits into evidence at this time.
THE COURT: They'll be received.
BY MR. JACOBS:
Q. Now, Mr. Klingenstein, did you reach a conclusion as to whether the past violations were serious?
A. Yes, I did, and that was that, yes, they were serious.
Q. And, again, for what reason?
A. They were discharges either without a permit or in excess of a permit into bodies of water that were considered to be threatened and, therefore, by definition, had to be considered serious.
Q. Would you describe the relationship between the past violations, that is to say, the unpermitted discharge violations and the present violations, that is to say, the NPDES permit violations?
A. Well, again, much as with Barefoot Bay, if, in fact, the discharge had been eliminated through implementation of one of several options, by definition, no violations could

have taken place since the discharge, itself, would have been eliminated.
Q. Now, what, if anything, could have been done to prevent the current violations?
A. Well, there were a number of options available to Florida Cities at the Carrollwood plant. Not the -- thank you. First of which, was, in fact, connection to Hillsborough County, which, in fact, is the option that was ultimately implemented.
Q. Let me stop you for a second just to identify the record to reflect that you're now making reference to Exhibit 597-D as in David, 2. Is this, again, a chart prepared either by you or under your supervision, sir?
A. Yes, it was.
Q. And what does it depict?
A. This depicts a number of different options that were available to Florida Cities that could have eliminated the discharge and eliminated, therefore, the violations, first of which was connection to Hillsborough County. Florida Cities, the record indicates, that Florida Cities had had contact with Hillsborough County since the -- at least the late 1970's, attempting to secure a commitment to connect.
There was a periodic contact back and forth between Florida Cities -- from Florida Cities with the county, and in a number of instances, the county indicated that they, in

fact, could not provide firm dates for connection. And in particular, a number of those would be numbers -- Government Exhibits number 263 and 278.
MR. JACOBS: Move those into evidence at this time, Your Honor.
THE COURT: 263 and 278?
MR. JACOBS: Yes, Your Honor.
THE COURT: They'll be received.
MR. JACOBS: Also, move into evidence at this time, the chart that Mr. Klingenstein testified was put together at his instruction, 597-D-2.
THE COURT: D as in dog?
MR. JACOBS: Yes, sir.
THE COURT: It will be received.
BY MR. JACOBS:
Q. Mr. Klingenstein, you said that there was no firm commitment ever made by Hillsborough County or did there come a time when Hillsborough County and the company did reach an agreement?
A. Yes, they ultimately did reach an agreement and in January of 1992, the flow was diverted over to Hillsborough County.
Q. And when did the unpermitted discharges begin?
A. The permit was denied, I believe, in 1984.
Q. Was there another available alternative or was there

an alternative that was, indeed, available in 1984, that would have permitted the cessation of the discharge?
A. Yes, I believe so. There was the possibility that they could have connected to another system, rather than to Hillsborough County's, and the one that appears to have been most available was Tampa, and, in fact, the company did contact Tampa and received a reply from Tampa, and I believe in December of 1983, that specifically identified potential points of connection to the system, and that, in particular, identified one of those points of connection as being available at that time.
Q. Do you recall how far away that point was?
A. I believe it was about 15,000 feet.
Q. So, roughly, three miles away?
A. About three miles, yeah.
Q. Was there any technological or technical reason, in your opinion, that would have precluded the connection to the Tampa system at this point in time?
A. None that I'm aware of.
Q. Were there any other alternatives available that would have resulted in preventing these unpermitted discharges?
A. Yes, I believe that both spray irrigation or the use of percolation ponds would have been a possibility. And Government Exhibit 261 is a report, preliminary review and evaluation of existing percolation ponds and off-site

disposal areas for Carrollwood Wastewater Treatment Facility, dated 1/24/84, that was -- documents the results of a preliminary study by a firm by the name of Jamal.
Q. Did Jamal do this particular study at the request of Florida Cities Water Company?
A. Apparently so, yes.
Q. They were, in fact, its contractor for this study?
A. Yes, that's what it appears to be.
MR. JACOBS: Move 261 into evidence, Your Honor.
THE COURT: It will be received.
MR. BULLOCK: Your Honor, a quick question.
(Conferring with Mr. Jacobs.)
MR. BULLOCK: Your Honor, the question is, on the exhibit list we were given, 261 is another document.
MR. JACOBS: I'll check that, if I may.
I think my distinguished co-counsel is correct. Should be 268, not 261.
THE COURT: All right. Then 268 and not 261 will be received.
You had down 261, or did you have 268?
THE WITNESS: No, I had 261, Your Honor. It should be 268. 268 is the correct document.
THE COURT: All right.
BY MR. JACOBS:
Q. Mr. Klingenstein, did you have occasion to refer to

261?
A. I'm sorry. 261 or 268?
MR. JACOBS: I'm back to 261 for another purpose now.
THE COURT: The real 261.
THE WITNESS: The real 261.
MR. JACOBS: Thank you, Judge.
THE WITNESS: Yes, in fact, I did.
BY MR. JACOBS:
Q. And for what reason, sir?
A. That was a document that was reviewed in the course of reviewing the Carrollwood file. And it was one that, in fact, was a memo from a Mr. W. G. Lee to file on Florida Cities Water Company letterhead, that, in fact, and I'm reading from the document, we've established the fact that it would be impractical and impossible for Florida Cities Carrollwood Wastewater Treatment Plant to connect to the Hillsborough County Northwest Regional STP. I have written to Ed Snipes of the Tampa Office of the DER requesting a change in the requirement of our topic.
MR. JACOBS: Okay. I'll move 261 into evidence at this time, Your Honor.
THE COURT: It will be received.
BY MR. JACOBS:
Q. Now, you've testified that and as represented on the

timeline from 1979 through 1991, you said there was and I'm quoting from the exhibit itself, 597-D-2, you said, there's sporadic contact with the county regarding connection, but no firm commitment reached or received and no agreement negotiated. Was there a technical or technological reason why connection to the Carrollwood system during this point in time could not have been implemented?
A. A connection from the Carrollwood system to Hillsborough County, no, that connection could not be made. By all of Hillsborough County's representations, they did not have adequate capacity.
Q. But Tampa did?
A. Yes.
Q. Any technical or technological reasons why spray irrigation and percolation ponds could not have been used to eliminate the discharge from the Carrollwood plant?
A. No, and in particular, referring to Exhibit 268, a number of sites were evaluated for percolation pond use and one site was evaluated for use as spray irrigation and that would have been a golf course, and the estimated capacity of the sites were such that one site was found to have more than adequate capacity to handle the entire plant flow, and the remainder of the sites were found to have not sufficient capacity in any one of the sites to handle the entire plant flow, but rather substantial capacities.

Q. Now, aside from ceasing the discharge entirely, would it have been possible to otherwise comply with the permit that was issued in July 1991, for Carrollwood?

A. If, in fact, a plant upgrade had been in place at that time such that the plant was at AWT status.

Q. Then the plant could have complied with its permit; is that what you're saying?

A. Yes, that's true.

Q. And was there any technical or technological reason why such a plant could not have been built in time to comply with the NPDES permit?

A. No, there's no technological reason such a plant couldn't be built.

Q. In terms of your opinions that you've drawn with respect to the AWT plant at Carrollwood, are there any documents or data that you've relied upon, sir?

A. Again, Exhibit 294, 298, 300 and 302.

MR. JACOBS: I'd like to move those into evidence at this time, Your Honor?

THE COURT: They'll be received.

BY MR. JACOBS:

Q. Turning your attention now, Mr. Klingenstein, to the Waterway Estates Plant, I'm going to, with the Court's permission, activate the video of the plant and ask you to narrate it and at that time to describe the plant and

treatment design.

And this is the same exhibit, Your Honor.

THE COURT: Same exhibit?

MR. JACOBS: Yes.

THE COURT: Okay.

(Video tape playing.)

THE WITNESS: The Waterway Estates Wastewater Treatment Plant in contrast to the Barefoot Bay Plant was, at the time of our inspection in December of 1994, had been upgraded to an AWT status and, in fact, its outfall had been relocated from the canal into which it originally discharged out into the Caloosahatchee River.

These are views as we're passing into the plant, the mechanical equipment through which the wastewater enters the plant and is distributed up into the various treatment units. Also, I believe, we're looking directly at the site of a large equalization basin. This is a unit that provides for a dampening effect, if you will, of flows into the plant. And, again, this plant is what's known as an AWT configuration. And in this case, the plant consists of basically two of the types of package units that we've seen, of the single unit we've seen at the Barefoot Bay, modified somewhat. That's one of them there in the background, and then looking over on the other one, right there.

THE COURT: When did you say this was constructed?

THE WITNESS: Well, I can't tell you the date of the very original construction, Your Honor, but the upgrade took place —

THE COURT: The upgrade.

THE WITNESS: The upgrade took place in the early 1990's.

THE COURT: All right.

MR. JACOBS: Go ahead.

THE WITNESS: Again, still looking down into one of the treatment units, in this case the equalization basin. And we should soon see the — as we pan across, no, still panning across the top of the treatment units. Again, these are consolidated package-type units that provide for both biological treatment and for separation of solids, as well. They combine a number of different treatment units into one steel unit, hence the name, package unit. And separation of solids, particular biological solids takes place in the center of that unit. And these types of treatment systems are, in general, very widely used throughout the United States, in particular for smaller plants, as opposed to larger plants that would tend to have large in-ground concrete tankage.

Looking down around the various units and that's the sludge-holding tank in which the removed solids are aerated.

I believe we're looking now down on top of the denitrification units, and which, I believe, there were three of.

And then we should pan over to the disinfection unit. In this case, this plant, rather than using chlorine to disinfect, uses ultraviolet light to effect the disinfection, in the channels underneath that grating in that concrete structure.

And this is the boat yard that immediately adjoins the plant proper. And then the plant office and laboratory.

This is looking out into the canal, which surrounds the plant.

And panning around now, should be panning around out toward the canal to which the plant formerly discharged and, in fact, right there we'd be looking at the point into the canal where the discharge had formerly taken place.

And now panning out along the canal and looking out into the Caloosahatchee.

Now, the outfall discharges quite a ways out into that — a ways out into that river some — I believe the total extension length of the outfall was some 2500 or 2600 feet and about 800 feet up the canal.

Q. Is that where that gentleman was pointing to the old outfall?

A. That would be the old outfall. And would have come

right out from the plant right into the canal there.

You can see it's quite a quist or quiescent body of water in the body canal.

Q. What do you mean by quist or quiescent?

A. Well, it's being a canal as opposed to a river or stream, it, by definition, doesn't have any tremendous amount of flow through it, it's just sort of a quiet body of water, and so anything that's discharged into it is going to have a bit more of a tendency to stay there than to be mixed and ultimately be flushed out.

That's looking back up the canal from, I believe, from the boat yard next to the treatment plant.

And now looking out into the Caloosahatchee. And the outfall, I believe, follows the — you can't see it there, may get a better view, but the outfall follows the boat channel out into the middle of the Caloosahatchee to the 6-foot contour line, which is the point at which the river is on average 6-foot deep, follows out along the boat channel, out into the center of the river.

And this is another view, I believe — this view was taken from the property across from the plant, looking at there — looking at actually the — in the foreground, the original point of discharge, and at the same time we would be looking out along the new discharge line, as well.

Q. Now we're back?

A. That's finished.

(End of video.)

Q. Mr. Klingenstein, are there, also, photographs that you took during your inspection of the Waterway Estates Plant?

A. Yes, there are. Those photographs would begin on — with photograph number 71, which begins with the picture of the facility sign. Photograph 72, 73, 74, 75 and 76 are of treatment units in the plant. 77 is a view of the disinfection unit, the UV disinfection unit. 78 would be of the denitrification unit — units. 79 and 80 are, again, views of the treatment units, as are 81 and 82, 83. 84 would be the truck loading station. Again, 85, looking over the denitrification system. 86, again, the disinfection unit, the UV disinfection unit. 87 is a view looking down at the original point of discharge into the canal. 88 and 89 and 90 are views out into the Caloosahatchee River.

Q. I believe we have a topographical map of that area, as well. I wonder if you could point out the location of the plant on the topographical map?

Which, again, is an exhibit to Mr. Klingenstein's report, Your Honor.

THE WITNESS: The discharge would have taken place from the plant and was located in the region.

MR. JACOBS: Let the record reflect that the

witness is pointing to the lower right hand quadrant of the exhibit, along the banks of the Caloosahatchee River, as depicted on the exhibit.

BY MR. JACOBS:

Q. Mr. Klingenstein, the Court has already held that as alleged in the Government's Complaint, the Waterway Estates Plant discharged without a permit from October 1, 1988, until October 31st, 1989. That's 396 days of violations.

Did you have occasion to review whether there was a history of unpermitted discharges before October 1, 1988?

A. Yes, I did.

Q. And what conclusion did you reach, sir?

A. That, in fact, there had been a discharge without a permit since, I believe, January of 1987.

Q. And what data did you rely upon to draw that conclusion, sir?

A. That was, in particular, Government Exhibit Document 354 and 361.

MR. JACOBS: I'd like to move 354 and 361 into evidence.

THE COURT: They'll be received.

BY MR. JACOBS:

Q. When did the unpermitted discharges actually begin, Mr. Klingenstein?

A. At the point in time at which the permit was denied by

USEPA.

Q. Was that January?

A. I believe effective January 1987.

Q. Thank you.

The Court has, also, held that it was unlawful for Florida Cities to discharge to the boat canal that you pointed out both in the video and the photo or photos, and that on each day during the period November 1st, 1989 to July 14th, 1991, that is to say, 621 days, the Waterway Estates Plant discharged to the boat canal, instead of to the 6-foot contour line of the river.

MR. HIRD: Your Honor, so the record is clear, and I just want to do this once, so we don't have to interrupt the witness' testimony. I want it understood that with respect to the claims of discharge without a permit, that those claims are — that Avatar Holdings has summary judgments on those claims and, therefore, the evidence will not be admitted with respect to liability about that. And when Mr. Jacobs asked the witness about the number of days of discharging in the wrong location, Avatar Holdings has a judgment in its favor on certain of those days prior to May 4th, 1990. With that understanding, that's understood, I would not further object to the witness' testimony.

THE COURT: Your objection is that as to those violations which I've granted judgment in your favor, that

there should be no evidence presented, and you want a standing objection in that respect?

MR. HIRD: Yes, Your Honor.

THE COURT: Okay, all right. I think that's reasonable. I think that's a pretty well defined area of objection and I -- if we get to a point where you think there might -- the record might be unclear in that respect, then feel free to voice your objection.

MR. HIRD: Thank you.

BY MR. JACOBS:

Q. Mr. Klingenstein, can you first explain what the difference is between the discharging to the boat canal and discharging to the 6-foot contour line of the river, itself?

A. Well, the difference is the discharge to the boat canal is taking place into a narrow, poorly mixed and with very low flow, part of the -- not even actually part of the river, but canal that is tributary to the river, whereas the discharge to the 6-foot contour line gets the discharge out into the best mixed part of the Caloosahatchee River. And so, by definition, it provides for a much better dispersal of pollutant load and, therefore, takes advantage of the river's ability to handle that pollutant load.

Q. Were any studies done, to your knowledge, of the difference between these two discharge points?

A. Yes, there was a document that has been listed as the

1981 Wasteload Allocation Study, and it is titled, Caloosahatchee River Wasteload Allocation Document, Lee County, January, 1981, which is Government Exhibit 349.

Q. And what pertinent parts of that study would you draw to our attention, sir?

A. Several. First would be on what should be page 10, although I believe the page number is missing on this copy. First would be the second paragraph, Waterway Estates STP, although discharging only about 10 percent of the flow of the Fort Myers Central STP still demonstrated localized build-ups.

Q. Let's start with STP, sir. What does that mean?

A. Sewage treatment plant.

Q. What is localized build-ups means?

A. Well, what that means is what the effort is -- the study is doing is looking at the tendency for effluent concentration to build up in the area of a particular discharge. This is going to -- this will give you an idea, will give the regulatory body an idea as to whether or not the particular level of nutrient discharge is going to be acceptable or if the nutrient levels will build up to a point where they would become a concern.

Q. You mentioned regulatory body. Who published this study?

A. This was published by the State of Florida.

MR. JACOBS: I'd like to move 349 into evidence at this time, Your Honor.

THE COURT: It will be received.

BY MR. JACOBS:

Q. Any other portions of Exhibit 349 that you would like to draw to our attention that served as a foundation for your conclusions, sir?

A. On page 12, the last paragraph, there is a mention that the Waterway Estates Treatment Plant was eliminated from further modeling due to the assumed tie-in to the Cape Coral Facility and the assumed impracticality of upgrading to AWT and relocating the outfall for such a small flow.

Q. Any other portions of this report that you would like to bring to the Court's attention?

A. One page, that same page 10, actually two paragraphs down, the fouth paragraph, beginning in the middle of the paragraph, the other dischargers, parentheses, Fort Myers Central, Cape coral and Waterway Estates, besides needing to upgrade to nutrient removal, would also need to relocate their outfalls.

Q. What does "upgrade to nutrient removal" mean?

A. In particular, would be to put in place AWT treatment.

Q. Advanced wastewater treatment?

A. Yes.

Q. Okay. And this study was performed at what time, sir?

A. The actual document was published in January of 1981.

Q. Presumably the study took place somewhat prior to that?

A. Somewhat prior to that, and I believe it was based on monitoring that took place in the late 1970's and perhaps as late as 1980.

Q. To what cause or causes do you attribute the unpermitted discharges and the discharges at the unpermitted locations, Mr. Klingenstein, in your opinion?

A. Failure to either eliminate the discharge or to upgrade the plant and relocate the outfall.

Q. In your opinion, were these violations serious?

A. Yes, I believe they were.

Q. And on what data do you base this opinion?

A. Again, on Government Exhibit 349, Government Exhibit 422. Primarily those two.

Q. Anything in 422 that you would like to call to the Court's attention?

If not, would you just identify it for the record?

A. No, we could certainly call something to the Court's attention.

422 is the Caloosahatchee River water quality based effluent limitations document.

MR. BULLOCK: Objection. Is 422 in evidence?

MR. JACOBS: I'll move it in at this time.

THE COURT: Okay. It will be received.
THE WITNESS: On page --
THE COURT: Do you have a question you want to ask him?
MR. JACOBS: Yes. He was about to speak, I think.
THE COURT: What was your question?
MR. JACOBS: The question was, any particular information in 422 that you would like to bring to the Court's attention?
MR. BULLOCK: Your Honor --
THE COURT: That's kind of open-ended.
Why don't you ask him a question that means something here?
MR. JACOBS: Very well, sir.
BY MR. JACOBS:
Q. Mr. Klingenstein, you said that you've relied in part on Government Exhibit 422 in terms of coming to the conclusion that the unpermitted discharges and the discharges to the improper location were serious, and you said that there were portions of 422 that you relied upon to draw that conclusion.
What particular portions of 422 did you rely upon to draw that conclusion?
A. Well, if we look at page 15, the fourth paragraph on that page, in the middle of that paragraph, the shallows

near the Waterway Estates outfall were most impacted as levels greater than 20 micrograms per liter were recorded.
Likewise, on page 16, design runs for relocating the City of Cape Coral and Waterway Estates discharges to beyond the 6-foot contour line reduced their impacts considerably.
Q. Let's take them one at time and put them in layman's terms, please, starting on page 15 in the middle of the fourth paragraph on the page.
A. On page 15, what it's referring to is that, in fact, because the area at the point of discharge, the old point of discharge for the Waterway Estates Plant was poorly mixed, this study projected pretty severe impacts on that area because the effluent would not be dispersed and, in particular, what's being referred to here is levels of chlorophyl A, which is a measure of changes that are potentially occurring in the plant population, if you would, the aquatic plant population in the estuary.
Q. Now, flipping to page 16, the second full paragraph, I believe, is where you highlighted the portion you relied upon. Would you put that in layman's terms, as well?
A. That's basically saying, if you take the outfall and run a line out to the 6-foot contour out into the deep part of the Caloosahatchee River, you'll reduce that -- you'll very significantly reduce that impact, you'll get the effluent out of that poorly mixed, quiet area, out into the

bulk of the river, if you will.
THE COURT: That's the first full paragraph, page 16?
THE WITNESS: Yes, sir.
BY MR. JACOBS:
Q. Now, Mr. Klingenstein, did you, also, have the opportunity to examine the permit effluent violations that the Court has held took place from July 1991, to March of 1992 at the Waterway Estates Plant?
A. Yes, I did.
Q. And would you describe these violations, please?
A. These were violations of whole effluent toxicity and total nitrogen limits.
Q. And what data did you review in coming to those conclusions?
A. Both the summary of violations and the underlying DMR's.
Q. And what about the permit for the plant?
A. Yes, sir, I reviewed that, as well.
MR. JACOBS: At this time, Your Honor, I'd like to move the permit into evidence. That's Exhibit 399.
Mr. Klingenstein, you reviewed the DMR's, did you?
THE WITNESS: Yes, I did.
THE COURT: I will receive Exhibit 399.
MR. JACOBS: Thank you, Your Honor.

And the DMR's are Exhibits 454, 458, 460, 461, 464, 467, 469, 470, 471, 472, 473 and 477.
I'd ask the Court to accept those exhibits into evidence at this time, as well, please.
THE COURT: They'll be received.
MR. BULLOCK: If the Court please, the same objection for the record as to the cover pages.
THE COURT: To the cover letter? All right. Same ruling. I'll overrule the objection.
They'll be received.
BY MR. JACOBS:
Q. Mr. Klingenstein, do you have an opinion as to the seriousness of the permit effluent violations at the Waterway Estates Plant?
A. Yes, I believe they were serious.
Q. And why is that?
A. There were discharges in excess of the permit limits to a water body, that even though the outfall had been relocated, was still one that was considered to be threatened and, therefore, of concern.
Q. And what data did you rely upon, if any, to form that conclusion?
A. Again, both of the previously cited 349 and 422.
Q. Now, Mr. Klingenstein, did you have the opportunity to review what alternatives, if any, the Defendants could have

pursued to prevent the violations at the Waterway Estates Plant?
A. Yes, I did.
Q. What opinions, if any, did you draw?
A. That there were a number of options that were available to Florida Cities to address those violations.
Q. Making reference as you see fit, Mr. Klingenstein, to exhibit 597-D as in dog, 3 — let me ask you first, do you recognize this exhibit?
A. Yes, I do.
Q. Would you identify it for the record?
A. This is a timeline for various discharge alternatives for the Waterway Estates Plant. It was prepared under my direction.
Q. What alternatives existed at this plant, sir?
A. Well, first, much as with the Carrollwood plant, connection to another utility was a possibility.
In this case, a private utility, North Port Myers Utility was, in fact, contacted by Florida Cities, but no agreement was reached with North Port Myers. It did appear that North Port Myers had the capacity to accept wastewater from the Waterway Estates Plant at some time in mid 1988.
Q. Was that a technically and technological feasible alternative?
A. Yes.

Q. And the North Port Myers Utilities, do you know what method of discharge they used for their effluent?
A. I believe they have a non-surface water discharge that, I believe, uses spray irrigation and has a deep well, as well.
Q. Is there any surface water discharge, then, from this plant to the Caloosahatchee?
A. From the North Port Myers Utility? No, not to my knowledge.
Q. Any technical or technological reason why connecting to the North Port Myers Utility Plant was not an option at this time?
A. No.
Q. When, in 1988, did it become an option, to your knowledge?
A. Mid 1988. I believe, August 1988.
Q. Were there any other alternatives available to the Defendants to preclude the violations at the Waterway Estates Plant?
A. Certainly either deep well injection or land application would have been possibilities. These appear not to have been investigated to any great degree, and, in particular, seems to be born out by US Exhibit or Government Exhibit 371.
Q. Did you rely on any particular portions of Government

Exhibit 371?
A. Yes, I did.
MR. JACOBS: I'd like to move 371 into evidence at this time.
THE COURT: It will be received.
MR. JACOBS: I think you might have it on the bench, Your Honor.
THE COURT: All right.
MR. JACOBS: Do you, also, have it, Mr. Klingenstein?
THE WITNESS: Yes.
THE COURT: Did you offer 597-D-3? I don't think you did. Did you intend to offer it?
MR. JACOBS: I do, Your Honor. Thank you.
THE COURT: It will be received.
BY MR. JACOBS:
Q. Now, what portion or portions of 371 did you rely upon, Mr. Klingenstein?
A. There in the last full paragraph on the first page of this document, beneath the line, total project costs, there is a line that begins, there are two other alternatives that were not explored in adequate detail within the ESE preliminary engineering report. ESE did evaluate in a very preliminary nature the costs and time constraints with deep well injection, and goes on to describe the use of deep well

injection.
Q. What's "ESE," Mr. Klingenstein?
A. ESE was one of Florida Cities' consultants.
Q. And who wrote this memorandum?
A. This memo was written by a Mr. Robert French to Mr. Tony Reeves, and it's dated October 27th, 1987.
MR. JACOBS: For the record, both of these witnesses are unavailable. Mr. Reeves pled the Fifth Amendment and Mr. French now resides in Australia.
BY MR. JACOBS:
Q. Mr. Klingenstein, is it your interpretation that Mr. French is taking issue with the ESE report?
MR. BULLOCK: If the Court please, Your Honor, leading.
THE COURT: Just a moment.
Well, it is, but I'm going to permit it. I'll overrule it.
THE WITNESS: Certainly seems to be saying that the alternatives, the two alternatives he's referring to were looked at only in a very preliminary fashion.
BY MR. JACOBS:
Q. Any other portions of Exhibit 371 that you've relied upon, in particular?
A. On page — the second page — I'm sorry — perhaps — on the bottom of the third page is apparently a wrap-up, to

a certain degree, that begins, as we've discussed there are numerous pros and cons for each of the alternatives evaluated. Deep well injection permitting is time consuming and until the well's installed and tested there's no guarantee the expenditure will be rewarded —

THE COURT: You're going a little bit fast.

THE WITNESS: I'm sorry, sir.

Deep well injection permitting is time consuming and until the well's installed and tested there's no guarantee the expenditure will be rewarded as an anticipated. ANT facility proposed by ESE utilizes latest technology available to conserve space and — it's difficult to read because it's punched through — effect a degree of treatment required for discharge for the Caloosahatchee River. Connection to the North Port Myers Utility System involves potential recovery —

THE COURT: You know, you're going to wear out my Court reporter here.

THE WITNESS: Yes, sir.

THE COURT: A little bit slower.

THE WITNESS: Connection to the North Port Myers Utility System involves the potential recovery of some of our expenditures through pay back agreements, as well as salvage value of the property where the existing Waterway Estates Plant is located. On the downside, Florida Cities

Water Company users would be required to pay the fees required for the operation and maintenance and capital expenditures of Florida Cities Water Company, as well as the user charges of $2.62 per thousand gallons to North Port Myers Utilities.

And, then, the final paragraph explains how Florida Cities Water Company employees had identified a different alternative than identified by ESE, which involved the upgrade of the facility through the utilization of an existing treatment unit coming, I believe, from the Fiesta Village Treatment Plant, and the — one of the particular advantages that was cited, and this is in the second to last full paragraph on that page, is the existing treatment units which are currently inactive at the Fiesta Village Plant could be maintained in the overall company rate base, and most importantly, capital cost is less than any of the other alternatives evaluated. Based on these advantages we would recommend that this alternative be pursued as the most cost effective option available.

BY MR. JACOBS:

Q. Can you tell me, Mr. Klingenstein, was that memorandum written at a time when the unpermitted discharges had already begun?

A. Yes, it was.

Q. Did you see any reference in this memorandum to

compliance with the law?

A. No.

Q. Let's now focus on the discharges to the wrong location, the boat canal.

How far did the Defendants have to move the discharge in order to have the outfall point at the 6-foot contour line instead of on the shore of the boat canal as you've depicted?

A. I believe the total length of the new outfall was something in the order of 2600 feet.

Q. Were there any technological or technical reasons which prevented the Defendants from moving the discharge point by the effective date of the permit, which was November 1st, 1989?

MR. HIRD: Your Honor, I'd like to object to the form and the use of the word "Defendants" as it assumes Avatar Holdings had obligation and responsibility to do that. To that extent it assumes facts not in evidence and I would like him to rephrase the questions to refer to Florida Cities.

MR. JACOBS: Your Honor, even with Mr. Hird's own statements, some of the discharges at the wrong location are still in existence with respect to Avatar Holdings, so I think I'm entitled to certainly — I respect his earlier objection with respect to the unpermitted discharges, but

there are some discharges at the location —

THE COURT: I'll overrule the objection.

BY MR. JACOBS:

Q. Do you recall the question, sir?

A. No. If you could repeat it, please?

Q. Were there any technological or technical reasons which prevented the Defendants from moving the discharge point by the effective date of the new permit, November 1st, 1989?

A. No.

Q. Turning now to the effluent violations at the Waterway Estates Plant, what, if anything, could have been done to prevent these violations?

A. Again, if either one of these options had been put in place to eliminate the discharge or if, in fact, the plant had been upgraded and the outfall relocated in a more timely fashion, then the violations would have most likely been avoided.

Q. And in your opinion, is there any technical or technological reasons why the upgrade in outfall could not have been moved in a timely fashion?

A. No.

Q. Going back to Exhibit 597-D-3, you mentioned, I believe, that North Port Myers uses the deep well injection and also uses spray irrigation. On D-3 you've referenced a

land application. I just want to clarify; is land application another word for spray irrigation?
A. Yes, it is.
Q. Did you rely on any data or documentation in terms of your conclusion that deep well injection and land application could have been used at Waterway Estates?
A. Certainly, that previously cited Government Exhibit 371.
Q. Do you have an understanding as to whether Florida Cities permit renewal was denied in 1986?
A. Yes, I do.
Q. And what is your understanding?
A. That, in fact, it was denied in 1986, effective, I believe, as I stated previously, January 1987.
Q. And do you have any knowledge as to when they applied for the permit or the renewal of the permit, they indicated where the intended outfall would be?
A. At the time that the — that they applied, that the permit renewal was denied, I believe the indication was that they was to discharge into the canal.
Q. Do you have an understanding as to whether they represented at the time they applied for the permit renewal that they would be upgrading to AWT standards?
A. That I do not recall.
Q. Now, did you have occasion to review the process by

which Florida Cities and Avatar Holdings did eventually begin the construction of the AWT plant and the movement of the outfall —

MR. HIRD: Objection. It assumes Avatar Holdings began the construction and there's no evidence that Avatar Holdings would be involved with the construction.

MR. JACOBS: There will be.

THE COURT: Well, does he know that? Does this witness know that?

MR. JACOBS: That's a fair distinction.

THE COURT: I'll sustain the objection at this point.

BY MR. JACOBS:

Q. I could ask the witness, do you have any knowledge as to whether Avatar Holdings was involved in the process through which the plant was upgraded to AWT standards and the outfall was moved?
A. Only to the extent that it —

MR. HIRD: I'd like to object. It calls for hearsay if it's not personal knowledge. This is not where he's testifying as an expert. He's being asked to testify as to personal knowledge of involvement in a company in a construction project, and clearly is not — is outside the scope of his expertise and, therefore, I think it's —

THE COURT: I don't know — he's not being offered as

a witness for the purpose of implicating Avatar, I don't believe, and so I'm going to ask that you try to skirt that area —

MR. JACOBS: I will try, Your Honor.

THE COURT: — and avoid that area.

BY MR. JACOBS:

Q. Now, Mr. Klingenstein, did you have the occasion to review the step-by-step process that Florida Cities Water Company engaged in, in upgrading the plant to AWT standards and moving the outfall?
A. Yes, I did.
Q. And are you able to say in what year Florida Cities actually did start that process?
A. Well, the process itself began in 1987, or appears to have begun in 1987, when preliminary engineering was carried out and this resulted in the generation of a preliminary engineering report in mid 1987.

Florida Cities appears to have made a decision on what option to pursue at the end of 1987, and then began the process of hiring an engineer to carry out the detailed design of the plant.

Ultimately, the selection of an engineer and the award of a notice to proceed did not occur until, if I recall correctly, mid 1990, and once the contractor was able to get on site and all of the necessary paperwork and permitting

had been completed, actual construction took place in '91, and substantially was done in mid '92, with final sign-off, I believe, by the State, early in 1993.
Q. Tell me, again, the process started when?
A. Process started in 1987.
Q. Do you know what month?
A. Certainly, it appears that in early 1987, perhaps February, Florida Cities was taking the actions necessary to hire a preliminary engineering firm.
Q. Mr. Klingenstein, were you present at the deposition testimony of the Florida Cities Water Company technical expert, Mr. Douglas Smith?
A. Yes, I was.

THE COURT: Just a moment.

MR. BULLOCK: Your Honor, this timeline is not a part of Mr. Klingenstein's report, it was not produced to the Defendants until last week. I had come to Florida to prepare, and I didn't see this until over the weekend and we object to this and object to it being produced and used so late in time.

MR. HIRD: Join in the objection, Your Honor.

MR. JACOBS: Your Honor, this, indeed, is not part of Mr. Klingenstein's report. This is a graphic drawn from their expert's report, and I have questions about Mr. Smith's testimony that I would like to ask

Mr. Klingenstein his opinion of. And the graphic was designed in order to illustrate both Mr. Smith's testimony and Mr. Klingenstein's testimony, some of which will coincide, and the purpose of the exhibit is to highlight where the experts agree and where they don't, for what it's worth.

MR. BULLOCK: Sounds like from that representation that Mr. Klingenstein has somewhat expanded the basis of the report after discovery is closed and after he's prepared his own record.

Again, we didn't see this until last week, were unaware of it, and if he's going to ask his opinion from it, regardless of whether or not it's in the report, it's going to go to the basis of his expert testimony, which is then being expanded and we move for its exclusion.

THE COURT: You're asking this -- you're asking your expert to opine with respect to the opinions of the opposing expert; correct?

MR. JACOBS: Yes, Your Honor, which I believe the opposing expert will have the opportunity to do, since he'll be called.

THE COURT: Is he going to do that?

MR. JACOBS: He did in deposition testimony.

THE COURT: I mean, is that -- is that a part of -- well, you know, what's good for the goose is good for the

gander. I'm just trying to look ahead now and see where we are going with this --

MR. BULLOCK: Your Honor --

THE COURT: In other words, are you going to be attempting to elicit testimony from your expert, which seeks to comment upon this -- Mr. Klingenstein's testimony? And if it is not a part of your expert's report and so forth, then I assume the same objection would be applicable.

I'm just trying to determine where we are going.

MR. JACOBS: I'll stipulate if they're not going to comment on my -- if they're not going to have their expert testify about my expert's testimony, I'll withdraw the exhibit and this line of questioning.

MR. BULLOCK: The Court's indulgence for just a second, Your Honor?

(Pause.)

Your Honor, Mr. Smith is not going to do any comparison of his testimony to Mr. Klingenstein's testimony. He's going to talk about the steps that were necessary to go through this process, but he's not going to do any comparison of those numbers compared to Mr. Klingenstein's testimony or his chart.

THE COURT: Okay. I think you should be restricted to his report and the exhibits that be -- the documents that he's already testified or which he referred

to in his report, so I'm going to sustain the objection.

MR. JACOBS: I understand.

We'll withdraw the exhibit at this time, reserve the right to reintroduce it during Mr. Smith's testimony.

MR. BULLOCK: Your Honor, if Mr. Jacobs intends to ask Mr. Smith comparison questions on cross-examination, I want the report to be clear so that there was no indication that we were somehow misleading the Court. Mr. Smith -- Mr. Jacobs asked Mr. Smith those questions on cross-examination. That's a different ball game.

THE COURT: Well, if he -- okay. If he asks questions of Mr. Smith, that opens the door to -- well --

MR. BULLOCK: I'll withdraw that, Your Honor.

THE COURT: Go ahead.

BY MR. JACOBS:

Q. Mr. Klingenstein, did you have occasion to review step-by-step the process whereby the Florida Cities Water Company upgraded the plant and moved the outfall?

A. Yes, I did.

Q. Did you have occasion to reach a conclusion as to whether that process proceeded as quickly as possible?

A. Yes, I did. My conclusion was that while the construction itself as in once ground was broken did take place in a fairly expeditious manner, that the process of deciding what option would be pursued and the process of

selection of engineers and the process of completing the necessary permit applications in an effective manner was somewhat slower than it could have been and resulted in delays in the completion of the project.

Q. Are you aware of when EPA actually notified the Florida Cities Water Company of the intended denial of the '86 permit application?

A. Yes, I believe it was in mid 1986.

Q. And are you aware how much time it took Florida Cities Water Company to decide what they were going to do about that?

A. Well, by all accounts it wasn't until very late in 1987, I would say basically December 1987, before it appears a decision was made as to specifically what solution would be put in place.

Q. And that's where Government Exhibit 371 comes into play, they're evaluating the options; is that correct?

A. Yes.

Q. And when was the construction completed and the outfall moved?

A. The outfall was moved in mid 1991. Substantial completion of construction at the plant was apparently -- I want to say somewhere in the March -- April, rather, to June time frame of 1992. And then the last bits were finished up in late 1992, and State sign-off took place in '93, I

believe, February, 1993.
Q. So, is it fair to say that by roughly April of '92, Florida Cities was in compliance with the NPDES permit that was issued when?
A. Yes, that is a fair statement, they were in compliance with the permit that had become effective in November of 1989.
Q. That date is represented on 597-D-3?
A. Yes.
Q. And you've represented the in-service date of the 6-foot contour line on the exhibit, as well?
A. Yes, I believe we have.
It is in 1991.
Q. And I see you have represented that in February of '93, the company, that is to say, Florida Cities Water Company has certified that the AWT upgrade is complete; is that correct?
A. That was, yes, that was the State certification process, that the construction project was completed.
Q. Now, in your opinion, sir, did this all take an appropriate length of time?
A. No. I believe this took more time than it should have.
Q. And where were the delays, in your opinion?
A. I believe the delays were in the process of deciding

on what option to pursue, there were delays in the negotiation with contractors and with the engineering firms as to responsibilities, particularly the engineering firms, and there were delays that appear to have resulted from incomplete -- well, inadequate completion of permit applications or the application for construction permits.
Q. And on what data or documentation do you base these conclusions, sir?
A. Government Exhibits 363, 367, again 371, 372, 374, 375, 391, 406, 411, 412, 418, 424, 425, 431, 437, 442, 443, 444, 456, 475.
MR. JACOBS: Move those exhibits into evidence at this time, please, Your Honor.
MR. HIRD: Your Honor, with all indulgence, Mr. Klingenstein read those exhibits so quickly, and I don't think we were able to get them all down.
THE COURT: All right.
Ms. Cole, did you get all those?
MR. JACOBS: I'll be happy to read them back.
THE COURT: Why don't we have Ms. Cole do it and that way we can check and make sure the Court has them right, too.
THE CLERK: 363, 367, 371 which has already been admitted, 372, 374, 375, 391, 406, 411, 412, 418, 424, 425, 431, 437, 442, 443, 444, 456, and 475. Is.

MR. HIRD: Could we have a moment to check the exhibit list to see if there's any objection?
THE COURT: Yes.
(Pause.)
MR. BULLOCK: Florida Cities has no objection.
MR. HIRD: Avatar has no objections.
THE COURT: All right. They'll be received.
BY MR. JACOBS:
Q. Mr. Klingenstein, in your opinion, when could this process have actually started?
A. Well, specifically, this process could have started as soon as Florida Cities became aware of the fact that they were not going to be allowed to continue to discharge into the canal. Given the fact that the 1981 wasteload allocation process took place and identified the need for movement of the outfall -- relocation of the outfall, and even though a zero wasteload allocation was put forth in that document, because there was the presumption at that point in time that Florida Cities was going to tie in with Cape Coral into a regional facility.
When it became apparent that that regional facility was not going to be constructed and that Florida Cities would need to continue to discharge on their own, I would assume at that point in time Florida Cities would have wanted to have proceeded to begin to identify what option or

options they had and which one they needed to pursue in order to address their situation.
Q. And what was that point and time, what year, to your knowledge, did it become apparent that the regional facility was not going to be built?
A. Based on the documents I've seen, it seems like 1982 or 1983, the regional facility was becoming very unlikely.
MR. JACOBS: Your Honor, Mr. Klingenstein has testified that he's relied on summaries of violations. These are summaries that have already been filed in the context of the summary judgment papers, but I would like to move them into evidence at this point. They are Government Exhibits 1, 255, and --
THE COURT: Wait a minute. You have them here?
MR. JACOBS: Yes, sir.
THE COURT: The same as these other exhibits, you are just saying that they were previously relied upon?
MR. JACOBS: Yes.
THE COURT: Okay. Go ahead.
MR. JACOBS: Government 1, 255 and 348.
MR. BULLOCK: If the Court please, Your Honor, these were attached to Government's summary judgment motion and prepared by an EPA employee, and we object to any information that would have appeared that Mr. Kwan, the EPA employee who prepared these documents, would have put in

there that would not have been on DMR's, just numbers of violations.

If Plaintiff wants to produce Mr. Kwan to go through his own tables, that's fine, but relying on this other documentation without his own personal knowledge of these days of violations, which do not appear in the information which Florida Cities filed with EPA, we would believe would be outside the scope that Mr. Klingenstein would testify.

MR. JACOBS: Your Honor, if I may?

THE COURT: Yes, sir.

MR. JACOBS: First of all, with respect to Government Exhibit 1, there's been no exception or objection noted by the Defendants. Likewise, with 255, based on my list, and likewise, with 348.

MR. BULLOCK: Your Honor, we have no objections as to those columns which list issues such as date, parameter, monthly average and daily maximum, reported exceedents and column entitled agent. We do object to the columns that are headed, do not report, actual exceedents and quote "penalty days".

THE COURT: All right. Just a minute.

I'm looking for Florida Cities' objections to Plaintiff's exhibits. Do you have that —

THE CLERK: Yes, sir, I gave you a copy.

THE COURT: I don't see that.

THE CLERK: Government's objection?

THE COURT: No, I'm talking about Florida Cities objections to the United States' Exhibits. I've got a whole room of stuff that was furnished this morning, but I don't have — somebody direct me to the list of objections that Florida Cities has made to the exhibits of the United States.

MR. JACOBS: Your Honor, I'd be happy to loan you mine for a moment.

THE COURT: Missed it again. Just a minute.

MR. JACOBS: I've got Avatar's, as well.

Well, I've got Avatar's.

THE COURT: Let me see the Florida Cities'.

MR. BULLOCK: Your Honor, let me hand up a copy. I'll withdraw my objection.

THE COURT: All right. Do you have an extra copy?

MR. BULLOCK: Extra copy?

THE COURT: I don't know why I didn't have a copy unless it wasn't submitted.

THE CLERK: Do you have the original for filing?

MR. BULLOCK: We'll file it and give it to you. I'll withdraw as to those.

THE COURT: All right. 1, 255 and 348 will be received.

Do you have something — did you intend to pass up this letter?

MR. BULLOCK: I'm sorry, Your Honor. No, I do not.

THE COURT: All right.

MR. JACOBS: At this time, Your Honor, we have introduced a number of pieces of Mr. Klingenstein's report at one time or another, but at this time we'd like to move 597 into evidence in its entirety.

THE COURT: It will be received.

MR. JACOBS: Thank you.

And finally, we have focused specifically at different points in Mr. Klingenstein's testimony on particular exhibits, but as you may recall, we started out by asking him to list all of the exhibits that he relied upon in any way, form or fashion and I would like to move all of those into evidence with the exception, obviously, of the ones that we've addressed already.

MR. HIRD: Your Honor, this is, obviously, I think it would make sense if he gave us the list of numbers and during the break we can look at them and come back and see.

THE COURT: I don't know what you are offering. I would have to go back. We would all have to go back to the numbers that he's listed, so I think that — I think his request is reasonable.

MR. JACOBS: Understood. We kept track. We'll be happy to go down the remaining ones at the Court's pleasure.

THE COURT: We're going to take a 15-minute recess and we'll break and you can get started.

Are you through?

MR. JACOBS: With the exception of that, yes, sir, with Mr. Klingenstein at this time.

THE COURT: All right. You're through with his direct?

MR. JACOBS: Yes, sir.

THE COURT: All right. Well, then, perhaps this would be a good time to take 15 minutes.

THE MARSHAL: All rise. We'll be in recess for 15 minutes.

(Thereupon, a brief recess was taken, after which the following proceedings were had:)

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MR. HIRD: Your Honor, during the recess, we attempted to go through the exhibit list. There appear to be several hundred exhibits that Mr. Jacobs is attempting to move into evidence at this time. It would take a long time for us to go through them on a one-by-one basis.

Accordingly, we proposed to the government that we continue with the examination, and by the morning of the next trial day, we can indicate whether this has been resolved and how it has been resolved. The government has asked instead that we go by one by one through each exhibit.

MR. JACOBS: I agree to a certain extent it's cumbersome, but I think it's timely in the sense that the witness has touched upon a number of the exhibits and a number of the --

THE COURT: Well, now, wait a minute. Are you talking about exhibits that he referred to at the beginning of his testimony?

MR. JACOBS: Yes, sir.

THE COURT: That wasn't several hundred, was it? Or was it?

MR. JACOBS: I didn't think they were that long. And they were a series, so I don't think it was that long a process.

THE COURT: Well, maybe -- I quit writing at one point. So --

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MR. JACOBS: What we've done during the break is we've broken that list down into a subset of the ones that have not already been admitted. And I would just propose that I read those into evidence. There are not that many objections to these exhibits, according to the objection list submitted by the defendants. I just think it's as good a time as any to go through them.

THE COURT: How long is that going to take?

MR. JACOBS: Depending on the number of objections -- I told the court reporter I would read slowly -- but I think I can get through it in seven or eight minutes.

THE COURT: You can get through within seven or eight minutes?

MR. JACOBS: The list, yes, sir.

THE COURT: The list? I'm talking about totally.

MR. JACOBS: I can't forecast the number of objections, but many of them appear from the defendants' objection list to be unobjectionable.

THE COURT: Well, I'm not going to do that now. Well, let me think just a minute.

Well, let's go ahead and -- I want to see how this is going to go first. All right. You offer what?

MR. JACOBS: The government offers Exhibits 2, 3, 5, 6 --

THE COURT: Well, now, wait a minute --

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MR. HIRD: Your Honor, with respect to Exhibit 3, it's a newspaper editorial entitled "Sewage Problems." It is undated. We would object. It's hearsay and irrelevant.

THE COURT: All right. The first one that is objected to is 3?

You've offered what, 2?

MR. JACOBS: 2, yes, sir; 2 and then 3.

THE COURT: Well, 2 will be received.

(Government's Exhibit Number 2 was received into evidence.)

THE COURT: All right. They're offering 3, and there's an objection.

MR. JACOBS: Your Honor, if it would help save some time, we'll just withdraw 3.

THE COURT: Good. Next?

MR. JACOBS: 5.

THE COURT: It will be received -- well, wait a minute. If I'm going too fast, let me know.

MR. JACOBS: 6.

THE COURT: 5 will be received.

(Government's Exhibit Number 5 was received into evidence.)

THE COURT: 6 will be received.

(Government's Exhibit Number 6 was received into evidence.)

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MR. JACOBS: 7.

MR. HIRD: Objection, handwritten notes, undated. It's not clear the origin or the source of the relationship with the documents. So hearsay objection as well as relating to potentially barred claims or barred claims.

MR. BULLOCK: We would also join on relevance, Your Honor.

MR. JACOBS: Judge, these would clearly come from the defendant or -- Florida Cities' files. I can't tell you at the moment whether Florida Cities' files are --

MR. BULLOCK: Your Honor, if I may, while Mr. Jacobs is looking and so that the record is clear, may we have a standing objection to all of these based on our earlier objection that these cover issues that you've already ruled on?

And I understand that Your Honor has already ruled, and I just want to make sure that we've preserved on the record having an objection to these documents on that basis --

THE COURT: On what basis?

MR. BULLOCK: The basis that these cover liability issues which you've already ruled upon in your earlier --

THE COURT: In other words, as to those documents and testimony that relate to violations which the Court has ruled in your favor on --

MR. BULLOCK: Correct.

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THE COURT: -- as far as the plaintiff being able to assert substantive violations.
MR. BULLOCK: That is correct.
THE COURT: All right.
MR. BULLOCK: And we would object, Your Honor, that they're totally irrelevant to the remainder of this case. We understand the Court's ruling and the basis of the plaintiff's offering them. I just want to make sure that our right to object is preserved on the record.
THE COURT: Yes. But, now, if there are documents -- I don't know how an appellate court is going to be able to determine -- if you don't make an objection to a particular document, I don't know how the appellate court is going to divine that that is something that necessarily relates -- well, I guess if it's clear that it relates to a violation that has -- for which the Court has found in your favor, then there's no problem.
If there's any gray area as to whether that document falls in that category, you're running a risk, I suppose, of waiving your right to object.
I'm perfectly agreeable to giving you a standing objection on the basis that you've indicated where it is clear that the testimony or the document relates only to violations that the Court has ruled in favor of the defendants on.
MR. BULLOCK: Your Honor, my only concern was I

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didn't want to sound like the Popping Jake coming up every five minutes making the same objection. If there's a way around it, fine. If not, then I will make --
THE COURT: Well, I hope there's a way around it.
MR. HIRD: Well, Your Honor, may I suggest that we just use a one- -- and we'll join in -- a one- or two-sentence code word?
THE COURT: A code?
MR. HIRD: A code word, "standard objection" or something like that?
THE COURT: How about Code 1?
MR. HIRD: Code 1? All right.
THE COURT: And we all know what we're talking about.
MR. JACOBS: Your Honor, I would point out if it's of help that the Court has indeed, as we all know, found for one or more of the defendants on certain of the claims that were in our second amended complaint, but the Court has equally found in its order of this morning that we are entitled to introduce history --
THE COURT: Well, I know that. I know that. And that's why I'm overruling their objection. They just want to preserve the record.
MR. BULLOCK: Well, Your Honor, let me make sure -- my understanding of the motions in limine and overruling the

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objections to the motions in limine, I have to -- in order to preserve the objection, I have to at least renew it on the record. And I'd rather not be caught in a situation where, you know, I am not renewing that.
THE COURT: Well, I understand. And I'm not prepared to advise you that you don't have an obligation to do that.
All right. So that's Code 1. All right.
So you have a standing -- well --
MR. BULLOCK: I at least have a truncated objection.
THE COURT: Yeah, you have a truncated objection.
MR. HIRD: And can we assume, Your Honor, so I don't have to jump up as well, that whenever he says Code 1, he's saying it for me as well?
THE COURT: Yes, yes. You can join in -- or you don't need to join in on the Code 1 objections. You will be deemed to have objected also unless you opt out of any individual objection. Okay.
All right. I have Exhibit 5. That's received. What's your next one, Exhibit 6?
THE CLERK: 6 was received.
MR. JACOBS: In that case, 7 --
THE COURT: Wait. Wait. Wait a minute. Did I receive 6?
THE CLERK: Yes, sir.

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MR. BULLOCK: And that was subject to a Code 1 objection.
MR. JACOBS: 6 was?
THE COURT: All right. Yes. 6 is received. Next?
MR. JACOBS: 7 were the handwritten notes which come from, I believe, based on the Bates stamp, an Avatar Holdings former officer.
MR. BULLOCK: The same objection, Your Honor.
MR. HIRD: Excuse me, Your Honor. May I consult?
(Discussion off the record.)
MR. HIRD: Your Honor, is this the initials JAC, if I may ask counsel?
MR. JACOBS: No. The Bates numbers appear to be from what we would call the Sharp documents.
MR. HIRD: Okay. Your Honor, we would object. This was from Mr. Sharp's personal office and not from Avatar Holdings' files. Mr. Jacobs subpoenaed Mr. Sharp's files individually after we indicated that we had no possession, custody, or control of those files.
MR. JACOBS: Mr. Sharp, if I might say, was the president, the chairman of the executive committee of the board of directors of Avatar Holdings and held numerous other positions with Avatar Holdings itself for an extended period of time.
I wouldn't by any means concede that this was a

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personal document. I would say that it was not produced by Avatar Holdings, which is why we subpoenaed it from Mr. Sharp's real estate company in New York.

THE COURT: All right. What is the objection that has been recorded?

MR. HIRD: There are several objections. One is hearsay. We don't have a -- we can't indicate that this is a regular --

THE COURT: Sustained.

MR. BULLOCK: Your Honor, I promise this is the last time I'm going to do this, which may be famous last words.

Back to Exhibit Number 6, Exhibit Number 6 carries information about several Florida Cities facilities which are not at issue in this lawsuit. And that would be an additional relevancy objection which we would make.

THE COURT: All right. Overruled.

MR. JACOBS: I hate to go back to 6 too, but neither party stated an objection to 6.

THE COURT: Well, as it stands right now, I've ruled in your favor. Do you want me to reconsider?

MR. JACOBS: No, Your Honor. Thank you. I'll move on quickly.

8.

MR. HIRD: The same objection as to 7, Your Honor.

MR. JACOBS: I would stipulate that the same facts

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apply, Your Honor.

THE COURT: All right. Sustained.

MR. JACOBS: 11.

MR. HIRD: Your Honor, I would -- first of all, there's a Code 1 objection. But I'd like to register a distinctly separate Avatar Holdings objection. We --

THE COURT: All right. Now, don't give me any objections other than what you've got in your objections for which you have --

MR. HIRD: This is in my objections, Your Honor.

THE COURT: All right.

MR. HIRD: And the separate objection is we object with respect to any document that may be used to prove Avatar Holdings' liability, that any document generated before the statute of limitations be used for that purpose.

We believe that numerous of the documents that are relied on in Mr. Klingenstein's report are documents that relate to a period before the statute of limitations.

Mr. Klingenstein has been allowed to talk about the history of violations, but not about Avatar Holdings' liability. And therefore, we think the documents that were generated prior to the statute of limitations should not be admitted with respect to the issue of Avatar Holdings' liability.

THE COURT: Okay. Well, I don't -- while -- I don't

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think that the fact that certain claims may be barred by the period of limitations, that that necessarily means that all activities and conduct which tends to show the relationship between parent and subsidiary are necessarily inadmissible.

MR. HIRD: I don't disagree with you, but I think it should be only on the evidence that relates to the specific time period and the specific violation at issue.

What the government is attempting to do with some of these exhibits -- I can certainly deal with it -- is to attempt to say well, there was a connection between Avatar Holdings and Florida Cities on some matter back in 1983 or whatever, therefore you should assume from that that Avatar Holdings caused the violations in 1991-92.

And I think what we're dealing with here is a wide range of very broad documents that have nothing to do with the specific violations that are left in the case against Avatar Holdings. And I think we're dealing with approximately a hundred documents.

MR. JACOBS: Your Honor, the story starts in 1980, and this is a 1983 document. And it relates directly to Avatar Holdings' role in the violations at Barefoot Bay.

THE COURT: Okay. Well, I think your objection is well stated. But I think for the reasons that I've indicated, I'm going to allow the document in, and I'll overrule your objection.

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MR. HIRD: Your Honor, for simplicity, can I call this Code 2?

THE COURT: Code 2? Sure.

(Government's Exhibit Number 11 was received into evidence.)

MR. JACOBS: 12.

THE COURT: I'll have to pass along this technique to the author of the manual for complex litigation.

MR. HIRD: Code 1 and Code 2, I believe, Your Honor.

THE COURT: On what exhibit?

MR. HIRD: 12.

THE COURT: 12? Okay. Overruled.

(Government's Exhibit Number 12 was received into evidence.)

MR. JACOBS: 13.

MR. HIRD: Code 1 and Code 2.

THE COURT: You can remain seated for these purposes.

Code what?

MR. HIRD: Code 1 and Code 2.

THE COURT: Okay. Overruled.

(Government's Exhibit Number 13 was received into evidence.)

MR. JACOBS: 14.

THE COURT: When I say overruled, they'll be

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received.
What's the next number?
MR. JACOBS: 14, Your Honor.
MR. HIRD: Code 1 and Code 2, Your Honor.
THE COURT: Overruled.
(Government's Exhibit Number 14 was received into evidence.)
MR. JACOBS: 15.
MR. HIRD: Code 2, Your Honor.
MR. BULLOCK: Code 1 as well, Your Honor.
THE COURT: Overruled.
(Government's Exhibit Number 15 was received into evidence.)
MR. JACOBS: 17.
MR. HIRD: Code 1 and Code 2, Your Honor.
MR. BULLOCK: Code 1 as well, Your Honor.
THE COURT: Overruled.
(Government's Exhibit Number 17 was received into evidence.)
MR. JACOBS: 18.
MR. HIRD: Code 1 and Code 2, Your Honor.
THE COURT: Overruled.
(Government's Exhibit Number 18 was received into evidence.)
MR. JACOBS: 19.

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MR. HIRD: Code 1 and Code 2, Your Honor.
MR. BULLOCK: Code 1, Your Honor.
THE COURT: Okay. Mr. Bullock, do you want to incorporate by reference --
MR. BULLOCK: That would be fine.
THE COURT: – or adopt cocounsel so only one of you will need to object?
MR. BULLOCK: Thank you.
THE COURT: Overruled.
(Government's Exhibit Number 19 was received into evidence.)
MR. JACOBS: 20.
MR. HIRD: Code 1 and Code 2, Your Honor.
THE COURT: Overruled.
(Government's Exhibit Number 20 was received into evidence.)
MR. JACOBS: 22.
MR. HIRD: Code 1 and Code 2 again, Your Honor.
THE COURT: Overruled.
(Government's Exhibit Number 22 was received into evidence.)
MR. JACOBS: 23.
MR. HIRD: Code 1 and Code 2 again, Your Honor.
THE COURT: Overruled.
(Government's Exhibit Number 23 was received into

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evidence.)
MR. JACOBS: 24.
MR. HIRD: Once again, Code 1 and Code 2.
THE COURT: Overruled.
(Government's Exhibit Number was 24 received into evidence.)
MR. JACOBS: 26.
MR. HIRD: Once again Code 1 and Code 2, Your Honor.
THE COURT: Maybe we ought to have a Code 3 that if you're silent – no. Okay.
Overruled.
(Government's Exhibit Number 26 was received into evidence.)
MR. JACOBS: 27.
MR. HIRD: Code 1 and Code 2, Your Honor.
THE COURT: Overruled.
(Government's Exhibit Number 27 was received into evidence.)
MR. JACOBS: 28.
MR. HIRD: Code 1, Code 2, and also a question about relevance. This relates to a potential purchase of property that was never purchased during the time period or never developed during the time period of the alleged violations.
It is a nonstarter, never raised to admit -- actually, it was, rather, during the time period of violations

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that Your Honor has already ruled in favor of the defendant. So it is way beyond the relevance of anything in the case or anything with respect to the history of violations.
Hearndon Properties was never developed; nothing was done; there was no homes attached from it; there was no pollution at that property. It's totally irrelevant.
MR. JACOBS: May I, Your Honor?
THE COURT: Yes, sir.
MR. JACOBS: This is a very important and revealing document. It reflect the prospective purchase of the neighboring site, one of the areas that Mr. Klingenstein referred to as being a possibility for disposal of effluent, whether by spray irrigation or percolation ponds or, for that matter, deep well.
And in fact, Avatar Holdings went ahead and purchased this property but never used it for effluent disposal purposes. It's highly relevant and highly revealing.
THE COURT: Overruled.
(Government's Exhibit Number 28 was received into evidence.)
MR. JACOBS: 29.
MR. HIRD: Code 1 and Code 2, Your Honor.
THE COURT: Overruled.
(Government's Exhibit Number 29 was received into evidence.)

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MR. JACOBS: 31.
MR. HIRD: Code 1 and Code 2, Your Honor.
THE COURT: Overruled.
(Government's Exhibit Number 31 was received into evidence.)
MR. JACOBS: 32.
MR. HIRD: Code 1 and Code 2, Your Honor.
THE COURT: Overruled.
(Government's Exhibit Number 32 was received into evidence.)
MR. JACOBS: 33.
MR. HIRD: Once again, Code 1 and Code 2.
THE COURT: Overruled.
(Government's Exhibit Number 33 was received into evidence.)
MR. JACOBS: 36.
MR. HIRD: Code 1 and Code 2, Your Honor.
THE COURT: Overruled.
(Government's Exhibit Number 36 was received into evidence.)
MR. JACOBS: 37.
MR. HIRD: Code 1 and Code 2, Your Honor.
THE COURT: Overruled.
(Government's Exhibit Number 37 was received into evidence.)

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MR. JACOBS: 39.
MR. HIRD: Code 1 and Code 2, Your Honor.
THE COURT: Overruled.
(Government's Exhibit Number 39 was received into evidence.)
MR. JACOBS: 40.
MR. HIRD: Code 1 and Code 2, Your Honor.
THE COURT: Overruled.
(Government's Exhibit Number 40 was received into evidence.)
MR. JACOBS: 41.
MR. HIRD: Code 1 and Code 2, Your Honor.
THE COURT: Overruled.
(Government's Exhibit Number 41 was received into evidence.)
MR. JACOBS: 43 through 47.
MR. HIRD: Each of these again is Code 1 and Code 2.
THE COURT: Overruled.
(Government's Exhibits Numbers 43 through 47 were received into evidence.)
MR. JACOBS: 49.
MR. HIRD: Once again, Your Honor, Code 1 and Code 2.
THE COURT: Overruled.
(Government's Exhibit Number 49 was received into evidence.)

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MR. JACOBS: 50.
MR. HIRD: Once again, Code 1 and Code 2, Your Honor.
THE COURT: Overruled.
(Government's Exhibit Number 50 was received into evidence.)
MR. JACOBS: 54 to 57.
MR. HIRD: Once again, Code 1 and Code 2. And I would also -- 55 and 56 relate to Hearndon, and I renew my objections on those two about that issue.
THE COURT: All right. Overruled.
(Government's Exhibits Numbers 54 through 57 were received into evidence.)
MR. JACOBS: 59.
MR. HIRD: Code 1 and Code 2.
THE COURT: Overruled.
(Government's Exhibit Number 59 was received into evidence.)
MR. JACOBS: 61.
MR. HIRD: Again, Code 1 and Code 2, Your Honor.
THE COURT: Overruled.
(Government's Exhibit Number 61 was received into evidence.)
MR. JACOBS: 64.

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MR. HIRD: Code 1 and Code 2, Your Honor.
THE COURT: Overruled.
(Government's Exhibit Number 64 was received into evidence.)
MR. JACOBS: 66 through 74.
MR. HIRD: Code 1 and Code 2 with respect to all of them.
THE COURT: Overruled.
(Government's Exhibits Numbers 66 through 74 were received into evidence.)
MR. JACOBS: 76 through 78.
MR. HIRD: These are all Code 2, Your Honor.
THE COURT: Overruled.
(Government's Exhibits Numbers 76 through 78 were received into evidence.)
MR. JACOBS: 84 to 101.
THE COURT: Just a moment, please.
All right.
MR. HIRD: Code 1 and Code 2 for all of them, Your Honor, except for 97, which is a Code 2 only.
THE COURT: All right.
MR. BULLOCK: Your Honor, as to 84 and 87, that would be also in a position of hearsay objection. Those contain two newspaper articles.
THE COURT: This is 84 and what?

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MR. BULLOCK: And 87.
MR. JACOBS: Would you like me to respond, Your Honor?
THE COURT: Yes.
MR. JACOBS: 84 is not simply a newspaper article, as was the case with the earlier newspaper article that I withdrew. This one has a distinct cover memo attached from an Avatar Utilities officer to an Avatar Holdings officer, copied to another Avatar Holdings officer. So to characterize it simply as a newspaper article is somewhat incomplete.
THE COURT: What about 87?
MR. JACOBS: 87 is simply a newspaper article, but it contains the handwritten name of an Avatar Holdings officer in the upper right-hand corner, FYI J. Sladkus, an Avatar Holdings officer. And based on the Bates number, it came from the files of Peter Sharp and Company, an Avatar Holdings officer.
MR. HIRD: I join in my colleague's objection to hearsay with respect to these two documents.
MR. JACOBS: And I can't bring Mr. Sladkus here today because he's pled the Fifth Amendment. Mr. Sharp is deceased.
THE COURT: You got that from taking Mr. Sharp's deposition?
MR. JACOBS: No. Mr. Sharp is deceased. We

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subpoenaed the records of Peter Sharp and Company, a real estate company in New York, which apparently had the files of the Avatar Holdings records that Mr. Sharp kept at that office. And that's how we got this document, to the best of my recollection.
THE COURT: I'll overrule the objections.
(Government's Exhibits Numbers 84 through 101 were received into evidence.)
MR. JACOBS: 103 to 115.
MR. HIRD: Your Honor, 103 to 108 are Code 1 and Code 2. 109 is Code 2. 110 through 115 are Code 1 and Code 2.
THE COURT: Overruled.
(Government's Exhibits Numbers 103 through 115 were received into evidence.)
MR. JACOBS: 117 to 119.
MR. HIRD: All three, Your Honor, are Code 1 and Code 2.
THE COURT: Overruled.
(Government's Exhibits Numbers 117 through 119 were received into evidence.)
MR. JACOBS: 122 to 126.
MR. HIRD: 122 through 124 are Code 1 and Code 2. 125 is Code 1 only, as is 126.
THE COURT: All right. Overruled.

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(Government's Exhibits Numbers 122 through 126 were received into evidence.)
MR. JACOBS: 128 to 136.
MR. HIRD: No objection, Your Honor, to 128. 129 is Code 1. There is also an objection that this was a privileged document that was inadvertently produced, and we therefore would call it back. A similar objection relates to 130, which is also a Code 1.
THE COURT: 130, is that a privilege objection also?
MR. HIRD: Yes, Your Honor. 129 and 130 were both privileged documents inadvertently produced, as is 136.
THE COURT: Are you talking about attorney-client?
MR. HIRD: Attorney-client privilege, Your Honor.
THE COURT: Has this been the subject of dispute?
MR. JACOBS: It has been, Your Honor, but it has never been raised before the magistrate. And I'm happy to address the issue if the Court would like to hear me at this time on that issue.
There are roughly 99 documents that have been objected to on the basis of inadvertent production that are now claimed to be privileged that were not claimed to be privileged at the time of their production. I'm happy to address the matter if the Court wishes me to be heard on it.
THE COURT: Well, the last one of these that I had, the magistrate judge ruled on the issues regarding privilege,

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and I'm wondering why this is just now coming before the Court.
These documents were, I gather, produced, but there is a claim that they were produced inadvertently. And how come this hasn't surfaced before now?
MR. JACOBS: I'd be happy – I can't answer that question because I think it behooves the defendant to explain why they did not bring this before the magistrate. I can certainly address the facts surrounding what they're calling the inadvertent production if you care to hear it, Your Honor.
THE COURT: Well, I want to start -- I want to know what the -- I want an answer to my question as to procedurally why we're at this point now during the trial of the case. Isn't there something that would have needed to be done, such as a motion to retrieve the documents -- was there a motion filed?
MR. BULLOCK: If the Court please, Your Honor, I can address some of these issues. But just so that the record is clear, Mr. Scroggin was involved in some of the correspondence back and forth. He will address the issue as well. So let me pass to him since he's an eyewitness. I just want to make sure that that doesn't become a question.
MR. SCROGGIN: Your Honor, this is an issue that arose early on in the discovery process, which has involved at least three rounds of producing hundreds of thousands of

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pages.

We were apprised by the Department of Justice early on that the Department of Justice wished us to respond promptly to their document requests, which Florida Cities at that time made every effort to do.

We informed the Department of Justice that in light of our prompt response, there might be some documents from the five or six different offices from which these documents were culled that inadvertently would be privileged. And we asked at that time that if any such documents were inadvertently produced, they be returned.

We had, at least according to my understanding, an informal but unwritten agreement that we would return such documents. In fact, from that first document production, Mr. Jacobs did in fact return a couple of documents with a smile kindly to me, pursuant to what I had understood was an ongoing agreement.

I wrote Mr. Jacobs, returning to him also a document that clearly was privileged and inadvertently produced by the government and in that letter memorialized what was Florida Cities' understanding of the ongoing agreement, that inadvertently documents produced in good faith in order to respond promptly, providing hundreds of thousands of pages of documents, would be returned rather than slow the process down, which would have involved weeks, perhaps a month or more

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of more careful review.

At this time we have requested and continue to request, when these documents have been produced in depositions, their return.

We are informed by the United States' representative and counsel that that agreement is no longer in effect or by their understanding was never in effect.

And that is not our understanding, and we have continued to the present moment to request the return of those documents which are clearly privileged.

THE COURT: Mr. Jacobs.

MR. JACOBS: Your Honor, if I may, we have gone through a number of rounds of document discovery. And in the first round I did, as Mr. Scroggin described, as a matter of courtesy and without even his request, hand him back documents that in my mind had been inadvertently produced. And there were a few of these. That was the first request for production of documents.

The second request for production of documents, we attempted to negotiate with Mr. Scroggin an agreement with respect to inadvertently produced documents. It was our position that it wasn't the -- the onus was not on the government to be screening these documents, the onus was on the defendant.

And we sent -- or, rather, Mr. Scroggin sent us a

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letter July 13th, 1994 -- which I would be happy to pass forward -- suggesting an agreement with respect -- a formal agreement with respect to the return of inadvertently produced documents without limitation.

And our response on July 22nd of 1994 was again, we can't be screening your documents, but in good faith, we'll return the first ten that you inadvertently produced, no questions asked. All you have to do is sign on the dotted line.

We didn't sign on his dotted line because it didn't want to be unlimited -- we didn't want the agreement to be unlimited. We didn't want to screen his documents.

He didn't sign on our dotted line apparently because he didn't want it to be limited to ten. So I dare say at the time that the --

THE COURT: What year was this?

MR. JACOBS: 1994, Your Honor.

At the time that they responded to our formal document request, which was Document Request Number 2, they submitted a formal response on July 18th, 1994, at which time there was no agreement whatsoever.

In fact, as we learn in first-year contracts, there was no meeting of the minds. There had been negotiation and absolutely no meeting of the minds.

The response came in. And what it said was you can

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come visit our six facilities, and we will produce for inspection and marking for copying as they are kept in the ordinary course of business inter alia all requested nonprivileged documents in defendant's possession, custody, and control. Defendant will present plaintiff with indexes of privileged documents at the time of inspection at the respective production sites or as soon thereafter as practicable.

That was July 18th, 1994.

On July 22nd, 1994, after verbal discussion with Mr. Scroggin, we set out a schedule for visiting these six facilities. The defendants suggested we come to six different facilities across the state of Florida, as it has the right to do, as opposed to accumulating the documents in a central location. And we began to inspect and mark the documents.

The system that had been set up was that we would take those little yellow stickums, and we'd flag the documents that we'd want copied at our expense, and the defendant would subsequently copy the documents and send them to us.

Now, at none of these six facilities that we went to visit did we receive a privilege list.

THE COURT: Just a moment.

(Discussion off the record.)

THE COURT: Go ahead.

MR. JACOBS: As I said, these inspections began on

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July 28th, 1994, and carried through into early August. And no privilege lists were produced, notwithstanding that the promise in the formal response dated July 18th -- that is to say, ten days before the first inspection began of the documents -- that such lists would be forthcoming.

We then, as I say, marked these documents for copying and awaited their copying at our expense in Washington. And ultimately, the documents were delivered to us copied in Washington, including, of course, the ones that the defendant now claims to be privileged.

We then, beginning in October of 1994, began to use the documents that we had inspected, marked, and had copied over the summer of '94. We began to use these at depositions and, I might add, without objection. And we did not even receive a privilege list until after we started to introduce these documents without objection at deposition. In fact, the privilege list didn't come in until April of '95.

This matter has never been raised with the magistrate, notwithstanding our many discovery disputes with the magistrate.

And I would call the Court's attention to Clifford Ray versus Cutter Laboratories, 746 F. Supp. 86, a published opinion by Judge Kovachevich of this court in which Judge Kovachevich adopts what's known as the majority rule as enunciated in Hartford Fire Insurance Company versus Garvey,

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109 FRD 323, the majority rule, she says, quote unquote, on inadvertent production.

The factors to be considered are: one, the reasonableness of the precautions to prevent inadvertent disclosure.

In this instance, Your Honor, I believe there were no precautions whatsoever taken. While I cannot personally say that I would agree that all 99 of these documents are privileged, some of them do bear markings that suggest that they would be, somewhat bold markings in from one to three places, suggesting that even the most superficial screening would have developed or divulged at least the suggestion that these were privileged and that they should be withheld or at least deserving of some careful scrutiny.

Number two, Judge Kovachevich says --

THE COURT: Excuse me just a moment.

Mr. Klingenstein, why don't you just step down? This is going to take a while. You can just have a seat out in the audience.

THE WITNESS: Thank you very much, Your Honor.

(The witness descended from the witness stand.)

MR. JACOBS: The second factor in the majority test as Judge Kovachevich has adopted it is the time taken to rectify the error.

I would suggest that first of all, the defendant had

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two bites at the apple. If it didn't want to screen it before it released them or before it produced them, it certainly could have screened them once we selected some of those very documents that it now claims are privileged before it boxed them up and sent them to us in Washington.

And, of course, we selected these documents beginning in late July and continuing into early August of '94. And as I stated, the privilege list didn't come out until roughly nine months later. So I dare say that the first two tests under Judge Kovachevich's ruling are -- simply cannot be met by the defendant.

Judge Kovachevich's third factor is the scope of discovery. Admittedly, the scope of discovery in this case has been rather vast.

Four, the extent of the disclosure. Well, this was not one in a million or one in a thousand. This was in the course of I would say clearly thousands of documents, roughly 5 to 10 percent of the documents that they're now claiming they produced are privileged. So I think the extent is rather dramatic.

And then finally, the overriding issue of fairness is what Judge Kovachevich calls the fifth factor in the majority rule.

Well, I think fairness would dictate that if there was some sort of emergency, some sort of immediate request

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that the documents be returned, that perhaps it would be unfair at this point in time.

But as the Court has noted, we're hearing for the first time at trial in the context of objections to an exhibit list that these documents are privileged.

And there were sporadic objections at depositions to some of these documents, but only after the documents had been used numerous times previously without objection at depositions. These same documents were used as evidence in the summary judgment proceedings. And the Court's order on that matter came out, as the Court knows, in November of '95.

So I dare say that I don't think at this point in time there is a fairness question that should take precedence over any of the other factors that Judge Kovachevich sets out in her ruling.

If the defendants wanted to wait until trial to raise this issue, I dare suggest perhaps their last opportunity might have been in the context of a motion in limine so that we were not faced in the middle of Mr. Klingenstein's testimony with this issue.

I might emphasize that many of these documents were authored or received by Mr. Getman, who has been introduced as the in-house counsel for Avatar Holdings, but in fact also serves in the capacity as -- has also served as vice president, senior vice president, and executive vice president

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at Avatar Holdings.
And in another context, when we came to a discovery dispute before the magistrate judge with respect to whether those documents had to be produced at all -- the ones that had not yet been produced, that is -- the magistrate judge noted in particular that just because Mr. Getman happened to have a law degree doesn't mean such documents were privileged.
MR. HIRD: Your Honor, may I respond to that last point? There is evidence that you will hear that Mr. Getman --
THE COURT: Yes, you may. Now you can respond.
MR. HIRD: I apologize, Your Honor.
THE COURT: Because I ordinarily don't allow counsel to interrupt someone in the process of making an argument, what is it that you've got to tell me right now before I recognize you when he gets through?
MR. HIRD: I apologize, Your Honor. I assumed he had just concluded --
THE COURT: Are you finished?
MR. JACOBS: No, Your Honor, but I will sum up quickly.
THE COURT: I'll recognize you in just a moment.
MR. HIRD: Thank you, Your Honor.
MR. JACOBS: Just to sum up, to go through the factors set out by Judge Kovachevich under the Cutter Labs

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test, reasonableness of precautions, there were apparently no precautions taken. The documents were produced en masse, apparently without any screening. They were produced by counsel himself.
Secondly, time taken to rectify. Over eight months.
Third, scope of discovery. Admittedly, large. But there were numerous discovery requests, document requests. I think this was only one of five.
Four, these were not isolated incidents. These were many, many documents. And we had not been successful; we had distinctly not negotiated any agreement that would cover the production of inadvertently disclosed documents.
And finally, fairness, these documents have already been used in evidence at depositions; they were used in pretrial practice; they were listed as trial exhibits; these lists were filed.
We had two pretrials with the magistrate in December, and these issues were not raised with the magistrate. These issues were not raised in a motion in limine. And in any event, we don't necessarily concede that many of these documents are privileged under any set of circumstances.
THE COURT: Okay. Thank you.
Mr. Hird.
MR. HIRD: Yes. I want -- I think Mr. Scroggin will

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respond on the discovery request, but I just want to deal with one question.
Mr. Jacobs mentioned that Mr. Getman holds the title of executive vice president of Avatar Holdings. As Your Honor will hear in testimony, that is a title to reflect his status in the company, but not a title with any additional business obligations of significance. Mr. Getman's function is as general counsel. And I did not want that factual representation to go without response.
THE COURT: All right, sir.
MR. HIRD: And Mr. Scroggin will respond to the -- or Mr. Bullock. I apologize.
THE COURT: Yes, Mr. Bullock.
MR. BULLOCK: Your Honor, first of all, let me put the scope of the discovery in context -- shall I use the podium?
THE COURT: Yes.
MR. JACOBS: It will take me a moment.
THE COURT: Okay.
MR. BULLOCK: Thank you, Your Honor. I apologize for not having used the podium before.
Let me put the issue of the scope of discovery into context. There were approximately a million pages of documents made available, of which is our understanding the plaintiff copied or produced to them somewhere between a half

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a million and 600,000 pages of documents.
Mr. Jacobs commented to the fact that these were at five different facilities. Under Florida law, a number of these documents cannot be taken off of the premises. So that's why the discovery was made, for example, logs --
THE COURT: I'm not concerned about the number of places. Go ahead.
MR. BULLOCK: All right, sir. And so the scope of discovery is huge. But the amount of documents that we're actually talking about is very small. There were objections made to the use of these documents at some of the depositions. Some of the depositions, there weren't any objections made. But the point of the matter is --
THE COURT: Well, let me ask you this: Was there ever any motion filed to retrieve inadvertently disclosed privileged documents?
MR. BULLOCK: No, Your Honor, there wasn't. I wanted to address that. I didn't want to -- it's a delicate question because --
THE COURT: All right.
MR. BULLOCK: -- Your Honor, at some point in time, when it comes to motions practice, you have to make a judgment call about whether you're motioning the Court to death or not. And there's a fair argument that in this case we came awfully close.

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And I think that we knew that we would have the right to list this as an objection in the joint pretrial statement in the objections to the exhibits that were listed in the joint pretrial statement.

Quite frankly, I thought that some of the objections would be addressed by the magistrate judge before now. In fact, he preserved all of those objections for you to hear at trial. But in terms -- that's when we first raised those in a formal sense.

THE COURT: Well, it seems to me that the inadvertent disclosure of privileged documents is -- it is a unique matter which should be treated differently from simply an ordinary objection that may be made as an exhibit is offered into evidence.

And I think that one of the factors, it seems to me, that should be weighed and considered by the Court is the timeliness of the efforts by the party claiming the privilege to rectify that inadvertent disclosure.

But go ahead.

MR. BULLOCK: That's all, Your Honor. Thank you.

THE COURT: Mr. Scroggin, did you want to respond further?

MR. SCROGGIN: I would only add, Your Honor, that --

THE COURT: Yeah, go to the microphone, please, sir.

MR. SCROGGIN: -- at the time of this discovery, the

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scope of this case had been enlarged from one facility, Waterway Estates, to over five facilities.

We were told by the Department of Justice that the -- it was urgent on their behalf that we show good faith and cooperate.

Florida Cities made every effort to show good faith and cooperate. We believed that we had an understanding. We believe today that that understanding has not been honored.

It was simply a question in our minds of whether at this point Florida Cities should be somehow penalized for its prompt and complete cooperation throughout this discovery process.

And our position is that Florida Cities should not be punished for that full and open disclosure of its files in order to expedite rather than to hinder and to delay the production process.

THE COURT: Excuse me just a moment, please.

(Discussion off the record.)

THE COURT: Were you through, Mr. Scroggin?

MR. SCROGGIN: Yes, Your Honor.

THE COURT: Okay. Thank you.

All right. Give me just a moment, please.

Counsel, Mr. Scroggin, Mr. Jacobs made a certain proffer of the sequence of events that occurred. And what I would ask is whether there is anything about that proffer by

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Mr. Jacobs, including the representation regarding the letters, that is inaccurate.

MR. SCROGGIN: Yes, sir, it is. He did indeed proffer in his letter that he would return the first ten documents. Since my clear understanding and Florida Cities' clear understanding was that it would not be limited to ten, but, in response to our full cooperation, we would have all such documents returned, and since we had in good faith returned theirs and we thought we had all of the ones that had been inadvertently produced returned to us, we simply did not respond. We did not wish to limit them to ten.

We believed we had an agreement, and we believed also that in light of the new discovery rules and in light of our belief that this Court should not be burdened with discovery disputes at each step, but that Florida Cities, believing it had nothing to hide, should cooperate fully and promptly with the government.

And as you've noticed, Your Honor, there is no mention of delay or lack of cooperation in the statement from the government because there was none.

We did not accept their offer because we believed we had already concluded a deal informally -- not in writing -- not to retain documents that had been inadvertently produced in good faith in order to expedite the discovery process.

THE COURT: All right. Well, based -- yes, sir.

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MR. JACOBS: I have the two significant letters if the Court would --

THE COURT: Do you want to show them to counsel?

MR. JACOBS: One is the July 13th, 1994 letter from Mr. Scroggin proposing a joint discovery stipulation regarding privileged documents and inadvertent production, asking us to sign on the dotted line, again July 13th, 1994; our response on July 22nd, 1994, no, we can't agree with that, but we propose this ten-document limit if you'll sign ours. And --

THE COURT: All right. If you want to show them to counsel and if you want to offer them for purposes of this proceeding.

Any objection to the Court receiving those for purposes of this issue?

MR. BULLOCK: None, Your Honor, with the caveat that as Mr. Scroggin said earlier, you know, the context of these letters we believed was an attempt to change an already preexisting agreement. So the letters speak for themselves, and we have no objection to the Court reading them.

THE COURT: All right. The Court will receive those as -- let's call them Court's Exhibits A and B for purposes of this issue here.

MR. JACOBS: In chronological order, sir?

THE COURT: Yeah, chronological order, so that A will be -- what's the date of that letter?

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THE CLERK: July 13th is the first one, and then July 22nd.
THE COURT: All right. The July 13th letter will be A, and the other one will be B.
(Court's Exhibits A and B were received into evidence.)
THE COURT: Let me see them, please.
MR. JACOBS: Judge, I might also offer the defendant's response to the United States' second request for production of documents that represents that the defendant will present the plaintiff with the privilege list at the time of inspection at the respective production sites or, quote, as soon thereafter as practicable.
THE COURT: Show it to counsel.
(Mr. Jacobs tendered a document to counsel.)
MR. BULLOCK: If the Court please, Your Honor, it's our discovery response, and we would have no objection.
THE COURT: All right. It will be received as Court's Exhibit C for purposes of this issue.
(Court's Exhibit C was received into evidence.)
THE COURT: Now, what part of this defendant's response to the United States' second request for production of documents -- this is a 22-page document, and I need to be directed to those portions that are relevant to this issue.
MR. JACOBS: I think, Your Honor, just the first two

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pages where the --
THE COURT: That was my impression as to what you were offering that for.
MR. JACOBS: Yes, Your Honor, where they set out as far as their concern the mode of production, their system that we followed, that we would mark the ones we'd like copied, which is what I said gave them sort of a second bite at the apple.
Between the time of marking the documents and the time that they themselves copied them and sent us the copies, they had another opportunity to screen, a second opportunity to screen, if you will.
MR. SCROGGIN: May I be heard, Your Honor?
THE COURT: All right. Mr. Scroggin.
MR. SCROGGIN: Your Honor, I would point out that during the production, the production involved easily over a million pages of documents, of which four to six hundred thousand were actually copied and sent to the Department of Justice.
At the time of these productions, Your Honor, there was only one facility in the case. Four facilities had documents that were produced. The cost of this massive document production was believed by Florida Cities to be prohibitive, without even knowing what -- the charges that might be brought against these other four facilities.

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Waterway Estates only was in the case at that time. We opened freely our files at the other facilities pursuant to the request of the Department of Justice.
It was only after a year or virtually a year of such production that the charges were brought against the other facilities and Florida Cities had a clue as to which documents, if any, might be of interest to the government or even what charges might be brought against the other facilities.
The question, in Florida Cities' judgment, boils down again to whether it should be punished for its cooperation in producing documents under circumstances where it had no notice of what the charges might be against these facilities and where it believed the cost of a full-blown document production would be prohibitive.
THE COURT: Yes, sir.
MR. JACOBS: Your Honor, I don't want to drag on unnecessarily. But the first discovery dispute that arose before the magistrate in this case had to do with the scope of discovery, and in particular, whether the government could have discovery as to these other facilities, because it is true that we named just Waterway Estates at first.
That particular issue was brought up by the defendant Florida Cities in front of the magistrate in the context of a motion for a protective order which was denied.

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Magistrate Judge Swartz ruled that we could discover information about the other facilities. And --
THE COURT: When was that?
MR. JACOBS: That was April 18th, 1994, Your Honor, before the very first deposition.
So the suggestion that there was a lot of cooperation in terms of discovery is something we might take some issue with. But certainly this issue, there was a distinct effort on the part of Florida Cities to preclude deposition into the other facilities, and that the magistrate judge distinctly ruled that we could get into those other facilities. And it was subsequent to that that we submitted our second request for production of documents.
THE COURT: All right. Just a moment.
All right. The Court has reviewed these exhibits which have been received for purposes of this -- determining this issue.
A very significant consideration that weighs heavily with the Court with respect to this claimed inadvertent disclosure of privileged documents is the lack of any significant effort on the part of the defendant to protect privileged materials from inadvertent disclosure.
I understand that the scope of discovery in this case has been broad and that there has been extensive disclosure, but it is incumbent upon a party who may -- a

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person or party who may have a privilege of this nature to engage in reasonable and necessary precautions to protect that privilege.

Moreover, although this particular factor is not determinative, it does appear that the documents have from time to time been used without objection in depositions.

The Court further is of the view that while it certainly doesn't want to invite any more motion practice than has already been involved in this case, this is the type of issue that is peculiarly appropriate for what I would suggest would be an immediate motion for the Court to order the return of inadvertently disclosed documents, assuming that the recipient of those documents or opposing counsel or party refuses to return them.

That simply was not done in this case. And I appreciate the indications of counsel that perhaps they were trying to spare the Court's patience with respect to increasing the already considerable motion practice in this case.

The last one of these that I had, there was such a motion which was determined initially by the magistrate judge. And if I recall correctly, the Court entertained an appeal from the magistrate judge's order in that case well in advance of the trial.

And with respect to the issue of fairness, I am not

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persuaded that there is any overriding issue of fairness that militates in favor of the Court's at this point recognizing the privilege.

And so the Court will find and does hereby find that whatever privilege may have existed, attorney-client privilege that may have existed with respect to these documents has been waived.

What document numbers are these?

THE CLERK: The objection was 129 and 130.

MR. JACOBS: We would ask the defendants to assert which ones they're claiming fall into these in case they've added --

MR. HIRD: Your Honor, we have these marked in our objections, and we'll make a list as we move through the objections, turn it into -- I hate to say this, but -- Code 3?

THE COURT: All right. Well, I've run out of time because I had a sentencing scheduled for 4:00 which I moved back to 4:45 so I could try to squeeze as much time for this trial, and then I have a meeting at five o'clock.

So we're going to need to recess this case at this time. We'll plan to reconvene at nine o'clock on Wednesday morning. Anything further?

MR. JACOBS: No, Your Honor.

MR. BULLOCK: Your Honor, is nine o'clock the normal starting time that you --

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THE COURT: That's the normal. Do you have a suggestion?

MR. BULLOCK: I just wanted to say we would be willing to -- if the Court wanted to know whether we could be back earlier, we would be glad to do that as well.

THE COURT: Do you mean earlier?

MR. BULLOCK: Earlier in the day or later in the evening.

THE COURT: Just a moment.

MR. JACOBS: Judge, we're happy to stick with nine if that's the --

(Discussion off the record.)

MR. JACOBS: We don't have quite the staff as you'll see that the defendants have.

THE COURT: We'll start at 8:30 on Wednesday morning. I have a sentencing at four o'clock, but I'll move that back as close to five as I can. So we'll convene at 8:30 Wednesday morning.

All right. I'll reconvene in here for the sentencing in just two minutes.

(Thereupon, at 4:57 p.m. these proceedings were recessed, to be reconvened on Wednesday, March 26, 1996, at 8:30 a.m.)

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CERTIFICATE

I hereby certify that the foregoing is an accurate transcription of proceedings in the above-entitled matter.

Official Court Reporter Date

TRANSMISSION REPORT

(TUE) MAR 26 1996 16:53

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DEPARTMENT	

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,) Case No. 93-281-CIV-FTM-21
Plaintiff,)
vs.) Wednesday, March 27, 1996
FLORIDA CITIES WATER COMPANY) Tampa, Florida
and AVATAR HOLDINGS, INC.,)
Defendants.)

TRANSCRIPT OF NON-JURY TRIAL
BEFORE THE HONORABLE RALPH W. NIMMONS, JR.,
UNITED STATES DISTRICT JUDGE

Appearances of Counsel:

For the Plaintiff: Mr. Daniel S. Jacobs
Mr. T. Anthony Quinn
Ms. Gwendolen Fitz-Henley

For Defendant Avatar: Mr. David B. Hird
Ms. Joanne Tsotsos

For Defendant Florida Cities: Mr. Gary H. Baise
Mr. Alexander M. Bullock
Mr. Lance High
Mr. Don G. Scroggin

Reported by: Dennis Miracle
Official Court Reporter

PROCEEDINGS

THE COURT: Good morning.

All right. I think we're ready to proceed. Where is Mr. Jacobs?

MR. QUINN: Mr. Jacobs is on his way, Your Honor, but I'm going to carry on with the exhibits.

THE COURT: All right.

MR. QUINN: Avatar Holdings prepared over the night a stipulation which I'm in the process of reviewing. It seems to list all of the documents which we listed seriatim yesterday.

The stipulation puts in the Code 1, Code 2 and Code 3 objections. I believe it is acceptable.

It merely states that the objections are indicated in the following manner and that there are a few exhibits that the Government seeks to admit through the testimony of Mark Klingenstein that are not the subject of this stipulation. Defendants will raise the individual objections to these exhibits on Wednesday, today. These exhibits are identified as Government's Exhibits 172, 350, 510, 511 and 512.

I believe this stipulation is acceptable, so we can proceed with those five objections, Your Honor, and address those documents rather than the whole list that we had the other day. Maybe it will save some time.

MR. HIRD: Your Honor, we prepared this over night in order to save time.

I just want to note for the record that in addition to the exhibits that were admitted on Monday, the Government is seeking through Mr. Klingenstein to get in a total of 331 additional exhibits.

We have noted our objections for the record. We think a lot of these exhibits go way beyond the history of the violations and the information Mr. Klingenstein needed in order to state in his reports.

And we want to make very clear our sense that we feel that it is inappropriate for these exhibits to come in this way.

I'm sorry, Your Honor. I gather you're having trouble hearing me?

THE COURT: Well, I have heard you. I --

THE COURT SECURITY OFFICER: The court reporter has to hear you.

MR. QUINN: With the Court's permission, Mr. Jacobs is going to sign off on the stipulation and then we can address those five exhibits right now. We'll handle distributing these at the next break, Your Honor.

THE COURT: All right.

MR. QUINN: The next exhibit is Exhibit Number 172.

MR. HIRD: Your Honor, this exhibit appears to be handwritten notes. It does not appear to be an express business record, and I think our objection to this exhibit has to do with hearsay.

THE COURT: All right.

MR. JACOBS: Good morning, Your Honor.

THE COURT: Good morning.

By the way, the jackhammer will terminate at 9:00 o'clock, as I understand it.

MR. JACOBS: Thank you, Your Honor. I apologize for running a little late this morning.

This is a business record --

THE COURT: Is or is not?

MR. JACOBS: It is a business record from Florida Cities' own files.

THE COURT: I need to see the exhibit, please.

(Pause.)

MR. JACOBS: Just looking at the Bates number, this was produced by Florida Cities. It is a business record. It reflects a telephone conversation with the then executive vice-president of Florida Cities, Tony Reeves, if you look at the top of the exhibit.

THE COURT: Who is Tony Reeves?

MR. JACOBS: The former executive vice-president of Florida Cities who pled the Fifth Amendment.

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THE COURT: I'll overrule the objections and receive Exhibit 172.

MR. HIRD: The next exhibit, Your Honor, is Exhibit 350. Your Honor, this is a memorandum concerning the Florida Cities Fiesta Village wastewater treatment plant. That's not a facility in this case, and our objection is that it's irrelevant.

MR. JACOBS: Judge, it's not the first page of the memorandum, per se, but the attachment which contains important admissions by Florida Cities with respect to their knowledge of matters specifically relating to a waste load allocation at the Waterway Estates plant.

THE COURT: That was what number, 350?

MR. HIRD: 350, Your Honor.

THE COURT: 350.

MR. JACOBS: And the reference to Waterway Estates is on Page 3 of the exhibit.

Again, Exhibit 350, Page 3, you'll see references right up at Paragraph 7 to Waterway Estates. Then you'll see a reference in Paragraph 8 to the Caloosahatchee waste load allocation documentation which Mr. Klingenstein referred to in his testimony and, again, another reference in Paragraph 8 to Waterway Estates, so it's highly relevant.

THE COURT: Say that again. I just got the exhibit.

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MR. JACOBS: I'm sorry, Your Honor.

Exhibit 350 --

THE COURT: Right.

MR. JACOBS: -- directing the Court's attention, if I may, to Page 3, Paragraphs 6 and 8 in particular, both reference the Waterway Estates plant. So does Page 4, for that matter.

The document references the waste load allocation study performed by the State of Florida in 1981 that Mr. Klingenstein referred to yesterday in his testimony.

THE COURT: Yes, sir?

MR. BULLOCK: If the Court please, Your Honor, this has somehow been represented as a document which Florida Cities admits knowing that it had no waste load allocation. We object to that characterization of the document. We don't believe the document says that. The document...

THE COURT REPORTER: Judge, could counsel go to the microphone? I'm having a very difficult time hearing them.

THE COURT: Mr. Miracle is having a difficult time. Is the microphone working at your table? No?

I tell you what, do we have the portable microphone? Do we have the portable, hand-held microphone?

THE DEPUTY CLERK: Yes, sir.

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THE COURT SECURITY OFFICER: It's working now.

THE COURT: It's working? All right.

MR. JACOBS: Your Honor, I might also say this: This is a petition of the Florida Cities Water Company, again, directing the Court's attention not to the cover page, but this was a publicly filed document apparently with Florida Department of Environmental Regulation. It's the petition itself signed by Florida Cities' own counsel that we ask be entered into evidence.

If the objection is specifically to Page 1, I could perhaps understand the basis of the objection, but not to a publicly filed document.

THE COURT: Mr. Bullock?

MR. BULLOCK: May I speak to that, Your Honor?

THE COURT: Yes, sir.

MR. BULLOCK: Your Honor, let me, first of all, refer you to Paragraph 8 on Page 3, the parenthetical that says, Except that the Respondent did not model its Caloosahatchee River waste load allocation documentation because of the assumed tie-in to Cape Coral, and the rest of the document -- the rest of the assumptions that are in that parenthetical.

If that parenthetical is removed -- which, in fact, what happened is, there was no tie-in to the Cape Coral facility, then the assumptions which follow are

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incorrect, so what happened is the design conditions for -- or the underlying purpose for Waterway Estates not being included in the 1981 document didn't happen, so there is no evidence from this or from any document that Florida Cities lost its 1981 waste load allocation.

MR. JACOBS: Your Honor, he's arguing the merits. We would obviously have a different interpretation. The objection is relevancy. It relates directly to Waterway Estates. It's a publicly filed document. It's written by Florida Cities' own counsel.

THE COURT: All right. I'm going to sustain the objection as to the first page of this document, which is a memorandum. I'll receive the balance of it.

MR. HIRD: Your Honor, the last three exhibits are 510, 511 and 512 and they are all -- they are very similar. These are statements from depositions in which witnesses took the Fifth Amendment.

Our objection is we can't -- A, it's irrelevant and, B, we can't understand how this has anything to do with Mr. Klingenstein's opinion and how this would shape his views as to the seriousness of the violation or any other issue by looking at pages where individuals asserted their Fifth Amendment rights.

MR. JACOBS: In a civil case --

THE COURT: Wait, wait, wait.

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MR. JACOBS: I'm sorry, Your Honor.
THE COURT: Are you through?
MR. HIRD: I'm not finished.
Your Honor, the Court, while Mr. Jacobs --
THE COURT: I'll tell you what, I'll call on you -- I'll determine when counsel is through, and then I'll call on you, then you can start speaking.
MR. JACOBS: Yes, sir.
MR. HIRD: Mr. Jacobs may argue that you're entitled to draw an inference -- and we have a dispute with that -- but there is no question that Mr. Klingenstein has no particular power to draw an inference.
And the idea that he was somehow influenced by people taking their Fifth Amendment in his expert opinion is absurd.
THE COURT: All right. Just a moment.
Now, the exhibits we're talking about are 510, 511 --
MR. HIRD: -- 511 and 512.
THE COURT: -- 511 and 512.
All right. Just a moment.
(Pause.)
THE COURT: All right. Mr. Jacobs?
MR. JACOBS: Well, Your Honor, this is a civil matter in which adverse inferences, as the Court is well

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aware, can be drawn from the invocation by the Defendant's officers of the Fifth Amendment.
If the specific objection is to introducing it in the context of Mr. Klingenstein's testimony, we would be happy to reintroduce it during the testimony, or the lack of testimony, of the individuals who --
THE COURT: Well, I'm inclined to agree with Mr. Hird at least as to introducing these exhibits in connection with Mr. Klingenstein's testimony. We can address the balance of the objections if and when you proffer those exhibits again. But I'll sustain the objection at this point.
By the way, just so I'll understand, 510, 511 and 512 in my notebook simply state the -- make the statement, Upon the advice of counsel, I respectfully decline to answer and invoke my rights under the Fifth Amendment.
You're obviously saying that this pertains to a certain witness' invoking a Fifth Amendment privilege, and one cannot tell from looking at the exhibit in my notebook as to who is asserting that. I can't tell anything from this. That's just for future reference, I guess, but that's what's in my notebook.
MR. JACOBS: Yes, Your Honor.
The witness list itself will identify 510 as the statement of Gerald Allen, 511 as --

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THE COURT: Well, you see, the witness list is not really an exhibit as such. It's an aid. So, any exhibits that we've got in here need to stand on their own. That's for future reference --
MR. JACOBS: Thank you, Your Honor.
THE COURT: -- in this case.
MR. HIRD: Your Honor, if I may, just to make the record complete, we have a further objection with respect to 510, the statement of Mr. Allen. Mr. Allen ultimately did testify in deposition and will be a trial witness in this case.
THE COURT: Mr. Allen, did you say?
MR. HIRD: Yes, sir.
THE COURT: Okay.
All right. Are we ready for Mr. Klingenstein to retake the witness stand?
MR. JACOBS: Yes, Your Honor.
THE COURT: All right.
Yes, sir. You may proceed.
MR. JACOBS: Your Honor, no further questions of Mr. Klingenstein at this time.
THE COURT: All right. Mr. Bullock, you may cross-examine.
MR. BULLOCK: Thank you, Your Honor. Good morning.

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MARK JAMES KLINGENSTEIN,
being previously duly sworn, testified as follows:
CROSS EXAMINATION
BY MR. BULLOCK:
Q. Good morning, Mr. Klingenstein.
A. Good morning.
Q. Mr. Klingenstein, as I believe you testified in your direct testimony, you are currently employed by SAIC, is that correct?
A. Yes, that is.
Q. SAIC, for the most part, exists to provide expert witness and other services to EPA and DOJ, is that correct?
A. SAIC as an entity exists to provide a variety of high-tech consulting services to a variety of both Government and private clients.
Q. And one of your major clients is, in fact, EPA and another is DOJ, is that correct?
A. They are certainly very significant clients.
Q. As a matter of fact, your current duties include working on work assignments in which SAIC provides expert witness services to EPA and DOJ, is that correct?
A. Yes, that is correct.
Q. And you have previously managed a group of about 20 individuals all of whom are dedicated to providing expert witness and related services to EPA and DOJ, is that

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correct?
A. Expert witness services and other services related to U.S. EPA programs.
Q. Including enforcement actions, enforcement services?
A. Yes.
Q. All right. In the calendar year 1995, can you tell me how much of your time was spent working for EPA and DOJ on these work assignments?
(Pause.)
A. I couldn't tell you exactly. Certainly more than 50 percent of my time.
Q. And can you tell me how much in billable time you, yourself, generated for SAIC working on work assignments for EPA and DOJ?
A. I would assume that would be the same answer, which would be more than 50 percent of my time, which we work a 40-hour work.
Q. Can you tell me in dollar figures how much that was billed to EPA and/or DOJ?
A. Not off the top of my head.
Q. Can you give me a ballpark estimate?
A. Well, the billing rate -- my billing rate would be approximately 94, $95, $96 an hour, so that fraction of a year times $96.
Q. Okay. Now, you are also a vice-president, an

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assistant vice-president of SAIC?
A. Yes, an assistant vice-president.
Q. And as part of that, you would consider yourself part of management of SAIC?
A. Yes, that's true.
Q. All right. And can you tell me in dollar figures how much the enforcement unit that you used to manage generated for SAIC in 1995 as a result of working for EPA and DOJ?
A. Well, I didn't -- the portion of the company that's doing actual enforcement work, under my direction last year, we did just about a million dollars worth of work.
Q. Okay. Was that a similar figure for 1994?
A. Pretty close, roughly.
Q. Okay. How many times in the past five years have you worked as an expert witness or a consultant on behalf of a defendant in an environmental enforcement action?
A. I'm sorry, counsel. What do you mean "how many times"?
Q. How many times in the last five years have you been employed as an expert witness or a consultant on behalf of a defendant in an environmental enforcement action?
A. You mean how many different actions?
Q. How many contracts have you performed in which you have provided expert witness or expert consultant services for a defendant in an environmental enforcement action?

A. Well, in terms of contracts, it would b
one contract with EPA and one contract v
Department of Justice.
THE COURT: With a defendant, did you say.
MR. BULLOCK: With a defendant.
THE WITNESS: I'm sorry, sir. I --
MR. JACOBS: I'm sorry. For clarification, is it for the Defendant? I thought Mr. Bullock first asked --
THE COURT: I think he said "a defendant." Did you mean any defendant?
MR. BULLOCK: I meant any Defendant.
THE WITNESS: I'm sorry, sir. Did you mean working for the Defendant?
BY MR. BULLOCK:
Q. That's correct.
A. None.
Q. Thank you.
THE COURT: And that's any defendant, not just the Defendants in this case, is what his question pertains to. You understood that?
THE WITNESS: Yes. Thank you.
BY MR. BULLOCK:
Q. Let me refer you, if you have it in front of you, to your resume which is attached to the back of your report. You, on Page 2 of 7 --

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MR. BULLOCK: Your Honor, I believe it is Appendix A.
THE COURT: I've got it.
BY MR. BULLOCK:
Q. Mr. Klingenstein, you list a number of cases in which you have provided expert support. That would be the third paragraph down.
A. Yes.
Q. All right. Fort Smith, Arkansas, what type of case was that?
A. That was a Clean Water Act case.
Q. And who was the defendant?
A. Was the City of Fort Smith, Arkansas.
Q. A municipal facility?
A. Yes.
Q. The PennTech Paper Company, I assume, was a manufacturing facility?
A. Yes, that's correct.
Q. Menominee Paper was a manufacturing facility?
A. It was a manufacturing facility, but the case involved the Menominee municipal case -- facility as well.
Q. The Tyson's Chicken case was a manufacturing facility, correct?
A. Yes, that's correct.
Q. The Purnell Sausage and Gorton's of Gloucester, both

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of those were manufacturing facilities?
A. Yes, they were.
Q. O'Donell-Usen, what was that case?
A. That's a manufacturer.
Q. Okay. Terra Haute, Indiana?
A. Is a municipal facility.
Q. Winchester, Kentucky?
A. Was municipal.
Q. Okay. Hawaii Kai -- I'm not going to begin to pronounce that -- but Hawaii Kai?
A. Hawaii Kai. That is a municipal facility.
Q. All right. Bunnell?
A. Is a municipal facility.
Q. And Metro Dade Citizens Authority?
A. Involved the authority in Miami.
Q. All right. Taracorp?
A. It is an industrial facility.
Q. Gulf Chemical?
A. It's an industrial.
Q. And Jefferson County?
A. Is municipal involving the county authority.
Q. All right. You have never been employed by a privately owned, publicly regulated utility, have you?
A. I was employed by the City of Philadelphia while I was an intern in school.

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Q. Okay. Is the City of Philadelphia owned privately?
A. Oh, I'm sorry, sir. No.
Q. Okay. So, the answer to my question is, you have never been employed by a privately owned, publicly regulated utility?
A. No.
Q. All right. Have you ever provided consulting services for a privately owned, publicly regulated utility?
A. No, I don't believe so.
Q. All right. You have never designed a plant for a privately owned, publicly regulated utility?
A. No.
Q. All right. You have never sought to permit a facility like -- which is a privately owned, publicly regulated utility, correct?
A. That's correct.
Q. All right. And that would include any facility -- you have never permitted a facility in the state of Florida, is that correct?
A. That is correct.
Q. All right. You're not an engineer licensed in the State of Florida, are you?
A. No, I'm not.
Q. All right. Do you hold any operator licenses in the State of Florida for plant operations?
A. No, I do not.
Q. Do you hold any licenses for pl
state or political subdivision in the
A. No, I do not.
Q. Have you ever in any way over
a facility for a privately owned, pu
utility?
A. No, I have not.
Q. Have you ever provided any engineering or consulting services for any company who is regulated by the Florida Public Service Commission?
A. No, I have not.
Q. All right. And isn't it true that you really have no knowledge of the procedures and practices of the Florida Public Service Commission?
A. I have knowledge of their procedures based on the documents that I have reviewed as a result of my involvement in this particular case.
Q. Can you tell me which documents that involve the Public Service Commission you have reviewed?
A. Primarily correspondence that -- from Florida Cities, parties either to various outside entities, such as the State of Florida, or internal documents that have discussed Public Service Commission issues.
Q. Have you reviewed any of the statutes or regulations

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which govern the Florida Public Service Commission?
MR. JACOBS: Objection, Your Honor; beyond the scope of direct on the Public Service Commission.
THE COURT: Overruled.
THE WITNESS: No.
BY MR. BULLOCK:
Q. Have you reviewed any communication between Florida Cities and the Public Service Commission, or vice versa?
(Pause.)
A. That I can't recall.
Q. Let me turn now and ask you, what experience have you had performing modeling studies of river flows in the State of Florida?
A. None.
Q. You testified on Monday that you had interviewed EPA Region 4 employees about this case, is that correct?
(Pause.)
A. I don't specifically recall saying that on Monday.
Q. I believe you testified that you interviewed some EPA employees, isn't that correct?
A. My point, counsel, is I don't recall specifically whether EPA employees were identified as opposed to other individuals.
Q. Well, let me ask you this way, then: Have you ever interviewed any EPA Region 4 employees about -- well, we'll

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start with Waterway Estates -- and the claims that surround Waterway Estates?
A. I have had conversations with EPA Region 4 employees.
Q. About Waterway Estates?
A. Yes.
Q. Okay. Can you tell me who they were?
A. Mr. Ken Kwan and Ms. Gwen Fitz-Henley and Mr. Roger Pfaff.
Q. Let me turn with you now and talk about the 1981 waste load allocation study. In your report on Page 14, you have stated that the river was unacceptably impacted by nutrients from dischargers, the third paragraph up from the bottom.
A. Yes.
Q. Isn't it true, Mr. Klingenstein, that there is no actual data which supports this statement?
THE COURT: What paragraph? What does it start with?
MR. BULLOCK: FDEP's January 1981 Caloosahatchee River...
THE COURT: All right.
MR. BULLOCK: And, Your Honor, it is the last sentence of that paragraph.
THE COURT: All right.
THE WITNESS: My interpretation of the waste load allocation document was that the Florida agency was of the

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opinion that the overall nutrient loads to the river were a concern.
BY MR. BULLOCK:
Q. My question, Mr. Klingenstein, is, isn't it true that there is no actual data which supports this conclusion in your report?
(Pause.)
A. My belief is that the State agency came to this conclusion based on data available to them.
Q. Okay. And what data have you reviewed that support your conclusion that the river was unacceptably impacted?
A. Well, certainly even up through the present 1994 305(b) Florida State Water Quality Study, there are notations made that there is concern on the part of the State based on data from the last -- well, since, I believe, 1989 -- that there are still unacceptable nutrient loads to the river.
Q. All right. Well, let's go through some of this, then. The 1981 study, that was a modeling study, wasn't it?
A. Yes.
Q. All right. The 1990 study which was based on the 1989 information that you just spoke of was also a modeling study, wasn't it?
A. Yes, it was.
Q. Isn't it true, Mr. Klingenstein, that modeling is

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merely an attempt to predict possible impacts based upon certain assumptions of future water quality conditions under assumed scenarios of water flows, treatment and disposal options used in the river?
A. Not entirely to the extent that it doesn't necessarily have to be modeling future, at some far, distant point in time. A modeling effort is carried out typically using available data to calibrate the model, in effect to make the model as carefully represent as possible conditions in the river, and then a variety of different scenarios can be modeled. Both existing scenarios can be modeled as well as future or predicted scenarios.
MR. BULLOCK: Your Honor, I'm going to be referring to Plaintiff's Exhibit 349, or we have marked it as Florida Cities' Exhibit 16.
THE COURT: 349 is in evidence?
MR. BULLOCK: And I'll be glad to hand a copy of that, if you would like. It's our 16.
THE COURT: Same as Plaintiff's 349?
MR. BULLOCK: That is correct, Your Honor.
THE COURT: All right.
MR. JACOBS: Just for the record, Your Honor, it's not exactly the same.
THE COURT: All right.
MR. JACOBS: The first page is not the same.

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MR. BULLOCK: We'll be glad to give you our copy of Plaintiff's 349. The substance of the document is the same.
MR. JACOBS: I suspect that would be the case, Your Honor.
THE COURT: All right. Well, go ahead.
MR. BULLOCK: Thank you, Your Honor.
THE COURT: 349 is in evidence. And if he refers to something that's not in evidence, you can point it out.
MR. JACOBS: Thank you.
BY MR. BULLOCK:
Q. Mr. Klingenstein, who was this study prepared for?
A. I'm sorry, sir. Who was it prepared for?
Q. Who was it prepared for?
(Pause.)
Q. Well, let me move on a little bit. Let me refer you to the second paragraph of Page 1, beginning "These allocations." Isn't it true that this document was prepared for the Fort Myers District Office of the Florida Department of Environmental Regulation?
A. Yes, that would be the indication of that paragraph.
Q. All right. Who is it in the FDER or which section in the FDER actually issues discharge permits for the State of Florida?
A. I couldn't give you their formal name.

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Q. Okay. Do you know whether or not the discharge permits are issued from Tallahassee or from the regional offices?
A. I could not tell you.
Q. All right. Well, assume with me, then, that the district offices are the offices which issue the discharge permits. Under that scenario, then, this would have been -- the language in the paragraph which I just pointed out to you indicates that this study was generated due to pending requests for permits from -- at the Fort Myers office?
MR. JACOBS: Objection, Your Honor. I think this is an improper hypothetical for this witness. He's already testified he doesn't have personal knowledge of exactly which offices prepare these.
THE COURT: I'll overrule the objection.
THE WITNESS: I'm sorry. Could you repeat the question?
BY MR. BULLOCK:
Q. Assume with me, then, that the regional offices are the offices which issue the discharge permits; then the language of this document -- isn't it true that this document states that it was generated for the regional offices in preparation or due to pending requests for permit renewals?
A. Given that hypothetical, that would be the implication

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of that paragraph, yes.
Q. All right. Let's turn now to the study. I asked you a minute ago about the different scenarios -- whether or not modeling was based on assumed scenarios. You would agree with me that modeling is based on assumed scenarios, is that correct?
A. I agree that modeling can be based on assumed scenarios, but it can also be based on actual scenarios.
Q. All right. In real life, many of these assumed scenarios are unlikely to occur, is that correct?
A. That, I guess, would depend on what particular situation you were modeling, how likely the scenarios are to occur.
Q. Well, the 1981 study that we're looking at, the modeling study was based upon the predictions of certain design conditions simulated by DER in their computer program, isn't that correct?
A. Yes.
Q. Okay.
MR. BULLOCK: Your Honor, I realize we keep flipping back and forth between DER and DEP -- and I know that is a little confusing -- but during this time it was FDER, and I think early -- in the early '90's it became FDEP, so I may say the same thing.
BY MR. BULLOCK:

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Q. One of the design conditions of this study, Mr. Klingenstein, was that all four facilities in this area of the river were all discharging at full capacity simultaneously?
A. Yes, I believe that's true.
THE COURT: Just a moment, please.
I'm looking for Plaintiff's 349.
(Pause.)
THE COURT: Go ahead.
BY MR. BULLOCK:
Q. If I might, Mr. Klingenstein, let me ask the question again: Isn't it true that the design conditions of this study were based upon the presumption that all four of the facilities in this area of the river were all discharging at full capacity simultaneously?
A. Yes, I believe it was.
Q. All right. Just as an aside, Mr. Klingenstein, how much time did you actually spend in reviewing this report -- in reviewing this study to generate your report?
A. I couldn't tell you an exact amount of time.
Q. Isn't it true, Mr. Klingenstein, that during the projected time of this study, that these -- the four facilities which discharge into this portion of the Caloosahatchee River never discharged at full capacity simultaneously?

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A. Well, I haven't reviewed data for all of these facilities, so I couldn't answer that question for all the facilities.
Q. All right. So, the answer to the question is, you don't know whether or not they discharged to full capacity simultaneously between 1980 and 1990?
A. As I said, I have not reviewed data for all the other facilities.
THE COURT: And so you don't know --
THE WITNESS: I do not know.
THE COURT: -- because you haven't reviewed, correct?
THE WITNESS: Yes. Yes.
THE COURT: All right.
BY MR. BULLOCK:
Q. Have you reviewed data from Waterway Estates?
A. Yes, I have.
Q. And what years of data did you review?
A. I've reviewed flow data -- I couldn't tell you every specific year -- but from the period of time of this study up until the present.
Q. And Waterway Estates never discharged at full capacity, did it?
A. That's correct.
Q. All right. So, in a sense, one -- right away, we can

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tell that one of the four design criteria for this modeling study never occurred?
(Pause.)
A. Well, the actual flows were not as high as the number that was used for this particular scenario, no; that's correct.
Q. Thank you.
You rely, on the bottom of Page 14 of your report, the 1990 study --
MR. BULLOCK: That is Plaintiff's 422, Your Honor.
THE COURT: Are you basically through with 349?
MR. BULLOCK: Your Honor, no, sir. You might want to keep it close.
THE COURT: Okay.
BY MR. BULLOCK:
Q. Mr. Klingenstein, you rely on the 1990 study for confirmation of the 1981 study in your report?
A. Yes.
Q. Okay. In fact, the 1990 study is another computer model, isn't that correct?
A. It reports the results of another modeling effort, yes.
Q. And the modeling effort in the 1990 study is -- actually, the 1990 study is a model of proposed expansions of all of the discharges on the Caloosahatchee River?

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A. I don't recall whether expansion of every one was proposed.
Q. How much time did you spend reviewing the 1990 study in preparing your report?
A. Again, I couldn't give you an exact figure.
Q. Okay. The 1990 study is assumed on all of the dischargers discharging at full capacity, isn't that correct?
(Pause.)
A. I know that the specific discharge assumptions were made in the report; without that document in front of me and having the ability to refer to it and compare that to the design capacity of each of those plants at that point in time...
Q. Okay.
MR. BULLOCK: Your Honor, what I have is the Defendant's exhibit that I can hand him. It's in evidence as a Plaintiff's exhibit. It's Plaintiff's 422.
THE COURT: All right. Hand me up Plaintiff's 422.
That's also Defendant's exhibit what?
MR. BULLOCK: I'm sorry. It is not a Plaintiff's exhibit.
THE COURT: Okay. Okay.
MR. JACOBS: I'm sorry to interrupt, Your Honor.

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For the record, are we looking at Plaintiff's 422?
MR. BULLOCK: That's correct.
MR. JACOBS: Thank you.
Does the witness have it in front of him?
THE WITNESS: I'm sorry. No, I don't.
THE COURT: What's the question?
MR. BULLOCK: Your Honor, I'm asking him whether or not the 1990 study was based on the -- whether or not any of the -- the 1990 study was based on assumptions that all of these facilities were discharging at full capacity.
THE COURT: Okay.
THE WITNESS: That appears to be true.
BY MR. BULLOCK:
Q. And, again, I believe you said that you have no knowledge of whether or not in fact these facilities have discharged at full capacity between 1990 and today?
A. I'm sorry. Could you repeat that?
Q. I said, I believe you have said earlier that you have no knowledge of whether or not the four facilities modeled in this study actually discharged at full capacity from 1990 until today?
A. Other than having seen some flow data for Waterway Estates...
Q. Has Waterway Estates ever discharged at full capacity between 1990 and today?

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A. Certainly recalling the data, its average flow has been below its capacity.
Q. Okay. The answer to the question is, you don't even know whether Waterway Estates or not has ever discharged at full capacity, correct?
A. Well, the answer is, I can't recall each individual day's data to say with certainty that on any one day it may not have reached its capacity flow, but its average flow has been below its capacity flow.
Q. So, you don't know?
THE COURT: I think I understand his answer. Go ahead.
MR. BULLOCK: Thank you, Your Honor.
BY MR. BULLOCK:
Q. Isn't it true that your testimony as to risk of harm of discharges from the Waterway Estates facility is based upon computer studies of information -- excuse me -- computer studies of situations which, in fact, never came to pass?
A. My opinion as to the potential for harm came from a combination of the findings of these studies and the specific information that they provided about the flow characteristics in the Caloosahatchee River particularly in the area of the Waterway Estates discharge and from my professional opinion based on having inspected the facility,

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having seen the characteristics of that canal and what the likelihood was of the effluent building up in that canal.
Q. My question was -- and let me rephrase it slightly, then -- in part, your opinion is based on these computer models and the reports generated as a result of these computer models, correct?
A. Yes, that's correct.
Q. You can't say whether or not the situations that are forecast in -- or the presumptions that these computer models are based upon actually happened, can you?
A. In terms of having seen data in that canal, no. To my knowledge, such data doesn't exist.
Q. Okay. The data exists about what that flow was for all four facilities, doesn't it, Mr. Klingenstein?
A. Yes.
Q. All right. You haven't looked at that data for all four facilities that discharge in -- that this study is based upon, have you?
A. I have certainly possibly seen some data, but I have not looked at it in detail.
Q. All right. So, you can't say whether or not the predictions that the model predicts actually occurred because you don't know whether or not the scenarios assumed in the model ever existed or not, correct?
A. I believe that certain characteristics indicated by

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the model, particularly the build-up of effluent in the area of the Waterway Estates, occurred regardless of whether or not those plants discharged at exactly the flows that were put forth in this model.
Q. But the data -- but you haven't reviewed the data to support the model?
A. I have reviewed data regarding water quality in the river.
Q. You have testified that you believe the 1981 study provides a zero discharge for Waterway Estates, is that correct?
A. I believe those are the exact words from the document itself.
Q. All right. In the same document, the study also suggests that the company should build a new outfall for the plant, isn't that correct?
A. I believe there's mention of the fact that the outfall would need to be relocated.
Q. All right. Isn't there a logical disconnect here between a zero waste load allocation and then demanding that the company build an outfall for a plant that has a zero -- a new outfall for a plant that has a zero waste load allocation?
MR. JACOBS: Objection to the mischaracterization of the document.

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THE COURT: Overruled.
THE WITNESS: My read on the document was, and continues to be, that in carrying out the study, the State of Florida looked at the technical need to relocate the outfall and then, based on its understanding of what Florida Cities' intentions were, i.e., to tie in to a regional facility with Cape Coral, decided not to continue the modeling effort looking at the relocated outfall and so, therefore, assumed that no waste load allocation would go to the Waterway Estates facility because it would be tied in to the Cape Coral plant.
BY MR. BULLOCK:
Q. In fact, the next year, in 1982, that Cape Coral plant was cancelled or was never built, is that correct?
A. I don't know if it was in exactly 1982, but it seems in the 1982, 1983 time frame, that agreement fell apart.
Q. So, that scenario didn't occur either, did it?
A. No, apparently not.
Q. All right. Are you familiar with the State of Florida's laws and regulations that address permitting for facilities such as the Waterway Estates plant?
A. No, not in any detail.
Q. Can you tell me whether or not this document was binding upon the Fort Myers office in its ability to grant a permit to the Waterway Estates facility?

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MR. JACOBS: Objection to the extent that the question calls for a legal conclusion, Your Honor.
MR. BULLOCK: Your Honor, he has --
THE COURT: Well, I'll permit him to answer the question, if he knows. Overruled.
THE WITNESS: No, I don't know.
BY MR. BULLOCK:
Q. In fact, later in 1981, isn't it true that the Fort Myers office of the FDER granted permission to continue discharging at the Waterway Estates facility after the 1981 waste load allocation study was published?
A. I believe a permit was issued.
MR. BULLOCK: If I may, I would like to show the witness Defendant's Trial Exhibit Number 17.
BY MR. BULLOCK:
Q. Let me refer you to what would be the third page of Exhibit 17. Isn't it true that this is a State of Florida DER operation permit for Waterway Estates?
A. Yes, it is.
Q. And the date of issuance is 1981 -- excuse me -- April 1, 1981?
A. Yes, it is.
Q. All right. And the next page, which is at the bottom of the page, set forth as Number 1 of 4?
A. Yes.

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Q. This page authorizes Florida Cities to operate a 1.08 MGD wastewater treatment plant to discharge effluent to the Caloosahatchee River – into a canal to the Caloosahatchee River, is that correct?
A. That is what is written there, yes.
Q. Didn't EPA also grant a permit to discharge to Waterway Estates in 1981?
A. I believe it was in 1981.
Q. Let me show you Defendant's Trial Exhibit, Florida Cities, Number 18 and refer you to the second page of that exhibit.
Isn't this a permit to discharge – an NPDES permit to discharge for Waterway Estates?
A. Yes, it is.
Q. Okay. Isn't it true that in 1983, the Florida Department of Environmental Regulation renewed the Waterway Estates discharge permit?
A. Yes, I believe that's true.
Q. Let me refer you to Defendant Florida Cities' Trial Exhibit Number 20 and refer you to Page 2 of that exhibit. Again, this is authorization to operate a 1.08 million gallons a day treatment facility and to discharge into the canal which leads to the Caloosahatchee River, correct?
A. Yes, that is true.
MR. BULLOCK: Your Honor, we would move

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Defendant's 17, 18 and 20 into evidence.
MR. JACOBS: No objection, Your Honor.
THE COURT: It will be received.
BY MR. BULLOCK:
Q. Referring to Exhibit 20, can you tell me what the expiration date of Exhibit 20 is? And I'm referring to Page 4 of 5.
A. All of the pages would indicate an expiration date of August 2, 1988.
Q. Thank you.
In investigating this claim, Mr. Klingenstein, you had access to the files of EPA Region 4 --
A. Yes.
Q. -- is that correct?
You had access to the materials put forth in discovery by Florida Cities, is that correct?
A. Yes, that is correct.
Q. You have worked on enforcement inspections of facilities for NPDES compliance, have you not?
A. Yes, I have.
Q. All right. Let me ask you to look at Florida Cities' Trial Exhibit 199. Can you identify what type of document 199 is?
A. 199 is what would be known as a CEI, or compliance evaluation inspection report.

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Q. All right. Was this report done jointly with the Florida Department of Environmental Regulation?
A. Yes, it was.
Q. All right. And let me refer you to Page 2 of 4 in the actual document.
A. I'm sorry. That would be Page 2 of 4 of the form itself?
Q. That's correct.
And on Line F -- excuse me -- Line G, would you read Line G?
A. Number and location of discharge points are as described in the permit.
Q. And the answer which was checked off?
A. Was "yes."
Q. All right. And would you read Line H?
A. Correct name and location of receiving waters.
Q. And that was checked off as a "yes" as well?
A. Yes.
Q. Is it unusual to have joint State and Federal inspections?
A. It's not uncommon.
MR. BULLOCK: Your Honor, we would move that Defendant's 199, Florida Cities, be moved in evidence.
MR. JACOBS: No objection, Your Honor.
THE COURT: It will be received.

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Why don't we have an understanding that if there is no objection, you need not say anything. And I'll pause for a moment to --
MR. BULLOCK: Thank you, Your Honor.
BY MR. BULLOCK:
Q. Mr. Klingenstein, let me refer you to Florida Cities' Exhibit 200. Could you tell the Court what 200 is?
A. 200 is another compliance evaluation inspection report.
Q. And this was done jointly by FDER and EPA?
A. Yes, it was.
Q. All right. Let me refer you to Section C of the second page of this exhibit. And under the heading Effluent slash Receiving Waters, what grade was that given?
MR. JACOBS: Your Honor, this hasn't been moved into evidence yet. We object to questioning the witness about the document.
THE COURT: Correct.
MR. BULLOCK: I'm sorry, Your Honor. I would move for Defendant's 200 to be --
MR. JACOBS: Here we would object, Your Honor. The document is incomplete. There should be an attachment to it, as we understand it. The objection then would be based on Federal Rule of Evidence 106. We believe it's irrelevant. The objection would be based on Federal Rule of

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Evidence 402. We believe it's hearsay, and the objection would be based on Rule 802. Hearsay within hearsay, Rule 805.

MR. BULLOCK: Your Honor, it's my understanding this document was produced out of EPA's own compliance files. The document clearly states what it is.

The attachments which are attached to it have no bearing on the issue that it's being offered for. We sought this document in discovery requests, and this is a document which was produced to us.

THE COURT: I'll overrule the objections. If the Government wants to at a later time offer the balance of this for any purpose, the Court will entertain that at that time.

BY MR. BULLOCK:

Q. Mr. Klingenstein, let me refer you again to Section C and the sub question that addresses Effluent slash Receiving Waters. What mark was that given?

A. An "S."

Q. And "S" under the key code means?

A. Is listed as being equal to satisfactory.

Q. And under Section C, satisfactory is the highest grade that can be given?

A. Yes.

Q. Thank you.

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Isn't it true, Mr. Klingenstein, that at any time during the 1980's, the Florida Department of Environmental Regulation could have withdrawn its permission for Florida Cities to discharge from Waterway Estates?

A. I can't speak on behalf of FDER, FDEP.

Q. In preparing your opinion or preparing to testify, did you interview any FDER or now FDEP officials?

A. Yes, I did speak to a number of them.

Q. Do you remember who you spoke to?

A. I certainly recall speaking to Mr. Ron Blackburn, and I believe I also spoke to a former FDER employee which would have been Mr. Bruce DeGrove.

Q. Okay. You had characterized Florida Cities' discharge without a permit between 1987 and 1989 as serious violations. The seriousness of those violations is based purely upon the fact that they didn't have an NPDES permit during that period, isn't that correct?

A. And my belief that discharge was taking place at the wrong level of treatment and to the wrong location.

Q. Again, the issues about the wrong level of treatment are based on the 1981 study and your analysis of that study, isn't that correct?

A. And my understanding and belief on what would have been the impacts of that secondary discharge on the particular point of discharge.

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Q. All right. You have no data which points out that, in fact, that area was actually impacted, do you not?

A. I have not seen data. In fact, I believe your Mr. Smith in his report did, in fact, refer to some data that might have existed that indicated there were impacts in that area of discharge.

Q. But you'll defer to Mr. Smith's testimony on that, won't you?

A. I have not seen data for the canal.

Q. In fact, isn't it true that the Plaintiff has admitted that there is no -- that they have no evidence of environmental harm?

THE COURT: Well, now, wait a minute -- well, go ahead.

MR. JACOBS: I'll object to the extent that the question calls for a legal conclusion here.

THE COURT: Yes. You know, the Plaintiff is the United States, and I think I'll sustain the objection, at least as framed.

BY MR. BULLOCK:

Q. Did you assist the Plaintiff in preparing any of its discovery requests -- responses to its discovery requests?

MR. JACOBS: Objection to the extent that the question invades the attorney work product privilege. Mr. Klingenstein served both as an expert witness and also

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as an expert trial consultant. The work that he did with respect to -- in his capacity, rather, as an expert trial consultant I believe would be protected.

MR. BULLOCK: Your Honor, I have not asked him the content of any work or conversation.

THE COURT: I'll overrule the objection at this point.

Ask the question again.

BY MR. BULLOCK:

Q. Mr. Klingenstein, did you participate in responding to any of the discovery requests which were propounded to the Plaintiff?

(Pause.)

A. Yes.

Q. All right. Have you read the actual discovery responses which the United States filed in this case?

MR. JACOBS: Objection, Your Honor. There have been numerous responses. If counsel could possibly pinpoint one or two for the witness so the record is accurate...

MR. BULLOCK: Sure. I'll be glad to.

BY MR. BULLOCK:

Q. Either the United States' responses to Avatar Holdings' second set of interrogatories, or responses to Florida Cities' interrogatories.

A. I believe I may have read portions of one or both, but

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I could not tell you specifically.
Q. Okay. Isn't it true that in the United States' responses to the Defendant Avatar Holdings' second set of interrogatories and in response to the Defendant Florida Cities' interrogatories, the United States has stated that --
MR. BULLOCK: Your Honor, may I withdraw that?
THE COURT: Yes, sir.
MR. BULLOCK: Just a moment, please, Your Honor.
(Pause.)
MR. BULLOCK: Let me withdraw that question, Your Honor, and ask it in a different way.
BY MR. BULLOCK:
Q. Isn't it true that in responses to Avatar Holdings' second set of interrogatories, the United States responded that it was aware of only potential and not actual harm or damage?
MR. JACOBS: Could I ask that the witness be shown the document before he responds?
THE COURT: I think that's fair.
MR. BULLOCK: This would be Avatar Holdings' Trial Exhibit Number 8.
MR. HIRD: Your Honor, I believe there's an exhibit book for the witness that we can provide for our exhibits so that we don't need to take it out of the binder.

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THE COURT: All right. That's one binder?
MR. HIRD: Yes. We have one binder.
THE COURT: All right. Here it is.
What number is that?
MR. BULLOCK: Number 8.
MR. JACOBS: Your Honor, I might assist in moving things along. The Government has, indeed, stipulated that we do not have evidence of actual environmental harm. The theory of our case is that there is the potential for environmental harm, and that was the substance of the testimony yesterday, if that's helpful to...
THE COURT: All right. Well, if that's helpful, fine.
MR. BULLOCK: I'll accept that stipulation and move on, Your Honor.
THE COURT: Okay.
BY MR. BULLOCK:
Q. Let me refer you to Page 1 of your report, the first paragraph under Section 2, Background, the last sentence where you said, By requiring receipt of a permit prior to discharge, the NPDES system allows EPA to determine whether a receiving water has the capacity to assimilate a pollutant discharge and, if so, at what particular point in the water body and for what quantities of particular pollutants. Is that correct?

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A. Yes, that's the word.
Q. All right. And the other point is, it allows EPA to know exactly what dischargers are in the various waters of the United States and what the substance of their discharge is?
A. That's the intent of the system, yes.
Q. Okay. Between January 1987 and November '89, isn't it true that the Waterway Estates facility remained within the EPA regulatory framework?
MR. JACOBS: Objection; vague.
THE COURT: What was your objection? Objection what?
MR. JACOBS: Vagueness, Your Honor.
THE WITNESS: In what sense, sir?
THE COURT: Wait.
You said "date"?
MR. BULLOCK: No, Your Honor. My question --
THE COURT: I'm sorry, I didn't understand what the -- you said objection what?
MR. JACOBS: On the grounds of vagueness, Your Honor. The question is vague and ambiguous.
THE COURT: Oh, vague, vague. I'm sorry, I didn't understand that. I thought you said "date." Vague.
All right. What was the question, please?
MR. BULLOCK: Your Honor, the question was,

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between January 1987 and November of '89, wasn't the Waterway Estates facility still within the regulatory framework of the EPA, of the NPDES system?
THE COURT: I'll overrule the objection.
Can you answer that?
THE WITNESS: My response would be, in what sense, sir?
BY MR. BULLOCK:
Q. Well, every month they sent in a discharge monitoring report, didn't they?
A. That's my belief.
Q. All right. And the facility was under an administrative order or a series of administrative orders issued by EPA, isn't that correct?
A. Yes.
Q. All right. So, every month EPA knew what was being discharged into the Caloosahatchee River, didn't it?
MR. JACOBS: During what period of time?
THE COURT: All right. Can you be more specific?
BY MR. BULLOCK:
Q. Between January '87 and November '89.
A. I can't speak for EPA's knowledge.
Q. Well, you said you believed they received discharge monitoring reports, isn't that correct?
(Pause.)

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A. That -- I'll correct myself. I'm not sure.
Q. Okay. In general, a discharge monitoring report is the method by which EPA learns what a discharger is actually discharging through its effluent, correct?
A. Yes, that's correct.
Q. All right. So, if the evidence demonstrates that Florida Cities continued to submit discharge monitoring reports to EPA during the period of time from January '87 through November of '89, you would agree that EPA knew what was being discharged and the effluent?
MR. JACOBS: Your Honor, compound; calls for speculation. The witness has said he doesn't know whether the DMR's were submitted during that period. He testified yesterday that he reviewed the ones where violations were indicated, but he hasn't testified that he's reviewed all of the DMR's so --
THE COURT: Well, he's asking him in a sense a hypothetical. This is an expert witness. I'm going to allow him that latitude. I'll overrule the objection.
Do you remember the question?
THE WITNESS: If you could repeat it, please?
BY MR. BULLOCK:
Q. Certainly.
Assuming with me that the evidence indicates that Florida Cities submitted discharge monitoring reports to EPA

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Region 4 between January 1987 and November 1989, EPA would have been aware of the substances reported as being discharged in the effluent, correct?
A. Again, if such reports were submitted, EPA would have received them. I can't speak for who within EPA would have been aware of that information.
Q. Okay. Who normally receives discharge monitoring reports, Mr. Klingenstein; what branch of the EPA?
A. Typically, the compliance branch.
Q. Okay. And so here, the compliance branch of EPA Region 4 would have received any discharge monitoring reports sent by Florida Cities, correct?
A. I would have assumed, but I can't speak for Region 4's compliance branch.
Q. Have you ever interviewed anyone in EPA Region 4's compliance branch regarding this lawsuit?
MR. JACOBS: Asked and answered, Your Honor.
THE COURT: Overruled. Go ahead.
THE WITNESS: My only recollection of specific discussions with regard to this case has been with Mr. Kwan and Ms. Fitz-Henley.
BY MR. BULLOCK:
Q. Mr. Kwan works for which branch?
A. I believe he's in enforcement.
Q. All right. And is enforcement different than

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compliance in Region 4?
A. I can't speak to Region 4's exact organization.
Q. And Ms. Fitz-Henley is one of the legal counsel for EPA Region 4?
A. Yes.
Q. All right. It was within EPA's power to shorten the period of time that Florida Cities was discharging secondarily treated effluent, was it not?
MR. JACOBS: Objection to the extent that the question calls for a legal conclusion.
THE COURT: Read the question back, Mr. Miracle.
(Record read back.)
THE COURT: Overruled.
THE WITNESS: I can't speak for EPA's particular control of that situation.
BY MR. BULLOCK:
Q. They had the authority to grant administrative orders and permits, didn't they?
A. Yes.
Q. And in the administrative orders, at some point in time they could have said, You will cease secondary discharge, correct?
MR. JACOBS: Same objection, Your Honor.
THE COURT: Overruled.
THE WITNESS: That would be my expectation that

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they could.
BY MR. BULLOCK:
Q. Have you reviewed the administrative orders relevant to Waterway Estates between 1987 and 1991?
A. I have looked at those orders.
Q. All right. In fact, those orders authorize discharge at secondary levels until October 1, 1991, or until the outfall was moved, isn't that correct?
MR. JACOBS: Objection, Your Honor. If he's going to be asked to discuss the administrative orders, first of all, I would ask that they be presented.
Secondly, I take strong issue to the word "authorize." That word does not appear in the administrative orders, and I'll object on the grounds that the question therefore calls for a legal conclusion.
MR. BULLOCK: Your Honor, I'll withdraw that and rephrase it.
BY MR. BULLOCK:
Q. Let me first refer you to Defendant's 28. Let me then refer you to Page 3 of Exhibit 28, Page 3 of the actual administrative order.
Paragraph 2 states --
THE COURT: Have you reviewed this order?
THE WITNESS: Yes, I have, sir.
THE COURT: Okay. Go ahead.

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BY MR. BULLOCK:
Q. Paragraph 2 states that this should be in no way considered a permit to discharge. However, if the Respondent does discharge to the waters of the United States in violations of the Act, the Respondent's discharge of treated wastewater shall at least comply with the effluent limitations monitoring schedule and other requirements contained in its previous permit.
Is that an accurate depiction of the document?
MR. JACOBS: I'm sorry. It's incomplete.
Paragraph 2 starts with, This should in no way be considered a permit to discharge. However...
MR. BULLOCK: I believe I read that, Your Honor.
THE COURT: I don't recall whether you did or not.
BY MR. BULLOCK:
Q. The point of my question, Mr. Klingenstein, is, EPA didn't have to state that the Respondent should at least comply with secondary discharge if it continued to discharge, did it?
(Pause.)
A. Could you repeat the question, counsel?
THE COURT: Do you want it read back, or do you want to repeat it?
MR. BULLOCK: I'll repeat it, Your Honor.
BY MR. BULLOCK:

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Q. EPA did not have to include this provision which stated that the facility should at least continue -- if it was going to discharge, should at least continue to comply with the effluent limitations monitoring schedules and other requirements of its previous permit?
A. Well, without offering a legal opinion as to whether this has to be included, I think EPA included this to specifically make the point that this does not operate as a permit.
Q. My question was, they didn't have to put the language in there about secondary treatment, correct?
A. When you say "secondary treatment," with regard to its previous permit?
Q. Correct.
You're familiar with the previous permits, are you not?
A. I have reviewed its permit.
Q. All right. Those are secondary treatment permits, are they not?
A. As I recall.
Q. All right. Let me refer you to Defendant Florida Cities' 195.
MR. BULLOCK: Your Honor, while he's doing that, I would move Exhibit 28 into evidence.
THE COURT: It will be received.

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BY MR. BULLOCK:
Q. Mr. Klingenstein, have you reviewed Exhibit 195 previously?
A. Yes, I have.
Q. All right. Let me refer you to Page 4 of the administrative order itself, Paragraph 2. Paragraph 2 contains the same language that was found in the previous exhibit, isn't that correct?
A. Yes, that is.
Q. All right. And, again, you have been involved in a number of EPA enforcement actions, correct?
A. Yes, I have.
Q. All right. EPA could have directed the company to shut down and cease secondary discharge, couldn't it?
MR. JACOBS: Objection to the extent that the question calls for a legal conclusion.
THE COURT: I'll permit him to answer it if he can. Overruled.
THE WITNESS: EPA could have directed them to do such a thing.
BY MR. BULLOCK:
Q. Exhibit 195 also contains a construction schedule, does it not?
A. Yes, it does.
Q. And this was a construction schedule to construct an

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AWT, or an advanced wastewater treatment facility, correct?
A. And to relocate the outfall.
Q. And to relocate the outfall, isn't that correct?
A. Yes, it is.
Q. All right. So, at the time EPA issued this order, isn't it correct that EPA knew that the facility was continuing to discharge secondarily treated effluent?
A. Yes.
Q. And you have reviewed discharge monitoring reports between 1989 and 1991, have you not?
A. Yes, I have.
Q. All right. And those discharge monitoring reports came out of the files of EPA Region 4?
A. Yes.
Q. So, it's clear in your mind that EPA Region 4 was informed as to the character and the constituents of the effluent?
A. Yes.
Q. EPA did not require the advanced wastewater treatment plant to be completed under the schedule in this administrative order until September of 1991, isn't that correct?
A. I believe the date of compliance shown is October 1.
Q. October 1.
If EPA had thought that there was a serious risk of

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environmental harm from continued secondary discharge between 1989 and 1991, it was within their authority to shorten this construction schedule?
A. I cannot speak to the process that generated this construction schedule.
Q. Okay. The State of Florida actually has in a sense the front line on developing water quality standards, is that correct?
A. Within the State of Florida.
Q. Yes. And we're talking in this case only about the State of Florida, correct?
A. Yes.
Q. The State of Florida continued to authorize this, to continue secondary discharge, until September of 1992, isn't that correct?
A. I believe that's correct.
Q. All right. If the State of Florida had had serious concerns about continued discharge of secondarily treated effluent, they could have ordered the cessation prior to September of 1992, isn't that correct?
A. Again, not being able to speak for the State of Florida, but I would expect they would have had the ability under their State permitting system.
Q. Okay. Does EPA independently establish water quality standards for the State of Florida?

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(Pause.)
A. Not that I'm aware of.
Q. Okay. So, if it's done through EPA at all, it's done in conjunction with the State of Florida?
A. That's my understanding.
Q. All right. Let me ask you to assume with me that before May of 1986, there was no requirement to cease discharge of secondarily treated effluent into the canal adjacent to the Caloosahatchee River.
Under that scenario, isn't it true that Florida Cities had no technically available option to cease discharge by January of 1987?
A. I'm sorry. Your start date was --
Q. -- was May of '86.
A. If, in fact, their first notice of needing to cease discharge was May of 1986, it would have been very difficult to cease discharge by January of 1987.
Q. What technically feasible options would have been available?
A. Probably the most technically feasible would have been to connect to another authority.
Q. And was there another authority available between May of 1986 and January of 1987?
A. Not that I'm aware of.
Q. All right.

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MR. BULLOCK: Your Honor, at this time I would also move Defendant's 195 into evidence.
THE COURT: It will be received.
BY MR. BULLOCK:
Q. Do you know whether or not EPA ever challenged Florida's granting of the Waterway Estates permits in 1981, 1983 or 1988?
A. I'm not aware of whether such a challenge took place.
Q. All right. In fact, if there was no technically feasible alternative to discharge available to Florida Cities in January of '87, isn't it true that they could not cease discharging?
A. It would have been basically impractical.
Q. As a matter of fact, it would have been a public health hazard, wouldn't it?
A. Unless some alternate means of disposal was provided.
Q. Okay. We're assuming that -- first of all, you haven't identified an alternative that was available during that period of time, isn't that correct?
A. I have identified alternatives that were available during that period of time. The question I believe you had asked, sir, was whether if, in fact, their first notice took place in mid 1986, whether that alternative could have been implemented by January 1987.
Q. That's correct.

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A. That's a different question.
Q. And the answer to that question was no, it couldn't?
A. Would be difficult.
Q. All right. You have not been able to identify any alternative that, in fact, was available under the scenario that I proposed to you in January of '87?
A. The other possibility would have potentially been if a spray irrigation site could have been identified, an agreement made and wastewater transported to that spray irrigation site.
Q. Again, you have not identified any area where, in fact, that could have occurred between May of '86, January of '87, correct?
A. I have not seen documentation that would show me such an option existed within that six-month period that would have -- that could have been implemented within that six-month period.
Q. All right. Florida Cities operates Waterway Estate under a franchise agreement with Lee County, isn't that correct?
A. I believe that's correct, yes.
Q. Florida Cities provides wastewater treatment pursuant to permission from the Florida Public Service Commission, isn't that correct?
A. Yes, that is correct.

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Q. Well, to have ceased to provide treatment in January of 1987 would have been a violation of its franchise and its agreements with the Public Service Commission, isn't that correct?
A. I have not reviewed those agreements in detail, so I couldn't speak to that.
Q. All right. And isn't it true that ceasing to discharge with no viable alternative would have -- in January of '87, under the scenario that I have given you, would have created a public health hazard?
A. Again, without an alternative form of handling the wastewater, in effect, to shut the plant off, yes.
Q. Okay. I believe you testified that you had access to all of the materials which Florida Cities produced through discovery?
MR. JACOBS: Objection to the extent that the question mischaracterizes the witness' previous testimony. He said all of the documents, which there are hundreds of thousands of --
THE COURT: All right. Well, rephrase the question.
MR. BULLOCK: I'll withdraw it.
BY MR. BULLOCK:
Q. Were you given free rein to look at whatever discovery materials were in the possession of the Plaintiff which had

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been produced by Florida Cities?
A. No, I was not given free rein.
Q. Were you not allowed to look at some material?
A. Materials were sent to me for review.
Q. Okay. And is that the normal method that you as an expert witness use is you rely on someone else's judgment as to what you need to review to generate your opinion?
MR. JACOBS: Objection to the extent that this particular witness -- he's not asking this particular witness what he did; he's asking about expert witnesses in general, common procedures, and I don't know that this witness is qualified to answer that.
THE COURT: Well, I don't know. I think he can examine him concerning his customary mode of operation in playing a role in the determination of what documentation he may need, so I think that falls basically within proper cross.
MR. JACOBS: I understood the question to refer to expert witness testimony in general, not particular -- not this particular witness. I have no problem with examination regarding this particular witness' mode of operation.
THE COURT: Yes, I think we need to limit it to his --
MR. BULLOCK: Yes, Your Honor, and I intended it to be limited that way.

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THE COURT: Okay.
BY MR. BULLOCK:
Q. Is it normal for someone else to select what you review when you're rendering an expert opinion?
A. To the extent that in many of the cases we work on, files and documents for our review are provided to us rather than us going into and myself going into either EPA or State offices and, in effect, going through the State or the EPA files to look for materials.
Likewise, we rarely receive discovery materials directly as part of our support on a case. So, I would say no, having -- being sent materials is fairly common.
Q. Did you ask to see any other materials other than what was provided to you?
A. Certainly at various points in times, conversations took place where I -- where we asked whether certain materials were available, I'm sure.
Q. All right. Do you remember what additional information was forwarded to you?
A. No.
Q. Okay. Who selected the information that was sent to you?
A. I couldn't specifically say.
Q. Okay. Who signed the cover letter that came to you?
A. A certain amount of material was received from

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Mr. Jacobs; certain material was received from Mr. Kwan.
Q. Anybody else?
A. I'm trying to recall. I believe some of the materials that I received were signed by Mr. Bartlett.
Q. By Mr. --
A. -- Byron Bartlett. I believe that was materials received from the County.
Q. All right. Who did you have phone conversations with about whether or not other information existed?
A. Probably Mr. Jacobs and Mr. Kwan.
Q. Did you review the Environmental Sciences and Engineering August 1987 report to Florida Cities?
A. That would have been the preliminary engineering report?
Q. Correct.
A. Yes.
Q. Okay. The ESE report examined various options, isn't that true?
A. Yes, that is true.
Q. And these were options regarding how -- what would -- how the Waterway Estates effluent would be disposed of, isn't that correct?
A. Yes.
Q. All right. Let me refer you to the report which is Florida Cities' Trial Exhibit 194.

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Let me first ask you, this is the report we've referred to a few minutes ago?
A. Yes, this appears to be it.
Q. And you reviewed this in preparation of providing your opinion on behalf of the Plaintiff?
A. Yes.
Q. All right.
MR. BULLOCK: Your Honor, I would move that Florida Cities' 194 be moved into evidence.
THE COURT: It will be received.
BY MR. BULLOCK:
Q. Let me first discuss the issue of spray fields and/or percolation ponds.
First of all, the Waterway Estates facility is in a residential district, is it not?
A. Yes, it is.
Q. Do you have any opinion about how large a percolation pond, or ponds, would have been required to handle the Waterway Estates effluent?
A. Without seeing specific percolation tests for the area, in other words, for the soil characteristics of the area, I couldn't give you an estimate.
Q. Have you performed any tests yourself?
A. No.
Q. You are not, by background, a hydrogeologist, are you?

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A. No, I'm not.
Q. And you have no particular experience with the hydrogeology in Florida, do you?
A. No.
Q. Now, let me refer you to Page 6.6 of the exhibit, the ESE report.
MR. BULLOCK: Your Honor, the page numbers are in the upper right-hand corner.
Your Honor, can I hand this to the Clerk? I didn't know if you wanted her to have a copy of it or not.
THE COURT: Yes.
MR. BULLOCK: Okay.
I just handed a copy of the report to his Law Clerk.
MR. JACOBS: It's an additional copy of the same --
MR. BULLOCK: Of the ESE report. It's the same exhibit.
THE COURT: So that you won't think that there is some impropriety here, I asked a few minutes ago for retrieval of a duplicate copy of a report so that my Law Clerk could follow along, Ms. Lasso, and that's what he was offering to do.
So, if you have an extra copy, if we're going to spend any time on a document, I would appreciate it, if

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there is a spare document that is convenient, or if there are duplicates, Plaintiff's and Defendant's, then you can go ahead and tender another copy so we can follow along -- so she can follow along as well.
MR. BULLOCK: And I saw that, Your Honor; that's why I went ahead --
THE COURT: I understand.
Apparently Mr. Jacobs didn't understand that.
MR. JACOBS: No, I didn't understand.
THE COURT: I wanted to make sure that there was no suggestion of any impropriety there.
MR. JACOBS: I didn't think there was, Your Honor; I just wanted to know what was going on.
THE COURT: Right.
MR. JACOBS: Thanks.
BY MR. BULLOCK:
Q. Referring again to Page 6.6, ESE did calculations for the size, number and configuration of percolation ponds that would be necessary at Waterway Estates, isn't that correct?
A. Yes, that is correct.
Q. Okay. And the pond system required, according to ESE's calculations, 140 acres, isn't that correct?
A. Yes.
Q. And as you said a minute ago, you haven't performed any alternative calculations, isn't that correct?

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A. Yes, that is correct.
Q. All right. You testified that Florida Cities could have -- excuse me.
Your report on Page 21 states that Florida Cities could have constructed adequately-sized percolation ponds to handle the Waterway Estates flow.
Is that a correct reading of page -- that portion of Page 21?
A. Yes, that's a correct reading.
Q. All right. Isn't it true that ESE found that there was not adequate acreage available for the Waterway Estates facility to build percolation ponds?
A. Well, ESE found that there was not adequate acreage, as the report describes, within the service area. So, my interpretation of the report was that the limits of the investigation was, in fact, the Waterway Estates service area itself, and not the areas surrounding the service area.
So, not finding myself limited to that particular area, I did not see a reason to believe that there was not the possibility of an area outside that immediate service area for construction.
Q. But you didn't investigate to determine where that land might be, did you?
A. I did not carry out an investigation to specifically identify what pieces of property might have been available

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at that point in time.
Q. Okay. Do you know what the closest piece of property that might have been available at that time was?
A. No, I do not.
Q. So, you don't have any idea about how far away from the plant these ponds would have been?
A. No, because, again, Florida Cities and its consultants didn't apparently carry out such an investigation, or at least I have not seen documents to that effect, so no, I did not have that information available.
Q. All right. Are you aware of whether or not there are any Lee County ordinances that would be relevant to percolation ponds in a residential district?
A. I'm not specifically aware of what Lee County's ordinances are in that regard, no.
Q. All right. Are you aware of any FDER regulations regarding perc ponds in a residential district?
A. Excuse me. To the extent that there are certain requirements to protect the public as far as buffer zones and that sort of thing.
Q. Okay. Do you know how large the buffer zone would have to be?
A. It would depend on the size of the pond and the characteristics of the wastewater, I believe, put into it; but I couldn't tell you exactly what buffer zone would be

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required.
Q. You stated that permitting should not have been overly burdensome. I believe you just testified a minute ago that you're not aware of what the Lee County requirements would have been to permit this facility, are you?
A. Not specifically, but that was my belief.
Q. Okay. So, you really don't have any basis for your opinion that permitting this facility would or would not be burdensome, isn't that correct?
A. That was based only on the understanding of fairly widespread use of ponds in Florida, and those ponds being located in -- or in relatively close proximity to residential areas.
Q. But as to this particular permitting, you don't have any basis for this statement?
A. Other than that just stated.
Q. Aren't most percolation ponds right on the site of a treatment facility?
A. I couldn't speak for "most percolation ponds." Those I have seen have been.
Q. In your general experience, they have been?
A. Yes, in my experience.
Q. And how far away from a plant is it practical to have a percolation pond?
(Pause.)

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A. Depending on the characteristics of the terrain, a pond could be located quite some distance, since the terrain would tend to influence pumping costs.
In an area such as Florida where, in fact, the land is quite flat, I wouldn't see any reason that such a pond couldn't be located a number of miles away.
Q. That would require construction of a forced main between the plant and the pond?
A. Yes.
Q. All right. And you would have to construct a forced main at Waterway Estates through a residential neighborhood, wouldn't you?
A. Yes.
Q. Which would require other permits, would it not?
A. Yes.
Q. You have no opinion as to how much building perc ponds at Waterway Estates during this period of time would have cost, do you?
A. I have not carried out such a detailed estimate, no.
Q. You indicated that Florida Cities, in your words, on Page 21 appeared to have readily identified two golf courses capable of accepting AWT treatment effluent. And, again, that's in the second bullet point on Page 21.
A. Yes, I see that.
MR. BULLOCK: Your Honor, we have another copy of

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this report. I don't know if we should hand one up for your Clerk or --
THE COURT: That would be helpful.
You're talking about this witness' report, Mr. Klingenstein's report?
MR. HIRD: Your Honor, the copy that's being handed up is mine, and I would hope that -- and the tabs are tabs that I have put on it, so I hope that I could retrieve it for my cross.
THE COURT: Yes, sir. Certainly.
MR. JACOBS: Your Honor, if Mr. Hird needs his -- all the originals are in a box, I believe, at the hands of the Deputy Clerk, or thereabouts, and if the Law Clerk wants to make reference to those, we'll be happy to fetch them.
MR. HIRD: I have no problem with her using it now, Your Honor. It's just when I do my cross, I will need it.
THE COURT: Okay. Thank you.
Ignore the stickies, Maria.
THE LAW CLERK: Okay.
MR. BULLOCK: That would be better than trying to read my handwriting, Your Honor.
MR. JACOBS: No objection to the stickies, Your Honor.
THE COURT: Okay.

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BY MR. BULLOCK:
Q. Let me refer you in the next series of questions to Page 6.5 of the ESE study.
First of all, in order to discharge treated effluent onto a golf course, wouldn't Florida Cities have had to build an AWT upgrade at Waterway Estates anyway?
A. Yes.
Q. Now, ESE identifies on Page 6.5 two golf courses: El Rio, which is a 30-acre golf course, and Lochmore, which is an 18-hole track of 93 acres, is that correct?
A. Yes.
Q. All right. ESE goes on to note in the middle of the page, the last sentence of that middle paragraph, During dry weather, the golf courses apply approximately 200,000 gallons a day on Lochmore and 50,000 gallons a day on El Rio. Isn't that correct?
A. Yes, that is.
Q. All right. Do you have any opinion about how much they apply when it rains?
A. They would apply less.
Q. As a matter of fact, they may not apply anything at all on rainy days, isn't that correct?
A. That's entirely possible.
Q. Now, the minimum area of land needed to handle the Waterway Estates plant, according to ESE, was 220 acres,

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which includes 180 acres of wet area, five acres of storage, and a 35-acre buffer zone, isn't that correct?
A. Yes.
Q. The golf courses together only add up to 123 acres, if my math is right?
A. Yes, that's correct.
Q. All right. And that is approximately a hundred acres less than the land that was actually needed, isn't that correct?
A. Yes, that is.
Q. All right. And that would not have allowed discharge every day particularly during wet weather, isn't that correct?
A. That is correct.
Q. All right. So, these two golf courses together would have been inadequate to handle spray irrigation from Waterway Estates, isn't that correct?
A. Yes, that is correct.
Q. All right. The other area identified was identified as a 159-acre tract owned by Gerald and Mary Moody, isn't that correct?
A. Yes.
Q. And isn't it true that ESE approached the Moody family about selling this land?
A. That's the characterization of the report.

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Q. And isn't it true that the Moodys were not interested in purchasing that land?
MR. JACOBS: Objection. The witness can testify from the report, but he can't testify as to facts about whether ESE approached the Moody family. He has no basis.
THE COURT: Well, I don't know whether he does or not. He may have talked to those people and may have formed the basis of his report. If he hadn't, he can testify.
MR. BULLOCK: I'll withdraw the question, Your Honor, and ask it again.
THE COURT: All right.
BY MR. BULLOCK:
Q. Mr. Klingenstein, did you ever talk to the Moody family?
A. No, I did not.
Q. All right. And does the report indicate that ESE talked to the Moody family?
A. The report indicates that Florida Cities talked to the Moody family.
Q. Okay. And does the report indicate whether or not the Moody family was interested in selling the property?
A. It indicates – would indicate that they were not.
Q. Okay. 159 acres would have been inadequate to handle the discharge from Waterway Estates, wouldn't it?
A. It would appear to have been, yes.

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Q. All right. Because even during extremely dry weather, 159 acres was below the minimum of 220, correct?
A. Yes.
Q. And it would have been even less effective during wet weather?
THE COURT: Is that correct?
THE WITNESS: Yes, that would be correct.
THE COURT: You need to put your questions in the form of questions.
MR. BULLOCK: Yes, sir.
THE COURT: Let's take a ten-minute recess.
(A recess was taken.)

MR. HIRD: Your Honor.
THE COURT: Yes, sir.
MR. HIRD: Before Mr. Bullock resumes, Avatar Holdings would designate as its corporate representative Mr. Leon Levy. When he comes in the Courtroom, I will identify him. He should be in some time today.
THE COURT: Very well. Thank you.
All right, Mr. Bullock.
MR. BULLOCK: Thank you, Your Honor.
BY MR. BULLOCK:
Q. Going back to page 6.5 of the ESE study, you stated that Florida Cities never seriously pursued spray irrigation as an option on page 21 of your report.
Isn't it true that the ESE report presented sufficient information for Florida Cities to have determined that spray irrigation was not a viable option for the Waterway Estates Facility?
A. Based on my review of the report, I did not glean sufficient information to ascertain that other sites were not available, particularly those outside of the Waterway Estates service area, and that if such sites were available, whether or not they would be practical to use.
Q. Okay.
So you didn't do any research on that yourself either?
A. Not as to what was available at that point in time, no.

Q. All right.
Nor did you do any research or calculation about how much it would have cost to move the effluent from outside of the service area on a spray field or golf course; you don't have any opinion about that, do you?
A. Well, that would depend. Such cost would depend on the particular location of the site identified, so without specific sites being identified, it would not be practical to carry out such an evaluation.
Q. Okay.
I believe I may have asked this earlier, let me ask specifically, the next topic we want to discuss about is do deep well injection -- have you ever attempted to permit a deep well in the State of Florida?
A. No, I've not.
Q. Have you undertaken any research about the hydrology in the Lee County area as to its suitability for deep wells?
A. To the extent that I have had conversations with FDER personnel with regard to -- with regard to that possibility.
Q. Can a deep well be used as a primary disposal of treated effluent?
A. I believe reuse, surface reuse is also typically required.
Q. If -- all right.
Is deep well -- if you have a deep well as a primary

source of discharge, do you have to have an additional deep well as a backup in Florida?
A. I don't believe that specifically a second deep well has to be installed.
Q. All right.
Let me refer you to page 6.7 and the word "underground injection." Would you read the heading, first two sentences, please.
A. Underground injection at the WTP requires two, one, parentheses, one MGD capacity class one effluent disposal wells. The second injection well will serve as a backup as required by the FDER.
Q. This paragraph goes on to say that FDER is presently favorable toward deep wells, correct?
A. Yes, it does.
Q. All right.
This paragraph goes on to say that the public opinion in North Fort Myers would likely be strongly opposed to deep wells, does it not?
A. That is the report's characterization.
Q. All right.
The report also characterizes the South Florida Water Management District as being somewhat concerned about the proliferation of deep wells in this area of Florida, isn't that correct?

A. That is the report's characterization.
Q. And this concern is characterized because the South Florida Water Management District was concerned about, that the water injected in the deep wells is basically a non-recoverable resource, correct?
A. Yes.
Q. All right.
What is the South Florida Water Management District?
A. It is one of the local water management districts within Florida.
Q. And can you tell me what regulatory authority it has?
A. I believe such authority is as granted to it by the State.
Q. Have you reviewed in fact what regulatory authority is granted to the water management districts?
A. I know I'm not fully aware of all of its regulatory authority.
Q. All right.
And you indicated that reuse was a requirement when deep wells were involved, is that correct?
A. I believe some form of backup or some form of firm disposal is a requirement.
Q. Okay.
And that would be in case the deep well failed?
A. I believe so.

Q. All right.
And who would have required the reuse?
A. I would believe it would be likely the water management district.
Q. All right.
And the reuse would have required sufficient backup to handle the capacity of the plant?
A. Yes.
Q. And ESE has already identified that according to their report -- let me start over again.
Isn't it true ESE was unable to find any suitable discharge for surface water or, in this instance, for spray such as spray fields, golf courses, et cetera?
MR. JACOBS: Objection, it's one thing again to ask him to testify about the report, but when he gets into exactly the underlying investigation that ESE or ESE might not have done, I believe it's beyond the scope of this witness' expert testimony.
THE COURT: Well, I'll overrule the objection. If he doesn't know, he doesn't know.
THE WITNESS: Not having a contact with ESE with regard to what investigations they might have carried out, I would say only given the limitations that are of the investigation.
BY MR. BULLOCK:

Q. Isn't it true in their report that their report states they were unable to find adequate spray irrigation pockets?
A. I believe the way the report characterizes it, these were the particular locations that were identified within the service area.
Q. The facts indicated that that area was inadequate for the discharge of the capacity of the plant, isn't that correct?
A. That those sites that were identified were inadequate, yes.
Q. Okay.
You also -- strike that.
Isn't it true, Mr. Klingenstein, there was no State requirement to upgrade Waterway Estates to an advanced wastewater treatment plant until 1988?
A. I believe there was a State requirement for them to upgrade the plant by 1988.
Q. And where do you find that requirement?
A. I believe there may have been a requirement in the previous permit.
Q. Which permit would that have been?
A. I couldn't say for certain.
Q. You have reviewed the 1981 State permit, have you not?
A. I'm sorry.
Q. Earlier to this morning, we reviewed the 1981 FDER permit for Waterway Estates, correct?

A. Yes, we did.
Q. And we reviewed the 1983 permit for Waterway Estates issued by FDER, correct?
A. Yes, we did.
Q. Let me refer you to Trial Exhibit 33 which is the 1983 permit which we've already looked at before. I'm sorry, I told you the wrong number.
Let me refer you to Exhibit 20 which is the 1983 permit. You have Exhibit 20 in front of you?
A. Hold on.
Q. Florida Cities Exhibit 20?
A. Hold on for a minute.
Q. Would you take a minute and identify for me where in the 1983 permit there is a requirement for Waterway Estates to upgrade to advanced wastewater treatment.
A. No, there's no requirement.
Q. Let me show you -- let me ask you to look at Exhibit 17 which was the 1981 permit, and ask you whether or not you can find a requirement in the '81 permit to upgrade AWT?
A. No, there was no requirement.
Q. Let me refer you then -- strike that.
First, isn't it true then there was no requirement before 1988 from the State of Florida for the Waterway Estates Plant to be upgraded to advanced wastewater treatment?
A. I can't answer that from memory.

Q. All right.
Let me refer you to Exhibit 33 which is the 1988 State permit. Let me refer you to actually the second page of the exhibit, it's entitled page 1 of 6. This is the first permit -- excuse me -- isn't this the first permit that requires an upgrade to advanced wastewater treatment?
A. This permit does require upgrade to advanced wastewater treatment.
MR. BULLOCK: We would move Defendants' 33 in evidence.
THE COURT: It'll be received.
BY MR. BULLOCK:
Q. Let me also refer you to Defendant Florida Cities' 51. Can you identify Exhibit 51?
A. Yes, this is -- this is covered by cover letter October 30, 1990, and it is apparently an extension of the Waterway Estates permit.
Q. And this extension grants an extension, isn't it true, this extension grants an extension of the construction of AWT until September 1, 1992?
A. The permit was extended until September 1, 1992.
MR. HIRD: The corporate representative of Avatar Holdings, Mr. Leon Levy, is now present.
THE COURT: Yes, sir.
BY MR. BULLOCK:

Q. Now, are you aware of any other permits issued by the State of Florida to Waterway Estates between 1983 and 1988?

THE COURT: Would you ask that question again, please.

BY MR. BULLOCK:

Q. All right.

Sir, we have looked at the permits, Mr. Klingenstein, 1981, 1983, 1988 and 1990. Are you aware of any other permits between 1980 and 1990 from the State of Florida to the Waterway Estates Facility?

A. Not that I'm aware of.

Q. All right.

MR. BULLOCK: Your Honor, we would move that Florida Cities' 51 be admitted in evidence.

THE COURT: It'll be received.

BY MR. BULLOCK:

Q. Isn't it true, Mr. Klingenstein, that you're unaware of any other requirement of the State of Florida to upgrade the Waterway Estates Treatment Plant, AWT, other than the 1988 and 1990 permits?

A. Trying to refresh my memory as to whether there was another State requirement; perhaps under an order to have this take place by the end of the term of the permit which expired in 1988.

Q. But in fact, you don't remember whether or not that

existed or not as you sit here today, do you?

A. At this moment, I do not recall.

Q. Let me refer to what has already been admitted in evidence as Florida Cities' Exhibit 195. Let me refer you to page three of the administrative order.

Isn't it true that paragraph one on page 3 of this exhibit contains a construction schedule for the construction of an advanced wastewater treatment plant at Waterway Estates?

A. Yes, it does.

Q. All right.

Are you aware of any earlier requirement other than this administrative order from EPA which required the construction of an AWT facility at Waterway Estates?

A. Not that I'm aware of.

Q. On page 21 of your report, you have stated that Florida Cities could have avoided discharge to an unpermitted location by extending the outfall in a timely manner; that would be the bottom paragraph.

A. Yes, that's correct.

Q. All right.

Isn't it true that Exhibit 195 contained the first requirement from EPA to Florida Cities to move the outfall at Waterway Estates?

A. Florida Cities' first notification of the need to address their situation would have come, in my mind, when the Cape

Coral Facility became non-reality and they should have recognized the need to have addressed their situation and put in place measures to have allowed them to discharge at the proper location.

MR. BULLOCK: Your Honor, I move to strike as non-responsive.

THE COURT: Ask the question again.

BY MR. BULLOCK:

Q. Isn't it true that the first requirement from the Environmental Protection Agency to Florida Cities to move the outfall of the Waterway Estates Plant occurred in Exhibit 195?

THE COURT: I'll grant your request and strike the answer.

THE WITNESS: Certainly with regard to notification from EPA, in my mind, the tentative denial of the permit and the basis for that denial should have put Florida Cities on notice that they had need to take action and, in fact, correspondence indicates such that Florida Cities was aware at that point to the need to take such action.

MR. BULLOCK: I would also move to strike, too, there is no requirement in the 1986 permit denial.

THE COURT: I'll let it stand for what it's worth.

BY MR. BULLOCK:

Q. Okay.

Did any of the earlier administrative orders issued by

EPA in 1987 and 1988 order Florida Cities to move the outfall?

A. I would need to refresh my memory by looking at those orders.

Q. As you sit here today, though, you can't remember whether or not they did or not.

A. As I said, I need to see those orders to refresh my memory.

Q. Let me refer you to Florida Cities' Exhibit 23. Could you identify Exhibit 23?

A. This is a letter dated June 30, 1986. It is to Mr. Patrick Layman and it's from Ms. Connie Kagey and it is a letter that is entitled NPDES Permit Denial, Waterway Estates, NPDES Permit Number.

Q. Can you identify where in this document there is the language that directs Florida Cities to move its outfall?

A. There is not language specifically requiring Florida Cities to move its outfall.

Q. So my question which we go back to is, isn't it true that the September 26th administrative order, September 26, 1989 administrative order, which is 89-109, is the first requirement from the Environmental Protection Agency for Florida Cities to move the outfall; yes or no?

MR. JACOBS: Again, Your Honor, I'd ask that the witness be permitted to look at all the administrative orders and not skip over some.

THE COURT: Well, if he needs to, if he has to do so, then I'll permit him to do so.

THE WITNESS: I would like to see the additional administrative orders, if I could.

(Pause.)

THE COURT: You're -- never mind.

BY MR. BULLOCK:

Q. Let me refer first --

THE COURT: You don't recall at this time; is that correct?

THE WITNESS: Yes, Your Honor.

THE COURT: All right.

Now if you want to, on redirect, to present him with those documents, you can. I think that is a better way to handle it at this point.

MR. BULLOCK: Your Honor, may we refer him to the documents? I'll handle it either way.

THE COURT: Your -- I'll permit you to do that if you want to.

MR. BULLOCK: I don't want to hold us up needlessly.

THE COURT: Okay.

BY MR. BULLOCK:

Q. Let me refer you first to Florida Cities' Exhibit 28 and then Exhibit 52, and ask you if in those documents you find any direction for Florida Cities to move the outfall of this

facility?

MR. JACOBS: Your Honor, objection to 52. It's one page of -- it's just one page, doesn't seem to be complete.

THE COURT: Well, he's asking him to -- well -- I don't know. What is 52? That's not in evidence, is that correct?

MR. BULLOCK: Not yet, Your Honor.

Your Honor, 52 is an amendment to Exhibit 28.

MR. JACOBS: I'll withdraw the objection with the understanding that it's incomplete, if that would assist in moving things along.

MR. BULLOCK: Your Honor, it's also Plaintiff's 382.

THE COURT: One page?

MR. BULLOCK: That I do not know, but our Exhibit 52 is their 382.

THE COURT: Well, take a look at Plaintiff's 382 and see what we have got because what I have in my binder is one page of what purports to be an amendment to the order.

MR. JACOBS: Your Honor, I withdraw the objection.

THE COURT: All right.

Do we have a question on the floor?

BY MR. BULLOCK:

Q. Is there anything in the '87 administrative order or the amendment thereto which directs Florida Cities to move the outfall of this facility?

A. Certainly not with regard to 52, not on that page and there's nothing in Defendants' Exhibit 28 that specifically requires the movement of an outfall or relocation of outfall.

MR. BULLOCK: Your Honor, I would note for the record the Plaintiff's version of this exhibit is also one page, I believe.

THE COURT: Okay.

I think that is why he withdrew his objection.

BY MR. BULLOCK:

Q. Isn't it true that the 89-109 administrative order gave Florida Cities until August 1, 1991 to complete the construction of the outfall?

A. I believe that was the date. We have unfortunately taken that exhibit away. Yes, I recall that was the date.

Q. Okay.

A. I'm sorry, that was the completion of outfall or upgraded facility.

Q. Completion of outfall?

A. Could I see that again, please.

Q. Exhibit 195.

A. I believe the date complete construction ceased discharge at current location, August 1, 1991.

Q. Isn't it true that the outfall was completed and put into service on July 14, 1991?

A. I recall it was in July of 1991, yes.

Q. All right.

That would be ahead of the schedule put forth in Exhibit 195, the construction schedule?

A. That would be ahead of that date.

Q. Isn't it true that in order to move the outfall, Florida Cities had to have a Section 404 Dredge and Fill Permit from the Army Corps of Engineers?

A. Yes.

Q. All right.

And in your experience, would it ever be possible for a construction project such as the Waterway Estates outfall to be moved to the six foot contour line without a Section 404 Permit?

A. I'm not aware of how that would be done.

Q. Isn't it true that Florida Cities filed for a dredge and fill permit on April 7, 1989?

A. I can't recall the date that they filed.

Q. Isn't it true that the Corps of Engineers did not grant this permit until April 11, 1990?

A. I believe it was in April, 1990, that if memory serves.

Q. Let me refer you to Exhibit 42, Florida Cities'. Would you identify Exhibit 42?

A. It is a letter from the Department of Army enclosing the construction permit with notice of authorization.

MR. BULLOCK: Your Honor, we would move Exhibit 42 in

evidence.

THE COURT: Be received.

BY MR. BULLOCK:

Q. Isn't it true that Florida Cities was required to obtain building permits from Lee County before it began construction on either the AWT upgrade or the plant outfall?

A. Yes, that was true.

Q. Are you aware of how many permits the Florida Cities Waterway Estates Project had to obtain in order to construct the outfall and upgrade the plant?

A. I couldn't give you an exact number.

Q. Okay.

Do you know how many different permitting facilities Florida Cities had to apply to to obtain permits to construct the outfall and upgrade the plant?

A. I'm aware they had to get the permitting through the Army Corps of Engineers for the outfall, State permit and county permit.

Q. Do you know which county permit?

A. No, I'm sorry. County permits, in other words, that was a permit required from the county.

Q. Do you know how many permits from the county were required?

A. No, no, I do not.

Q. If you assume with me that the first requirement to move

the plant outfall came on September 26, 1989, isn't it true that it was physically and legally impossible to move this outfall by November 1, 1989?

MR. JACOBS: Objection, calls for a legal conclusion.

THE COURT: I'll permit him to answer it if he knows.

THE WITNESS: I'm sorry, your starting date was again?

BY MR. BULLOCK:

Q. If you assume with me the first time Florida Cities was required by the Environmental Protection Agency to move the outfall was September 26, 1989, wasn't it both physically and legally impossible to have the outfall moved by November 1, 1989, the effective date of the NPDES permit?

A. Assuming that no action had been taken on Florida Cities up to that point in time, yes, that would have been very unlikely.

Q. Are you familiar when Florida Cities applied to Lee County for a zoning variance to expand the building for the AWT construction?

A. I would need to refresh my memory on that, Counsel.

Q. Okay.

But as you sit here today, you're not aware of it?

A. Not the exact date, no.

Q. Did you review the Lee County applications for zoning variances?

A. I don't know if I reviewed the entire applications.

Q. All right.

Are you aware of when Florida Cities applied for a development ordinance exemption?

A. I would also need to refresh my memory.

Q. Do you even know what a development ordinance exemption is?

A. It is obviously exemption that is granted by that particular body with regard to certain ordinances involving facilities that are being built within the particular area, but I can't tell you specifically what is being exempted.

Q. You're just speculating as to what those are, is that correct?

A. In fact, I'm not speculating as to what those are.

Q. You've never filed any permit applications or anything like that, though, have you, in Lee County?

A. No, I have not.

Q. Are you aware of whether or not Florida Cities could have started construction of the AWT upgrade or the plant outfall before they received permission from Lee County?

A. I believe it needed Lee County's permission.

Q. Let's move now to the permits, exceedences of the NPDES permit. Isn't it true that the only parameters which were actually exceeded after the plant outfall was moved was nitrogen from August through April of the next year?

A. I believe, if I recall, yes, it was nitrogen violations.

Q. In fact, Florida Cities was meeting the other removal of the other pollutants in the effluent at AWT levels, isn't that correct?

A. I believe they were complying with their other permit requirements.

Q. And isn't it true that even during the interim in which there were actual exceedences of nitrogen, the Florida Cities had raised its level of nitrogen removal above secondary treatment levels.

A. I'm sorry, could you repeat that?

Q. Isn't it true that between August of '90 and April -- August '91 and August -- April of 92, that even though there were nitrogen exceedences, Florida Cities had raised the level of nitrogen removal in its effluent to above secondary treatment levels?

A. I believe there was an improvement in nitrogen removal.

Q. The answer to the question is yes?

A. Yes.

Q. The effluent limitations that were in effect between November 1, 1989 and August of '91 were contained in the administrative order that you've looked at earlier which would be Exhibit 195?

A. I'm sorry, that was within -- between which two dates?

Q. November 1, '89 -- or excuse me, it would be September 26, '89 through August of '91?

A. That should be true.
Q. All right.
And isn't it true there were no violations of these administrative order effluent limitations?
A. Yes, I believe that was true.
Q. All right.
Isn't it true that the State of Florida through the FDER allowed Waterway Estates to discharge secondary treatment levels until September of 1992?
A. I would need to go back and again refresh my memory on that document as to the specific date, but --
Q. Well, we looked earlier at the 1988 and 1990 State permits, correct?
A. Correct.
Q. And the 1988 and '90 State permits contained construction schedules, do they not?
A. Correct.
Q. And the 1990 permit was an extension of the construction deadlines, correct?
A. Yes, it was.
Q. Let me refer you to Exhibit 51. Isn't it true that Exhibit 51 in fact extends the construction schedule until September 1, 1992?
A. Yes. The subject permit was extended until September 1, 1992.

Q. In reviewing the decisions that Florida Cities made regarding the Waterway Estates Wastewater Treatment Plant, isn't it true that you don't take into account any consideration that Florida Cities was required to make regarding the Public Service Commission of the State of Florida?
A. No, I would not say that is true.
Q. Okay.
What considerations do you refer to in your report regarding the Florida Public Service Commission?
A. I don't recall whether I specifically made reference to the Florida Public Service Commission in my report.
Q. And I believe you testified this morning that the only information that you reviewed regarding the Florida Public Service Commission was correspondence back and from Florida Cities, I believe, to FDER; I'm not sure that I remember exactly the characterization.
A. Correspondence regarding issues regarding the Florida Public Service Commission.
Q. But you never reviewed any correspondence regarding the Florida Public Service Commission?
A. No, I believe I said I reviewed --
Q. I'm sorry.
A. Yeah.
Q. I'm sorry, let me withdraw that, sir.

You never reviewed any correspondence between Florida Cities and the Public Service Commission?
A. I can't tell you that. I don't recall exactly whether it was included correspondence between the Florida Public Service Commission and Florida Cities.
Q. Do you know whether or not the Florida Public Service Commission ever ruled on the prudency of Florida Cities' decision to expand the -- upgrade the AWT and the corresponding construction?
A. I'm aware of documents that discussed or indicated some testimony had been given at rate hearings, so I would assume there is likelihood that they did.
Q. Okay.
And you don't know the outcome?
A. I don't know the exact outcome, no.
Q. All right.
Earlier in your testimony, we reviewed some of the other cases that are listed in your resume for cases that you previously provided either expert testimony or consulting, and I believe that a number of those involved manufacturing facilities, isn't that correct?
A. Yes, it is.
Q. A manufacturing facility has different financial considerations than a privately owned publicly regulated utility, does it not?

A. I would say it has some that are similar and some that are different?
Q. All right.
And one of the -- how would you distinguish the differences?
MR. JACOBS: He's not being offered as an expert for purposes as it goes into finances. They objected when I got into that with him.
MR. BULLOCK: Your Honor, he's offered opinions about the motivations of why the company did or did not undertake certain activity. He's offered motivational opinions about whether or not the company was following the Clean Water Act and why it was and why it wasn't. I believe that --
THE COURT: All right.
What is it you're seeking to elicit from him now?
MR. BULLOCK: Shall I rephrase the question?
THE COURT: Yeah.
BY MR. BULLOCK:
Q. All right.
Isn't it true, Mr. Klingenstein, that a manufacturing facility -- that it behooves a manufacturing facility to not spend money on upgrades for environmental related construction?
THE COURT: All right.
I'll permit him to answer that.
THE WITNESS: I don't know that I would completely

agree with that.

THE COURT: Well, now, I think we're getting a little afield here. Now you have questioned him regarding his experience in some of the instances in which he has performed consulting services which relate to other than public/privately owned wastewater treatment facilities. But I think we're getting a little afield here. You want to be heard any further on this?

MR. BULLOCK: Your Honor, my only comment would be that he is offering opinions as to why Florida Cities made certain decisions and I would like to investigate whether or not he knows the differences between regulated utilities and the other types of facilities that he's investigated to determine whether or not his assumptions on why certain decisions were made are valid.

THE COURT: Yes, sir.

MR. JACOBS: The assumptions he made and the question I posed yesterday had to do with technology and whether an option was technologically feasible. I didn't get into this area of analyzing the difference between a publicly operated wastewater treatment plant, a privately upgraded wastewater treatment plant. We just didn't open the doors to those types of questions, Your Honor.

MR. BULLOCK: Your Honor, there are several references in his opinion.

THE COURT: Well, I'm going to allow it for what it's worth and if you want to get into it further on redirect, Mr. Jacobs, you can.

All right, go ahead.

BY MR. BULLOCK:

Q. Mr. Klingenstein, isn't it true that the only way that a regulated utility can earn a return on investments is to have that included in its rate base -- capital investment included in its rate base?

A. I would assume with the exception of any investment they might make that they might be able to later sell for profit, perhaps, but I would assume that in terms of when they own the investment, it would need to be on a rate base.

Q. So that isn't it true then that there is no benefit from an avoid cost of not spending money on capital expenditures for environmental protection?

A. Again, to the extent that I'm qualified to answer the question, my understanding of the process is that such an entity has to go to its regulatory body and in effect obtain approval for the inclusion of that expenditure in the rate base and that there is often concern on the part of such an entity as to whether or not the particular expenditure will be found appropriate for inclusion in the rate base.

And to the extent that an expenditure would be made, say that would be more expensive, but would be more timely and

therefore would meet a particular deadline, but would end up resulting in a higher cost to be passed along to the users, those in the rate base.

I would assume there is a risk that that additional cost might have to be borne by the company itself.

Q. But you would agree with me that the company's legitimate concern is that the Public Service Commission find that its expenditure is to be prudent?

A. I'm certain from a business standpoint, not being qualified as an expert in business matters, but as a business matter, I would assume it's of concern to them.

Q. Thank you.

Let's turn now to the Carrollwood facility. Did you interview anyone at EPA Region IV about Carrollwood?

A. Mr. Ken Kwan.

Q. And did Mr. Kwan state whether or not he had investigated the Carrollwood Facility during the period of time at issue in this lawsuit?

A. I can't remember specifically whether he used the word "investigated," but we discussed the facility.

Q. Did he indicate to you whether or not he had visited the Carrollwood Facility while it was in operation?

A. That I don't recall.

Q. Did you interview Mr. Thomas Pfaff?

A. No, I don't believe Thomas Pfaff and I have ever spoken

about Carrollwood.

Q. The NPDES permit which was effective July 1, 1991 for Carrollwood was an advanced wastewater treatment facility, correct?

A. The permit limits that it included would typically be expected to require an AWT Plant in order to meet them.

Q. Have you ever seen a secondary plant with the limitations contained in the July 1, 1991 permit?

A. Not that I recall.

Q. All right.

Isn't it true that it would be technically impossible for a secondary treatment plant to consistently meet all of the parameters in the July 1, 1991 permit?

A. Would certainly be very unlikely.

Q. Isn't it true that between July 1, 1991 and January, 1992, the Carrollwood Plant in fact met some of the limitations, particularly those for total suspended soilient and biological oxygen demand?

A. Yes. As I recall, they did meet some of those.

Q. Are you familiar with the measures which Florida Cities took which enabled the plant to meet some of the 1991 effluent limitations in that permit?

A. I don't recall which specific measures they took.

Q. Okay.

Do you know of any data which demonstrates that the

discharges from the Carrollwood Plant between July 1, '91 and January, 1992, caused any environmental harm to Sweetwater Creek?

A. Certainly I've seen data that I believe is from the -- what's known as the STORET System, that looks at the data from I believe mid-1989 through 1994 and splitting that data at the point in time at which the discharge was ceased.

There are noticeable reductions in both phosphorus and nitrogen load in the creek, these from a point several miles downstream from the site of the treatment plant.

Q. And have you made a survey of what other dischargers discharge into this particular body of water?

A. As I recall from the description in Florida Cities' contractor's report, LTI, I don't believe there were any substantial discharges.

Q. There was nine point source runoff in this area?

A. I would suspect there would be some, yes.

Q. This in fact is a heavily urbanized area, is it not?

A. Fairly well developed.

Q. Okay.

Are you able to, sir, with a reasonable degree of scientific certainty, more probably than not, that you can trace the effects you found in the STORET data specifically to the Carrollwood Plant?

A. Not specifically.

Q. Okay.

When did EPA first require Florida Cities to build an AWT Plant at Carrollwood?

A. I can't recall from memory when the first actual requirement to construct might have taken place.

Q. Isn't it true that the first -- strike that. Let me start over again.

Isn't it true that before the July 1, '91 NPDES permits, EPA never took any action which mandated an upgrade to AWT at Carrollwood?

A. As I said, I can't recall.

Q. So your answer actually is no?

A. Well, certainly I can't recall.

Q. Carrollwood had received -- and isn't it true that Carrollwood received an NPDES permit in 1975?

A. I believe that is true, yes.

Q. Isn't it true that between 1975 and January, 1992, the Carrollwood Facility was always authorized to discharge by the State of Florida?

A. I believe the facility operated under a series of permits.

Q. So the answer to my question is yes?

A. Yes.

Q. And are you aware of the Wilson-Grizzle Legislation in Florida?

A. To a certain degree.

Q. And what is your understanding of Wilson-Grizzle?

A. My understanding -- actually my understanding probably relates more to I think what is described as Grizzle-Figg.

Q. My question is about Wilson-Grizzle?

A. Other than being aware that I believe it predated Grizzle-Figg, not in detail.

Q. You don't know the specifics of that legislation?

A. No, not the specifics of that.

Q. Did Florida Cities apply for a renewal of its State discharge permit in 1979?

A. I would assume they did, but I would need to be refreshed as to the specifics of that application.

Q. Okay.

And did the State in fact grant a renewal?

A. That is my recollection.

Q. All right.

Isn't it true that at some point in time in 1979, FDER required that in the future, Florida Cities connect the Carrollwood Plant to a Hillsborough County Plant at a subsequent date?

A. Again, as I said, I recall that there was a reissuance, but I would need to have my recollection refreshed.

Q. Are you aware of whether or not in 1979 there was adequate capacity in any Hillsborough County Facility to accept

the Carrollwood flow?

A. My recollection based on correspondence between Hillsborough County and Florida Cities is no, there was not.

Q. And isn't it true that Hillsborough County is different from other sections of Florida in that Florida has delegated some of FDER's responsibility to Hillsborough County?

A. I couldn't speak for all the sections of Florida. That is apparently the case in Hillsborough.

Q. Let me refer you to Defendants' Exhibit 94. Have you located Exhibit 94?

A. Yes, I have.

Q. Would you identify it, please?

A. It's a letter dated February 14, 1983, to a Mr. A. A. Reeves, and it is on Hillsborough County Environmental Protection Commission letterhead. It's from a William J. Harper. It is a letter that basically states that Florida Department of Environmental Regulation Permit TP29-29206 requires connection to the Carrollwood Wastewater Treatment Plant to the Hillsborough County System by June 30, 1983.

MR. BULLOCK: Your Honor, I would move Defendants' 94.

THE COURT: Be received.

BY MR. BULLOCK:

Q. In fact, to your knowledge, was there capacity in the Hillsborough System by June 30, 1983?

A. Based on correspondence I see, no.
Q. Florida Cities -- let's back up a second.
Florida Cities applied to renew its NPDES permit in 1980, is that correct?
A. 1980 or 1979.
Q. 1980 --
A. Again, I need to have my recollection refreshed.
Q. All right.
Isn't it true that in order for EPA to issue a NPDES permit in a non-delegated State such as Florida, EPA must obtain State certification of the permit?
A. That is my understanding, yes, that's how the system works.
Q. All right.
And to your knowledge, was Florida able to certify --
A. I'm sorry, which year?
Q. Let me finish my question.
A. I'm sorry.
Q. To your knowledge, was Florida able to certify the 1980 application to renew the NPDES permit?
A. I've not seen such or I don't recall anyway seeing such certification, but I understand that a permit was issued.
Q. You understand the 1980 NPDES permit was issued?
A. There was a permit.
Q. Isn't it true that actually that permit application was

denied in 1984?
A. Yes.
Q. All right.
And in fact, wasn't it denied because the State would not certify the permit?
A. If I recall correctly, yes.
Q. Now, you testified that Florida Cities had another option in 1983 to divert the effluent coming into the Carrollwood Plant, is that correct?
A. Yes.
Q. That would be with the City of Tampa, correct?
A. Yes.
Q. And the City of Tampa -- isn't it true that the City of Tampa identified a connection point into its system at approximately fifteen thousand feet from the Carrollwood Plant?
A. I believe they identified three connections, but the fifteen thousand foot connection was available at that time.
Q. Okay.
And fifteen thousand feet is approximately three miles?
A. Yes, sir.
Q. Have you calculated what the cost would have been to build a three mile force plant?
A. I have not carried a detailed calculation of that cost.
Q. Have you visited the area in which the Carrollwood Plant was located?

A. Yes, I believe as I've indicated in my direct testimony we did visit the site of the former plant.
Q. Would you identify the surroundings of the Carrollwood Plant?
A. A residential area.
Q. Is it a relatively upscaled residential area?
MR. JACOBS: Relevancy, Your Honor.
THE WITNESS: I can't --
THE COURT: Wait, wait, wait, wait.
THE WITNESS: I'm sorry.
THE COURT: What's the relevancy?
MR. BULLOCK: Your Honor, during the direct, they were discussing whether or not there were alternatives available. One of the alternatives would have been apparently not drive a three mile force main through a residential --
THE COURT: Overruled. You remember the question?
MR. JACOBS: I'm sorry, I wanted to make my objection a little bit clearer. My point was that there is no -- the point is it's not relevant whether this was an upscale community or not in terms of putting a force main through it. That's the relevancy part of my objection.
THE COURT: I understand. Overruled.
BY MR. BULLOCK:
Q. I'm sorry, the answer to the question was?
A. Could you repeat it.

Q. Was this a relatively upscaled neighborhood?
A. Other than having a general impression of it being a relatively pleasant area, I don't have a particular memory of what type of housing was in there.
Q. Have you performed any calculations about the costs of land condemnation or eminent domain proceedings or easements which Florida Cities would have needed to receive to build a three mile force main?
A. No, I have not.
Q. Do you have any idea what permitting requirements Florida Cities would have had to undertake to build a three mile force main through Carrollwood?
A. Well, certainly construction permits would have been required probably from both local and county.
Q. The City of Tampa was going to charge a connection fee for each of the hookups from -- excuse me -- connection fee of a certain figure per household that discharged into the Carrollwood System, isn't that correct?
A. Yes, I believe that was correct.
Q. And in fact, isn't it true that the tentative figure from the City of Tampa to the Carrollwood Facility was approximately eight hundred --
A. I'm sorry, how much?
Q. Was approximately eight hundred dollars per customer?
A. I recall hearing that figure.

Q. All right.
Isn't it true there would have been other fees as well as the connection fee?
A. I would assume, yes.
Q. All right.
Do you have a complete figure about how much it would have cost to construct a force main and hookup to the City of Tampa?
A. No.
Q. Isn't it true that Florida Cities would have had to submit this proposal to the Florida Public Service Commission or -- excuse me -- or to the Hillsborough County equivalent of the Public Service Commission?
A. I would assume they would have.
Q. All right.
And in that submittal, wouldn't Florida Cities have been required to demonstrate that hooking into Tampa would have been a prudent decision?
A. To the extent that they would have been able to recover the cost as opposed to pay for it out of their own pocket, I believe so, yes.
Q. All right.
During the 1980s, did Hillsborough County ever develop adequate capacity to accept the Carrollwood effluent?
A. Based on the representation in the correspondence, no.

Q. All right.
You have testified that there were other options which the company could have used as disposal methods at Carrollwood, correct?
A. Yes.
Q. All right.
One of the options was percolation ponds. Have you performed any calculation as to how large the percolation ponds would have been required at Carrollwood?
A. No, not independent.
Q. Have you performed any investigation of whether or not there was adequate land in the area at Carrollwood to build percolation ponds?
A. I've not, beyond what I have seen in the 1980 Jamal Report which I believe was entered yesterday.
Q. Did you yourself perform any hydrogeologic studies to determine whether or not there were any suitable sites for percolation ponds?
A. No.
Q. Is the Carrollwood residential subdivision densely populated?
A. I believe it's a reasonably well developed area.
Q. All right.
Do you know how much vacant land was in the area immediately around the plant during the 1980s?

A. Not beyond that which was characterized in the 1984 report.
Q. And how much did the '84 report state?
A. It identified a number of potential sites that had been looked at. It was not inclusive as to whether they were the only available sites in the area.
Q. I believe you identified there were some golf courses which would have -- which the company could have connected to the discharge effluent?
A. I believe the 1984 report looked at one golf course.
Q. Do you know whether or not these facilities were already accepting effluent from other locations?
A. That I can't recall.
Q. Okay.
Again, a golf course can only accept the maximum load during dry weather, isn't that correct?
A. Yes, that is true.
Q. And during wet weather, there would need to be other resources, correct, for disposal?
A. I would assume either storage -- adequate storage or other disposal objectives.
Q. Was there adequate storage available at the Carrollwood Facility?
A. Certainly not as it was constructed.
Q. And in order to discharge effluent to the golf courses,

that would have required AWT treatment?
A. Yes.
Q. Are you aware of whether or not Florida Cities requested permission in 1979 to construct an AWT Plant at the Carrollwood Facility?
A. I would need my memory refreshed as to whether they specifically requested permission to construct.
Q. As you sit there today, you have -- you can't answer one way or the other?
A. I have a recollection there may have been some discussion about AWT, but I can't recall whether they specifically requested the permission to construct.
MR. BULLOCK: The Court's indulgence just a second, Your Honor.
BY MR. BULLOCK:
Q. What materials were made available to you regarding the enforcement issues at Carrollwood?
A. Files from USEPA and files from Hillsborough County. I don't recall whether separate FDER files were reviewed.
Q. All right.
Let me refer you to Florida Cities Trial Exhibit 201.
A. I'm sorry, this is 200, I'm sorry.
MR. BULLOCK: Your Honor, is it in --
THE COURT: No, I don't have that volume.
THE CLERK: That's the one you just gave me.

THE COURT: I thought that went to 200. I thought you said 201.

THE CLERK: It goes to 202.

THE COURT: Oh, I'm sorry.

Well, okay.

(Brief Pause.)

MR. BULLOCK: This is the official copy, it's 201.

THE COURT: Yeah, I have 201.

MR. BULLOCK: I'm sorry.

THE COURT: I didn't think I did. I thought it just went through 200, but I found it now. Thank you.

BY MR. BULLOCK:

Q. Mr. Klingenstein, would you identify Exhibit 201?

A. This is entitled notes on the proposed penalty assessment and it appears to be undated.

MR. JACOBS: Objection to the use of the exhibit before it's been received in evidence, if in fact it is.

THE COURT: Well, hasn't been offered yet. It may well be offered, but I don't know, he hasn't.

BY MR. BULLOCK:

Q. Were you provided the -- we've discussed briefly what you looked at regarding Carrollwood. Were you provided the entire enforcement file for the Carrollwood Enforcement Facility?

A. I was provided materials from the enforcement file. I don't know if I was provided the entire enforcement file.

Q. One of the important aspects in the enforcement file would be the reports from the individuals from EPA that you actually investigated who actually investigated the facility, is that correct?

A. Certainly, yes.

Q. And I believe we established earlier that you never saw this facility when it was in operation, correct?

A. Yes, that is correct.

MR. BULLOCK: Your Honor, we would move Defendants' Trial Number 201 into evidence, the notes and proposed penalty and assessment which were produced from the Plaintiff's own enforcement files.

MR. JACOBS: Your Honor, here we would object on a couple of bases. First of all, the notes appear to be incomplete. Secondly, the Court already found in its November 22nd, 1995 order that the consent agreement that was entered into between EPA and Defendant Florida Cities with respect to the previous violation at the Carrollwood Plant, that that consent agreement should be construed within its four corners. I'm reading from page 12, footnote ten of the Court's November 22nd, 1995 order.

And I further quote, thus the consent agreement, within its four corners, the Court finds there's no indication that the notes are part of or are incorporated into the consent agreement, so, we would say they're irrelevant.

MR. BULLOCK: Your Honor, this was part of the Carrollwood Enforcement File which was produced pursuant to discovery, it was produced from EPA Region IV's own files. I believe that alone qualifies under Rule 803(a) as a public report.

THE COURT: This was in whose enforcement file?

MR. BULLOCK: EPA's Enforcement File for Carrollwood. Judge Swartz had directed that -- basically the tone of his order was that we would not have any authentication questions and he struck all the custodian of records as witnesses. I don't believe there's any argument that this is actually the document that was contained in the enforcement file regarding Carrollwood that the Government produced pursuant to discovery.

THE COURT: Yes, sir.

MR. JACOBS: Judge, I'm not arguing the document is not authentic, I'm arguing that the Court has already found it to be irrelevant and I'm also arguing that the document is incomplete.

Again, the Court found that the notes are -- there's no indication that the notes are a part of or are incorporated into the consent agreement and it's the consent agreement that is relevant and not any internal notes written by an EPA employee that related to whether or not the agency should accept the consent agreement.

MR. BULLOCK: Your Honor, this is not being offered

to somewhat contradict the consent agreement. Mr. Klingenstein has testified that in some part his opinion is based on his review of the EPA files which would include the enforcement files that came from Region IV.

THE COURT: I agree. I'll overrule the objection. Be received over objection.

BY MR. BULLOCK:

Q. Let me refer you to page 2 of this exhibit, and ask you to read paragraph six under other matters that justice may require.

A. Other matters that justice may require; penalty reduction is justified due to the re-evaluation of wasteload allocation by the State of Florida indicating discharges permissible under stringent requirements. In July, 1987, Grizzle-Figg Legislation became effective allowing discharges to certain streams provided specific conditions were met. The Grizzle-Figg provisions are applicable to Sweetwater Creek and the DER has modified its wasteload allocation to allow for discharges into the Sweetwater Creek. In 1988, Respondent retained and consultants conducted a minimum negative impact study.

Would you like me to continue.

Q. Yes.

A. The study indicated that discharges could be allowed but with stringent effluent limitations imposed to discharger. And

wastewater treatment -- I'm sorry -- and application was submitted to DER for construction of an advanced wastewater treatment AWT upgrade in November, 1989.

In July, 1990, DER issued Respondent a construction permit for the construction. On July 31, 1990, Respondent submitted an application for an NPDES permit. EPA plans to issue an NPDES permit to Respondent.

Q. Would you also read paragraph four under economic benefit?

A. The economic benefit realized by Respondent was --

THE COURT: Just a moment.

MR. JACOBS: I'll object again, beyond the scope of the witness' not being offered as an economic benefit expert, again technology and technological, but not economic benefit.

MR. BULLOCK: Your Honor, he's testifying as to the seriousness of violations. One of the issues under serious violation would be what kind of avoid cost or what kinds of economic benefit were gained from this.

THE COURT: He hasn't been offered as an expert in that area nor has he testified.

MR. BULLOCK: I'll withdraw it, Your Honor.

THE COURT: All right.

Let's recess for lunch. We'll reconvene at 1:15.

(Thereupon, a luncheon recess was taken.)

All right, Mr. Bullock.

MR. BULLOCK: Good afternoon, Your Honor.

BY MR. BULLOCK:

Q. Mr. Klingenstein, let me refer you to Defendants' 97. Could you identify this document, please?

A. This is --

MR. JACOBS: I'd object to the request that the witness be asked to identify documents. There's been no foundation laid that he has seen it before and should know how to identify it.

THE COURT: Can you identify this exhibit?

BY MR. BULLOCK:

Q. Mr. Klingenstein, can you identify Exhibit D-97?

A. Certainly on the basis of appearance and contents. I don't know whether I recall I specifically read the document or not.

Q. If you will turn to page 2 which is an attachment, isn't it true this -- strike this first.

What does this document purport to be?

A. By its appearance, it's a modification of the permit for the Carrollwood Plant from FDER.

Q. And if you would turn the page and see subparagraph A; isn't it true this states the connection from the Carrollwood Plant should be made to the Hillsborough County Dale Mabry System?

A. Yes, it does.

MR. BULLOCK: Your Honor, I would move D-97 into evidence?

THE COURT: It'll be received.

BY MR. BULLOCK:

Q. Let me refer you to Florida Cities' Exhibit 96. Are you familiar with this document?

A. Yes, I am.

Q. And would you identify what this document is?

A. This is a letter dated June 28, 1983, to Mr. A. A. Reeves. It's on County of Hillsborough letterhead and it's signed by Mr. Bruce E. Kennedy and the subject is connection of Carrollwood WWTP to County WW System.

Q. And this letter indicates that Hillsborough County did not have adequate capacity to accept the Carrollwood effluent, is that correct?

A. Yes, that is correct.

MR. BULLOCK: I would move D-96 into evidence.

THE COURT: Be received.

BY MR. BULLOCK:

Q. Mr. Klingenstein, let me refer you to Defendants' 108. Have you reviewed this document before?

A. Yes, I have.

Q. All right.

And would you identify for the record what the document is?

A. This is a -- this is a permit from the State of Florida Department of Environmental Regulation, date of issue, 4-5-88, for the Carrollwood S-DWTP.

Q. And that would be the Carrollwood Wastewater Treatment Plant?

A. Yes.

Q. And page 2 of this exhibit sets forth specific limits for the effluent, is that correct?

A. Yes, it does.

Q. And those are secondary limits?

A. If you mean under paragraph four, yes, they would be consistent with the secondary plant's performance.

MR. BULLOCK: I would move D-108 in.

THE COURT: It'll be received.

BY MR. BULLOCK:

Q. Mr. Klingenstein, let me direct you to D-125, and ask you if you've ever seen this exhibit?

A. Yes, I have.

Q. And would you identify what this exhibit is?

A. This is a letter on the Board of County Commissioners, Hillsborough County, Florida, Office of the County Administrator letterhead, and it is a letter dated July 27, 1990, it's to Mr. A. A. Reeves, and it is from Mr. Michael W. McSweeny.

Q. And it has no subject listed?

THE COURT: I'm sorry, you looking at Defendants' 125?
THE WITNESS: I'm sorry, I believe that was --
THE COURT: Letter dated July 27, 1990?
THE WITNESS: I believe so.
THE COURT: Okay.
MR. BULLOCK: I'm sorry, Your Honor, we were intending to put in the 1990 permit to construct.
THE COURT: Well, my 125, apparently Mr. Klingenstein's is just what he described.
MR. BULLOCK: Until we can identify it, let me withdraw that line of questioning.
BY MR. BULLOCK:
Q. You testified this morning that you, Mr. Klingenstein, that you were familiar with the Grizzle-Figg Legislation?
A. To a degree, yes.
Q. Okay.
What is your understanding of the purpose of Grizzle-Figg Legislation?
A. My understanding of its purpose was to -- is that its purpose was to allow for the discharge of effluent from wastewater treatment plants to certain bodies of water as long as certain conditions were met, those conditions being a certain level of treatment and minimum negative impact being demonstrated.
Q. Do you know when Grizzle-Figg was passed?

A. My belief is 1987.
Q. All right.
Prior to that time, excuse me -- let me start over again.
Do you know what water bodies Grizzle-Figg affected?
A. Not, I can't recall inclusively.
Q. Isn't it true that prior to the passage of Grizzle-Figg, Florida Cities would have been unable to build an AWT Plant?
A. It's my understanding that Grizzle-Figg is the piece of legislation that enabled them to, so that would be my understanding.
Q. Okay.
And isn't it true that once Grizzle-Figg was passed, Florida Cities requested that they be allowed to build an AWT Plant at Carrollwood?
A. Yes, that's my understanding.
Q. And isn't it true that the FDEP required that a minimum negative impact study be performed?
A. Yes, they did.
Q. All right.
And was that study in fact performed?
A. Yes, it was.
Q. All right.
Let me refer you to exhibit -- Defendants' Exhibit 116, and ask you if you've seen this study before?
A. Yes, I have.

Q. And would you identify the study for the record?
A. Well, this is a cover letter from Florida Cities Water Company dated June 19, 1989 to Florida Department of Environmental Regulation from Mr. Robert French and it is to the attention of Mr. Bruce DeGrove, environmental supervisor, and it is a letter, cover letter transmitting the results of a minimum negative impact study.
Q. You have in fact reviewed the minimum negative impact study that is attached, isn't that true?
A. Yes, that is true.
Q. This is what is known as a Limno-Tech Study?
A. Yes.
MR. BULLOCK: Your Honor, we would move Defendants' 116 in evidence?
MR. JACOBS: The only part of that I'd object to is the cover page, Your Honor. He's reviewed the report, I'm not sure he's seen the cover page which is hearsay.
BY MR. BULLOCK::
Q. Have you in fact reviewed the cover page?
A. Yes, I have seen the cover letter.
MR. JACOBS: Withdraw the objection.
THE COURT: It will be received, 116.
BY MR. BULLOCK:
Q. Florida eventually accepted the minimum negative study that Limno-Tech put forth, isn't that correct?

A. Yes.
Q. And on that basis, Florida Cities was issued a construction permit to construct an AWT Facility.
A. Yes, after certain concerns, initial concerns were satisfied, yes.
Q. Isn't it true also that in 1988, Hillsborough County informed Florida Cities that it would have available capacity in 1990?
A. I'm sorry, that was in which year.
Q. 1988?
A. I believe there was correspondence from Hillsborough in that year regarding when capacity would be available. I would need to refresh my memory as to exactly what year they represented.
Q. You have read correspondence, though, the 1988 correspondence informing them?
A. I recall reading correspondence in that timeframe that discussed when capacity might be available, but I don't recall specifics as to exactly when.
Q. Let me refer you to Defendants' 106. Have you seen this document before?
A. Yes, I believe so.
Q. And this is a document we were speaking of a few minutes ago from 1988?
A. Certainly possibly one of them.

MR. BULLOCK: Your Honor, I move Defendants' 106 in evidence?

THE COURT: Be received.

BY MR. BULLOCK:

Q. Let me refer you to page 2 of this exhibit. Isn't it true that page 2 contains a capacity fee of approximately five point five million dollars?

A. Yes, it does.

Q. And that would be divided among the twelve hundred customers of Carrollwood?

MR. JACOBS: Objection, lack of foundation as to the number of customers.

THE COURT: Well, I don't know whether he knows or not to testify to that. I'll overrule the objection at this point.

BY MR. BULLOCK:

Q. Mr. Klingenstein, have you reviewed data about how many customers the Carrollwood Plant served?

A. I certainly have, but I can't recall exactly what that number was.

Q. All right.

Would you disagree -- assume hypothetically that the plant served approximately twelve hundred customers.

A. Yes.

Q. You would then divide the capacity fee among -- the five

point five million dollars among the customers of the plant?

MR. JACOBS: Same objection, Your Honor.

THE COURT: Okay, well --

MR. JACOBS: Or slightly similar to the improper hypothetical at this point. Not offered again for the financial reasons, but for technological reasons.

THE COURT: If there's no evidence regarding the number of customers, I think it is vulnerable to objection. I'll sustain the objection.

BY MR. BULLOCK:

Q. All right.

May I also then refer you, Mr. Klingenstein, to Exhibit D-125. And let me ask you, are you familiar with this document?

A. Yes, I am.

Q. And would you identify what this document is?

A. This would be the July 27, 1990 letter that had been previously identified from on Board of County Commissioners, Hillsborough County, Florida, letterhead, from Mr. Michael McWeeny to Mr. A. A. Reeves.

Q. All right.

Isn't it true this document states that the Hillsborough -- the capacity for Carrollwood to hook into the Hillsborough System would be available during the first quarter of 1991 -- excuse me, sometime after the first quarter of 1991?

A. Yes, it does.

Q. All right.

THE COURT: During the first quarter of 1991; isn't that what it says?

MR. BULLOCK: Well, it's expected to be commissioned during the first quarter of 1991, then after the startup capacity, would be --

THE COURT: Oh, okay.

BY MR. BULLOCK:

Q. Isn't it true then, Mr. Klingenstein, that the first time that Hillsborough County would have had capacity to accept the Carrollwood -- I guess the technical term is influent, would have been sometime after -- during or after the first quarter of 1991?

A. That is my understanding based on a review of the documents and the correspondence.

MR. BULLOCK: I would move Defendants' 125 in evidence.

THE COURT: Be received.

BY MR. BULLOCK:

Q. Isn't it true, Mr. Klingenstein, that Florida Cities in fact applied for an AWT Permit at the Carrollwood Facility sometime in June or July of 1990?

A. In that timeframe.

Q. All right.

Let me refer you to Defendants' 126. Have you reviewed this document before?

A. I don't recall that I have specifically seen this document.

Q. Can you identify what this document is?

A. Its covered by a letter dated July 31, 1990, it's addressed, one, Florida Cities Water Company, and addressed to NPDES Permit Section, Environmental Protection Agency, and it is signed by Mr. Jack Tompkins and the subject is Carrollwood WWTP NPDES Permit Number FL0029319.

Q. Is this form an application form for an NPDES permit?

A. Yes, it is.

MR. BULLOCK: Your Honor, I would move D-126 in evidence.

THE COURT: It'll be received.

BY MR. BULLOCK:

Q. Let me refer you to Defendant Florida Cities' 129, Mr. Klingenstein, and ask you if you have seen this document before?

A. I believe so.

Q. All right.

And isn't it a letter from Florida Cities to EPA advising EPA that it could not meet the limitations contained in the draft permit -- I'm sorry -- I should -- continues to say as the plant was presently construed?

A. Yes.
Q. Isn't it true this letter also requests that interim limitations be established that would allow the plant to continue to operate until AWT Plant was brought on line?
A. Yes, it does.
Q. And doesn't it also state that the plant would not be in operation until January of 1992?
A. Yes, that is the date stated.
Q. Let me refer you next to Defendants' 131.

MR. BULLOCK: Your Honor, while he's looking at that, may I move Defendants' 129 into evidence?

MR. JACOBS: Your Honor, we'd object on the basis of the grounds that it's a letter -- purports to be a letter to EPA, but it doesn't have an EPA receipt stamp and it's not signed, so I'm not sure it ever was sent.

MR. BULLOCK: Your Honor, it's listed as Plaintiff's 311. If they would have more preference to use it, we'll be glad to move theirs in evidence as well.

MR. JACOBS: One moment.

Objection is withdrawn.

THE COURT: It'll be received.

MR. BY BULLOCK:
Q. Mr. Klingenstein, have you seen Exhibit 131 before?
A. Yes, I have.
Q. And would you identify the letter and what's attached to

it?
A. It is a letter to Ms. Martha Hunter, it's on Florida Cities' Water Company letterhead, it is from Jack Tompkins, and it is regarding the NPDES Permit for the Carrollwood Wastewater Treatment Plant.
Q. Isn't it true this letter again points out that the draft permit is for AWT limitations and that the company would not be able to meet those limitations at the Carrollwood Facility until January, 1992?
A. Yes.

MR. BULLOCK: Your Honor, we would move Defendants' 131 into evidence?

THE COURT: Be received.

BY MR. BULLOCK:
Q. Let me ask you next to look at Defendant Florida Cities' 132. Have you seen 132 before?
A. I believe so.
Q. Let me refer you to page 3 of 11 in Exhibit 132, paragraph eight. Let me refer you to what is the sixth line down in paragraph eight, beginning with this consent order, and ask you to read that sentence?
A. This consent order authorizes and requires Respondent to continue to operate the WWTP.

THE COURT: Continue to what; operate?

THE WITNESS: I'm sorry, to continue to operate.

THE COURT: You're on paragraph --

THE WITNESS: I'm sorry, this is --

MR. BULLOCK: Your Honor.

THE COURT: You're on paragraph eight, page 3 of 11?

MR. BULLOCK: Yes, sir.

THE WITNESS: I believe I was on the sixth line down, Your Honor.

THE COURT: Oh, one, two, three, four, five, six, okay. I was on the first line.

BY MR. BULLOCK:
Q. If you would begin to read that sentence again?
A. Surely. This consent order authorizes and requires Respondent to continue to operate the WWTP in compliance with T.O.P. until such time as the new AWT WWTP is constructed and placed into service.
Q. And since environmental law is filled with an abundance of acronyms, WWTP means?
A. Wastewater Treatment Plant.
Q. And isn't it true TOP means the State Temporary Operating Permit?
A. Yes.

MR. BULLOCK: Your Honor, we would move 132 into evidence?

THE COURT: Be received.

MR. JACOBS: I'm sorry, Your Honor, again, this is an

unsigned document, it's -- the last two pages of the exhibit have numerous signature lines, there's not a signature. This could conceivably be a draft of a consent order that was negotiated between the parties, neither of which was the Federal Government.

MR. BULLOCK: We'll be glad to pull from the files a copy, the signed order and substitute it.

THE COURT: Okay.

Or you can show it to counsel and see that that satisfies him, either way.

MR. JACOBS: I have 132, I have just been handed another 132. The objection is that 132 is not signed, and again, it's a consent order presumably negotiated between two parties and neither of which is the Federal Government.

THE COURT: Well, we're talking about identification, authentication and I thought that the Magistrate Judge talked to you guys about that, at least I asked him to at the pre-trial conference.

MR. BULLOCK: Yes, Your Honor, he did.

MR. JACOBS: He did, and we objected, but with all candor, we objected on relevancy grounds and we did not object on authenticity grounds.

MR. BULLOCK: Your Honor, I have a copy of --

MR. JACOBS: It's not relevant because it's not signed, I suppose would be another way to look at it.

THE COURT: It's not relevant because it's not signed. Well, that's -- I'm not real impressed with that backdoor approach.

MR. JACOBS: I'm not sure I am anymore myself, Your Honor.

MR. BULLOCK: I'll be glad to hand this copy of the signed permit to Mr. Jacobs if he wants to review it.

THE COURT: All right.

MR. JACOBS: I'd be happy to accept counsel's representation this is an exact copy that he's just handed me of 132, except for the fact that it's been signed.

THE COURT: Well --

MR. JACOBS: But it doesn't appear to be --

THE COURT: I tell you what, I'm going to receive it subject to some later problem with that document and you can study it and compare it, but --

MR. JACOBS: Just on a short comparison, it's not the same document by any means.

THE COURT: Not the same?

MR. JACOBS: No, sir.

THE COURT: Well, okay, I'm going to reserve ruling on that. I'll sustain the objection at this point. If you want to try to move it later on after you have had a chance to look at it further, we'll see about it.

MR. BULLOCK: Thank you, Your Honor.

BY MR. BULLOCK:

Q. Mr. Klingenstein, let me refer you to Exhibit Number 135, and ask you if you have seen this document before?

A. Yes, I believe I have.

Q. And can you identify the document?

A. It's a letter dated March 1, 1991, on the Florida Cities Water Company letterhead, it's to Ms. Martha Hunter from Mr. Paul Bradtmiller and it is a revised draft of the Carrollwood Wastewater Treatment Plant.

MR. BULLOCK: Your Honor, we would move Defendants' 135.

THE COURT: Be received.

BY MR. BULLOCK:

Q. Isn't it true this letter is another request from Florida Cities to EPA to adopt the interim limits between establishing a consent order between FDEP and Florida Cities which would in a sense be secondary limits?

A. This letter does request that the interim limits established in the consent order between EPA and Florida Cities be included.

Q. Let me ask you to look at 137 and ask you if you have seen that?

A. I believe -- I'm sorry, I believe I've seen this.

MR. BULLOCK: Your Honor, we would move Defendants' 137 into evidence.

THE COURT: Be received.

BY MR. BULLOCK:

Q. Just to save some time, Mr. Klingenstein, isn't this letter also a request for EPA to continue secondary treatment levels at Carrollwood?

A. The letter again requests the interim limits be incorporated.

Q. Let me refer you to Defendants' 139. Have you seen this document before?

A. Yes, I believe I've seen this.

Q. All right.

Would you identify it, please?

A. This is a letter dated May 20th, 1991. It's on Florida Cities Water Company letterhead to John T. Marlar, it is from Mr. Paul Bradtmiller and it's re, Carrollwood Advanced Wastewater Treatment Plant, Administrative Order Number 90-100, and then gives the NPDES permit number.

MR. BULLOCK: Your Honor, we would move Defendants' 139.

THE COURT: Be received.

BY MR. BULLOCK:

Q. Isn't it true this letter informs EPA that in fact Florida Cities has completed an agreement with the Hillsborough County Public Utilities Department to connect Carrollwood to the Hillsborough County Facility?

A. Certainly, the letter indicates that negotiations had been completed and that the agreement was scheduled to be, I suppose, reviewed for approval by the County Commissioners.

MR. BULLOCK: Your Honor, I'm getting ready to move into a different area, just so the record is complete. If you want to address at this time, Mr. Baise and Mr. High have reviewed the document that we had the disagreement over earlier, the State Consent Order, and it is identical in fact to the exhibit that we proferred earlier save for the fact this one actually is signed. There are two exhibits attached to it which are State permits which are already into evidence.

MR. JACOBS: Well, that's what made them different as I quickly saw that 132 had eleven pages and they handed me something with roughly thirty or thirty-five. I was able to tell the Court it wasn't the same document. I didn't compare it, perhaps counsel, if I might suggest, would like to remove from the one he's saying is the signed version, the additional pages, then I would have no objection to 132 if it's identical. I'm not trying to belabor the issue, I'm trying to advance.

MR. BULLOCK: I'll be glad to submit pages one through eleven of this report.

THE COURT: All right.

Want to show it to counsel.

MR. JACOBS: I can't review all eleven pages, but I'll be happy to accept Mr. Baise's representation it's

identical, so if he makes that representation, I will.

MR. BAISE: I make that representation, Your Honor.

MR. JACOBS: I withdraw the objection.

THE COURT: Defendants' 132 will be received.

MR. BULLOCK: Your Honor, may we substitute the version of it at a later time so Mr. Jacobs can make a copy of this?

THE COURT: Yes, sir.

BY MR. BULLOCK:

Q. Let me ask you to look next at Defendants' 140, and ask you if you've seen this document before?

A. Yes, I have.

Q. And could you identify it?

A. It's dated, I'm sorry, May 28, 1991, it is on U. S. Environmental Protection Agency, Region IV letterhead to Mr. Paul Bradtmiller, Senior Vice President, Florida Cities Water Company, it is signed by Mr. W. Ray Cunningham, and it is re, final issuance of NPDES Permit Number FL0029319, Carrollwood WWTP, and it covers the NPDES permit.

Q. And the permit is attached to it, is it not?

A. Yes.

MR. BULLOCK: Your Honor, we would move Defendants' 140 into evidence.

THE COURT: It will be received.

BY MR. BULLOCK:

Q. Mr. Klingenstein, let me refer to what I believe is the tenth page of that exhibit. Isn't it true this is identified as the amendment to the statement of the basis at the time of issuance of this permit?

A. Yes, it is.

Q. Let me refer you to paragraph two and actually -- excuse me -- sub heading two and the two paragraphs which fall under public comment and ask you to read those two paragraphs?

A. And in April 1, 1991, letter was received from Florida Cities Water Company FCWC. In this letter, FCWC requested that the interim limits established in the consent order of February 4, 1991 entered into by FCWC with the Environmental Protection Commission of Hillsborough County and the State of Florida, Department of Environmental Regulation be incorporated into this permit. This request is a compliance matter. A copy of the letter was given to Thomas Pfaff and the compliance section. On April 8th, 1991, the compliance section will address the request after final issuance of this permit.

Would you like me to continue, sir?

Q. That's fine, thank you.

Let me refer you next to Defendants' 142.

Have you seen this document before?

A. Yes, I believe I have.

Q. Would you identify it for the record?

A. It is a letter on Florida Cities Water Company letterhead

dated June 24, 1991. It's addressed to Mr. Michael Hom, the Environmental Protection Agency. It's signed by Mr. Paul Bradtmiller, and the subject is NPDES Permit Number FL0029319, Administrative Order Number 90-100, Carrollwood Wastewater Treatment Facility.

Q. Isn't it true this is also a request from the company for relief from the AWT limits and a new permit?

A. Yes.

Q. All right.

And isn't it true that this letter states that it was written pursuant to discussions with Thomas Pfaff of the EPA Enforcement Staff?

A. That's the indication.

Q. All right.

MR. BULLOCK: Your Honor, the next series of exhibits are 147, 148, 150, 151 and 154. These are the discharge monitoring reports for the Carrollwood Facility. The DMR's are already in evidence. If you remember on Monday we objected, they did not have the cover letters attached. I don't know exactly how you want me to approach these. I'd like to move the DMR's with the cover letters into evidence.

THE COURT: Any objection?

MR. JACOBS: No, Your Honor. I said on Monday if you wanted to introduce the cover letters, I have no objection and I stand by that.

THE COURT: All right.

Do each one of them have a cover letter; is that what you're saying?

MR. BULLOCK: That's correct, each of those exhibit numbers that I read to you have cover letters attached to them.

THE COURT: So you're offering them individually?

MR. BULLOCK: Yes.

THE COURT: Are the numbers you just indicated?

MR. BULLOCK: That's correct.

THE COURT: Say again, please.

MR. BULLOCK: 147, 148, 150, 151, 154.

THE COURT: All right.

Then they'll be received.

BY MR. BULLOCK:

Q. Mr. Klingenstein, let me ask you to look very briefly at the first page of each of those exhibits and tell me if you've ever seen them before?

MR. BULLOCK: Your Honor, I would also include Exhibit 152 which is also a DMR with a cover letter attached.

THE COURT: All right, will be received.

THE WITNESS: I don't recall whether I've seen the cover letters.

BY MR. BULLOCK:

Q. All right.

Isn't it true these cover letters informed EPA that they

will be transferring the wastewater flow from the Carrollwood Plant to Hillsborough County in late December or early -- well they will be transferring it and that they will request a cancellation of their NPDES permit or --

MR. JACOBS: Could I ask counsel to rephrase, I think that was vague.

THE COURT: Well --

MR. JACOBS: He started down one track and switched. I'm not sure the record will reflect --

THE COURT: Well, just restate the question, if you would.

BY MR. BULLOCK:

Q. Mr. Klingenstein, isn't it correct that each of these cover letters informed EPA that Hillsborough County -- that Carrollwood will connect with Hillsborough County and that Florida Cities will seek a revocation of its NPDES Permit?

A. Well, certainly Exhibit 147 does, 148 does --

Q. Isn't it true, Mr. Klingenstein --

THE COURT: Wait, he's not through.

THE WITNESS: And 150 does.

THE COURT: Okay.

THE WITNESS: As does 151.

THE COURT: You through?

THE WITNESS: I'm sorry, was 151 the last of those that you asked me to look at?

BY MR. BULLOCK:

Q. 152 and 154?

A. Yes, 152 as does 154.

Q. Mr. Klingenstein, isn't it true that the Administrative Order 90-100 remained in effect until March 3rd, 1992?

MR. JACOBS: Objection to the extent that the question calls for a legal conclusion.

THE COURT: Okay.

Well, if you know, I'll overrule the objection. Do you know?

THE WITNESS: No, I couldn't tell you.

BY MR. BULLOCK:

Q. Let me refer to Florida Cities Exhibit 156. Have you seen this document before?

A. Yes, I believe I have.

Q. I believe you testified earlier that the effluent limitations in 90-100 were in fact secondary treatment limits, is that correct?

A. I believe that was what we said, yes.

Q. And let me ask you to read the first paragraph of Exhibit 156?

A. This is the cover letter?

Q. That is correct?

A. Dear Mr. Bradtmiller, we are in receipt of your February 10, 1992 correspondence regarding the closure of the above

mentioned facility. This is to advise you Administrative Order Number 90-100 parentheses WKS issued on September 27, 1990, has been complied with and placed in an inactive status.

Q. Mr. Klingenstein, isn't it true that you have reviewed the enforcement history in EPA Region IV of the Carrollwood Facility?

A. I've reviewed documents from the enforcement file.

Q. Isn't it true that no enforcement action against Carrollwood was taken for the violations of the permit between July 1, '91, through January, 92, until this lawsuit was amended in April of '95?

A. I'm not aware of any.

Q. Thank you.

MR. BULLOCK: Let me move 156 in evidence, Your Honor.

THE COURT: It'll be received.

BY MR. BULLOCK:

Q. Mr. Klingenstein, let's turn now to Barefoot Bay. Did you interview anyone at EPA Region IV about the enforcement history of the Barefoot Bay Facility?

A. I believe I spoke to Mr. Kwan.

Q. Did you speak to anyone else?

A. Not that I recall.

Q. So you did not speak with Roy Herwig, is that correct?

A. Not with regard to Barefoot Bay.

Q. Do you know who Roy Herwig is ?

A. Yes, I know Roy Herwig.

Q. Who is Roy Herwig?

A. He's an employee of EPA Region IV.

Q. And to your knowledge, was Mr. Herwig involved in the enforcement actions at Barefoot Bay?

A. I've seen Mr. Herwig's name mentioned in the correspondence.

Q. Do you recall what documents you reviewed from the EPA Region IV enforcement files in preparation of your report?

A. Not specifically. I mean, there were quite a number.

Q. Let me refer you to Florida Cities' 202, and ask you if you've ever seen this document?

MR. JACOBS: Just for the record, Your Honor, forgive the interruption, but apparently we had a renumbered exhibit list yesterday, sorry, Monday, at the beginning of Court, and until now, it's matched up with the Government's objections that were submitted to the Court by exhibit by exhibit.

At this point, it no longer matches because the list was shortened, so I'm happy to try and keep up, but it might take me a moment longer to look at the exhibit because I no longer have the current list and the Court's list is no longer current because as I say, the Defendants gave us a new list Monday morning which was the time we submitted our list to the Court with our objections, not before.

MR. BULLOCK: Your Honor, I might respond by saying that this previously has been listed, we have identified that Exhibit 202 was formerly Florida Cities' 498 and that the Plaintiffs objected to this on the grounds of irrelevancy and offers to compromise.

MR. JACOBS: Well, Counsel did indicate that it was formerly 498 which will help us, but the objections aren't listed on the new list, so I think perhaps we've got to do a new list for the Court.

Now we have new numbers. I'm thinking both in terms of my own problem in keeping up as well as the Court's in making sure it has a current version of the Government's objections which it no longer does. I don't know how many these are, Mr. Bullock. If there's only a few, we perhaps can work through it.

MR. BULLOCK: I believe there are four; is that correct, four?

MR. JACOBS: I yield to the Court on that issue. We'll do a new list or --

THE COURT: Now, does this -- what effect, Mr. Bullock, does this new list have on it the list of objections that the United States has now?

MR. BULLOCK: Your Honor, the only difference between my list, I mean, the difference would be that we added at the end of the list Exhibits 199, 200, 201 and 202. Those were

previously identified to the Government as exhibits that we intended to use at trial. Those were previously identified with the trial exhibit number and the Government has filed objections as far as I'm able to tell to only one of those. As I say, it only involves four documents and we can easily give Mr. Jacobs the prior exhibit numbers right now.

MR. JACOBS: May I just inquire with respect to the additional exhibits, your list now goes up to 202. We objected up to 519. Have you, with the exception of those four, withdrawn all the remaining ones following 202?

MR. BULLOCK: Your Honor, we have provided, pursuant to the Court's order, a copy of our exhibit list with the exhibits that we intend to put in on our direct case. We reserve the right, I believe, as did all parties to put in documents for cross examination or rebuttal purposes, and so -- but in terms of the -- and I'll be glad to have Mr. High, who actually negotiated this with Mr. Quinn, discuss this matter if the Court sees fit. Again, we're talking about four documents that we can identify right now to counsel for the Plaintiff.

MR. JACOBS: Your Honor, we certainly endeavored to put on our list every single document we intended to use here for purposes of direct or cross examination so we wouldn't get into a situation like this again. If it's only four, we'll work with the Defendants. I would like to have a representation as to whether they have withdrawn everything after 202, and

then perhaps we can move on.

THE COURT: Take a fifteen minute recess, work it out, gentlemen.

(Thereupon, a brief recess was taken.)

Okay, we all set?

MR. BULLOCK: That's correct, Your Honor.

Your Honor, we have discussed this on the break, we have identified, in fact, there are only four exhibits that were added to the end of the list, two of them the Government has no objection to.

The third one is Exhibit 201 which you have already admitted into evidence over their objection and a fourth one is 202 which we're offering now and they filed the same objection. They were previously identified with other numbers on them.

The only reason we moved them in is the Court's order directed us to put them in sequential number and when we were removing exhibits, we changed the numbers so they would continue to be in sequential number and have identified that for Plaintiff's counsel.

MR. JACOBS: And Your Honor, we appreciate counsel for the Defendant working with us on this and indeed, I think he's accurately represented there's only one that remains now and that is the newly numbered 202 for clarification, though again, one matter that I had raised before we recessed briefly was what happened to the three hundred or so exhibits after 199

and I just want to make sure they're not going to resurface as cross examination exhibits.

MR. BULLOCK: Your Honor, in our submission in the joint pre-trial statement, we stated that we listed the documents which we would put forth in our direct case and we reserved the right to use other documents for rebuttal and cross examination and this is the first objection I've heard to that inclusion in the joint pre-trial order.

MR. JACOBS: Judge, we endeavored, on the other hand, we understood the arrangement to be that we list every conceivable document, both for everyone's own convenience as well as the Court in our exhibit list.

MR. BULLOCK: Your Honor.

MR. JACOBS: We understood that to be our obligation and that is what we've done and I'm just trying to make sure we're not going to have any surprises. We've begun at 200, are we going to go back up to 500? I didn't realize we were down to 200 until Monday and going back up to 500. I'd rather know now than again to take the time of the Court on an individual basis when they start popping up and with new numbers.

THE COURT: All right.

You had a list of five hundred and some odd exhibits?

MR. BULLOCK: That's correct, Your Honor. We had attempted to come up with a -- we came up with a list of five hundred exhibits that were submitted with a revised joint

will be transferring the wastewater flow from the Carrollwood Plant to Hillsborough County in late December or early -- well they will be transferring it and that they will request a cancellation of their NPDES permit or --

MR. JACOBS: Could I ask counsel to rephrase, I think that was vague.

THE COURT: Well --

MR. JACOBS: He started down one track and switched. I'm not sure the record will reflect --

THE COURT: Well, just restate the question, if you would.

BY MR. BULLOCK:

Q. Mr. Klingenstein, isn't it correct that each of these cover letters informed EPA that Hillsborough County -- that Carrollwood will connect with Hillsborough County and that Florida Cities will seek a revocation of its NPDES Permit?

A. Well, certainly Exhibit 147 does, 148 does --

Q. Isn't it true, Mr. Klingenstein --

THE COURT: Wait, he's not through.

THE WITNESS: And 150 does.

THE COURT: Okay.

THE WITNESS: As does 151.

THE COURT: You through?

THE WITNESS: I'm sorry, was 151 the last of those that you asked me to look at?

BY MR. BULLOCK:

Q. 152 and 154?

A. Yes, 152 as does 154.

Q. Mr. Klingenstein, isn't it true that the Administrative Order 90-100 remained in effect until March 3rd, 1992?

MR. JACOBS: Objection to the extent that the question calls for a legal conclusion.

THE COURT: Okay.

Well, if you know, I'll overrule the objection. Do you know?

THE WITNESS: No, I couldn't tell you.

BY MR. BULLOCK:

Q. Let me refer to Florida Cities Exhibit 156. Have you seen this document before?

A. Yes, I believe I have.

Q. I believe you testified earlier that the effluent limitations in 90-100 were in fact secondary treatment limits, is that correct?

A. I believe that was what we said, yes.

Q. And let me ask you to read the first paragraph of Exhibit 156?

A. This is the cover letter?

Q. That is correct?

A. Dear Mr. Bradtmiller, we are in receipt of your February 10, 1992 correspondence regarding the closure of the above

mentioned facility. This is to advise you Administrative Order Number 90-100 parentheses WKS issued on September 27, 1990, has been complied with and placed in an inactive status.

Q. Mr. Klingenstein, isn't it true that you have reviewed the enforcement history in EPA Region IV of the Carrollwood Facility?

A. I've reviewed documents from the enforcement file.

Q. Isn't it true that no enforcement action against Carrollwood was taken for the violations of the permit between July 1, '91, through January, 92, until this lawsuit was amended in April of '95?

A. I'm not aware of any.

Q. Thank you.

MR. BULLOCK: Let me move 156 in evidence, Your Honor.

THE COURT: It'll be received.

BY MR. BULLOCK:

Q. Mr. Klingenstein, let's turn now to Barefoot Bay. Did you interview anyone at EPA Region IV about the enforcement history of the Barefoot Bay Facility?

A. I believe I spoke to Mr. Kwan.

Q. Did you speak to anyone else?

A. Not that I recall.

Q. So you did not speak with Roy Herwig, is that correct?

A. Not with regard to Barefoot Bay.

Q. Do you know who Roy Herwig is ?

A. Yes, I know Roy Herwig.

Q. Who is Roy Herwig?

A. He's an employee of EPA Region IV.

Q. And to your knowledge, was Mr. Herwig involved in the enforcement actions at Barefoot Bay?

A. I've seen Mr. Herwig's name mentioned in the correspondence.

Q. Do you recall what documents you reviewed from the EPA Region IV enforcement files in preparation of your report?

A. Not specifically. I mean, there were quite a number.

Q. Let me refer you to Florida Cities' 202, and ask you if you've ever seen this document?

MR. JACOBS: Just for the record, Your Honor, forgive the interruption, but apparently we had a renumbered exhibit list yesterday, sorry, Monday, at the beginning of Court, and until now, it's matched up with the Government's objections that were submitted to the Court by exhibit by exhibit.

At this point, it no longer matches because the list was shortened, so I'm happy to try and keep up, but it might take me a moment longer to look at the exhibit because I no longer have the current list and the Court's list is no longer current because as I say, the Defendants gave us a new list Monday morning which was the time we submitted our list to the Court with our objections, not before.

MR. BULLOCK: Your Honor, I might respond by saying that this previously has been listed, we have identified that Exhibit 202 was formerly Florida Cities' 498 and that the Plaintiffs objected to this on the grounds of irrelevancy and offers to compromise.

MR. JACOBS: Well, Counsel did indicate that it was formerly 498 which will help us, but the objections aren't listed on the new list, so I think perhaps we've got to do a new list for the Court.

Now we have new numbers. I'm thinking both in terms of my own problem in keeping up as well as the Court's in making sure it has a current version of the Government's objections which it no longer does. I don't know how many these are, Mr. Bullock. If there's only a few, we perhaps can work through it.

MR. BULLOCK: I believe there are four; is that correct, four?

MR. JACOBS: I yield to the Court on that issue. We'll do a new list or --

THE COURT: Now, does this -- what effect, Mr. Bullock, does this new list have on it the list of objections that the United States has now?

MR. BULLOCK: Your Honor, the only difference between my list, I mean, the difference would be that we added at the end of the list Exhibits 199, 200, 201 and 202. Those were

previously identified to the Government as exhibits that we intended to use at trial. Those were previously identified with the trial exhibit number and the Government has filed objections as far as I'm able to tell to only one of those. As I say, it only involves four documents and we can easily give Mr. Jacobs the prior exhibit numbers right now.

MR. JACOBS: May I just inquire with respect to the additional exhibits, your list now goes up to 202. We objected up to 519. Have you, with the exception of those four, withdrawn all the remaining ones following 202?

MR. BULLOCK: Your Honor, we have provided, pursuant to the Court's order, a copy of our exhibit list with the exhibits that we intend to put in on our direct case. We reserve the right, I believe, as did all parties to put in documents for cross examination or rebuttal purposes, and so -- but in terms of the -- and I'll be glad to have Mr. High, who actually negotiated this with Mr. Quinn, discuss this matter if the Court sees fit. Again, we're talking about four documents that we can identify right now to counsel for the Plaintiff.

MR. JACOBS: Your Honor, we certainly endeavored to put on our list every single document we intended to use here for purposes of direct or cross examination so we wouldn't get into a situation like this again. If it's only four, we'll work with the Defendants. I would like to have a representation as to whether they have withdrawn everything after 202, and

then perhaps we can move on.

THE COURT: Take a fifteen minute recess, work it out, gentlemen.

(Thereupon, a brief recess was taken.)

Okay, we all set?

MR. BULLOCK: That's correct, Your Honor.

Your Honor, we have discussed this on the break, we have identified, in fact, there are only four exhibits that were added to the end of the list, two of them the Government has no objection to.

The third one is Exhibit 201 which you have already admitted into evidence over their objection and a fourth one is 202 which we're offering now and they filed the same objection. They were previously identified with other numbers on them.

The only reason we moved them in is the Court's order directed us to put them in sequential number and when we were removing exhibits, we changed the numbers so they would continue to be in sequential number and have identified that for Plaintiff's counsel.

MR. JACOBS: And Your Honor, we appreciate counsel for the Defendant working with us on this and indeed, I think he's accurately represented there's only one that remains now and that is the newly numbered 202 for clarification, though again, one matter that I had raised before we recessed briefly was what happened to the three hundred or so exhibits after 199

and I just want to make sure they're not going to resurface as cross examination exhibits.

MR. BULLOCK: Your Honor, in our submission in the joint pre-trial statement, we stated that we listed the documents which we would put forth in our direct case and we reserved the right to use other documents for rebuttal and cross examination and this is the first objection I've heard to that inclusion in the joint pre-trial order.

MR. JACOBS: Judge, we endeavored, on the other hand, we understood the arrangement to be that we list every conceivable document, both for everyone's own convenience as well as the Court in our exhibit list.

MR. BULLOCK: Your Honor.

MR. JACOBS: We understood that to be our obligation and that is what we've done and I'm just trying to make sure we're not going to have any surprises. We've begun at 200, are we going to go back up to 500? I didn't realize we were down to 200 until Monday and going back up to 500. I'd rather know now than again to take the time of the Court on an individual basis when they start popping up and with new numbers.

THE COURT: All right.

You had a list of five hundred and some odd exhibits?

MR. BULLOCK: That's correct, Your Honor. We had attempted to come up with a -- we came up with a list of five hundred exhibits that were submitted with a revised joint

pre-trial statement in January.

Subsequent to that list, we made an effort, because we knew the time was going to be precious in this trial, to get them down to as minimum number as possible and the documents that we were going to use on our direct case and so that is where the new 202 list came on Monday.

THE COURT: Are you saying that you have no obligation to list documents that you intend to use on cross examination, that you only have the obligation to list exhibits that you intend to introduce in your case in chief? That is not -- that is not proper.

MR. BULLOCK: May I beg the Court's indulgence just a second?

THE COURT: Yes.

MR. JACOBS: Judge, if I -- forgive me.

MR. BULLOCK: Your Honor, as for cross examination, we would agree that we would be bound by the 202 list. As for rebuttal, I believe that is a different issue. If there is surprise, we would have no way to identify those documents in advance.

THE COURT: Well, that is another issue, I think. Yes, sir.

MR. JACOBS: Judge, again, it's my understanding and I'm always the Plaintiff in these cases, that the Plaintiff gets rebuttal case, but not necessarily the Defendant, but in

any event, in the Court's February 27th, 1995 order setting out what the pre-trial -- the joint pre-trial statement to be filed with the Clerk of the Court shall contain, paragraph eight, item D as in dog, a list of all exhibits with notation of all objections thereto. There is no --

THE COURT: All exhibits what? Read it to me.

MR. JACOBS: Paragraph eight, no later than three work days prior to the date set for the pre-trial conference of which -- by the way, there were two before the Magistrate Judge, one in early --

THE COURT: I know that.

MR. JACOBS: Okay, sir. The parties file their joint pre-trial statement with the Clerk of the Court with a, quote, courtesy copy, unquote, so marked.

THE COURT: I know, just read to me that paragraph.

MR. JACOBS: Subparagraph d, lower case d as in dog, a list of all exhibits and Rule 5.04, exhibit substitutes to be offered at trial with notation of all objections thereto. That is verbatim.

THE COURT: All right.

MR. BULLOCK: That was the five hundred list, Your Honor.

THE COURT: That was the five hundred?

MR. BULLOCK: That we filed.

THE COURT: Yeah. Okay.

Well, and that was furnished to Plaintiff's counsel?

MR. BULLOCK: That's correct.

THE COURT: When?

MR. BULLOCK: That was furnished I believe January 14th or 15th.

THE COURT: And the new list that Mr. Jacobs is referring to?

That was a pared down list that was furnished on Monday morning?

MR. BULLOCK: That is correct.

MR. JACOBS: My interpretation would be that the requirements would still hold, they would need to list all exhibits that they intend to introduce at trial. We're happy to see fewer, but again --

THE COURT: All right. Well --

MR. BULLOCK: I don't mean to belabor this point, Your Honor, but in at least two different occasions in front of the Magistrate, Mr. Jacobs made extensive comments and arguments about the length of our exhibit list, so we have on a number of occasions attempted to cull through these documents to lower --

THE COURT: You had seventeen hundred and some odd at one point, didn't you?

MR. BULLOCK: That's correct, Your Honor, that was before you issued either of the Summary Judgment orders and so

after that, we have been -- we have been aggressively and in some instances frantically paring them down. We recognized that's too much as well and we got them down to --

THE COURT: Well, you're saying that it's possible that you want to reserve the right -- let's see, you're Defendants, so you've got -- you don't have rebuttal.

MR. BULLOCK: Well --

THE COURT: Go ahead.

MR. BULLOCK: Your Honor, this is one of those unusual cases where we bear the burden of mitigation.

THE COURT: Well, okay.

And so, if any of the exhibits, hopefully not, but if any of the exhibits among those other three hundred and some odd are offered, then I'll hear the objection at the time. They may not be. Hopefully not.

MR. BULLOCK: Thank you, Your Honor.

THE COURT: All right.

All right, let's proceed.

MR. BULLOCK: Your Honor, I believe that I had moved Defendants' 202 into evidence.

THE COURT: All right.

MR. JACOBS: We object. Again, this would be -- these are additional notes. Same objection as the other notes. I know the Court's already ruled on them.

THE COURT: 201, I think. All right. The Court

will, for the sake of consistency, at least, overrule the objection to 202, and the Court will base its ruling on the same ruling as 201. Be received.

BY MR. BULLOCK:

Q. Mr. Klingenstein, is there a reason why you didn't speak to Mr. Herwig about his investigation of Barefoot Bay?

A. Other than he did not speak to me, no, none that I can identify.

Q. Well, you were engaged to form an expert opinion about this case, isn't that correct?

A. Yes, that is correct.

Q. Mr. Herwig is the only EPA official who investigated this case during the time period at issue to your knowledge, isn't that correct?

A. As I said, I've seen his name in the records, so I certainly have knowledge that he had some involvement.

Q. Okay.

Is there a reason then why you didn't feel it was necessary in formulating an opinion to learn the facts from the actual investigating agent of EPA Region IV?

MR. JACOBS: Objection, assumes facts not in evidence. There's no indication Mr. Herwig was the investigating agent for this facility. At this point in time, he's written some notes?

THE COURT: Sustained.

Ask your next question.

BY MR. BULLOCK:

Q. All right.

Would you refer to page 3 of the notes on proposed planning assessment. Would you read that for the Court, please?

A. Surely. The entire page?

Q. Excuse me, would you read paragraph six for the Court, please?

A. Sure. The enforcement team considered the fact that Respondent has been working closely with the Florida Department of Environmental Regulation since 1985 to develop a solution to the problem. Since being contacted by EPA, Respondent has been very cooperative. Consideration was given to calculating liability on a daily basis beginning with the initial overflow in 1985.

However, since the Respondent has been working with DER and since the effluent being discharged would have met the limitations contained in the permit now being issued by EPA, it is believed that the true violation was limited to that of not applying for an NPDES permit.

Q. EPA Region IV issued an administrative order for Barefoot Bay, isn't that correct?

A. Yes, I believe that is correct.

Q. And in fact, you have testified about violation of the

effluent limitation in that administrative order, isn't that correct?

A. Yes, it is.

Q. EPA issued a final NPDES permit in November of 1991, isn't that correct?

A. I'm not sure the issuance was in November of 1991. I believe the effective date was 1991, November, 1991.

Q. All right.

And isn't it true that the effluent limitations in the final permit were different than those contained in the administrative order, isn't that correct?

A. Yes, as I recall.

Q. Let me refer you to Plaintiff's 145, and also at the same time, Defendants' Exhibit 192. Are you familiar with those two documents?

A. Yes, I am.

Q. And I believe you did testify that the limits in the final permit were different than in the administrative order, isn't that correct?

A. Yes.

Q. All right.

And have you performed any comparisons of the exceedences which occurred of the administrative order to determine whether or not they would have been exceedences of the final permit limits?

A. Not that I specifically recall, no.

Q. Do you know where the final permit limit numbers were derived from?

A. Since I was not involved in the development of the permit nor have I seen the files that related to the development of the permit, no, I couldn't speak to where specifically each of those numbers came from.

Q. If the evidence shows that in fact the effluent, the exceedence levels would not have been -- exceedences, excuse me. Let me start over again.

If the evidence shows that the effluent would have passed the limitations in the permit as opposed during the period of time covered by the administrative order, would that lessen the seriousness of the violation of the administrative order?

A. From a technical standpoint, it would depend on the bases of each of the relative numbers.

Q. Okay.

And again, the State of Florida is taking the lead in determining water quality standards; isn't that correct?

A. Yes.

Q. When we played the videotape that you shot of the Barefoot Bay Plant, isn't it true that it showed a number of citrus groves in the area?

A. Yes.

Q. Were there other agricultural activity in the area?

A. I would expect so.
Q. And isn't it true that these facilities would be using agricultural chemicals?
A. I would expect they would.
Q. And isn't it true that some of these chemicals would eventually make their way into the canal and into the Sebastian River?
A. Yes.
Q. And isn't it true nine point source pollution such as agricultural runoff is one of the greater dangers on the Sebastian River?
A. Yes.
Q. And in fact, on Monday, you referred to Plaintiff's Exhibit 249 which is the SWIM document, the Surface Water Improvement Management Plan?
A. Yes.
Q. Let me refer to that document and ask you to look again at page 11. Mr. Jacobs asked you to read the second bullet point on page 11 about domestic and industrial wastewater treatment plants on Monday, is that correct?
A. I don't recall whether he specifically requested that I read that bulleted item.
Q. Isn't it true the first bullet point discusses runoff from residential and commercial property, storm water discharges?

A. Yes, it does.
Q. All right.
And these are also serious problems for the Sebastian River and Indian River Lagoon?
THE COURT: You asking him or telling him?
BY MR. BULLOCK:
Q. Isn't it true these are also serious problems?
A. Yes.
Q. The third bullet point addresses the problem -- isn't it true the third bullet point addressed the operation of marinas and boatyards as serious problems for the Indian River Lagoon?
A. Yes, it does.
Q. And this includes discharges of heavy metals, hydrocarbons and raw sewage, isn't that correct?
A. Yes, that's what is characterized, that's right.
Q. And secondarily treated effluent does not include raw sewage, does it?
A. It should not if there are no by-passes.
Q. One of the NPDES permit violations you discussed was toxicity, is that correct?
A. Yes, correct.
Q. And isn't it true that toxicity involves subjecting certain test species to one hundred percent effluent in a laboratory?
A. Yes.

Q. All right.
Toxicity testing in and of itself, isn't it true, it is not a test of the effluent as it inter -- reacts with the receiving water?
A. It's intended to provide an indication of whether or not that effluent has the capacity to provide toxic -- to cause toxic effects in organisms in the receiving water.
Q. My question was, though, isn't it true it is not -- it does not address the actual way in which the effluent reacts with the receiving water?
A. Well, as I said, it's intended to provide a measure of what will happen to the organisms in the receiving water when it's discharged there.
Q. It's done in the laboratory, isn't it?
A. Yes, yes.
Q. One of the other violations involved total residual chlorine?
A. Yes.
Q. And I believe you testified yesterday that chlorine is used to disinfect effluent in one of the final stages of treatment?
A. Yes.
Q. Isn't it true during the period of time involving the TRC exceedences at issue, Florida Cities was using an EPA approved method to test for total residual chlorine?

A. My recollection was that there was an issue regarding which method was used versus which method should have been used.
Q. Are you aware that the Plaintiff has withdrawn that allegation in this case?
A. Yes, I am.
Q. All right.
Are you familiar with EPA Region IV's policy on how to report total residual chlorine levels in discharge monitoring reports for facilities in Florida depending upon the various test methods used?
MR. JACOBS: Objection, assumes facts not in evidence. That is to say that EPA Region IV reporting procedures are any different from the rest of the --
THE COURT: Read the question back.
(Thereupon, the record was read back.)
Overruled.
THE WITNESS: I'm aware there is language in the permit or at least I've seen language in permits to that effect.
BY MR. BULLOCK:
Q. Okay.
Let me ask you to refer to Defendant Florida Cities' Exhibit 158.
THE COURT: I've got it, I just need to purge my

bench here.

Okay.

BY MR. BULLOCK:

Q. Are you familiar with this document?

A. No, I'm not.

Q. Would you identify the document?

MR. JACOBS: Objection, how can he identify it if he's not familiar with it, Your Honor.

MR. BULLOCK: If I may, Your Honor.

THE COURT: Well, yeah. You know, technically the question is inappropriate. If he doesn't know what the document is, he can't identify it. If you're asking him truly for the purpose of identification, yeah, go ahead.

MR. BULLOCK: Your Honor, this is a document which was produced by EPA's files pursuant to a document production. It's on United States Environmental Protection Agency letterhead, and my purpose in asking him to identify it was merely to identify what the title of the document was on the records.

THE COURT: Well, all right.

You can ask him that question.

BY MR. BULLOCK:

Q. Can you identify or state for us what the title of the document is?

A. It's on United States Environmental Protection Agency,

apparently memo paper, dated April 11, 1986, and it appears to be entitled Region IV NPDES Permits, Chlorine Strategy.

MR. BULLOCK: Your Honor, I would move Defendants' 158 in evidence.

MR. JACOBS: Objection, Your Honor, hearsay and relevancy.

THE COURT: Hearsay and relevancy. Let me hear your relevancy.

MR. JACOBS: I'm seeing this for the first time as well as Mr. Klingenstein. Look at the date, it's April, 1986, the violation --

THE COURT: Now wait a minute, you're saying this document was not produced or rather was not disclosed to you? You're not --

MR. JACOBS: No, oh, no, that I'm not saying, Your Honor.

THE COURT: All right.

MR. JACOBS: I'm saying I've just scanned this, this very moment, which is not an excuse, because it has been produced earlier.

THE COURT: What's the relevance?

MR. JACOBS: The point is that it's dated April, '86. There is no foundation laid that it's in that. Then it refers to a policy or strategy, as I read the title, there's no evidence that it applies at the point in time that the

violations took place which is after November of 1991 which is over five and a half years later, and as I scanned the document, the bottom of page 4 speaks in terms of a July 1, 1988 deadline, so again, I'm drawing conclusions from a quick glance at the document, but it seems to relate to a policy or practice or strategy that might have been in effect between '86 and '88 and not after November, '91 which is when the violations in question took place.

MR. BULLOCK: Your Honor, the document again was found in EPA's own files.

THE COURT: All right.

Well, I'll assume that.

We're talking about relevancy.

MR. BULLOCK: The relevancy is, Your Honor, this is a document that demonstrates how or its guidance to permit riders on dealing with the issue in Florida which has a particularly sensitive issue regarding residual chlorine and EPA and Florida have contracted agreements about issues such as permitting and residual chlorine and this document is a guidance to permit riders on how to address the issue on permits in Florida, TRC testing under various test methods.

THE COURT: Okay.

Other objections?

MR. JACOBS: Yes, Your Honor. Again, if it was an instruction to a permit rider, I'm not sure that the foundation

has been laid. Again, the permit was written in 1991, five and a half years later there is no indication that this policy was in effect at that time and therefore, I would say it's irrelevant.

MR. BULLOCK: Well, Your Honor --

THE COURT: All right.

I'll overrule the objections and receive it for what it's worth.

MR. BULLOCK: Thank you, Your Honor.

THE COURT: Don't thank me, just move on.

MR. BULLOCK: That's -- all right.

BY MR. BULLOCK:

Q. Mr. Klingenstein, let me refer you to page four, the second paragraph which begins with the NPDES permit conditions. Have you read the paragraph?

A. Yes, I have.

THE COURT: Which paragraph?

MR. BULLOCK: I'm sorry, the second paragraph, Your Honor?

THE COURT: All right.

BY MR. BULLOCK:

Q. Referring also to Defendants' 192 which is the 1991 permit, isn't it true that the 1991 permit allowed Florida Cities to use the DPD colorimetric method to test for total residual color that's found on page I-2 of the permit?

A. Not in my interpretation of that paragraph.
Q. In fact, Mr. Klingenstein, the Government has withdrawn its claim that -- isn't it a fact that the Government has withdrawn its claim as to the propriety of which test method was used?
MR. JACOBS: I object, asked and answered.
THE COURT: Is that the same question you elicited from him before?
MR. BULLOCK: Well, Your Honor, he testified that in a fashion, Your Honor, but asked in a different context, he's --
THE COURT: All right, all right, I'll overrule the objection. Let's get going.
BY MR. BULLOCK:
Q. Well, assume with me, Mr. Klingenstein, that the DPD colorimetric test method was in fact permitted under the permit. In the next series of questions, I'll ask you to follow that assumption. What was the -- isn't it true that the NPDES permit required a TRC residual level of .01?
A. Yes.
Q. And this was in effect based on concerns from the State of Florida?
A. Yes.
Q. All right.
Isn't it true that the EPA guidance in the 1986 document

that you're looking at states that the EPA knew that the DPD colorimetric method was not sensitive enough to detect chlorine down to a .01 level?
A. Yes.
Q. And therefore in those cases, the permittee need only report non-detectable using one of those tests to be considered in compliance, isn't that correct?
THE COURT: That's not non-detectable, it's not detectable.
BY MR. BULLOCK:
Q. Not detectable?
A. That's the indication in Exhibit 158.
Q. And assume with me for purposes of hypothetical that Florida Cities was not informed of this requirement or this method of reporting. If they were using the DPD colorimetric method, wouldn't in fact some of the TRC violations be false reports, false positives and in fact should have been reported as non-detect?
A. That would depend on what detection limit Florida Cities was receiving in the DPD test.
Q. But in fact if they were not receiving down to .01, isn't it true that this EPA memo states that they should be told to check off non-detect -- not detect?
A. What the memo is indicating is that if in fact you're at or below your detection limit, then you would put non-detect --

not-detect.
Q. And under those assumptions, isn't it true that some of the TRC exceedances that were reported could in fact be false positives.
A. Again, that would depend on specifically what detection limit you were achieving.
Q. But it is possible those were false positives; yes or no?
A. It is possible.
Q. Let's look at some of the alternatives which you listed as possibilities at Barefoot Bay for alternative discharge.
Have you investigated what land was available to be purchased for percolation ponds in the Barefoot Bay area?
A. To the extent that I have seen documents in the file that indicated that various parcels of land were discussed as being potentially available for sale.
Q. Are you aware of the cost per acre of that property?
A. Some of those documents included costs.
Q. All right.
Have you yourself personally investigated the cost of the land?
A. Independent of those documents?
Q. Correct?
A. No.
Q. You have no independent opinion then as to reasonable cost of land in Brevard County for agricultural land which

could be purchased for percolation ponds?
A. No.
Q. You have no opinion as to what price the Florida Public Service Commission would have found to be prudent, isn't that correct?
A. No.
Q. All right.
You testified on Monday that the company built two test ponds on what's been referred to as the forty acre site, but those ponds lacked sufficient capacity to accept all the plant's effluent, isn't that correct?
A. Yes.
Q. Isn't it true that in fact the company determined that the hydrogeological conditions in the Barefoot Bay area were not suitable for percolation ponds?
A. I would characterize it that the company investigated the capacity of a limited number of sites and based on the inadequate capacity of those sites decided to abandon pursuit of percolation ponds.
Q. But you haven't done the research to determine in fact whether or not any sites in the area were suitable for percolation ponds?
A. It's my opinion want of sufficient size might have been.
Q. What do you base that opinion on?
A. The fact that the company was percolating a certain

amount of wastewater through an existing size pond. They did carry out tests on-site that demonstrated percolation capacity of some fixed capacity or a given size of a piece of property and therefore that a proportionately larger site would be expected to likely provide the necessary capacity.

Q. So that's based on your review of documents in this case?

A. Of actual tests carried out by Florida Cities' consultants.

Q. Those were documents in this case?

A. Yes.

Q. But isn't it true that Florida Cities determined that percolation ponds were not a viable option in Barefoot Bay?

A. It's my opinion that Florida Cities decided not to pursue percolation ponds. I can't speak as to what all of their motivations were.

Q. Do you know what requirements were necessary to permit the percolation ponds in Brevard County, Florida?

A. I'm not aware of all of the State of Florida's requirements, however, I assume that Florida Cities was since they had previously done so.

Q. So the answer to the question is, you're not aware of the permitting requirements for percolation ponds in Brevard County, correct?

A. I can't say I know all of them, no.

Q. Which requirements are you familiar with?

A. Well, certainly that the pond would have to have adequate capacity to accept the plant's flow and be concerned with protection of ground water quality.

Q. Which permitting agency requires that?

A. Well, that would probably be FDER, certainly.

Q. But you're not really familiar with FDER permitting requirements for perk ponds, are you?

A. Not in detail.

Q. All right.

You're not familiar in detail with the requirements for Brevard County, are you?

A. No.

Q. Isn't it true that the Florida Department of Environmental Regulation agreed with Florida Cities' analysis of the perk pond option and directed the company to look at other discharge options?

A. I recall from the correspondence that the Florida Department of Environmental Regulation agreed with the position to not pursue putting percolation ponds on the sites that had been previously put forth or had been looked at by Florida Cities. I can't say whether they would have not agreed to a percolation pond on another site.

Q. Let's turn to the spray field option. You testified that the company started looking at the option of spray fields in 1987, but did not purchase any land until recently, is that

correct?

A. Yes.

Q. Isn't it true that on a number of occasions, Florida Cities contacted grove owners in the area about providing effluent for various groves for spray irrigation?

A. Yes.

Q. Isn't it true that -- strike that. Let me back up.

Would AWT have been required for discharge into spray irrigation?

A. Depending on what land you were spraying on to.

Q. Okay.

What land would secondary effluent have been allowed to be sprayed on?

A. Wholly owned land, I believe, without any food crop on it?

Q. If it was owned by Florida Cities but had food crop on it, it would require AWT?

A. Yes.

Q. And isn't it true that if it was owned by other owners, and was growing food crops, it would be -- the effluent should be treated to AWT levels?

A. That's my understanding.

Q. Isn't it true that Florida Cities was unable to find other owners of groves who would accept the spray effluent?

A. Florida Cities, based on my review of the documents,

Florida Cities spoke to a number of grove owners, however, financial issues seemed to continue to stand in the way of them being able to reach an agreement.

Q. Isn't it true that they could not find other grove owners to take the spray effluent, Mr. Klingenstein?

MR. JACOBS: Objection, Your Honor, to the extent that he's asking again for a matter of fact, not a matter that he's gleaned from documents.

THE COURT: I'll overrule the objection.

THE WITNESS: Certainly, history bears out that they did not end up in an agreement with any other grove owners.

BY MR. BULLOCK:

Q. You reviewed a number of pieces of correspondence back and forth between Florida Cities and various grove owners, correct?

A. Yes.

Q. And Florida Cities was unable to -- that correspondence indicated that Florida Cities was unable to come to any agreement with these grove owners, correct?

A. With the grove owners they were in contact with, yes.

Q. What was the financial reasons you referred to a minute ago?

A. That I recall, issues regarding the cost of on-site development on the groves which would be improvements to the irrigation systems, to allow distribution of wastewater,

storage facilities on-site, cost of the wastewater itself that Florida Cities was interested in charging the grove owners for the actual wastewater. Those sort of issues.

Q. Isn't it a fact that the Public Service Commission mandated that Florida Cities charge for effluent?

MR. JACOBS: Objection, calls for speculation, facts not in evidence.

THE COURT: Well, I don't know whether he knows that or not.

BY; MR. BULLOCK:

Q. Do you know whether or not Florida Cities was mandated to charge for its effluent by the Public Service Commission?

A. I would say I don't know whether or not the Florida Cities Public Service Commission -- I'm not aware that there was something that would have prevented Florida Cities from providing the effluent to the grove owners at no cost, if they had been willing to assume that cost.

Q. Okay.

The answer to the question is, you don't know whether or not the EPA mandated that Florida Cities charge for its effluent; yes or no?

A. No, I'm not aware of anything that specifically required Florida Cities to charge.

Q. So, if they did require that, it would be news to you?

THE COURT: Well, go on to your next question.

Let's pause for change of Reporters.

(Thereupon, there was a change in Court Reporters.)

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CONTINUED CROSS-EXAMINATION
BY MR. BULLOCK:
Q. Isn't it true that Florida Cities actually initiated an eminent domain proceeding to obtain grove land for spray irrigation in the Barefoot Bay area?
A. Yes, I am aware that such an action was taken.
Q. Isn't it true that a group of adjacent landowners intervened in that proceedings and appealed the issue to the Florida Court of Appeals?
A. Yes, I am aware of that.
Q. And didn't that stay the eminent domain proceedings?
A. Yes, it did.
Q. Isn't it true that FDER continued to authorize the company to discharge surface water and directed that the company continue to look at other alternatives following the eminent domain proceeding, if you know?
A. I believe that's true.
Q. All right. Let's turn to the deep well injection option. You testified that Florida Cities did not look into deep well injection seriously until 1989; is that correct?
A. Yes.
Q. And, again, we've -- you've testified earlier that you don't have any particular experience with deep wells in the state of Florida, correct?
A. That's correct.

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Q. Are you familiar with the permitting process for deep wells vis-a-vis Brevard County?
A. Just to the extent that I am from this case.
Q. And what Brevard County requirements are you aware of?
A. Well, I am aware of the requirement specifically to go through the water district.
Q. All right. Would there be county-specific permits as opposed to the water district permits to your knowledge?
A. That I can't say.
Q. Have you researched the performance of other deep wells in the Brevard County area?
A. To the extent that I followed that issue through the documents that have been available.
Q. Have you performed any independent research yourself?
A. On?
Q. Deep well performance in Brevard County.
A. I had one conversation with a Florida Department of Environmental Regulation employee with regard to performance of wells.
Q. And who was that?
A. I cannot recall the name offhand. That was some time ago.
Q. Have you reviewed the operating data from any other deep well in Brevard County?
A. No, I've not.

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Q. Isn't it true that the St. Johns River Water Management District would govern permitting of deep wells in Brevard County?
A. They have an involvement in it.
Q. Okay. Did you interview anyone at the St. Johns River Water Management District about their policies on deep well injection?
A. No, I did not.
Q. All right. Didn't Florida Cities actually apply for permits for deep well?
A. Yes, they did.
Q. And isn't it true that Florida Cities could not have proceeded with the construction of deep wells without the permission of the St. Johns River Water Management District?
A. That's my understanding.
Q. The NPDES permit violations at issue, let me move back to those just a second. Between the date of those violations -- excuse me. Let me start over again.
Were there any enforcement actions taken by EPA on those violations prior to the Barefoot Bay facility being added to this lawsuit in April of 1995?
A. Not that I can recall, not that I'm aware of.
Q. Mr. Klingenstein, I have a few brief questions back on Waterway Estates that I omitted, and I will move through those very briefly.

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One of the other options which you had identified was a connection to the North Fort Myers Utility?
A. Yes.
Q. All right. And in your report -- excuse me. Let me add -- North Fort Myers' capacity is based upon spray fields and deep well injection; is that correct?
A. Yes, that's correct.
Q. All right. Do you know how many deep wells North Fort Myers had?
A. No, I'm not aware of the exact number.
Q. Do you know the cost of connecting to North Fort Myers?
A. I've seen documents that have included various discussions of what the costs might be.
Q. Have you yourself performed any calculations about the cost of connection to the North Fort Myers compared to the actual construction of the AWT plant?
A. No, I've not.
Q. In the 1981 and 1990 studies -- let me refer you to the 1990 waste load allocation study, which is in evidence as Plaintiff's 422. Let me refer you specifically to page 17, the third paragraph. The last sentence of the third paragraph reads, "This is the same recommendation made in the 1981 model document (WQTS, Volume II, Number 52)."
Isn't it true that the recommendation that they were referring to is moving the point of discharge? Is that

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correct?
A. Yes.
Q. And the term used in this 1990 study is "recommendation" and not "requirement"; isn't that correct?
A. The document uses the word "recommendation."
MR. BULLOCK: Your Honor, that completes my cross.
There are about four or five documents which we would request to move into evidence which we've discussed: Florida Cities Number 23, which is the NPDES Permit Denial in '86.
No objection?
MR. JACOBS: No objection.
THE COURT: All right. It will be received.
(Florida Cities Exhibit Number 23 received in evidence.)
MR. BULLOCK: The next one, Your Honor, would be 33, which is the letter re: Lee County Waterway Estates temporary operating permit.
MR. JACOBS: (Indicates affirmatively.)
THE COURT: Okay. Be received.
(Florida Cities Exhibit Number 33 received in evidence.)
MR. BULLOCK: 52, which is the amendment to Section 309, I believe you ruled on that already, and the Government objected and then withdrew its objection.

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MR. JACOBS: I agree, Your Honor.
THE COURT: Okay. Be received.
(Florida Cities Exhibit Number 52 received in evidence.)
MR. BULLOCK: 142, which is a letter regarding the Carrollwood NPDES permits requesting relief in the permit, I believe you had already ruled on that as well.
MR. JACOBS: (Indicates affirmatively.)
MR. BULLOCK: Your Honor, I believe that the record will indicate that you already admitted these, although Ms. Cole indicated to us that she had not written them down or didn't have --
THE COURT: 142 was not actually offered. I don't know whether it was an oversight.
MR. BULLOCK: I'm sorry. It's my fault, then, Your Honor, and I would offer it at this time.
MR. JACOBS: (Indicates affirmatively.)
THE COURT: It will be received.
(Florida Cities Exhibit Number 142 received in evidence.)
MR. BULLOCK: And 192, the final issue of the NPDES permit for Barefoot Bay.
MR. JACOBS: (Indicates affirmatively.)
THE COURT: Okay. It will be received.
(Florida Cities Exhibit Number 192 received in

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evidence.)
MR. BULLOCK: The only other matter, Your Honor, we now have copies of Exhibit 132, which was the Hillsborough County consent order. Mr. Jacobs had raised the question that the copy he had seen earlier didn't have -- was not executed. We now have copies of all of it sufficient for everyone of the actual document. We'd just like to substitute that.
THE COURT: All right. That's 132.
Okay. Mr. Bullock, are you through?
MR. BULLOCK: I am, Your Honor.
THE COURT: Okay. Mr. Hird?
MR. HIRD: Thank you, Your Honor.
If we may, I'd like to retrieve my copy of the report.
THE COURT: Yes, sir.
MR. HIRD: But we have a substitute copy we will give to the law clerk.
THE COURT: All right. Thank you.
CROSS-EXAMINATION
BY MR. HIRD:
Q. Good afternoon, Mr. Klingenstein.
A. Good afternoon.
Q. You testified when questioned by Mr. Bullock that SAIC's annual billings to EPA and DOJ for enforcement matters was approximately $1 million in the last two years; is that

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correct?
A. Approximately a million dollars each year I believe was the testimony.
Q. I'd like you to look at the first page of your resume in the bottom paragraph. Do you see a reference there, sir, that billings were approximately $2 million per year?
A. Yes. That was for those two years.
Q. Thank you. Now, Mr. Klingenstein, if I -- on pages 4 and 7 -- or pages 4 and 5 of your resume you describe your experience with treatment system design and operation; is that correct?
A. Yes.
Q. And you describe being involved in the construction of three facilities on those two pages; is that correct?
A. Yes.
Q. And those include, one, metal finishing facility and, two, electroplating facilities; is that correct?
A. Yes.
Q. Now, the pollutants that come from metal finishing and electroplating facilities are different in nature and kind than those that come from domestic sewage facilities; isn't that correct?
A. Yes.
Q. And the treatment technology used to remove those pollutants from the waters is completely different from that

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that's used for domestic sewage; is that correct?
A. There are certainly significant differences.
Q. Well, you use principally ion exchange to remove metals from these facilities. Wouldn't that be correct?
A. You could. You --
Q. And you don't use ion exchange --
THE COURT: Wait. Wait. Wait.
MR. HIRD: I'm sorry.
THE COURT: Had you finished?
THE WITNESS: You could use ion exchange. You could use precipitation technologies. There are a variety of technologies that could be used.
BY MR. HIRD:
Q. And those technologies are not used with domestic wastewater sewage; is that correct?
A. Typically not.
Q. Now, Mr. Klingenstein, you identified yourself as an engineer when you began your examination; is that correct?
A. Yes.
Q. And you were qualified as an expert in wastewater treatment; is that correct?
A. Yes.
Q. You don't have any training as a psychiatrist or a psychologist, do you?
A. None whatsoever.

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Q. And you're not an expert here testifying here about human behavior or human motivation, are you?
A. That's not my understanding.
Q. Okay. I'd like you to turn to page 9 of your report, if you would.
A. I'm sorry. Which page?
Q. Page 9. Do you have that page, sir?
A. Yes, I do.
Q. Could you read the first full paragraph – I'm sorry. It's the second full paragraph beginning "furthermore."
A. "Furthermore, FCWC failed to avail themselves of the opportunity to connect to the North Fort Myers Utility Company, NFMU, an available option which would have allowed cessation of discharge prior to August 1988. Correspondence after this date indicates that FCWC decided that the plant upgrade and relocation of the outfall were the best choice nominally for cost reasons.
"However, the assertion that cost prevented FCWC from connecting to NFMU is not consistent with the record. NFMU indicated that it would provide service to Waterway Estates for 3.6 million or less (competitive with FCWC's actual costs on the upgrade and outfall extension)."
THE COURT: What page are we on?
THE WITNESS: I'm sorry. Page 9 of the report, sir.
MR. HIRD: Page 9, Your Honor, of his report.

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THE COURT: And what paragraph?
MR. HIRD: The paragraph that begins "furthermore." I believe it's the second.
THE COURT: Okay. Okay. Go ahead.
THE WITNESS: "A November 27, 1991 FCWC memo from Gordon to Levy provides an indication of another possible motivation for FCWC's rejection of NFMU's offer. NFMU's financial health and need to sell capacity was discussed, and a recent balance sheet for the utility was attached. It appears that FCWC did not want to yield its customers to its competitor."
BY MR. HIRD:
Q. Now, here you're writing about Florida Cities' motivation, aren't you? Isn't that correct? You're writing about what you consider Florida Cities' motivation to be?
A. I would be offering an opinion there as to a potential reason for why such a connection was not made.
Q. And you've just testified previously that you're not trained to speak as an expert about motivation; is that correct?
MR. JACOBS: He said he wasn't a psychiatrist.
THE COURT: Well, all right. Let's move on. I've got that point.
MR. HIRD: All right.
BY MR. HIRD:

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Q. Well, let me explore this issue with you. I'd like to have you take a look at Government's Exhibit Number 466, if you would. And at the same time would you get a copy of Avatar Holdings' Exhibit Number 3, please?
THE COURT: I missed your last question, Mr. Hird. What was that?
MR. HIRD: I'm going to ask him questions, Your Honor, about Government Exhibit 466 and Avatar Holdings Exhibit 3.
BY MR. HIRD:
Q. Do you have those in front of you, sir?
A. I have one of them. I'm sorry. And the other one was your Exhibit 3?
Q. Do you have Exhibit 466 in front of you, sir?
A. I have 466 in front of me, and I have your Exhibit 3.
Q. Okay. First I'd like to ask you whether 466 is the November 27, 1991 memo that you're referring to on page 9.
A. Yes, it is.
Q. And then looking at Exhibit 3 I'd like to ask you whether the first three pages of Avatar Holdings Exhibit 3 correspond to Exhibit 466 from the Government.
THE COURT: You mean are identical?
MR. HIRD: Are identical.
THE WITNESS: They certainly appear to be.
MR. JACOBS: Just for the record, they have

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different Bates numbers, but I'll agree in substance they are. The Bates numbers may or may not --

BY MR. HIRD:

Q. Now --

MR. JACOBS: I'm sorry. Also on the top of Avatar 3 there's a handwritten notation "file."

THE COURT: All right. Go ahead.

BY MR. HIRD:

Q. Now, Mr. Klingenstein, this memo to which you refer to is written on November 27, 1991. That's correct?

A. Yes.

Q. I believe you testified that the negotiations between Florida Cities and North Fort Myers occurred in mid-1988; is that correct?

A. In the late 1980s.

Q. So this is written two to three years after those negotiations were over.

THE COURT: Is that correct?

THE WITNESS: Yes.

BY MR. HIRD:

Q. Now, you offer your opinion that because this document 466 includes references to North Fort Myers' financial health and the need to sell capacity and included a balance sheet that Florida Cities was concerned that it did not want to yield its customers to its competitors; is that right?

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A. Yes.

Q. I'd like you to look at the first page of 466 and the corresponding first page of Exhibit 3. Do you see a line that says "ref"?

A. Yes.

Q. And subpart B in that says, "B, memorandum dated 11/20/91, Sharp to Wilkov"?

A. Yes.

Q. Okay. Could you turn to the fourth page of Avatar Holdings Exhibit 3? Do you have that, sir?

A. Yes, I do.

Q. Does that appear to be a memorandum from Peter Sharp to Lawrence Wilkov dated November 20, 1991?

MR. JACOBS: Objection, lack of foundation. He hasn't established that the witness has seen this document yet.

MR. HIRD: Your Honor, this document -- I don't believe the witness has. However, this document comes from Mr. Levy's files and is a business record.

I am going to be using it for Mr. Klingenstein in the nature of impeachment, so therefore I think I can appropriately question Mr. Klingenstein about it. I will be offering it through Mr. Levy.

THE COURT: Well, how do you plan to impeach the witness on the basis of a document that he's not seen before?

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MR. HIRD: I am attempting to show him that there is another cause that would supplant his opinion as to why the Florida Cities -- why this memorandum was written and that this memorandum has nothing to do with the cause that he attributes to it.

THE COURT: Well, I don't know -- I think maybe you might be able to ask him questions of a hypothetical nature at this point.

MR. HIRD: All right, Your Honor.

THE COURT: But I'm going to sustain the objection to the document at this point.

MR. HIRD: Then I will move to a hypothetical.

BY MR. HIRD:

Q. Let me ask you to assume that sometime shortly before the November 27th, 1991 letter was written that North Fort Myers Utility had approached Avatar Holdings and expressed an interest in Avatar Holdings or one of its subsidiaries to purchase North Fort Myers Utility, either the whole thing or an interest.

Can you make that assumption with me?

A. If you ask me to, yes.

Q. Now, if you make that assumption, wouldn't it be reasonable for a memo to be prepared that discussed North Fort Myers Utility's financial health?

A. Yes.

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Q. And wouldn't it be reasonable to discuss the need to -- North Fort Myers Utility's need to sell capacity?

A. Yes.

Q. And wouldn't it be reasonable to include a balance sheet?

A. Yes.

Q. And wouldn't this provide another explanation different from the one in your report as for why the November 27th, 1991 memo was written?

A. Yes.

Q. All right. Turning back to the November 27th, 1991 memo -- or, rather, for a moment let's turn back to your report. I believe when Mr. Bullock questioned you, he asked you whether you compared the cost of connecting to North Fort Myers to the cost of building an upgrade and the outfall extension; is that correct?

A. Yes, I believe he asked me that.

Q. And you said that you didn't compare it.

A. I believe I said I had not carried out my own detailed independent analysis of that.

Q. I see. But in this paragraph you seem to indicate that you believe the two costs were comparable; is that correct?

A. I believe I was referring to a piece of correspondence that had specifically offered a summation of what the cost would have been.

Q. Do you know if that summation of the cost included tax

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gross-up?
A. No, I do not.
Q. *Do you know what tax gross-up is?*
A. No, I do not.
Q. Now, if you take a look at Exhibit 466, which has been referenced in your letter – in your report, rather, 466, do you see in the middle of the middle paragraph on the first page the phrase "the tax gross-up impact made the connection uneconomic compared to upgrading our existing plant"? Do you see that phrase?
A. Yes, I do.
Q. And you were unable to interpret that phrase because you didn't know what tax gross-up is; is that correct?
A. I interpreted it to the extent that it was an indication that there was some tax-related cost that was being identified as having had an impact on the cost.
Q. And further down in 466 is the statement "being unable to reach an agreement that made economic sense – the gross-up was the killer – Florida Cities turned its attention to upgrading its existing wastewater treatment facility." Do you see that?
A. Yes, I see that.
Q. So at least in the view of this letter the tax gross-up was something that made a difference in terms of Florida Cities' decision here; is that correct?

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A. Apparently in the view of the writer.
Q. But you don't know what difference it was and how it impacted the comparative costs?
A. Not at this point, no.
Q. I'd like you to turn to the second page of 466. That shows the balance sheet for National Fort Myers Utilities (sic) that you referred to in your report; is that correct?
A. Yes.
Q. And it shows a negative number for equity capital of $3,995,000 in the year 1990; is that correct?
A. It appears to, yes.
Q. And moving down the page, in the year 1990 it shows a net loss of 1,479,000; is that correct?
A. Yes, it does.
Q. And turning to the last page of 466, there is the statement -- in the paragraph beginning "obviously," there is the statement, "Obviously without a bailout by the county, North Fort Myers Utilities' future appears bleak." Do you see that?
A. Yes, I do.
Q. Now, in considering whether to hook up to North Fort Myers in 1988, would it have been reasonable for Florida Cities to consider the financial condition of North Fort Myers?
A. Yes.

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Q. And it would not be a good solution for Florida Cities to hook up to a facility that was in danger of floundering because of financial reasons; is that correct?
A. Well, unless their hooking up made a difference in the condition of that entity.
Q. Now, you have talked about a Mr. Ken Kwan at several times during your examination. Mr. Kwan is the EPA enforcement lead for this case; is that correct?
A. Yes.
Q. And he is the -- he's an engineer by training; isn't that correct?
A. Yes, I believe that's so.
Q. And he is the person who is responsible on behalf of EPA for making the technical decisions with respect to this case; is that correct?
A. I wouldn't want to characterize who makes the decisions for EPA.
Q. But he is the staff -- the front-line person, the first-line person with respect to technical issues in this case; is that correct?
A. He's been my primary point of contact in this case within EPA.
Q. Are you testifying under a contract with EPA or the justice department for this case?
MR. JACOBS: Objection, relevancy.

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THE COURT: Overruled.
THE WITNESS: EPA.
BY MR. HIRD:
Q. And do you have a contract officer in connection with that contract?
A. Within our company or within EPA?
Q. Within EPA.
A. Yes.
Q. And do you have a project officer within EPA with respect to this particular task order?
A. Yes.
Q. And is Mr. Kwan the project officer?
A. No.
Q. Now, I'd like to have you take a look at Exhibit 494, if you would.
MR. HIRD: This is Government Exhibit 494, Your Honor.
THE COURT: Yeah. I'm assuming that you don't have 494 exhibits.
MR. HIRD: We have only one book, Your Honor.
THE COURT: Yeah.
MR. HIRD: Do you have that in front of you, Your Honor?
THE COURT: I have 494.
THE WITNESS: Yes, I do too.

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BY MR. HIRD:
Q. This is one of the documents you relied on in your report, is it not?
A. I've seen this document, yes.
Q. Okay. This document refers to a meeting between EPA and the Department of Justice on one hand and representatives of Florida Cities and Avatar Utilities on the other, does it not?
A. Yes, it does refer to a meeting that took place.
Q. And this meeting took place on December 22nd, 1992; is that correct?
A. Well, I believe the meeting took place on December 16.
Q. I'm sorry. It took place on December 16th, and the memo is dated December 22nd; is that correct?
A. Yes, that appears to be correct.
Q. Okay. Now, at this meeting representing the Government was Mr. Jacobs; is that correct?
A. Representing the U.S. Department of Justice apparently, yes.
Q. And representing EPA was someone named Gwen Eason; is that correct?
A. Yes.
Q. Is that the same person as Gwen Fitz-Henley?
A. Yes.
Q. Also representing the Government at this meeting was Mr. Ken Kwan.

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A. Yes, that appears to have been correct.
Q. And this was a meeting about the Waterway Estates claims in this case; is that correct?
A. Yes.
Q. Okay. Now, at that meeting, if you go down to the first -- to the paragraph that has one line, about the middle of the first page, it says, "Ms. Eason stated the violations were as follows." Do you see that?
A. Yes.
Q. And those are essentially the Waterway Estates violations that are in this case; is that correct?
A. Without matching exact dates, yes.
Q. Well, it's actually a little broader because the alleged violations here start June 1988 and the complaint starts November 1, 1988; is that right?
A. I believe so.
Q. And then if you go down the next block, it says, "Ms. Eason stated the penalties are based on the following factors." Do you see that?
A. Yes.
Q. And the first factor is seriousness of violation; is that correct?
A. Yes.
Q. And, Mr. Klingenstein, you're here testifying about seriousness of violation; isn't that correct?

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A. That's correct.
Q. Now, on the next page you see a calculation of various dollar figures; is that correct?
A. Yes.
Q. And I'd like you to go down way towards the bottom of the calculation. You see a figure called gravity component seriousness.
A. Yes.
Q. Do you see that?
A. Yes.
Q. And what figure is that?
A. $407,000.
Q. And if you go back up to the heading of the paragraph, that states, "Mr. Kwan showed the calculations pertaining to the settlement model as follows"; is that right?
A. I'm sorry. Where is this exactly?
Q. Up at the --
A. Oh, I'm sorry. Just above that.
Q. Yeah.
A. Yes, I see that.
Q. So Mr. Kwan expressed at this meeting that the seriousness of the violations was worth to the agency $407,000; is that correct?
A. That's what this memo reflects.
Q. Now, you were here when Mr. Jacobs gave his opening

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argument on Monday?
A. Yes, I was.
Q. And Mr. Jacobs asked this Court for $1.9 million with respect to the claims of unpermitted discharge. Do you recall that?
A. Yes, I do.
Q. And that's almost five times the $407,000 figure in this letter.
THE COURT: Well, don't examine the witness on the basis of an opening statement by counsel. I won't permit that.
MR. HIRD: All right.
Your Honor, I have no further questions of the witness.
THE COURT: Redirect?
MR. JACOBS: Very briefly, Your Honor, with your permission.
THE COURT: Don't say "very briefly" unless you mean it now.
MR. JACOBS: I mean it, Your Honor.
THE COURT: Oh, good.
MR. JACOBS: First thing this morning we spoke of a stipulation. And we did submit it to Ms. Cole, but I understand that we have not technically moved into evidence all of the exhibits in the joint stipulation that has been

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signed by all three parties and submitted to the Court. And I'd like to do so at this time.

THE COURT: All right. Okay. I have the joint stipulation which I have reviewed, and the Court will permit over the objections which are reflected in the joint stipulation as Codes 1, 2, and 3 the exhibits that are set forth in Attachment A to that joint stipulation. I don't think that we will need to go through verbally all of those. I think you've got a record of that here in your joint stipulation.

And Ms. Cole can -- she's not here right now, but I'll instruct her to make note of that on the -- where she records the exhibits that are received.

All right.

REDIRECT EXAMINATION

BY MR. JACOBS:

Q. Mr. Klingenstein --

THE COURT: Now, that's of course with the exception of -- well, those exceptions are noted in the last paragraph of the joint stipulation which we've already addressed.

All right. Go ahead.

BY MR. JACOBS:

Q. Mr. Klingenstein, you spent some time with Mr. Bullock on the subject of when Florida Cities was on notice of the need to upgrade the plant and move the outfall, and you went

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through some documents with him. In your opinion, sir, when was Florida Cities Water Company first on notice of the need to upgrade the plant at Waterway Estates, that is, and move the outfall?

A. Well, in my opinion, Florida Cities' first indication that they would need to do something about that treatment plant was when in fact the 1981 waste load allocation study was completed and a zero waste load allocation was found for the plant based on the assumption that it was going to tie into the Cape Coral Regional Facility.

When that regional facility, the arrangement in effect fell apart, in my opinion Florida Cities should have been on notice that -- given that it was clear from the document that in fact no waste load allocation would be found to exist at the existing point of discharge for the existing level of treatment, some action would need to be taken. So back in that time frame, in the time frame when that fell apart, 1982, 1983.

Q. I see. Now, the waste load allocation study was what year?

A. 1981.

Q. And then continuing down the time line, so to speak, when did the concept of the regional plant fall through?

A. The documents that I've seen would seem to indicate that it was in the 1982-1983 time frame when that arrangement fell

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apart apparently due to cutbacks in federal funding.

Q. Now, assuming for whatever reason they were not on notice in 1981 or 1982 or 1983 of the need to upgrade the Waterway Estates plant and move the outfall, what milestone, if you will, would you next identify in terms of the notice that they received of the need to upgrade the plant and move the outfall?

A. Well, certainly a very formal notice would be the tentative denial of the permit.

Q. And would that be Florida Cities Exhibit 23?

A. If I could refer to it.

Yes, and that's dated June 30th, 1986.

Q. Very well. And was there any additional notice after that to Florida Cities that they needed to upgrade the plant and move the outfall?

A. Well, certainly they also received the formal denial at the end of the year that became effective in January of 1987.

Q. And would that be Florida Cities Exhibit 27?

A. Yes, which is dated December 8, 1986. Both of those documents indicate that there is no permit either going to be issued or issued for the discharge at that particular location for that particular discharge. The logical conclusion is that an additional -- rather, an alternative point and type of discharge is necessary or zero discharge is necessary.

Q. Now, Mr. Bullock also went through a series of

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administrative orders, known as AO's, with you at Waterway Estates, the first of which was Defendant's or Florida Cities' Exhibit 28. Would you take a look at that, please, sir?

A. Yes. That's dated May 11, 1987.

Q. Directing your attention to the second page of the administrative order itself, which is the third page of the exhibit, would you tell me what, if anything, the agency ordered Florida Cities to do with respect to its discharge?

A. Under item number 1, it specifically says that "Respondent shall cease discharging pollutants to waters of the United States at the earliest date practicable but not later than September 30, 1988. The Respondent shall report on progress toward meeting this compliance date as follows."

And then a two-column table of activities and due dates is provided that provides for a series of progress reports, the start of construction, completion of construction, and then the meeting of the final requirements to cease discharge.

Q. And that means cease discharge at the present location; is that correct?

A. Certainly there would not be anything that would preclude the application for the right to discharge at another location or with another type of discharge.

MR. BULLOCK: If the Court please, objection. The document speaks for itself as to what it means, and I would

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object to his interpretation which on the face of it appears to be outside of the scope of the meaning of the language of the document.

THE COURT: I'll overrule the objection.

BY MR. JACOBS:

Q. Had you finished your answer, Mr. Klingenstein?

A. Yes.

Q. Now, in your opinion, sir, was this order in schedule set forth in paragraph 1 of the administrative order, Florida Cities Exhibit 28, complied with?

A. No, it was not.

Q. Directing your attention to paragraph 2 of the same exhibit.

A. On page 3?

Q. Yes, sir. Does that paragraph give any indication with respect to whether this administrative order can be considered an NPDES permit?

A. Yes, it specifically reads, "This should in no way be considered a permit to discharge."

Q. Now, if the paragraph continues that "The Respondent does discharge to the waters of the United States in violation of the act," this administrative order provides that what needs to happen?

A. "The Respondent's discharge of treated wastewater shall at least comply with the effluent limitations, monitoring

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schedule and other requirements contained in its previous permit."

Q. Now, Mr. Bullock also directed your attention to a subsequent administrative order, Defendant's or Florida Cities' 195. Can I direct your attention to that administrative order, please?

THE COURT: Don't give me another one, please. I'll just do my best. Thank you very much, though.

THE WITNESS: Yes.

BY MR. JACOBS:

Q. First of all, is there an indication in Defendant's Exhibit 195, which is the September '89 administrative order, as to whether or not that administrative order constitutes an NPDES permit?

A. Yes, on page 4 there is the same language in paragraph 2 that this should in no way be considered a permit to discharge.

Q. And is there also a construction schedule set out in this administrative order?

A. Yes, on page 3 under paragraph number 1 there is a schedule listed at the bottom of the page, again a two-column table activities and due dates with start construction on May 1, 1990, complete construction and cease discharge at the current location August 1, 1991, and comply with NPDES requirements at permitted location by October 1, 1991.

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Q. And were any of these requirements violated?

A. Yes. Construction of the complete upgrade was not completed by the October 1, 1991 date.

Q. You mean the compliance with the NPDES permit requirements was not completed by October 1, 1991?

A. By October 1, 1991. The completion of all construction was not completed by August 1, 1991.

Q. Those are two separate requirements; is that correct?

A. Yes.

Q. And it's your testimony that both were violated?

A. Yes.

Q. Now, finally Mr. Bullock brought to your attention Defendant's or Florida Cities' Exhibit 52, the one-page, as it were, administrative order which substituted new dates for some of these milestones.

Again, is there a reference in this particular order as to whether this order excuses compliance with the Clean Water Act --

A. I --

Q. -- or an NPDES permit?

A. I'm sorry. I don't have it in front of me.

Q. I'm sorry. This is Defendant's 74. Oh, it has two -- I'm sorry. It's Defendant's 52 for trial purposes. It was Deposition 74.

A. Yes.

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Q. And what is the indication in that respect, sir?

A. There is again a construction schedule provided, again a two-column table showing activities and due dates, start construction February 1, 1989, complete construction May 1, 1990, and meet final requirements by ceasing discharge November 1, 1990.

Q. And these are new dates, are they, substituted dates for the previous order? Is that correct?

A. For the order that preceded this as opposed to the order that we just looked at.

Q. Is there one we haven't looked at to your knowledge that was in between?

A. Well, I'm sorry. Could we refer back to the previous one? What was the number of the previous one?

THE COURT: Is that 195?

MR. JACOBS: 195. Thank you, Judge.

BY MR. JACOBS:

Q. And before that we referred to 28 so perhaps I could rephrase the question and ask you to testify as to which previous administrative order this one-page administrative order amends.

A. Well, this one would amend 87-085.

Q. By setting out later dates; is that correct?

A. Setting out later dates, yes, as opposed to the dates that were in the --

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Q. Now, while it sets out later –
THE COURT: Wait. Wait. Wait.
Were you through?
THE WITNESS: Just as opposed to the dates that were in the one that we had previously reviewed.
MR. JACOBS: Sorry.
BY MR. JACOBS:
Q. Now, looking at the bottom of 52 again, you said the order sets out new dates. Does the order excuse compliance with the previous order with the NPDES permit or with the Clean Water Act?
A. Paragraph 6 notes that "Nothing in this order shall be construed to prevent further enforcement of the violation stated herein, nor shall it preclude institution of administrative penalties or civil litigation based on violations of the Clean Water Act."
Q. Thank you. Moving on to Carrollwood, Mr. Bullock called your attention to Exhibit 201, which were these notes written by an EPA staffer describing the history of compliance and/or lack thereof at Carrollwood. I'd like to direct your attention to the bottom of page 2 of the exhibit.
THE COURT: Now, you're talking about Defendant Florida Cities 201, correct?
MR. JACOBS: Yes, sir. Thank you.
BY MR. JACOBS:

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Q. The bottom of page 2, end of paragraph 6, of Defendant Florida Cities 201, "An application was submitted to DER for a construction of an Advanced Wastewater Treatment, AWT, upgrade in November 1989. In July 1990 DER issued Respondent a construction permit for the construction. On July 31st, 1991 Respondent submitted an application for an NPDES permit. EPA plans to issue an NPDES permit to the Respondent."
A. Yes, I see that.
THE COURT: Did he read that correctly?
THE WITNESS: Yes.
THE COURT: Okay.
BY MR. JACOBS:
Q. Now, Mr. Klingenstein, can you tell me whether you have an opinion as to whether one could draw an inference from that statement that the NPDES permit that EPA planned to issue was based on the construction of an AWT plant by Florida Cities Water Company?
A. Yes, that's the inference.
Q. Now, directing your attention to Florida Cities Exhibit 97, I believe Mr. Bullock directed your attention to page 2 of the exhibit to subparagraph A. I'd like you to look at subparagraph D, as in "dog," and E, as in "Ethel."
Would you read D, first of all, into the record?
A. "If an agreement with Hillsborough County is not made by the deadline in B, the permittee shall submit a construction

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application to provide an alternate effluent disposal method by July 1, 1984." Paragraph –
Q. Mr. – I'm sorry?
A. Paragraph E –
Q. Let me stop you at D, if I may. Now, do you know whether an agreement was reached between Florida Cities Water Company and Hillsborough County by July 1st, 1984?
A. Yes, I am aware that no agreement, such agreement was reached.
Q. In fact, when was the agreement reached?
A. The agreement was not reached until I believe mid-1991, the year prior to the disconnection, or, rather, the connection to Hillsborough County and the taking off line of the Carrollwood plant.
Q. So is it a fair inference from this state document that under the circumstances the permittee – that is, the state of Florida Cities Water Company – needed to submit a construction application to provide an alternate effluent disposal method by July 1, 1984?
A. That would appear to be the requirement of this modification of the permit.
Q. And now would you take a look at subparagraph E, as in "Ethel"?
A. Yes.
Q. And would you read that into the record, please?

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A. "The discharge to Sweetwater Creek shall cease no later than January 1, 1985."
Q. When did the discharge to the Sweetwater Creek cease?
A. When the connection was made to Hillsborough County in very early 1992.
Q. Seven years later?
A. Yes.
Q. Now, Mr. Bullock has brought to your attention a couple of documents reflecting correspondence between Florida Cities Water Company and the Hillsborough County with respect to a potential connection.
Based on your testimony yesterday, approximately how many pieces of such correspondence did you review in addition to the few that Mr. Bullock called to your attention?
A. I can't recall the exact number, but it's something between a half dozen and a dozen I would say.
MR. JACOBS: One moment, Your Honor.
THE COURT: Okay.
BY MR. JACOBS:
Q. Mr. Klingenstein, based on your review of the correspondence between Florida Cities and Hillsborough County over the span of the seven or eight years, can you tell me whether there was any commitment given by Hillsborough County to hooking up the Florida Cities Carrollwood system?
A. Based on my review of the correspondence, I didn't see

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what I would have considered to be anything approaching a commitment until 1991 when in fact an agreement was reached.
Q. Thank you. Did you see any documents that suggested that there could actually be a no guarantee of a connection?
A. Certainly there were a couple of documents, couple of letters that indicated concerns on Hillsborough County's part about being able to provide capacity certainly by a particular date.
Q. Did you see any indication that Hillsborough County encouraged Florida Cities Water Company to pursue alternative means of providing wastewater service given the deadline imposed on them by EPA?
A. No. Certainly there was at least one mention in a Hillsborough County letter that perhaps Florida Cities should pursue other options. And, frankly, I took the fact that Hillsborough County apparently lost one of Florida Cities' applications and that it had to be resubmitted some period of time later as an indication that they were not strongly encouraging such a connection.
Q. Directing your attention to Government Exhibit 263, would you look at the second full paragraph? I take it you've seen this document before, sir?
A. Yes, I have.
Q. Would you look at the second full paragraph, please, and read that into the record?

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A. "We understand that the Department of Environmental Regulation has requested that your facility be taken out of service and wastewater disposal service provided by Hillsborough County. However, we do not see this as a realistic possibility at this time or in the near future."
THE COURT: Was that not previously read?
MR. JACOBS: I don't think that paragraph was.
THE COURT: Okay. It just sounded kind of familiar.
MR. JACOBS: The document looked a little –
THE COURT: I don't want you to repeat anything. Okay.
Did you read that?
THE WITNESS: I don't know, Your Honor. I've read so much.
THE COURT: Okay. Go ahead. Move on.
BY MR. JACOBS:
Q. Directing your attention now to Government Exhibit 278 and in particular to page 2, have you previously examined this exhibit, sir?
A. Yes, I have.
Q. And in paragraph 2 of page 2 of Exhibit 278, does the indication or suggestion appear from Hillsborough County that Florida Cities pursue alternative means other than connecting to Hillsborough County?
A. There is a notation "the department would have no

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objection to Florida Cities pursuing alternative means of providing wastewater service for this development given the deadline" –
THE COURT: Wait. Wait. Wait.
THE WITNESS: Oh, I'm sorry.
THE COURT: A little fast for the Reporter.
THE WITNESS: Let me read that over.
"The department would have no objection to Florida Cities pursuing alternative means of providing wastewater service for this development given the deadline imposed on them by EPA."
BY MR. JACOBS:
Q. And what deadline was that, sir, if you know?
A. I'm sorry. What date?
Q. What deadline?
A. Oh, the deadline to cease discharge to the creek.
Q. Under an administrative order?
A. Yes.
Q. And do you recall what that deadline was?
A. I can't recall at this point which deadline.
Q. Now, Mr. Bullock also brought to your attention the permit application for the Carrollwood facility, did he not? I believe that was Defendant Florida Cities 126.
And I believe you said you've seen that previously; is that correct?

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A. Actually I don't – I couldn't say whether I had seen that as I recall.
Q. I stand corrected. Are you familiar with reviewing these types of applications?
A. I'm familiar with these types of applications, yes.
Q. Okay.
A. I've not reviewed them for EPA in terms of submitted, but I'm familiar with reviewing them in the course of working with facilities.
Q. Very well. Directing your attention to the fifth page of the exhibit – again, this is Defendant Florida Cities 126, and this would be the fourth page of the application itself. Is there an indication in the application – is there an indication by the Florida Cities Water Company as to whether it intends to upgrade the Carrollwood plant?
A. Yes. Under –
Q. And what is that indication?
A. Under item 6, "treatment system," which requests the applicant to describe briefly any treatment systems used or to be used. "In general an Advanced Wastewater Treatment, AWT, System designed to comply with the Grizzle-Figg legislation by employing the following treatment technologies: screening, grit removal, flow equalization, biological treatment using the Orbal oxidation ditch process, clarification, tertiary filtration, chlorination, de-chlorination, and post-aeration."

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Q. Now, to your knowledge, sir, an EPA NPDES permit was issued based on this application; is that correct?
A. Yes, it was.
Q. And, in fact, that permit did require treatment of the effluent to AWT standards; is that correct?
A. Yes, it did.
Q. And is it a fair inference to be drawn that the permit was actually issued based on the representation in the application that the plant would be upgraded to AWT standards?
A. Yes, that is.
Q. Now, Mr. Bullock also asked you to look at Defendant Florida Cities Exhibit 156, and I wonder if you could take a look at that now, please.
A. Yes.
Q. And I believe he referred you to a paragraph that reflected that the administrative order had been placed in an inactive status; is that correct?
A. Yes.
Q. Now, by the time the administrative order had been placed in an inactive status, had the NPDES permit already been issued?
A. Yes, it had.
Q. In fact, when did that permit take effect?
A. I believe July 1991.
Q. And this deactivation, as it were, took place when?

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A. I believe it's dated March 3rd, 1992.
Q. In your professional opinion, sir, was the administrative order previously issued superseded by the NPDES permit that took effect in November 1991?
MR. BULLOCK: If the Court please --
THE COURT: Just a moment.
MR. BULLOCK: I don't believe this is a proper subject for his testimony if he's testifying about what an agency action does or doesn't do. He's not an agency employee. He doesn't know the purpose or the motivation behind sending that letter. He can look at the letter, but in terms of why it was done, the basis of doing it, is outside the scope of expert testimony.
MR. JACOBS: Your Honor, it's rebuttal, and I think they've well opened the door in terms of interpreting EPA documents.
MR. BULLOCK: Your Honor, there is an EPA official here who's sitting --
THE COURT: I'll sustain the objection.
MR. BULLOCK: Thank you.
BY MR. JACOBS:
Q. Finally, turning to Barefoot Bay, Mr. Klingenstein, Mr. Bullock also directed your attention to Government Exhibit 145, the administrative order for the Barefoot Bay facility, and I wonder if you could take a look at that again, please, sir.

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A. Yes, I have that.
Q. Thank you. Could you tell me if there's language in this administrative order as to whether or not it constitutes a permit?
MR. BULLOCK: If the Court please, Your Honor, he went into this on direct, and he's asked the exact same whether or not --
THE COURT: Sounds familiar to me. I'll sustain the objection.
MR. JACOBS: Very well.
BY MR. JACOBS:
Q. Mr. Klingenstein, in your professional opinion, what is the purpose of these administrative orders at each of the three facilities?
MR. BULLOCK: If the Court please, Your Honor, same objection.
THE COURT: Sustained.
BY MR. JACOBS:
Q. Directing your attention now to Defendant Florida Cities Exhibit 192, I think you previously identified this as the Barefoot Bay permit issued in September of '91 effective November of '91; is that correct, sir?
A. Yes.
Q. Now, Mr. Bullock brought to your attention an internal

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EPA document as I recall dating back to '95 -- or -- sorry -- '85 that related to permit requirements for the testing for total residual chlorine. Do you recall that?
A. Yes.
Q. Now, does the permit itself instruct the permittee on the methods that are to be used both to measure and to report total residual chlorine?
A. Yes.
Q. And where does the permit do that?
A. On page Roman numeral I-2 which is within part 1, and it's under item number 2.
MR. JACOBS: Thank you, sir. No further questions at this time.
MR. BULLOCK: If I promise to be brief, Your Honor, and live up to it?
THE COURT: Well, I -- this is going to have to truly be legitimate recross. What are the areas that you want to --
MR. BULLOCK: Two questions, Your Honor. Excuse me. Two areas, Your Honor. I would like to address issues raised regarding the 1986 permit denial, the Administrative Order 87-085, and I want to ask him about -- a question about a letter of correspondence with Hillsborough County regarding --
THE COURT: I'll permit limited recross, but let's be very brief.

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RECROSS-EXAMINATION

BY MR. BULLOCK:

Q. Mr. Klingenstein, Mr. Jacobs asked you about the tentative denial of the '86 permit application in Exhibit 23. There's nothing in either the tentative denial or -- isn't it true that there's nothing either in the tentative denial or the formal denial in Exhibit 27 which directs upgrade to AWT?

A. There's nothing that specifically directs upgrade to AWT, that's correct.

Q. Let me also ask you to look at 87-085, which is Exhibit 28. Mr. Jacobs asked you to read paragraph 1 on page 2. The language in paragraph 1, page 2, isn't it true that this language states that "the Respondent shall cease discharging pollutants to the waters of the United States at the earliest date practical but no later than September 30, 1988"? Is that correct?

A. Yes, that's the language.

Q. There is no requirement in this order to begin constructing an AWT facility, is there?

A. No, there's no specific requirement to construct an AWT.

Q. And, in fact, EPA for whatever reason did not believe that at this point in time Florida Cities had the authorization to discharge into the waters of the United States; is that correct?

A. My interpretation would be that they did not have

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authorization to discharge into the waters of the United States at a particular place.

Q. And where is that stated? Is that stated in the '86 -- excuse me. Let me withdraw that.

Can you point out where that is in the '86 tentative denial?

A. Well, a denial denies a permit application.

Q. Okay. Would --

A. I'm sorry. An applicant applies to discharge a particular wastewater flow with certain characteristics at a certain place.

Q. Well, the denial has to state a basis of a denial, does it not?

A. My experience, typically they do, yes, they do include a reason for denial.

Q. Is there a -- let me refer you to page 2 of Exhibit 23, page 2 of the actual -- of the fact sheet. Excuse me.

The basis for the final effluent limits and permit conditions do not say anything about -- isn't it true that that does not say anything about whether or not there was a waste load allocation developed for the canal in 1981?

A. Only to the extent that that same document on the previous page lists receiving water as Caloosahatchee River via a canal.

Q. Isn't it true that the first time there was any

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requirement, any formal official requirement from the Environmental Protection Agency to Florida Cities Water Company regarding AWT construction was in September 26, 1989?

A. Certainly based on our review of documents today, that's the first document that I recall seeing that's specifically from EPA that specifically required AWT in writing in the document.

Q. So the answer to my question is yes?

A. Yes.

Q. Let me turn with you to Carrollwood briefly. Exhibit 272, which would be *Plaintiff's* 272 --

A. I'm sorry. That was 272?

Q. Correct. That would be the letter from Hillsborough County to Florida Cities in 1986. Is that correct?

A. No, this is -- I'm sorry. This is Government 272?

Q. Yes.

A. I'm looking at Government 272, which is dated September 27, 1984. It's a U.S. EPA letter from Paul Traina.

Q. I'm sorry. I may have written the wrong number down.

Well, I can ask you this question because you just recently looked at the document. Mr. Jacobs showed you a document from Hillsborough County in 1986 stating that the county did not have the capacity to accept the effluent and the county would have no objections to the company looking at other options. Do you remember that?

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A. Yes.

Q. All right. In fact, that letter came from the Hillsborough County Department of Sanitary Services; isn't that correct?

A. I'd have to look at the document again.

MR. JACOBS: We can stipulate to that if it would help.

MR. BULLOCK: Thank you.

BY MR. BULLOCK:

Q. Isn't it true that the Department of Sanitary Services is not the governing body for discharge permits in Hillsborough County?

A. My understanding, it is the Hillsborough County EPC would be.

Q. So the Sanitary Services could not excuse any condition of a Hillsborough County Environmental Protection Commission permit or an FDER permit, could it?

A. I would expect not.

MR. BULLOCK: Thank you.

THE COURT: Okay. Thank you, sir. You may step down.

THE WITNESS: Thank you, Your Honor.

(Mr. Klingenstein was excused.)

THE COURT: I think we'll go till 5:30 this evening. And we've been here for over two hours, so let's take a

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ten-minute recess.
(Recess taken.)
THE COURT: Sorry. I had an emergency.
Okay. Call your next witness.
MR. JACOBS: Your Honor, the United States calls Jack Schenkman.
While he's taking the stand, Your Honor, my questions of Mr. Schenkman will be very brief, and I understand that to be the case with both of the defendants as well.
Mr. Schenkman was kind enough to fly up from Miami on Monday and again today, so we're going to I think mutually agree to finish him today. And we'll try to do that by 5:30 within the Court's specifications.
THE COURT: All right.
THE CLERK: Raise your right hand.
(Whereupon Jack Schenkman was duly sworn.)
THE CLERK: Take a seat in the witness box.
State your name and spell the last for the record, please.
THE WITNESS: Jack Schenkman, S-c-h-e-n-k-m-a-n.
THE CLERK: Thank you.
DIRECT EXAMINATION
BY MR. JACOBS:
Q. Good afternoon, sir. And thank you for coming, and I

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apologize for the inconvenience.
Would you tell me how you're employed, please.
A. I'm the chairman of the board of North Fort Myers Utility.
Q. And that's in Fort Myers, Florida?
A. Yes, it is.
Q. And how long have you been affiliated with North Fort Myers Utilities?
A. I started at North Fort Myers Utility from the beginning, and it was about I would say around ten, 11 years ago.
Q. And does North Fort Myers Utilities operate a wastewater treatment plant?
A. Yes, it does.
Q. When was this plant first placed in service?
A. Let's see. About 1985, '84, something like that.
Q. Mr. Schenkman, do you recall executing a declaration in this case back in November?
A. Yes, I do.
Q. Would it refresh your recollection to have that handy?
A. Surely.
MR. JACOBS: Your Honor, may I?
THE COURT: Yes, sir.
THE WITNESS: Thank you.
BY MR. JACOBS:
Q. Now, making reference to your declaration as you see fit,

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sir, could you tell me what the capacity of the North Fort Myers Utilities Wastewater Treatment Plant is?
A. Two million gallons per day.
Q. And when did the plant have that capacity?
A. We had it -- we really started to build it in beginning of '87. By '88 we had it resolved, finished.
Q. And so when was the plant first placed in service?
A. The plant was placed in service before that in -- North Fort Myers Utility was near Old Bridge Village, which is one of my communities, and then I moved it to a 40-acre site, which it is in today, and we built a two-million-gallon facility at that time.
Q. And, again, with reference to your declaration, if you need to, sir, at what point in time did you have the two-million-gallon capacity?
A. 1987.
Q. Take a look at paragraph 2. Does that refresh your recollection as to when the two-million --
A. Yes, yes.
Q. All right. Just for the record, when did the plant have the two-million-gallons-per-day capacity?
A. From 1987 on.
Q. All right. Paragraph 2 you say, "North Fort Myers Utilities Wastewater Treatment Plant, which has a capacity of two million gallons per day, was first placed in service on

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August 27th, 1988."
A. That's true. But in 1987 it was under construction.
Q. Okay. I understand. You began construction in '87, and it was complete and ready to go in August of '88; is that correct?
A. That is correct.
Q. Now, can you tell me, Mr. Schenkman, what method the plant uses to dispose of its treated effluent?
A. Well, we send treated effluent to golf courses, public grounds, and so forth. It's all reuse.
Q. It's all reuse?
A. Everything is for reuse.
Q. So you do or you don't have any discharge to a surface water?
A. No, we don't. We also have a two-million-gallon deep well into the boulder zone in case of unusual weather so that we don't flood the streets.
Q. Or the golf course?
A. Or golf courses that might not be able to take the excess water we have.
Q. So in wet weather your backup is the deep well; is that correct?
A. That's correct.
Q. Now, Mr. Schenkman, at any point in time did you have discussions with representatives of the Florida Cities Water

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Company relative to providing wastewater treatment service to wastewater from the Waterway Estates facility?
A. I think some discussions began about 1987, and we offered to service them if they wanted to come in to us.
Q. And did your attorney actually conduct those negotiations --
A. That is correct.
Q. -- at your instruction?
A. That is correct.
Q. And did he copy you on the correspondence?
A. Yes, he did.
Q. Directing your attention now to Government Exhibit 362, which will be brought to you, Mr. Schenkman, is this a piece of correspondence that your attorney wrote?
A. That is correct.
Q. At your instruction?
A. That's right.
Q. And in this letter, Exhibit 362, does your attorney on your behalf offer to provide bulk sewer service to Florida Cities Water Company for the Waterway Estates plant?
A. That is right.
Q. And the date on this letter, sir?
A. Let me see. February 2nd, 1987.
Q. Was an agreement reached in February of '87?
A. No, we never did reach agreement with them. We made the

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offer.
Q. And just focusing on this offer for the moment, I see there's a signature line on the bottom of page 2 I take it that was never signed, meaning an agreement was not reached; is that correct?
A. That is correct.
Q. And is that because the offer was not accepted?
A. That is right.
Q. Now, were there subsequent negotiations?
A. Yes. They talked about it after. And we gave them a figure at the time. And then there was further discussions, but they never accepted us.

MR. JACOBS: Okay. Before we move on to the next piece of correspondence, Your Honor, I'd like to move 362 into evidence.

THE COURT: Be received.

(Government Exhibit Number 362 received in evidence.)

BY MR. JACOBS:

Q. Now, Mr. Schenkman, I'd like to direct your attention to Government Exhibit 385. Do you recognize Government Exhibit 385, sir?
A. Yes, yes, I do.
Q. And would you identify it, please, for the record?
A. It was dated November the 17th, 1988.

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Q. And, again, is this a letter from your attorney written on your behalf with respect to the same subject?
A. That is correct.

MR. JACOBS: Move 385 into evidence, please.

THE COURT: Will be received.

(Government Exhibit Number 385 received in evidence.)

BY MR. JACOBS:

Q. Now, Mr. Schenkman, in this particular November '88 letter, are you essentially lowering your price for the connection?
A. Yes, we did at that time to help out as much as we could to Florida Cities.
Q. You wanted to help them out. Did you also want to make a deal, Mr. Schenkman?

MR. BULLOCK: If the Court please, Your Honor, I know he's trying to rush to get through, but he is kind of bordering on leading a little bit, and we would object to it.

THE COURT: Okay. Well, try not to lead too much.

BY MR. JACOBS:

Q. Mr. Schenkman, let me direct your attention to the second full paragraph on the first page of Exhibit 385. Do you see that?
A. Yes, I do.
Q. Could you read that first sentence of the second full

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paragraph, please?
A. "Jack recently indicated that he could provide capacity at the same point on Pondella Road for a total of three-million-two primarily because of his willingness to utilize tax losses for the benefit of the deal which losses he could otherwise utilize on consolidation and other operations."
Q. Okay. That was paragraph 3. I wonder if I could ask you to read the first sentence of paragraph 2.
A. "Although Jack fully appreciates your intent to go forward with the construction of the advanced wastewater treatment unit on your Waterway Estates plant, I am reminded of our earlier discussion wherein you indicated to me that the possible interconnection" --

MR. BULLOCK: Objection.

THE COURT: Just a moment.

Sir?

MR. BULLOCK: Objection, hearsay.

THE COURT: I received this in evidence.

MR. BULLOCK: All right. I'll withdraw that.

THE COURT: Go ahead.

BY MR. JACOBS:

Q. "I am reminded."
A. "I am reminded of our earlier discussion wherein you indicated to me the possible interconnection into North Fort

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Myers Utility is simply a matter of dollars. The last time we discussed this matter, North Fort Myers Utility offered you one million gallon per day of capacity for three-million-seven and estimated it would cost an additional 800,000 to extend its lines to a point of interconnection on Pondella Road for a total cost of 4.5 million.

"Mr. Schenkman agreed to reduce that price somewhat, but you calculated your internal cost at an additional approximately 1.8 or 1.9 million."

Q. Okay. Now, moving on to the top of page 2 of the same exhibit, could you read just the last sentence of that first paragraph beginning with "therefore"?

A. Wait a minute. I lost you.

Q. Just flip the page.

A. Okay.

Q. And start on the top, first full paragraph but the second full sentence beginning with "therefore."

A. I first got to find it.

Q. May I approach?

THE WITNESS: Would you show me where it is? Where is he talking about?

Oh. "Therefore we extended the offer" --

THE COURT: No. Wait. Wait. Wait.

THE WITNESS: "Therefore we extend" --

THE COURT: Wait. Wait. "Therefore he extends,"

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right?

THE WITNESS: You're right, sir. I'm sorry.

THE COURT: The court reporter is taking this down. I don't want an error.

THE WITNESS: "Therefore he extends an offer to build lines and provide one million gallons of capacity to the designated point under Pondella Road for 3.2 million subject of course to negotiation of the appropriate contract to us to do so."

BY MR. JACOBS:

Q. Okay. Now, looking down two paragraphs, there is a representation by the author of the letter, Mr. Sundstrom -- and he is your attorney; is that correct?

A. That is correct.

Q. -- that you, Mr. Schenkman -- I'm sorry. -- that "Mr. Reeves and Bob French have consistently told Jack Schenkman and me," meaning Mr. Sundstrom, "that you would prefer to come to North Fort Myers Utilities as a permanent and final solution, but that, as aforesaid, it is simply a 'matter of dollars.'"

Do you recollect, Mr. Schenkman, that that is what in fact got in the way of reaching an agreement? Was it a matter of dollars?

A. That is correct, sir.

MR. BULLOCK: Objection.

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THE COURT: Wait. Wait. Wait a minute.

MR. BULLOCK: He's now being asked -- my impression of the question was that Mr. Schenkman is being asked what Mr. Sundstrom's understanding was of what Mr. Reeves and Mr. French were saying. I think, while I understand that the letter is in evidence, the subsequent questions beyond that are calling for hearsay.

THE COURT: Well, I'll overrule the objection.

BY MR. JACOBS:

Q. Let me ask it again, Mr. Schenkman. Did you hear from both Mr. Reeves and Mr. French -- do you remember who Mr. Reeves is at the time?

A. Yes, yes, I do.

Q. Did he work for Florida Cities Water Company?

A. At that time he did.

Q. Okay. And Mr. French, did he work for Florida Cities Water Company at that time?

A. Yes, he did.

Q. And did you hear from them that they would come to North Fort Myers Utilities --

THE COURT: Well, now, this is your witness. Don't lead him.

MR. JACOBS: I'm sorry, sir.

BY MR. JACOBS:

Q. The representation in the letter that these gentlemen

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told you that they would prefer to come to North Fort Myers Utilities as a permanent and final solution but that it was simply a matter of dollars that prevented them from coming, is that an accurate statement, Mr. Schenkman?

A. That is correct.

Q. Now, do you recall how you came up with the $3.2 million figure?

A. Well, that's what our cost was to go up to Pondella Road.

Q. Can you recollect whether Florida Cities ever represented to you what it would cost them to upgrade their plant and move their outfall and thereby continue their discharge as opposed to hooking up to your facility?

A. I wasn't privy. I heard rumors, but I wasn't privy to them telling me what it cost.

Q. Let me direct your attention then now to Exhibit 397. Is this again, Mr. Schenkman -- well, let me ask you this.

Can you identify 397?

A. Yes, I can.

Q. Would you, please?

A. Yes, dated September 25th, 1989.

Q. And who's this letter written to and by whom?

A. It was written Bill Sundstrom, Rose, Sundstrom & Bentley, to Florida Cities Water Company, attention to Mr. Tony Reeves at the time.

Q. And you're a recipient of a cc of this letter, are you,

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sir?
A. Yes, yes, I was.
MR. JACOBS: Move –
THE COURT: Just a moment.
MR. BULLOCK: Objection, Your Honor, hearsay. The document contains representations of Mr. Sundstrom's conversations with the Department of Environmental Regulation employees and what the employees said, and it's Mr. Sundstrom's characterizations of those conversations.
THE COURT: Okay. Yes, sir?
MR. JACOBS: I'm sorry. Did you sustain?
THE COURT: No, no. Do you want to be heard on that?
MR. JACOBS: Well, first of all, Your Honor, there's no objection to the exhibit on the objection list, and I'll move it into evidence on that basis at this time.
MR. BULLOCK: I'll withdraw it.
THE COURT: Be received.
(Government Exhibit Number 397 received in evidence.)
BY MR. JACOBS:
Q. Now, Mr. Schenkman, directing your attention to the bottom of the first page of the exhibit beginning with "North Fort Myers Utilities has capacity now permitted and in service to provide raw sewage treatment and disposal sufficient for

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the Waterway Estates district of Florida Cities Water Company" -- or, to be precise, "FCWC" – through the end of that paragraph which reads, "NFMU has offered to provide sewage treatment and disposal services to FCWC for the same capacity at approximately the same or slightly less than that cost," can you tell me whether in trying to make a deal, as you said you did, with Florida Cities Water Company you essentially tried to give them a price that was lower than the price or cost that they would expend as represented to you to upgrade the plant and move the outfall?
THE COURT: Just a moment.
MR. BULLOCK: Question is leading.
THE COURT: Sustained.
BY MR. JACOBS:
Q. Mr. Schenkman, do you recall receiving any information from Florida Cities that related to the cost of moving the outfall and upgrading the plant?
A. I don't know what that cost was, but we at that time offered them some tax advantages losses that we had that they -- that would be advantageous to them.
Q. Can you tell me whether Florida Cities Water Company accepted your September 25th, 1989 offer?
A. No, they didn't.
Q. And did you come to an understanding as to why?
A. They believed they felt that they can do it for less cost

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than what we offered.
THE COURT: Any further questions?
MR. JACOBS: Just one more document, Your Honor, if I could direct the witness's attention to Government 408.
BY MR. JACOBS:
Q. Do you have 408 in front of you, sir?
A. Yes, I do.
Q. Do you recognize that, and, if so, could you identify it, please?
A. Yes. It was written February the 5th, 1990 addressed to Mr. Reeves from Florida Cities Water Company.
Q. And it was written by whom, sir?
A. It was written by -- let me see the back of it -- William Sundstrom.
Q. Is that your attorney?
A. Yes, he is.
Q. And did you receive a cc of this letter?
A. Yes, I did.
Q. At or about the time that it was written?
A. That's correct.
MR. JACOBS: I'd move 408 into evidence, sir.
THE COURT: Be received.
(Government Exhibit Number 408 received in evidence.)
BY MR. JACOBS:

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Q. Now, Mr. Schenkman, in Exhibit 408 do you again offer to make a deal with Florida Cities Water Company to connect the Waterway Estates plant?
A. Yes, we did.
Q. And was that offer accepted?
A. No.
Q. And did you in this February 5th, 1990 communication again drop the price?
A. I think we went down to three-million-two. I'm going to try to –
Q. Take your time, sir.
Let me direct your attention to paragraph 1 on the first page. Does that help, Mr. Schenkman, to refresh your recollection, first page of Exhibit 408?
A. Yes. "North Fort Myers Utility would commit to sell a million gallons of sewage treatment in an effluent disposal capacity to Florida Cities for a firm price of 2,470,000 or 2.47 – $2.47 per gallon."
Q. Are you again dropping the price here, sir?
A. I think it was dropped a little bit at the time.
Q. And directing your attention to paragraph 3 to refresh your recollection, if you need to, did you also offer to construct the necessary sewage transference lines either at your own cost or at the county's cost to the point of connection?

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A. I think the way it reads -- and let me read it for you exactly because it's back to 1990. "Additionally, it is anticipated that the county would finance and construct all of the transference lines from the existing Waterway Estates plant to North Fort Myers Utility lines. Should you desire, North Fort Myers would commit to construct the remainder of the lines from interconnection of 41 and Pondella Road to the Waterway Estates plant as a recoverable investment as another option available to FCWC."
Q. And moving on, flipping the page now and starting with paragraph 4, did you also offer to finance the investment for Florida Cities Water Company?
A. That is correct. "North Fort Myers Utility would agree to finance the FCWC investment at its outstanding tax exempt rate of 8 percent with an amortization period not to exceed ten years."
Q. And now focusing your attention on the bottom of the page, same page, the second page of the exhibit, last paragraph, can you tell me, Mr. Schenkman, whether at this point in time you still had sufficient capacity to take the Waterway Estates effluent?
A. We did.
Q. Okay. And can you tell me, then, from the point in time of this first offer in February of '87 through February of 1990, over those three years did you at all times have the

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capacity to accommodate the Waterway Estates effluent?
A. Yes, we did.
Q. And was a deal ever reached?
A. No.
MR. JACOBS: Thank you. No further questions.
THE COURT: Mr. Bullock?
CROSS-EXAMINATION
BY MR. BULLOCK:
Q. Good afternoon, Mr. Schenkman.
A. Good afternoon.
Q. How are you? Nice to see you again.
Mr. Jacobs just asked you whether or not at all times between February of '87 and February of '90 did you have capacity to accept the Waterway Estates effluent. Isn't it true that you didn't have capacity until August of 1988 based on your own declaration?
A. Well, we had at that time capacity for 700 -- when we first started to construct, 700,000. By the time we would have hooked up we would have had capacity to take more than a million.
Q. But you didn't have completion of the two-million-dollar facility -- I mean two-million-gallon facility until August 27, 1988.
A. But we had the capacity to handle everything you had at the time which was -- we offered 700,000, and we had it at the

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time. And the time we would have connected the lines we would have had all the capacity you needed.
Q. Okay. The Waterway Estates plant was permitted for 1.08 million gallons a day, was it not? Isn't that true?
A. I don't know what they were permitted for at the time. I don't know what Waterway Estates had.
Q. All right. Isn't it true that they would have to find capacity for their -- the entire projected capacity of 1.08 MGD?
A. No, no. At the time when we made that offer we would have been completely finished at the time that lines were interconnected and hooked up.
Q. But my question was -- Mr. Jacobs' question to you was did you have the capacity in February of '87.
A. When we first discussed it --
THE COURT: Did you have the capacity in February of '87? That's his question.
THE WITNESS: February '87, no, I only had for 700,000.
BY MR. BULLOCK:
Q. How many deep wells does your facility have?
A. We have one deep well.
Q. Okay. How many -- what is the capacity of the spray field?
A. In the deep well?

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Q. No, the spray field.
A. The spray field?
Q. Yes.
A. Oh, we can send a million and a half, two million gallons in the spray field.
Q. All right. And then what is the capacity of the deep well?
A. Couple million gallons, two, three million gallons.
Q. Do you use the spray field and the deep well at the same time?
A. No. The only time we use the deep well, if there's heavy rain that the spray fields cannot take it, then we send it to a deep well. Otherwise we try to save as much as the water we can for the -- keep the aquifer intact.
Q. Mr. Jacobs asked you to look at what was Government's Exhibit 408, which is the February 5th, 1990 letter.
A. Okay. I'm looking at it. What did you want?
THE COURT: Just a moment.
BY MR. BULLOCK:
Q. Isn't it true that in February of 1990 Florida Cities was well on its way to constructing the AWT plant at Waterway Estates?
A. I don't know what Florida Cities had or didn't have. I didn't get into their affairs.
Q. Well, if you assume with me that they were well on their

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way to building an AWT plant -- excuse me -- to permitting and designing an AWT plant, let's assume that, would it have made sense to stop at that point in time and hook into your facility?

MR. JACOBS: Objection, calls for speculation.

MR. BULLOCK: I'll withdraw the question, Your Honor.

THE COURT: I'll overrule.

THE WITNESS: I can't speak for Florida Cities.

BY MR. BULLOCK:

Q. All right. Did you offer in your February 1990 letter to reimburse Florida Cities for any of the engineering or design costs that it would have already incurred in designing an AWT facility to Waterway Estates?

A. Not to my knowledge.

MR. BULLOCK: Thank you, Mr. Schenkman.

THE COURT: Give me just a moment, Mr. Hird.

Go ahead, Mr. Hird.

MR. HIRD: Thank you, Your Honor.

CROSS-EXAMINATON

BY MR. HIRD:

Q. Good afternoon, Mr. Schenkman.

A. Afternoon.

Q. You I believe testified that the total capacity of North Fort Myers would be two million gallons per day; is that

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correct?

A. That's correct.

Q. And in the period that we're talking about, the late 1980s, when you first began operations, you only had commitments for about half of that; is that correct?

A. Less than half.

Q. Less than half. And in terms of getting a rate established from the Public Service Commission, isn't that rate based on the used capacity?

MR. JACOBS: Objection, beyond the scope.

THE WITNESS: I don't know.

THE COURT: Just a moment. I'll overrule the objection.

Do you know? Do you know, sir?

THE WITNESS: No, I don't know.

BY MR. HIRD:

Q. You don't?

A. No.

Q. You don't know whether the rate is based on the used capacity as opposed to the --

A. No, I don't.

Q. -- potential capacity? Okay.

Now, were you operating in the period of the late '80s in the red or in the black?

A. We haven't made a profit really, even today, that is, in

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the utility business. But we keep growing and growing and growing, and the assets keep growing with it.

Q. So you were operating in the red; is that correct?

A. Yes.

Q. Now, if you would turn to Exhibit 385, if you would.

THE COURT: Plaintiff's?

MR. HIRD: I'm sorry. Government Exhibit 385.

BY MR. HIRD:

Q. Do you have that in front of you, sir?

A. I don't know. The gentleman will tell me.

Q. Do you have that, sir?

A. I have it in front of me.

Q. Okay. If you'd look at the second paragraph -- and I believe you read this language with Mr. Jacobs -- it says, "The last time we discussed this matter, NFMU offered one million gallons per day of capacity for 3.7 million and estimated that it would cost an additional 800,000 to extend its lines to a point of interconnection for a total cost of 4.5 million." Do you see that?

A. Yes, I do.

Q. And then you see the next sentence, "Mr. Schenkman agreed to reduce the price somewhat, but you calculated that your internal costs at an additional approximately 1.8 or 1.9 million." Do you see that?

A. Yes, I do.

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Q. So if you add those together at that point in time, the cost to Florida Cities would be somewhere in the neighborhood of 6.3, 6.4 million; is that correct?

A. I don't know what the cost would be to Florida Cities.

Q. Well, you would have to add the 4.5 plus the 1.9, would you not, because of the internal cost that Florida Cities would bear?

A. Yeah, but, you see, we were using tax benefits that I would -- we wouldn't be spending any more than 4.5 on the job.

Q. But you see --

A. So what it would cost Florida Cities is really -- I wasn't aware of or --

Q. But your lawyer was aware that it would cost between 1.8 and 1.9 million additional, wasn't he? Didn't he say your internal costs would be an additional 1.8 or 1.9 million?

A. Yeah, that's correct.

Q. So if you add that to the 4.5, you get a total of approximately 6.4; is that correct?

A. Go ahead.

Q. Now, if you reduce the price here to 3.2 million --

A. That is correct.

Q. -- that would still mean the total cost to Florida Cities would be about 5.9 million; isn't that correct?

MR. JACOBS: Calls for speculation, Your Honor.

THE WITNESS: I'm not that --

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THE COURT: Overruled.
THE WITNESS: -- familiar with the cost to Florida Cities because I don't run their books. I don't know.
BY MR. HIRD:
Q. But you recognize there's an internal cost to Florida Cities that's not reflected in your offer; is that correct?
A. I wouldn't have the internal cost of Florida Cities in my offer at any time. I wouldn't know what -- how you run your company.
Q. You've indicated you don't know what the internal cost is, but if the internal cost was 1.8 or 1.9, that would be a factor in making this option, the option of connecting to North Fort Myers, more expensive, would it not?
A. That's a guesswork. I wouldn't know.
Q. But you recognize that there would be some internal cost to Florida Cities, but you don't know what --
A. Possibly.
Q. And do you have reason to disagree with your lawyer's estimate of 1.8, 1.9?
A. No. No, I don't.
Q. Okay. Now, in order to connect to North Fort Myers, Florida Cities would have to build a pipeline connection; is that correct?
A. That is correct.
Q. And Florida Cities would have to contribute that as

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property in kind to North Fort Myers; is that correct?
A. I believe so.
Q. And Florida Cities -- and that would be taxable income to North Fort Myers, isn't that correct, that contribution?
A. I imagine so.
Q. And Florida Cities would have to pay the tax --
A. No.
Q. -- on that contribution.
A. No, not really because we had a tax losses and benefits that we can pick up so it would save the money for Florida Cities.
Q. So you believe that that tax would not have to be --
A. That's correct.
Q. But you -- Mr. Schenkman, you indicated that you were operating in the red at this time.
A. That's right.
Q. And if Florida Cities had made this deal, it would have helped you a good deal; is that correct?
A. To some degree.
Q. Did there come a time in 1991 that you made a proposal to Avatar Holdings or its subsidiaries to buy an interest in North Fort Myers?
A. Not to my knowledge.
Q. Did you ever -- do you know a man named Arnold Sheven?
A. I heard of him, but I don't know him.

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Q. You don't know him?
A. (Indicates negatively.)
Q. You never contacted a lawyer with the law firm of Stroock, Stroock & Lavan?
A. I didn't.
MR. HIRD: Your Honor, I'd like to show the witness a portion of Exhibit -- of Avatar Holdings Exhibit 3 to see if it refreshes his recollection.
THE COURT: All right.
BY MR. HIRD:
Q. I'd like to show you the last page of Avatar Holdings Exhibit 3.
A. Sure.
Q. Would you read that to yourself, sir?
MR. JACOBS: Objection, no foundation.
THE WITNESS: Want me to read the whole thing?
THE COURT: Well, he showed him a document, and he's going to ask him to read it to himself to see if that refreshes his recollection regarding his last question, I guess.
MR. JACOBS: Which I would add, Your Honor, I think was beyond the scope of direct, well beyond the scope of direct.
MR. HIRD: Me?
THE COURT: Yeah.

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MR. HIRD: I think this is clearly within the scope of direct because we're talking about the connections between Florida Cities and North Fort Myers. And he's gone through the history, and there's another stage in the history that he hasn't gotten to.
MR. JACOBS: This is 1991. This is a November 1991 document, and the --
THE COURT: I'll sustain the objection, beyond the scope.
MR. HIRD: I have no more questions, Your Honor.
THE COURT: You don't have any redirect, do you?
MR. JACOBS: No, Your Honor, I do not.
THE COURT: All right. We'll reconvene at 8:45 tomorrow morning. We'll be in recess.
(Adjourned at 5:55 p.m.)

CERTIFICATE

I hereby certify that the foregoing is an accurate transcription of proceedings in the above-entitled matter.

_____ _____

Court Reporter Date

Florida Cities Water Company
Docket No._____
Rate Application for Recovery
of Legal Expenses
Exhibit____(GHB-76)
Gary H. Baise
Volume 5 of 7

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663-WS EXHIBIT NO. 6 - Vol. 5
COMPANY/
WITNESS: Baise
DATE: 8-12-98

FLORIDA CITIES WATER COMPANY

RATE APPLICATION FOR RECOVERY OF LEGAL EXPENSES

EXHIBITS____(GHB-1 THRU GHB-110) OF

GARY H. BAISE

Exhibit List for Testimony of Gary H. Baise

Exhibit	Document
1	Player's List
2	TIME LINE, *U.S. v. Florida Cities Water Company*
3	Resume of Gary H. Baise
4	List of Gary H. Baise's reported cases
5	Court's Standard Interrogatories
6	United States' Answers to Court's Standard Interrogatories
7	Defendant Florida Cities Water Company's Answers to Court's Standard Interrogatories
8	Motion for Extension of Time in Which to File Motion to Strike Affirmative Defenses
9	United States' Motion to Strike Affirmative Defenses
10	Memorandum in Support of United States' Motion to Strike Affirmative Defenses
11	United States' First Request for Production of Documents
12	Deposition digest of Julie Karleskint Deposition
13	Defendant's Motion for a Protective Order
14	Order re: Florida Cities Water Company's Motion for Protective Order (dated April 18, 1994)
15	Letter to Mr. Jacobs from Mr. Scroggin (dated April 19, 1994)
16	Letter to Mr. Scroggin from Mr. Jacobs (dated April 20, 1994)
17	Memorandum in Support of United States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees
18	Memorandum in Opposition to Plaintiff's Motion for an Order Allowing

Ex Parte Contacts with Former Employees

19	Motion and Memorandum for Permission to File Reply Memorandum in Support of United States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees
20	Order re: Defendant's Emergency Motion for a Temporary Protective Order (dated Feb. 13, 1995)
21	Order re: Plaintiff's Motion for an order allowing ex parte contacts (dated March 16, 1995)
22	Deposition digest of John Marlar deposition
23	Deposition digest of Peter McGarry deposition
24	Defendant's Motion to Disqualify Counsel
25	Transcript of February 15, 1995 hearing before U.S. District Judge Swartz
26	Order re: Motion to Allow Ex-Parte Contacts and Motion to Disqualify Counsel
27	United States' Second Request for Production of Documents
28	Deposition digest of Connie Kagey deposition
29	Deposition digest of Bruce Barrett deposition
30	Defendant Florida Cities Water Company's Motion for Partial Summary Judgment and Request for Oral Argument
31	Deposition digest of Paul Bradtmiller deposition
32	Deposition digest of Johnnie Overton deposition
33	Deposition digest of Jack Tompkins deposition
34	Letter to Mr. Baise from Mr. Jacobs (dated Jan. 30, 1995)
35	United States' Reply to Defendant's Emergency Motion for a Temporary Protective Order and Defendant's Request for Oral Argument in Connection with Defendant's Motion to Disqualify Counsel

36	*United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994)
37	United States' First Set of Interrogatories to Defendant Florida Cities Water Company
38	Defendant's Second Request for Production of Documents to Plaintiff United States of America
39	Defendant's Offer of Judgment
40	Defendant's Notice of Intention to Oppose Constructive Motion by United States for Leave to File Amended Complaint
41	Defendant's Memorandum in Partial Opposition to Plaintiff's Motion for Leave to Amend Complaint
42	Order re: United States' Revised Amended Complaint (dated April 26, 1995)
43	Revised Amended Complaint
44	Defendant Florida Cities Water Company's Motion to Strike
45	United States' Motion for Reconsideration of Court's Order on Amendment of Complaint
46	Defendant Florida Cities Water Company's Answer to Revised Amended Complaint
47	United States' Opposition to Defendant Florida Cities Water Company's Motion to Strike
48	United States' Third Request for Production of Documents
49	Defendant's Motion for Partial Summary Judgment
50	United States' Opposition to Defendant Florida Cities Water Company's Motion for Partial Summary Judgment
51	Order Denying FCWC's Motion for Partial Summary Judgment
52	United States' Motion for Partial Summary Judgment (exhibits omitted)
53	United States' Second Set of Interrogatories and First Request for Admissions

54	Research Memos
55	FCWC Motion for Partial Summary Judgment and Request for Oral Argument
56	Deposition Summaries
57	Deposition Summaries
58	FCWC's Fourth Request for Production of Documents and Third Request for Interrogatories
59	United States' Fifth Request for Production of Documents
60	FCWC's Notice of Dispositive Authority
61	Order re: Summary Judgment Motions
62	FCWC Exhibit List and Stipulations
63	DOJ Exhibits
64	Joint Pretrial Statements
65	United States' Motion for an Order Permitting Discovery of Defendant's Late-Named Witnesses
66	FCWC Memorandum in Opposition to Plaintiff's Motion for an Order Admitting Discovery of Defendant's Late-Named Witnesses and for Expedited Consideration
67	Order re: Discovery of Late-Named Witnesses
68	United States' Motion for Expedited Reconsideration of the Court's Ruling on Res Judicata and in Reply to Avatar Holdings' Motion for Clarification of the Court's Order
69	Order re: Motion for Reconsideration on Res Judicata and Motion for Clarification
70	FCWC Proposed Findings of Fact and Conclusions of Law
71	FCWC's Pretrial Brief

72	Defendant's Joint Motion in Limine to Exclude the Testimony and Report of Mark J. Klingenstein.
73	United States' Motion in Limine
74	Defendant's Joint Motion in Limine to Exclude the Testimony and Report of Eileen Zimmer
75	Berz Settlement Proposal
76	Trial Transcript
77	United States' Offer of Proof in Lieu of the Testimony of Witnesses who Plead the Fifth Amendment
78	Defendants' Joint Memorandum of Law Addressing the Invocation of the Fifth Amendment
79	FCWC's Witness List
80	Plant Effluent Quality Report (Black & Veatch)
81	FCWC Motion to Strike the Deposition Testimony of Jack Williams Tompkins
82	Parties' Proposals for Post-Trial Submissions
83	Order Regarding Fifth Amendment and Request Court Draw Inferences from Refusal to Testify
84	United States' Post-Trial Memorandum
85	United States' Post-Trial Proposed Findings of Fact and Conclusions of Law
86	FCWC Post-Trial Brief
87	FCWC Proposed Findings of Fact and Conclusions of Law
88	United States' Motion for Reconsideration on Adverse Inferences and Extension of Page Limits
89	FCWC Memorandum in Opposition to Motion for Reconsideration
90	Order Granting in Part and Denying in Part Motion for Reconsideration

91	United States' Citation of Additional Authority
92	Defendants' Joint Response to Plaintiff's Citation of Additional Authority
93	Order Directing Parties to File Memorandums on Borough of Ridgeway
94	United States' Reply Memorandum in Support of Reinstatement of Res Judicata
95	Defendants' Joint Response to Memorandum Seeking Reinstatement of Res Judicata
96	Order Reaffirming Res Judicata Effects
97	Opinion
98	FCWC Verified Motion for Attorney Fees
99	FCWC Motion for Bill of Costs
100	United States' Memorandum in Opposition to Attorney Fees
101	Order Denying Attorney Fees
102	United States' Notice of Appeal
103	FCWC Notice of Cross Appeal
104	Order Granting Motion to Dismiss with Prejudice
105	Pleadings Table
106	Depositions Table
107	Correspondence re: Fees
108	Billing Chart
109	Cover Letter to Bills
110	Letter to Avatar on Fees

Page 1

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs.
FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS, INC.,
Defendants.

Case No. 93-281-CIV-FTM-21

Thursday, March 28, 1996
Tampa, Florida

TRANSCRIPT OF NON-JURY TRIAL
BEFORE THE HONORABLE RALPH W. NIMMONS, JR.,
UNITED STATES DISTRICT JUDGE

Appearances of Counsel:

For the Plaintiff: Mr. Daniel S. Jacobs
Mr. T. Anthony Quinn
Ms. Gwendolen Fitz-Henley

For Defendant Avatar: Mr. David B. Hird
Ms. Joanne Testoni

For Defendant Florida Cities: Mr. Gary H. Baise
Mr. Alexander M. Bullock
Mr. Lance High
Mr. Don G. Scroggin

Reported by: Dennis Miracle
Official Court Reporter

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PROCEEDINGS

THE COURT: Good morning.

All right. Mr. Jacobs, you may call your next witness.

MR. JACOBS: Thank you, Your Honor.

The United States calls William Schafer.

THE DEPUTY CLERK: Come forward and be sworn. Raise your right hand.

Do you solemnly swear that the testimony you shall give in this cause shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

THE DEPUTY CLERK: Take the witness stand.

State your name for the record and spell your last name.

THE WITNESS: My name is Bill Schafer, S-C-H-A-F-E-R.

- - -

Thereupon,

BILL SCHAFER,

a witness, having been duly sworn to speak the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JACOBS:

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Q. Good morning, Mr. Schafer.
A. Good morning.
Q. I understand you have been under subpoena since Monday. And while you are here in Tampa, I apologize for the lack of certainty as to when you would be called precisely, and we appreciate your yielding to Mr. Schenkman yesterday so he could get back to Miami.
Would you state, please, how you are employed?
A. I'm Head of Planning for the Sanitary Sewer Department of the City of Tampa.
Q. And for how long have you been employed in that capacity, sir?
A. Fifteen years.
Q. And would you describe, please, your responsibilities as Head of Planning in the Department of Sanitary Sewers?
A. My primary responsibility is to deal with expansions over our system and our plant to make sure we have enough capacity to add new development.
Q. And did there come a time when the City of Tampa expanded its wastewater treatment plant?
A. Yeah. The plant was – the last major expansion was in 1978; we went to 60 million gallons a day. We're now doing another one.
Q. In 1983, sir, approximately how much capacity remained of the 60 million gallons that you expanded to in '78?

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A. About ten million gallons a day.
Q. Now, did there come a time when Florida Cities Water Company contacted the City of Tampa to inquire about the possibility of connecting its Carrollwood sewer system to the City of Tampa sewer system in order to eliminate the Carrollwood plant?
A. Yes.
Q. And do you recall, sir, when that was?
A. It was in 1983.
Q. Directing your attention to Government Exhibit 266, would you identify Exhibit 266, please?
A. It's a letter to Elton Smith, who was the director of our department at that time, from Larry Good, who was the regional manager for Florida Cities Water Company.
Q. And can you testify that this letter was, in fact, received by your department, sir?
A. Yes, it was.
Q. And to your recollection, does this letter represent the contact that you said took place in 1983 to inquire about the possibility of the connection from Carrollwood to the City of Tampa system?
A. Yes.
Q. To your recollection, sir, did Florida Cities representatives subsequently meet with representatives of the City of Tampa Department of Sanitary Sewers to actually

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discuss the possibility of the connection of Carrollwood to the City of Tampa system?
A. Yes, they did.
Q. And do you know, sir, when that took place, that meeting?
A. It was sometime in the fall of '83, I think. It was after this letter.
Q. Okay. You are welcome to refer to your declaration that's, I believe, been provided to you, if you would like to pinpoint the date.
MR. JACOBS: And for the record, the declaration has been filed with the Court and has been provided to opposing counsel.
THE WITNESS: I don't have it. It's back with that stuff you took when I sat down. It should be right on top.
BY MR. JACOBS:
Q. Handing the witness his declaration filed with the Court on December 28th, 1995, and directing his attention to Paragraph 3, does that refresh your recollection, sir, with respect to at what point in time the meeting took place between the representatives of your department and the representatives of Florida Cities Water Company on the matter of the connection of the Carrollwood plant to the Tampa plant?

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A. Yes. It was October of that month -- of that year.
Q. And that year is 1983, sir?
A. '83, that's right.
Q. Did you subsequently, sir, on behalf of the City of Tampa write a letter to the Florida Cities Water Company describing the options available for connection of the Carrollwood system to the City of Tampa system?
A. Yes, I did.
Q. Directing your attention to Government Exhibit 525 at this time, sir, are you able to identify Exhibit 525?
A. Yes.
Q. Would you do so, please?
A. It's a letter from me to Mr. Good outlining the points of connection and some other -- and requesting additional information from them in order to proceed.
Q. And is that your signature on the bottom of Page 2 of Exhibit 525?
A. Yes, it is.
Q. And did you write and sign this letter on or about December 29th, 1983?
A. Yes.
Q. And in this letter, sir, how many different connection points do you propose as possibilities for the connection?
A. Three.
Q. And is there one in particular that you favored at the

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time?
A. The third one at 131st Street and Rome Boulevard.
Q. Directing your attention to Paragraph 3 of the letter, doesn't it say 131st and North Boulevard?
A. I'm sorry. What did I say? That's what I meant.
Q. I thought you said Rome.
A. Oh, I'm sorry. No, it's North Boulevard.
Q. Okay. And why did the City of Tampa favor that connection point, sir?
A. At that time, that was the only connection point available that was ready to go without any additional improvements on our part.
The other two that we had discussed all required additional downstream improvements.
Q. I see.
When you say "ready to go," does that mean -- what do you mean by that, sir?
A. It was in the ground; all they needed to do was run a line and connect to it and they were connected.
Q. It was immediately available?
A. Correct. And there was capacity in it.
Q. And the distance of the line that would need to be run was how long, sir?
A. 15,000 feet.
Q. Approximately three miles?

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A. About.
Q. Mr. Schafer, did Florida Cities actually subsequently request a connection from its Carrollwood system to the City of Tampa system?
A. No. The response -- I got a response from them, but it did not really request the connection. It just wanted to know what we needed -- I had asked for additional information, and they wanted to know why we needed that.
Q. The additional information you asked for, is that the information that you referred to on Page 2 of Exhibit 525?
A. Yes.
Q. And to your recollection, they responded how?
A. They wanted to know why I needed it, but they didn't go beyond that.
Q. Any subsequent contacts, to your knowledge?
A. No.
Q. Again, any subsequent actual request to connect the Carrollwood system to the City of Tampa system?
A. Not until some years later when they contacted me again to see if those options were still available.
Q. Do you recall when that was, sir?
(Pause.)
A. It was '86; '85 or '86.
Q. Directing your attention to Paragraph 5 of your declaration, does that refresh your recollection as to which

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year it was exactly?
(Pause.)
A. No. I have it in my notes, but that doesn't -- that just tells me it was '86 that the capacity was available again, but I don't -- I thought it was '86 that they called me again, or that they contacted us again.
Q. To the best of your recollection, they contacted you in '86 --
A. Yes.
Q. -- again.
And at the point that they contacted you again, did you then have capacity?
A. No, we did not.
Q. Why not?
A. Two things: One was that during that period, we had an increase in growth of development, and a lot of new projects came on line that we had committed -- that we had to commit to.
And we also had increases in ground water because of heavy rain, and the two things combined, it brought us -- the actual connected plus the committed unconnected brought us close to the 60 million gallon a day capacity. And we were under -- we had received notification from the Environmental Protection Commission that any additional connections to our system at that time would not be

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permitted.
Q. And this was in 1986?
A. That was '86.
Q. Now, did there subsequently come a time when you did have additional capacity that became available --
A. Yes.
Q. -- at your system?
And when was that, sir?
A. Within about two years of that time.
Q. So, is it fair to say from '83 to '86, you had capacity; from '86 to '88, you did not but --
A. Yes.
Q. -- subsequent to '88 you did?
A. Yes.
Q. Thank you, Mr. Schafer.
MR. JACOBS: No further questions.
THE COURT: Okay. Mr. Bullock?
CROSS EXAMINATION
BY MR. BULLOCK:
Q. Mr. Schafer, good morning. I'm Alex Bullock.
A. Good morning.
Q. Mr. Schafer, have you ever been a Hillsborough County employee?
A. No, I have not.
Q. All right. Referring to the December 29, 1983,

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letter, which is Exhibit 525 --
THE COURT: That wasn't offered, was it?
MR. BULLOCK: Oh, I'm sorry.
MR. JACOBS: Your Honor, it's already in evidence.
THE DEPUTY CLERK: It is.
THE COURT: Oh, it is? Okay. Excuse me. Both of those are --
MR. JACOBS: Yes, Your Honor, that's my understanding.
THE COURT: All right.
BY MR. BULLOCK:
Q. Mr. Schafer, when you met with the folks from Florida Cities first in October, you didn't give them a firm figure on the cost to connect at that point in time, did you?
A. No.
Q. All right. You gave them at some point in time a ballpark figure of a connection fee, which would have been approximately $800 a customer?
A. We gave them that number as kind of the maximum fee, but nobody knew at that time if that's actually what it would be. It was just a "Here's the most you'll probably have to pay" kind of number.
Q. In fact, this would have been the largest connection that the City of Tampa -- one of the largest connections that the City of Tampa would have undertaken at that time,

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isn't that correct?
A. I don't know. I would have to go back and look at my records.
Q. Carrollwood is not in the City of Tampa, is it?
A. No.
Q. All right. You have testified earlier that the connection location was about 15,000 feet from the Carrollwood plant?
A. Right.
Q. All right. Florida Cities would have been responsible for constructing the forced main that connected the plant to your system, isn't that correct?
A. That's correct.
Q. All right. Do you know whether or not Carrollwood ever hooked up into another system?
A. I understand that they eventually hooked up into the County system.
Q. All right. And do you know who paid the bill -- the forced main to hook them up into the County system?
A. No, I do not.
Q. All right. The Carrollwood area is a residential subdivision?
A. Uh-huh.
Q. Okay. I need for you to say "yes" or "no" so the court reporter can take that down.

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A. Yes.
Q. Thank you.
Building the forced main to connect to Tampa would have required Florida Cities itself to construct a forced main through the residential area, isn't that correct?
A. It would not -- I'm sorry. It would not have required them to construct a forced main through their residential area. It would have been through parts of the City, some parts of which are residential.
Q. All right. That would have required them to develop some -- the cost of going through residential areas and paying for disturbing roads and trees and issues like that?
A. Yeah, the normal costs of construction.
Q. All right. Do you have any opinion as to the cost of the construction of that forced main?
A. At that time, my best guess would have been a -- roughly, if you take two and a half times the cost of the size of the pipe in dollars and, say, that's your per foot cost, that generally takes care of the excavation and the restoration and any other thing that goes along with it.
Q. Would they have had to obtain building permits and construction permits from Hillsborough County?
A. They would have had to get permits from us, from Hillsborough County, and any state or -- any state or Federal roads that they would go through, they would also

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have to get permits from them.
Q. All right. In your December 29 letter that we have referred to, Exhibit 525, you did not give -- isn't it true that you did not give them a hard final cost?
A. No, I did not.
Q. Okay. You referred to some correspondence between Larry -- between Florida Cities when they wrote back to -- wanting to know why you needed additional financial information about the company?
A. That's correct.
Q. Isn't it true that in that letter, they also asked you to provide a connection fee figure so that they could evaluate the option further?
A. That's correct.
Q. All right. And did you ever provide a firm connection fee?
A. No, because we -- we needed the financial information to come up with the connection fee number, and we never got it. It was kind of a Catch-22.
Q. Okay. Why did you need the financial information on the company to determine a connection fee?
A. The main reason that we requested that was that we wanted -- two things, really -- one, to find out if they were financially stable; and if we did connect them, would they still be around ten years from now, or would we have to

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take over that system.
The other was, did they have any assets which might be usable as a capacity fee.
Q. Even without that information, isn't it true that you could have given them a figure that would have allowed them to -- a firm figure that would have allowed them to compare and develop whether or not that was a viable option?
A. They could have had the $800 a unit figure at any time.
Q. Okay. As a regulated utility, at least in Hillsborough County, Florida Cities' rates are governed by Hillsborough County's version of the Public Service Commission?
A. That's my understanding, yes.
Q. And the Hillsborough County Public Service Commission, or whatever the technical name of it is, would have had to pass on the prudency of that decision, isn't that correct?
MR. JACOBS: Objection; beyond the scope, Your Honor.
THE COURT: I think it is. I'll sustain the objection.
BY MR. BULLOCK:
Q. Mr. Schafer, isn't it really true that in terms of this dispute, you don't really have a dog in this fight?
A. I'm sorry?

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Q. You don't really have a dog in this fight about -- between EPA and Florida Cities, isn't that correct?
A. No, I don't.
Q. All right. And when you negotiated with -- you've negotiated a number of contracts dealing with a tie-in or connections to Tampa's system, isn't that correct?
A. That's correct.
Q. And when you were negotiating with Florida Cities, isn't it true that you believed that Florida Cities was negotiating with Tampa in good faith?
A. I had no way of knowing. I presumed that they would. I wouldn't have wasted time with them if I thought otherwise.
Q. You have negotiated with other people enough to determine whether or not you can figure if somebody is negotiating in good faith?
A. I think so.
Q. All right. Do you know how large a forced main they would have had to build?
A. I think it was a ten-inch forced main. But just off the top of my head, I don't recall. I've got it in my notes; it's there.
Q. All right. So, your estimation on calculating the forced main would be two and a half times the cost of per foot of a ten-inch pipe; is that how you would have

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calculated it?
A. Yeah, at that time. Now it's a whole lot more, but...
Q. Okay. As a matter of fact, the cost of that had gone up in the mid '80's, isn't that correct?
A. The cost of construction?
Q. Yes.
A. I can't say that one way or the other. It's all -- usually it's a function of how much -- how busy the contractors are, and I would presume at that time they got -- they were busier, so probably it did.
Q. And by mid to late 1980's, the cost of any connection fee with Tampa would have gone up as well?
A. The cost did not increase until 1987.
Q. All right. And that's when the City -- you testified the City had additional capacity?
A. Yes.
Q. All right. Thank you.
THE COURT: I thought you said you didn't have additional capacity until '88. Was it '87 or '88?
THE WITNESS: It was '88. You're right, Your Honor.
MR. BULLOCK: Thank you, Your Honor.
THE COURT: Okay. Mr. Hird?
MR. HIRD: Very briefly, Your Honor.
CROSS EXAMINATION

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BY MR. HIRD:
Q. Mr. Schafer, you said that you got additional capacity in 1988, is that correct?
A. Yes.
Q. And you didn't have it earlier in '86?
A. Correct.
Q. Did you ever have any communication with Florida Cities about that additional capacity?
A. No.
Q. Thank you.
THE COURT: Any redirect?
MR. JACOBS: Only one very brief question.
THE COURT: Okay.
REDIRECT EXAMINATION
BY MR. JACOBS:
Q. Mr. Schafer, you said that you didn't have a dog in the fight. I wonder if I could ask you, was it in the interests of your department to make a deal with Florida Cities to connect when you had that ten million gallon capacity?
Do you understand the question?
A. Yeah, I understand the question.
My answer is probably no.
Q. It was not in the City of Tampa's interest to --
A. No -- mainly the problem is that Florida Cities'

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franchise is outside of our service area. And theoretically, our capacity is reserved for our service area.
We were really only interested in that connection because there was some environmental problems involved and it was a good thing to do if we could do it.
Q. Did you want to make the deal?
A. At the time, yes.
Q. Thank you.
MR. JACOBS: No further questions.
THE COURT: Thank you, sir. You may step down.
THE WITNESS: Thank you.
THE COURT: Call your next witness.
MR. JACOBS: The United States calls Leon Levy.
THE DEPUTY CLERK: Come forward and be sworn. Raise your right hand.
Do you solemnly swear that the testimony you shall give in this cause shall be the truth, the whole truth, and nothing but the truth, so help you God?
THE WITNESS: I do.
THE DEPUTY CLERK: Take the witness stand.
MR. HIRD: Your Honor, before Mr. Levy begins his testimony, I would like to bring a procedural matter to the Court's attention.
Mr. Levy is chairman of the board of Avatar

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Holdings. We intend to call him in our case in chief. I had proposed to the Government that we allow the Government to begin examination of Mr. Levy; and when my turn comes, for me both to include the cross examination and my direct so that Mr. Levy will only have to testify one time. I believe this will serve the interests of judicial economy.
This will also be beneficial for Mr. Levy who resides in New York. He came here on a special chartered plane from Eleuthera in the Bahamas.
He is under the care of a cardiologist who he expects to see in New York in the next few days. He's also undergoing a series of root canal operations in New York.
I think both for Mr. Levy's interests and the interests of judicial economy, this is the proper thing to do.
I was surprised yesterday to learn that the Government would not accede to this request.
MR. JACOBS: Your Honor, Mr. Levy has been designated as the representative of the party entitling him to be in court the entire time of trial, first of all.
Second of all, there was not just one but two motions for protective orders filed by Avatar Holdings in which they maintained that Mr. Levy had no relevant information whatsoever to the case.
So, to hear now that Mr. Hird wants to call him as

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a witness in the middle of our case in chief, which we had expected to complete yesterday, I think is a bit of a disruption to our case.

And with all due respect to the needs of Mr. Levy, we have had witnesses waiting for days now to testify, and we will have more witnesses that they have asked us to put on standby.

And while I sympathize with this particular witness' needs, there are many people's needs here that need to be met, and we really would like to stick with our direct and then Mr. Hird's cross. And if Mr. Hird feels the need to call Mr. Levy again in his case, which I understand follows Florida Cities' case, we would have no objection to him recalling Mr. Levy at that time.

THE COURT: Well, you wouldn't be in a position to object to calling him anyhow.

How long would you intend to be, Mr. Hird?

MR. HIRD: I imagine -- my straight direct, right now, I would imagine, will go between half an hour and 45 minutes. When I see Mr. Jacobs cover whatever he's going to cover, I imagine that would cut down substantially my direct.

THE COURT: Well, I'll take that under submission. We'll get through the direct examination and see where we are at that time.

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MR. HIRD: Thank you, Your Honor.

THE DEPUTY CLERK: State your name and spell your last for the record, please.

THE WITNESS: Leon Levy, L-E-V-Y.

- - -

Thereupon,

LEON LEVY,

a witness, having been duly sworn to speak the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JACOBS:

Q. Mr. Levy, first of all, there was a reference to a cardiology problem. I asked you at your deposition whether there was any medical reason why your deposition should not go forward. Do you recall mentioning this cardiology problem?

A. I don't remember whether I did or not, but I think at that particular time, being in New York and I didn't have any appointments with a cardiologist, I would have seen no reason why I shouldn't have gone forward.

It just so happened that I did have an appointment -- and I hate to discuss medical reasons in court; it's somehow like getting undressed -- but I did have an appointment with my cardiologist, which I have cancelled for today, but --

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Q. But not --

A. -- but I'm fine right now.

Q. Is there any urgent need for you to see your cardiologist this week, sir?

A. I don't think there's an urgent need.

Q. Now, how are you employed, sir?

A. I'm a partner of Odyssey Partners, which is the successor of Oppenheimer and Company, and is an investment partnership. And I'm also involved in a number of non-for-profit organizations which consume a great deal of time.

Q. Do you have any relationship to a company called Avatar Holdings?

A. I'm chairman of the board.

Q. And Mr. Hird represented that you reside in New York. From your deposition testimony, you reside in New York City at a place called Sutton Place, is that correct?

A. That is correct.

Q. And you also have a personal residence in Westchester County, New York, is that correct?

A. That is also correct.

Q. And you, in addition, have a residence, again, that Mr. Hird referred to in the Bahamas, is that correct, sir?

A. That is also correct.

Q. You do not reside nor have you ever resided in the

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State of Florida, is that correct?

A. That is also correct.

Q. And you have never maintained an office --

A. Only, I might add, with one exception: At the Government's suggestion, during the war, at Camp Blanding for a good while.

Q. And you have never maintained an office in the State of Florida, have you, sir?

A. No, I have not.

Q. But you do maintain an office in New York City, is that correct?

A. Yes, I do.

Q. And that office is at the offices of Odyssey Partners?

A. Right.

Q. And you don't have any other offices anywhere, is that correct?

A. That is also correct.

Q. So, when you conduct Avatar business, you conduct it from your Odyssey Partners office, is that correct, sir?

A. That is generally correct.

Q. Now, Mr. Levy, you have testified under oath on a number of occasions in a number of different matters, isn't that right?

A. Yes, I have.

Q. In fact, you have given your deposition some 25 to 30

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times, roughly, is that correct?
A. I really don't remember. That sounds as if it might be a fair estimate. I don't know.
Q. Do you recall whether that was exactly the estimate you gave at your deposition?
A. No, I don't recall.
Q. Okay. Let me direct your attention to Page 7 --
THE COURT: What does it matter? What does it matter?
MR. JACOBS: I'm sorry, sir?
THE COURT: Does it really matter?
MR. JACOBS: No. Okay. We'll move on.
THE COURT: Yes.
BY MR. JACOBS:
Q. You do, sir, recall giving your deposition in this particular matter on October 24th, 1995, and December 6th, 1995, both times in New York City, is that correct, sir?
A. Yes, I do.
Q. And would you tell the Court, please, whether you testified truthfully on both of those occasions?
A. I -- to the best of my ability.
Q. And prior to giving your deposition, on June 7th, 1995, you executed a declaration under penalty of perjury in this matter, isn't that correct?
A. I believe so.

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Q. And you do recall that the context in which you executed that declaration was a motion to -- motion for a protective order filed on behalf of Avatar Holdings to preclude your testimony on the grounds that you had nothing to do with Avatar Holdings, is that correct?
MR. HIRD: Objection; that's a mischaracterization.
MR. JACOBS: I'll rephrase.
BY MR. JACOBS:
Q. Do you recall, sir, that in that declaration you said, I reside and work in the State of New York. I am fully occupied with work that is unrelated to the affairs of Avatar Holdings?
A. Well, I think that is correct; but like everything else, there's a slight ambiguity there.
Q. I'm sorry. Let me make sure that the record is clear.
Have I correctly represented your statement in the declaration? And I'm happy to bring it up to you.
A. Well, if you tell me that that's what it says, I -- that's fine with me. But nevertheless, I mean, I am fully occupied with the work at Odyssey.
And I also should add that -- well, I don't know when work stops and ends and I spend a great deal more time than maybe a working day.
And, moreover, Avatar is an investment of ours at

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Odyssey, and so I work on that in New York.
Q. Well, let me ask you this, sir: Is it or is it not true that you are fully occupied with work that is unrelated to the affairs of Avatar Holdings?
A. Fully occupied? I guess it's not entirely true.
Q. In fact, at your deposition, did you not state that you spent 15 to 20 percent of your time on matters related to Avatar Holdings and its subsidiaries?
A. I might have. That's a pretty rough estimate because I don't keep time records.
Q. Would you agree that that's your testimony, sir?
A. Yes, I would.
Q. And didn't you at that time say that the statement in which you said, I am fully occupied with work that is unrelated to the affairs of Avatar Holdings, was a false statement?
A. It might have been not entirely correct.
MR. JACBOS: I'd like the witness to look at his deposition testimony, Pages 123 to 124.
THE COURT: Let me see what we're doing here procedurally, now. You're entitled, as I understand it, to offer the deposition testimony of an adverse party witness.
Now, if that's your purpose, and that is to offer during your case in chief the testimony -- deposition testimony of an adverse party witness, you just do that; you

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don't call the witness to the witness stand and confront him with the testimony that you want the Court to consider.
Now, if the witness testifies to something different -- if you call the witness and he testifies to something differently, then you can confront him with his deposition. I don't understand procedurally this approach here.
MR. JACOBS: Well, if the witness told me one thing at his deposition and he's telling you something else, Your Honor, I --
THE COURT: Well, you haven't even elicited any -- you know, you haven't asked him substantive questions as yet for -- and if his response is different from his affidavit or from his deposition, then you can confront him with his affidavit or his deposition or, as I say, alternatively, since he's a party in this case, he -- I believe he would qualify as a party where you could use his deposition as substantive evidence. But let's try to adhere to -- unless I have misstated what the proper procedure is on these matters...
MR. JACOBS: These are admittedly not substantive questions, or questions that don't go to substance. They really go to bias, Your Honor --
THE COURT: Well --
MR. JACOBS: -- and credibility.

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THE COURT: Yes. But, you see, he hasn't been offered --

MR. HIRD: Your Honor, Mr. Levy is obviously testifying as an adverse witness, and clearly his sympathies are with Avatar Holdings. I don't think Mr. Jacobs needs to labor this to demonstrate any sort of bias.

MR. JACOBS: Let me try and move on.

THE COURT: Yes, let's do that.

BY MR. JACOBS:

Q. Let me ask you, Mr. Levy, how much time did you spend on matters related to Avatar Holdings and its subsidiaries?

A. Again, I'd say -- look, I come down every -- eight times a year to board meetings at Avatar. Very occasionally I will come down, oh, I would say, once every several years when there's not a board meeting, and the annual meetings; and I get reports from Avatar in the mail. And occasionally I talk on the telephone to the chief executive about the real estate business.

It's hard to quantify and be particularly specific about something which, to me, is more amorphous.

Q. In fact, Mr. Levy, with the exception of your work with Odyssey Partners, Avatar Holdings takes up more of your time than any of your other business endeavors, isn't that correct, sir?

A. Well, business endeavors -- I spend a great deal of

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time with the Institute for Advanced Studies where the chairman just became head of the World Bank and asked me to take over for him.

And I also spent a great deal of time at the Jerome Levy Institute, which is an economic research institute of which I'm president. Where the time is greater, I don't know. If I kept time sheets, I would be able to tell you, but I don't.

Q. Do you recall that at your deposition you testified that, quote, I spend the majority of my time on Odyssey Partner matters?

THE COURT: Do you all want a reference to the -- if you're not interested in slowing down for the page and --

MR. HIRD: I'm trying to avoid slowing everything down; but if this continues this way, I guess we would need references to any deposition pages.

THE COURT: Okay. Well, at such time as you want to assert your rights in that respect -- ordinarily, I require that counsel will -- if they are impeaching a witness or attempting to with a deposition ask a witness -- remind him of his deposition, Do you recall giving the following answer to the following question, page number, line number and so forth.

MR. JACOBS: Very well.

BY MR. JACOBS:

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Q. Mr. Levy, directing your attention to the deposition you gave on August 24th, 1995, in New York, and in particular to Page 73 -- and a copy is being given to you and an original will be provided to the Court --

THE COURT: Well, I'm not requiring that. If you want to do that, that's fine but --

MR. JACOBS: I want you to be able to follow along if you --

THE COURT: Well, I know, but I'm not requiring that you do that with the witness either. That's not part of my requirements. But if you want to do that, that's all right.

BY MR. JACOBS:

Q. On Page 73, Line 4, Question: If we could go down the list of the organizations with which you're presently affiliated, Mr. Levy, would you tell me what percentage of your time you spend on matters relating to your affiliation with Odyssey Partners --

A. Right.

Q. -- would you read your answer, sir, please?

A. Well, I might answer that by saying I spend a majority of my time on Odyssey Partner matters. And after that would come Avatar, and the others don't take up much time except that some of the non-for-profit organizations do. They truly take up most of the time, the Institute for Advanced

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Study and the Jerome Levy Institute.

Q. Thank you.

THE COURT: For future reference, Mr. Jacobs, you can ask him, Do you recall giving the following answer to the following question? And you read the question and you read the answer. And then you can ask him if he recalls giving that answer.

MR. JACOBS: Thank you, Your Honor.

THE COURT: All right.

BY MR. JACOBS:

Q. Mr. Levy, as chairman of the board of Avatar Holdings, do you consider yourself responsible for ensuring that Avatar Holdings and its subsidiaries comply with Federal laws and regulations?

A. Well, I certainly consider myself responsible for seeing that they are an ethically and morally run company.

I think the question you put to me is more of a legal question than a -- so far as the ethics and the morals, I feel very strongly about that.

As far as how you answer a question like that or what its legal implications are, I just cannot answer it.

Q. Well, Mr. Levy, who at Avatar Holdings, if anyone, is the officer whose duties it would be to ensure that Avatar Holdings and its subsidiaries operate in compliance with Federal laws and regulations?

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A. Our chief legal officer and executive vice-president is Dennis Getman, who has been with the company for quite a number of years.
Q. Do you know how long, sir?
A. I would think about 15 years -- I may be mistaken -- but almost as long as I have.
Q. Now, Mr. Levy, in 1980, you and Peter Sharp acquired what was then known as GAC Corporation, isn't that right?
A. We acquired an interest in the bonds of GAC; and in a reorganization plan, the bondholders received a considerable amount of stock. But at that time we did not -- we -- and today -- we never had a majority of the stock.
Judge Britton, who is a Federal Judge in Miami, did something which I was told was unusual in a bankruptcy case, because the various parties of interest suggested directors, and Judge Britton discarded all of their suggestions and appointed a number of directors of his choosing.
I might say he did very well, I think, aside from myself or Peter Sharp, but that's for others to decide.
Q. You said you didn't have a majority of stock. Did you have a controlling interest, sir?
MR. HIRD: Object to the characterization of --
THE WITNESS: It became --
THE COURT: Wait, wait, wait.
THE WITNESS: Well, as it became --

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THE COURT: When an objection is made, Mr. Levy, you just wait until I rule on the objection.
THE WITNESS: I'm sorry.
MR. HIRD: I think this calls for a conclusion. If Mr. Jacobs wants to ask what percentage he controls, he can -- he owns, he can do that; but "controlling" is a subjective term.
MR. JACOBS: "Controlling," I think, is a term of art in Mr. Levy's profession.
THE COURT: All right. I'll overrule the objection, if he can answer it.
You can go ahead and answer the question, if you remember it. Do you remember the question?
THE WITNESS: Yes.
I think in a sense, Judge Britton appointed Peter Sharp -- I forget what appointment he gave Peter Sharp -- someone else was appointed chairman of the board at the time by the Judge. And after about a year, he retired and I became chairman of the board.
BY MR. JACOBS:
Q. And at that time Mr. Sharp became the chief executive officer, is that correct?
A. Yes, he was chairman of the executive committee at that time.
Q. And between you and Mr. Sharp, did you all have a

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controlling interest in Avatar Holdings?
A. Well, I guess in the -- I guess you might say we did.
Q. Now, you mentioned Peter Sharp. Who was Peter Sharp?
A. Peter Sharp was a fellow who was born here in Florida and his parents were in the hotel business, in the real estate business.
He subsequently became a good friend of mine. He went to Princeton where he studied medieval French.
THE COURT: Do you want to know all of this? Are you wanting to elicit this?
MR. JACOBS: I'm trying not to interrupt the witness in midstream.
I think some of it is relevant, actually.
THE COURT: All right. Go ahead.
THE WITNESS: And then he moved to New York, after having lived in different places, where he managed some family hotels, and finally he settled in New York.
BY MR. JACOBS:
Q. And did he become a successful real estate businessman in New York?
A. Yes, he was.
Q. And did you come to know him pretty well? You said he became a friend.
A. Yes, I knew him quite well.
Q. And in addition to being chief executive officer of

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Avatar Holdings, Mr. Sharp also served as the chief operating officer, is that correct?
A. I don't believe -- he was chairman -- well, he was chairman of the executive committee. I forget whether he was chief operating officer or not.
These titles are always rather fuzzy. In different companies they mean different things.
Q. What does it mean at your company, Avatar Holdings?
A. Well, the chief operating officer today, for example, would be Mr. Jacobson.
Q. Let me ask you this: Until Mr. Jacobson became the chief operating officer, was Mr. Sharp essentially the chief operating officer?
A. He may have been in title -- and I just don't remember -- I think -- he was chairman of the executive committee, but he was mostly concerned with very broad issues.
MR. JACOBS: Move to strike, Your Honor.
THE WITNESS: I'm sorry?
MR. JACOBS: Move to strike about the nature of the issues he was concerned with being broad; move to strike as non responsive.
THE COURT: I'll deny your motion. Let's move on.
BY MR. JACOBS:
Q. Directing your attention to Government Exhibit 518,

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Mr. Levy –
A. All right.
MR. BIRD: Could you give us a moment, Your Honor, to pull this?
THE COURT: Yes.
(Pause.)
BY MR. JACOBS:
Q. – and in particular to Page 15 of the exhibit –
THE COURT: Just a moment.
(Pause.)
THE COURT: Okay. All right.
THE WITNESS: All right.
BY MR. JACOBS:
Q. Do you see the name "Peter Sharp" on Page 15?
A. Yes, I do.
Q. Could you tell me what position he held at this time with Avatar?
A. Chief executive officer and chief operating officer, director, chairman of the executive committee of the board.
Q. And what was the first title? I'm afraid, perhaps, that I overlapped with your answer.
A. Well, you didn't say in 1980. This is, I think, the original 10-K, or whatever, that the company filed. Subsequently, there were a number of other people who became president and perhaps chief operating officer and –

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THE COURT: He asked you what your –
THE WITNESS: I'm sorry?
THE COURT: He said chief executive officer.
MR. JACOBS: Right, and I'm afraid that – the first item that's listed is president, and I can't tell whether he said that or –
THE COURT: Are you asking him to –
THE WITNESS: He was president –
THE COURT: Wait a minute.
Are you asking him to read what's on that exhibit?
MR. JACOBS: Yes, Your Honor.
THE COURT: Would you read what that says, please, sir?
THE WITNESS: Yes, sir. Thank you.
President and chief executive officer and chief operating officer, director, chairman of the executive committee of the board.
BY MR. JACOBS:
Q. And did he serve in all these capacities at the time that this 10-K form, as you have identified it, was filed with the Securities and Exchange Commission?
A. I assume he did, yes.
Q. Now, Mr. Sharp, after you and he acquired the controlling interest of Avatar Holdings, Mr. Sharp even moved to Florida – he moved to Florida, did he not, when

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you first acquired the company?
A. Yes, he did.
Q. And he took an apartment in Coral Gables, right?
A. That is correct.
Q. So that he could work at the Avatar Holdings offices which are, in fact, in Coral Gables, is that correct?
A. That's so. I think he – right. Whether his home was in Coral Gables or was near there is – would be irrelevant, I guess.
Q. Okay. And, in fact, he stayed in Florida for the first two years after you and he acquired the controlling interest, isn't that correct?
A. Yeah. I seem to – as best I remember.
Q. And after that time, he went back to New York City where he worked out of his offices at Peter Sharp and Company, is that correct?
A. That's correct.
Q. And the business he did which related to Avatar Holdings, to your knowledge, when he was in New York, he did out of those Peter Sharp and Company offices, is that correct?
A. That is correct.
Q. And New York City is where he resided after he returned from Florida after those first two years, is that right?

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A. That is also right.
Q. Now, although you said, Mr. Levy, that presidents – other presidents were subsequently appointed, Mr. Sharp remained the chief executive officer of the company until 1990, isn't that true?
A. I believe that is true.
Q. And he remained the chairman of the executive committee of the board until 1991; is that not correct?
A. Yes, that is correct.
Q. Now, Mr. Sharp was a very wealthy man, wasn't he?
A. Yes, he was.
Q. In fact, he was on the Forbes list of the 500 richest men in the United States, is that correct?
A. Four hundred.
Q. And perhaps I should be more politically correct: Richest people.
A. Right.
Q. Now, Mr. Sharp was a micro manager, wasn't he, Mr. Levy?
A. He was a what?
Q. Micro manager.
A. No. He was very curious in that regard, by the way, because he had the ability –
THE COURT: Okay. He said "no." He answered your question.

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THE WITNESS: I'm sorry, I --
THE COURT: Ask your next question.
BY MR. JACOBS:
Q. Well, didn't he personally get involved in quite a variety of issues that related to Avatar Holdings and its subsidiaries?
A. His choices of what he got involved in was rather eccentric.
Q. Let me ask you this: When he got a memo or a letter about a given issue, didn't he go through it meticulously?
A. He often did.
Q. In fact, the example you gave me at your deposition was that if he got a legal brief from his lawyers, he would go through 80 pages and correct it for grammar and spelling and other less important details as much as for substance, is that correct?
A. He has been known to do that.
Q. And Mr. Sharp was very much in charge of any project he actually did -- I'm sorry, I'm going to start again.
Mr. Sharp was very much involved -- very much in charge of any project he got involved with at Avatar Holdings, wasn't he?
A. Yes. I would emphasize what he got involved with.
Q. That was the question.
A. Yes.

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Q. Now, knowing Mr. Sharp as well as you do, Mr. Levy, would you say that when Mr. Sharp said something, he meant what he said?
A. Yes. I would say he was an honorable man.
Q. Is that a "yes"? When he said something, he meant what he said?
A. Yes.
Q. And he was very used to giving orders, wasn't he?
A. Yes, he was.
Q. And when Mr. Sharp gave an order, he expected it to be carried out, didn't he?
A. He generally did.
Q. Did anyone at Avatar Holdings have the authority to countermand one of Mr. Sharp's orders?
A. I -- you know, that's a very complicated question. I would have to say not to my knowledge.
Q. And a man in Mr. Sharp's position, he wasn't really used to taking many orders, was he?
A. Well, I guess not, but...
Q. In fact, Mr. Sharp didn't really like to be told what to do, did he, Mr. Levy?
MR. HIRD: Objection. I have been letting some of these questions go forward, but this goes way beyond the scope, talking about general characterization of the individual. If Mr. Jacobs wants to talk about specific

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actions of Mr. Sharp, I think he needs to --
THE COURT: I think he covered this pretty well. Let's move on.
MR. JACOBS: Yes, sir.
BY MR. JACOBS:
Q. Now, at a point in time Mr. Sharp became ill, is that correct, Mr. Levy?
A. That is so.
Q. And he passed away in April of 1992, is that correct?
A. That is correct.
Q. With the exception of the time during which Mr. Sharp was ill, though, he was, in fact, for the entire period or entire course of his affiliation with Avatar Holdings in essence its chief executive officer, is that correct?
MR. HIRD: Objection, Your Honor; this was asked and answered. Mr. Jacobs has asked about when Mr. Sharp resigned as chief executive officer.
THE COURT: Sustained. Sustained. Let's move on.
BY MR. JACOBS:
Q. Moving on now, Mr. Levy, who was John Sladkus?
A. John Sladkus was a Czech who immigrated to the United States, became a citizen, and is an engineer.
Q. And did he have any relationship, business relationship with Mr. Sharp?
A. He worked with Peter Sharp fairly closely.

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Q. And he supervised engineering on Mr. Sharp's projects, including Avatar Holdings' projects, isn't that right?
A. Yes, he did.
Q. And do you happen to recall whether Mr. Sharp was an officer of Avatar Holdings?
THE COURT: Mr. Sladkus, you mean?
MR. JACOBS: Yes. Thank you, Your Honor.
THE WITNESS: I don't recall. He might well have been.
BY MR. JACOBS:
Q. Directing your attention to Government Exhibit 519, could you identify Government Exhibit 519, sir?
A. It is meetings of the -- minutes of the annual meeting of the board of directors of Avatar Holdings, held on May 14th, 1981, at 11:00 o'clock at the annual meeting of shareholders. I left out some -- the rest of...
MR. JACOBS: One moment, Your Honor.
THE WITNESS: I'm sorry?
MR. JACOBS: I was talking to the Judge, Mr. Levy.
(Pause.)
MR. JACOBS: Judge, with your indulgence, I want to move back and move 547 into evidence. I think that's one of the few we've referred to that had not yet been moved into evidence.
MR. HIRD: I'm sorry, Your Honor. I don't believe

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547 is one that has been discussed with this witness. If you can give me a moment so I can take a look at it...
(Pause.)
MR. HIRD: We have no objection.
MR. JACOBS: Likewise 551.
I'm sorry, Your Honor, I didn't give you a chance to rule.
THE COURT: 547 will be received.
MR. JACOBS: 551.
MR. HIRD: No objection.
THE COURT: It will be received.
BY MR. JACOBS:
Q. Now, Mr. Levy, redirecting your attention to Exhibit 519, Page 4, do these minutes refresh your recollection as to whether Mr. Sladkus had an official position with Avatar Holdings?
A. Yes, it does. He did at that time.
Q. And what was that position, sir?
A. He was executive vice-president, land and utility operations.
Q. To your knowledge, did Mr. Sladkus hold that position throughout his entire affiliation with Avatar Holdings?
A. I really don't know without having the records.
Q. Now, Mr. Sladkus had quite a lot of responsibility with Avatar Holdings, didn't he, sir?

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A. Yes, he did.
MR. HIRD: Objection, Your Honor. The witness has previously testified he didn't know what Mr. Sladkus' position was.
THE COURT: I'll overrule the objection.
You can answer the question.
THE WITNESS: When this company emerged from bankruptcy, there was $160 million of mandated work that the previous management had not completed and which the Court or the Federal Trade Commission ordered to be done. Mr. Sladkus was in charge of the completion of this mandated work.
BY MR. JACOBS:
Q. In fact, Mr. Sladkus was the only one, in addition to you and Mr. Sharp, who had the authority to sign checks over $100,000 on behalf of any Avatar entity, isn't that correct, sir?
A. I accept that. I don't remember that, but I accept it.
Q. Is that a "yes"?
A. I'm sorry?
Q. Is that – I need –
THE COURT: Do you know or not know?
THE WITNESS: I don't know.
BY MR. JACOBS:

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Q. Directing your attention, then, to Exhibit 526, can you identify Exhibit 526, sir?
A. It's the minutes of the board of directors of Avatar Holding held on Friday, January 27th, 1984.
MR. JACOBS: Move 526 into evidence.
THE WITNESS: I beg your pardon?
THE COURT: It will be received.
MR. JACOBS: I'm talking to the Judge, Mr. Levy.
THE WITNESS: I'm sorry.
BY MR. JACOBS:
Q. Now, directing your attention, please, to Page 10 of Exhibit 526 and in particular to the second full paragraph on Page 10, doesn't that paragraph say that only you, Mr. Sharp and Mr. Sladkus have the authority to sign checks in the amounts of $100,000 or more?
A. Yes, it does say that.
Q. And does that then refresh your recollection as to whether only the three of you had that authority?
A. Well, I accept it as it's written.
Q. Any reason to believe it's not true?
A. No, no reason not to believe it.
Q. Turning your attention now to Mr. Lawrence Wilkov, could you tell the Court who Lawrence Wilkov is?
A. Mr. Lawrence Wilkov eventually became the president, chief operating officer of Avatar.

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Q. Do you know when he became the president?
A. I can't tell the date without seeing some --
Q. Does 1984 sound correct?
A. Yeah, that sounds right.
Q. Will you accept that?
A. I would gladly accept that.
Q. Okay. And then he became the chief executive officer beginning in 1990; would you accept that?
A. I would completely accept that.
MR. JACOBS: Move 526 into evidence which documents 1984 as the date for Mr. Wilkov joining the company.
THE COURT: All right. What number?
MR. JACOBS: 526.
THE COURT: That's already been received.
MR. JACOBS: I'm sorry. 551, which references the 1990 date when he became chief executive officer.
THE COURT: That's already been received.
MR. JACOBS: I'm sorry, Your Honor. I've got my exhibits out of order.
BY MR. JACOBS:
Q. Now, Mr. Wilkov's offices were in Coral Gables, is that correct?
A. That is correct, at the headquarters of the company.
Q. And he remained with the company until he got into a

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major disagreement with Edwin Jacobson, is that correct?
A. Well, you can put it that way.
Q. Now, Mr. Jacobson came on board in 1992 as a member of the board of directors and chairman of the executive committee of the board, is that correct?
A. That is correct.
MR. HIRD: Objection. Mr. Jacobson may have come on -- assumed the two roles at different times, and I think the question is misleading.
MR. JACOBS: The question wasn't meant to be misleading. Let me try it again, for the record.
THE COURT: Okay.
BY MR. JACOBS:
Q. Mr. Jacobson came on board in 1992 as director and chairman of the executive committee of the board, correct?
A. I believe that is --
MR. HIRD: Objection again. Mr. Jacobson, I believe, came on as director and subsequently in that year became chairman of the board.
THE COURT: Are you going to testify, or are you going to let this witness testify? I mean --
MR. HIRD: I think the question is misleading.
THE COURT: I don't think it is.
You know, this is a grown man. If he knows, he knows. If he doesn't, he doesn't. And if he testifies to

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something that is not accurate, you'll have him on cross examination. Now let's move on.
BY MR. JACOBS:
Q. Mr. Levy, do you know the answer? Do you need the question repeated?
A. No, I understand the question.
I believe he became -- to the best of my memory, he became chairman of the executive committee.
Q. Of the board of directors in 1992, is that correct, sir?
A. Yes, in 1992.
Q. And then he became president of the company in what year?
A. I would have to refresh my recollection as to the times.
Q. But it was subsequent to 1992, is that correct?
A. Yes.
Q. Now, as a result of the disagreement, as we've described it, with Mr. Wilkov, Mr. -- I'm sorry -- with Mr. Jacobson, Mr. Wilkov subsequently left the company, correct?
A. That is correct.
Q. And then he sued Avatar Holdings, Odyssey Partners and Mr. Jacobson over this employment dispute, correct?
A. That is right.

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Q. And that suit was settled for $1 million, is that correct?
A. That is right.
Q. Let's turn back to your acquisition with Mr. Sharp of GAC which you renamed Avatar.
Is it fair to say you did rename it "Avatar," Mr. Levy?
A. It was renamed "Avatar," you might say.
Q. And was that your idea or Mr. Sharp's or --
A. No, it was neither of our ideas.
Q. Why did it get renamed "Avatar"?
A. Well, GAC seemed an inappropriate name at the time. It had all sorts of connotations about defaulted debt and all the other things that a company in bankruptcy has.
And it was also originally named after a finance company in Harrisburg, Pennsylvania, which had nothing to do with what the company was now doing.
Q. Why was the name "Avatar" picked? What does "Avatar" mean?
A. Actually, the then treasurer of the company came up with the name of "Avatar," and it means reborn, or from the ashes, like a phoenix. It was a literary allusion.
Q. Now, you and Mr. Sharp acquired GAC primarily for the land, is that correct?
A. Well, we acquired it as you would acquire any company:

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For all of the assets minus all of the liabilities. And you would give more weight to some than others. And the land was obviously a principal consideration.
Q. Were the utility holdings an additional consideration?
A. Relative to the entire assets of the company, they would not have been very important at that time.
Q. Now, the original owners of the company were the Rosen brothers, is that correct?
A. That is correct.
MR. JACOBS: Move 253 into evidence.
MR. HIRD: Your Honor, I object to 253. 253 is a memo prepared by a gentleman who joined Avatar Holdings in 1995. It was done with the -- his own musings as to what may have happened to Avatar -- to the preexisting company prior to 1980.
The memo has nothing -- is not based on personal experience, is not based on anything that anyone in the management post bankruptcy had done. It was simply language by a gentleman who joined the company 15 years after the bankruptcy speculating as to what happened before the bankruptcy.
MR. JACOBS: Your Honor, may I respond?
THE COURT: Yes, sir.
MR. JACOBS: First of all, it's a business record of Avatar Holdings.

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Secondly, it contains Mr. Levy's handwritten notation on the top, and that was his testimony at his deposition.

Third, it's a historical narrative point by point of the history of the company. And Mr. Hird can certainly use his time on cross examination to dispute this history; but, otherwise, Mr. Levy has already testified in deposition that the history is correct.

THE COURT: All right. What do your objections say that you --

MR. HIRD: My objection, Your Honor, is this is not a business record. It's --

THE COURT: Is this what your recorded objections say?

MR. HIRD: Number one, it's not a business record.

Number two, Your Honor, it's not an admission.

Number three, the individual who prepared it had no personal knowledge and was not even involved in the company at the time.

Moreover, the activities of General Acceptance Corporation prior to 1980, before the bankruptcy, has nothing to do with not only the Avatar Holdings post 1980 but the violations at issue in this case which date from 1990.

So, it's totally irrelevant. It's hearsay; it's

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irrelevant; it's not an admission by a party opponent.

MR. JACOBS: Judge, there's no objection on their list.

MR. HIRD: Yes, there is. 253: Irrelevant; hearsay within hearsay.

MR. JACOBS: I'm holding Avatar Holdings' objections to Government exhibits, unless it's a superseded company --

MR. HIRD: That's way old. That's because you renumbered the exhibits, and we had to redo our objections.

Here you go. 253, there are the objections.

MR. JACOBS: Thank you.

May I respond to the objections?

THE COURT: Yes, sir.

MR. JACOBS: Your Honor, do you have the exhibit in front of you?

THE COURT: No, I don't have the exhibit.

MR. JACOBS: Let's get the exhibit.

(Pause.)

MR. JACOBS: We think it's on the bench.

THE COURT: 253?

MR. JACOBS: Yes, Judge.

THE COURT: Yes.

MR. JACOBS: Your Honor, there's testimony by Mr. Levy --

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THE COURT: Well, give me just a moment.

MR. JACOBS: I'm sorry, sir.

(Pause.)

THE COURT: Yes, Mr. Jacobs?

MR. JACOBS: It's a business record. Mr. Levy testified at his deposition that the author --

THE COURT: Well, now, don't tell me about what he testified during his deposition.

MR. JACOBS: It's a business record. It's an admission --

THE COURT: How do we know it's a business record?

MR. JACOBS: It comes from Mr. Levy's files. That's his handwriting at the top. He testified that that's his file, the handwriting.

Milton Dresner is a director of Avatar Holdings. He's recounting a history of Avatar Holdings, which is very relevant to the issues in this case, particularly Paragraph 3: The owners were quick to install roads without sewer and water.

MR. HIRD: Your Honor, if I may respond for a moment?

THE COURT: Are you through, Mr. Jacobs?

MR. JACOBS: I'm sorry, sir?

THE COURT: Are you through?

MR. JACOBS: Yes.

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THE COURT: Yes, sir?

MR. HIRD: Your Honor, to be a business record, a document has to be prepared at or near the time of the events. This is Mr. Dresner's memo done on July 15th, 19-- July 7th, 1995. Mr. Dresner joined Avatar Holdings in 1995. He is writing about events that precede 1980.

THE COURT: I agree. I don't think it qualifies as a business record. I'll sustain the objection.

BY MR. JACOBS:

Q. Mr. Levy, the Rosen brothers were the original owners of the company, is that correct?

A. To the best of my knowledge, yes.

Q. And to the best of your knowledge, they were hustlers, is that correct?

MR. HIRD: Objection, Your Honor. I think this goes to relevance. Mr. Levy has testified that he acquired -- he and Mr. Sharp became involved in Avatar Holdings in 1980 when it emerged from bankruptcy. The violation was in 1991. This isn't even a history of violations. This goes back to a different set of owners that were removed by the Bankruptcy Court and has nothing to do with this case.

THE COURT: Yes, sir?

MR. JACOBS: This is the beginning of a story, 1980, and I'm attempting to establish, as I did at

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Mr. Levy's deposition, that when Mr. Levy and Mr. Sharp took over this company, they knew what they were getting into in terms of the previous owners being hustlers -- and that's the word that appears in the deposition transcript -- and that they, in fact, were known to install roads without sewer and water. And the inadequacy of sewer facilities at Barefoot Bay is a major part of this case. And there is direct knowledge of this testimony by Mr. Levy based on his direct knowledge of these facts at his deposition.

MR. HIRD: Your Honor, if I may briefly respond, Mr. Levy has just testified this morning that Judge Britton ordered Avatar Holdings install $160 million worth of improvements to the properties in the new company. This is ancient, ancient history.

What's happening here is an effort to tar the company that was reinvented in 1980 with its history of prior owners before the time, and it's totally irrelevant to violations that don't start until 1990 at the earliest with respect to --

THE COURT: I'll sustain the objection.

BY MR. JACOBS:

Q. Mr. Levy, do you have knowledge of whether the Rosen brothers made a practice of selling land which did not have sewer and water service?

MR. HIRD: Same objection, Your Honor.

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THE COURT: Sustained.

MR. JACOBS: Your Honor, may I address --

THE COURT: No, sir. Let's move on.

MR. JACOBS: Okay.

BY MR. JACOBS:

Q. Now, in addition to the land, when you acquired GAC, you acquired significant water and wastewater utility holdings as well, is that correct?

A. That is correct.

Q. And these utility holdings included valuable holdings both in the mid-west and Florida, is that correct?

A. That is right.

Q. And one of these properties was Barefoot Bay, is that correct?

A. I believe so, yes.

Q. And Avatar acquired both the Barefoot Bay development and the Barefoot Bay wastewater treatment plant, is that correct?

A. I believe so. We acquired so many properties at that time, including a very complicated title insurance company, CATV systems and whatever. So, on any of the specifics, my memory is not necessarily accurate.

Q. Let me ask you this, moving from the past to the relative present, Mr. Levy: In 1990, did Avatar Holdings' utility operations represent a significant portion of the

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company's total business?

A. What is the "significant portion"? Yes, I guess it did, depending on how you define "significant portion."

Q. Isn't that the way Avatar Holdings characterized the holdings in its 10-K statement for that year?

A. Yeah, I guess it was.

Q. And that included 15 wastewater treatment plants, is that correct, sir?

A. If that's the number, that's right.

I say, if that is the proper number, that is -- I'll -- if you tell me that, I will agree; I accept that.

Q. You don't quarrel --

A. No, I don't quarrel.

Q. And including Barefoot Bay, is that correct?

A. Correct.

Q. Now, the water and wastewater utilities continued to play a large role in Avatar Holdings' business until it sold off the mid-west utilities in 1993 for approximately $60 million, is that correct?

A. That is correct.

Q. When you acquired Avatar, it had significant land holdings in Florida, correct?

A. That is correct as well.

Q. And these included Barefoot Bay?

A. Yes.

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Q. And a number of other land holdings?

A. Right.

Q. Now, you visited a number of these land holdings, isn't that right, sir?

A. Yes, sir.

Q. And you visited a number of these wastewater treatment plants, isn't that correct, sir?

A. I visited mostly water utilities. The only ones I remember having visited were in the mid-west.

Q. You don't recall having visited wastewater treatment plants?

A. No, I don't.

Q. Mr. Levy, at your deposition, I asked you, So you have been to some wastewater treatment --

MR. HIRD: Excuse me, Your Honor. Could he refer to the page and volume?

THE COURT: Yes, sir.

MR. JACOBS: By all means. This is the August 24th, 1995, deposition, in New York City, Page 65, Line 17.

Question --

THE COURT: Wait, wait, wait. Let him find it.

(Pause.)

THE COURT: Okay. Did you give the following answers to the following questions? Go ahead.

BY MR. JACOBS:

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Q. Mr. Levy, did you give the following answers to the following questions? Question, Line 17: So, you have been to some wastewater treatment plants?
Answer: Yes.
A. Yes, that is true. The only ones I remember, though, were in the mid-west.
Q. But they were not just water --
A. No, they were wastewater treatment plants.
Q. And you said you visited a number of land holdings, but you never visited Barefoot Bay, is that correct?
A. I don't recall having visited Barefoot Bay.
Q. And the reason you didn't visit Barefoot Bay is because as an investor, it was worth a lot less to you than these other land holdings, is that correct?
A. That's right. We had a great deal of scattered land in Florida and most of the --
THE COURT: He answered "yes." He answered "yes."
THE WITNESS: Yes.
MR. JACOBS: I'm happy to move on, but I don't want to be interrupting --
THE COURT: No, no, I understand, but he's answered your question, so you can go ahead and ask your next question. He said "yes."
BY MR. JACOBS:
Q. What kind of housing is there at Barefoot Bay,

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Mr. Levy?
A. I'm told it's manufactured housing.
Q. Drawing on a word we used -- or that was used yesterday, is that upscale housing, Mr. Levy?
MR. HIRD: Objection. The witness has testified that he's never been to Barefoot Bay. In answer to the last question, he said he was told it's manufactured. I don't know how he can answer that question based on personal knowledge.
THE COURT: Overruled.
THE WITNESS: No, it is not upscale.
BY MR. JACOBS:
Q. Now, you didn't visit the Barefoot Bay, Carrollwood or Waterway Estates treatment plants, is that correct?
A. That is correct.
Q. That's because they were small investments for you, correct?
A. Relatively small in relation to the company.
Q. That's why you didn't visit them, is that correct?
A. Well, that would certainly have been a major reason.
Q. Mr. Levy, do you recall that at the July 27th, 1984, Avatar Holdings board of directors meeting, Mr. Wilkov, the president at the time of the company, reminded the board that, quote, The Department of Environmental Regulation has been imposing stricter requirements and that in his opinion,

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developmental growth within certain areas will depend heavily upon the availability of water and sewer facilities?
A. I'm sure that's true.
Q. As a member of the Avatar Holdings board of directors, Mr. Levy, you did receive -- you did receive a briefing on wastewater treatment, did you not?
A. Yes, we did.
Q. In fact, by late 1985, you had received a briefing not only on wastewater treatment in general, but on a particular plant called Fiesta Village which at that point in time was in the planning stage, is that correct?
A. I believe it was around that time, yes.
Q. And at that particular same Avatar board of directors meeting, a brochure was distributed entitled Nature's Way: How Wastewater Treatment Works for You, is that correct?
A. I don't recall that, but I will accept that.
Q. Now, Mr. Levy, who is Robert Gordon?
A. Robert Gordon is president of Avatar Utilities.
Q. And how long has he been with Avatar?
A. He was with the company going all the way back, I believe, certainly before I became involved.
Q. So, before 1980?
A. Yes.
Q. But it wasn't Avatar Utilities back then, was it?
A. No. It couldn't have been Avatar Utilities. I guess

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it was Consolidated Water.
Q. Turning now to the Barefoot Bay facility, Mr. Levy, did there come some point in time when you became aware that there was a problem with the disposal of the wastewater at Barefoot Bay?
A. Yes, I believe there was.
Q. And do you recall when you became aware of that problem?
A. No, I do not.
MR. JACOBS: Move 21 into evidence at this time.
MR. HIRD: Your Honor, if you would give us a moment?
THE COURT: Yes, sir.
(Pause.)
MR. HIRD: No objection, Your Honor.
THE COURT: It will be received.
MR. JACOBS: Move 25 into evidence.
(Pause.)
MR. HIRD: No objection.
THE COURT: It will be received.
BY MR. JACOBS:
Q. Mr. Levy, directing your attention to Exhibit 25 --
A. Right.
Q. -- do you have that in front of you?
A. Yes, I do.

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Q. Would you identify it, please?
A. It's the minutes of the board of directors meeting on November 30, 1984.
Q. Directing your attention to Page 4 of Exhibit 25, do the minutes of this November 30th, 1984, board meeting refresh your recollection with respect to the date on which the Barefoot Bay effluent disposal problem came to your attention?
A. Well, it says what it says. I think the document speaks for itself.
THE COURT: Well, whether you think it speaks for itself or not, does it refresh your recollection? That's the question.
THE WITNESS: Let's see. We're on page -- this is Exhibit 25?
MR. JACOBS: Yes, sir, Page 4.
THE WITNESS: Page 4.
THE COURT: Why don't you ask him the question again. It's been a while.
BY MR. JACOBS:
Q. Looking at Page 4 of these November 30th, 1984, board meeting minutes, can you tell me whether the minutes refresh your recollection as to in what year you personally became aware of the problem with the disposal of the effluent from the Barefoot Bay wastewater treatment plant?

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A. Well, my honest answer has to be that, of course, I accept what it says here, but I cannot say that I remember at the time and it doesn't jog something in my memory that reminds --
THE COURT: Okay. He's answered your question.
BY MR. JACOBS:
Q. You have no reason to doubt -- let me ask you this --
A. No, I have no reason to doubt it.
Q. Okay. And you did sign these minutes, didn't you, on Page 9, Mr. Levy?
A. Right. No, I have no reason to doubt them.
Q. That you became aware in 1984 of these problems --
A. Correct.
Q. -- is that correct, sir?
A. Yes, sir.
MR. HIRD: Objection. I don't think that was his testimony. His testimony is that he signed this and that this says what it says; but he has no memory of the specific issue.
THE COURT: Well, I think that's a different matter. I'll overrule the objection.
BY MR. JACOBS:
Q. Now, Mr. Levy, can you tell me what, if anything, was done about these problems at the Barefoot Bay wastewater treatment plant, say, between 1984 and 1987?

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MR. HIRD: Objection. It's not clear what problems are being discussed. He just asked what he -- whether he has any recollection of this issue being raised. I'm not sure --
THE COURT: Well, if he has a difficult time understanding what problems there were, then he can say that and he won't be able to answer the question, but I'll overrule your objection.
THE WITNESS: Will you repeat your question, please?
THE COURT: Read the question back, Mr. Miracle.
(Record read back.)
THE WITNESS: I'm afraid I cannot.
BY MR. JACOBS:
Q. Okay. Now, at the January 30th, 1987, meeting of the Avatar Holdings board of directors, you received another report on this same problem, did you not, sir?
A. I would have to look at those minutes.
Q. Very well. Government Exhibit 53 will be directed to your attention.
MR. JACOBS: Your Honor, may I move 351 into evidence while he's looking at that, the minutes?
MR. HIRD: No objection.
THE COURT: 351?
MR. JACOBS: Yes, sir.

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THE COURT: All right. It will be received.
MR. JACOBS: And while he's looking, can I move 53 in, also minutes?
MR. HIRD: No objection.
THE COURT: It will be received.
THE WITNESS: Your question was -- excuse me.
THE COURT: I don't think he's asked -- you haven't asked a question yet, have you? You asked him to turn to Exhibit 53, correct?
MR. JACOBS: That was the last thing I did.
BY MR. JACOBS:
Q. The question was, before that, at this January 30th, 1987, meeting of the board of directors of Avatar Holdings, you received another report on the Barefoot Bay effluent disposal problem, is that correct, sir?
A. So it says in the minutes, yes. I believe the -- I'm sure they are correct.
Q. In fact, at that meeting, Mr. Wilkov, the president, reported that under consideration is extending the option to purchase property contiguous to the Barefoot Bay subdivision, the purpose being to determine if the soil tests positive for spray irrigation.
He advised that the 40 acres previously acquired by Avatar Utilities for such purpose had proven unsuitable for percolation ponds and a damage claim against the testing

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engineer is being considered.
He also advised that if the optioned property tests positive, we would construct a golf course on approximately 80 acres and develop the remaining 190 acres for home sites.
A. Right.
Q. Do you recall whether Mr. Wilkov gave that report at the meeting, sir?
A. My memory just doesn't work that I can remember him giving the report, but I'm sure he did if it says so.
Q. And you did sign these minutes on Page 8, sir?
A. And I certainly signed the minutes.
Q. Now, you personally continued to receive reports on this problem, did you not, sir?
A. I assume that if the reports were sent, I would receive them.
Q. All right. Let me direct your attention to Exhibit 61.
A. Right.
Q. Do you have that in front of you, sir?
A. Yes, I do.
Q. Do you see your name in the upper right-hand corner, handwritten; C.C.: Leon Levy? Can you make that out?
A. Oh, yeah.
Q. Okay. Now, this is a report -- the cover memo, anyway, is a report from John Sladkus to Peter Sharp, is

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that correct?
A. That is correct.
Q. And it attaches a memo from Robert Gordon to the file, is that correct?
A. It says: Enclosure: Robert -- Bob Gordon's memo of 2-10-88. The following page -- yes, it's Robert Gordon to the file.
Q. Now, Mr. Gordon's memo has to do with the meeting that he had with DER, is that correct?
A. Yes, the Orlando Department of Environmental Regulations. That's correct.
Q. In fact, this meeting Mr. Gordon represents as being held on February 9th, 1988, is that correct?
A. That's what he represents.
Q. And the purpose of the meeting which takes place in the Orlando Department of Environmental Regulation office is to discuss the proposed consent order recommended by the Orlando DER office in August 1987, is that correct?
A. That is apparently correct.
Q. And the consent order, according to Mr. Gordon, as originally drafted, basically required the company to eliminate the discharge from the Barefoot Bay wastewater treatment plant to a nearby canal and imposed a moratorium on additional connections to the system until there was a final resolve of the effluent disposal problem.

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The company countered with a recommended consent order whereby the company would request approval of the surface water discharge; would institute monitoring of the nearby canal to determine the level of treatment to meet water quality standards; would proceed to make any necessary changes to its treatment process to meet water quality criteria even if this meant converting the existing plant to advanced wastewater technology, is that correct?
A. That's what it says, and there's no reason not to believe it.
Q. And Mr. Gordon further represents that the meeting opened up with Mr. Alexander of the DER indicating that the discharge into the canal had gone on for over three years without an apparent resolve of the problem in the near future, and he wanted action now.
George Gioia, G-I-O-N-I-S, the Orlando DER enforcement officer, stated that it was their position that the consent order as proposed by the DER should be executed. And in order to discontinue the existing discharge to the canal, the company should proceed with construction of the percolation basins on the new 40-acre site.
Have I accurately represented that portion of the memo, sir?
A. Yes, you have.
Q. Continuing on, Mr. Landers, the Florida Cities Water

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Company attorney, proceeded to -- and I have added that in for the Court's benefit -- proceeded to explain that building the ponds did not solve any problem in that the ponds would not have sufficient capacity to eliminate the entire current discharge. If the surface water discharge was approved, building of the ponds would be a complete waste of time.
THE COURT: Of money.
MR. JACOBS: Thank you.
BY MR. JACOBS:
Q. Although the existing outfall was illegal, there was no reason why the DER could not approve a temporary discharge permit while the testing was going on.
Have I accurately represented that paragraph, as the Judge corrected me?
A. Yes, you have.
Q. After private discussion by the two parties -- I'm skipping down a little ways -- the company proposed the following: The company would enter into a consent order which would not contain a moratorium; would agree to immediately construct a spray irrigation system on the 40-acre site; and proceed to design and construct a deep well.
This proposal was generally accepted by Mr. Alexander, although expressing some reservation about the continued

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connection of additional customers to the system.
We also indicated that we needed our board approval before the consent order could be executed.
Did I accurately represent –
A. Yes, you accurately read it.
Q. Now, moving from Mr. Gordon's memo to the shorter memo which is the first page of Exhibit 61, Mr. Sladkus tells Mr. Sharp that he's – first of all, in Paragraph 1 – and I'll try and paraphrase this to save time – that he's sending along a copy of Mr. Gordon's memo, is that correct?
A. That is correct.
Q. And he essentially paraphrases the memo in the following four paragraphs. Although he's numbered the paragraphs 2, 3, 3 and 4, there are a total of five paragraphs, is that correct?
A. Right.
Q. And he's outlined there the cost of the deep well system in Paragraph 3, is that correct?
A. This is on –
Q. In the first Paragraph 3, on that first page, Exhibit 61?
A. The deep well system – oh, yes, $2 million. Right.
Q. Okay. And he also says, quote, We have confidence that it will be effective because there are a number of deep wells in the area. Correct?

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A. Right.
Q. And then he goes on to say, In addition, if successful, it will solve our Barefoot Bay problem once and for all?
A. That is correct.
Q. And I continue to quote, And finally, we really don't have any alternative. Did I accurately read that part –
A. Yes, you did.
Q. – of Paragraph 3?
Now, backing up to Paragraph 2, the proposed resolution is as follows: We would immediately spray irrigate on the 40-acre Hearndon property.
Now, we haven't touched upon that yet, Mr. Levy. What is the 40-acre Hearndon property?
A. I really can't answer that without being –
Q. Refreshed?
A. – refreshed.
Q. Okay. I can perhaps do that later.
We would also proceed with the design and subsequent construction of a deep well system. Correct?
A. That's what it says.
Q. The spray irrigation will pose no significant expense since we have spare traveling irrigators on Plant Number 2 in Poinciana, is that correct?
A. That's what it says.

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Q. What's Plant Number 2 in Poinciana, Mr. Levy?
A. I just don't know.
Q. What's Poinciana?
A. Poinciana is a large development outside of Orlando, or Kissimmee.
Q. I'm sorry?
A. Near Kissimmee.
Q. And do you know who owns that development?
A. We do.
Q. Meaning Avatar Holdings?
A. Avatar Holding, yes.
Q. So, is it fair to say that based on Mr. Sladkus' memo here that the irrigators are going to be moved from Poinciana's wastewater treatment plant over to the Barefoot Bay treatment plant?
THE COURT: Just a moment.
MR. HIRD: Objection; no personal knowledge.
THE COURT: I'll overrule the objection – well, no, I'll sustain the objection to the form of the question, whether it's fair to say, particularly in the context of his previous responses. I'll sustain the objection.
BY MR. JACOBS:
Q. Is Mr. Sladkus here proposing that the irrigators be moved from another Avatar facility, Mr. Levy?
A. That apparently seems to be what he's saying, yes.

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Q. Now, moving down to what I'll call the second paragraph 3, which is actually the fourth paragraph, Mr. Sladkus says: As you will note in the memo, Bob made a tentative commitment subject to the board's approval.
Is "Bob" referring to Bob Gordon here?
A. I assume that's right, yes.
Q. And then he says, Meaning, of course, your consent to the above. Do you know what that means?
A. I assume that it – Peter Sharp was the chief executive and that Sladkus wanted to be sure that Peter agreed with what Bob's commitment was.
Q. And Peter Sharp here is essentially the board as far as Mr. Sladkus is concerned, is that correct?
MR. HIRD: Your Honor, objection. It's not clear the board of which company. We have several companies that could be involved: Florida Cities, Avatar Utilities, Avatar Holdings.
THE COURT: Well, he can explain that if – overruled.
You want the question read back, sir, or do you remember the question?
THE WITNESS: Well, yes. I guess that Peter was the chairman of the executive committee. And I believe at that time he was the chief executive officer of the company, and he would act for the – as chief executive officer.

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(The witness' microphone fell on the floor.)
THE WITNESS: They never gave me any mechanical problems to work on with that company.
THE COURT: Why don't you let Mr. Doherty place the microphone where it needs to be, Mr. Levy. If you have problems with it, you call on Mr. Doherty here who is our mechanical engineer.
THE WITNESS: All right. Thank you.
Well, Peter -- first of all, normally, I guess in most companies, in between board meetings, the executive committee and the chairman of the executive committee acts for the board. I believe that it's that way with Avatar.
BY MR. JACOBS:
Q. Okay. I think you answered my previous question. Let me ask you another one, Mr. Levy. You referred to the company and Mr. Sharp's role, or roles, in the company. What company and what board were you referring to?
A. Well, I was referring -- there are so many different companies here, and each question would have to have its own answer.
Q. Right. Now, the question refers to actually your previous response: Peter Sharp, he was chairman of the executive committee of what company?
A. He was chairman of the executive committee of Avatar, but don't forget --

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Q. Avatar Holdings?
A. Avatar Holdings.
But you must be careful, because I am on the board of Avatar Holdings and have had very little to do with the utility companies, so my frame of reference would be Avatar Holdings whether --
MR. JACOBS: Move to strike, Your Honor.
THE COURT: Overruled; denied.
Go ahead. Ask your next question.
BY MR. JACOBS:
Q. In what I have called the second Paragraph 3, Bob made a tentative commitment subject to the board's approval. In this context, what board are we talking about, sir?
A. I can't tell.
Q. He says, Meaning, of course, your consent to the above, referring to Mr. Sharp. Do you know whether Mr. Sharp served on the board of any other Avatar entities?
A. No, I don't. I mean, he may have. I just don't know.
Q. Mr. Levy, directing your attention now to Government Exhibit 80, do you recognize this?
A. Yes, I do.
Q. Would you identify it, please?
A. It's the annual utility operations review meeting dated January 20, 1989. And there's an enclosure which seems to be the agenda for the meeting -- which is the

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agenda for the meeting.
MR. JACOBS: Move Exhibit 80 into evidence, if you will, Your Honor.
MR. HIRD: Your Honor, this witness -- this would still be subject to our objections for matters relating to barred claims and issues that preceded the statute of limitations, so I would like to preserve those objections for the record.
I would also like to state, with respect to any questioning on such documents, I wonder if we could have a standing objection with respect to those issues so we don't have to raise them with respect to specific questions.
THE COURT: Very well.
The Court will adhere to its previous rulings and will overrule your objections as to Government's Exhibit 80, and you will have the standing objection as you requested.
MR. JACOBS: Proceed, Your Honor?
THE COURT: Yes, sir.
BY MR. JACOBS:
Q. Mr. Levy, you did receive a copy of this, did you not?
A. Yes.
Q. In fact, that's your handwriting on it, correct?
A. I think it is. I'm sure, yes.
THE COURT: Let's take a ten-minute recess.
(A recess was taken.)

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THE COURT: Mr. Jacobs.
MR. JACOBS: Thank you, Your Honor.
BY MR. JACOBS:
Q. Mr. Levy, do you still have Trial Exhibit 80 in front of you?
A. Exhibit 80?
Q. Yes, sir?
A. Just let me check. Here it is, 80. Yes, Mr. Jacobs.
Q. And you did receive a copy of this memorandum at or about the time that it was written, correct?
A. Yes, I believe so.
Q. January 20, 1989?
A. Right.
Q. And it advises you of an upcoming utility meeting, did it not?
A. Yes, it does.
Q. And one of the items it advises you of is the agenda on a major construction project at Barefoot Bay, is that correct?
A. Yes, that's correct.
Q. Item number nine and the major construction project under item number nine for Barefoot Bay is deep well disposal system, is that correct?
A. That's correct.
Q. What is a deep well disposal system?
A. Well, it's a well that goes I guess below the surface

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water and you put effluent into the deep -- into the deep well.
Q. So you do understand that it's used for disposal of effluent?
A. Yes, I understand that.
Q. And the other major construction project listed is the Waterway Estates Wastewater Treatment Plant, is that correct?
A. Yes, that's correct.
Q. Now, do you recall whether at some later point in time the concept of a deep well for the Barefoot Bay effluent was rejected?
A. I don't recall that either way.
Q. Directing your attention then to Exhibit 96, do you have that in front of you, sir?
A. That is the one that begins with Ohio Suburban Water Company, Peter Sharp from Robert Gordon, August 16th?
Q. Yes. You're looking down into the text. If you could refer to the caption to identify it, sir.
A. Right.
Q. Is it from Gordon to Sharp and Wilkov?
A. It is, indeed.
Q. And subject, Avatar Utilities, general?
A. Correct.
Q. And the date is August 16, 1989?
A. That's correct.
Q. And you're the recipient of this memorandum, is that

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correct, sir?
A. Yes, I am.
Q. Directing your attention to page 3 of the exhibit. The first paragraph reads, the further the company gets into the deep well injection process, the more uncertain the whole process becomes. What company is this?
A. I assume that's Avatar Utilities. I don't know for a fact.
Q. All right, sir. The DER is demanding more and more testing and monitoring system design while at the same time expressing concern that the, quote, geology in Brevard County is properly understood and in at least one area of the county appears to be unsuitable for class one injection wells. The company's confidence level for success is expanding.
Did I accurately read that?
A. You accurately read that, Mr. Jacobs.
Q. And then he goes on to say, they're looking at spray irrigation at the time, is that correct?
A. That's correct.
Q. And he's advising the recipients of this memo that among other possibilities, he's looking at the possibility of acquiring orange groves on which to spray the effluent instead of constructing the deep well, is that correct?
A. That seems to be what he recommends or suggests we explore.

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Q. And he's even telling you he's thinking of going into the citrus business, isn't he? If you look at the second paragraph from the bottom of page 3.
A. Yes, well I think that would be not a recommendation to go into the citrus business, but if we go into the buying of the place to put the affluent, we would have to be in the citrus business and find out what it's about.
Q. Now I think you said "affluent," did you mean a effluent?
A. Right, right, excuse me.
Q. The other recipients of this memo, sir, are Mr. Allen, Mr. Getman, Mr. Kleinerman and Mr. Sladkus. Would you identify Mr. Allen, please?
A. Yes. Gerald Allen is the second person in Avatar Utilities.
Q. And Mr. Getman I believe you identified. What about Mr. Kleinerman?
A. Mr. Kleinerman was the chief financial officer of the company at that time.
Q. And for clarification, which company are we discussing?
A. He was chief financial officer of Avatar, but he may have also been chief financial officer of Avatar Utilities, GLU -
Q. Mr. Levy, do you mean Avatar Holdings?
A. Well, depends on context.
Q. What context did you mean the last answer?
A. My last answer, since I'm thinking in terms of Avatar

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since they're the people I work for, I would be most of the time thinking in terms of Avatar, but that is not a legal thought, that's merely a colloquial identification.
Q. When you identify Mr. Kleinerman as being an officer of Avatar, did you mean Mr. Kleinerman as an officer of Avatar Holdings?
A. He was an officer of Avatar Holdings.
Q. At the time of this memorandum, sir?
A. He also may have been an –
THE COURT: His question is at the time of this memorandum was he an officer of Avatar Holdings.
THE WITNESS: Yes, he was.
THE COURT: And you said he was also what?
THE WITNESS: He also may have been an officer of Avatar Utilities or whatever.
MR. JACOBS: Move to strike as speculation.
THE COURT: Overruled, denied.
BY MR. JACOBS:
Q. Now, if Mr. Gordon on behalf of Avatar Utilities wants to go ahead and build the deep well, whose approval does he need?
A. Well, the stock of Avatar Utilities was owned by Avatar Holdings, and which might have given him very, very broad discretion, but I think it's a matter of policy, you would notify the largest stockholder if you had a major expenditure in view.

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Q. Well, didn't we already establish that anything over a hundred thousand, you, Mr. Sharp or Mr. Sladkus had to personally approve?
A. We established that for signing checks at one particular time. I don't think it suggests anything more than that.
Q. Well, is it your testimony that Mr. Gordon did not require Mr. Wilkov and/or Mr. Sharp's approval in order to expend the funds that would be necessary either for the deep well or the spray irrigation?
A. I don't think I testified on that one way or another.
Q. Okay.
Do you have an understanding one way or another with respect to that?
A. I would think he would probably, as a matter of policy, discussed it with Mr. Sharp or –
Q. And sought Mr. Sharp's approval?
A. And sought that.
Q. Directing your attention now to Government Exhibit 97, sir, if you would. Do you have that in front of you, sir?
A. Yes, I do.
Q. And in this memorandum, Mr. Gordon – or rather Mr. Gordon writes this memorandum five days after he wrote the previous one that we discussed, correct, which was Exhibit –
A. Why I'll take your word for it.
Q. I'm sorry, correction, Trial Exhibit 97?

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A. Uh-huh. (Indicating affirmatively.)
Q. So he's written 97 five days after 96, is that correct?
A. Well, is that date? Want me to check it or shall I take your word for it? I'd rather take your word for it, Mr. Jacobs.
Q. If you'll accept it, I'm sure the Court would.
MR. HIRD: We'll stipulate it was written five days later.
THE WITNESS: Right.
THE COURT: Thank you.
BY MR. JACOBS:
Q. And this second memorandum, Trial Exhibit 97, also relates to the possibility of an acquisition of an orange grove in the vicinity of the Barefoot Bay Plant to be used for effluent disposal, is that correct?
A. That's correct.
Q. And this memorandum is again written from Mr. Gordon to Mr. Sharp with copies to Mr. Allen, Mr. Getman, Mr. Kleinerman, Mr. Levy and Mr. Sladkus?
A. That is correct.
Q. Now, do you recall receiving on or about November 27th, 1989, a rather extensive report authored by Mr. Allen on the subject to alternatives to deep well injection?
A. I don't recall receiving it, but as I think you asked me in my pre-trial examination, I don't have a very good memory

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for all of those things.
Q. Directing your attention to Government Exhibit 115.
A. Right.
Q. Does 115 refresh your recollection with respect to whether or not you were the recipient of an extensive report from Mr. Allen on the subject of wastewater disposal alternatives to deep well injection at Barefoot Bay?
A. I accept it, I did receive it, Mr. Jacobs. I don't think you're misleading me by putting in.
Q. I'm sorry, I didn't hear you.
A. I don't think I would be misled by having somebody putting this in and ask me whether I received it if I hadn't received it.
Q. I'll stipulate to that, and can I ask you, sir, did you recall receiving it at or about the time that it was written and it's dated November 27, 1989?
A. Well, I would agree that I would have received it at that time.
Q. Directing your attention on the top of page 3, Mr. Allen represents that there are approximately three thousand –
THE COURT: Page 3 of what?
MR. JACOBS: I'm sorry, sir, same exhibit.
MR. HIRD: My exhibit of 115 is one page.
THE COURT: Yeah, there's only one page in Exhibit 115 in my notebook.

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MR. JACOBS: Uh, we might have consolidated 114 and 115. I suspect that 115 is the cover page for the report or cover memorandum for the report which is actually –

THE COURT: 114 in my book is Wastewater Disposal Alternatives to Deep Well Injection.

MR. JACOBS: Right, that would be the report that was transmitted by cover memorandum, Exhibit 115.

THE COURT: All right.

MR. JACOBS: I'm sorry for the confusion. Why don't we look at 114 since that appears to be the correct –

THE COURT: You want him to turn to –

MR. JACOBS: Page 3.

THE COURT: Three.

BY MR. JACOBS:

Q. And in the event we've not moved 114, I think we moved 114 already into evidence, yes, we have, so there is no problem there.

Now, Mr. Levy, directing your attention to the second full paragraph on page 3 of Exhibit 114, Mr. Allen represents that there are approximately three thousand acres of orange groves located within one point five miles of the Barefoot Bay Wastewater Treatment Plant.

A. Where on page 3 of exhibit?

Q. 114?

A. Right, yes, I'm with you.

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Q. Now, moving down to the third full paragraph on this same page of Exhibit 114, there is a discussion in that paragraph of consummating *reuse agreements with the orange grove owner.*

A. Right.

Q. Mr. Levy, do you know what reuse means in that context?

A. I can surmise, but that would be – I don't know for a fact.

Q. Just give me your best understanding if you would then, sir?

MR. HIRD: Calls for speculation.

THE COURT: Well –

THE WITNESS: I would think –

THE COURT: Wait, wait, wait, wait.

THE WITNESS: I'm sorry.

THE COURT: Well, just a minute, just a minute. You said you would be surmising. Well, let's go ahead and give us that and I may strike it. It's how knowledgeable he appears to be. I'll overrule the objection.

THE WITNESS: I think it only means they would, after they were finished with whatever irrigation purposes or water purposes, that the orange groves would be returned to the original owner.

MR. JACOBS: I would stipulate to striking the response.

THE COURT: Well, they may withdraw the motion at

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this point.

All right, do you adhere to your motion or your objection?

MR. HIRD: I adhere to my objection because the answer simply demonstrates that the –

THE COURT: You withdraw the objection?

MR. HIRD: I adhere to it.

THE COURT: Adhere to the objection, all right. It will be sustained, and I'll strike the witness' answer, his response.

BY MR. JACOBS:

Q. Now, Mr. Allen also kept you personally apprised of certain EPA regulations, did he not, sir?

A. Not particularly, no.

Q. May I direct your attention then to Exhibit 548. Do you recognize Exhibit 548, Mr. Levy?

A. Well, I can't say I recall having seen it, but I'm sure I did and I notice my handwriting on top of it.

Q. Is that handwriting that says file?

A. Yes.

Q. And you're on the distribution list on page 2, is that correct?

A. Yes, I am.

MR. JACOBS: Move 548 into evidence.

MR. HIRD: Your Honor, we object at this time, on

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grounds previously stated, also irrelevant. This deals with drinking water treatment standards, has nothing to do with wastewater treatment. Avatar Holdings ran drinking water – I'm sorry – Florida Cities and other Avatar Utilities subsidiaries ran water treatment systems to provide drinking water. Avatar Utilities and Florida Cities also ran water treatment plants providing drinking water and this rule deals with drinking water regulations.

MR. JACOBS: Your Honor, indeed it does, but the question was, did Mr. Allen keep you apprised of certain EPA regulations. It was more general, it was not specific.

THE COURT: I'll overrule the objection. Be received.

THE WITNESS: Apparently he did, and occasionally whether he did it systematically or frequently or rarely, I cannot tell you.

BY MR. JACOBS:

Q. Mr. Levy, now directing your attention to the Waterway Estates Wastewater Treatment Plant, do you recall being privy to the issue of Florida Cities' acquisition of the entire Lee County water and wastewater utilities system?

A. No, I don't recall it now.

Q. Directing your attention to Government Exhibit 384.

A. All right.

Q. Just to be sure, does this exhibit have three pages,

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Mr. Levy?
A. Yes, it does.
Q. And is the first page a memorandum from Mr. Sharp to Mr. Gordon?
A. Yes, it is.
Q. And does it attach a memorandum from Mr. Gordon to Mr. Sharp and Mr. Wilkov on which you're listed as a cc?
A. Yes, it does.
Q. Do either of these memorandums refresh your recollection to whether it was Florida Cities' goal to acquire the entire Lee County Water and Wastewater Utility System?
A. No more than merely the statement as it says here. That may have been a brainstorm of Peter's on that day or he may have been serious, I don't know.
MR. JACOBS: Non-responsive, move to strike. I asked him if it refreshed his recollection about the objective, I didn't ask him anything about whether it was serious or not.
THE COURT: Oh, I'll leave it in and I'll deny your request.
BY MR. JACOBS:
Q. Now, Mr. Sharp is saying that Florida Cities' long term objective should be to own the entire Lee County system, that is, the County's facilities as well as the City's, is that correct?
A. That's what he said.

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THE COURT: Just a moment.
MR. HIRD: Your Honor, although the second part of this Exhibit appears to be copied to Mr. Levy, there is no evidence that the first page has been -- ever came to Mr. Levy's attention, therefore I object to him being questioned without having personal knowledge.
THE COURT: Yes.
MR. JACOBS: It's hard to know exactly what he's seeing and what he hasn't seen because he testified that he throws a lot of documents away, and he's also testified that his recollection isn't very good, so I think it's fair to ask him about --
THE COURT: When did he testify he's thrown a lot of documents away? I may have missed that.
MR. JACOBS: No, I'm sorry, Your Honor, he did that in a deposition. I can --
THE COURT: Don't tell me what he said in a deposition.
MR. JACOBS: I can go through that. I'll voir dire him on this if that will assist the process.
THE COURT: I'll overrule the objection and receive it.
BY MR. JACOBS:
Q. Now Mr. Levy, Mr. Sharp says that the Florida Cities Water Company's long term objectives should be to own the

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entire Lee County system, that is the county's facilities as well as the city's, is that correct?
A. That's what it says.
Q. To your knowledge, did anyone ever countermand that objective?
A. No, not to my knowledge. I don't know. I'll leave it at that.
Q. Now, Mr. Levy, shutting down one of Florida Cities Lee County Wastewater Treatment Plants would not have been consistent with that objective, would it have been?
A. Well, he doesn't say it was an objective. It said it should have been an objective. I think he means that as a subject for discussion. I mean that's my interpretation, but he doesn't say it's an objective.
Q. He says Florida Cities' long term objective should be to own --
A. He doesn't say it's --
THE COURT: Wait, wait, wait, wait, wait, let him finish his question before you start answering.
BY MR. JACOBS:
Q. Mr. Sharp says, Florida Cities' long term objective should be to own the entire Lee County system, that is, the county's facility as well as the city's, is that correct?
A. That is correct.
Q. Now, to shut down one of the Florida Cities Wastewater

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Treatment Plants in Lee County is not consistent with that objective, is it?
A. Well, but there is -- I have a problem with the language because I don't know whether subjective should be there. You're talking about a -- well, look, I'm quibbling.
THE COURT: What did you say, sir?
THE WITNESS: I say, it would not be -- I'm not so sure that was an objective of Peter Sharp's, even from his language, which is all I have here, because when he said should be, that does not to me indicate an objective. That is like will be or is or it's something else.
BY MR. JACOBS:
Q. So, you're testimony is you're not sure whether this is -- strike that. I'll go back to my other question then.
Assuming that Mr. Sharp is stating that the objective should be and he is stating that the objective should be to own the entire Lee County system, isn't it true that shutting down one of Florida Cities' plants would not be consistent with that objective?
THE WITNESS: As far as the city's plants?
THE COURT: Just a moment.
MR. HIRD: Asked and answered, Your Honor.
THE COURT: Well, we got an answer of sorts. Let's try it again. Go ahead, see if you can answer it. Answer the question.

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THE WITNESS: Florida Cities –
THE COURT: Assuming that that is just an assumption.
THE WITNESS: No, no, Florida Cities is in Lee County.
BY MR. JACOBS:
Q. I think the Court can take judicial notice of the fact that the Waterway Estates Plant is in Lee County.
A. All right.
On that assumption, yes, you're right, it is inconsistent with acquiring all of the Lee County systems.
Q. Shutting down the Waterway Estates Plant would be inconsistent with the objective of owning the entire Lee County system, is that correct?
A. That is correct.
Q. In fact, the exact opposite is true, right? Rather than shutting down a plant, acquiring another plant would be consistent with that same objective, correct?
A. I think unless I were aware of all the circumstances surrounding it, I couldn't – I couldn't certify that – agree with that necessarily.
Q. Well, assuming that the objective is to acquire the entire system, acquiring another plant would be consistent with that objective, correct?
A. Well, might have been duplication.
MR. BULLOCK: If the Court please, he's actually

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going – the basis of my objection is Mr. Levy's I believe testified that he doesn't have the factual background to understand what the Lee County system was and if we want to get into how many plants were in Lee County, how many customers they were going to treat, whether the plants they were going to buy or the plants they were going to shut done switched the same customers to other plants, that's a different story, but this hypothetical is getting way out of what the witness already testified he has any substantive knowledge or the ability to base an intelligent answer on the facts of that hypothetical.
THE COURT: Mr. Jacobs?
MR. JACOBS: Well, Your Honor, I think we finally got an answer to the question of what the objective was and I'm just taking it one step further and he's an intelligent man and he's the chairman of the board of the company and I think I'm establishing that.
THE COURT: I'll overrule the objection. I'll permit him to answer this question and let's move on.
THE WITNESS: Could you read that back to me, please?
(Record read back.)
And I suggest I cannot answer that because I don't know whether the other plant – closing down another plant wouldn't duplicate, might possibly expedite the acquiring of the system. Maybe one is duplicative of another. I just don't

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have enough information to be able to answer that.
MR. JACOBS: Your Honor, I respectively move to strike the answer as non-responsive. It is one thing to say he doesn't know, but he went on to speculate that shutting down might be –
THE COURT: Motion denied, ask your next question.
BY MR. JACOBS:
Q. Mr. Levy, are you aware that at the time Mr. Sharp and Mr. Gordon are exchanging these memoranda and the issue of acquiring all of the Lee County Waste – sorry, Wastewater and Wastewater Utilities is on the table that Florida Cities is discharging in the Caloosahatchee River without a permit?
A. No, I was not aware of that.
Q. Mr. Levy, isn't it true that over ten years ago, the Avatar Holdings' Board of Directors was concerned about potential liability for environmental violations?
A. That is certainly true.
Q. In fact, that issue came up at the January 30th, 1986 meeting of the audit committee of Avatar Holdings Board of Directors, isn't that correct?
A. That is correct.
MR. HIRD: Your Honor, I object. There's been no establishment that Mr. Levy served on the audit committee, so he cannot – this is going beyond his personal knowledge.
THE COURT: Well, I don't know whether it is or not.

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He may have personal knowledge.
MR. JACOBS: He already answer it.
THE COURT: What was his answer?
MR. JACOBS: Correct.
THE COURT: Well, ask your next question.
BY MR. JACOBS:
Q. In fact, isn't it true that the minutes of the March 20, 1986 audit committee meeting reflect that Mr. Getman, Mr. Gordon and Mr. Sladkus had met with Mr. David Berz, Esquire, an environmental attorney with Avatar general counsel Weil, Gotshal & Manges and that the purpose of that meeting was to discuss Mr. Berz' review and a settlement of the utility company's potential liability exposure and that Mr. Getman expressed Mr. Berz' opinion that the existing corporate structure and operating procedures provide adequate liability protection against an attempt to, quote, pierce the corporate veil, but that further assessments would be made?
MR. HIRD: If he's reading from an exhibit, can we have the exhibit number?
THE COURT: Yeah. I think the appropriate way to do that is let's get to the exhibit that you're reading from.
MR. JACOBS: By all means, Judge. I apologize. I'm trying to move things along. It's Government's Exhibit 353 and it is already in evidence.
May I inquire as to whether Ms. Cole has recorded

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this as being in evidence, 353?
THE CLERK: No, it's not.
MR. JACOBS: Move 353 into evidence.
MR. HIRD: Your Honor, we do not object.
THE COURT: Be received.
MR. JACOBS: Move 48 in evidence, if it's not in evidence.
MR. HIRD: What is 48?
MR. JACOBS: Also minutes. These are both minutes. Have they been accepted, Your Honor?
MR. HIRD: I'm trying to find 48. No objection to 48.
THE COURT: All right.
353 and 48 will be received.
BY MR. JACOBS:
Q. Let's look at 48 for a moment, Mr. Levy.
A. That's Exhibit 48. I don't think I have that here?
Q. We'll get it for you in just a moment.
A. I have it.
Q. Now, Mr. Levy, can you identify Exhibit 48?
A. Well, I see I have it in front of me, yes.
Q. Can you?
A. It's the minutes, oh, I'm sorry, it's the minutes of the meeting of the board held on Friday, March 21st, 1986.
Q. And is your signature on page 10? This is again Exhibit

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48, for the record.
A. Yes, that is my signature.
Q. And then is there an Exhibit A attached to these minutes, sir, following page 10?
A. Well, there's some minutes of the audit committee, yes, Exhibit A, something wrote in pen, yes, that's right.
Q. So the audit committee minutes are an exhibit to the minutes of the entire board of Avatar Holdings, is that correct?
A. They certainly were at this time if Exhibit A was written at this same time as the rest were when they were attached.
Q. Look at page 4 of the audit committee minutes.
MR. JACOBS: And while the witness is doing that, can I just ask for a stipulation, to speed things up, from Avatar Holdings, that in fact, and perhaps Ms. Tsotsos can speak to this, that the minutes of the Avatar Holdings Audit Committee or rather the Audit Committee of the Board of Directors of Avatar Holdings are in fact exhibits in the minutes --
THE COURT: Why don't you consult with -- if you're asking for a stipulation, my rule is to not request that in the present of the trier of the facts?
MR. JACOBS: Forgive me, sir.
THE COURT: Or within the trier of the facts' hearing.
MR. HIRD: Your Honor, we'll stipulate that the audit committee minutes are exhibits to the minutes of the board

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meeting. We'll not stipulate that Mr. Levy was in attendance at the audit committee meeting.
MR. JACOBS: I didn't go as far as that, all I wanted to be clear is --
THE COURT: Is the format?
MR. JACOBS: Yes, sir.
THE COURT: All right.
MR. JACOBS:
Q. Now, look at page 4 of the audit committee minutes, Mr. Levy?
A. Page 4 of the audit committee minutes?
Q. That would be three pages back from the end of the exhibit.
A. This is Exhibit 48?
Q. Yes, sir.
A. Right.
Q. Mr. Gordon indicated David Berz, Esquire, an environmental attorney with Avatar's general counsel --
THE COURT: You're reading now?
MR. JACOBS: YES.
THE COURT: Right.
MR. JACOBS: Yes, sir.
THE WITNESS: This is what page of that audit committee meeting?
THE COURT: Page 4.

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BY MR. JACOBS:
Q. Page 4, Mr. Levy, first full paragraph. I'm going to read it again to speed things along.
Mr. Gordon indicated that David Berz, Esquire, an environmental attorney with Avatar's general counsel, Weil, Gotshal & Manges, had been contacted requesting his assistance in assessing the utility company's environmental liability exposure with recommendation to limit said exposure, if any.
Did I accurately read that paragraph?
A. Yes, you did.
Q. Now, turning your attention to Exhibit 353, do you recognize that, sir?
A. That is minutes of a meeting of the Board of Directors held on May 29th, 1986.
Q. And you signed those minutes on page 8, did you not, sir?
A. Yes, I did.
Q. And attachment, it's an Exhibit A, which represents the minutes of the meeting of the audit committee of the Board of Directors of Avatar Holdings on March 20, 1986, correct?
A. Yes, they seem to be attached.
Q. And could I direct your attention, please, to page 4 of the audit committee notes, and again, that would be for your convenience, sir, four pages back from the end of the exhibit?
A. Right, I have it in front of me.
Q. And I'm going to read into the record the second full

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paragraph.
Mr. Getman reported that he, Mr. Gordon, and Mr. John K. Sladkus had met with David Berz, an environmental attorney with Weil, Gotshal & Manges, in Washington, DC, to discuss Mr. Berz' review and a settlement of the utility company's potential liability. Mr. Getman expressed Mr. Berz' opinion that the existing corporate structure and operating procedures provide adequate liability protection against an attempt to, quote, pierce the corporate veil, unquote. But that further assessments would be made.
Did I accurately read that paragraph, sir?
A. Yes, you did, Mr. Jacobs.
Q. Now, directing your attention to Government Exhibit 356, which I'll move into evidence at this time.
THE WITNESS: Is that the –
THE COURT: Will be received.
THE WITNESS: That is the minutes of the board meeting of Wednesday, July 30, 1986?
BY MR. JACOBS:
Q. And you signed those minutes, sir?
A. Yes, I did.
Q. Now, Mr. Levy, the majority of these minutes are devoted to environmental matters, is that correct?
A. I would have to read them in order to be able to answer that.

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Q. Fair enough.
THE COURT: What are you referring to? You're referring to –
MR. JACOBS: To 3 –
THE COURT: What exhibit?
MR. JACOBS: 356, sir.
THE COURT: 356. Well, we're not going to wait for him to read it. He can scan them if he wants to. We're not going to wait for him to read it.
MR. JACOBS: Fair enough.
BY MR. JACOBS:
Q. Let me see if I can put it a different way, Mr. Levy. Isn't it true that a majority of these meetings related to environmental issues, including –
A. Oh, this meeting, I would agree with, yes, I thought you were asking me in general if the minutes of the board refer to environmental matters.
Q. No, I'm just asking you about this meeting, sir?
A. Yes.
Q. Mr. Levy, were you personally concerned at any time that Avatar Holdings might be called to account for the environmental violations of Florida Cities?
A. I was concerned about everything that Avatar Utilities did, but I felt the people in the water companies were very conscientious and that they would, as you have to rely on other

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people, I felt comfortable relying on them.
Q. Mr. Levy, Avatar is a public trade corporation, isn't that right?
A. That's correct.
Q. And you have a large stake in Avatar Holdings, do you not?
A. That is also correct.
Q. In fact, no one has a larger stake, isn't that right?
A. That is true.
Q. In fact, you beneficially own over twenty-five percent of the stock, isn't that true?
A. No, that's not true.
Q. Directing your attention to Exhibit 591.
A. I'm afraid, Mr. Jacobs, you're probably including all of the stock the Odyssey partners own of which I'm merely one partner.
Q. 591 is already in evidence. It's a 1994 10-Q statement filed with the Securities and Exchange Commission?
A. Which page would you like me to turn to, Mr. Jacobs?
Q. I'd like you to turn to the schedule 14-A information towards the back of the document which lists the principal stockholders.
MR. HIRD: Are you talking about page 14, Exhibit A?
MR. JACOBS: No, it's a computer printout. That's why I'm struggling.

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BY MR. JACOBS:
Q. Let me refer you to Avatar Holdings Exhibit 1, which is the annual report.
MR. HIRD: This contains the same information.
THE COURT: Okay.
Let's move along.
MR. JACOBS: I'm sorry, Your Honor, I'm trying to convert a computer printout into a hard copy of the SEC statement. With the Court's permission, I'll read the footnote that I have in mind. I'll just ask the witness if he agrees. Is that permissible?
MR. HIRD: Which page does the footnote appear on the printout?
MR. JACOBS: I can show it to counsel in the computer version.
THE COURT: All right.
It's all right, fellas, just get on with it.
BY MR. JACOBS:
Q. Mr. Levy, footnote one under principal stockholders and security ownership of management represents that Mr. Levy, Mr. Nash – let me read it. Mr. Levy, Jack Nash, Steve in Bussen-Mayer, Joshua Nash, by virtue of being general partners of Odyssey, share voting and dispositive power with respect to the common stock owned by Odyssey, and accordingly, may each be deemed to own beneficially the common stock owned by Odyssey.

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Do you agree with that statement?
A. Well, I am sure it's legally correct, but in layman's language, obviously all four of us did not own the same block of stock.
Q. The question was whether you beneficially own over twenty-five percent of the stock of Avatar Holdings?
A. Well --
Q. Using the definition, if you will, which is the definition or footnote from the SEC statement?
A. It's the SEC statement, I guess I have to accept that, but --
Q. Thank you.
And the next largest owner is an investment group which owns less than twenty percent, is that correct?
A. That's correct.
Q. Would you tell me, sir, as such a large stockholder in this company, would a multi-million dollar penalty against Avatar Holdings have an economic impact on you?
MR. HIRD: Objection. Are you talking about on Mr. Levy, personally, or on the company, or on Odyssey Partners. I need to know before the question is answered. I think it's vague. It should be clarified.
THE COURT: You need to clarify your question.
THE WITNESS: The question related to?
THE COURT: Wait, wait, wait.

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MR. JACOBS: Whether a penalty, a multi-million dollar penalty against Avatar Holdings would have an economic impact on the witness.
THE WITNESS: Yes, it would have an economic impact.
MR. JACOBS: Why?
THE WITNESS: Well, obviously --
THE COURT: Wait, wait, wait, wait, you have an objection?
MR. HIRD: I object to relevance, Your Honor, why the impact on the individual witness would -- what relevance does it have?
THE COURT: Yes, the issue is economic impact on the Defendant. I'll sustain the objection.
THE WITNESS: I mean, if it lost a dollar --
THE COURT: Wait, wait, wait, wait. I'll sustain the objection.
MR. JACOBS: No further questions.
THE COURT: Mr. Hird, you have -- I've taken under submission your request to be permitted to, at the conclusion of your cross examination, to present testimony that you would present over and above any testimony that you would elicit on cross examination of this witness.
MR. HIRD: Your Honor, actually, I think much of what Mr. Jacobs has questioned the witness about covers topics in my direct examination. I think there may be one or two areas in

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which we might get an objection as to scope and what I would suggest is to go through, because I think Mr. Jacobs has shortened my examination tremendously and I think if I could go --
THE COURT: I hope so, I hope so.
MR. JACOBS: I was trying to, Your Honor.
MR. HIRD: And do that, I think we would make it simpler. If Mr. Jacobs has an objection as to scope at that time, we can deal with it.
THE COURT: All right, All right.

CROSS EXAMINATION

BY MR. HIRD:
Q. Mr. Levy, Mr. Jacobs questioned you about the organization that you worked for, Odyssey Partners. Does Odyssey Partners have any relationship with Oppenheimer and Company?
A. Oppenheimer and Company was started by, among others, the partners of --
THE COURT: Well, is the answer to that yes or no and then you can explain.
THE WITNESS: The answer is no, okay.
BY MR. HIRD:
Q. What is Oppenheimer? Is Odyssey a successor in any way to Oppenheimer?
A. It is a successor. It has a historical relationship, but

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no current relationship?
Q. Could you explain that historical relationship?
A. Yes. Some of the partners of Oppenheimer -- of Odyssey started Oppenheimer and Company or were there at the very beginning. And many years later, the partners of Oppenheimer decided to sell Oppenheimer and Company, the partnership, and retain the proceeds and other assets of Oppenheimer and became an investment partnership and we called ourselves Odyssey because the buyers of Oppenheimer felt they were entitled, quite properly, to the name of the brokerage and the investment firm.
Q. And were you one of the original partners of Oppenheimer, sir?
A. I became a partner about a year after -- less than a year after the firm started?
Q. About when was that?
A. 1951.
Q. And when you worked for Oppenheimer, did you have any involvement in the Oppenheimer Fund?
A. Yes, I started the Oppenheimer Fund, Inc.
Q. And could you tell us what the Oppenheimer Fund was, please, sir?
A. The Oppenheimer Fund was a mutual fund. It was more of a hitch fund, actually, but it was a fund.
Q. Do you still have relationship with the Oppenheimer Fund?

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A. Yes, I'm chairman of the board.
Q. And when the Oppenheimer Fund started, about how much money did the fund have in terms of assets?
A. About two million dollars.
Q. And how much does it have today, sir?
A. Oh, the group -- it's now a group of several different funds. It has about forty billion.
Q. Was the Oppenheimer Fund the first such mutual fund in America?
A. It had many distinct qualities about it which may have made it certainly among the first, but I don't --
Q. Now, when Mr. Jacobs asked you about how you spent your time, you mentioned that you worked for many not for profit organizations. Can you identify those organizations, please?
A. Yes. I work for the Institute for Advanced Studies down in Princeton.
Q. And what does that do?
A. It has four divisions. I'll make it very brief. That's where Einstein worked, that's where the people who interpret the Hubble Telescope photographs work. They work in abstract math and abstract physics and also in history.
Q. What position do you have with the organization, sir?
A. I'm vice chairman of the board when the chairman of the board is on leave.
Q. So you're acting chairman at this point?

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A. I'm active chairman.
Q. What other not-for-profit organizations do you work for, sir?
MR. JACOBS: I object, beyond the scope, relevance.
THE COURT: Wait, wait, I will overrule the objection.
THE WITNESS: I'm treasurer of the Institute for Advanced Studies as well as I work for the Guggenheim Foundation and the Guggenheim Awards and I'm chairman of that finance commission, I work for the Jerome Levy Institute, I'm president, and that's an economic research institute.
BY MR. HIRD:
Q. Any others, sir?
A. I'm sure there are, but, yes, the Rockefeller Institute in New York. I'm on the finance committee and board of directors of trustees.
Q. Do you have any training in the operation of wastewater treatment plants?
A. No, I do not.
Q. Do you own any -- have you ever operated wastewater treatment plants?
A. No, I certainly haven't.
Q. Do you have any background or training in the utility business?
A. None, except as looking in the financial statements of

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utilities.
Q. Now, in your position as chairman of the board of Avatar Holdings, what is the nature of your responsibilities?
A. I would say overall strategy and I would also think for certain times of financial decisions.
Q. What is your role with respect to the business of Avatar Holdings' subsidiaries?
A. I'm not really involved in the operating decision in the businesses.
Q. What is your involvement with the operation of Florida Cities Water Company?
A. Virtually nothing.
Q. Does the Avatar Holdings Board of Directors ever handle the day-to-day operations of the Florida Cities Water Company?
A. No, they do not.
Q. Now, you've seen a number of board minutes in this Court in Mr. Jacobs's examination. How often does the Avatar Holdings Board of Directors meet?
A. About eight times a year.
Q. And you preside at those meetings?
A. Yes, I do.
Q. Are you a member of the audit committee of Avatar Holdings' Board of Directors?
A. No, I'm not.
Q. Is anyone associated with the management of Avatar

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Holdings a member of the audit committee?
A. No, they are not.
Q. Who comprises the audit committee?
A. Oh, gee, I have to refresh my memory on that. I think it's Martin Myerson and --
MR. HIRD: Your Honor, I withdraw the question at the time. I'll show him the exhibit later that will help him refresh his recollection.
BY MR. HIRD:
Q. Have you ever been an officer, director or employee of Florida Cities Water Company?
A. No, I have not.
Q. Have you ever attended a Florida Cities board meeting?
A. No, I have not.
Q. Now, Mr. Jacobs showed you some correspondence which came to your attention -- I'm sorry -- correspondence which you acknowledged that you received. Can you describe your practice in receiving correspondence? How do you treat correspondence when it comes into your office?
A. Yes. Depending upon its nature, I read it carefully or glance at it or other kinds of material that comes from Avatar, I might even discard without looking at it if there would be --
Q. So, how you treat a piece of correspondence depends on the nature of the subject matter?
A. Exactly.

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Q. Do you get more in a week than you could read?
A. Yes, I do.
Q. And what would your -- how would you treat a document that came to your office with respect to Avatar Holdings Utility business?
A. I think it would depend on the nature of the document.
Q. Well, what document would you read seriously and perhaps keep?
A. Well, I would be very interested in documents that suggested serious regulatory problems or suggested serious investment possibilities or commitments or you just have to make a subjective judgment as to the import on the entire operation on both the utilities and on the company itself as to how much time you would spend on the document. It's like allocating time for anything else.
Q. And how would you treat documents that dealt with technical aspects of utility operation at a particular plant?
A. I would have felt I could add very little to that. I would have difficulty understanding most of it, so I would probably not read any technical discussions of the water Utilities.
Q. Now, Mr. Jacobs asked you a number of questions about Peter Sharp. Did Mr. Sharp have any background experience in the utility industry before becoming --
A. Not to my knowledge, he had none.

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Q. Now, when you and Mr. Sharp acquired Avatar Holdings or required a significant interest in Avatar Holdings back in 1980, did you acquire it in order to obtain interest in real estate or to obtain a utility business?
A. We were interested in real estate.
Q. Why were you interested in real estate at that time?
A. Because prior to the whole exercise, Peter Sharp and I had a long conversation one day where Peter figured he owned enough real estate in New York and would like to own more real estate in the sun belt, and we looked at a number of companies that operated in the sun belt and owned land and finally we came across GAC.
Q. Now, when you and Mr. Sharp acquired an interest in GAC, you were appointed to the Board of Directors by Judge Britton?
A. That is correct?
Q. And who selected the original directors?
A. Oh, Jeff Hazard and Bill Porter recently resigned of the original directors appointed by the Judge.
Q. That was my question, Mr. Levy. Were the original directors appointed by the Judge?
A. A number of original directors were appointed by the Judge, yes.
Q. And was Mr. Jeffrey Hazard one of those?
A. He was among those, yes.
Q. Who is Mr. Hazard?

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A. He is a Professor at Yale Law School who was in charge of -- whose fame, and that I think is fair, is in the field of legal ethics.
Q. And did Mr. hazard serve as a director?
A. He did, for many years.
Q. Did he serve on the audit committee of the board?
A. I believe he did, yes.
Q. Was a Henry King Stanford appointed?
A. Yes, he was also appointed by Judge Britton.
Q. Who was Mr. Stanford?
A. He was president of the University of Miami for a great many years. Very distinguished gentleman.
Q. Was an Edward Houston appointed?
A. Yes, he was.
Q. Who is Mr. Houston?
A. Mr. Houston, I think, I believe was a Federal Judge in Fort Lauderdale.
Q. And did Mr. Houston serve on the Board of Directors?
A. Yes, he did, for quite a number of years?
Q. Did he serve on the audit committee?
A. I believe he did, yes. I think he was chairman of the audit committee.
Q. Was a William Porter appointed?
A. Yes, he was appointed also by Judge Britton, as was Mr. Houston.

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Q. And did Mr. Porter serve on the audit committee?
A. Yes, he did.
Q. Did a Martin Myerson become a director of Avatar Holdings?
A. That was sometime later, yes, he did.
Q. What was Mr. Myers background?
A. President of the University of Pennsylvania. He was Provost out in California.
Q. And did Mr. Myerson serve on the audit committee?
A. Yes, he did, still does.
Q. Did a Leon Kendall join the Board of Directors?
A. Yes, Lee Kendall did, indeed.
Q. And what was his background?
A. He was chairman of Magic which was the first mortgage insurance company, the earliest mortgage insurance company before that or after that. He was chairman of the SIA, the Security Industry Association, which represented all of the interest in the security business, and he's now a Professor at the University -- North Western University.
Q. Did Mr. Kendall serve on the audit committee?
A. He still does.
Q. And now, you had testified that Mr. Sharp came down to Florida the first couple years after Avatar Holdings emerged from bankruptcy, is that correct?
A. That is correct.

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Q. But he moved back to New York, is that correct?
A. That is also correct.
Q. Would that be in approximately 1982?
A. I think around that time.
Q. And from that time forward, Mr. Sharp never lived in Florida, is that correct?
A. That is correct, he visited Florida, but he didn't live in Florida.
Q. And you testified that Mr. Sharp is dead, is that correct?
A. Yes.
Q. And that he died in April of 1992?
A. Yes, that's right.
Q. What was the cause of his death, sir?
A. Cancer, lymph cancer.
Q. Do you know whether if he was ill for a long period of time?
A. Well, he was visibly ill, as much as he would go to the hospital over a few years. If I may, it was my instinct, every year he went out to the Mayo Clinic. He was a very quiet and private person. I think he had instincts that he was ill for much longer than he would let on.
Q. Now, sometime before his death, Mr. Sharp resigned as chief executive officer, *is that correct*?
A. That is correct.

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Q. And I think Mr. Jacobs asked you whether that occurred about 1990?
A. I think about then.
Q. Now, there were some questions concerning Mr. Sladkus?
A. Right.
Q. And you identified Mr. Sladkus when Mr. Jacobs showed you an exhibit that refreshed your recollection that Mr. Sladkus was an executive vice president of Avatar Holdings?
A. Right.
Q. Do you know whether Mr. Sladkus ever resigned that position?
A. Whether he did? I believe he did, yes.
Q. Do you recall when?
A. No, I don't.
Q. I'd like to show the witness Avatar Holdings' Exhibit 17.
Mr. Levy, do these appear to be board minutes of Avatar Holdings, Incorporated?
A. Yes, they do.
Q. And were these board minutes at the time that you were chairman of the board?
A. If you tell me what period this covers, to save time. What period?
THE COURT: It's a meeting?
MR. HIRD: it's Exhibit 17.
MR. JACOBS: Judge, to save time, we'd stipulate

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Mr. Sladkus resigned from the position of executive vice president of the land and utility operations as effective January 1st, *1991, if that's helpful.*
MR. HIRD: That's what I was attempting to elicit.
THE COURT: Okay, very good.
MR. JACOBS: But not from his affiliation – any other affiliation he might have held with the company subsequent to that time.
BY MR. HIRD:
Q. Now, you mentioned – now what was Mr. Sladkus' background?
A. He was an engineer.
Q. Do you know whether – excuse me.
Do you know whether his engineering expertise was in the nature of wastewater treatment or some other specialty?
A. I think he was a civil engineer. He built things, he supervised the building when Peter would build an office building or what-have-you, among other things.
Q. Was his experience in the construction industry?
A. I think so because we used to refer to the mandated work that we talked about before as horizontal engineering, when you had them put in the roads and whatever that was ordered by the Corp and the Federal Trade Commission and Sladkus spent a great deal of time working on that.
Q. All right.

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Where did Mr. Sladkus maintain his office?
A. I believe he maintained his office in the same building as Peter Sharp maintained his office, in New York.
Q. Did Mr. Sladkus apprise Sharp on projects that were unrelated to Avatar Holdings?
A. He certainly did, yes.
Q. To your knowledge, did Mr. Sladkus ever have an office in Florida?
A. Not to my knowledge.
Q. Was Mr. Sladkus a director of Avatar Holdings?
A. No, he is not, nor was he.
Q. Now, you had been questioned *a little bit about* Mr. Wilkov?
A. Correct.
Q. Was Mr. Wilkov a member of the audit committee of Avatar Holdings?
A. No, he was not.
Q. Was Mr. Sharp?
A. No.
Q. What was Mr. Wilkov's background?
A. I believe he was in the real estate business up in New York and then he moved to Florida and he acted as an independent and then he joined Avatar.
Q. And did he have any experience in the utility business?
A. Not to my knowledge.

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Q. You also discussed Mr. Getman who was identified as general counsel of Avatar Holdings, is that correct?
A. That is correct.
Q. What are Mr. Getman's responsibilities?
A. Well, Mr. Getman is responsible for overlooking, overseeing all of the legal aspects of the family of companies in the Avatar family.
Q. Do you know whether Mr. Getman also holds the title of executive vice president of Avatar Holdings?
A. Yes, he does.
Q. Does that title involve any duties in addition to his role as general counsel?
A. Yes, I believe it does.
Q. Do you know what those duties are?
A. I couldn't enumerate them.
Q. Does he have business responsibilities?
A. Yes, he does.
Q. Does he have business responsibility with respect to the utility operations?
A. Well, I don't know -- I really don't know since I couldn't enumerate and outline exactly what his responsibilities are.
Q. Would Jacobson know what Mr. Getman's business responsibilities would be?
MR. JACOBS: Objection.

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THE COURT: You can ask him if he knows, whether he would be in a position to know. I think that question would be legitimate, so rephrase your question. Overrule the objection.
BY MR. HIRD:
Q. Would Mr. Jacobson be in a position to know what those business responsibilities would be?
A. I can't see how.
Q. Now, you were asked some questions about Barefoot Bay and I believe you indicated that Barefoot Bay was one of the properties that was acquired when Avatar Holdings --
A. Yes, that was among the properties in Avatar Holdings from the GAC.
Q. Was this considered one of the major real estate properties?
A. No, it was not.
Q. Why not?
A. 'Cause its size possibility, potential, all of the other measures that you would use to measure one property as against another and the impact it would have on the company as a whole was not as great by a long shot as a Hoover Island, Poinciana, King Cal.
Q. Did you visit the major properties of Avatar Holdings?
A. Several times?
Q. Did you ever visit Barefoot Bay?
A. No, I never did.

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Q. Now Mr. Jacobs asked you whether you ever visited wastewater utilities. How often have you visited wastewater utilities owned by Avatar Holdings or its subsidiaries?
A. Oh, gosh, aside from when we first acquired the company and I went out in the midwest and visited most of the utilities that we had in the midwest, I would say almost never. The only familiarity I had was in a presentation to which Bob Gordon made at Fiesta which was an advanced wastewater plant that we built in Lee County, I believe.
Q. But you never visited Fiesta Village?
A. No, I never visited Fiesta Village.
Q. So you only visited some utilities in the midwest at the time that you first became involved with Avatar Holdings?
A. That's correct.
Q. You never visited Barefoot Bay Treatment Plant?
A. No.
Q. And you never visited the Carrollwood Treatment Plant?
A. No.
Q. And you never visited the Waterway Estates Treatment Plant?
A. No.
Q. Now, you were asked some questions about Robert Gordon. Does Mr. Gordon have any position with Avatar Holdings?
A. No.
Q. How many times a year do you speak with Mr. Gordon?

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A. Maybe two or three, at the most. Perhaps maybe we run into each other by accident. We'll be very friendly as we are, but I don't see him.
Q. You were also asked some questions about Gerald Allen. Does Mr. Allen have any positions with Avatar Holdings?
A. No, he does not.
Q. How many times a year do you speak with Mr. Allen?
A. Maybe I see him two or three times a year, at the most.
THE COURT: I assume you have some more?
MR. HIRD: I have some more, and Your Honor, actually it would be -- I can be in a better position after the break.
THE COURT: All right.
This would be a good time to recess for lunch. We'll reconvene at 1:15.
(Thereupon, a luncheon recess was taken.)
All right, Mr. Hird.
MR. JACOBS: Pardon me, may I be heard on one procedural matter with respect to tomorrow's schedule, with the Court's permission? Mr. Quinn and I have 5:00 p.m. flights which are apparently the last non-stop flights to Washington, and I just don't know if that's acceptable to the Court. I wanted to find out.
THE COURT: How are you going to be here and there at the same time?
MR. JACOBS: That's the point. If I'm going to be

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here, I'm not going to be on the 5:00 p.m. flight.
THE COURT: Well, let me see just a minute. Well, I have two sentencings tomorrow afternoon that were originally scheduled for 4:00 o'clock that I had moved back to 4:45, and those will be probably fairly lengthy sentencings, and I don't plan to be here Friday night, so we may be able to accommodate you.
MR. JACOBS: That would be great. Thank you, so much, Your Honor, and we'll cut it very close. If you want to go to 3:30 or 3:45, we'll take our chances getting out there by 5:00.
THE COURT: Probably will want to go till at least 3:45.
MR. JACOBS: All right, sir. but I've got a 5:00 o'clock flight.
THE COURT: Okay.
MR. JACOBS: It's 3:45.
THE COURT: You want to be heard?
MR. HIRD: Your Honor, defense counsel I believe is going to be here for the duration.
MR. BAISE: We're here for the duration, Your Honor, and we hadn't planned on returning over the weekend.
MR. HIRD: And we're prepared to go to however late Your Honor wishes.
THE COURT: Well, I'll tell you what, you know, I got

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some other balls in the air, too, and as a matter of fact, some things that have kept me awfully busy, and I'm here for the duration, not just this case, but if I want to continue in this position, Judges have to pace themselves, too, but which brings up the subject of where are we in this case? I have an estimate from the Government of several days, whatever it was, and the Defendants estimated eight days.
MR. BAISE: That is correct, Your Honor.
THE COURT: Where are we in that estimate?
MR. JACOBS: Judge, we estimated a maximum of five Court days. As you recall, we actually set out a potential scheme on how to split those five days up. The last penalty trial that we had was finished in three days, that includes both sides. We had anticipated completing our case in chief yesterday. We now anticipate, based on the length of the cross examination of Mr. Klingenstein, we'll complete our case in chief this afternoon.
MR. BAISE: With respect to Florida Cities, Your Honor, we have approximately seventeen witnesses that we need to call in light of the evidence that's been brought forth. We're going to do our very best to push that group into next week and it's going to be very difficult to do and we understand that.
MR. HIRD: On behalf of Avatar Holdings, assuming that Mr. Levy does not have to come back, which at this point I

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think is probably the case, we have, I think, two witnesses, I imagine would be completed in about two hours.
MR. JACOBS: Judge, these are reductions from the list. If counsel could share with us their revised list, we'd sure appreciate it. This is nineteen instead of twenty-six.
MR. BAISE: I may have mispoken, counsel, it's either seventeen or nineteen. I have to look at the list, Your Honor.
THE COURT: Well, why don't we -- why don't you cooperate with each other to the extent of keeping each other abreast of the witnesses that you intend to call so we can try and move this thing along as expeditiously as possible.
MR. BAISE: We have been doing that, Your Honor. I find no difficulty in terms of working with Government counsel in terms of them keeping us apprised of their witnesses. In fact, we were just talking here a few moments ago about how to fill in the rest of today, assuming under the best of circumstances that they finish their case and we finish our cross, we have an hour or so left this afternoon, how can we fill that in productively. We're making arrangements, one of my colleagues has been attempting to make arrangements to pull in a gentleman that will talk about the Carrollwood situation for maybe the last hour, hour and a half this afternoon, if we have that amount of time.
MR. JACOBS: The agreement was, though, we exchange a day ahead of time not only who was going to be expected to be

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called the next day, but the order, and so far, it seems like the Defendants are not sticking with the order which is making our job a little bit tougher and we really did endeavor to get our precise number down way ahead of time as well as our order.
MR. BAISE: One of the reasons, Your Honor, that it has been somewhat difficult to keep that order is the length of time that direct and cross examination has been taking. Obviously, we have an order in which we would like to present our case, so what I'm, at the present time trying to do is fill in, if there's any time left this afternoon, with the gentleman who can deal with our Carrollwood situation so we can start with on direct cleanly tomorrow.
THE COURT: All right.
Well, we're going to move on now.
MR. BAISE: Thank you.
THE COURT: I think that Ms. Cole, I'm sure she told you that Tuesday I have to be in Jacksonville, that's not going to be a Court day.
MR. BAISE: Yes, she did.
THE COURT: I also have a two week trial calendar commencing a week from Monday in Jacksonville which I've committed to, so we'll move on now, okay.
MR. JACOBS: Can we plan on our flights for tomorrow? Will you be able to terminate by 3:45?
THE COURT: We'll do that.

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MR. JACOBS: Thank you, sir.
MR. HIRD: Your Honor, just to correct something, I said I mentioned two witnesses, in reality it's three, but one witness will be called during Florida Cities' examination, I will question him with respect to my case in chief.
MR. JACOBS: So we understand, who?
MR. HIRD: Gerald Allen. I've already told Mr. Quinn.
THE COURT: All right, proceed.
BY MR. HIRD:
Q. All right.
Mr. Levy, could you take a look at Government Exhibit 80, please?
A. Thank you.
Q. Mr. Levy, I believe Mr. Jacobs questioned you about Government Exhibit 80 and you identified it as a cover memo and the agenda?
A. Yes, that's correct.
Q. I'm sorry, I hadn't finished, I was waiting for Judge Nimmons to get the document.
THE COURT: Okay.
BY MR. HIRD:
Q. I believe when Mr. Jacobs questioned you about Exhibit 80, you identified this as a cover letter and agenda for an annual utilities operation meeting, is that correct?

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A. That is correct.
Q. And these annual meetings, they occur once a year?
A. If that often.
Q. Did you ever attend any of these annual utility operation meetings?
A. I think I attended one.
Q. But did you miss most of them?
A. Yes, sir.
Q. Why did you decide not to go to those meetings?
A. Well actually, if the meetings followed a regular board meeting, I would probably have attended it unless I had to be somewhere else.
Q. But you wouldn't go specially?
A. I wouldn't have gone specially.
Q. Okay.
If you could turn for a moment to Government Exhibit 61, please.
A. Yes, sir.
Q. Mr. Jacobs asked you a number of questions about Government Exhibit 61. I'd like to ask you a more basic question. Do you ever remember reading this exhibit, this document at the time it was dated?
A. Well, as I mentioned before, I don't remember reading it, but I wouldn't say that I didn't read it either.
Q. You were asked questions about disposal of effluent at

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Barefoot Bay. Is that an area about which you felt specially qualified?
A. No, it was not.
Q. Would it be your practice to deal with that issue directly or to leave it to others within Avatar Holdings or its subsidiaries to deal with such an issue?
A. I would normally always leave it to others in the subsidiary to deal with.
Q. Now, with respect to the attachment, the attachment refers to a meeting between Florida Cities Water Company and the Florida Department of Environmental Regulation, is that correct?
A. Yes, sir.
Q. Based on your review of the attachment, does it appear anyone attended that meeting on behalf of Avatar Holdings?
A. I'm sorry?
Q. Did anyone attend that meeting on behalf of Avatar Holdings?
A. Not to my knowledge.
Q. Did Avatar Holdings ever direct Florida Cities what to do with the effluent at Barefoot Bay?
A. Not as far as I know, sir.
Q. I'd like to have you look at Exhibit 384, please, government Exhibit 384.
A. Yes.

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Q. This is a document about which Mr. Jacobs questioned you. In particular, he asked you about the first paragraph 384. Can you read the second one, please, for the record?
A. What?
Q. Second paragraph of the first page.
A. Right.
Q. Could you read it aloud, please.
A. We should be trying to work out an agreement either to purchase now or to operate or lease the facilities with the right to purchase sometime in the future, preferably at a price fixed now.
Q. So, to the extent Mr. Sharp was suggesting that Florida Cities acquire Lee County's utility systems, he was talking about purchasing or leasing other systems, is that correct?
A. That seems to be the case.
Q. So, the control of Lee County Utility Systems could have been obtained by simply leasing or buying other utilities regardless of whether Waterway Estates continued to operate?
A. That is correct.
Q. I'd like to have you take a look at Government Exhibits 96 and 97, if you would, sir.
A. Yes, Mr. Hird.
Q. Now, Government Exhibit 96 is a memo entitled Avatar Utilities, general, is that not true?
A. That is correct.

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Q. And this memo refers to various different aspects of Avatar Utilities' operation, not just Barefoot Bay?
A. that is so.
Q. And that includes Avatar Utilities operations in the midwest, is that correct?
A. That's right.
Q. Did Avatar Utilities -- I think you alluded to this briefly, but was there a sale of Avatar Utilities' midwest operations?
A. Yes, there was.
Q. And does Avatar Utilities have any operations now outside the State of Florida?
A. It has a small operation in Arizona, very small.
Q. But previously, it was in what states?
A. It was in Ohio, Indiana, Michigan.
Q. Would Missouri be one?
A. Missouri, yes.
Q. And all of those operations were sold?
A. Right.
Q. And did that result in reduction in the number of employees that Avatar Utilities had?
A. Well, it certainly would have, certainly in the field.
Q. About when did that sale occur?
A. I think it occurred in '92 or '93, but I want to refresh my memory before I --

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Q. Now, exhibit -- the portion of Exhibit 96 that deals with Barefoot Bay, and Exhibit 97, both mention the possible purchase of orange groves; do you see that, sir?
A. Yes, I saw that.
Q. Would this have been a different business for Avatar Holdings?
A. Well, I don't think we owned any orange groves, but it would not have, in a sense, I guess the technical answer would be, yes, but it wasn't was so widely different from what we were doing. We had sod farms and other agricultural interests incident to whatever else we were doing.
Q. Now if a subsidiary was thinking of a new business venture, is that the kind of thing that would be brought to the attention of you or either Mr. Sharp?
A. Yes, if it was major, going into a new direction, that would have been brought to our attention.
Q. I'd like you to take a look at Government Exhibit 114 and 115, if you would, sir.
A. 114.
Q. 114 and 115.
A. Yes, sir.
Q. Are those in that book?
THE COURT: You have them?
THE WITNESS: I have the Exhibit. Did you ask me a question, I'm sorry?

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BY MR. HIRD:
Q. No, I didn't know if you had it yet.
A. I'm sorry.
Q. Exhibit 115 is a cover letter and Exhibit 114 is the memo from Mr. Allen about wastewater disposal alternatives, deep well injection at Barefoot Bay. Do you see those documents?
A. Yes, I do.
Q. All right.
Is this memo, 114 -- first of all, do you have a recollection of actually reading 114 at the time it was sent to you?
A. No, I don't have a recollection, no.
Q. Is the topic that 114 is discussing in the area of your responsibility and expertise?
A. No, it is not.
Q. And you testified I believe that you get a lot of things during the course of your affairs that you don't have time to read, is that correct?
A. That is correct.
Q. Mr. Levy, does Avatar Holdings control Florida Cities' operations on a daily basis?
A. No, it does not.
Q. Does it control the operations of any of its individual plants on a daily basis?
A. No, it does not.

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MR. HIRD: Your Honor, at this time, I'd like to move into evidence certain exhibits that have been designated as annual reports or board minutes of Avatar Holdings. I have discussed it with counsel during the break and I believe there are no objections.
MR. JACOBS: Well, what you said during the break was that some of them were incomplete. I said as long as they were complete, I have no objections.
MR. HIRD: I will give you the complete ones, Your Honor, and then to the extent any of these exhibits are incomplete, we have complete copies that can be substituted.
Exhibit 1 Avatar Holdings' 1994 annual report.
THE COURT: Wait a minute. All right.
Exhibit 1.
MR. HIRD: Avatar Holdings' Exhibit 1.
MR. JACOBS: Can counsel represent whether it's complete?
MR. HIRD: Yes, it is.
MR. JACOBS: No objection.
THE COURT: Be received.
MR. HIRD: Exhibit 10, Avatar Holdings' minutes of a board of directors meeting dated September 24, 1980 is complete.
THE COURT: It'll be received.
MR. HIRD: Exhibit 11, Avatar Holdings' minutes of a

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board of directors, dated 10-23-1980.
MR. JACOBS: Complete.
MR. HIRD: Complete.
THE COURT: Be received.
MR. HIRD: Exhibit 15, Avatar Holdings' minutes of a board of directors dated January 1 -- 25, 1990.
MR. JACOBS: Complete?
MR. HIRD: Complete.
THE COURT: Be received.
MR. HIRD: 17, Avatar Holdings' board meeting, date, January 1, 1931 -- January 31, 1991, complete.
THE COURT: Be received.
MR. HIRD: Exhibit 18, Avatar Holdings' board minutes dated 6-15-92, this is complete.
THE COURT: Be received.
MR. HIRD: Your Honor, the following exhibits we have in excerpted form. We do have complete copies to the Government if he wishes to see them. The Government had the full opportunity to review all of Avatar Holdings' board minutes, so we are offering them in their excerpted form. If that is not acceptable to the Government, we can replace the completed form. Exhibit 21.
THE COURT: This is among those now that you're talking about?
MR. HIRD: Pardon?

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THE COURT: This 21 is among those you're talking about?
MR. HIRD: Yes, the ones that I'm going to read are all of this variety.
MR. JACOBS: 21, in at least the version that was provided to us by Avatar Holdings, are not minutes of board meetings, they purport to be minutes of the audit committee meeting.
MR. HIRD: As Mr. Jacobs already established, the audit committee meetings are an exhibit to the board meeting. We do have the board minutes to which they were attached that can be provided as well to the Government if it's unacceptable for that reason.
MR. JACOBS: It is unacceptable if it's incomplete. If it's complete without the minutes of the board meeting, I think we established it is not complete.
MR. HIRD: We have the board minutes with us, we can attach that. The substance of what we wish to have it for is the audit committee minutes so we can have it admitted, either in its excerpted form or its whole form.
THE COURT: Well, do I already have the minutes; do we already have the minutes of the board meeting in evidence?
MR. HIRD: No, we do not, Your Honor. I can produce them, they can be authenticated through Mr. Levy or some other means. We simply -- and Mr. Jacobs personally was able to see

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the entire board minutes.
THE COURT: Well --
MR. JACOBS: It's true, I'm sorry, Your Honor.
THE COURT: All right.
We have documents here. The documents are -- these are exhibits that objections have been made to them. Now, what objections have been made by the Government with respect to this excerpted Exhibit 21?
MR. JACOBS: Incomplete under rule of evidence Rule 106.
THE COURT: Incomplete, well --
MR. HIRD: Federal Rule 106 is not an absolute bar. It simply provides the other party has the right to introduce the rest of the document. We can have the document entered as the audit committee minutes only or we have here that can be substituted the exhibit with the board minutes attached. In order not to clutter up the Court's record, I did not want to put in a longer document simply to get what was relevant which was the smaller portion.
THE COURT: How many of these do we have like this?
MR. HIRD: There's only four that we particularly wish to see added on. That's 21, 23, 24 and 25.
THE COURT: All right.
Well, let's go ahead and put the -- make it complete, satisfy the Government and can we do that sometime during the

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recess?
MR. HIRD: I can do that during the break, Your Honor, if we don't need Mr. Levy to authenticate the documents.
THE COURT: Okay.
MR. HIRD: There's only one other exhibit that I'd like Mr. Levy to authenticate, it's probably the only examination I think that is beyond the scope of what we have, if I may do that, it would --
THE COURT: Go ahead, ask your question.
BY MR. HIRD:
Q. Okay.
Mr. Levy, can you look at Avatar Holdings' Exhibit 3? Do you have that in front of you?
A. Yes, I do.
Q. Is that your marking file in the corner?
A. Yes, that's my marking, Mr. Hird.
Q. And if you could turn to the fourth page of the exhibit, see the words "call Bob Gordon" written in handwriting?
A. Yes.
Q. Is that your handwriting?
A. That is indeed my handwriting.
Q. Do these documents comprising Exhibit 3 come from your office?
A. Yes, I believe they do.
Q. Are these records that you keep in the ordinary course of

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your business as chairman of the board of Avatar Holdings?
A. Yes, although they would be probably filed in a warehouse sometime after about two years.
MR. HIRD: Your Honor, I move that Exhibit 3 be admitted in evidence.
MR. JACOBS: Your Honor?
THE COURT: Yes.
MR. JACOBS: May I be heard? Mr. Hird represented in open Court these were Mr. Levy's personal records and were not the documents, the business records of Avatar Holdings. I've just heard him say the opposite. He told the Magistrate that these were not produced to us as Avatar Holdings' records because they were Mr. Levy's personal records, at which point in time we had to go subpoena Mr. Levy. So to hear him now say these are Avatar Holdings' business records is somewhat inconsistent. We object. It's got to go one way or the other.
MR. HIRD: May I reply, Your Honor?
THE COURT: Yes.
MR. HIRD: I indicated that these were not records of Avatar Holding Company per se. What I've asked Mr. Levy today is whether these are business records that he keeps in the course of his duties as chairman of the board of Avatar Holdings. These are not from the official files of Avatar Holdings, but they were from the files that Mr. Levy keeps personally in connection with his responsibilities as Avatar

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Holdings Board of Directors, so I think the statements were consistent, but this is not from an official Avatar Holdings' file, but it is from the business files that he keeps for himself.
MR. JACOBS: Can't have it both ways, Your Honor. If he keeps them as Avatar Holdings' files, then they're Avatar Holdings' records. He's the chairman of the board of Avatar Holdings. Mr. Hird has argued repeatedly in pleadings and in open Court that these particular records were Mr. Levy's personal records.
Exhibit 3 also seems to contain three separate documents and would appear to be hearsay and hearsay within hearsay, certainly with respect to the second two.
MR. HIRD: Your Honor, I believe with respect to the second document, Mr. Levy identified that it was his handwriting on the documents, with respect to the third, it is clearly the document that is referred to and incorporated in the second.
THE COURT: I'm going to overrule and receive it.
MR. HIRD: Thank you, Your Honor.
Mr. Levy, thank you very much, I have no more questions.
And, Your Honor, with this inquiry, I don't believe I will need to bring Mr. Levy back.
THE COURT: All right.

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Okay.
Redirect.
MR. JACOBS: No redirect, Your Honor.
THE COURT: All right.
You have no redirect?
MR. BULLOCK: No.
THE COURT: Thank you very much, you may step down.
THE WITNESS: Thank you very much, sir.
THE COURT: Call your next witness.
MR. JACOBS: Your Honor, at this point in time, the United States would call James Elder, Dennis Getman, Robert B. Gordon, Anton A. Reeves, III, John K. Sladkus and Lawrence Wilkov. All of these six individuals have refused to answer any substantive questions in this matter at deposition on the grounds that their responses would incriminate them and have asserted their Fifth Amendment Right not the respond. The depositions themselves are, I would proffer, the deposition testimony of these witnesses at this time as recorded on page 34 of the revised joint pre-trial statement. In addition, I would like to make an offer of proof.
THE COURT: What page?
MR. JACOBS: Page 34, Your Honor, joint pre-trial statement.
THE COURT: Yes.
MR. JACOBS: And in addition, I would make an offer

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of proof in lieu of the testimony of the witnesses who pled the Fifth Amendment because it's a bench trial. I've put it in writing and would like to submit it to the Court with the Court's permission.
MR. HIRD: Your Honor, I don't think we have seen this offer of proof.
THE COURT: Well, show it to counsel before you show it to me.
MR. JACOBS: I've got copies for counsel, sir, and the original.
THE COURT: Before you show it -- well, just hand it to the Clerk. Now, you're offering -- you're offering these portions of the depositions of the six witnesses that you named?
MR. JACOBS: Yes.
THE COURT: Which is set forth on page 34 of the joint pre-trial statement?
MR. JACOBS: Yes, Your Honor.
THE COURT: All right.
First of all, is there any objection to those portions of the depositions?
MR. BULLOCK: Your Honor, I would note, first of all, the Government has never attempted to list these people as witnesses in the joint pre-trial statement or anything filed or delivered to us subsequent to the joint pre-trial statement.

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MR. JACOBS: Your Honor -- sorry.
THE COURT: Wait a minute.
MR. BULLOCK: We would also object under relevance of offering these portions of the depositions.
THE COURT: Now, let's take one thing at a time. If this is a list of depositions that the Government as indicated intends to introduce at trial, correct, depositions to be offered in evidence at trial?
MR. JACOBS: Yes, Your Honor.
THE COURT: I don't understand your first objection, counsel.
MR. BULLOCK: In the context of, if he is at the present time going to argue that he would call these people in his case in chief had he not -- had they not pled the Fifth Amendment, we've never had any notice of the fact he would have called these people in his case in chief. He didn't list those as potential witnesses in the pre-trial statement.
THE COURT: Well, wait a minute. He's listed their depositions and certain pages and lines. I don't follow you.
MR. JACOBS: I might add, if I may.
MR. BULLOCK: Some of these people, in fact --
MR. JACOBS: I've also listed on page 15, I specifically stated in the same pre-trial statement that I would have called those witnesses but for the fact that they asserted the Fifth Amendment at deposition.

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MR. BULLOCK: I withdraw that.
MR. HIRD: I would like to make a specific -- with respect to one of the individuals, John Sladkus, who we had initially indicated might be one of our witnesses, the Government objected to John Sladkus being on our witness list, so therefore I don't think the Government can thereby offer information concerning Mr. Sladkus' potential testimony.
THE COURT: Well, the Government objected to Mr. Sladkus being on your witness list?
MR. HIRD: That's correct, Your Honor.
MR. JACOBS: Only --
THE COURT: And was that ruled upon?
MR. HIRD: Ultimately, Mr. Sladkus' name was withdrawn. Actually, Your Honor, I think you probably did rule upon it in your order last Monday because it was briefed. We indicated --
THE COURT: You indicated in your response what?
MR. HIRD: Mr. Sladkus had been withdrawn.
MR. JACOBS: I believe the Court therefore ruled that issue is moot because Mr. Hird had withdrawn him as a witness.
THE COURT: Yeah. What was the issue?
MR. JACOBS: The issue was Mr. Hird listed Mr. Sladkus as a witness when we had deposed Mr. Sladkus. He asserted the Fifth Amendment Right, and therefore didn't testify. The Government's position was, well, if he's going to

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testify at trial, he has to be deposed first, and discovery had already closed, so we said that Mr. Hird couldn't call him as a witness. And therefore, Mr. Hird withdrew him from the witness list and the Court, as I recall Monday's order, said the issue was moot.
THE COURT: I did, I said the issue was moot because they had removed him from the witness list. That's what I said.
MR. HIRD: Yes, but we had no indication Mr. Sladkus would be treated as a witness by the Government.
THE COURT: He's been listed.
MR. HIRD: Not by the Government.
THE COURT: Yes, he has. Oh, okay, maybe -- well, he is on page 34, his deposition.
MR. HIRD: I mean as a live witness.
MR. JACOBS: On Plaintiff's page 15, I said I would have listed all the witnesses, but for the fact they asserted their Fifth Amendment Rights at deposition. Especially notes the United States would call the witnesses who have asserted the Fifth Amendment at deposition, see section H, infra, which is indeed page 34. I believe I preserved the right in two places.
THE COURT: Okay, Mr. Bullock.
MR. BULLOCK: Your Honor, I have another separate objection, but I didn't want to interrupt.

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THE COURT: Yeah.
MR. BULLOCK: Your Honor, we had -- this is the first time that the -- at least Florida Cities has seen the offer of proof. I'm a little confused because as I understand --
THE COURT: Well now, wait just a minute. As I understand it, the Government has asked to introduce these depositions, that is not a separate issue.
MR. BULLOCK: Well, Your Honor, the offer of proof includes putting the depositions in. It's not clear whether just the depositions are going in. Mr. Jacobs also attached a number of exhibits to these depositions. It's not clear, I have not had the opportunity to figure out whether or not he's trying to include the exhibits which were attached to these depositions to bring them in as well.
THE COURT: Let me see the -- well, have you -- this is a thirty-five page document here. Have you tendered this to counsel before?
MR. JACOBS: Not before today, Your Honor. This is part of our case in chief, and as far as we're concerned, they're entitled to rebut it in their cases and we've offered it in in fairness to allow them to.
MR. HIRD: Your Honor, we have substantial objections to the offer of proof. I don't know whether you want to deal with that now or whether you want to deal just specifically with the depositions, but and we're prepared to deal with it,

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whichever sequence you want.
THE COURT: Well, I don't understand what this -- what is this document?
MR. JACOBS: This is my -- the Government's proffer, Your Honor, of what we would be able to show were these witnesses to testify.
THE COURT: They have not?
MR. JACOBS: They have refused to testify in response to any substantive questions.
THE COURT: Well, how do you determine what they would testify to?
MR. JACOBS: Based on the documentation. We asked the Court to draw adverse inferences in this civil matter through the documents. As I said in any opening statement, these witnesses did not testify, they have that right, but the Government has the right to ask the Court to draw adverse inferences from the failure to testify, and as I said in my opening statement, they've left a long paper trail and essentially what I've done for the Court here is taken the Court through the paper trail and suggested the adverse inferences that should be drawn.
MR. HIRD: Your Honor, two points --
THE COURT: Well now, just a minute.
MR. HIRD: Sorry, Your Honor.
THE COURT: Is this not more in the form of you're

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asking the Court, number one, assuming the Court receives in evidence those portions of the depositions wherein these witnesses take the Fifth Amendment and, of course, this is predicated, this offer or this document here is predicated on that, that is -- you're arguing what inferences the Court may draw from these various witnesses taking the Fifth Amendment during their depositions.
Now, is this not more in the form of arguments regarding reasonable inferences based upon the evidence that comes before the Court, including the claims of the Fifth Amendment than it is any separate items? This is not -- this is not evidence here, these are your arguments regarding the inferences the Court may legitimately draw based upon the evidence that is before the Court, including the claims of the Fifth Amendment.
MR. JACOBS: Yes, and based on the evidence that there are another perhaps twelve to fifteen documents that I would move into evidence at this time. The point is that at this point in the case, I would be calling six adverse witnesses, and I would be showing -- essentially, I would be showing the Court essentially through the testimony of those witnesses, as you saw me run Mr. Levy through certain documents, I would be introducing certain evidence. Because these individuals have refused to testify in a civil case, adverse inferences may be drawn. I'm simply setting forth here

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in this document and at this point in my case in chief what I would expect to be able to prove through the testimony of those witnesses, particularly the testimony of the Avatar witnesses, Mr. Getman, Mr. Gordon, Mr. Sladkus, Mr. Wilkov.
MR. HIRD: Your Honor, Mr. Bullock will go first.
THE COURT: Mr. Bullock.
MR. BULLOCK: Your Honor, a couple of issues. First of all, we're actually double checking the transcripts right now. I do not believe that at least in some of these depositions, Mr. Jacobs actually propounded questions to the witnesses, the answers of which he's now trying to infer negative because they took the Fifth Amendment.
Secondly, for example, I refer you to page 2 of this document where he starts out a listing of Avatar Holdings' key players, including Peter Sharp, a New York City real estate tycoon who took a close personal interest in his investment. Obviously, Mr. Sharp's deceased. I don't know if Mr. Jacobs' trying to put evidence in because he can't get hold of Mr. Sharp, but at this point in the case, basically to turn in a brief where he's basically writing the testimony these people I think is highly improper and not a legitimate offer of proof.
MR. JACOBS: If it's just --
MR. HIRD: May --
THE COURT: Sir?
MR. HIRD: Following the points of Mr. Bullock, in

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none of these instances were there any specific questions asked in the ten or fifteen minutes, these deposition ended on page 10 or 12, so there were no specific questions asked.
With respect to the documents, as the Court has seen, the substantial number of documents that were admitted into evidence, Mr. Jacobs can argue whatever inferences he can for those documents, but specific questions were not propounded to these witnesses.
Mr. Sharp, as Mr. Bullock said, was dead, so he shouldn't be included in this, and is the first person mentioned in this list, and beyond the -- with respect to Avatar Holdings, in particular, two of the individuals who are recited were former employees. Mr. Wilkov has not only left the company at the time he was deposed, but he had filed suit against the company in connection with his termination. Moreover, he was deposed before Avatar Holdings was even in the case.
Mr. Sladkus, as you have just seen, left the company in 1991 and was deposed over the summer of 1995. Mr. Getman who was the third individual was deposed both for Florida Cities and Avatar Holdings, but is an attorney, and many of the specific questions would have been objected to on the grounds of the attorney/client privilege.
What we have here is an effort to embellish on inferences that he would have the Court draw from the

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documents. We have here a post trial brief that is rephrased as an offer of proof and we think this document is wholly illegitimate under the circumstances. We also don't think that any adverse inference should be drawn against Avatar Holdings because as you heard, we had the chairman of the board testify. He's been able to depose the president, the vice president of financial operations, he would have been able to depose the secretary, Ms. Kerrigan, if he called her in time. We have substantial officers of Avatar Holdings to testify.

Thank you, Your Honor.

MR. JACOBS: Your Honor, on the point of depositions, I forgive Mr. Hird. I believe he was only present at one of these six. I forgive him for saying that I didn't ask substantive questions because I did. And in fact, there were stipulations made that these witnesses would refuse to answer any substantive questions and the pattern that I followed was I went through each facility and I asked questions about each facility, I handed over literally dozens if not in some cases over a hundred documents and asked them if they recognized them and I went through a series of questions, a litany, if you will, and to each question the witness asserted his Fifth Amendment Rights. In fact, in each instance, you'll recall yesterday we saw a sample of a cue card, if you will, that said I respectfully decline to answer. In fact, each of these witnesses would state their name and their address and I think

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that was about it. When I got to how are you employed, that is when they started asserting the Fifth Amendment Right.

And then I went through my litany relating to each facility. I proffered the documents that I would have asked them about. Those documents are attached to the depositions. The depositions have already been filed with the exhibits.

So I think I've got my record here that I would have had the opportunity to elicit substantial testimony from these witnesses. And all I'm doing now in my case in chief is making an offer of proof of what I could prove at this point in my case in chief if these witnesses took the stand and testified. And in a civil matter, I believe I'm entitled to make that offer.

THE COURT: Now, you've cited Jacksonville Electric versus Bermooth. Where is the body of law that deals with the inferences that may be drawn in a civil case from the Defendant – a witness invoking the Fifth Amendment privilege?

MR. JACOBS: A moment, Your Honor, I think I have it.

In the United States trial memorandum, page 16. First of all, footnote seventeen, we set out again the –

THE COURT: Just a moment.

MR. JACOBS: Sorry.

THE COURT: What page?

MR. JACOBS: Page 16 of the Government's trial memorandum. We set out in footnote seventeen the record of the

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deposition testimony.

THE COURT: Right.

MR. JACOBS: Those individuals who pled the Fifth Amendment.

THE COURT: Right.

MR. JACOBS: And then at the bottom of the same page, we suggest the adverse inference.

THE COURT: Right.

MR. JACOBS: And the body of law following.

THE COURT: Okay.

MR. JACOBS: Your Honor, this is not an attempt at surprise. To the contrary, we're right to argue this later on, perhaps in post trial briefs. It might be said the Defendants had not had an opportunity to respond. By offering this at this point in time, I think the Defendants are in fact advantaged by being able to rebut to the extent that they're capable of my offer in the context of their cases.

And in particular, this document, as I said, relates mostly to the inferences to be drawn from the failure of the Avatar witnesses to testify, and based on Mr. Hird's request that the Avatar Holdings part of the case follow the Florida Cities part of the case which is expected, based on what we heard just after the recess to be much more lengthy, seventeen or nineteen witnesses as opposed to two, I think that will give Avatar Holdings sufficient time to address these adverse

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inferences that we've suggested. There is no surprise intended and there is no unfairness intended.

THE COURT: Okay.

MR. SCROGGIN: May Florida Cities be heard?

THE COURT: Sir?

MR. SCROGGIN: May Florida Cities address the issues raised by –

THE COURT: I thought you had? Who is doing that; both of you now?

MR. BULLOCK: Your Honor, the only difference would be is in case the Court had any question about the actual deposition, Mr. Scroggin was at the deposition, also has copies of –

THE COURT: All right.

MR. SCROGGIN: Thank you, Your Honor. I was present I believe at each one of the depositions at which the Fifth Amendment was asserted. I can state personally that the procedures for these was essentially in an assembly line process wherein on some occasions hundreds of documents were introduced without being identified other than by number. No questions were propounded regarding each of the exhibits that were produced, and indeed, several of these Fifth Amendment depositions took an hour, sometimes less, at two or three times were scheduled for a single morning. In one instance, counsel for the United States asked that we simply accept a boxful of

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documents without seeing what was in the box as though those would appear later as exhibits for the deposition.

We insisted they be taken out of the box and at least numbered, but they were neither reviewed, identified or discussed. And in most instances, specific questions other than the broadest of questions regarding the names of facilities were propounded, sometimes a dozen questions and the deposition was over.

Florida Cities' position would be that the inferences were not set up in a manner because the questions were not propounded in a manner that would allow any inference to be draw.

MR. HIRD: Your Honor, may I speak for Avatar?

THE COURT: Wait a minute, wait a minute.

MR. SCROGGIN: And finally, Your Honor, I would point out both the president, Mr. Gerald Allen and vice president, Mr. Paul Bradtmiller of Florida Cities have indeed agreed to testify and have waived their Fifth Amendment Rights.

MR. JACOBS: Your Honor, may I be heard on the matter of depositions?

THE COURT: Yes.

MR. JACOBS: Your Honor, these exhibits were actually pre-marked at the request of Florida Cities to expedite the process. They wanted their witnesses not to be humiliated, they wanted to be able to come in quickly, assert their rights

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and leave. We accommodated their request in that respect. In each deposition, I suggest that you will see that I've asked questions about each facility, substantive questions about each facility. When I handed the documents over, they were identified by exhibit number and the first question was, do you recognize any of the documents and the response was, I refuse to respond on the grounds of the Fifth Amendment, what you saw on that cue card yesterday, and at that point, I entertained a stipulation by Florida Cities' counsel that the witness would take the Fifth Amendment in response to any substantive question.

And at that point, I think I've set my record clear. There is nothing more to be done. I don't think I need to spend two days with each witness on each exhibit. I think the record shows clearly that the witness refused to testify beyond, as I say, his name and address.

THE COURT: All right, Mr. Hird.

MR. HIRD: Your Honor, looking quickly at this offer of proof which is, as we said, we've just seen, Mr. Jacobs wishes to draw adverse witness inference from five individuals, the first is Peter Sharp. Peter Sharp is dead. I don't think there is any adverse inference that can be drawn from a man being unable to testify because he's dead. The second is John Sladkus as the Court has heard, recently –

THE COURT: Well now, just a minute. What's the name

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of the first?

MR. HIRD: Peter Sharp.

THE COURT: Sharp. He could have been called as an adverse witness?

MR. JACOBS: Except he's deceased.

THE COURT: I understand that.

MR. JACOBS: He's unavailable.

MR. HIRD: He died in 1992. So there's no –

THE COURT: Now, the Government sought to take his deposition?

MR. HIRD: no, Your Honor, no.

MR. JACOBS: He was already deceased.

THE COURT: He was already deceased.

MR. JACOBS: Which I think makes him unavailable.

MR. HIRD: I don't think leads to an adverse witness inference.

MR. JACOBS: Perhaps not an adverse inference, certainly an inference from the paper trail, again the documentation.

THE COURT: Go ahead.

MR. HIRD: Okay.

I'm going to skip to Mr. Wilkov and go back to Sladkus. Mr. Wilkov was deposed at a time when he was no longer employed by Avatar Holdings. He had filed a lawsuit against Avatar Holdings and he was deposed before Avatar

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Holdings was a party in this case.

THE COURT: His name is what?

MR. HIRD: Lawrence Wilkov.

THE COURT: All right.

MR. HIRD: W-I-L-K-O-V. Fifth Circuit recognized the problem in the case of FDIC versus Fidelity and Deposit Company of Maryland, 45 F 3rd, 969, it's a 1995 decision, indicating that a problem in drawing inferences where you have a disgruntled ex-employee who may invoke the privilege to hurt his former employer. Here, we have a situation where an employee who obviously left under bad circumstances that caused him to sue his employer. The deposition itself was not taken a at time Avatar Holdings is in the case. It's inappropriate to draw an inference from that.

Mr. Sladkus, John Sladkus was deposed in the summer of 1995. Mr. Sladkus resigned from his connection with Avatar Holdings in 1991. He is therefore a former employee, although he – I would not characterize him as a disgruntled former employee. I think this period of separation is so long that it's inappropriate to draw the inference with respect Mr. Sladkus.

There are two more individuals, one is Robert Gordon. You've heard the testimony today that Robert Gordon has never been an employee, officer or director of Avatar Holdings. He is president of Avatar Utilities. But he has no employment

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relationship with Avatar Holdings, therefore it is wholly inappropriate to draw the inference.

The last individual is Dennis Getman who holds the position of being general counsel to both Avatar Holdings and Florida Cities and was originally called, I believe, his deposition was noticed I believe at the time when Florida Cities was the only Defendant in the case. Had there been full questioning of Mr. Getman, there may have been numerous legitimate invocations of the attorney/client privilege since Mr. Getman's role is as general counsel, the two entities.

In this situation, Your Honor, Avatar Holdings' chairman of the board has just been – has just testified. The president, Edward Jacobson was deposed and will testify. Charles McNairy, the vice president for financial matters, was deposed and will testify. Juanita Kerrigan, the secretary of the corporation signed interrogatory responses, was originally on our witness list, been dropped, we don't believe she's necessary, but she would have been able to testify.

To draw these inferences we think is illegitimate and I would point out that the reason why these witnesses invoked the Fifth Amendment had to do with the scope of the Weisenoff case which it has been brought to your attention earlier which indicated that very broad criminal liability rule in connection with the criminal enforcement of the Clean Water Act. Prior to that case, there was a general perception that a knowing

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violation of the Clean Water Act required you to know that what you were doing was a violation of the Act itself. That case said no, in order to be criminally liable, all the Government has to prove is that you know what you did.

And certain individuals in the wake of that case made their personal decision to take the Fifth Amendment, including Mr. Sladkus and Mr. Wilkov, at that point and with no assertion of Avatar Holdings, and therefore, had ever reason to put personal considerations ahead of company considerations, so under the circumstances, we think it's highly I believe appropriate to draw these inferences.

If the Government believes that there is such a clear document trail, he has those documents in evidence, he can ask this Court to draw what inferences he wants, but to make up this inference just out of documents I think is illegitimate under the facts of this case where so many Avatar Holdings' employees have testified and the few – and the two or three that haven't were not employees at the time they were deposed, one employee is dead and the last one is a special case and general counsel and could have invoked the attorney/client privilege.

MR. JACOBS: May I, Your Honor, briefly?

THE COURT: Yes.

MR. JACOBS: With respect to Mr. Getman who is executive vice president according to Mr. Levy's own testimony

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this morning, the other point of Mr. Levy's testimony was Mr. Getman has been with Avatar Holdings back almost as far as Mr. Levy has been. Likewise, Mr. Gordon preceded Mr. Levy in terms of his affiliation with Avatar Utilities or whatever it was known before it became Avatar.

And finally, Mr. Sladkus, as you heard Mr. Levy, was one of three individuals in addition to Mr. Levy and Mr. Sharp that had the authority to expend funds over one hundred thousand dollars. It is true that Mr. Jacobson, the present president of Avatar Holdings, has testified. It is also true based on Mr. Levy's testimony that Mr. Jacobson did not become affiliated with the company until 1992.

Essentially, the people who are being offered by Avatar Holdings as willing witnesses here are the people who either came in after the fact or, as Mr. Levy is maintaining, has no recollection or knowledge of the violation.

We would be able to establish through this offer of proof and the documents that it references that the three individuals, Mr. Getman, Mr. Gordon and Mr. Sladkus were highly knowledgeable of the violation, highly involved on behalf of Avatar Holdings in decision-making directly relating to these violations.

THE COURT: All right.

Yes, sir.

MR. BULLOCK: Would Your Honor consider a request to

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take this under advisement till we can at least provide some kind of legal memorandum on the validity of this?

THE COURT: Did you address this in your trial memorandum?

MR. BULLOCK: No, Your Honor. We addressed the overall Fifth Amendment issue in the Summary Judgment. We have not addressed the propriety of the offer of proof in this context nor has either side actually submitted the actual testimony, copies of the depositions.

MR. JACOBS: We filed them, Your Honor.

THE COURT: All right.

Well, I don't think it would be appropriate for the Court to draw any inferences from the deposition of Lawrence Wilkov who is no longer with Avatar and indeed demonstrated some – certainly had no – well, demonstrated hostility by the fact he himself filed suit against Avatar.

As far as Sharp is concerned, I don't know, I don't understand how the Government is entitled, if I understand correctly, he was never deposed, he died before he was ever deposed. I don't know how you can assert the same rationale for drawing inferences against Avatar by reason of his unavailability at trial. Talk to me a little bit about that.

MR. JACOBS: Well, by all means, I don't think we have the same right under the line of cases that I cited to in my trial memorandum because he did not assert the Fifth

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Amendment. He is unavailable by definition. And therefore, we can suggest inferences from the documents that he's left behind. But I don't think we –

THE COURT: Yeah, yeah, that's argument. I mean, that's – you'd be able to do that or at least argue it.

MR. JACOBS: The reason for the introduction to Mr. Sharp actually at the beginning of the document is just to put in prospective some of the other exhibits that are cited in the offer of proof because so many of them went from Sharp to Sladkus, as you have seen this morning, through Wilkov or Sharp to Wilkov and Sladkus, and/or to Levy or Gordon to Sharp. And if it was just that particular portion of the document, I'd be happy to have the Court accept the document with excising the section on Peter Sharp. That again is on the bottom of page 2 and ends on the top of page 4, because I think I've elicited that information through Mr. Levy, so I'd be happy to have that stricken from the document if the concern is that he does not fall into the same category as the witnesses who plead the Fifth Amendment which I would concede in terms of adverse inferences.

THE COURT: Well, okay, I'm going to permit counsel for the Defendants to brief this issue and I'll take this under advisement, and I need to know, the Government is offering the depositions of which of these persons again; they're listed on page 34?

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MR. JACOBS: Yes, sir. James Elder, Dennis Getman, Robert Gordon, Anton A. Reeves, III, John K. Sladkus and Lawrence Wilkov.

THE COURT: I've already ruled on Lawrence Wilkov. I'm not going to -- I'm not going to allow that deposition, sir.

MR. HIRD: That was the clarification that I was standing to ask you about because I thought you had. I wasn't certain.

THE COURT: Now, now you were going to offer into evidence documents?

MR. JACOBS: Yes, Your Honor. Government's 16.

THE COURT: Well, how many of these are we talking about?

MR. JACOBS: It's a very short list.

THE COURT: You said very briefly yesterday afternoon, too, so you better -- they will be. How many are there?

MR. JACOBS: Yes, Judge.

(Brief Pause.)

Thirty-three, Your Honor.

THE COURT: Thirty-three?

MR. JACOBS: And I can't tell you how many --

THE COURT: Brief is relative -- short is relative, isn't it?

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MR. JACOBS: I'm not sure there will be objections to that many, although I can't speak to that.

Is 16 in already?

THE CLERK: Yes.

THE COURT: See, there are only thirty-two now.

MR. JACOBS: Briefer than I thought.

Is 26 and 30, are they in also? I think they might be?

THE CLERK: 26 and 30, yes.

MR. JACOBS: And 34 is as well, is it not?

THE CLERK: Yes.

MR. JACOBS: I'm sorry, I didn't do my homework. 38 is as well?

THE CLERK: No.

MR. JACOBS: Move 38 in.

MR. HIRD: Your Honor, once again, 38 is subject to, I guess, code one and code two objections.

THE COURT: All right.

Overruled, it will be received.

MR. JACOBS: 51 I believe is already in.

THE CLERK: No.

MR. JACOBS: Forgive me. Then I'll move 51.

MR. HIRD: We have no objection to 51.

THE COURT: Be received.

MR. JACOBS: 52.

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MR. HIRD: I believe 52 is in.

THE CLERK: No.

MR. HIRD: This also is a code one and code two objection, Your Honor.

THE COURT: All right.

It'll be received.

MR. JACOBS: 58.

MR. HIRD: This is Avatar Holdings, we have no objection.

THE COURT: Be received.

MR. JACOBS: 65.

MR. HIRD: We have no objection.

THE COURT: Be received.

MR. JACOBS: 81.

MR. HIRD: This has a code one and code two objection, Your Honor.

THE COURT: All right. It will be received.

MR. JACOBS: 82.

MR. HIRD: Code one and code two objection, Your Honor.

THE COURT: It'll be received.

MR. JACOBS: 83.

MR. HIRD: Code one and code two objection, Your Honor.

THE COURT: Will be received.

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MR. JACOBS: I believe 99 is in.
THE CLERK: Yes.
MR. JACOBS: I believe 156 is in.
THE CLERK: Yes.
MR. JACOBS: Is 156 in?
THE CLERK: Yes.
THE COURT: All right.
MR. JACOBS: 196.
MR. HIRD: We have no objection.
THE COURT: Be received.
MR. JACOBS: 201.
THE COURT: I thought that was in.
THE CLERK: No, it's not.
MR. HIRD: No objection.
THE COURT: Be received.
MR. JACOBS: 203.
MR. HIRD: No objection.
THE COURT: Be received.
MR. JACOBS: 273, these are minutes.
MR. HIRD: No objection.
THE COURT: Be received.
MR. JACOBS: 383.
MR. HIRD: Your Honor, this is a code two objection.
THE COURT: All right. Overruled, it will be received.

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MR. JACOBS: 386.
MR. HIRD: No objection.
THE COURT: Be received.
MR. JACOBS: 403.
MR. HIRD: This is a code two objection, Your Honor.
THE COURT: Overruled, be received.
MR. JACOBS: 462.
MR. HIRD: We have no objection to that one.
THE COURT: Received.
MR. JACOBS: 496.
MR. HIRD: We have no objection to that one.
THE COURT: Be received.
MR. JACOBS: 497.
MR. HIRD: No objection to that one.
THE COURT: Received.
MR. JACOBS: 513.
MR. HIRD: Your Honor, this is Mr. Sladkus' statement invoking the Fifth Amendment. I believe that is what you just took under advisement.
MR. JACOBS: I believe that is the cue sheet.
THE COURT: Cue sheet, oh yeah.
MR. JACOBS: If the Court wants to consider that with the offer of proof.
THE COURT: Yeah, that's going to be within the parameter of what I'm inviting counsel to brief. Okay, so I'll take that under advisement.

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MR. JACOBS: Likewise, 515, it's another cue sheet.
MR. HIRD: I believe that's on Wilkov. I think you already ruled on Mr. Wilkov.
THE COURT: Yes, I have. That is Wilkov's?
MR. HIRD: Yes.
THE COURT: Okay, well -- is that Wilkov?
MR. QUINN: 515 is Lawrence Wilkov.
THE COURT: Yes, I'll sustain it.
MR. JACOBS: 515, it's a cue sheet for Mr. Elder.
MR. BULLOCK: Your Honor, wouldn't that also be the scope of the -- wouldn't that also be within the scope of what you are holding in abeyance?
THE COURT: Yes.
MR. BULLOCK: Thank you.
THE COURT: Reserve on that.
MR. JACOBS: 522, these are minutes.
MR. HIRD: No objection.
THE COURT: Be received.
MR. JACOBS: 521, also minutes, I believe.
MR. HIRD: No objection.
THE COURT: Be, received.
MR. JACOBS: 546, this is an annual report, 1990, of Avatar Holdings.
MR. HIRD: No objection.

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THE COURT: Be received.
MR. JACOBS: 560.
MR. HIRD: No objection.
THE COURT: Be received.
MR. JACOBS: 568.
MR. HIRD: No objection.
THE COURT: Received.
MR. JACOBS: 579.
MR. HIRD: No objection.
THE COURT: Received.
Isn't that thirty-three?
MR. JACOBS: I'm sorry, sir?
THE COURT: Haven't we gotten past thirty-three ir the exhibits?
MR. JACOBS: I'm on my last one.
THE COURT: Good.
MR. JACOBS: I'll count them and let you know if I was wrong again.
THE COURT: No. You got one more?
MR. JACOBS: 593 should be the last one, sir.
MR. HIRD: I'm sorry, 593?
THE COURT: 593.
MR. JACOBS: Yes.
MR. HIRD: We have no objection.
THE COURT: Be received.

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Okay.
I need to give counsel a time within which you'll be expected to address these issues here. I guess it comes -- it'll probably come as no surprise to you I'm probably not going to announce my ruling at the end of this case. I don't anticipate doing that. Frankly, the only reason why I would suggest that the Court has to have your response right away would be for the Court to rule on a motion made at the close of the Plaintiff's case which may be coming shortly, but when can you have your responses ready?
MR. HIRD: May we confer, Your Honor?
THE COURT: Yes, sir.
(Brief pause.)
MR. BULLOCK: Your Honor, would the Court consider Wednesday?
THE COURT: You want to be heard?
MR. JACOBS: Will we have the opportunity after Wednesday to respond? I don't mind if the Court wants to take the matter under submission. You don't expect to rule before the end of the case as I understand what the Court just said.
THE COURT: Yeah.
MR. JACOBS: We can do it in the context of --
THE COURT: Really, what we're talking about here --
MR. JACOBS: Do you want to do this in the context of post trial briefs? I have no problem with that, Your Honor.

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THE COURT: Well, that might be the best way to handle it.
MR. HIRD: Your Honor, Avatar Holdings was contemplating a Rule 52-C motion at the time that the Government finishes its case and if it's inconvenient for the Court, obviously we'll deal with it, but it had been our hope to put that motion forward in that way, hopefully.
Avatar Holdings had been planning a Rule 52-C motion when the Government finishes its case. We don't believe the Government has proven liability against Avatar Holdings. Obviously this is an issue that needs to be resolved before, that if the Court is more comfortable with doing it in the scope of post trial briefs, we obviously exceed to the Court, however, we don't intend to pursue a motion that the Court does not feel it's prepared to deal with, but if there's any matter which we can schedule so our 52-C motion can be considered and perhaps avoids us to unnecessarily produce witnesses, we would appreciate it.
MR. JACOBS: I'm not sure what he just proposed. If this is helpful, we probably have in evidence roughly five hundred documents already, many of which we would argue will establish Avatar Holdings' liability. If that relates to his upcoming motion, we just haven't had a chance to argue it. We argue some of these obviously in the offer of proof and again, in fairness, we really did intend the other side to rebut this

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in their case through evidence that they can present. They're sort of in control of the cards here because they have been able to pick which witnesses testify and which don't. It's a luxury we haven't had in terms of calling their witnesses.
THE COURT: Well, let me consider that and let you know by the end of the day how I think we ought to best handle this issue. When we first started talking about this and when I heard Mr. Jacobs talking about the number of exhibits, the exhibits are coming in and there is no uncertainty with respect to the exhibits themselves, I'm not talking about the cue cards here, and so, there is no uncertainty anymore regarding those exhibits. The only issue is as to which if any of these witnesses who have pled the Fifth Amendment is the Court going to permit the Government to rely upon adverse -- that is adverse to the Defendant's inferences.
MR. HIRD: And also what inferences can be drawn, Your Honor.
THE COURT: And what inferences can be drawn.
MR. JACOBS: Your Honor, again, there was no unfairness intended and if they want to rebut the offer during their cases or even in their post trial brief, I have no problem with that. In a sense, I've shown my hand as opposed to waiting till that point in time.
THE COURT: All right.
Well, Mr. Hird, frankly what the Court may wind up

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doing and likely will be doing is reserving ruling on your motion that you'll be making at the close of the Government's case and so I don't think that you're going to be prejudiced by the Court's providing for post trial motions or memoranda addressing this particular issue, but I'll hear you on your motion at the close of the Plaintiff's case and I haven't set that in concrete as yet.
MR. HIRD: Yes, Your Honor.
MR. BULLOCK: Your Honor, just one other point, two other points, just briefly. As you know, we have not had a chance to read this document. It's unclear from this document, at least a cursory review, as to how many of these documents are offered as proof inferences against which specific proposed witnesses or these individuals that the Plaintiff is trying to claim the Court should draw an adverse inference from. And I don't know if that's something you want to -- if you wanted to look at the documents this afternoon and see if that addressed any of the issues or not. And the other question is whether or not this is a brief of some sort and we could be excused from the Court's page limit as well since this is thirty-five pages as I assume it's either ten or fifteen pages over the Court's page limit for a brief.
MR. JACOBS: Your Honor, we stopped at thirty-five based on the precedent that you set earlier in this case when we submitted something in excess of thirty-five and you

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departed back to thirty-five and that is why we stopped at thirty-five here. There was, as I said before, fifteen years history to cover.

THE COURT: Well now, let me – let me make sure I understand. The Court is being asked to draw certain inferences from the invocation of the Fifth Amendment by these various witnesses. And are the – is the Government – well, let me see.

MR. BULLOCK: Your Honor, I may be able to point you to –

THE COURT: Yes.

MR. BULLOCK: You look, for example, at page 34, there is a footnote which lists the whole slew of documents that the Government's claiming. These are other trial exhibits which support further the inferences suggested, but it's not identified which documents against which individuals to draw what inferences against which companies.

MR. JACOBS: Judge, this document relates almost exclusively to the liability of Avatar Holdings. I'm not sure we – only peripherally do we have adverse inferences with respect to Florida Cities for what that is worth.

THE COURT: Is that clear from your written submission?

MR. JACOBS: I think it should be, Your Honor. I perhaps can enlighten upon that.

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THE COURT: All right, I tell you what, Counsel, you'll have a greater opportunity to absorb this document. We have spent a considerable amount of time on this this afternoon, and I think that you know I don't have to necessarily put it in concrete this afternoon as to how we're going to deal with this. I think after you have had an opportunity to assimilate this, we can perhaps address procedurally how we best ought to approach this.

This is a fairly unusual situation here and frankly, I'm groping a little bit at this point and I don't doubt that in a civil case that certain inferences may be drawn by reason of a witness who is associated with a party in the case invoking the Fifth Amendment. But, just how far that can go, and I don't know at this point, so, I'll let you know when – I'll not require a response sooner than Wednesday, and may extend that further. So, perhaps we'll discuss it further in the morning. Okay.

Call your next witness.

MR. QUINN: Yes, Your Honor. The United States calls Ms. Eileen Zimmer.

Thereupon,

EILEEN ZIMMER,

having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

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THE CLERK: Take a seat in the witness stand. State your name and spell your last name for the record, please.

THE WITNESS: My name is Eileen Zimmer, Z-I-M-M-E-R.

DIRECT EXAMINATION

BY MR. QUINN:

Q. Thank you. Good afternoon, Ms. Zimmer.

A. Good afternoon.

MR. QUINN: Your Honor, we would like to make an offer of proof in light of the Court's ruling, it will not be long.

Were Ms. Zimmer allowed to testify as to the wrongful profits analysis, she would testify to those areas as set forth in parts one and three of United States Exhibit for identification 598.

BY MR. QUINN:

Q. Ms. Zimmer, where do you work?

A. I work for the Antitrust Division of the Department of Justice?

Q. What is your title at the United States Department of Justice, Antitrust Division?

A. I'm a senior financial analyst with the Corporate Finance Department.

Q. As senior financial analyst with the Corporate Finance Department, which unit did you work for?

A. Corporate Finance Unit.

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Q. As senior financial analyst with that unit, did you analyze wrongful profits and ability to pay in this case?

A. Yes, I did.

Q. Have you prepared an expert report in this action?

A. Yes, I have.

Q. And I'd like the witness to be shown Exhibit 598, please.

My question is going to be is that your report when you get to it.

A. Yes, it looks like it is.

Q. Have you formed an opinion as to the ability of Florida Cities Water Company to pay a civil penalty in this case?

A. Yes, I have.

Q. Have you formed an opinion as to the economic impact of payment of a civil penalty on Florida Cities Water Company?

A. Yes, I have.

Q. Have you formed an opinion as to the ability of Avatar Holdings, Incorporated to pay a civil penalty in this case?

A. Yes, I have.

Q. And have you formed an opinion as to the economic impact of payment of a civil penalty on Avatar Holdings, Incorporated?

A. Yes, I have.

Q. Can I ask you some questions about your background as a financial analyst, Ms. Zimmer?

Where did you earn your undergraduate degree?

A. I earned it at Penn State University.

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Q. Which year?
A. 1976.
Q. Do you also have a Masters degree in business administration?
A. Yes, I do.
Q. And where did you get that?
A. From the George Washington University.
Q. And when did you get that?
A. In 1978.
Q. Have you taken any other graduate courses?
A. No, I haven't.
Q. And are you a certified financial analyst?
A. I'm a chartered financial analyst.
Q. Excuse me. Can you tell me what the requirements are to become a chartered financial analyst?
A. The chartered financial analyst program or CFA program is a program, is a three year course of study that covers a range of business disciplines including accounting, economic quantitative analysis, fixed incomes securities, equities, security analysis, and there's an ethics portion, and in addition, there is a three year experience requirement.
Q. Is this a self-study program, Ms. Zimmer?
A. It can be a self-study program. There's also courses, there is a national professional agency that runs the CFA program and each regional area such as for instance Washington,

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DC, has a regional chapter and they run review courses.
Q. Did you complete the required course work, Ms. Zimmer?
A. Yes, I did.
Q. When did you do that?
A. 1991?
Q. Did you complete the experience requirements?
A. Yes, I did.
Q. About how many chartered financial analysts are there in the United States?
A. I'm not sure of the exact number, but it's somewhere in the range of about thirty-five thousand.
Q. Can you tell he how does a chartered financial analyst differ from a certified public accountant?
A. A certified public accountant or a CPA is a professional accreditation in the acting field. The CFA program is a professional accreditation in, as I said, it covers a broader range of business disciplines.
Q. Have you taught any seminars in the field of financial analysis?
A. Within the Department of Justice, I have taught a few seminars for the various divisions within the Department and the AUSA's.
Q. And what areas were those seminars?
A. It was in understanding financial statements, bankruptcy and evaluating a company's ability to pay.

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Q. Ms. Zimmer, could you please briefly describe your employment history?
A. Yes. After I graduated, from Penn State, I worked as a statistician at the Census Bureau, U. S. Bureau of the Census, and then I went and obtained my MBA from the George Washington University. After I graduated, I worked for about a year for Washington Gas Light Company which is a public utility in the DC area. And after that, I worked for the Federal Energy Regulatory Commission for about five years. And after that, I started my job with the Department of Justice. I've been at Justice for twelve years.
Q. And has all that time been in the Antitrust Division?
A. Yes.
Q. Thank you. Can you please briefly describe your experience in determining a company's ability to pay a civil penalty in separate cases?
A. Well, I have twelve years of experience at Justice in doing that type of analysis, over twelve years.
Q. About how many cases or companies have you analyzed to determine their ability to pay a civil penalty?
A. I don't have an exact count, but it's hundreds of cases.
Q. And other than corporations, have you also analyzed other entities' ability to pay civil penalties?
A. Yes.
Q. That would still be within the same hundreds of cases?

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A. Right.
Q. Thank you. Can you please tell me a little bit about the work that you did in the U. S. versus Heater Boil Company and Sonny Wayne Mash? What was the work for?
A. That was in an ability to pay, that was for a sentencing hearing.
Q. And when was that?
A. I'm not -- I think it was in 1993, but I'm not sure. It's listed on my CV. It was antitrust price fixing sentencing hearing.
Q. About how many cases have you analyzed ability to pay in antitrust cases?
A. I really don't know. The number I gave previously included ability to pay cases in all of the divisions.
Q. And which of those divisions, please.
A. The Antitrust Division, the Civil Division and what is now known as the Environment and Natural Resources Division.
Q. Do you sometimes do analysis when the United States is a Defendant in a case?
A. Yes. Do you mean for ability to pay?
Q. Yes?
A. No.
Q. Do you sometimes testify when the United States is a Defendant, though?
THE COURT: You mean for the United States?

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BY MR. QUINN:
Q. For the United States. Withdrawn.
Do you ever do work in cases in which the United States is a Defendant?
A. Yes, I do.
Q. Thank you. And have you ever determined a company's economic benefit from non-compliance with a law or regulation?
A. Yes, I have.
Q. About how many times over the course of your twelve years?
A. The cases that I've worked on determining economic benefit were environmental cases and I have testified at my deposition that I had three cases that I worked on, three cases with regards to that.
Q. Have you ever analyzed wrongful profits which inured as a result of a violation of law or regulation?
MR. HIRD: Your Honor, I do believe we're getting to the point where it has been ruled on on our motion in limine.
THE COURT: Appears so.
MR. QUINN: I withdraw the question.
Your Honor, at this time, I'd proffer Ms. Eileen Zimmer as an expert witness in the area of financial analysis.
THE COURT: Okay, proceed.
BY MR. QUINN:
Q. Ms. Zimmer, could you please tell me what economic

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benefit means?
A. Economic benefit --
MR. HIRD: Your Honor, what I'm concerned about, we've set forth in our brief what we understood the law to be in economic benefits. You accepted our view, Magistrate Swartz endorsed it. That's fine. if this is another argument as to why wrongful profits should be used, I would object.
MR. QUINN: Your Honor, this is not another argument about wrongful profits. I'm merely getting into some definitions about what economic benefit is.
THE COURT: All right.
MR. HIRD: Also, I would like to point out there is nothing in her expert witness report about economic benefit other than wrongful profits analysis and therefore if they're going to substitute some additional numbers about economic benefit, we would most intensely object.
MR. QUINN: Ms. Zimmer is not going to talk about any numbers, Your Honor.
THE COURT: All right.
BY MR. QUINN:
Q. My question was, can you tell me what does economic benefits mean in your opinion, Ms. Zimmer?
MR. HIRD: Objection, Your Honor, are we talking under the Clean Water Act or talking generally?
MR. QUINN: I withdraw the gentleman.

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BY MR. QUINN:
Q. Under the Clean Water Act, what does the term economic benefit mean to you?
MR. HIRD: Objection, calls for a legal conclusion.
THE COURT: I'll overrule the objection. I'm not sure where we are going with this right now, but go ahead and answer the question.
THE WITNESS: In my opinion, economic benefit is the gain derived by an entity as a result of not being in compliance with a law. I guess in your example, it's the Clean Water Act.
BY MR. QUINN:
Q. Have you ever heard of the United States EPA's Ben Model?
A. Yes, I have.
Q. What is it, please?
A. The Ben Model is a computer model or program that was designed to be – I'll use the term, "user friendly," simple, easy to use. It's a computer program which calculates the economic benefit from delayed costs of compliance.
THE COURT: Wait just a minute. I'm trying to recall now, but my recollection of reviewing her report in dealing with pre-trial motions was that her opinions regarding economic benefits is centered on wrongful profits.
MR. QUINN: That is correct, just wrongful profits.
THE COURT: All right, now. I believe that what is

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carved out or what is left legitimately for her to testify to has to do with Defendants' ability to pay.
MR. QUINN: Yes, Your Honor. I'm trying to lay a foundation for a subsequent witness as to the Ben Model.
MR. HIRD: Your Honor, I would object because I think what they're attempting to do is put in evidence of economic benefit through the Ben Model which is a more traditional method of doing it which they did not produce in their expert testimony, did not give us before trial. The only calculations of economic benefit that they gave us was wrongful profit. Apparently what they're trying to do is Mr. Pfaff is their only witness left and now to do an economic Ben Model calculation is something that's never been disclosed to us in this case.
THE COURT: Where has she included in her report reference on the Ben Model?
MR. QUINN: Does not have any anything in her report with regard to the Ben Model. However, she did discuss it upon inquiry during her deposition.
THE WITNESS: In my report.
MR. HIRD: In her deposition, we asked her, Mr. High particularly, about the Ben Model, pointed out she hadn't used the accepted method for calculating the economic benefit and at that point, she had only produced wrongful profits analysis and forgone what is the traditional technique.
THE COURT: She's not going to be permitted to

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testify concerning anything that is not in her report.
MR. QUINN: Thank Your, Honor. I'll move on.
BY MR. QUINN:
Q. Moving to the area of about to pay, Ms. Zimmer; Ms. Zimmer, did you analyze the financial condition of Florida Cities Water Company with respect to its ability to pay a civil penalty in this case?
A. Yes, I did.
Q. How did you analyze the financial condition of Florida Cities?
A. I reviewed the documents produced by the Defendants here, the which include the financial statements from 1981 for my reports. I had the financial statements from 1981 through 1993. In addition, I attended the deposition of Mr. Murphy, the CFO of Florida Cities. But that deposition was after my report.
Q. Did you -- you said you reviewed documents. I'd like to show you three exhibits, please, United States Exhibit 583, 584, 585. Could you please tell me whether you reviewed Exhibit 583 in preparation of your expert opinion?
A. Yes, I did.
MR. QUINN: Your Honor, I would --
THE WITNESS: Uh, can I clarify my answer?
BY MR. QUINN:
Q. Please?

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A. Are we talking about Florida Cities Water Company?
Q. I'm talking -- I'll withdraw the question.
In review, in preparing your expert opinion as to Florida Cities' and Avatar Holdings' ability to pay, did you review United States Exhibit 583 for identification?
A. Yes, I did.
MR. QUINN: Your Honor, I would move United States Exhibit 583 into evidence.
MR. HIRD: Your Honor, Exhibit 583 seems to be excerpts from Avatar Holdings' Exhibit 1 which is already in evidence and on that basis, we have no objection.
THE COURT: Be received.
BY MR. QUINN:
Q. Ms. Zimmer, did you review again portions of the Avatar Holdings Exhibit 584 for identification?
MR. HIRD: Mr. Quinn, I appear not to have a copy of Exhibit 584 in the notebook that you gave me.
MR. QUINN: I apologize.
MR. HIRD: Is that your annual report?
MR. QUINN: Portions of it.
MR. JACOBS: You want to see portions?
MR. HIRD: It might be easier to just use Exhibit 1.
MR. QUINN: I'm not going to refer to these documents at all, Your Honor. I wanted to identify them for the record and move them in evidence. Ms. Zimmer, if she needs to, will

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have them at her disposal.
MR. HIRD: You're representing that's another excerpt of Avatar Holdings' Exhibit 1?
MR. QUINN: My representation is that Exhibit 584 is a different excerpt of the same annual report, Your Honor.
THE COURT: Okay. Be received.
BY MR. QUINN:
Q. Thank you. Turn to page, hopefully there will be an exhibit there to United States Exhibit 585 for identification. Can did you review that exhibit, Ms. Zimmer?
A. Yes.
Q. Could you please tell me what it is?
A. It's the audited financial statements for Florida Cities Water Company for December 31st, 1993.
MR. QUINN: We're going to move the next book -- like you to take a look at Exhibits 591, 594, 595 and 596, and I'm going to ask you the same questions. With regard to United States Exhibit for identification 591, have you seen -- did you rely upon that exhibit?
A. Yes, I have.
Q. With regard to United States Exhibit 594 for identification, did you rely upon that exhibit, Ms. Zimmer?
A. 594?
Q. Yes.
A. For my report, are you talking about for my report?

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Q. For your ability to pay analysis only.
A. For my ability to pay analysis, yes, I did rely on 594.
MR. QUINN: Your Honor, I would move United States Exhibit 594 for identification into evidence, please.
MR. HIGH: no objection.
THE COURT: It'll be received.
BY MR. QUINN:
Q. Did you rely upon 595 for your financial analysis?
A. Yes, I did.
MR. QUINN: Your Honor, I would move United States Exhibit 595 into evidence at this time, please.
THE COURT: Be received.
BY MR. QUINN:
Q. Ms. Zimmer, would you please look at one last exhibit, Exhibit 596 for identification. Did you rely upon 596?
A. Yes.
Q. What is 596, please?
A. It's a SEC 10-Q quarterly report for the three month period ending September 30, 1995.
MR. QUINN: Your Honor, at this time, I'd like to move United States Exhibit 596 for identification into evidence.
THE COURT: It'll be received.
BY MR. QUINN:
Q. Ms. Zimmer, do you have an expert opinion as to Florida

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Cities Water Company's ability to pay a penalty in this case?
A. Yes, I do.
Q. What is your expert opinion on that?
A. My opinion is that Florida Cities Water Company has the ability to pay an amount up to seven and a half million dollars.
Q. And do you have an expert opinion as to the economic impact that payment of a civil penalty of up to seven and a half million dollars would have on Florida Cities Water Company?
A. Yes, I do.
Q. And what is that opinion, please?
A. My opinion is that a seven and a half million dollar amount would not have a material adverse affect on the company.
Q. Ms. Zimmer, you also stated earlier that you analyzed the financial condition of Avatar Holdings with respect to its ability to pay a civil penalty in this case, is that correct?
A. Yes, I did.
Q. Could you please tell me what you did do to go about analyzing the financial condition of Avatar Holdings?
A. Avatar is a public company, so I reviewed the filings that the company made with the SEC, and I also had a financial data base with printout information on public companies that is based on the SEC filing.
Q. What is the data base you had?

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A. The Standards and Poors Compustat Data Base.
Q. Ms. Zimmer, you did you attend any deposition of any chief financial officers?
A. Yes, I did.
Q. And?
A. The CFO of Avatar Holdings, Mr. McNairy.
Q. Ms. Zimmer, in your experience, do balance sheets of companies always accurately reflect the true value of a company?
A. A balance sheets reflect the accounting amount for the assets, the liabilities and the net worth of the company in terms of market value or the value, the total net worth or the total equity that's listed on a balance sheet. That number may or may not be reflective of a company's true market value.
Q. Ms. Zimmer, do you have an expert opinion as to Avatar Holdings ability to pay a civil penalty in this action?
A. Yes, I do.
Q. And what is that opinion, please?
A. My opinion is that Avatar can afford to pay a penalty up to fifteen million dollars.
Q. Ms. Zimmer, do you have an expert opinion as to the economic impact that payment of a penalty of up to fifteen million dollars would have on Avatar Holdings?
A. Yes, I do.
Q. And what is that opinion?

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A. My opinion is that a payment of fifteen million dollars would not have a material adverse affect to the company.
MR. QUINN: Thank you, Your Honor. I have no more questions.
THE COURT: Okay.
MR. HIGH: Your Honor, may name is Lance High, I represent the Defendant Florida Cities.
THE COURT: Yes, you may proceed.
CROSS EXAMINATION
BY MR. HIGH:
Q. Good afternoon, Ms. Zimmer.
A. Good afternoon.
Q. Ms. Zimmer, you testified that you've always worked for the U. S. Government from 1978, 1979; is that correct?
A. Yes.
Q. Have you ever given any expert testimony for any entity other than the U. S. Government?
A. No.
Q. Ms. Zimmer, what percentage of time do you spend performing ability to pay analyses for the privately owned, publicly regulated utilities in your position with the Department of Justice?
A. Very little.
Q. Would that be less than ten percent of your time?
A. Yes, sir, certainly.

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Q. Have you ever performed an ability to pay analysis for a company that is regulated by the Florida Public Service Commission?
A. No, I have not.
Q. Ms. Zimmer, would you turn to page 8 of your report, please?
A. Could you tell me what the exhibit number is?
Q. I believe it's Plaintiff's 597 -- 598.
THE COURT: What page?
MR. HIGH: Page 8, please, Your Honor.
THE WITNESS: 585?
BY MR. HIGH:
Q. 598, Ms. Zimmer.
A. Okay.
Q. Ms. Zimmer, you conclude on page 8 in the second paragraph that liquidity as represented by its current ratio and working capital is poor; is that for Florida Cities?
A. Yes, Florida Cities Water Company.
Q. And current ratio is the ratio of current assets to current liabilities, correct?
A. Yes, it is.
Q. And it's meant to be somewhat of a Litmus test for short term obligations, is that correct?
A. Typically, yes.
Q. And the results of that current ratio tell you that the

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working capital is poor, correct?
A. Yes.
Q. That means there's no free, access money just floating around in some bank account, correct?
A. That's one portion of liquidity.
Q. And then you go on to state, Ms. Zimmer, equity has been established since 1991, correct?
A. Yes, I do.
Q. And that long term debt has increased over that period of time, correct?
A. Yes.
Q. So for that period of time that you analyzed since 1991 through 1993, at least the equity to debt ratio, that has fallen, hasn't it?
A. I don't have those amounts specifically on this page. I think they're in a later exhibit.
Q. Well, in reaching that conclusion, Ms. Zimmer, didn't you analyze Florida Cities' financial statement?
A. Yes, I did.
Q. For the years 1989 through 1993?
A. Yes, I did. I'm just looking for the exhibit that has that balance sheet which is in Exhibit 4, just to check my answer before I give it. And the answer is that it has been declining somewhat, but it is basically stable.
Q. And the equity to debt ratio is another Litmus test,

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isn't it, about the financial situation?
A. It's another financial indicator.
Q. And over this period of time, it's been somewhat diluted, the equity has been stable and debt has increased, correct?
A. I'm not exactly sure what the question is. Could you repeat the question?
Q. The question is, Ms. Zimmer, over the period of time that you analyzed, the equity to debt ratio has been somewhat diluted, isn't that correct?
A. Well, actually when you're looking at the long term debt for the company, it went down in 1993,, in 1990 it was, just to use numbers, it's twenty-three and a half, I'm looking at the long term debt, long term debt as twenty-three and a half million, it went down in '91, it went up in '92, and went down again in '93. In terms of comparing a long term debt to total capitalization ratio, that ratio has actually improved somewhat in '93, but it's basically stable over the period.
Q. But you conclude, don't you, Ms. Zimmer, that equity has been stable, but long term debt has increased somewhat?
A. Over the years that I compared, it has increased, it went down in '93, it's changed in '94.
Q. Ms. Zimmer, would you turn to page 2, Plaintiff's Exhibit I believe it's 594, please?
A. Okay.
Q. And that indicates and would you -- I'm sorry, would you

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turn to page 2 of that exhibit, please. I believe it would be the third page of the document, page 2.
A. Okay.
Q. And that's the page titled capitalization liability, isn't that correct?
A. I have it.
Q. And you say, Ms. Zimmer, long term debt has decreased between 1993 and 1994, is that correct?
A. No, I didn't. This financial statement indicates that the long term debt in '94 has gone down.
Q. That's right. It's gone down. Would you look a little bit below that under current liabilities, Ms. Zimmer?
A. Okay.
Q. What has happened to notes payable between 1993 and 1994?
A. Notes payable went up in '94 as compared to '93.
Q. And by how much did it go up?
A. About one point six million dollars.
Q. And accounts payable, how much did that go up between 1993 and 1994?
A. Oh, about a million dollars.
Q. And how much did the amount due to parent company affiliates go up between 1993 and 1994?
A. That went up about one point six million.
Q. So even though long term debt has been decreased by about one point five million dollars, short term liabilities have

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gone up by about six million, isn't that correct?
A. Actually, the number's more like four point three. I'm looking at the total current liability number.
Q. But the fact of the matter is liabilities have gone up by about four point three million?
A. Yes.
Q. Liabilities are debts, are they not?
A. They're obligations of the company.
Q. And the company must pay those obligations?
A. Well, you see, it depends. Mr. Murphy in his deposition specifically addressed the two million dollars that Florida Cities Water Company obtained in a loan from an affiliate. I think it was Consolidated Water Company, and he stated during his deposition he does not expect that Florida Cities would have to pay that back.
Q. Did you interview anybody from Consolidated Water Company?
A. No, I didn't.
Q. Did you investigate any of the loan terms between Consolidated Water company and Florida Cities Water Company?
A. We deposed Mr. Murphy in terms of seeing the actual loan document. No, I have not seen the loan document if there is a loan document.
Q. So other than Mr. Murphy's testimony, you have no independent basis?

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A. No, but Mr. Murphy is the CFO of the company of Florida Cities.
Q. But you yourself have no independent basis for saying Florida Cities Water Company will not have to pay the two million dollars?
A. The significance is Mr. Murphy is CFO of Florida Cities Water Company and the statement in his deposition.
Q. But you have no independent basis other than that statement?
MR. QUINN: Objection, Your Honor, asked and answered.
THE WITNESS: Right.
THE COURT: Sustained.
BY MR. HIGH:
Q. Ms. Zimmer, let's go back to your report, page 8, please. The next paragraph where we --
A. I forgot the number of the exhibit.
Q. 597.
A. Okay.
Q. Plaintiff's 597?
A. I think it's 598.
Q. 598, I'm sorry.
A. What page, please?
Q. Page 8.
A. Okay.
Q. Ms. Zimmer, you go on to state in the next paragraph, the

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third paragraph down, that earnings have declined over the period analyzed for Florida Cities Water Company, is that correct?
A. Yes, in the period covered in my report, yes.
Q. And then you state that revenues are increasing, but at a lower rate than costs, correct?
A. Yes.
Q. So costs are outpacing revenues?
A. During the period that is contained in my report, yes.
Q. You state then, Ms. Zimmer, capital expenditures have decreased over the period, correct?
A. Yes.
Q. Do you know what the capital expenditures for Florida Cities Water Company will be in the next five years?
A. That is another area that we deposed Mr. Murphy on, and he explained that during 1995, 1994 and 1995, Florida Cities Water had implemented a large capital expansion, capital expenditure program, but that he expected capital expenditures from 1996 forward for the next few years to be at light levels was the term he used.
Q. Do you know how much or what light levels means or is that the only basis for your opinion?
A. During his deposition, we deposed him and asked him what the capital expenditures in the five year plan were budgeted for, and he addressed that they had gone through this major

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capital expenditure program and they did not expect that their cash needs nor capital expenditures would be very -- would be significant in the next few years.
Q. But you don't know what significant is, do you, Ms. Zimmer?
A. He could not remember the actual numbers in the budget, and he was in -- the company was in the process of developing the next set of projections.
Q. You haven't seen those projections, have you?
A. No, I haven't.
Q. Those projections are not a part of your opinion, is that correct?
A. Right.
Q. And so if those projections are higher than what Mr. Murphy recalled, then that would affect your conclusions in this ability to pay analysis, is that correct?
A. It would depend on what those typically -- typically that's done during an interview and I can ask Mr. Murphy what the capital expenditures are for and whether or not there's any possibility or the likelihood that any of the capital expenditures could be delayed for a few years.
Q. But the fact of the matter is you don't know what the capital expenditures and capital budgets are for the next five years?
A. No, I do not.

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Q. Ms. Zimmer, you go on to state that their eighteen thousand shares of preferred stock will be retired annually between 1997 and 2001?
A. I see that.
Q. Do you know what the liquidation of those shares is?
A. Could I refer to the footnote in the financial statements?
Q. Yes, ma'am.
A. The liquidation value is stated at a hundred dollars per share.
Q. One hundred dollars liquidation value, is that what you said?
A. One hundred dollars per share.
Q. And is that an annual obligation of one point eight million dollars per share between 1997 and 2001, is that correct?
A. That's stated in the footnotes to the financial statements.
Q. And that is an obligation that Florida Cities Water Company will have to pay, correct?
A. It's an obligation that the company has; depends on the terms of the preferred stock.
Q. And it says in the financial statement that 18 thousand shares per year will be liquidated at a hundred dollars per share?

A. That's a liquidation schedule disclosed in the financial statement.
Q. So their one point eight million dollars obligation enters into your analysis?
A. The preferred stock liquidation and preferred stock dividend did enter into my analysis, yes, sir.
Q. You assume, Ms. Zimmer, don't you, that the preferred stock dividends will not be paid during this period of time that Florida Cities might be paying a penalty, is that correct?
A. What I assumed is that preferred stock dividend payments could be deferred?
THE COURT: We need to change Reporters. We'll take just a couple minutes. We'll be at ease.
(Thereupon, a ten minute recess was taken.)

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CONTINUED CROSS-EXAMINATION

BY MR. HIGH:

Q. Ms. Zimmer, I believe when we left off you stated that the preferred dividends would not be made during this five-year period for Florida Cities would be paying 1 to 1.5 million a year; is that correct?

A. What I assumed is that the preferred dividend payments would not be made. When we deposed Mr. Murphy, who, again, is the CFO of Florida Cities Water Company, we asked him who owned those preferred shares, and he mentioned that Florida Cities' immediate parent, FCWC Holdings, Inc., held the preferred shares.

In the footnote to the Florida Cities financial statements, it explains that in 1991 a certain amount of common stock shares were converted to preferred shares.

Q. And, Ms. Zimmer, aren't you assuming that the preferred shares of Florida Cities Water Company Holdings are owned by an Avatar-related entity? Isn't that correct?

A. I'm not making that assumption. What I'm making the assumption -- the assumption I'm making is that the preferred stock of Florida Cities Water Company is owned by its immediate parent, FCWC Holdings, Inc., and that assumption is based on Mr. Murphy's deposition testimony.

Q. And have you investigated the preferred stock shares, the agreement, or the terms of the preferred stock? Strike that.

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Let me start over.

Have you investigated -- in your analysis of this ability to pay, have you investigated the terms of the preferred stock?

A. During Mr. Murphy's deposition, we asked him what the specific terms of the preferred stock were, and he could not remember. They are -- some of the terms are disclosed in a footnote to the financial statements, but other terms such as -- for instance, some types of preferred stock when dividends are not paid, they just accumulate.

Q. Have --

A. Those details Mr. Murphy did not know.

Q. Ms. Zimmer, have you independently investigated the terms of the preferred stock?

THE COURT: You mean other than what she just testified?

BY MR. HIGH:

Q. Other than what you just testified to, Ms. Zimmer.

A. No.

Q. Ms. Zimmer, what would happen if Florida Cities Water Company defaulted on its preferred stock obligations?

A. It depends on the terms of the preferred. If it's owned by its immediate parent, it's very unlikely that an immediate parent would exercise whatever the default provisions are. There may be no default provisions. Also, as I said

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previously, the unpaid dividends may just accrue.

Q. Ms. Zimmer, isn't it also equally as likely that the credit rating of Florida Cities Water Company would be affected by a default on its preferred stock?

A. It depends. It's possible. It may or may not be affected.

Q. Assume for me that Florida Cities Water Company cannot opt out of this obligation to pay preferred stock dividends. Wouldn't that affect Florida Cities Water Company's ability to go to the market and borrow money?

A. It may or -- it depends on how Florida Cities goes to the -- when you say "go to the market," you're not talking about a public debt issuance, I assume. I assume you're talking about going to a bank or some private placement or something like that.

Q. Yes, ma'am.

A. It depends on the term of the debt. If there's security offered, depending on whatever security is offered, it may -- what I'm saying is it may or may not affect it.

Q. Ms. Zimmer, do you know whether there are any assets free to be offered as security?

A. May I refer to the financial statement for a moment?

THE COURT: Yes.

THE WITNESS: The problem with answering that question is when you look on the financial statements, they do

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have first mortgage bonds which indicate that those are secured. But during our deposition with Mr. Murphy, he indicated that the company was in the process of refinancing and obtaining an additional long-term debt financing of $18 million. Some of that would be used to pay the 1995 capital expenditures, which I was previously discussing, and some of it would be used to pay back existing debt.

So at that time it had not yet been entered into, so that would certainly have an effect on the current security or unencumbered assets, depending upon whatever that -- whatever happened.

BY MR. HIGH:

Q. Ms. Zimmer, I believe the question was do you know whether there are any plant assets free to be offered as security.

A. At this time, no.

Could I also offer a clarification?

THE COURT: Yes.

THE WITNESS: We're talking about obtaining additional borrowing. One of the other areas that Mr. Murphy mentioned in his deposition was the existence of a line of credit that Avatar Utilities, Inc. had, and he mentioned that Florida Cities Water Company was able to borrow from Avatar Utilities on that line. He mentioned that they never had, but that they were able to.

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And the 1994 10-K for Avatar indicates that the -- and also the deposition of Mr. McNairy, who at that time at least was the CFO of Avatar Holdings, indicated that the $15 million unsecured line of credit that Avatar -- that is listed in Avatar Holdings' 1994 10-K was a 15 million line of credit that Avatar Utilities had. And in that 10-K they cite that the unused portion was 8.2 million.

MR. HIGH: One moment, please, Your Honor.

THE COURT: Yes.

BY MR. HIGH:

Q. Ms. Zimmer, do you know whether Avatar Utilities is a defendant in this case?

A. I don't know for sure. I don't think it is.

Q. And you don't know whether Avatar Utilities or Avatar Holdings would be able to loan 1 to $1.5 million per year to Florida Cities Water Company; isn't that correct?

A. What I was referring to, I actually made a reference to it in my report, the possibility that Florida Cities could borrow the full amount from Avatar, and then they would -- they wouldn't have to borrow 1 and a half, 1 million to 1 and a half per year. They could borrow the entire amount up front. So it wouldn't be an annual borrowing.

Q. And I'll leave the issue of whether Avatar Holdings would be willing to offer that to Mr. Hird.

Ms. Zimmer, you concluded that it's unlikely that

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Florida Cities Water Company would be able to borrow money from a bank to pay this penalty; isn't that correct?

A. Typically that's often the case with companies. And in this instance it's probably likely that they could not borrow.

Q. And that's because banks like to lend money to income-generating activities; isn't that correct?

A. Right.

Q. So really the only instance or the only availability of $7 and a half million would have to come from Avatar Holdings; isn't that correct?

A. Well, actually when we're talking about Florida Cities Water Company's ability to pay, looking at their ability to generate income and a cash flow and using the guidance that Mr. Murphy gave in his deposition with regard to the fact that he expected future earnings for the company for the next few years out into the future to be in the one-and-a-half- to two-million-dollar range, plus he expected capital expenditures to be light, what I took from that was if you make the assumption that capital expenditures equal depreciation, which for Florida Cities is about let's say -- is about $3 million, the excess of cash flow, just looking at cash flow being depreciation plus earnings, the earnings would be available to fund a payment to the government.

If there were any other cash needs that the company may have, they had other options available, such as borrowing

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on this Avatar -- against this Avatar -- going to Avatar Utilities to borrow against their working capital line.

Q. And you don't know what the capital expenditures are in the future; you don't know whether they will equal the depreciation expense, do you?

A. No. But I made that assumption, and it's -- typically or generally speaking, it's an often-made assumption in analysis like this.

Mr. Murphy himself said that capital expenditures would be light, and that's in comparison -- I took that to be as in comparison to historical levels. And historical levels -- you can look in my report -- range from somewhere like 2 million to 7 -- I think 7 million was the 1994 or 5 amount, which, as Mr. Murphy explained, was due to an unusual capital expenditure program at Florida Cities.

Q. And isn't it a fact, Ms. Zimmer, that capital expenditures for the period of time you analyzed have always been greater than net income?

A. I didn't look at that specifically.

Q. Well, doesn't that mean, Ms. Zimmer, that Florida Cities Water Company has not been funding capital expenditures merely from operating activities?

A. Right, that's what that would mean.

Q. That means they've been borrowing the money for capital expenditures; isn't that correct?

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A. No, not necessarily. Depreciation is -- when you're looking at net income, that's after depreciation. And depreciation is a non-cash expense, so you add that back.

Q. But you don't know, Ms. Zimmer, whether the capital expenditures have been greater or less than depreciation over this period of time; isn't that correct?

A. If you look at page 8 of my report, you can see the bottom line on the earnings indicator chart lists the capital expenditures over those years compared, and there's a -- the third line is the net income line.

Depreciation you can find in Exhibit 1 to my report. The fourth line down, for the period 1981 through 1993, you can see that it -- it's in the $2 million range for '93. It was 2 and a half million for '94. It was somewhere in the range of around $3 million.

I did have nine-month statements for '95, which are produced in late 1995, and that had nine-month figures for the year 1995 ending September 30th. And it indicated that depreciation levels were somewhat higher than that in '94, which I previously stated were listed on the financial statements at about 3 million. It also indicated that net earnings for the company for the first nine months of '95 were a little bit higher than net earnings for the first nine months of '94.

And when you look at the 1994 statements, you'll see

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that net earnings included an accounting charge for expenses related to this case. They took a $1.3 million charge for the litigation costs relating to this case.

In addition, and as Mr. Murphy testified in his deposition, there were expenses actually incurred in 1994 for litigation costs relating to this case. The reason I mention that is that those are non-recurring costs. And when you add those non-recurring costs back to the earnings of the company, since Mr. Murphy said that the operating earnings of the company would be somewhat -- would be stable but somewhat increasing due to inflation and minor rate increases that they would probably likely apply for in the future, you can see that actually the company is generating increasing earnings.

Q. And the fact of the matter is, Ms. Zimmer, isn't it, that in the future the company also has recurring one-time costs such as preferred dividend liquidation obligations? Isn't that correct?

A. Well, we already talked about the preferred dividend obligations. The way I factored that in was that Mr. Murphy told or testified that the preferred stock was owned by its immediate parent, FCWC Holdings, so that it was -- my assumption was that those deferred dividend payments and redemption rights could be extended.

Q. And that's an assumption that you make --

A. Yes.

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Q. -- isn't that correct?

A. Yes.

Q. Ms. Zimmer, did you know whether a penalty in this case is tax deductible?

A. I don't -- typically we don't take a position with regard to the tax deductibility of a civil penalty payment.

Q. Isn't it a fact, Ms. Zimmer, that the tax deductibility does not exist for a penalty?

MR. QUINN: Objection, Your Honor. This goes beyond the scope and also conflicts with the statement of the witness that the United States doesn't take the position.

MR. HIRD: Your Honor, that may be the statement of the witness, but in any dealing that I've had with the United States in this and other cases, they take the position.

If the United States is taking a different position now, it would be interesting to know that.

THE WITNESS: Can I --

THE COURT: Well, I'm going to overrule the objection and permit the question.

Do you remember the question?

THE WITNESS: No, I don't.

BY MR. HIGH:

Q. Isn't it a fact, Ms. Zimmer, that a penalty in this case is not tax deductible?

A. Typically in my analysis I assume that it is

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nondeductible.

Q. And so in order to pay a $1.5 million penalty per year, Florida Cities would have to increase its revenues by about $2.2 million per year; isn't that correct?

A. Well, the -- you're assuming a 40 percent tax rate?

Q. Assuming 40 percent, yes, ma'am.

A. That's one way to look at it. The way I did it was I looked at the earnings history of the company, looked at what the future earnings would likely be, primarily basing my opinion on that. Nobody has a crystal ball, but I used Mr. Murphy's judgment that he expressed during his deposition. He is the CFO of the company, and I used his guidance, because he is the CFO of the company, and looked at what future cash needs would be. He expressed that they would be light in the next few years, so I kept capital expenditures to depreciation levels.

They could fund capital expenditures through depreciation, and then any excess would be used to pay a civil penalty. And that's on a net income basis after taxes.

And, for instance, looking at 1994, their ability to generate earnings -- I think their net income was 1.3 million, but as I mentioned earlier, that includes a $1.3 million charge for litigation expenses relating to this case. And then in addition, there were other -- there was at least $284,000 of litigation costs relating to this case, and

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Mr. Murphy testified that the 1994 amount was higher than the 284,000. So that is also a non-recurring expense which should be added back.

And I'm assuming that future earnings are at least equal to those of '94 and probably higher because, as I indicated when I was looking at the 1995 first nine months' unaudited statements that were provided in late '95 and they have a comparison for the first nine months of '95 to the first nine months of '94, it indicated for '95 that net earnings were higher than '94.

Q. Do you recall exactly how much higher?

A. It wasn't a large increase, but it was higher.

Q. So just a little --

A. A few percentage points, yes.

Q. Just a little bit higher?

A. Yes.

Q. And in this analysis you're assuming that net income or the -- strike that.

You're assuming the capital expenditures can be funded through depreciation; isn't that correct?

A. Basically, yes.

Q. And that if capital expenditures happen to go up in the future, then Florida Cities would have to borrow the money; isn't that correct?

A. When you look at the -- keeping with 1994 net earnings,

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those net earnings --
THE COURT: Can you answer that yes or no and then explain your answer, or can you do that?
THE WITNESS: Could you ask the question again? I'm sorry. I forgot what the question was.
BY MR. HIGH:
Q. If you assume -- your assumption is that capital expenditures will be funded through depreciation, correct?
A. Yes.
Q. And that if capital expenditures then go up, Florida Cities would have to borrow the money, correct?
A. It depends by how much capital expenditures go, how much they increase by.
THE WITNESS: Should I explain that?
THE COURT: If you need to.
THE WITNESS: Okay.
THE COURT: Briefly.
THE WITNESS: Looking at '94 net income, it's 1.3 million. They had a 1.3 million charge for these litigation expenses. You add that back, that's 2.6. Plus they had some pretax expenses for litigation expenses relating to this case. I'm not exactly sure how much that is, but it's at least 284,000. But those have to be put on an after-tax basis.
So let's just stick with the 2.6. That's the net income that's reflected on the '94 income statement, plus the

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1.3 charge, which is a non-cash order, a non-recurring expense. That's 2.6. If you pay a million or a million and a half to the government, there's a little bit left over. So if capital -- it allows capital expenditures to go up by the difference. Anything in excess would have to be borrowed.
BY MR. HIGH:
Q. Ms. Zimmer, you've referred a lot to Mr. Murphy's deposition. Did that deposition in any way affect your conclusions in this report?
A. No. That deposition occurred after the report. But this report is also based on information up through 1993, and Mr. Murphy had the use of the 1994 statement.
Q. And in this report you conclude that Florida Cities, if it were to pay the penalty, would have to borrow it from an Avatar-related entity, correct, pay the penalty up front?
A. No, I presented that as an option. The conclusion of my report listed on page 9 indicates that based on that information that Florida Cities could pay a million to a million and a half per year. However, if they were able to borrow from an Avatar-related entity, the -- and I'm assuming if they were able to borrow the full amount, they could pay the full amount up front.
Q. And the 7 and a half million up front would have to come from an Avatar-related entity, correct?
A. That's expressed in this report, yes.

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Q. So the answer is yes, Ms. Zimmer?
A. Could you ask the question again just so I get the exact wording?
Q. Sure.
THE COURT: You want it read back, or do you want to restate it?
MR. HIGH: I'll restate it, Your Honor.
BY MR. HIGH:
Q. Ms. Zimmer, your conclusion is that if Florida Cities were to pay a $7 and a half million penalty, it would have to come from an Avatar-related entity, correct?
A. If they were to be -- if they could -- if they had to pay it up front immediately.
Q. So your answer is yes?
A. Yes.
MR. HIGH: Thank you. No further questions, Your Honor.
THE COURT: Mr. Hird?
CROSS-EXAMINATION
BY MR. HIRD:
Q. Good afternoon, Ms. Zimmer.
A. Good afternoon.
Q. You indicated that you are a chartered financial analyst; is that correct?
A. Yes.

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Q. And you try to make a distinction between that and a CPA, a certified public accountant; is that right?
A. Yes.
Q. One of the distinctions that you didn't make between them is the nature of the body that certifies or charters them; is that correct?
A. Yes, they're chartered or certified by different bodies.
Q. And aren't certified public accountants certified by state agencies?
A. Yes.
Q. Governmental bodies; is that correct?
A. Actually I'm not a CPA, so I -- I do know they have to be state certified. I don't know which body does it.
Q. And chartered financial analysts are not certified by state agencies; is that correct?
A. Correct.
Q. Or by federal agencies?
A. Correct.
Q. Isn't it true that to be a chartered financial analyst you simply get a charter from a trade organization of chartered financial analysts?
A. It's the Association for Investment Management Research. I don't know if that's a trade organization. It's a --
Q. But that's not a governmental or regulatory agency?
A. No, it is not.

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Q. Okay. Thank you. Mr. High asked you a couple of questions about the preferred dividend on Florida Cities -- I'm sorry. Excuse me.

Mr. High asked you some questions about the preferred stock that's owned in Florida Cities by FCC Holdings, and you said that you assumed that the dividend on that preferred stock wouldn't have had to be paid because the parent corporation owned that -- owned Florida Cities; is that correct?

A. What I assumed is that those payments could be deferred or extended because it is owned by its immediate parent.

Q. Well, do you know that there is preferred stock in Florida -- in FCC Holdings? Do you know that preferred stock exists in FCC Holdings?

A. I assume --

Q. FCWC Holdings.

MR. HIRD: I'm sorry, Your Honor.

BY MR. HIRD:

Q. Let me ask the question again. Are you aware that the immediate parent of Florida Cities Water Company, FCC - FCWC Holdings, has its own preferred stock?

A. No, I'm not aware of that. I assume they have the preferred stock of Florida Cities Water Company, but you're talking about a different --

Q. That there is preferred stock in FCWC Holdings; that it

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has itself issued preferred stock.

A. No, I'm not aware.

Q. And you're not aware that that preferred stock is owned by Allstate Insurance; is that correct?

A. No, I'm not aware.

Q. And you're not aware that the payment that Florida Cities will make on its preferred stock to its parent, FCC Holdings, will then be repaid by FCWC Holdings to its preferred shareholder, Allstate Insurance; is that correct?

A. Could you say that one more time?

MR. HIRD: Your Honor, may it help if I could illustrate it on the blackboard?

THE COURT: Yeah, you can write your question on there graphically.

MR. HIRD: Do we have any chalk?

THE COURT: Well, now, that's asking a little much. We're supposed to.

You've got all colors except white it looks like.

BY MR. HIRD:

Q. Okay. You have said that Florida Cities has preferred stock. And assume -- and you understand that Florida Cities' preferred stock is owned by FCWC Holdings; is that right?

A. Right.

Q. That's the immediate parent of Florida Cities.

A. Right.

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Q. Now, you are unaware that FCC Holdings has its own preferred stock.

A. Right.

Q. And you are unaware that that preferred stock is owned by Allstate Insurance; is that correct?

A. Right.

Q. And you're unaware that when Florida Cities will pay its dividend on its preferred stock that FCWC Holdings will then turn around and pay its dividend on its preferred stock to Allstate Insurance; is that correct?

A. That's correct.

Q. Thank you. I'd like you to turn to Avatar Holdings Exhibit 1, if you would.

MR. HIRD: Bob?

THE WITNESS: He said Exhibit 1.

Okay.

BY MR. HIRD:

Q. Ms. Zimmer, this is the 1994 annual report of Avatar Holdings. You indicated in your testimony that you viewed at least excerpts of the report. Did you view the whole annual report?

A. Yes, I had.

Q. Okay. I'd like you to turn to page 39, if you would.

A. Okay.

Q. I'm waiting till both you and the Court have that.

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THE COURT: My page numbers are partially --

MR. HIRD: It's the second to last page in the exhibit.

THE COURT: I've got it now.

MR. HIRD: It's headed "Five-Year Comparison of Selective Financial Data."

BY MR. HIRD:

Q. Can you see line 2 of this chart, "loss (income from continuing operations before extraordinary item and changes in method of accounting)"? Do you see that?

A. Yes, I do.

Q. This is the five-year comparison of losses and gains in Avatar Holdings, is it not?

A. Yes.

Q. Okay. Let's start with the year 1990. That shows an $11,132,000 gain; is that correct?

A. It shows an $11,132,000 income.

Q. Income. I'm sorry. You testified that you attended the deposition of Charles McNairy, chief financial officer of Avatar Holdings; is that right?

A. Yes.

Q. Didn't he testify in that deposition that this gain was due to a one-time sale of land assets owned by Avatar Holdings in California?

A. I remember the one time. I don't remember where they

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were located.
Q. But that this gain was due to a one-time sale of certain assets?
A. Yes.
Q. And that absent this gain there would have been a loss in that year; is that correct?
A. Yes.
Q. All right. 1991 we have it shows a loss of 8,635,000; is that correct?
A. That's what this indicates, yes.
Q. 1992 there was a loss of 4,342,000 before extraordinary items; is that correct?
A. That's correct.
Q. And there was an extraordinary item loss of 2,402,000; is that correct?
A. Yes.
Q. Now, in 1993 we have -- there's a gain of 5,474,000; is that right?
A. That's right.
Q. And in Mr. McNairy's deposition, didn't he testify that that was the year of the sale of the Midwest Utilities?
A. Yes, he did.
Q. And that without that sale there would have been a loss?
A. Yes, he testified to that.
Q. Okay. 1994 we have a loss of $14,621,000; is that

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correct?
A. That's correct.
Q. All right. Keep that in front of you, and if you could also -- keep a finger in that point and, if you could, also turn to Exhibit Number 9, Avatar Holdings Exhibit Number 9.
Do you have that in front of you, ma'am?
A. Yes, I do.
Q. This is the Avatar Holdings 10-Q for the third quarter of calendar year 1995?
A. Yes, it is.
Q. And that's through at least the beginning of October of 1995; is that correct?
A. It's through September 30th.
Q. Through September 30th. I'm sorry. I apologize. This is a document that you reviewed as well in preparation to testify; is that correct?
A. Yes.
MR. HIRD: Your Honor, I move in evidence Avatar Holdings Exhibit 9.
MR. QUINN: No objection, Your Honor.
THE COURT: Will be received.
(Avatar Holdings Exhibit Number 9 received in evidence.)
BY MR. HIRD:
Q. Turn to page 4, if you would, in Avatar Holdings Exhibit

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9.
THE COURT: What page?
MR. HIRD: Page 4.
BY MR. HIRD:
Q. Do you have that in front of you, ma'am?
A. Yes, I do.
Q. And if you look down on the list, nine months for 1975, loss before income -- I'm sorry -- net loss, do you see that?
A. Yes, I do.
THE COURT: 1995.
BY MR. HIRD:
Q. 1995 net loss. So for the first three quarters of 1995 Avatar Holdings had a net loss of 5,444,000; is that correct?
A. That's correct.
Q. And in the corresponding five months in nine months in 1994 its loss was 6,077,000; is that correct?
A. Yes.
Q. But its ultimate loss for the year in 1994 was 14,621,000, is that right, if you go back to Exhibit 1, page 39?
A. You're talking about '94?
Q. '94.
A. Yes.
Q. So you would expect, would you not, that the loss for the final year of 1994 -- 1995 would be significantly greater than

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5,444,000? Is that right?
A. No, that is not correct.
Q. You don't know of any particular event that would have shown a short-term gain in the last three months of 1995 --
MR. QUINN: Objection.
BY MR. HIRD:
Q. -- for Avatar Holdings?
MR. QUINN: Objection, Your Honor. This calls for information that was requested during the course of discovery and had not been provided. I object to any questions that deal with information that was accumulated after Ms. Zimmer wrote her report and that has not been produced by the defendants, if there's any change, material change, in economic circumstances.
MR. HIRD: I'm not asking -- I'm not offering evidence. I'm asking for an opinion whether she expects the sudden upturn in the company based on what she's seen.
MR. QUINN: Your Honor, she hasn't seen anything because they haven't given her anything.
MR. HIRD: She's seen over five years of history of the company.
THE COURT: Well, I'll sustain the objection.
MR. HIRD: Okay.
BY MR. HIRD:
Q. All right. Is it fair to say that the history of Avatar

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Holdings absent the two extraordinary asset sales in '90 and '93, the economic history from 1990 to the end of the third quarter in 1995, has been one of continuous losses?
A. They've had net losses on their financial statements.
Q. Continuously throughout that period essentially?
A. Except for those two years.
Q. And those two years the gains were only due to extraordinary asset sales.
A. Yes.
Q. And not to usual operations.
THE COURT: Is that right?
BY MR. HIRD:
Q. Is that right?
A. Yes.
Q. Okay. Ms. Zimmer, you've indicated that Avatar Holdings can pay $15 million –
A. Yes, sir.
Q. – in penalties?
From what assets can Avatar Holdings make that payment?
A. Avatar has an investment portfolio listed on their balance sheet, and it's comprised of – you mentioned the 1993 sale of the Midwest Utilities. In 1993 they sold the Midwest Utilities for about $60 million, and they took a $20 million gain on that on their books. The $60 million, it's reflected

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in their 1994 annual statement or its 10-K that those proceeds were put into an investment account that is used in part to secure certain lines of credit that Mr. McNairy testified were for the Avatar Properties, the real estate operations.
Q. So that the --
A. And --
Q. That investment portfolio is securing lines of credit against which Avatar Properties has already invested -- borrowed; is that right?
A. The 1994 --
Q. Excuse me, Ms. Zimmer. Can you answer yes or no before you go into your explanation?
A. Yes. And the explanation is is that part of those securities are securing the Avatar Property lines of credit. The foot -- the annual report in the SEC 10-K annual report as of '94 stated that approximately 45 million of the -- it was somewhere in the range of $50 million of assets in the investment portfolio were providing security to about 31, $32 million of Avatar Property lines of credit.
Q. And that's the 1994 report which is already over a year old; is that correct?
A. Correct.
MR. QUINN: Objection. Move to strike the last question; move to strike the last response. Again, this is information about being over a year old.

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Your Honor, she would have done more work if she had the information.
MR. HIRD: Your Honor, this witness has information that is current through the third quarter of the past calendar year. And to indicate that that was a year old at this point given the time period when that would have come out is not anything in any way restrictive on information that she would have had after that point. She's testifying about information she's seen since then.
THE COURT: I'll overrule the objection.
THE WITNESS: I'm sorry. Was there a question?
THE COURT: No, you answered it.
BY MR. HIRD:
Q. You answered the question.
Have you analyzed in any way Avatar Holdings – or strike that.
Of this investment portfolio that we're discussing, is it held by Avatar Holdings or Avatar Properties?
A. At this point I'm not sure who owns it. It's listed in the consolidated Avatar Holdings financial statements. And Mr. McNairy, who's the CFO of Avatar Holdings, mentioned that that investment portfolio is used as in part, as I explained earlier, you know, security for Avatar Properties lines of credit.
Q. Didn't he also testify that it was in fact a portfolio

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held by Avatar Properties?
A. I don't remember that. He may have. I don't remember.
Q. So you just don't remember. But you have no information to say that that's untrue; you just don't remember?
A. I just don't remember.
Q. Assume with me that it is held by Avatar Properties. Avatar Properties is not a defendant in this case; is that correct?
A. What I understand is that Avatar Holdings is a defendant and Florida Cities Water Company is a defendant.
Q. And so your understanding is that Avatar Properties is not a defendant; is that correct?
A. Yes.
Q. And is it also your understanding that Avatar Properties is in the real estate business and not the utility business?
A. Yes.
Q. And that Avatar Properties has no direct connection with Florida Cities except that they're both subsidiaries of Avatar Holdings?
A. It's my understanding that they're both subsidiaries of Avatar Holdings. I don't have any other information to --
Q. But you have no other information about any connection between Avatar Properties --
MR. QUINN: Objection.
BY MR. HIRD:

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Q. – and Florida Cities?
THE COURT: Just a moment.
MR. QUINN: Objection. We've covered this. This has been asked and answered, Your Honor.
THE COURT: Sustained.
BY MR. HIRD:
Q. Would you reasonably expect this investment portfolio to be subject to management fees?
A. I think Mr. McNairy testified that there are two third-party managers of the investment portfolio, and so yes.
Q. And so they would pay management fees, and those would be expected in the ordinary course; is that correct?
A. Yes.
Q. And that would reduce the amount of money available in those portfolios; is that correct?
A. It depends on how the accounting is done. For instance, if you – just using – if you have a million-dollar portfolio and you have fees of let's say 100,000 and yet you earn 200,000, you have a net hundred-thousand-dollar gain.
Q. But that would reduce it beyond getting the – realizing the full 200,000 gain in your example; is that right?
A. Yes.
Q. Okay. Now, assuming that Avatar Holdings holds this portfolio, as a property company would it reasonably – would you reasonably expect it to have property taxes to pay?

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A. I'm not sure if your question -- I thought you said if Avatar Holdings holds the --
Q. I'm sorry. Let me strike that. I made an error.
Assuming that this portfolio is held by Avatar Properties as a property company, a real estate company, wouldn't real estate taxes be a recurring cost?
A. It doesn't matter if they hold a portfolio or not. I would normally expect a real estate company to have to pay property -- that owns real estate to have to pay property taxes.
Q. And wouldn't it use available assets to it to pay property taxes?
A. I would expect it would.
Q. And if it paid property taxes from that portfolio, wouldn't that reduce the amount in the portfolio?
A. Again, it depends on what the earnings from the portfolio are or were.
Q. In your report, Ms. Zimmer, you say that Florida Cities can pay 1.5 million without borrowing, but it can pay up to 7 million, 7 and a half million if it borrows from Avatar Holdings; is that correct?
MR. QUINN: Objection, Your Honor. Again, we've covered this a number of times.
MR. HIRD: I'm sorry. I think this was asked on Mr. High's questioning, and I'm asking some further -- I'm

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introducing a new topic.
THE COURT: I'm going to allow him to get into it, but only for the purpose of bringing out anything additional.
Of course, don't repeat anything unless it's –
MR. HIRD: I'm not repeating.
THE COURT: – necessary to get into some aspect of it.
MR. HIRD: I'm not repeating, Your Honor. I'm asking about a different issue.
THE COURT: All right.
MR. HIRD: I'm asking – Mr. High explored this question from a Florida Cities perspective, and I'm exploring it from an Avatar Holdings.
THE COURT: Go ahead.
BY MR. HIRD:
Q. If Avatar Holdings were to lend Florida Cities the additional money, how would it get paid back?
A. It depends on whatever the terms were that Avatar Holdings agreed – you know, they would have an agreement between Florida Cities and Avatar. They could spread payments over – you know, there would be an amortization.
Q. But wouldn't it be paid back out of money that would have otherwise gone from Florida Cities to Avatar Holdings as dividends?
A. I think – well, I think Florida Cities pays its parent

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dividends, Florida Cities Holdings. Are you talking about eventually it goes up to Avatar Holdings?
Q. Yes.
A. Well, any excess, it would be paid in interest and principal repayment rather than it would take away from dividend.
Q. It would take away –
A. The ability to pay dividends, yes.
Q. It would take away from the dividends. So ultimately the money would come out of Avatar Holdings' pocket, and it would not be repaid because the dividend income it would otherwise get would be lost; is that right?
A. They would not – it would prohibit Florida Cities from paying that amount in dividends. I'm not sure I'm following --
Q. And that would have been money that Avatar Holdings might otherwise get in dividends; is that right?
A. Yes, that's an option, that the company could pay it in dividends instead.
Q. So functionally if Florida Cities is assessed a penalty of more than 1.5 million and it borrows the excess from Avatar Holdings, that extra money really comes from Avatar Holdings' pocket, right?
A. Well, it's financed through Avatar. I assumed in my report Avatar Utilities. If you want to assume Avatar

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Holdings, that's fine.
Q. So it would in fact come from Avatar?
A. It would be financed by its parent or its ultimate parent. But Florida Cities would be paying it back through earnings over however many years out the loan went.
Q. And if this Court – let's assume for the moment that this Court found Avatar Holdings not liable. If a payment was assessed against Florida Cities for an amount above 1.5 million that required Avatar Holdings to lend the money to Florida Cities, wouldn't Avatar Holdings essentially be paying a penalty for liability it didn't have?
MR. QUINN: Objection. This calls for a legal conclusion and speculation.
THE COURT: Sustained. Sustained.
BY MR. HIRD:
Q. Let me ask another question, then. You've said that in addition to the seven – to Florida Cities paying this penalty that Avatar Holdings can pay its own penalty of up to 15 million; is that right?
A. Are you talking about in addition?
Q. Well, you said that Avatar Holdings can pay a penalty of up to 15 million.
A. Right.
Q. If this Court were to assess $7 and a half million penalties against Avatar Holdings and Florida Cities,

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wouldn't – strike that.
You just testified that anything above 1.5 million that would be assessed against Florida Cities would come from Avatar Holdings or some other Avatar-related entity; is that right?
A. No, I don't think I testified to that. I testified that if payments were to be made up front, it could be made if its parent, some parent above Florida Cities Water, were willing to loan the money or finance the payment to Florida Cities.
Q. If those payments were being made in that manner and that parent was Avatar Holdings and Avatar Holdings would be assessed its own penalty, wouldn't Avatar Holdings functionally be paying twice for the same violation?
MR. QUINN: Objection. Again, it calls for speculation and a legal conclusion.
THE COURT: Sustained.
MR. HIRD: I have no more questions, Your Honor.
THE COURT: Redirect?
MR. QUINN: Your Honor, two items, and we can move on.
Your Honor, at this time I move United States Exhibit 585 into evidence. I neglected to earlier.
And also with regard to Ms. –
THE COURT: Wait. Wait. Wait.
MR. QUINN: I'm sorry.

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THE COURT: That's 585?
MR. QUINN: Yes, sir.
THE COURT: All right. Do we know which one we're talking about here?
MR. QUINN: It was one of the documents Ms. Zimmer reviewed.
THE COURT: All right. It will be received.
(United States Exhibit Number 585 received in evidence.)
MR. QUINN: Your Honor, with regard to Exhibit 598 – that is the expert report of Ms. Zimmer – in light of the Court's ruling, I would only like to move portions of it in and mark for identification the remaining portions that deal with wrongful profits.
Your Honor, I would like to move into evidence Exhibit 598 only Part 2.
THE COURT: Okay. That will be received.
MR. QUINN: I would also like to move into evidence Exhibit 598-A.
THE COURT: 598-A?
MR. QUINN: Yes, which is an –
MR. HIRD: Excuse me, Your Honor.
THE COURT: Just a moment.
MR. QUINN: 598-A is an attachment to Ms. Zimmer's report. It was just broken out. It's Attachment 1 or Exhibit

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1.
MR. HIRD: What does it have on its attachment?
THE COURT: You mean exhibit or -- no.
MR. HIRD: No objection.
THE COURT: Wait a minute. I haven't found it. 598-A?
MR. QUINN: Yes, sir.
THE COURT: Oh, is that a separately -- or is that an attachment?
MR. QUINN: It was an attachment to the original report, Your Honor.
THE COURT: Oh, I see. I see. Well, that's –
MR. QUINN: But it's a separately-marked exhibit. There are certain other ones –
THE COURT: All right. It's not indexed with a tab, but it is -- it's on a page which it has typewritten "Exhibit 1," and then the tab is Government Exhibit 598-A. And that's what you're talking about?
MR. QUINN: Yes, Your Honor.
THE COURT: Okay.
MR. QUINN: I would like 598-B and C to be marked only for identification. I will not move those.
I will move, however, Exhibit 598-D, 598-E, and 598-F into evidence, please.
MR. HIRD: We don't object, Your Honor.

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THE COURT: Sir?
MR. HIRD: We don't object.
THE COURT: Okay. Well, let me find them here and make sure we know what we're talking about.
You're offering D?
MR. QUINN: E and F, Your Honor.
THE COURT: D, E, and F?
MR. QUINN: Yes, sir.
THE COURT: All right. They'll be received.
MR. QUINN: Thank you.
Your Honor, we have no more questions of Ms. Zimmer.
THE COURT: All right. Thank you, ma'am. You may step down.
THE WITNESS: Thank you.
(Ms. Zimmer was excused.)
MR. QUINN: Your Honor, for purposes of the remainder of the day, United States has one remaining witness, which I believe will take ten minutes on direct examination, after which we have two ministerial items moving some depositions in and some interrogatories in. I don't know how long the cross-examination is going to go.
After we've done that we rest, so what would you prefer, Your Honor?
THE COURT: Well, I have a sentencing that's -- is the defendant here? Is he incarcerated?

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THE CLERK: Yes.
THE COURT: Okay. Are the lawyers here?
THE BAILIFF: Everybody's here, Your Honor.
THE COURT: Okay.
THE BAILIFF: I don't see the Government, Your Honor, but the defendant is here and his attorney is here.
THE COURT: What is the urgency, if any, with respect to the witness? Is there any urgency?
MR. QUINN: Oh, no, none. We just want instead of leaving him hanging overnight --
THE COURT: Sure.
MR. QUINN: We can move the ministerial stuff now if you're waiting for the other. Or we can come back after.
Your Honor, there's no urgency with regard to the witness.
THE COURT: Okay. Let's --
THE BAILIFF: Everybody's present.
THE COURT: Let's take the ministerial stuff.
MR. QUINN: Yes, Your Honor.
THE COURT: And then I think we're going to have to recess for the evening.
MR. QUINN: Your Honor, ministerial item number 1 deals with answers to interrogatories. United States would move the following exhibits in. And Mr. Moore will pass them on to the defendant. These are answers by the defendants.

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The first item is the March 30th, 1995 document Florida Cities' Answers to the United States' First Set of Interrogatories and the Correction to Florida Cities' Answers to the United States' First Set of Interrogatories. We'd like to move those into evidence, Your Honor.
THE CLERK: What number?
MR. QUINN: Should I continue on down the list, or would you like to take these one by one?
THE COURT: Take them one by one.
MR. QUINN: Okay.
THE COURT: Are these marked?
THE CLERK: What exhibit --
MR. QUINN: I'm sorry?
THE COURT: Are these marked?
MR. QUINN: As exhibits?
THE COURT: Yes.
MR. QUINN: They are not marked as exhibits, Your Honor.
THE COURT: All right. They'll be received.
MR. QUINN: Thank you. The next item is the November 22nd, 1995 Florida Cities' Amended Revised Responses to Plaintiff's First and Second Interrogatories.
THE COURT: Okay. They'll be received.
MR. QUINN: Your Honor, the next item is the June 8th, 1995 Defendant Florida City Water Company Answer to

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Plaintiff's Second Set of Interrogatories.
THE COURT: They will be received.
MR. QUINN: The next item is the June 9th, 1995 Defendant Florida Cities Water Company Answer to Plaintiff's First Request for Admissions.
THE COURT: Received.
MR. QUINN: The next item is the June 9th, 1995 Defendant Avatar Holding, Incorporated Objections and Answers to United States' First Request for Admissions.
THE COURT: Received.
MR. QUINN: The next item is the June 15th, 1995 Defendant Florida City Water Company's Answers to Plaintiff's Second Request for Admissions.
THE COURT: Received.
MR. QUINN: And the final discovery item is the July 14th, 1995 Defendant Florida City Water Company's Answers to Plaintiff's Third Set of Interrogatories.
THE COURT: Be received.
MR. QUINN: The final ministerial item, Your Honor, deals with the movement of -- I'd like to move in certain deposition transcript portions. These have been set out in our pretrial memorandum located at page 32, 33, 34 -- the joint pretrial statement. Excuse me. The revised joint pretrial statement, Your Honor, pages 32, 33, and 34.
THE COURT: Well, now, 34 is the one we were talking

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about earlier.
MR. QUINN: I'm sorry. The top of 34, Your Honor. It continues over for Ms. Karleskint.
THE COURT: Karleskint?
MR. QUINN: Yes, sir. And then --
THE COURT: Well, now, wait a minute.
MR. BAISE: Your Honor, a point of clarification, is the Government moving in the deposition of Gerald Allen?
THE COURT: Of who?
MR. BAISE: Gerald Allen.
MR. QUINN: Yes, we are, Your Honor.
MR. BAISE: Gerald Allen's going to be testifying, though. He's available.
MR. QUINN: Your Honor, we can use depositions for a -- deposition of a party for any purpose.
MR. BAISE: You can use it to impeach, but he's going to be here to testify. That's best evidence.
MR. QUINN: Your Honor, we can use it for any purpose according to the Federal Rules of Civil Procedure.
THE COURT: All right. Now, is this a party?
MR. JACOBS: Party officer.
THE COURT: Party officer?
MR. QUINN: Yes, sir.
THE COURT: Yeah, that can be used.
Now, what you're proposing to do is to introduce

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these and have me read them at some time during my leisure, or are you going to read them?
MR. JACOBS: May I address that, Your Honor?
THE COURT: Yes, sir.
MR. JACOBS: The intention was to put them into evidence and then, as with the 500 documents, it's not our concept that you would read all of them at your leisure but that perhaps we would call your attention to particular documents and particular portions of testimony in post-trial proceedings.
THE COURT: Well, let me tell you, I've been burned on this sort of thing before where during non-jury trials counsel have dumped depositions on the Court instead of reading them during the trial of the case, and it becomes quite burdensome.
MR. JACOBS: We -- I think it's our intention to cover, as we have with Mr. Levy, for example, most of the material that took place in the deposition with the witness, if he is being called in fact by the defendant or one of the defendants.
Although they propose to call 26 witnesses, by my present count anyway, in the next five days, I'm not sure they're going to get to all of them. I don't want to risk, of course, their not getting to some of them and my not moving into evidence deposition portions. And as the rules provide

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for parties, officer, or managing agent, we are entitled to use their statements in their deposition for any purpose.
So I can certainly represent to the Court that there's no intention to in any way mislead the Court here. We want to preserve our right to have this material in evidence for the record.
MR. BULLOCK: Your Honor, let me address a couple of different issues. First of all, as to page 32 of the March 27, 1995 deposition of Gerald Allen -- as you will recall, Mr. Allen is here as the corporate representative of Florida Cities -- which is a deposition in which Mr. Allen took the Fifth Amendment, Mr. Allen subsequently changed his mind and testified for two full days and will be one of our witnesses.
I'm not sure whether this falls under the offer of proof from earlier this afternoon. I'm not really sure that it's relevant if the witness in fact is -- has been deposed and will testify.
THE COURT: Well, this deposition of March 27, 1995, this is the one in which he did not testify?
MR. BULLOCK: Chose not to testify, Your Honor.
THE COURT: Now, you're addressing right now only that deposition?
MR. BULLOCK: That is correct, on this point.
THE COURT: Well, it seems to me that -- seems to me that that particular deposition would fall under the Court's

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reserved ruling, wouldn't it, Mr. Jacobs?
MR. JACOBS: Well, perhaps the inferences to be drawn from the deposition, but under Rule 32(a)(2), the deposition of a party or of anyone who at the time of the taking the deposition was an officer, director, or managing agent --
THE COURT: Well, I understand that. I don't think there's any issue as far as I'm concerned as far as the Court -- or your entitlement to present the deposition of a party and any officer and so forth.
What we're talking about now is whether that particular deposition doesn't fall within the Court's reserved ruling with respect to that grouping on page 34 of the revised joint pretrial statement.
MR. JACOBS: Perhaps I misunderstood the Court's ruling in that respect. Mr. Wilkov, there was a distinction made because he was a former officer. And I understood the Court to be taking under advisement the issue of the effect of the pleading of the Fifth Amendment by these witnesses. I did not understand -- and perhaps that was my mistake -- that we had -- I didn't understand that we had at that point in time in the discussion actually moved these depositions into evidence, which is what --
THE COURT: Well, you were offering the ones on page 34 into evidence, and the Court has reserved ruling on that.

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Now, I announced that I was sustaining the objection to Mr. Wilkov for the reasons that I mentioned.

But it seems to me that at this point at least I'm going to put the deposition of Mr. Allen dated March 27, 1995 in the same category and reserve on that.

MR. BULLOCK: Your Honor, I would add as a supplemental point to that, it's my understanding of Mr. Jacobs' argument is that because he was unable to depose the individuals we discussed early this afternoon he ought to be able to draw the inference. In fact, he's been able to depose Mr. Allen for two days, and so I'm not sure -- that to me is another and a separate argument on our behalf that this particular deposition shouldn't be included.

MR. JACOBS: I'm not asking that adverse inferences be drawn from Mr. Allen's prior failure to testify or his prior assertion of the right to testify. As you can see, he went on to testify. I've got --

THE COURT: Well, then why do you want the March 27, '95 deposition in evidence, then?

MR. JACOBS: I think I'm entitled to have it in evidence, and I'm interested in why there was a change, frankly, Your Honor. And I don't want to get into that too much, but there was obviously a change of heart of some sort, which I'd like to discuss with Mr. Allen when he takes the stand.

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MR. BULLOCK: Your Honor, he actually asked Mr. Allen that question in his deposition, and Mr. Allen answered it.

MR. JACOBS: Well, I still think I can ask him when he gets to the stand.

THE COURT: Well, all right. I'm inclined to believe that notwithstanding the fact that a witness originally may take the Fifth Amendment and not submit to deposition, if you're able -- if he changes his mind and does take -- you do take his deposition later on, although I think that you may very well be entitled to inquire as to why the change of heart, I'm not sure that the deposition, the original deposition, is admissible.

I will -- I'll reserve ruling on that, that issue.

MR. JACOBS: Very well. And --

THE COURT: Which when you do brief this subject that we've been talking about, which was precipitated by our discussion regarding page 34, you can treat that as well.

MR. BULLOCK: Your Honor, as on page 33 -- Your Honor, he is offering the deposition of Julie Karleskint. I don't believe and don't know exactly how the Court would define an officer or director. I don't believe Ms. Karleskint has ever been an officer or director of Florida Cities Water Company.

MR. JACOBS: If I may, Your Honor, he's left out

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"managing agent." And her title is operations manager, so we think she falls under the rule.

MR. BULLOCK: Your Honor, Florida Cities would contend that she is a staff person, not someone that rises to that level.

THE COURT: Well --

MR. BULLOCK: Your Honor, we'll withdraw that.

THE COURT: Okay. All right.

MR. HIRD: Your Honor, on page 34 I don't know which ones are being admitted. Are you stopping with Ms. Karleskint?

THE COURT: Yes.

MR. HIRD: Okay.

MR. JACOBS: For clarification, then, is the Court accepting --

THE COURT: Yeah, I guess so.

MR. JACOBS: -- Mr. Tompkins, Mr. --

THE COURT: Who, Tompkins?

MR. JACOBS: Is the first one, Jack W. Tompkins.

THE COURT: Yes.

MR. JACOBS: Gerald Allen on November 13th, '95 --

THE COURT: Yes.

MR. JACOBS: -- and December 15th, '95?

THE COURT: Yes.

MR. JACOBS: Paul Bradtmiller, November 18th, '94

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and November 21st, '94?

THE COURT: Yes.

MR. JACOBS: Julie Karleskint on April 21st, '94 and October 2nd, '95 as well as --

THE COURT: Yes.

MR. JACOBS: -- October 16th, '95?

THE COURT: Yes.

MR. JACOBS: Thank you, Your Honor.

MR. BULLOCK: Your Honor, as a procedural matter -- and I almost hate to bring this up --

THE COURT: Then don't.

MR. BULLOCK: But unfortunately I think I have to.

In terms of objections to the questions that were in the depositions --

THE COURT: Okay. If there are objections, then you can read them just as if the witness is testifying.

MR. BULLOCK: Okay.

THE COURT: You see, that's the thing that I do not want to get saddled with later on.

MR. JACOBS: I think I took all of these that you've accepted without exception. And I believe that Mr. Scroggin was present at all of them, and I think that -- and Mr. Scroggin can correct me if I'm out of turn -- I think there were relatively few objections. I believe Mr. Baise was present for one day of Mr. Bradtmiller, but otherwise

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Mr. Scroggin was present. So, again, I don't --
THE COURT: They're going to go on the record here in this courtroom. You can read them, and I'll hear the objections as they --
MR. JACOBS: You --
THE COURT: I don't know when we'll finish this trial.
MR. JACOBS: Judge, you want us to read the lines that there are objections to?
MR. BULLOCK: Your Honor, my understanding of the Federal Rules is that all objections save as to the form of the question are reserved until the time the deposition will be used.
MR. JACOBS: There was no stipulation to that effect, Your Honor.
MR. BULLOCK: That's the operating basis of the Federal Rules.
THE COURT: Okay. We're through for the day, gentlemen. I'll see you at 8:45 tomorrow morning.
MR. JACOBS: Judge, what was your ruling with respect to these --
THE COURT: Those depositions?
MR. JACOBS: Yes, sir.
THE COURT: Yeah. You're going to be permitted to have them read. That's my ruling. And I'll hear the

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objections as they're read.
MR. JACOBS: And if there are -- I'm trying to get to expedite matters. If there are -- as I say, most of these questions and answers were not objected to. Can they be accepted, then, as such and we'll just read the lines that are objected to with the objections, or we'll just waive those and take them right out if we don't think they're that important? Again, I'm trying to move things along.
THE COURT: Well --
MR. JACOBS: Because if the Court accepts that proposal, I think we could probably get through this in, at most, an hour, all of them.
MR. BULLOCK: Your Honor, these depositions were taken under the understanding they were pursuant to the Federal Rules, and our position is that that's the Federal Rules that all the objections save as to the form are preserved. I don't believe that requires --
THE COURT: Now, wait a minute. Sit down. Sit down.
Did not the order, the pretrial order or the scheduling order, or the local rule require that any objections to any depositions that are listed be set forth in the joint pretrial statement?
MR. JACOBS: I have it handy if it would help the Court, Your Honor.

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THE COURT: The scheduling order provides that the joint pretrial -- or the pretrial statement shall -- let's see. This is subparagraph -- well, paragraph 8-H. A list of all depositions to be offered into evidence at trial, as distinguished from possible use for impeachment, including a designation of the pages and lines to be offered from each deposition.
Well, I was under the impression that the order required all objections to any portions of the deposition designated be set forth in the pretrial statement. Not so.
MR. JACOBS: Judge, again, if I can be helpful, there were very few objections. I don't think this is going to be a problem.
I would be willing to meet with counsel and either remove from our proposal the questions that were objected to, excise them and offer the rest, or just read the few lines where there are objections and ask the Court to rule.
And, again, my best estimate would be that would take no longer than an hour.
MR. BULLOCK: Your Honor, the point is, the Federal Rules allow us to preserve all objections. That is the underlying assumption that we've used in these depositions and --
THE COURT: Well, and that's -- I was telling you that I was under the impression that I descended further than

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that, and I know now to amend my scheduling order.
Go ahead.
MR. BULLOCK: I was just going to make a point that there was no understanding that the defendant, this defendant, was waiving that. I believe Mr. Hird can speak that there was no understanding that Avatar Holdings was waiving that.
As a matter of fact, Ms. Tsosos just handed me a copy of Mr. Levy's deposition, which clearly says it was taken pursuant to Federal Rules and they're not waiving objections.
MR. JACOBS: We didn't offer Mr. Levy, sir.
THE COURT: Sir?
MR. JACOBS: We didn't offer Mr. Levy. He's here.
MR. BULLOCK: There has to be agreement of all counsel that you would waive that.
THE COURT: Okay. Well, Mr. Bullock has posited that objections, unless they are as to form, are not waived.
MR. BULLOCK: That's correct.
THE COURT: And that sounds right to me. I think that's correct. And I'll be traveling on that assumption.
Mr. Jacobs, is that not your understanding of the Federal Rule?
MR. JACOBS: It wasn't my understanding, Your Honor, unless there's a stipulation, which there was never at any of these depositions.
THE COURT: A stipulation of what?

MR. JACOBS: By the parties that objections would be preserved. It was my understanding --

THE COURT: Well, now, you know, it's historically always been the case, as far as I recall, that while you must object as to the form of the question at a deposition, else run the risk of waiving those kinds of objections, that you don't waive the right to object to questions other than as to form.

Now, historically that's always been the case, I think. I mean that's -- as I get older, I know that when I -- the more dogmatic I am, the more I step on my own toes.

But, now, if you can disabuse me of that with some authority, then so be it. But I'm afraid that counsel for the defendants have a legitimate point here when they say that they will be entitled to raise objections to these depositions that are being offered on bases other than as to form unless they have raised the objections as to form during the deposition.

So that's what it appears at this point, so we'll proceed to hear your depositions in the morning. And we can have them read, and if somehow or other you can avoid the scenario that I think all of us see might occur, more power to you. But I will be here to hear these depositions tomorrow, however long it may take to read these excerpts.

So anything else?

We'll reconvene at 8:45 tomorrow morning, and we'll plan to recess at 3:45 tomorrow afternoon.

MR. JACOBS: Thank you, sir.

(Adjourned at 5:10 p.m.)

CERTIFICATE

I hereby certify that the foregoing is an accurate transcription of proceedings in the above-entitled matter.

_____ _____

Court Reporter Date

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs.
FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS, INC.,
Defendants.

Case No. 93-281-CIV-FTM-21

Friday, March 29, 1996
Tampa, Florida

TRANSCRIPT OF NON-JURY TRIAL
BEFORE THE HONORABLE RALPH W. NIMMONS, JR.,
UNITED STATES DISTRICT JUDGE

Appearances of Counsel:

For the Plaintiff: Mr. Daniel S. Jacobs
Mr. T. Anthony Quinn
Ms. Gwendolen Fitz-Henley

For Defendant Avatar: Mr. David B. Hird
Ms. Joanne Tsotsos

For Defendant Florida Cities: Mr. Gary H. Baise
Mr. Alexander M. Bullock
Mr. Lance High
Mr. Don G. Scroggin

Reported by: Dennis Miracle
Official Court Reporter

PROCEEDINGS

THE COURT: Good morning.

Okay. Are we ready to proceed?

MR. JACOBS: Your Honor, with your permission, I would like to address the issue that we left off with yesterday which had to do with reading in portions of depositions that the Government listed in its part of the joint pretrial statement.

I recall the Judge mentioning that he anticipated taking under advisement any Rule 52 motion. With that in mind, what I would propose -- and I'm cautiously optimistic that this will at least alleviate a great number of these depositions; and if not, certainly a great number of the lines of the depositions that we would need to have read into the record -- I would like to withdraw our proposal that we read those into the record now and reserve the right to do so in our case on rebuttal, if need be.

I suspect that most of the information that we seek to have entered into evidence through the depositions we will be able to elicit through the witnesses that Defendants advised us that they will be calling.

THE COURT: Well, you can do that, of course, if it's proper rebuttal. I mean, you don't have to reserve your right to do that.

MR. JACOBS: The only one exception is one

witness, Mr. Tompkins, is unavailable beyond the subpoena power of the Court since he resides in Nashville, Tennessee, so that -- but he's the only witness of the ones we've listed who did not take the Fifth Amendment who the Defendants are not also anticipating calling.

And I will personally commit to going through that particular deposition before our case on rebuttal and excising out any information that we could really do without by that point in our case so that, again, I'm cautiously optimistic that we could get through this all in an hour at the end of the case, if need be.

THE COURT: Mr. Bullock?

MR. BULLOCK: If the Court please. Good morning, Your Honor.

THE COURT: Good morning.

MR. BULLOCK: A couple of points on that issue. First of all, I looked at some case law in the library last night. There is authority within the Court's discretion for you to exclude depositions which are being offered to be read in if you find that the evidence would be cumulative or duplicative. And I would be delighted to hand the Court the authority and give a copy of that to counsel as well.

That even though the Plaintiff may have a right to read that in, you in your discretion may exclude that if you find it, I believe, duplicative, cumbersome or if it would

interfere with the time in which the case would be tried.

I would also note that Mr. Tompkins, the witness who Mr. Jacobs just spoke about, at the time of the taking of the deposition was not an officer, director or manager of Florida Cities Water Company.

Rule 32(a)(2) says that the deposition must be of an officer, director, managing agent at the time of the taking of the deposition. So, we would object to Mr. Tompkins' deposition being offered in that manner.

MR. JACOBS: Are you through?

MR. BULLOCK: I would note that the authority that I have cited is also found in Wright and Miller, in Volume 8-A, Section 2145. And if the Court pleases, I'll be glad to hand that up and to serve copies to counsel.

THE COURT: Okay.

MR. JACOBS: While he's doing that, may I respond just briefly --

THE COURT: Yes, sir.

MR. JACOBS: -- on Mr. Tompkins?

We do not seek to have the deposition testimony of Mr. Tompkins read pursuant to 32(a)(2). We seek to have the deposition testimony of Mr. Tompkins read pursuant to Rule 32(a)(3) which provides, under Subsection B, that the witness is at a greater distance than one hundred miles from the place of trial or hearing.

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Like I said, he's in Nashville, and I would ask the Court to take judicial recognition that Nashville is more than a hundred miles from here.

THE COURT: Okay. Mr. Bullock, what about that? He's not offering it under 32(a)(2).

MR. BULLOCK: Your Honor, if that -- my impression was as of last night, Your Honor, it was under 32(a)(2). If that's what he represents, that's -- in my mind it's a totally different ball game.

And, Your Honor, if he submits the deposition, we, of course, would reserve the right to offer other sections of the deposition as well.

Let me also, Your Honor, suggest an additional alternative in the event that the Court does not want to exclude under the authority...

THE COURT: All right. Well, right now, we're only talking about Tompkins. As I see the scenario that has been painted by Mr. Jacobs, he's not going to be offering any of this deposition testimony during his case in chief with the possible exception of Mr. Tompkins.

MR. JACOBS: I'd even hold off on that, Your Honor. I'm going to offer nothing now.

THE COURT: I know, I know, but what -- my understanding is that with respect to all depositions except Tompkins, Mr. Jacobs is proposing to be willing to only

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offer those depositions that he would seek to offer on rebuttal, if any. They would, of course, need to properly be rebuttal.

With respect to Tompkins, I suppose he's asking the Court -- if I'm misreading you, Mr. Jacobs, let me know -- I suppose you were asking the Court for leave to permit you to evaluate the Tompkins deposition and augment your direct case with so much of his deposition testimony as you wish to do after the conclusion of the Defendants' cases. Is that what you're asking?

MR. JACOBS: I'm not sure I'm going to need to do that, no. Actually, I -- I'm sorry I didn't make myself clear.

We've already designated certain lines --

THE COURT: Yes.

MR. JACOBS: -- and what I said I would commit to do is try and cut back on those lines.

THE COURT: On rebuttal?

MR. JACOBS: Yes, sir.

THE COURT: But only on rebuttal?

MR. JACOBS: Yes, sir.

MR. BULLOCK: And, Your Honor, subject to his establishing that this is, in fact, proper rebuttal...

THE COURT: Well, that's what I'm saying: He'll have to -- he's not going to be able to reopen his case, as

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it were, with these depositions. He's going to step back and be willing to take the chance that he'll be able to cover what he can by cross examination. And then if there are some minimal matters -- hopefully minimal, if any -- that he feels that he needs to present on rebuttal, proper rebuttal, through these depositions, then he'll seek to do so.

MR. BULLOCK: This is just as to Mr. Tompkins' deposition?

THE COURT: No. I --

MR. JACOBS: The only qualification that I mentioned earlier is if there's a 52 -- my understanding is, the Court is going to take any 52 motion under advisement until the close of all of the evidence.

THE COURT: Well, I said I probably would be doing that, but what has that got to do with this?

MR. JACOBS: That's the one reservation that I have about making this proposal to move things along. There are some lines that will relate to Avatar Holdings' liability. And I'm happy to read those in, again, at the end of the evidence, but I don't want my case thrown out when I rest my case in chief because I haven't read those lines in.

THE COURT: Well, you're presenting your case as to both Florida Cities Water and Avatar, and you will be

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closing pretty soon --

MR. JACOBS: Within an hour, I hope.

THE COURT: -- so I don't understand where the Tompkins deposition has any -- what that has to do with the Rule 52 motion and whether the Court reserves on that or rules on it.

MR. JACOBS: No, that would have to do only with two of the three witnesses that come under 32(a)(2) and these are witnesses -- the Company's own employees.

THE COURT: Well, yes, but if you present either, you know, depositions under (a)(2) or (3)(b), they are going to need to come in in your case in chief unless they are proper rebuttal.

MR. JACOBS: I understand.

MR. HIRD: Your Honor, may I speak to this issue for a moment? The two witnesses that he's referring to, I believe, are Mr. Allen and Ms. Karleskint. While they may be officers or managing agents of Florida Cities, they are not of Avatar Holdings, so I don't think they come in against Avatar Holdings under that rubric.

We do intend -- Your Honor may defer ruling on the Rule 52(c) motion, but we do intend to make one on behalf of Avatar Holdings at the close of Plaintiff's case in chief.

THE COURT: Yes. That's not surprising.

All right.

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Which, incidentally, that last quote or that last statement could be misconstrued. I didn't mean anything by that; I'm meaning that that's almost always done. I'm not commenting on anybody's case here.

Okay. Whether you all are clear or not, I think I'm clear, and so we'll just move on at this point.

MR. JACOBS: Thank you, Your Honor.

THE COURT: Call your next witness.

MR. QUINN: Your Honor, the United States calls Roger Pfaff.

THE DEPUTY CLERK: Come forward and be sworn. Raise your right hand, please.

Do you solemnly swear that the testimony you are about to give in this cause will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: Yes.

MR. HIGH: Your Honor, I have one issue to raise before Mr. Pfaff begins his testimony.

Yesterday, counsel tried to lay a foundation through expert witness Eileen Zimmer about the economic benefit model. I expect that counsel will try and do that today through Mr. Pfaff.

I would call the Court's attention to United States' supplemental responses to Defendant's first interrogatories served on November 17th where the

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interrogatory was, Identify all persons who you intend to call as fact witnesses at any hearing or trial or other proceeding; state the subject matter on which the witness is expected to testify and summarize the facts to which each witness is expected to testify.

They identified Mr. Pfaff, and they identified Mr. Pfaff to testify to the nature and number of Defendant's violations at Barefoot Bay and Carrollwood and Waterway Estates and to the enforcement history at each of those facilities.

So, to the extent that Mr. Pfaff is going to testify about economic benefit, I would ask that his testimony be limited.

In addition, Defendants served 30(b)(6) notices of deposition on the Plaintiff, and one of the paragraphs, Paragraph 38, stated: Any economic analyses performed by EPA to assess the economic benefit the company gained for alleged instances of non compliance of Barefoot Bay, Carrollwood and Waterway Estates, and the United States designated Mr. Kenneth Kwan to speak to that.

So, again, to the extent that Mr. Pfaff is going to talk about economic benefit, I would ask that his testimony be limited.

MR. HIRD: Your Honor, we join in the objection.

We would also like to point out that Ms. Zimmer

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was the only expert designated with respect to economic benefit. The only economic benefit analysis that was provided to the Defendants was Ms. Zimmer's report which this Court has struck in appropriate part.

THE COURT: All right. Mr. Quinn?

MR. QUINN: Yes, Your Honor. If I may, I'd like to address the 30(b)(6) issue first.

The United States -- counsel correctly states the United States did not designate Roger Pfaff as the United States' designee for that purpose.

Under Rule 30(b)(6), we are entitled to designate any person who consents to testify on that behalf. The fact that we didn't designate Roger Pfaff for purposes of testifying about economic benefit at that time does not prohibit him from testifying at a later point in time.

The mere fact that his deposition was noticed and we put him up -- or the agency's deposition was noticed and we put up Mr. Pfaff to testify about an area doesn't mean he can't testify about another area.

THE COURT: All right. Well, what about the other argument?

MR. QUINN: The answers to interrogatories, counsel correctly read the response. Mr. Pfaff will not be putting up anything new today. He'll be testifying about -- the portion that he'll be testifying about comes within that

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area of enforcement history. There will be one document that we will use with Mr. Pfaff, and that document was done during the course of enforcement history.

And then as to the expert issue, the United States will present -- the testimony of Mr. Pfaff is not expert testimony at this point. What we're trying to elicit from him will not require expert opinions, because we are limited; he didn't write a report and we didn't list him as an expert.

THE COURT: Well, you'll be precluded from eliciting any expert testimony on economic benefit from this witness.

MR. QUINN: Yes, sir.

THE COURT: All right. To that extent, I will sustain any anticipated objection; but, of course, Mr. High, if you perceive that that's being violated, you, of course, have the right to object at the appropriate time.

All right. You may proceed.

MR. QUINN: Thank you, Your Honor.

- - -

Thereupon,

ROGER PFAFF,

a witness, having been duly sworn to speak the truth, the whole truth and nothing but the truth, was examined and testified as follows:

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DIRECT EXAMINATION
BY MR. QUINN:
Q. Mr. Pfaff, where do you work?
A. At the U.S. Environmental Protection Agency in Atlanta.
Q. What is your title with the United States Environmental Protection Agency in Atlanta?
A. I'm chief of the Enforcement Section and the Water Management Division.
Q. When you say "Atlanta," do you mean Region 4?
A. Yes. That's the Region 4 office.
Q. How long have you been chief of the Enforcement Section, Water Management Division, at Region 4?
A. Six years.
Q. Sir, what is the BEN model?
A. It's a mathematical model used to compute the economic benefit of delayed or avoided costs of compliance with environmental laws.
Q. Can you tell me briefly what are delayed costs of --
MR. HIGH: Your Honor, I would object.
MR. HIRD: Objection, Your Honor.
MR. HIGH: This is getting into what the benefit model is.
MR. QUINN: This is a fact, Your Honor; this is not expert testimony.

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MR. HIRD: Your Honor, the Plaintiff proffered testimony on economic benefit using one methodology. He is now -- they are now presenting economic benefit testimony using a completely different methodology.
THE COURT: What's the purpose of his testimony if it's not to attempt to elicit from him testimony regarding economic benefit?
MR. QUINN: Your Honor, an exhibit has been entered and he is going to explain that exhibit.
THE COURT: What is the exhibit?
MR. QUINN: 494, Your Honor.
THE COURT: What is that exhibit?
MR. QUINN: It is an exhibit which has -- it's a memorandum with some attachments.
And, Your Honor, I also add that in your order of Monday, the Court agreed that in the instant case economic benefit should be analyzed as the present day value of costs avoided by non compliance rather than profits earned during the period of non compliance, from Page 3 of that order; and also on Page 4 of that order, the Court notes that Kenneth Kwan --
THE COURT: Would you sit down?
Gentlemen, I asked my -- I'm getting a little crotchety, I guess -- and I apologize for that -- but my rule in this courtroom is only one of you standing at one

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time. It's distracting to me when somebody else gets up while somebody is speaking.
As you know, I probably give attorneys more leeway in speaking than I should, but please don't get up until the other person has finished.
Go ahead.
MR. QUINN: Yes, Your Honor. I was reading from Page 4. Mr. Kwan testified at deposition that the method for calculating economic benefit involved analysis of the capital cost that is required to meet the permit or the Clean Water Act requirements as well as additional operations and maintenance expenses that are required to come in compliance.
On Exhibit 494, on the bottom -- it's numbered 733 and 734 -- are numbers which do that. And I am merely asking -- going to ask Mr. Pfaff to elucidate on those two pages.
And it does not -- my opinion is, and the United States' position is, this does not require a rocket scientist or expert testimony.
THE COURT: Okay, Mr. Hird.
MR. HIRD: Your Honor, this is an economic analysis. And although there is a model that's being used, it's a model that has been devised by EPA based on economic assumptions and economic analysis.

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I agree that the analysis of avoided costs is the accurate way to measure economic benefit, but there are a lot of assumptions that go into this model that affect the ultimate result, assumptions as to what the costs were, assumptions as to what the delay factor is, all sorts of things that one would cross-examine an expert witness about.
We don't have a designated expert witness whose deposition we could take because the witness that was designated used a different methodology. We deposed that individual. We explained how the methodology was wrong, and there was a motion to limit it.
So, what they are doing now is saying Mr. Pfaff is a fact witness because he, you know, may have turned the dials in the BEN model. In fact, he did not do it.
So, I don't think it's within his personal knowledge as to this particular calculation, these particular results. And they are using him as a pseudo expert.
THE COURT: Is 494 in evidence?
THE DEPUTY CLERK: Yes, sir.
MR. HIRD: 494 is in evidence; that is correct, Your Honor.
THE COURT: What are you going to offer in evidence through him?
MR. QUINN: Just 494, Your Honor. That's it.

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THE COURT: Which is already in evidence?
MR. QUINN: Yes. I'm just going to have him talk about those two pages, sir.
If I may add, Your Honor, these types of numbers are run for every case that EPA handles in the Clean Water Act.
THE COURT: Well, I'll hear his testimony and take under submission the objections, and you can renew your objections after I have heard his testimony.
MR. HIRD: Your Honor, may we also object at certain points as we go through on lack of personal knowledge?
THE COURT: Yes, sir.
MR. HIRD: Thank you.
THE COURT: You may proceed.
BY MR. QUINN:
Q. Mr. Pfaff, could you please turn to United States Exhibit 494, and I'd like to direct your attention to Page 733 and 734 as Bates stamped on the bottom. That's about the fourth and fifth pages in.
A. All right.
Q. Mr. Pfaff, what do these pages show?
MR. HIRD: Objection, Your Honor. Counsel has not shown that Mr. Pfaff prepared these pages or how he is otherwise familiar with them.

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THE COURT: Okay. Overruled.
THE WITNESS: They are two outputs of -- an output of two BEN runs for the Waterway Estates facility, one showing the economic benefit of not employing the wastewater treatment plant, and the other one for not moving the outfall in a timely manner.
THE COURT: Tell me what a BEN run is. I have read about it, but you need to elicit from him what a BEN run is.
MR. QUINN: Yes, Your Honor.
BY MR. QUINN:
Q. What's the BEN model used for at EPA?
THE COURT: Or BEN model.
THE WITNESS: The BEN model is used to calculate the economic benefit of the avoided or delayed costs of compliance with environmental laws, and these are computer outputs from runs made using that model.
THE COURT: You know, somewhere along the line this model that somebody has devised to determine economic benefit and to establish economic benefit -- you're saying that this can be established without anyone testifying as an expert.
MR. QUINN: Yes, Your Honor, we are at this point.
THE COURT: Ordinarily, you have somebody give testimony of economic benefit, come in and talk about the

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BEN model and what it means and how it was devised and why it has credibility.
MR. QUINN: Your Honor, I can't tell you what we've done before because I'm not aware that we get this far in a whole lot of cases, so I can't tell you that, sir. But I'll be happy to look it up and get back to you.
THE COURT: I'm concerned about -- you know, the Court has precluded you, rightly or wrongly, from bringing in the expert that you have designated to testify regarding economic benefit who has used a wrongful profits analysis, and then you bring somebody else in to testify regarding economic benefit and tell me that there is no expert testimony that is needed, that he can just look at an exhibit, which is a so-called "BEN run," and breathe credibility and life into that exhibit. It sounds like an end run to me.
MR. QUINN: Your Honor, I apologize if it appears to be an end run. The United States' position is that this document is in evidence, and there is nobody to say what it is.
THE COURT: Well, you know, there are documents that come into evidence in massive document cases that may be meaningless if there is not someone who can properly interpret those documents; and it seems to me that the person to properly interpret a BEN run is going to have to

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be an expert.
MR. QUINN: Your Honor, I respectfully disagree that an expert is required to do this, particularly because of the fact that at EPA and under Mr. Pfaff's supervision, runs like these are calculated all the time. They are --
THE COURT: All right. Go ahead.
MR. QUINN: I'm sorry. They are periodically done by engineers. It is correct that certain assumptions are made. The assumptions that are made are not being proffered at this point in time, just merely what that document says, and that's all I'm trying to do through this witness, Your Honor.
THE COURT: The purpose for this is to establish economic benefit?
MR. QUINN: Yes, Your Honor. We're trying to put a number on the table.
THE COURT: Yes, I know you are.
Well, go ahead and we'll see where we go.
MR. QUINN: Thank you, sir.
BY MR. QUINN:
Q. I think my last question was, can you tell me what Page 733 shows with regard to whether it was pollution control equipment or the relocation of the outfall? Can you tell me which one 733 is?
A. 733 is the pollution control equipment.

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Q. What is 734?
A. The relocation of the outfall.
Q. What does Page 733 of United States Exhibit494 conclude about the economic benefit of delayed compliance for the failure to upgrade pollution control equipment as calculated by the BEN model?
MR. HIGH: Your Honor, I would object to lack of personal knowledge.
MR. HIRD: I join in the objection.
MR. QUINN: I will withdraw that question.
BY MR. QUINN:
Q. Do you know what Page 733 of U.S. 494 concludes about the economic benefit of delayed compliance?
MR. HIRD: Same objection, Your Honor, as well as our continuing one.
THE COURT: Well, I'll overrule the specific objection at this point.
Go ahead.
THE WITNESS: Yes.
BY MR. QUINN:
Q. What does Page 733 of United States Exhibit494 conclude about the economic benefit of delayed compliance regarding the pollution control equipment as calculated by the BEN model?
A. It shows that as of March of 1993, it would be

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$3,089,000.
Q. Sir, do you know what Page 734 of United States Exhibit 494 concludes about the economic benefit of delayed compliance for relocation of the outfall as calculated by the BEN model?
A. Yes.
Q. And what does 734 of United States Exhibit 494 conclude about the economic benefit of delayed compliance as calculated by the BEN model?
A. That as of March of 1993, it is $226,018.
Q. Thank you.
MR. QUINN: No more questions, Your Honor.
MR. HIGH: Your Honor, I move to strike Mr. Pfaff's testimony.
THE COURT: I'm going to grant the motion. I think it would be necessary for the Government to come in and have someone testify as to what the BEN model is, why it has credibility; and of necessity I think that would have to be a person who would qualify as an expert witness, Mr. Quinn.
MR. QUINN: Yes, Your Honor.
THE COURT: All right. I'll grant the motion to strike for those reasons.
MR. QUINN: And we have no more questions for Mr. Pfaff.

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THE COURT: Thank you, sir. You may step down.
MR. QUINN: Your Honor, the United States rests.
MR. HIRD: Your Honor, just before the United States rests, if I may, there were four exhibits that were tendered yesterday that were tendered in incomplete form, and the Court instructed that if we had complete versions of them, they would be admitted.
We have provided them to counsel for the Government. I have copies for the Court and personal copies for Your Honor.
THE COURT: All right. Have you shown them to counsel?
MR. HIRD: Yes, sir. I believe Ms. Tsotsos, my colleague, has shown them.
We would like to have them --
MR. JACOBS: If you will just identify them for the record, I don't think we'll have --
THE COURT: Right. What are the numbers?
MR. HIRD: These were Avatar Holdings' Exhibits 21, 23, 24 and 25.
MR. QUINN: We have no objection, Your Honor.
THE COURT: All right. Those are being tendered by Mr. Hird. And as I understand it, those will replace the originals.
Do we have the first ones that were --

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MR. HIRD: Yes, Your Honor.
THE COURT: The originals?
MR. HIRD: Yes, or the incomplete versions.
THE COURT: Incomplete versions.
And so you have got hard copies of those, and those will be returned to, I guess, Mr. Hird.
THE DEPUTY CLERK: Yes, sir.
THE COURT: All right.
MR. HIRD: Your Honor, are those documents received?
THE COURT: Yes.
MR. HIRD: Thank you, Your Honor.
MR. QUINN: Now we rest, Your Honor.
THE COURT: Okay. These are just copies here that you handed to me?
MR. HIRD: Yes, Your Honor. Those are personal courtesy copies.
MR. BAISE: Your Honor, before the Defendant Florida Cities starts its case, I would like to defer to Mr. Hird for a motion, Your Honor.
THE COURT: All right, sir. Mr. Hird?
MR. HIRD: Thank you, Your Honor.
Your Honor, at this time Defendant Avatar Holdings would like to move the Court for a judgment on partial findings under Rule 52(c) of the Federal Rules of Civil

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Procedure.

In the Court's decision on summary judgment, it established the standard for holding a parent company liable for the Clean Water Act violations of its subsidiary, and that is that there had to be evidence showing that the parent corporation caused or directed violations or exercised actual and pervasive control of the subsidiaries to the extent of actually being involved in Florida Cities' daily -- Florida Cities' operations on a daily basis. So, in other words, we had to either actually control or direct the violation or be integrally involved everyday in the subsidiary. There has been no evidence that shows an every-day involvement of the parent corporation in the subsidiary.

THE COURT: Well, now, wait a minute. Are you saying that the Plaintiff -- the Government has to show evidence of some activity each day?

MR. HIRD: I'm reading your opinion -- from your opinion, Your Honor. You stated --

THE COURT: I think you read too much into that opinion.

Now, read back to me the portion that you're talking about.

MR. HIRD: Exercising actual and pervasive control of Florida Cities to the extent of being actually involved

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in Florida Cities' operations on a daily basis.

THE COURT: Well, you're not saying that the Government has to come in and put on evidence that the Defendant did something each day?

MR. HIRD: Not that the Defendant caused violations each day, but we're talking about -- what I understood you were saying about daily operations was that the companies would be so integrally involved that every day -- that even the most routine decisions would be made at the senior corporate management of the parent corporation.

THE COURT: Okay. Go ahead.

MR. HIRD: That level of control has not been shown by any of the evidence presented to date. There has not been the evidence of control on the everyday, the routine basis, the ordinary activity level.

Now, the other possibility that Your Honor left open, and the possibility which is consistent with the Lambert case decided by this Court, is the -- is a finding that the parent company caused or directed the underlying violations.

And let's look at what's left truly of the Government's case against Avatar Holdings. What's left at -- we'll start with Carrollwood. At Carrollwood, what's left is the Government's allegations that in this narrow window of time, the last six months of 1991, there were

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violations of the permit for the Carrollwood plant, the advanced wastewater treatment permit that was issued to a secondary treatment plant.

The Government basically alleges that if Florida Cities had done things faster or had tied in to the City of Tampa, those violations wouldn't have occurred.

You heard Mr. Schafer testify yesterday. He didn't testify in any way of any communications with Avatar Holdings. There's no indication that Avatar Holdings had anything to do with any activity relating to those violations within that narrow six-month window.

Indeed, the Court found in its earlier decision that there was very little evidence concerning Avatar Holdings' involvement at Carrollwood in any period later than 1984, and there is very little even at the 1984 level. Nothing else has come in to make a difference.

With respect to Waterway Estates, what we have left at Waterway Estates is the Court granted our motion on statute of limitations. We have the tail end of the Government's claims of discharge in the wrong location and we have a few alleged permit violations afterwards.

The Government's case against Avatar Holdings with respect to Waterway Estates is that somehow Avatar Holdings had a grand conspiracy to buy -- to acquire all of the wastewater treatment facilities in Lee County and,

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therefore, stubbornly made its subsidiary continue to violate rather than shut down and tie in to North Fort Myers. Yet, you have seen that Avatar Holdings had an opportunity to buy North Fort Myers in 1991 and didn't act on it. So, there's really no evidence that Avatar Holdings somehow caused those violations.

With respect to Barefoot Bay, the Government has been able because -- to get into evidence some 255 documents going back approximately ten years before the alleged violation at Barefoot Bay.

But what do we have at Barefoot Bay? We have violations of reporting biological oxygen demand as carbonaceous biological oxygen demand, which is simply a question of which test was used and which reports were done. There's nothing that Avatar Holdings could have done to cause that.

We have total residual chlorine violations, and I think Mr. Klingenstein testified that what happened was chlorine was added at the end of the process to disinfect the wastewater stream, and an allegation is made that not enough chlorine was taken out, again, before it was discharged. And we have these three toxicity test violations which essentially are species in the laboratory reacting to whole effluent, reacting in such a way that is adverse to health.

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There is this ten-year history that is being offered to say that somehow the ten-year -- the activities of Avatar Holdings caused these very, very technical violations. But when you look at the ten-year history, all that's going on there is there is discussions of long-term alternatives by the subsidiary as to how they are going to deal with long-term discharge situations.

And since these discussions necessarily involve major issues and major expenses, they are brought to the attention of the parent corporation. And the parent corporation people ask questions and get involved. But there's no indication that Florida Cities came and said, We're going to violate our toxicity tests unless you, Avatar Holdings, do "X". And Avatar Holdings did not do "X."

There's no indication of anybody at Avatar Holdings coming into any of these plants and fiddling with the valves and somehow changing the discharge.

This is a stretch. What you're dealing with is very, very technical violations of permit, and yet you're claiming that long-term planning activities that go back ten years somehow result in very technical violations of the permit ten years later. It is pushing the Clean Water Act way beyond its scope.

Your Honor, we, of course, will respond to the Government's offer of proof with respect to the Fifth

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Amendment, but I'd like to just discuss the five individuals who are mentioned there.

One is Mr. Sharp who, as you know, died in April 1992. I don't think the Government is entitled to any adverse inference from a witness who died before they filed the complaint. Mr. Sharp was dying of cancer during the last years of his life and resigned as chief executive officer in 1990. That's before the violations alleged against Avatar Holdings occurred.

Mr. Wilkov you have already struck, Your Honor, for this.

Robert Gordon was identified yesterday by Leon Levy as the president of Avatar Utilities. He's not an officer, director, employee of Avatar Holdings, and there's absolutely no reason why his taking the Fifth Amendment should in any way be imputed to another company.

You're left with John Sladkus and Dennis Getman. Mr. Sladkus retired the beginning of 1991. That was testified to yesterday. The violations here alleged against Avatar Holdings begin at the earliest May 4th, 1990, so the overlap is minuscule. In fact, at Barefoot Bay and Carrollwood, the alleged violations do not begin before Mr. Sladkus was gone.

Mr. Sladkus was deposed five -- four-and-a-half years after he had resigned from Avatar Holdings. This is

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not someone who we control; this is someone who made a personal decision. It's inappropriate, we believe, under the circumstances to read anything into that inference.

Finally, there's Mr. Getman. Mr. Getman is general counsel both of Avatar Holdings and Florida Cities. He was noticed at the time before Avatar Holdings was in the case, and he could have responded to -- and had he not taken the Fifth Amendment, many of the questions would have been objected to under the attorney/client privilege.

In contrast, we have witnesses who have testified -- you have heard Mr. Levy. There are many, many documents that the Government has put into place. The Government cannot make up for the lack of evidence by these adverse inferences.

The Government wants to argue from these -- from the documents that are in place -- it obviously has the right to do so -- but these documents cannot be augmented or reinterpreted or reinvented through the specter of witnesses who have taken the Fifth Amendment.

Your Honor, what we have here is a lot of smoke that is disguising the fact that there really is not a case against the parent company. In fact, the only reason why the parent company is here was brought out yesterday in the questioning of Ms. Zimmer. Florida Cities does not have the ability to pay the penalty that the Government would ask

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from this court. And that's the sole reason why Avatar Holdings is in this case.

Your Honor, I request respectfully that you grant Avatar Holdings' judgment on -- partial -- on partial findings in our favor.

THE COURT: Okay. Let me hear argument from the Government in response, Mr. Jacobs, and then I'll hear from Florida Cities Water Company.

MR. JACOBS: Your Honor, the Court ruled in its November 22nd, 1995, order that in order for Avatar Holdings to be held liable, it must have acted in such a way that it should be a person who violates, quote, unquote, under Section 309(d) of the Clean Water Act.

The Court noted in the same decision that there was both probative evidence in at least two, if not three, of the facilities indicating that decisions were made by the parent company relating to the violations in the complaint.

As I noted in my opening statement, far more additional evidence has surfaced since that motion was adjudicated. In fact, much of the evidence that is now in evidence was not even available to the Government until the close of discovery.

You heard some references yesterday, I believe, to the documents that came from Mr. Levy's files not being Avatar Holdings' records; they were Mr. Levy's personal

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files. So, they were not produced in a timely fashion.
Likewise with Mr. Sharp, there was an argument made that the documents that Mr. Sharp generated and maintained were his personal records and not those of the Company's and so much of these -- much of this evidence wasn't even available to the Government until the close of discovery.
The evidence -- and there are now approximately 500 documents in evidence -- and that evidence establishes that through its officers, Avatar Holdings was actually involved in critical decisions relating to the proven violations.
I'm not talking about the past unpermitted discharge violations at Barefoot Bay and Carrollwood; I'm talking about all of the violations that the Court has already found took place.
Under the Bernuth case, such involvement is, quote, a sufficient condition, unquote, for the imposition of liability.
Moreover, Avatar Holdings caused or directed the violations -- that's the standard that the Court put in its November 22nd, 1995, order -- by failing to direct and authorize actions that would have resulted either in the cessation of the discharge or the timely construction of advanced wastewater treatment facilities at each of the

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three plants.
We have introduced expert testimony to the effect that the alternatives that would have prevented the violations were either a number of cease discharge alternatives or the construction of advanced wastewater treatment facilities.
Avatar Holdings' officers were involved in all of these decisions. Avatar Holdings' officers and directors exercised actual and pervasive control over Florida Cities' environmental practices.
I was struck by Mr. Hird's opening statement when he said -- and I remember the Court interrupted him -- the Government has never come in and sued a parent company before. And that's absolutely false. We sue the parent company under the Clean Water Act when the parent company is liable. This is not a case of new impression whatsoever. And, in fact, in open court before the Magistrate, we gave a citation to Mr. Hird of another case in which that was done, a published case, United States versus Menominee Paper Company. And then we also gave Mr. Hird a list of 750 or so Clean Water Act cases on file in Federal Courts throughout the country in all of the EPA regions, a number of which included cases in which we named the parent company.
It's not the least bit unusual; we only do it when we think the parent company is liable.

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THE COURT: Is there a reported case in which you have successfully sued a parent company?
MR. JACOBS: There is a reported case in which we successfully sued the parent company, United States versus Menominee Paper Company and Bell Packaging, and the public -- I'll get the citation. I believe it's in one of my pretrial submissions.
That was a summary judgment decision, and essentially the subsidiary conceded liability both by the subsidiary and the parent. So, I'm not sure to what extent in that particular decision the Court analyzes the standard to be applied. In any event, the case is 727 F.Supp. 1110, Western District of Michigan, 1989.
As I say, because the point was conceded, I'm not sure how much discussion of that particular issue there is in that particular reported decision; but that was a case where we did sue the parent company and successfully so.
THE COURT: All right.
MR. JACOBS: Moving on to the individual facilities. As I've said before and as we established through the testimony of Leon Levy, the story here starts in 1980. And Mr. Levy's testimony was simply an introduction to what we would have established through these witnesses who took the Fifth Amendment.
And I do not suggest that we -- there need to be

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an adverse inference drawn from Mr. Sharp's unavailability. I'm not legally entitled to an adverse inference obviously from his unavailability. But we are entitled to draw -- or ask the Court to draw inferences from the documents that he wrote or that he received and from the instructions that he gave. And Mr. Levy testified that when Mr. Sharp gave an instruction, he expected it to be followed. And Mr. Levy testified that as far as he knew, nobody countermanded Mr. Sharp's orders.
And the documents will demonstrate -- and as I've outlined in the offer of proof and as we heard from Mr. Levy yesterday in conjunction with one particular exhibit, Mr. Sharp's objective was to take over the entire Lee County system. There was no way when he stated that objective in that memorandum that his subordinates, whether they be an Avatar Holdings subordinate who worked directly with him up in New York at his real estate company, who also held an Avatar Holdings vice-president position -- John Sladkus -- there was no way they are going to go back and tell Mr. Sharp that they are going to sell the Waterway Estate franchise, or that they are going to connect the Waterway Estates franchise to Mr. Schenkman's facility when Mr. Sharp said, We want to take over all the private franchises in the area and all the municipal and county systems as well; we want to own the whole system.

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Now, that was way back in the mid '80's. The fact that much, much later in 1991 there was a decision made that they didn't want to buy Mr. Schenkman's facility because Mr. Schenkman, as they pointed out, was in the red, that doesn't mean that they have changed their objective any.

Now, at Barefoot Bay, which I point out -- and I know this has come out repeatedly in evidence -- this was an Avatar development entirely. And the board itself was repeatedly involved, repeatedly involved. And Mr. Sharp was repeatedly involved, and Mr. Sladkus oversaw the project as Mr. Sharp's engineer, what to do about the disposal of the effluent.

The evidence yesterday was that in 1984, it was clear that the board of directors of Avatar Holdings knew they had a problem with the disposal of that effluent, a problem that they had not even solved as we sit here today, as far as I know. While the plant is under construction, it's still not completed. A decade later, still not completed.

And had they built the plant that they are now building way back when, none of those violations -- none of the violations that the Court has already held took place would have taken place, and that's true at all three of these facilities.

If the plant -- this company, or these companies,

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don't have the right to pollute. But if they go through the proper permitting procedures and they are permitted to discharge into a water body, then they may discharge into a water body.

It's not as if we're not allowing them to conduct their business. Nobody said, You can't discharge into any of these water bodies, which they could conceivably have said as regulatory bodies. They said, Either you're going to have to stop discharging; or if you're going to continue to discharge, you're going to have to meet -- you're going to have to apply for the permit and you're going to have to meet the permit limits.

And to do that, they had to build three advanced wastewater treatment plants, technology that was available as far back as 1970. Long before this case started, advanced wastewater treatment plants existed.

And those judgment calls were not being made by the subsidiary; those judgment calls were being made by the parent company.

And the fact that I cannot put Mr. Getman on the stand -- every time they mention Mr. Getman, they call him general counsel. Every time I mention Mr. Getman, I call him vice-president of the company. He served as vice-president, senior vice-president, and now he serves as executive vice-president.

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And he's made many, many, many business decisions that have nothing to do with the legal counsel that he may or may not have given to Avatar Holdings or any of the subsidiaries.

And there was no assertion of attorney/client privilege or attorney work product at his deposition. He just took the Fifth Amendment.

There was no motion before the Magistrate to preclude him from testifying on the grounds that he was an attorney. And the Magistrate has expressly held, in conjunction with requiring the production of documents from Mr. Getman's files, that just because he happened to have a law degree and a title as general counsel didn't mean that the documents weren't subject to discovery.

Now, we are handicapped by virtue of the fact that the Defendants can select which witnesses they put on the stand and testify and which are going to assert the Fifth Amendment. We have no control over that.

And it just happens to be that the ones who testify -- the only person who testified who goes back to 1980, who has knowledge -- had only slight knowledge, admittedly -- and that was Mr. Levy.

The other people in the know, Mr. Gordon, who predated Mr. Levy, took the Fifth Amendment. Mr. Getman, who started in the early '80's, took the Fifth Amendment.

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Mr. Sladkus, who started in the early '80's, took the Fifth Amendment.

And there's a reference to other Avatar Holdings' officers testifying -- and that's true -- Mr. Jacobson, who didn't come along until '92; and the financial officers who presumably were not involved in the technical engineering decisions.

Now, Mr. Sladkus was an engineer. He was the one who was calling the shots directly under Mr. Sharp's direction up in New York.

And I dare say there are over a hundred documents that have Sharp and Sladkus' name on them directly relating to what to do about the effluent at Barefoot Bay. This was a problem they knew about in the early '80's and continued to be a problem, I dare say, through Mr. Sharp's death and Mr. Sladkus' resignation, which took place at approximately the same time.

So, I dare suggest that there is far enough -- far more than enough evidence to establish already at this point in time Avatar Holdings' liability for the violations.

Thank you, sir.

THE COURT: All right. Mr. Baise?

MR. BAISE: Your Honor, may I address the Court?

THE COURT: Yes, sir.

MR. BAISE: Two points, Your Honor, I would like

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to bring to your attention. Government counsel has made a great deal with regard to witnesses of Florida Cities not testifying and some of them taking the Fifth Amendment.

Mr. Allen, of course, is one that you have been told about that did take the Fifth Amendment and will be testifying.

The reason I think it's important to bring to the Court's attention the fact that this whole issue arose has been alluded to on one occasion, and that is something called the Weitzenhoff case. When the Supreme Court refused certiorari with respect to that case coming out of the Ninth Circuit, I brought that case to all of the individuals' attention and asked them to take that case into consideration, consult with their own counsel with respect to what that case indicated. They did, and did so. Some chose to testify; some chose not to testify.

It all arose because the Weitzenhoff decision -- which a number of individuals commented on the area -- I believe it's an incorrect decision -- but the fact is, people have to draw their own conclusions with respect to what Weitzenhoff said. Weitzenhoff is very broad with regard to its potential liability.

So, we would suggest to the Court that, one, it review the Weitzenhoff case and take that into account.

Number two, counsel continues to suggest from the

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Government that these facilities did not have permits. They did not have the Federal permit; that is correct. But at all times they were discharging with State permits. That's number one.

Number two, these facilities were meeting the very high levels of secondary treatment, and I do not want to leave in the Court's mind that there was any discharge of raw or untreated waste during this particular period of time. And that obviously will come out in our direct case. Those are the only points I would like to make, Your Honor.

Thank you.

THE COURT: All right.

MR. HIRD: Your Honor, if I can have just one minute -- I literally mean just one minute.

THE COURT: Okay. You can have brief rebuttal.

MR. HIRD: First of all, Your Honor, the U.S. v. Menominee Paper decision had no discussion of corporate parent liability. We looked at that case when Mr. Jacobs brought it to our attention.

Secondly, Your Honor, Mr. Getman's deposition lasted for, I believe, a total of eight pages. No specific questions were asked to which the attorney/client privilege could have been raised.

But finally, I want to say, the most important thing I heard in Mr. Jacobs' statements was he's accusing

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Avatar Holdings of failing to take action to sufficiently direct the violations. And here's where I think Mr. Jacobs has confused the standards.

What he's asking the Court to do is assume that Avatar Holdings had a duty to act because certain information came up the chain and then our -- find Avatar Holdings liable because it didn't act. That's not the way it works.

Subsidiaries tell parent corporations about what they do. What has to be found to hold a parent corporation liable is the parent corporation reaching down and directing the subsidiary to do or not do something which the subsidiary would otherwise do or not do. That is not shown.

What Mr. Jacobs is saying is Avatar Holdings is liable for its inaction because it didn't do this, that or the other thing; putting aside the merits of what we did or what we didn't do or what Florida Cities did or didn't do, which Mr. Baise will get to. You can't prove pervasive control by inadequate supervision, and that's essentially what Mr. Jacobs is arguing.

Thank you, Your Honor.

THE COURT: All right. The Court is going to reserve ruling on the Rule 52 motions.

Florida Cities Water will go first, correct?

MR. BAISE: Yes, Your Honor.

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THE COURT: All right. Mr. Baise, you may call your first witness.

MR. BAISE: Your Honor, we are going to have to take a couple of our witnesses out of order because some of them have travel plans, particularly Mr. McWeeny, who will be the first individual to testify.

He will be testifying with regard to the Carrollwood facility and dealing with some of the points that have been raised with the Government. So, we would ask the Court's indulgence to allow us to take him out of order that we had suggested to the Government that we would follow.

THE COURT: All right, sir.

MR. BAISE: Thank you.

MR. BULLOCK: If the Court please, Your Honor, we would call Michael McWeeny.

THE DEPUTY CLERK: Come forward and be sworn. Raise your right hand, please.

Do you solemnly swear that the testimony you are about to give in this cause will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

THE DEPUTY CLERK: Take a seat in the witness stand.

State your name and spell your last for the

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record, please.
THE WITNESS: Michael W. McWeeny; M-C capital W-E-E-N-Y.
- - -
Thereupon,
MICHAEL W. McWEENY,
a witness, having been duly sworn to speak the truth, the whole truth and nothing but the truth, was examined and testified as follows:
DIRECT EXAMINATION
BY MR. BULLOCK:
Q. Mr. McWeeny, good morning.
Would you state your position, please?
A. I'm the director of the Hillsborough County Department of Public Utilities.
Q. All right. What is your responsibility in that position?
A. To manage that portion of County Government providing the water and wastewater service to about 95,000 customers in unincorporated Hillsborough County.
Q. And how long have you been in this position?
A. Approximately ten years.
Q. All right. When did you join Hillsborough County?
A. I became an employee of Hillsborough County in June 1985.

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Q. All right. Who was your predecessor?
A. Prior to me coming to the Hillsborough County Utilities Department, we had an interim director, Bruce Olvin. Prior to him, the last permanent director was Bruce Kennedy.
Q. All right. Do you know how long Mr. Kennedy was in his position?
A. I believe Mr. Kennedy was the director for about three-and-a-half years.
Q. All right. Let me refer you, first of all, Mr. McWeeny, to Florida Cities' Trial Exhibit 96. Have you seen this document before?
A. Yes, I have.
Q. Can you identify it for the record?
A. Yes. It is a letter dated June 28th, 1983, from Bruce Kennedy to Mr. A.A. Reeves, III, at Florida Cities Water Company.
MR. BULLOCK: Your Honor, we would move Defendant's 96 into evidence.
THE DEPUTY CLERK: It's in.
MR. BULLOCK: I'm sorry. Thank you.
THE COURT: It will be received.
THE DEPUTY CLERK: It's already in.
THE COURT: Beg your pardon?
THE DEPUTY CLERK: It's already in.

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THE COURT: Already in. Okay.
Go ahead.
BY MR. BULLOCK:
Q. Mr. McWeeny, let me refer you to the first paragraph, the sentence that begins with, We anticipate.
A. Yes.
Q. Would you read that sentence, please?
A. We anticipate a time frame of late 1985 at the earliest before we could consider providing service.
Q. All right. When you joined Hillsborough County in 1985, did the system have capacity to accept the effluent from the Carrollwood plant?
A. We did not have capacity in the system at that time, no.
Q. All right. Let me ask you to flip a couple of exhibits to Defendant's Exhibit 99. Have you seen this document before?
A. Yes, I have.
Q. Would you identify it for the record?
A. It is a letter dated September 6, 1984, from Bruce Kennedy to Mr. L.L. Good of Florida Cities Water Company.
MR. BULLOCK: Your Honor, we would move Defendant Florida Cities' 99.
THE COURT: It will be received.
MR. BULLOCK: Thank you.

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BY MR. BULLOCK:
Q. Let me refer you to the second paragraph of that letter; and about the fourth line down, the sentence begins, The latest projected date.
A. Yes, sir.
Q. Would you read that, please?
A. The latest projected date for having the expanded plant in service is June 1987.
Q. All right. Let me ask you to also read the following sentence.
A. In addition, the identification of the point of connection to the County's system is dependent upon the completion of a master wastewater transmission plan for northwest Hillsborough County, tentatively anticipated to be completed by mid 1985.
Q. Okay. Was the plan completed by mid 1985?
A. There were numerous plans that were developed for the Hillsborough County wastewater system. I believe the master plan was actually presented in early 1986.
Q. All right. Do you know approximately how many plans there were for Hillsborough County?
A. I believe there were probably three or four iterations of master plans within the 1985 to 1990 time frame.
Q. Was there capacity available to accept the Carrollwood effluent in 1987?

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A. There was not.
Q. All right. And can you tell us why the date for the capacity was continuing to be pushed back?
A. Yes. Hillsborough County, in 1985, when I became the director, August of '85 when I became the director, was in a situation where our wastewater treatment plants were pushing their permitted capacities. We did not have capacity for new development, and we were not meeting our permit criteria.

We initiated a significant capital improvement program in 1986 wherein we borrowed approximately $367 million to expand and upgrade our utilities system. That was a significant capital improvement program, far larger than anything the County had ever done before.

As we began to undertake those capital improvements, we experienced our earliest -- our earliest scheduling as being a little optimistic, and we were not able to complete those projects as we initially scheduled them.
Q. When you indicated a minute ago that you were not meeting your permit criteria, what regulatory body permitted your facilities?
A. Our permits were through the Florida Department of Environmental Regulation and EPA.
Q. All right. Let me ask you to turn to Florida Cities' Exhibit 103. Are you familiar with this document?

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A. Yes, I am.
Q. Would you identify it for the record?
A. Yes. It is a letter that I signed addressed to Mr. A.A. Reeves, III, vice-president of Florida Cities, dated June 3, 1986.

MR. BULLOCK: Your Honor, we would move Florida Cities' 103.

THE COURT: It will be received.

MR. BULLOCK: Thank you.

BY MR. BULLOCK:
Q. You wrote this letter, Mr. McWeeny, is that correct?
A. My staff wrote it and then I signed it.
Q. What was the purpose of this letter?
A. The purpose of this letter was to establish the parameters for connection of the wastewater service from the Carrollwood subdivision, Florida Cities Water Company, to Hillsborough County.
Q. And did you identify whether or not a connection fee would be necessary? And I'll refer you to Page 3.
A. Yes. On Page 3, in Section B, we do have a statement regarding fees and charges saying that all of the fees and charges be calculated and collected pursuant to County ordinance.
Q. Did you require Florida Cities to submit an application?

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A. An application was required, yes, sir.
Q. All right. Did you identify a specific plant that the County was building which would allow the system to have capacity?
A. Yes. In Page 1, the last paragraph, I identified that we anticipated capacity would be available when we brought the Sheldon Road wastewater treatment plant on line. That's the plant we currently call the Northwest Plant.
Q. Okay. In 1986, when did you anticipate that the Northwest Plant, or the Sheldon Road plant, would be on line?

(Pause.)
A. I don't believe that in this letter we identified the specific date that that particular plant would be on line.
Q. Okay. Did you identify a date in which you believed that there would be sufficient capacity anywhere in the system?

(Pause.)
A. We did identify that we thought the River Oaks Plant would be expanded by spring of 1988 and that we -- that would make capacity available.
Q. Okay. Was the River Oaks Plant expanded by 1988?
A. The River Oaks Plant was undergoing expansion from about 1985 through about 1988.
Q. Did those expansions, in fact, provide sufficient

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capacity to accept the Carrollwood effluent?
A. While the River Oaks Plant would have had capacity to accept the flow, the River Oaks Plant is a significant distance from the Carrollwood area, service area; and there was not infrastructure to take the wastewater from that area to the River Oaks Plant.
Q. Let me refer you next to Exhibit 106. Are you familiar with this document?
A. Yes, sir.
Q. And would you identify it for the record?
A. It is a letter dated March 8, 1988, addressed to Mr. Dale Ernsburger, P.E., of Reynolds, Smith and Hill signed by myself.

MR. BULLOCK: Your Honor, I believe 106 is already in evidence.

THE DEPUTY CLERK: Yes, it is.

BY MR. BULLOCK:
Q. What was the purpose of writing this letter, Mr. McWeeny?
A. The purpose of this letter is to provide a preliminary review of the plans for the connection of the service area to the County system and to identify the fees that would be required.
Q. Is this the first time that the County was able to identify any fee specifically?

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A. I believe this is the first time that we communicated in writing what we had calculated the fees to be.
Q. All right. What did you calculate the connection fee to be?
A. $5.5 million.
Q. All right. And what made up the connection fee?
A. The connection fee is the fee that the County charges to recover the capital cost of the facilities needed to provide the service, including the transmission facilities to bring the wastewater to the plant for treatment, the treatment plant itself, and the effluent disposal and sludge disposal facilities.
Q. Did this $5.5 million figure include any costs that Florida Cities would have to undertake to connect to the plant?
A. It did not include the cost of the connection itself. This was just to pay for the existing facilities that would be utilized.
Q. All right. Were you able to identify a time in which capacity would be available?
(Pause.)
A. In this letter, we indicated that the application for service would be put on a priority list and the capacity would be -- correction -- the applicant would be notified when the capacity was available. We did not in this letter

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indicate when that would be.
Q. Did Florida Cities question the $5.5 million connection fee?
A. As I recall, they did have considerable objection to the five-and-a-half million dollar fee.
Q. Your office -- let me start over again.
Does your office permit privately-owned wastewater treatment facilities in Hillsborough County?
A. We do not.
Q. All right. Do you have any control over the permitted -- the terms of the permits that these facilities would receive?
A. We do not.
Q. Did you continue to negotiate with Florida Cities regarding the connection fee?
A. As I recall, we had several conversations, but it essentially dropped because we could not reach resolution.
The capacity fees are not a negotiable item in our normal administrative activity.
Q. Did the negotiations pick up at a subsequent time?
A. Subsequently, the negotiations did pick up.
Q. And do you know why they picked up?
A. It is -- I have no personal knowledge other than we were --
MR. QUINN: Objection.

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THE COURT: Sustained.
BY MR. BULLOCK:
Q. Was the County contacted by Florida Cities to continue negotiations?
A. It is my understanding that we were.
Q. All right. And do you know when these negotiations picked up again?
A. I believe that would have been in 1990.
Q. Were any other parties involved in the negotiations?
A. I believe only the County staff and one of the County Commissioners and representatives of Florida Cities were involved.
Q. All right. Let me refer you to Defendant's 125. Are you familiar with this document?
A. Yes, I am.
Q. And would you identify it for the record?
A. It is a letter dated July 27, 1990, to Mr. A.A. Reeves of Florida Cities Water Company signed by myself.
Q. All right.
MR. BULLOCK: Your Honor, 125 is already in evidence.
THE COURT: Okay.
BY MR. BULLOCK:
Q. What was the purpose of this letter, Mr. McWeeny?
A. This was a response to a question posed by Mr. Reeves

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regarding the scheduling of the completion of County capacity that could provide service to Florida Cities.
Q. All right. When did the County anticipate that capacity would be available?
A. We identified in this letter that capacity would be available -- anticipated to be available in the first quarter of '91, 1991.
Q. And, in fact, did capacity become available during that time?
A. Capacity did become available, yes.
Q. Let me ask you to refer to Defendant's 141, which is in the next volume. Mr. McWeeny, are you familiar with this document?
A. Yes, I am.
Q. And would you identify it for the record, please?
A. This document is the transmittal letter and an agreement between Hillsborough County and Florida Cities to provide wastewater service.
MR. BULLOCK: Your Honor, I would move Defendant's 141 into evidence.
THE COURT: It will be received.
BY MR. BULLOCK:
Q. Mr. McWeeny, could you identify the day this agreement was entered into?
A. The date of the agreement is June 5, 1991.

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Q. Okay. Does this agreement reflect whether or not the capacity fee would actually be levied by the County?
(Pause.)
A. The agreement does not require the payment of a capacity fee.
Q. All right. Under the terms of this agreement, who is to bear the cost of construction of the forced main which would have been needed to connect Carrollwood to Hillsborough County?
A. A point of connection was identified, and the County bore the costs up to the point of connection, essentially west of the point of connection, between there and our wastewater plant; and Florida Cities picked up the cost of the infrastructure up to the point of connection.
Q. Whose forced main was longer, Florida Cities' or the one the County would construct?
A. I don't recall the answer to that.
Q. All right. Does the agreement address any penalties for construction delays?
A. Yes, it did.
Q. Okay. And what does the agreement reflect regarding the payment of any penalties for construction delays?
A. If the County were responsible for construction delays and not making the connection by the date certain, the County would be responsible for those penalties.

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Q. All right. And what was the date certain in this agreement?
A. I believe the date certain was, from memory, December 31st, 1991.
Q. Okay. Are you aware of when the connection actually occurred?
A. I believe it was five or six days later than that.
Q. All right. Are you aware of the distance between the connection point and the Carrollwood facility?
A. Generally, but I do not know the specific number of feet or miles.
Q. All right. Mr. McWeeny, did the County, in fact, pay any penalties for construction delays?
A. Yes, we did.
Q. Thank you, Mr. McWeeny.
MS. TSOTSOS: Your Honor, Avatar Holdings has no questions of this witness.
THE COURT: All right. Mr. Quinn?
MR. QUINN: Yes, Your Honor. I will be brief, and I do mean brief.

CROSS EXAMINATION

BY MR. QUINN:
Q. Good morning, Mr. McWeeny. My name is Tony Quinn. I'm counsel for the United States.
Mr. McWeeny, your understanding is that Florida

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Cities -- is it your understanding that Florida Cities Water Company was under an order to cease discharge to the Sweetwater Creek?
A. It was my understanding they were under an order to either cease discharge or to upgrade their effluent to meet the advanced waste treatment standards.
Q. But during your course of dealings since 1985 with Florida Cities Water Company, you didn't detect any sense of urgency to their dealings, did you?
A. I don't know how to measure a sense of urgency. Certainly I think they were anxious or interested in compliance, but I don't know how to define a sense of urgency.
Q. Sir, do you remember giving a deposition in this case?
A. Yes.
Q. I'll refer to Page 33, Lines 12 through 18.
Sir, do you remember the question being asked, In your dealings with Florida City with respect to connecting to Carrollwood, to the County, did you get the idea that the Company had a sense of urgency to the connection?
And your answer to that question was: I don't recall one way or the other any sense of that urgency.
Do you remember that?
A. Yes, generally.
Q. Okay. Well, does that -- I mean, you just stated now

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you don't know how to --
THE COURT: Well, he's answered your question and I have his previous answer and I've got this answer. Let's move on.
MR. QUINN: Thank you.
BY MR. QUINN:
Q. Sir, during your course of dealings with Florida Cities Water Company, did Hillsborough County ever lead Florida Cities down the path that a connection would be forthcoming immediately?
A. I don't believe that in any of our communication with them we indicated that capacity would be immediately available.
I believe that we did indicate that capacity was anticipated to be available when certain plant construction was completed, but we did not guarantee a date or an immediacy.
Q. So, you just told them the truth as to what the circumstances were and how those circumstances changed, didn't you?
A. Yes, sir.
Q. Prior to June of 1985 when you joined Hillsborough County, there was capacity at the Dale Mabry Plant, wasn't there?
A. I think that the amount of capacity that was available

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at any of the facilities in that time frame was under some question. And, in fact, one of the first things that I did as the Utilities Director was to determine that I could not sign off on the certifications that capacity was available at our treatment facilities. And shortly thereafter, the regulatory agencies placed us under a moratorium until we could clarify the amount of commitments and flow at our facilities.

Q. How about prior to you coming on in June of '85, do you know whether adequate capacity existed at the Hillsborough County plants?

A. I do not know.

Q. Okay. Sir, you have mentioned during direct testimony that a County Commissioner was involved in negotiations in 1990. Why was a County Commissioner involved in the negotiations with Florida Cities?

A. Hillsborough County is organized under a system of commissioners where we have four district commissioners and three at-large commissioners.

The commissioner that was involved, I believe, was Commissioner Iorio, and that was her district and I believe that she was representing her constituents.

Q. In the course of your dealings with privately-owned wastewater treatment plants, is it unusual for -- withdrawn.

How many times has a commissioner been involved in

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negotiations?

A. This is the only agreement that we have of this type, but generally commissioners are not involved in the administration.

Q. So, is it safe to say that this is, to your recollection, one of the only times that a commissioner was involved in negotiations with Hillsborough County and a privately-owned wastewater treatment plant?

A. Yes.

Q. Sir, at any time subsequent to you coming on in 1985, June, did Florida Cities make a commitment to tie in to the Dale Mabry Plant? Did they make a written commitment?

A. I don't recall any commitment to make a connection until we entered into the June 5, 1990, agreement.

Q. Okay. Subsequent to June of '85 and prior to the agreement, did Florida Cities ever agree to pay for the construction of necessary transmission piping or pumping equipment?

A. The only commitment or agreement we have is the June 5 agreement.

Q. Sir, do you know if Florida Cities had made a commitment to tie in to the Dale Mabry Plant in June of1985 and had agreed to construct the necessary transmission piping and pump stations, whether they would have been put on that priority list you mentioned during direct testimony?

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A. If they had made the application after August of 1985 when I became the director, I would not have been able to sign off that there was capacity. Whether my predecessors would have signed off, I cannot say.

Q. So, do you know whether if they had done -- withdrawn.

Do you know whether if they had made those commitments prior to you becoming director, whether or not a connection would have been allowed?

A. I don't know the answer to that.

Q. Do you know whether it's possible?

A. I think that it would depend on whether the regulatory agencies at that time would have considered us having been over-committed in our capacity, and I don't know how they would have evaluated that.

Q. Sir, during the time you have been with Hillsborough County, have you ever not had an NPDES permit for any of your plants?

A. We have currently, I believe, nine major wastewater plants, several of which do not have NPDES permits.

Q. Is that because of the delegation to the State of Florida?

A. No. That's because they don't have discharges.

Q. Okay. Let me rephrase my question. Since June of 1985, did any of the plants under your direction which had discharges ever not have NPDES permits?

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A. The only one that comes to mind as not having a discharge -- an NPDES permit is the South County Treatment Plant which had an NPDES permit which was rescinded to a zero discharge NPDES permit.

Although we had NPDES permits at several of our facilities, we did have consent orders and consent decrees with both EPA and DER regarding restrictions to some of those discharges.

Q. And Hillsborough County considers administrative orders and permits to be important documents, don't they?

A. Absolutely.

Q. And you wouldn't not apply for one, would you?

A. I'm sorry, I didn't hear the question.

Q. You would not fail to apply to renew a permit, would you?

A. Not knowingly. We might by accident miss a date, but we would not knowingly fail to permit a plant.

Q. During the time that you were on board since 1985 to present, have you ever accidentally failed to reapply for a permit when necessary?

A. I don't recall that we have.

Q. Sir, with regard to the plants that don't have surface water discharges, what do they do with the effluent?

A. The effluent is reused for irrigation or some other type of reuse.

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Q. Are there holding ponds?
A. Many of our plants have holding ponds.
Q. Sir, are there also deep well injection places?
A. Hillsborough County has no deep well injection for effluent disposal.
Q. About how many ponds do you currently have?
(Pause.)
A. I believe that we only use percolation ponds for effluent disposal – I take that back. We have one plant currently in operation that uses percolation ponds for effluent disposal. We have lined ponds at several facilities that are used for holding reclaimed water for future reuse.
Q. Sir, prior to Exhibit 106, which was the agreement we were talking about a little bit further on, did Florida Cities Water Company ever ask Hillsborough County for a cost to tie in to the plant?
A. They did ask us through the application process what would be the conditions for the connection. Our preliminary plan review, which was one of the exhibits previously discussed, identified the capacity fees and a point of connection.
The normal approach is that the applicant is responsible for the infrastructure up to the point of connection.

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Q. Is that what happened in this case?
A. That was not what happened in this case. In this case, we entered into a separate specific agreement that identified a point of connection. And based on that point of connection, the infrastructure up to the point of connection was provided by Florida Cities and beyond the point of connection by the County.
Q. Would you say that was unusual in this circumstance for the County?
A. It was only unusual in that we had a separate agreement rather than just using the preliminary plant approval letter.
Q. Thank you, sir.
MR. QUINN: I have no more questions. Thank you.
MR. BULLOCK: Nothing, Your Honor. Thank you.
THE COURT: Thank you, sir. You may step down.
Call your next witness.
MR. BAISE: Your Honor, Mr. Don Scroggin will call our next witness.
THE COURT: Okay.
MR. SCROGGIN: Florida Cities calls Mr. Douglas Smith.
THE DEPUTY CLERK: Come forward and be sworn. Raise your right hand, please.
Do you solemnly swear that the testimony you are about to give in this cause will be the truth, the whole truth and nothing but the truth, so help you God?
THE WITNESS: I do.
THE DEPUTY CLERK: Take a seat in the witness stand.
State your name and spell your last for the record, please.
THE WITNESS: My name is Douglas G. Smith, S-M-I-T-H.

- - -

Thereupon,

DOUGLAS G. SMITH,

a witness, having been duly sworn to speak the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCROGGIN:
Q. Good morning, Mr. Smith.
A. Good morning.
Q. Would you please state your name and current position?
A. Douglas G. Smith, senior partner and regional environmental manager for Black & Veatch.
Q. How long have you been employed at Black & Veatch?
A. Just over 16 years.
Q. Can you tell us what Black & Veatch is?

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A. Black and Veatch is a large engineering construction partnership founded some 81 years ago headquartered in Kansas City, Missouri, engaged in providing engineering and construction management and related services in the energy, environment and facilities business around the world. We have about 6,600 employees and do about $1.2 billion worth of business each year.
Q. Would you please tell me what college degree you hold?
A. I have an undergraduate degree, a bachelor of science, in civil engineering with an emphasis in sanitary engineering. I received that in 1971 from Kansas State University in Manhattan, Kansas.
And after that, I received a masters of science in civil engineering, essentially sanitary engineering, from the University of Colorado in Boulder; finished my work there in 1974 and the degree was conferred, I think, in 1975.
Then I have a juris doctor degree from the University of Denver College of Law, received that in 1989.
Q. Can you tell me what training you have relevant to the construction of wastewater treatment facilities?
A. Most of the training I have received has been pretty much on-the-job training. I began in the construction business in 1967 right out of high school and continued it essentially in some regard or another to the present time.

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I'm currently vice-president of our construction company, Black and Veatch Construction, Incorporated, where we engage in the construction of municipal water and wastewater treatment plants.

And during the 29 years since I first engaged in construction business, I have seen all kinds of construction activities regarding water and wastewater treatment plants for mostly what we would call municipal owners.

Q. Can you tell me if you have any other professional training?

A. We, in the engineering practices, have a number of informal and more formal training seminars and conferences and educational activities we take part of during the years.

I have attended or taken part in terms of either giving papers or participating in these educational activities essentially before even my undergraduate degree was completed, probably, say, beginning 1970 through the present time. And I probably averaged four or five of those kind of conferences or seminars each year, so probably in excess of a hundred such training sessions, generally focused in the sanitary engineering field, which has been the main focus of my vocation for the 25 years.

Q. Has this professional training related to the operation of wastewater treatment facilities?

A. Some of that has. As part of my early career, I was

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engaged directly in the operation of wastewater treatment facilities, and so I attended a great number of those. During the 1970's, that was a big focus.

After the 1970's, when I went to Black and Veatch in the consulting engineering business, I probably put less emphasis on just construction -- excuse me -- on operation-related activities; but that was always a part of these technical conferences and seminars that we attend -- that I attended.

Q. What was your first full-time job after college?

A. I began as chief of the sanitation branch for the Department of Army at Fort Riley, Kansas. I had responsibility for four wastewater treatment plants and three water systems, a couple of swimming pools and a landfill. Essentially I was the responsible operator for those plants; make sure they had to meet certain discharge requirements in the State of Kansas. And we then had operational -- I had operational responsibility, maintenance, those kind of things. And I did that until I returned to graduate school.

Q. What was your next full-time employment?

A. After completion of my graduate work at the University of Colorado, I began work for the City of Boulder, Colorado, and there I was first hired as assistant sewer division director and quickly moved to the sewer division director

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and then as public utilities director for the City of Boulder and at each of those levels had responsibility for the sewer division, which was all the sewer collection system, sanitary sewers, two sewage treatment plants, the largest of which was about 16 MGD; and then as public utilities director had responsibility for drinking water treatment, two surface water treatment plants which was -- one was about 50 MGD and the other was about 12 MGD, and then wastewater treatment, and then as well the storm water utility, which Boulder had one of the first storm water utilities in the U.S., and that was until I left there in 1979.

Q. You used the term "MGD." Can you tell us what "MGD" means?

A. That's a term representing the flow or capacity of one of these treatments plants. It stands for million gallons per day.

Q. Can you tell us what your next employment and responsibilities were?

A. I left the City in 1979 and for a few months worked for another consulting engineering firm, Hennings, Durman, Richardson in Phoenix, Arizona, and then was employed by Black and Veatch in late 1979 until the current time.

And during that period both with HDR and subsequently with Black and Veatch, I was first senior project manager in

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charge of large water and wastewater treatment plant construction -- design and construction projects, related feasibility studies, water quality studies, management studies in terms of financing improvements and implementing them. And then on into the late '80's -- excuse me.

With Black and Veatch, I was hired in Denver and was part of the Denver office there until 1989 when I moved to Florida and had responsibility for the Florida operations of Black and Veatch.

Q. Can you tell me how many years' experience and training you have relating to the construction and design of wastewater treatment facilities in total?

A. Essentially, I'd certainly represent more than 25 years, since my undergraduate degree, and through that entire time the focus has been on wastewater treatment.

Q. How many years' experience do you have regarding the operations of wastewater treatment facilities?

A. Certainly the focus of my ten years in the 1970's, from early '72 when I was employed by the Department of Army until I left the City of Boulder in '79, operations was a big focus of mine.

However, even in the early '80's, through the mid 1980's, one of my principal projects I was involved with was the upgrading of the Denver Metropolitan Wastewater Reclamation District's central plant. It's a 185 MGD plant.

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And I was very involved with looking at operations through that time, so I'd say probably on the order of 15 years.
Q. What experience do you have relating to the assessment of the impacts of the operations of such wastewater treatment facilities?
A. I assume you mean impacts on receiving waters?
Q. Yes, sir, the environmental impacts on receiving waters from the operation of wastewater treatment facilities.
A. While I was in Boulder, specifically we had two wastewater treatment plants discharging to Boulder Creek, which was a high-quality, front-range stream, trout stream, in the upper reaches, and so there's a great deal of concern about the impacts of wastewater treatment flows on that water body. And I was involved directly in sampling and assessing the impacts of those discharges on that creek and in trying to figure out what ways we could improve the quality of effluent and diminish the impacts on the creek. That was through the '70's and the improvements were – some improvements were built during the '70's and some later.
Then in the '80's, my focus was on Segment 15 of the South Platte River, which is the receiving waters of the Metropolitan Denver Disposal District's Plant, and we looked a great deal at flora and fauna in that reach of the stream and assessed impacts of water quality, particularly looking

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at dissolved oxygen conditions and ammonia discharges, impacts on ammonia on the fish species in the creek -- in the river.
Q. Have your experiences included the analysis and review of water quality data from receiving waters?
A. Right. Certainly in my graduate program, I actually did the sampling and testing and had to work those hours in the laboratory to actually know how to do the tests. After that point, essentially people worked for me that did it. We had laboratories in Boulder that performed those water quality analyses, and we did a great deal of working -- compilation of data and analyzing data and trying to determine what that data meant as to what kind of impacts were on the stream or what we could do to mitigate those impacts.
Q. What experience specifically in the State of Florida do you have regarding the construction of wastewater treatment facilities and the operations of wastewater treatment facilities in the State of Florida?
A. As I mentioned, I came to Florida in 1989 and during that time --
THE COURT: Let's stop there a moment. Let's take a ten-minute recess.
(A recess was taken.)

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THE COURT: Okay, Mr. Scroggin.
MR. SCROGGIN: Yes, Your Honor.
BY MR. SCROGGIN:
Q. Mr. Smith, can you tell me what national recognitions if any you've received for your experience in the areas of operations and construction of wastewater treatment facilities?
A. Well, probably the most important national recognition I've had is that of being accepted as a diplomate of the Academy of Environmental Engineers.
This Academy has been formed to recognize achievements and qualifications of those engaged in the practice of water, wastewater and air pollution engineering and it's a fairly vigorous examination and admittance procedure, and I was examined and admitted in 1989 and 1990.
Initially, I think it was '89 when I completed my application process and 1990 when I was interviewed and subsequently elected into the Academy and it's a fairly select group of a small number of what would be known as sanitary engineers with considerable experience in the field and recognized by their peers as such.
Q. You've testified you have experience relating to construction and operation of wastewater treatment facilities in the State of Florida.
I'm going to ask you now what experience if any do you have regarding the assessment of the environmental impacts in

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the State of Florida of wastewater treatment facilities?
A. You asked me that question, I didn't get to answer it, though, earlier. I don't know if you want me to answer that now regarding experience in the State.
Q. Yes, sir.
A. Particularly with wastewater treatment plants operation and construction, I've been involved with treatment plants in Pensacola, the Main Street Plant, which is about 20 MGD and the Avondale Plant which is now going to eight million gallons per day, the City of Tallahassee Treatment Plants, both of which have a combined capacity of about 25 MGD, City of Tampa, Hooker's Point, Howard F. Curen Plant, which is I think about 65 MGD, being expanded to 88 MGD, on down to the City of Manatee County Southwest Plant, Waterway Estates Plant, Caloosahatchee River, Fiesta Village, over to Fort Myers over to the Reedy Creek Plant for Disney World which is about an 8 MGD Plant, City of Daytona Beach, Western Regional Plant there which is 10 MGD. I might have missed a couple.
That's most of them I have been involved with regarding assessment of capacity, performance operations and recommendation for constructed improvements to change their treatment systems into the future.
Then your next question was which ones --
THE COURT: Wait a minute.
MR. JACOBS: I object. I let it go the first time,

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but I think it's a little improper for the witness --
THE COURT: Sustained, sustained.
BY MR. SCOGGIN:
Q. Mr. Smith, approximately how many such projects in the State of Florida have you been involved with?
A. I'd say at least fifteen to twenty treatment plants in individual projects, would probably be more than that 'cause there's multiple projects associated with individual plants, so --
Q. And how many such projects nationally have you been involved with?
A. Goodness, certainly more than a hundred, with probably fifty to a hundred treatment plants as individual plants that I've had projects associated with them.
Q. Have you published articles in professional journals?
A. Yes, published probably thirty to forty professional articles in journals and have presented those articles in addition to or presentations, probably another seventy-five presentations at conferences, technical symposiums.
Q. Can you tell me if you hold a professional license in the State of Florida?
A. Yes. I'm a registered engineer, professional engineer in the State of Florida, I think it's license number 43134, and licensed engineer in the State of Colorado. And since I left there, I essentially put it on inactive status, but I would

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become licensed again by just paying my dues back there.
MR. SCROGGIN: Your Honor, I could continue asking questions of this witness regarding his qualifications, but in order to save time and move forward, I would proffer this witness as an expert witness to this Court at this time in the areas of the construction and design of wastewater treatment facilities; second, in the area of operations of those wastewater treatment facilities; third, the environmental impacts of the operations of such facilities on the receiving waters and the associated environs; and finally, in the areas of analysis and review of water quality data.
THE COURT: Yes, sir.
MR. JACOBS: Opportunity to voir dire the witness, please?
THE COURT: All right.
You may voir dire.
You think he may not be qualified? Well, go ahead.
MR. JACOBS: I think he's not properly before the Court as an expert in this case, so, yes, the voir dire relates exactly to that subject sir.
THE COURT: All right.
VOIR DIRE EXAMINATION
BY MR. JACOBS:
Q. Mr. Smith, you signed three expert reports relating to three wastewater treatment plants at issue in this case,

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correct?
A. That's correct.
Q. But you didn't actually write any one of these three reports, did you?
A. I don't know what you mean by actually "write."
Q. Mr. Smith, do you recall that you were deposed in this matter on October 30, 1995, at the United States Attorney's Office here in Tampa?
A. Yes, sir, I do.
Q. Reading from page 7, line twenty-three of the deposition -- transcript of that deposition; Mr. Smith, who wrote these reports. That's the question I'm reading, sir, and your answer was, they're prepared by our firm and there were two principal authors, Dr. Barcus Jernigan and Andy Westfall.
I ask you again, sir, isn't it correct that you did not write --
THE COURT: No, ask him -- ask him if he gave those answers to those questions.
MR. JACOBS: I'm sorry, sir, forgive me.
BY MR. JACOBS:
Q. Did you give those answers?
A. Yes, I did.
THE COURT: Go ahead.
BY MR. JACOBS:
Q. Now, referring to page 8, line seven, but you didn't

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write them -- question, but you didn't write them, is that correct. Answer, line eight, no, I did not.
Sir, did you give that answer?
A. Testimony at deposition says yes, I believe I did.
Q. Page 8, line fifteen, question, and did you rely on the work of Dr. Jernigan and Mr. Westfall in terms of the preparation of these reports, line eighteen, answer, yes I did.
Do you recall giving that answer, sir?
MR. SCROGGIN: Your Honor?
THE WITNESS: Yes.
THE COURT: Just a moment, sir.
MR. SCROGGIN: Your Honor, I would object to this line of questioning which may be appropriate for cross examination of the witness or indeed weight to be given the evidence that he will present.
I would suggest, however, that it's not related to his qualifications as an expert and I proferred him as an expert in this case based on his qualifications to render an expert opinion, not the merits of that opinion and not the weight that this Court would give it. I would suggest counsel seeks to argue a cross examination issue more than a qualification.
THE COURT: Overruled, go ahead.
BY MR. JACOBS:
Q. Now, in terms of what information you personally

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reviewed, Mr. Smith, prior to giving your deposition in October, isn't it true that aside from reviewing the Government's complaint, you never personally reviewed any documents whatsoever except for a few compilations compiled by your staff?
A. I reviewed drawings and data that we had taken from the files from Florida Cities Water Company. I looked at, I think, I believe I said miscellaneous DMR's and MOR's, that's discharge monitoring reports and monthly operating reports.
I did not look at them in great detail or try to correlate at that point, and yes, those documents were then transcribed or the results from those documents were transcribed to graph compilations and presented in a report. I looked at some, I don't know if I said maps, and certainly some memoranda, schedules, things like that, construction documents; reviewed those, yes.
Q. I'm referring now to your deposition, sir, again page 12, line twelve, and during the course of the preparation of --
THE COURT: Ask him if he made the following answers to the following questions.
BY MR. JACOBS:
Q. And, sir, I'm asking if you made the following answers to the follow questions at the time of your deposition. And during the course of the preparation of any of the drafts of the final versions of these three reports, Exhibits 875 and 876

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and 877, and those for the Court's reference were the deposition exhibit numbers; did you have the occasion to review any documents. That is the question.
Now, sir, my question to you is, did you give the following answer, I believe that I reviewed just compilations of information that was compiled by my staff as part of the reports. I did review the complaint. I'm trying to think if there's any other documents. Nothing sticks out in my mind, any particular documents I reviewed.
Did you give that answer, sir?
A. Yes, I did.
Q. Do you recall that I then asked you the following question, are you sure, though, and I'm referring to page 12, line twenty-two, you're sure, though, that you reviewed what you have characterized as compilations of information compiled by your staff, is that correct, and the answer. I'm asking you whether you gave that answer, is that correct?
A. Yes, compilations included such things as excerpts and copies, that's right.
MR. JACOBS: Move to strike his last answer, sir, as non-responsive.
THE COURT: Denied.
BY MR. JACOBS:
Q. Then, do you recall, sir, that I asked you, and I'm referring to page 13, line five of the deposition, and about

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how voluminous were these compilations for each plant. Do you recall, sir, giving the following answer, and I'm referring to page 13, line seven, these are like tables or a series of tables and graphs or of data points, sequence of dates, that kind of information. Do you recall giving that answer, sir?
A. Yes, I do.
Q. I see you looking down, are you looking at the transcript?
A. No, I'm just concentrating. Thank you.
Q. Okay, fine.
A. And those questions are asked in the narrow context of formal documents, we're talking about MOR's and DMR's and NPDES permits. We actual have books of three or four inches thick of information that is backup to the reports.
Q. Right. And I didn't ask you that, sir.
A. Okay.
Q. You said "we," you mean Black and Beach has all that information?
A. That's right.
Q. Let me be very clear. I'm asking you what you personally reviewed?
A. That's what I was saying.
Q. You're not saying you personally reviewed all those notebooks before your deposition?
A. We had a project notebook, that's essentially that, yes.

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THE COURT: Proceed counsel, let's move on.
MR. JACOBS: I need to be able to distinguish and for the witness to understand that I'm inquiring not into what --
THE COURT: Just ask the question.
BY MR. JACOBS:
Q. Okay, sir.
Now, the next question relates again to the compilations. Question on page --
THE COURT: No, no, no, I tell you what, just ask him a question and if you have got something there that is in conflict with what he testifies here before me, then you can ask him the question as to what he testified to earlier. But ask him a question now, don't be asking -- don't be reading from the deposition until he says something that you think is inconsistent with what he is testifying to here?
BY MR. JACOBS:
Q. Okay.
The compilations, Mr. Smith, how voluminous were they?
A. The compilations that you asked me about in the deposition were compilations of data points from MOR's to DMR's. We have compilations of data from the project file that is in a notebook that was --
Q. I'm just asking you about the compilation?
MR. BAISE: Objection, Mr. Jacobs continues to interrupt the witness while he is answering.

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THE COURT: Sustained. Finish your answer.
THE WITNESS: I don't want to mislead anybody. We have a projects file that is part of a backup of a written report which includes data, memos, historical information. It's about a three or four inch notebook. I reviewed that.
And then you had asked me during the deposition very specifically as I recall about administrative orders, NPDES permits, MOR's, DMR's, and those I had not reviewed very closely, and that is the compilation of data points I spoke of that we had reduced to graphs which were included in the report, so I wanted to distinguish what we're talking about here.
THE COURT: All right, go ahead.
BY MR. JACOBS:
Q. I'm asking you whether you reviewed all those voluminous notebooks. My question to you now, sir, is it your testimony today, prior to your deposition you reviewed all those voluminous notebooks containing all that information you just referenced; you personally, sir?
A. There is one notebook, and I briefed through it prior to the testimony, obviously not enough, 'cause I didn't have all the facts in my mind.
Q. Now, let me go back to the earlier question, the compilations of data that you reviewed and you testified to at your deposition.

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How voluminous was that information, the compilations?
A. The compilations of data are essentially data points off MOR's, DMR's relating to specific effluent limit or effluent quality standards. They appear on OMR's, MOR's, DMR's at multiple places, so it's taking a point off of one month and putting it on a graph. So what I saw were graphs with those data points, and so talking about a few pages of graphs, that kind of thing. That's the compilations.
Q. Okay.
Now, aside from compilations that you've mentioned that were a few pages each that you've said were compilations of DMR and MOR information, and aside from the complaint, and aside from drafts of these reports that were prepared by others, isn't it true that prior to your deposition, you did not review any other data relating to this case?
A. Drafts of the reports, there are also some maps and diagrams, layouts of facilities, those kind of things that's in the backup, we didn't end up putting them in the final report. I think other than that, that's generally correct. I had not reviewed -- as I recall, the question was aimed at had I reviewed the NPDES permits. I had not at that time.
Q. Okay.
So you think there might have been in addition to what I just outlined, the DMR's, MOR's, the drafts that were prepared by your staff and the compilations of a few pages, you think

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you might have also reviewed a couple maps?
A. Yes, we had maps in the file.
Q. I understand. You didn't -- you don't recall mentioning that at the deposition, but you do think you reviewed those prior to the deposition, is that correct?
A. I believe it is. I know it's part of the notebook. I know I looked at the notebook a lot more since then.
Q. So you're not sure whether you reviewed the maps before the deposition or since the deposition?
A. I believe I did look at them before. I know I've studied them since.
Q. Okay.
Aside from the information we've just gone over, the maps, the DMR's, MOR's, the draft reports and complaint, you did not review any other data related to this case prior to your deposition, is that correct, sir?
A. That wasn't in the reports, that's correct.
Q. Right, I included the reports in the question?
A. Yeah, I think that is right.
Q. Okay, thank you.
THE COURT: You through?
MR. JACOBS: Just a moment, Your Honor, if I may.
BY MR. JACOBS.
Q. And isn't it true that prior to your deposition, these compilations were not provided to the Government?

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A. As I say, the compilations came right off the documents you had in your possession, so they were -- they were just data points off of the MOR's, DMR's.
Q. Sir, I'm not asking you about the DMR's or MOR's, I'm asking you about compilations that were put together by your staff. Isn't it true they were not provided to the Government prior to your deposition?
A. They were on the graphs that were in the reports, so it was data put from a column kind of thing to the graph.
Q. Are you testifying that the compilations are in the reports just as they were as you reviewed them or they're exactly the same as in the reports?
A. They changed form from the numerical statistics, if you will, to that of being on a graph, so I don't think we -- well, we didn't publish the compilations as part of the report, we published the graphs, so -- and that's what we used to prepare the graphs.
Q. Okay.
So you did not give the Government the compilations?
MR. BAISE: Objection, this has been asked and answered about three times, now the fourth time.
THE COURT: Well, I don't know, I'll overrule the objection. Let's go ahead.
THE WITNESS: The columns of data were not given to, as far as I know, they weren't in the report, thus, you did not

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have them before our deposition -- before my deposition.
BY MR. JACOBS:
Q. I'm not sure I heard you; they were not in the report and you did not provide them prior to the deposition, is that your answer is, sir?
A. That is what I said, yes.
Q. And prior to your deposition, sir, you had never visited in the context of your services as an expert witness in this case any of the three plants, is that correct?
A. In the context of expert witness, that is correct.
Q. And the only preparation you did for your deposition, for the deposition itself, was to review the three reports written by your staff and highlight them in preparation for your testimony, isn't that correct?
A. That's correct.
MR. JACOBS: Your Honor, in your Monday, March 25th, 1996 order at the bottom of page 4, you ruled, quote, so that there would be no misunderstanding, Mr. Smith will not be permitted to give testimony based upon documents or information not relied upon to generate his report, nor will he be permitted to give testimony based on his subsequent visits to the facility sites.
The testimony elicited from this witness establishes that he did not write the reports, that he did not review or rely on any documents or information in preparation of the

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reports with the exception of the DMR's and MOR's, and with the exception of data compilations, and by the way, those were not provided either, to your knowledge, Mr. Smith, were the particular DMR's and MOR's that you reviewed, were those particular ones provided to the Government prior to your deposition?
THE WITNESS: We just had copies of them, so I don't know if they were.
MR. JACOBS: Okay.
And he's testified that the data compilations were not provided to the Government prior to his deposition as required by Rule 26(a)2, and that the only documents he personally reviewed prior to his deposition to prepare were the reports themselves.
The United States, therefore, moves on the basis of the Court's rulings on the bottom of page 4 of its March 25th, 1996 order, to exclude the testimony of Mr. Smith.
MR. SCOGGIN: May I respond, Your Honor?
THE COURT: Let me find the order. What page?
MR. JACOBS: Page 4, sir.
THE COURT: Just a moment.
MR. JACOBS: And we'd be relying in part, of course, on 26(a)2(b) which relates to the disclosure of expert testimony which I see the Court also refers to on page 4.
THE COURT: Just a moment.

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(Brief pause.)
All right.
MR. SCROGGIN: May I respond?
THE COURT: Yes. Go to the microphone, please.
MR. SCROGGIN: Referring to your order, Your Honor, on page 4, the order reads, Mr. Smith will not be permitted to give testimony based upon documents or information not relied upon to generate his report, nor will he be permitted to give testimony based on his subsequent visits to the facility sites.
We will not ask Mr. Smith to give testimony regarding any information not relied upon to generate his report, nor will he be asked any questions regarding the facility site visits that he subsequently made after his deposition.
The purpose of an expert witness is to assist the trier of fact in understanding technical complexities in a case such as this. We believe that this expert witness satisfies that requirement. I would, if I might, clarify with the witness, I had a line of questions that I was going to ask him regarding the preparation of the report, if that would help.
THE COURT: Go ahead, go ahead.
MR. SCOGGIN: I will not read from the deposition, I will simply ask the witness the same questions that were asked at the closure of the deposition, but were not read by Mr. Jacobs.
MR. JACOBS: Can we have a clarification, who asked

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the questions?
MR. SCROGGIN: I asked the questions at the end of the deposition. If I may, I will ask the witness unless you want to hear the deposition.
THE COURT: Go ahead.
BY MR. SCROGGIN:
Q. Mr. Smith, you worked with others in the preparation of your report?
A. That's correct.
Q. Did you work with others in the preparation of your report?
A. Yes, we did, I did.
Q. Were you personally involved in every phase of the analysis and preparation of these expert reports?
A. Yes, I was, from the moment we were engaged until the reports were actually published.
Q. Did you personally supervise and oversee the work of any staff member who was working under you?
A. Yes, I did.
Q. There has been much talk of the compilation of data. What exactly were these compilations of data; did they contain any new information not already in your report or already produced to the United States?
A. Not that I'm aware. The information was simply presented in a different form in the report than it was in our --

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essentially our data extractions that are compilations we had before then.
Q. Can you explain what you mean by "different form"?
A. For instance, on the information regarding the discharge monitoring reports and monthly operating reports, we would have a month and then a corresponding column, the actual effluent quality associated with that, so for like for May of 1991, you'd have BOD, 4.8 and TSS 3.2 and right on across the form, so that would be -- that would be like a compilation we had of a series of those. Those were then -- that's what we had in 'cause that's what we took it off, the MOR's, DMR's, we took those and put them in the report then, and on a graph, and so we've got graphs that have the exact same information, it just has on one ordinate of the graph it has date and time, on the other ordinate of the graph it has the relative magnitude of what that parameter was.
The other thing was that of dates and schedules, and so we had listed dates and schedules. We ended up putting in bar charts and that kind of thing in the charts.
Q. Do these compilations contain data or analyses of data?
A. It's simply data.
Q. Were they anything more than rearrangement of data that appeared in the charts that are part of your report?
A. No.
Q. Can you tell me if you received drafts of your expert

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report as they were in preparation?
A. Yes. We worked through them in kind of a stage at a time trying to establish first data and make sure we had a picture of things correct, and so Barcus Jernigan and Andy Westfall were working directly with me, they would write them and they would send them to me and I would mark them up and get on the phone, we'd be in conference or conference calls and go over the things it said and say -- I'd tell them, oh, I believe that something was different or changed or a different opinion of what they had written and we would modify that based on my direction. And we worked out each stage through the preparation of the report until the final report was completed.
Q. Can you tell me approximately how many contacts, personally, you had with your staff members during the preparation of these reports?
A. Oh, dozens. I mean, we began -- I think we were engaged in May of 1995, the report was completed in October, so five months. Certainly dozens of meetings and a couple dozen, twenty meetings. I don't know, something like that perhaps.
Q. Can you tell me what questions you asked of your staff in response to the drafts you received?
A. I might ask clarifying questions on the data, the text that was written, where did they get it or did we know about something else that made that raise a question on it, so I wanted to know more about that.

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I may have asked based on my own background I would have thought something different, could they defend where we were going with this thought interaction, just like that, just collegial development, pretty normal practice for us. I mean, I'm a large firm, we're always working as teams and nobody ever just writes a report by themselves.

MR. JACOBS: Objection, move to strike.

THE COURT: Denied.

MR. SCROGGIN:

Q. What changes did you make in the draft reports that you received from your team members?

A. Generally, I would get the reports and blueline them, things that, you know, I thought was the wrong conclusion or maybe a conclusion that should have a different approach to it.

Obviously, the facts – I relied on my team for the facts and examination of those facts in the files is very tedious and time consuming which is not appropriate for me to be involved with, and so I just asked them where they got that stuff, that kind of thing.

Q. Is this team approach that you've described different from the approach you use in servicing other clients on similar projects?

A. No. I mean, that's the way we do business. We are – we have project teams, that's the essence of every project is a project team to balance the views of different people.

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THE COURT: Okay.

You've answered his question.

BY MR. SCROGGIN:

Q. What steps did you take to assure that errors were not made in the transcription of data by your team members?

A. We had checks within the team and then we had clerical checking as for transcription purposes so we didn't make mistakes. We did make some and I think Mr. Jacobs pointed it out, our bibliography had a couple errors. Certainly, that's what we try to do. It's a little difficult because of the confidential nature of the work. We didn't make it available to very many within the firm.

Q. Do you take personal responsibility for all of the conclusions and analyses in your expert reports?

A. Yes, I do.

Q. And has your opinion expressed from those reports changed since the time of your deposition in any way?

A. No, they have not.

MR. SCROGGIN: Your Honor, I would renew my motion for proffering Mr. Smith as an expert witness and in the areas I've already enumerated in this case.

THE COURT: Okay.

Mr. Jacobs, you want to be heard any further?

MR. JACOBS: Very briefly, Your Honor.

BY MR. JACOBS:

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Q. Mr. Smith, Mr. Scroggin asked you about these drafts you reviewed.

THE COURT: No, no, I'm not talking about testimony, I'm talking about argument.

MR. JACOBS: Oh. I don't have anything further, Your Honor. No argument, Your Honor. Thanks.

THE COURT: All right.

Well, your testimony – well, I guess I should ask counsel this.

Mr. Scroggin, this Court in its order provided that Mr. Smith would not be permitted to give testimony based upon documents or information not relied upon to generate his report.

MR. SCROGGIN: That is correct, Your Honor. We have no expectation of asking him any question regarding the compilation or other documents that –

THE COURT: Mr. Smith, will you be rendering any opinions or testimony based upon any documents or information not relied upon to generate your report or reports?

THE WITNESS: No, sir, I won't.

THE COURT: Will your testimony be based even in part on subsequent visits to the facility sites?

THE WITNESS: No, sir.

THE COURT: Okay.

I'll overrule the objection, I'll permit him to

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testify over objection.

BY MR. SCROGGIN:

Q. Mr. Smith, when were you retained as an expert witness in this case and by whom?

A. May of 1995, by Gabeler, Baise and Miller.

Q. Can you tell me the scope of inquiry that was given to you for your expert work?

A. In general, it was the three treatment plants. First emphasis was Waterway Estates. We were asked to look at the improvements that were made at the plant and had they taken a reasonable amount of time, and we looked at the effluent discharges, both during the time that the complaint was made and whether those discharges had any impacts or what the impacts might be on the receiving waters.

And then we looked at Barefoot Bay and asked similar kinds of questions about the treatment plant and what would be expected from the treatment plant and looked at the discharge and its impact on the receiving waters, what those impacts might be.

And then finally at Carrollwood Village, similar questions.

Q. Who personally was your contact for your retention as an expert witness?

A. I spoke with you, Mr. Scroggin, and we developed really our scope and idea of what we were going to perform.

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Q. What instructions were you given regarding the conclusions that you should reach in performing your analysis?
A. Well, we talked about wanting to maintain our objectivity and it was very important that our firm report what we saw and what we opined of our own basis of fact and that, you know, we were to render our judgment as an independent engineer and that was what we were to write.
Q. Did you in fact prepare expert reports for the three facilities; Barefoot Bay, Carrollwood and Waterway Estates, that are in issue in this litigation?
A. Yes, we did, a report for each one of the plants.
Q. Mr. Smith, are you familiar through your twenty-five years of experience with the design and operation of a general secondary treatment wastewater treatment facility?
A. Yes, I am.
MR. SCROGGIN: Your Honor, I would ask the indulgence of the Court in allowing Mr. Smith to go to the drawing board and to assist his testimony to speed the process, if we might, by his drawing --
THE COURT: Sure.
BY MR. SCROGGIN:
Q. I will ask you, sir, would you please draw and describe the operations of a general generic secondary treatment wastewater treatment facility?
A. Yes.

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Q. I'll ask you to do that, sir.
MR. JACOBS: Your Honor, may I move a little closer?
THE COURT: Sure.
THE WITNESS: Your Honor, we have domestic sewerage coming in from a sewage collection system. We generally look at this sewerage in regards to about three parameters; one is BOD, the other is TSS.
BOD is biochemical oxygen demand, and TSS. These are kind of the measures of how strong this sewerage is coming into the plant. For domestic sewerage, these typically are about two hundred parts per million of BOD and about a hundred and fifty parts per million to take suspended solids into a plant.
Sewerage comes in through a sewer line, gravity or pumped, and may first receive some general screening to take out any large items, rags and debris, wood, things like that. And that is scraped off on a screen, that is usually manually removed or with a machine, and then it goes into what we call a complete mixed activated --
THE COURT: Why don't you pivot that whole thing, that way you can move back. You can see how --
THE WITNESS: Now, that is --
THE COURT: Move back a little bit.
MR. JACOBS: Do you mind if I get a little closer to see?
THE COURT: Uh, I don't mind. I tell you what, just

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MR. JACOBS: We can look at it during the break, perhaps if you want to keep it there, Your Honor.
THE COURT: All right, go ahead.
THE WITNESS: This next stage of treatment is really where the work is done and you have the sewerage that comes in about two hundred parts per million, that's essentially raw sewerage that comes into the plant, comes into the activated sludge basin.
And in this basin, essentially all we're doing is adding air and that's added in various means, but essentially mixed with the sewerage and residents of the sewerage, micro-organisms, and begin growing and create what we call mixed liquor, which is eventually a biomass that consumes this BOD. It's the food for these micro-organisms.
They start growing with the help of air and changes this stuff that comes in as raw effluent from essentially sanitary waste from our houses, from restaurants, those kinds of places, is mixed, these bugs consume it, and then we take the bugs, this whole mixed volume now completely mixed and biogenous into a settling tank which we then separate the liquid from these bugs, essentially dead bugs and some that are still living, and this is separated out, the liquid then goes out and that becomes essentially the effluent which is discharged.

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The most important thing in a treatment plant is this return stream of what we call return activated sludge which is this microbial population that we're going to take back in to help start up the process. And we take off what we call waste activated sludge, the removal of those, and that right there is probably the single most important part of operating a wastewater plant is the waste activated sludge, how was that taken off and how is the age of that taken off.
The other aspect --
THE COURT: How is the what taken off?
THE WITNESS: The age of those bugs, how long they have been in the system.
THE COURT: Okay.
THE WITNESS: The other aspect that is very important is that of air, how much air you add to the process. If you can control these two things, that is essentially how you control the stream of the plant, the wasting of the sludge, the return of it, and thus, the air, so those are very important.
And this effluent which comes off the weir of this settling basin, then we usually add chlorine to and then in some cases, we take the chlorine -- the chlorine is added to disinfect the effluent, to kill disease-forming bacteria that might be in there.
Those bacteria may come in, they're called fecal-coliform, and they come in in the millions and by the

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time they go through the treatment plant, they're down here after chlorination to maybe, I think the standards are generally two hundred or four hundred, two hundred on an average basis, four hundred on a particular basis by the time it goes through the process.

So you've seen, we've taken out millions down to a very small number. That's a measure of how safe it is for public health purposes. This whole idea is for public health. Now, after the chlorine is added because chlorine is also a -- not only does it kill these kind of bugs, it has negative impact on other living things in the environment.

We add things such as sulphur dioxide to remove the chlorine. It's done its work, it's killed the bugs, now we have to, before it goes into the receiving waters over here, let's make it safe, and so then it's discharged. And that is generally a secondary treatment plant in general form.

So, air wasting, and the effluent from this plant, the BOD and TSS that comes in is usually removed at about 85 percent, yielding an effluent that is like thirty parts per million of BOD, and on the order of twenty to thirty parts per million of total suspended solids.

Now again, just to characterize this for you, Your Honor, total suspended solids are essentially if you took this effluent and put it through a coffee filter, the stuff remaining on the coffee filter is twenty to thirty parts per

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million, so one part of -- out of a liter would be what that is.

In the BOD, the test that's done for this is essentially, it's a measurement of how much oxygen like this air with this stuff, this food in this effluent consumed if were put in the stream, and it's very important because back when we were first discovering about these things in the stream, we looked at when sewerage was added to a stream, we saw that down the stream aways, we'd see a depression in the dissolved oxygen. The stream would use up it's dissolved oxygen to essentially do the same thing we now do in this tank.

That became of great concern and we figured it's about a five day period this happened and, thus, the test is called the BOD-5. That's what we're concerned about.

So, we put this sample in a bottle, we put it in an incubator, a certain time, and measure how much oxygen is consumed within that bottle and that's the measurement and that is something that has been around since early in the Twentieth Century. That's become now our standard of measurement. Really just measures the amount of organic matter to oxygen inducing impact. That's a general secondary treatment.

THE COURT: Okay.

MR. SCROGGIN: Your Honor, may the witness remain at the board as I ask my next question?

THE COURT: Yes.

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BY MR. SCROGGIN:

Q. Mr. Smith, what is raw sewerage?

A. Raw sewerage is that which is untreated and collected in the residential or commercial collection system, so it includes sanitary waste from households and residences and commercial establishments, includes gray water from like washing machines and floor drains, and that's generally it.

Q. Can you tell me the breakdown of raw sewerage between water and pollutants?

A. Well, two hundred parts per million means that two hundred parts of stuff in this million parts of water, so it's like ninety-nine point eight percent water and point two percent, or yeah, point two percent stuff.

Q. What is a part per million? Can you give us an example of a part per million?

A. Well, it's -- we're trying to figure this out. What would be a good way? It's actually equal to about one drop, like an eyedropper in thirteen gallons, and just calculate that out, and roughly to -- so you think of it as one drop in your gas tank which is like thirteen or fifteen gallons, that's the idea, that's the concentration of if one part per million is this, so twenty parts would be twenty drops in a gas tank or that kind of thing.

Q. What is BOD?

A. Well, that's what I was discussing a little bit earlier.

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BOD is biochemical oxygen demand. It's the amount of oxygen consumed by these micro-organisms from -- in a confined space where they can't get any other oxygen over a five day period.

Q. Your chart shows BOD two hundred parts per million after treatment. What is the BOD?

A. It comes in at about two hundred, exits under secondary treatment at about thirty.

Q. What is TSS?

A. That is the filterable fines that you can take out on a filter that is like a coffee filter, and that which is remaining, evaporated and weighed, and that is the TSS, total suspended solids.

Q. Your chart shows TSS and raw sewerage. It's approximately --

A. One hundred fifty parts per million coming in and it goes out at somewhere, twenty to thirty parts per million.

Q. Therefore, can you tell me, secondary treatment removes approximately what percentage of the BOD from the raw sewerage that comes into the treatment facility?

A. It's generally accepted about 85 percent. In fact, we used to define it that way, 85 percent removal with secondary treatment.

Q. Is there a higher level of treatment than secondary treatment?

A. Yes. Actually a couple different levels, but the next

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level would be tertiary treatment. And tertiary treatment is essentially taking this flow to the next level, removal of BOD and TSS, trying to get it down to much lower levels of BOD and TSS. And that would be by using other methods.

A couple of methods may be to add additional tankage on here or actually a separate tank where you would have had more aerated micro-organisms or you could add a filter where you would actually -- a seine filter much like is used in drinking water treatment to remove the fines and with those fines you would take out some associated BOD, and so you might see with the tertiary treatment BOD and TSS removal up to 95 percent, so down to less than ten, ten, or something less than that.

Q. And is there a higher level of purification of sewerage than the tertiary treatment you just described?

A. Right. The next level from tertiary, again this is secondary --

MR. SCROGGIN: I don't mean to interrupt the witness, may I ask Your Honor that his chart be marked for identification only as Florida Cities' 203?

THE COURT: Mark anything you want to for identification.

THE WITNESS: The third one would be what we called advanced waste treatment, AWT, and the focus of advanced waste treatment is now is a shift. It's something that is developed as we've advanced our treatment technologies and advanced waste

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treatment is focused now on removal of nutrients. Nutrients are carbon, nitrogen and phosphorus.

Carbon we mostly remove because carbon is what is associated with BOD, biochemical oxygen demands, is mostly in carbonaceous form, that's carbon which is found everywhere in the atmosphere. Nitrogen now is of concern. Nitrogen comes in in domestic sewerage, mostly in the form of urea. It's converted from urea, organic nitrogen into usually ammonia, it's hydrolized into ammonia in the treatment process, and some of it actually may be changed to nitrate, another form of nitrogen. The key here is --

THE COURT: The first, is that what they call ammonical nitrogen?

THE WITNESS: Yes, ammonia, yes, that's correct, sir.

THE COURT: Contrasted with that, I got into this fertilizer case I had one time, contrasting nitrate nitrogen with ammonical.

THE WITNESS: That's correct, sir.

THE COURT: Okay.

THE WITNESS: These three are of concern, because these are the basic --

THE COURT: Nitrate nitrogen breaks down more readily, does it not.

THE WITNESS: Well, ammonia nitrogen requires oxygen to break it down. Nitrate nitrogen already has oxygen with it

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so it facilitates its breakdown because the breakdown then takes nitrogen to nitrate gas and right out into the atmosphere.

THE COURT: Okay.

THE WITNESS: The last one is phosphorus and it is of concern because each one of these are basic building blocks of essentially all life forms, certainly plant life. And of concern quite directly is we're concerned about growing algae in receiving waters.

So if we can limit these elements, the algae won't grow, we won't get algae falling out into the receiving waters which then is called putrification and can actually affect the water quality.

So the idea is if you control this advanced waste treatment, you can control the quality of the receiving water. So that's the focus of advanced waste treatment.

Now, what actually happens may be again carbon and nitrogen is treated in this basin here, again, by micro-organisms, and essentially it requires more air, the sludge age has to be older, takes longer because that which removes the nitrogen takes longer, the micro-organisms are slower to act, they're not as fast and not as relatively strong within the environment.

The phosphorus is usually removed by chemical precipitation and you add chemicals here in the solids liquid

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separation and that chemical ties up the phosphorus, it settles out with the sludge and is removed and so then we take the phosphorus out.

So that is generally advanced waste treatment and it may have standards. Generally accepted standards in Florida are five parts of BOD, five parts of suspended solids, three parts of nitrogen and one part of phosphorus. Again these are parts per million, one drop to thirteen gallons.

BY MR. SCROGGIN:

Q. Mr. Smith, you first described secondary treatment and your testimony was that secondary treatment removes 85 percent of CBOD and TSS. Can you tell me what does the effluent from a secondary treatment facility look like?

A. Well, the effluent from a secondary plant would have on the order of thirty parts of BOD and twenty to thirty parts of suspended solids. The total nitrogen is probably on the order of fifteen to twenty parts per million and the total phosphorus is six to eight parts per million.

Q. What color is the effluent from a secondary treatment plant, the first one that you described?

A. It's generally colorless, unless there's color in the drinking water that you use, which we have in Florida some places, but generally it's colorless, fairly clear, when you look at it, it's fairly clear to look at, probably doesn't sparkle, doesn't have that sparkling look you see in real clean

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water.
Q. What is, in your experience, the level of treatment that most sewerage treatment facilities in the United States have?
A. By far, most of them are secondary treatment plants.
Q. Approximately what percentage of the facilities in the country based on your experience would have either tertiary or advanced wastewater treatment?
A. It's a very small percent. I'd hate to put a number on it. Certainly, on the order of maybe less than ten percent of the plants in the U. S.
Q. And with advanced wastewater treatment, can you tell me the color and characteristics of the effluent from the facility you've just finally described, the most advanced wastewater treatment facility?
A. It would be very sparkling, actually look very clear. If we have used filters to remove some of the solids, it would be very clear, sparkling. It may still have color with it because there's really nothing in the treatment plant to remove color, but essentially looking at it, it looks like a fresh stream.
Q. Why are nitrogen and phosphorus of environmental concern in a secondary treatment facility's effluent?
A. Why are they or aren't they?
Q. Why are nitrogen and phosphorus of potential environmental concern in the effluent from a secondary treatment facility?

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A. Well, generally, they haven't been a concern in secondary treatment and they're not regulated or concerned of -- the effluent isn't an issue. When it becomes an issue, the issue is that of being this building block and affecting the receiving waters for the purpose of growing algae, and the algae being an indicator of water quality and impact.
But there is another reason for nitrogen, and particularly the ammonia part of nitrogen. Actually, in many more plants than are receiving this kind of treatment, this 5,5,3,1, which this is total nitrogen, there's many more plants concerned with ammonia, because ammonia has an impact on fish in the River.
And so we're often asked to remove just the ammonia part or convert it to nitrate rather than leave it in the ammonia form because the ammonia in its unionized state is harmful to fish, can be harmful to some fish.
Q. Does that mean that effluent from a secondary effluent facility in Florida is harmful to fish?
MR. JACOBS: Objection, leading.
THE COURT: Overruled.
THE WITNESS: It can have an impact on fish, yes, but generally it's mitigated by the amount of water diluted with or the type of receiving water that is going into that kind of thing.
BY MR. SCROGGIN:

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Q. Can you tell me the role if any that chlorine plays in the effluents from secondary and advanced wastewater treatment facilities?
A. Well, I mentioned chlorine is introduced as a bactericide to kill the bacteria that are there in the effluent and that's very important from a public health standpoint. In fact, that's how we got started into sewerage treatment early in the century was to remove the disease-causing bacteria, that was the big issue.
So chlorine has been with us for sometime and it's an effective bactericide. It's been used in our drinking water, our swimming pools, very important. In fact, the levels that we added here are about the same that we add to our drinking water that we drink.
Now, what we've discovered is that we add this chlorine, is very effective, but now you've discharged that before it's mixed and has a chance to interact with the environs in the creek or whatever that receiving water is. It may actually -- there's some species that actually find that as a toxic is the word, but really what it is, they find it unfriendly. They came up, the fish was swimming up to this area which has chlorine in it, they'd get like a buzz and turn around and go the other way, so it creates an area which they would not like to inhabit.
Based on that, we started in the '80's, started looking

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at trying to remove that chlorine and towards the end of the '80's, it became a standard to remove the chlorine with the addition of sulphur dioxide. It's essentially just another chemical to add in, it's essentially an anti-chlorine chemical. And we add that to remove the chlorine, happens instantaneously upon mixing.
THE COURT: What do you get when you mix chlorine with sulphur dioxide?
THE WITNESS: You get a chlorioxide, it's essentially harmless. And sulphur dissolves, and so this just --
THE COURT: Is that SO-2, is that a very odorous --
THE WITNESS: It's a gas that you add.
THE COURT: Very odorous?
THE WITNESS: That's hydrogen sulfide is what you're thinking of, that stinks like rotten eggs.
THE COURT: Yes, that's it.
THE WITNESS: This is SO-2, is really, and so, we add that, it undos what the chlorine did, is discharged, then it has no harm, and those fish then that might not want to get into the zone now can swim through freely.
BY MR. SCROGGIN:
Q. I'd like to turn now, Mr. Smith, and you may take the witness chair with the Court's permission, to the three facilities that are at issue in this case, and I will ask you first, the flows of raw sewerage into these three facilities

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which are Barefoot Bay, Carrollwood and Waterway Estates, and ask you, I will then ask you to compare, but I'll first ask you the flows?
A. The flow at Barefoot Bay, I think the period in question is about point five million gallons per day or half of a million gallons per day.
Q. How does that compare, sir, with the other facilities that you have had personal responsibility for with respect to the magnitude of flow?
A. Well, it's a very small plant, it's a pea-shooter plant we'd call it. It's compared to like the City of Tampa has sixty-five million gallons per day or a hundred thirty times as much, just finishing a project in Nevada that's eighty-eight million gallons a day, Denver was a hundred and eighty-five million gallons, so it's very small, not atypical in Florida to have small plants like that.
Q. What was the flow at Waterway Estates?
A. Waterway Estates is just under one million gallons per day.
Q. And at Carrollwood, sir?
A. I believe it's right around a half million gallons per day.
Q. In your experience, is the flow parameter of interest in evaluating environmental impacts of an operating wastewater treatment facility?

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A. Oh certainly, flow is very important because it's related to how much of an impact it has on receiving water because of the affects of dilution.
Q. Did you analyze the operations and environmental impacts of the Barefoot Bay Facility as part of your expert analysis?
A. I didn't analyze the operations. What I looked at is the results which indicate how it was operated and then, yes, we looked at that and we looked at the impacts in terms of the receiving water at Barefoot Bay which is the Satia Canal.
Q. And did you prepare an expert report for this litigation reviewing plant treatment capability of effluent quality at the Barefoot Bay Facility?
A. Yes, we did.
Q. And I would ask that the witness be shown Florida Cities' Exhibit Number 183. And I will ask you, sir, is this the expert report that you prepared pursuant to the instructions and retention you described for this litigation analyzing the Barefoot Bay Facility?
A. Yes, it is.
MR. SCROGGIN: Your Honor, I would move Florida Cities' 183 in evidence.
MR. JACOBS: Objection, Your Honor. This is hearsay. He didn't prepare the report. I've established that already on voir dire and the report is not automatically admissible under Rule 702. It is hearsay under 801(3), and I have additional

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authority. Engebretsen versus Fairchild Aircraft, E-N-G-R-B-R-E-T-S-E-N, 21 F 3rd, 721.
The witness has testified that the reports were not prepared by him, that the underlying data was not prepared by him. And I therefore think that under the authority of the case as stated and in particular, at 21 F 3rd, 728, the reports are inadmissible as evidence.
MR. SCROGGIN: May I respond, Your Honor?
THE COURT: Yes.
MR. SCROGGIN: Your Honor, the witness has testified that he personally supervised every phase of the preparation of these reports, including the analysis that underlies them. He says in his testimony, which we'll be happy to read back, but the Court has heard it today, that he takes personal responsibility for every word in these reports. And that he personally oversaw their preparation and the analysis upon which they relied.
We would ask the Court to accept them into evidence.
THE COURT: I'll overrule the objection. 183 will be received.
BY MR. SCROGGIN:
Q. Mr. Smith, would you please describe the Barefoot Bay Facility.
MR. SCROGGIN: And I might again ask the indulgence of the Court, if we could, Your Honor. I trust there would be no

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objection from the United States if we would use their own exhibit of the Barefoot Bay area as a map. I would ask that that which is --
THE COURT: You can use anything that is in evidence. Is that in evidence?
MR. SCROGGIN: It is already in evidence, Your Honor. It is attachment number one, Mark Klingenstein's expert report, and it is a geographic map of the Barefoot Bay area.
MR. BULLOCK: I have an extra copy of the report. I don't know if I should refer it to the Court.
THE COURT: All right.
THE WITNESS: I'm sorry, is there a question, Mr. Scroggin?
MR. SCROGGIN:. May I please ask that the written chart be removed so we can see the map more clearly, just tear off the page, it's been marked already as our exhibit number 203. It can be flipped over so the map is clearer.
THE COURT: You want to hand him the pointer from over in the corner there. He's got it.
BY MR. SCROGGIN:
Q. Mr. Smith, would you please describe the location of the Barefoot Bay Facility and its environs, and you may feel free to use the map at this time.
A. The facility is located adjacent to the Barefoot Bay development which is in southern Brevard County, southeast

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Brevard County.
THE COURT: Why don't you have a seat over there in the jury box, take those things out of chair there, Mr. Jacobs, and you can have a seat right there.
MR. JACOBS: I always get excluded from the jury, normally.
THE COURT: Well, this will be a rare privilege for you. You can pretend like you're trying the facts, okay.
THE WITNESS: Okay.
I'm not exactly familiar with this map, but I think it's – I get somewhere, it's right along Micco Road which is right here. And I think -- I don't know what version this, I believe the plant and development is right along in here, general area, maybe over here. I'm not sure if this is the development or the orange groves. It's in an area of citrus groves, southern Brevard County. I'm not sure that is the exact place or I'll be honest, I can't tell from this map.
BY MR. SCROGGIN:
Q. Have you reviewed your own map of this area?
A. Right, and I'm not sure which version this is. Seems like the one I have has a little different demarcation of the development actually, so --
Q. Based upon your previous review of maps of the Barefoot Bay area in preparation of your expert report, would you describe the location of the Barefoot Bay Facility and the

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route of the discharge from that facility?
A. Right. The plant discharges into this drainage canal which is essentially across the road from the plant and the site goes down –
MR. JACOBS: Objection, he's relying on his visit at this point in time. That is how he knows exactly where that drainage ditch is because he previously testified he hadn't visited the plant.
MR. SCROGGIN: Your Honor, he just testified he relied upon a map and schematic diagram of the plant in determining its location and environs, not his visit, I'm not asking him about his visit.
THE COURT: You relying on your visit?
THE WITNESS: I don't want to kid anybody, obviously the visit –
THE COURT: Don't, don't, I don't want him testifying concerning anything that he observed with respect to that visit after his deposition. I already ruled on that.
MR. SCROGGIN: Yes, Your Honor.
MR. JACOBS: Forgive me, I am going to move to strike some of the earlier testimony. It's now apparent to me that he couldn't have pinpointed the location as precisely as he did until after his deposition because in the deposition, he testified it was somewhere in Brevard County. That was all he could say, so I'm going to move to strike all of his testimony

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about the location of the plant.
BY MR. SCROGGIN:
Q. Mr. Smith, did you review a map of the area of the Barefoot Bay Facility?
THE COURT: All right.
Let me reserve on that. Go ahead and ask him.
BY MR. SCOGGIN.
Q. Sorry. Did you review a map of the Barefoot Bay area in preparing your expert report?
A. Yes, I did, and I think I, in the deposition, testified to that fact.
Q. May I ask you please, to remove the Government exhibit of that map and draw your own map based upon information that you had reviewed prior to your deposition in preparing your expert report.
A. The general forms of areas of interest are the Indian River Lagoon, Sebastian River, the north prong of the Sebastian River, and then this – the Barefoot Bay Plant and Barefoot Bay development.
And essentially, the plant discharges to a drainage canal which drains in general areas which is indicated on the map as citrus groves and flows down to this north prong of the Sebastian River.
And I think if you look at the map, it's on the order of -- this distance is on the order of three to four miles from

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the point in which the plant discharges to the point which goes --
MR. JACOBS: Objection, there is no map in this report, there was no map provided to the Government prior to the deposition. Again, he's out of bounds, Your Honor.
THE COURT: Out of bounds?
MR. JACOBS: Out of bounds of the terms of your order. He's relying on information clearly reviewed subsequent to the deposition and/or his visit to the plant.
MR. SCROGGIN: Your Honor, he's testified that his – the map he's drawing is based upon information, maps that he reviewed prior to his deposition, any and all such maps.
THE COURT: Ask him that.
BY MR. SCROGGIN:
Q. I will, Your Honor.
Mr. Smith, is the map you're drawing based upon information and documents that you reviewed prior to your deposition and relied upon in preparing your expert report for the Barefoot Bay Facility?
A. Yes. We had had copies of USGA maps, USGA quad maps like this, similiar fashion.
Q. Is your testimony based upon your personal recollection of that review of those maps?
THE COURT: Just a moment, please.
BY MR. SCROGGIN:

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Q. How far, Mr. Smith, is the distance from the discharge of the Barefoot Bay Facility to the north prong of the Sebastian River.

THE COURT: I'm going to overrule the objection, the last objection that was made and the motion to strike and the immediately preceding one as well. Go ahead.

THE WITNESS: As I said, I think it's about three to four miles. If you look on the map, again, look at our report, the description I just gave orally is essentially the same description that I gave that is given in the report on page 6 of the Barefoot Bay report.

BY MR. SCROGGIN:

Q. Go ahead.

A. And so the drainage canal, there's a drainage canal, goes down, that's about three or four miles, then the River is, north prong of the Sebastian River is not very long, I don't believe, and then again into the Indian River Lagoon, this is a shorter distance than that, this distance here.

Q. The three to four miles along the canal, can you describe that canal?

A. It's a drainage canal which it has been -- the purpose of it is to drain the citrus area there, that's it use and purpose, so that it has upland characteristics for use for citrus groves.

So it drains the storm water from those groves, and thus,

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that's what is the receiving water for this sewerage treatment plant. I don't want to get into the particulars of the canal because I'm afraid I'd step over the line there, so I'd rather not.

Q. Yes, sir, I was only asking you the length of the canal based on your review.

A. Right, it's a man-made canal. Trapezoidal section kind of thing.

Q. Can you tell me, sir, what happens to polluntants such as chlorine residuals and ammonia that you said are present in secondarily treated effluent as they travel down such a canal?

A. Well, first with chlorine, as I said, it's a bactericide and an occident, so once it gets -- it wants to be consumed and wants to oxidize, so when it gets into the receiving water, it does its thing, and as soon as it does that, it's used up. It becomes essentially harmless.

So once it is in the mixing zone and it touches things that it can oxidize, then it essentially is used up and neutral.

So beyond a fairly short distance within the receiving water, depending on the flow, I would expect that you would find very little evidence of any chlorine that might have been in there.

Q. What is a short distance compared to three or four miles?

A. You know, fifty, hundred, two hundred yards, something

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like that. Depending on flows. Obviously with more flow, the distance would be shorter. And you're talking about a flow of either -- the effluent from the plant is a half MGD or it's like point seven five cubic feet per second, and I don't know what the flow in the canal is, but -- well, enough said there.

Then you asked about ammonia. Ammonia undergoes then the biological processes that may have occurred within the treatment plant and again it is a function of dilution, and the information we had received that was actually water quality monitoring done in this canal showed that total nitrogen concentrations in the canal were very low, on the order of one part per million, very low concentration, so we should say ammonia is even lower than that because its -- total nitrogen is all the different forms of nitrogen in the stream.

Q. Would you be able to give a more precise answer about the distance over which a polhutant such as residual chlorine would have an impact if you were to see a video of the Barefoot Bay Facilities outfall?

A. If it showed the channel and, you know, I could estimate the flow of the channel, it probably would help, yes.

MR. SCROGGIN: Your Honor, I would bear the Court's indulgence, I would ask the Court's permission, would ask perhaps after the lunch break the witness be allowed to view the United States' video, only the very brief section that relates to the outfall at Barefoot Bay.

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This is an expert witness who can evaluate it in front of the Court, and we would suggest that would assist the trier of fact in understanding the impact that is in question. That is with the Court's permission, I would ask the cooperation of the United States in being able to use their exhibit this afternoon for no more than a two or three minute excerpt from the video at which he could answer the question with more precision since it is this question that relates directly to the environmental harm or potential for harm that might have been caused by the outfall effluent at Barefoot Bay.

MR. JACOBS: Judge, we're happy to make the video available. My understanding is it's in evidence and he's allowed to rely upon it if he wants.

I might point out they've had the video which was made in December of '94 and they've certainly had a chance to show it to Mr. Smith, but I can't object to them showing it to him again if he hadn't seen it.

THE COURT: Okay.

All right, I think we're going to go ahead and take a recess till five minutes after 1:00 o'clock.

(Thereupon, a luncheon recess was taken.)

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THE COURT: Mr. Scroggin.
MR. SCROGGIN: Your Honor, during the lunch break, we procured a copy of the Government's exhibit videotape. And with the Court's permission, I would like to play us a portion of the videotape that, according to the testimony of the United States' expert, shows the outfall at the Barefoot Bay facility, which is one of the facilities located here.
THE COURT: All right.
MR. SCROGGIN: I have turned, Your Honor, the video so that it faces the witness, since he has not seen this video before. And I will --
THE COURT: Okay. Does that video have a number, exhibit number?
MR. JACOBS: I want to say 505, Your Honor.
THE COURT: Okay. That's all right.
MR. SCROGGIN: This is the road in front of the Barefoot Bay facility and the outfall, according to the testimony of the Government's expert. For the record, it is the Government's Exhibit 505, the videotape we are watching. And the counter on the tape begins at, approximately, 11 -- excuse me, approximately, 10:50. I believe it was set to zero when we started the tape in the beginning, just for reference, on this particular tape counter.
It's, approximately, one or two more minutes, Your

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Honor.
THE COURT: Okay.
MR. SCROGGIN: That's the end of the section, Your Honor, dealing with the outfall.
CONTINUED DIRECT EXAMINATION
BY MR. SCROGGIN:
Q. Mr. Smith, after viewing that brief videotape of the outfall and the receiving water, Satilli Canal, at the Barefoot Bay facility as identified by the Government's expert, do you have any opinion based on your experience regarding the flow of the canal or its size?
A. Just looking at it, the flow looked to be coming out of -- it's on the order of a half MGD, depending on what time of day it was. It could vary a little bit. It appeared to be probably 16-inch pipe -- 12- to 16-inch diameter pipe. It's free falling into the stream there, although it's apparent that the water level has been up near the outfall at times, because the vegetation is stripped around there, around the outfall where the pipe is actually coming out.
It's hard to tell how wide it was, but looking at it just trying to get a sense of it, it's obviously more than 10 feet, less than 20, something like that. I didn't get any sense of depth at all. If you assumed it was a foot deep -- which I'd guess at least it's a foot deep based on the plunge pool that was exhibited by the flow from the sewage plant.

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A foot deep, 15 feet deep across, even a triangular section, would probably yield seven and a half feet in flow. And we're talking about flow that's about a tenth of that, so -- but that's a rough approximation based on a limited view of that. So, something on the order of ten-to-one flow dilution.
Q. Based on a ten-to-one flow dilution of the outfall in the Satilli Canal, do you have any opinion regarding the impact of Barefoot Bay's discharges on the Satilli Canal?
MR. JACOBS: Objection, Your Honor. He's going beyond the scope of this report. This data that he's just speculated or roughly estimated is not on the report, and I don't think he can now rely upon it to answer the question.
THE COURT: Okay. Sustained.
BY MR. SCROGGIN:
Q. Would you anticipate -- have you reviewed, Mr. Smith, the characteristics of the effluent at Barefoot Bay?
A. Yes, we have.
Q. And in your judgment, can you tell me what impacts, if any, might be expected from those discharges into the receiving water canal?
A. Well, in the period in question, the plant is discharging very well-treated secondary sewage, which I'd expect very little impact, if any discernible impact. Looking at the water quality data that was provided, some sampling in the canal,

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looks that the water quality is reasonably good. It's not a real high water quality receiving stream, and there's not much impact from the plant.
Q. What do you mean by very highly-treated secondary effluent?
A. Well, as I mentioned earlier, the secondary treatment would expect treatment to something like 30 milligrams per liter of BOD in that order. And we're seeing effluent here of half that amount, on the order of 15 milligrams per liter BOD, so -- something over 90 percent removal of BOD in suspended solids. So, it's doing a very good job of secondary treatment.
Q. In preparing your expert report, did you review the exceedances noted for failure to report BOD in the discharge monitoring reports turned into EPA for this facility during the period of November 1991 through November 1993?
A. Yes, we did.
Q. And did you reach any conclusion regarding the environmental impact, if any, of those failures to report BOD on the discharge monitoring reports?
MR. JACOBS: Objection, Your Honor. This has been a pattern. The question has been "have you," and the response has been "we." And I'm going to object on the grounds of vagueness, because we can't tell from the question whether Mr. Scroggin is asking Mr. Smith whether he personally did this

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type of review or analysis or whether his firm did. And I think that distinction is important for the purposes as I annunciated earlier.

MR. SCROGGIN: May I respond, Your Honor?

THE COURT: I'll overrule the objection. You'll have him on cross.

THE WITNESS: Yes. We looked at it. Generally, as I recall, the tests that were being performed were actually carbonaceous BOD tests, and they were reporting what we call a CBOD. Indeed the permit was asking for BOD, and the exceedances then were being based on the fact that it was CBOD rather than BOD.

BY MR. SCROGGIN:

Q. In preparing your analysis, did you prepare a chart summarizing the trends of BOD or CBOD at Barefoot Bay during this period of time and the effluent from this treatment facility?

A. Yes, we did.

Q. I would ask, please -- we have an enlargement of one of the charts that are contained in the expert report -- the expert's report for Barefoot Bay. It's simply an enlargement for Florida Cities Exhibit 183.

Mr. Smith, can you describe what this chart presents?

A. Yes, sir. This top line is -- first, just as I mentioned earlier, this represents typical raw sewage, the strength of

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raw sewage, the BOD strength. Then it goes on to show the actual BOD strength. So, it's fairly what we call weak sewage coming into the plant. It looks like an average of maybe 125 to 150 milligrams per liter.

This diamond here is what's shown as the -- was in the order -- administrative order or the permit conditions as to effluent limits, 20 or 30 parts per million. And then the diamonds are the actual plant effluent reported, and I think that's where they were actually reporting numbers that were samples taken as CBOD and reporting them as BOD.

Q. Can you explain the difference that would be expected between the measured values for CBOD and BOD from this effluent during this period of time?

A. Well, it's interesting. This is a question that really was never an issue in years past in the sanitary engineering business, because CBOD was kind of all of BOD. You put this stuff -- diluted it into a bottle. You measured the amount of oxygen that was used up, and all the oxygen made the BOD.

Well, as we started going to higher and higher levels of treatment, it turns out that these -- as I showed you on that earlier chart -- the bugs that take up the nitrogen are not as strong as those that take up the carbon, and so it takes longer for them to do their thing.

And so, what's happened is, we've cleaned up the effluent more and more. There's not as much carbon for these

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bugs to consume. So, they consume all the carbon, and then they start consuming nitrogen. They convert ammonia to nitrate, and that exerts oxygen demand.

Well, what's happened is that in these very high quality effluents, such as we're seeing down here with discharges in the teens or ten, or somewhere in that range, at parts per million, it uses up all the carbon, exerts that demand. And then it starts using up the ammonia and exerts another demand, which we then call nitrogenous oxygen demand.

So, a plant operator is interested for his own treatment purposes in the carbonaceous demand, what's this plant doing, because that's what he's most interested in. But it does impact what the reported value is. But as I said, the work is first done by the carbonaceous microorganisms and then the nitrogenous.

So, what we see here in this graph is actually the reported CBOD values, because there's been an inhibitor added to the sample that doesn't let the nitrogenous microorganisms actually do their work. On the lower values, the impact of not having added that inhibitor could be greater, could be maybe as much as 25 percent more. So, if you had ten parts per million of CBOD, if you looked at total BOD, that may be as high as 12 or 13 parts.

If you were up higher than that, then the impact would be less, because it had to consume more carbon. It

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didn't have as much time for the nitrogen to be consumed. But from -- during the entire period up -- we've reported here through 6 of '93. Through this period here, this would never have exceeded effluent limitations, thus from that standpoint would not have impacted the environment any more than what was permitted by the permit.

Q. Mr. Smith, the Court has found that Florida Cities did incorrectly report CBOD values when the permit required reporting BOD values.

My question to you, sir, is can you tell from your analysis whether or not Florida Cities' effluent would have complied with the permit's limits during the time in question?

A. Well, that's what I was saying. In these areas here, the effluent reported as CBOD is very, very low. So, even that influence of NOD, Nitrogenous Oxygen Demand, would be, you know, relatively small, some on the order of 25 percent greater than what was reported.

If you added 25 percent to every one of those values, you're still well below the permit limits. Again, it's a very good effluent for that plant.

Q. During this period of time, sir, how many exceedances based on your analysis would Florida Cities had reported if they had been measuring and reporting correctly BOD instead of CBOD?

A. The only one we saw was early in the period, very early in

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the period, and I -- and that's this one spike here. Could you --
Q. But the period of time to which I'm referring you is November of '91 through November of '93. Let me phrase my question again, if I might, sir.
A. Okay.
Q. And that is, during the period of time of relevance to this litigation, November '91 through November '93, how many exceedances would Florida Cities have reported on the DMRs to EPA if they had been correctly measuring CBOD instead of BOD based upon your analysis?
MR. JACOBS: Objection. Asked and answered.
THE COURT: Overruled.
THE WITNESS: There would be no exceedances.
BY MR. SCROGGIN:
Q. No exceedances at all, sir?
A. No.
Q. I'd like to turn to the exceedances that are reported in the violations that have been found for total residual chlorine at the Barefoot Bay facility. I'm going to ask you, sir, can you tell me what levels of total residual chlorine the water quality standards of the state of Florida require in the final outfall from a sewage treatment facility?
MR. JACOBS: Objection. Relevancy. We're talking about a federal permit. There's no allegations of violations

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of the state permit.
THE COURT: Overruled.
THE WITNESS: It varies to application. Sometimes as high as .5 parts per million and as low as 003 for total residual chlorine. No detectable limit.
BY MR. SCROGGIN:
Q. Do you know, sir, what the specific permit limit was in the federal NPDES permit for total residual chlorine for this facility during the time of September 1992 through March of 1993?
A. I believe it was no detectable -- what do they call it -- no detectable trace or no detectable measurement.
Q. Do you know if the total -- do you know, in fact, what the -- what total residual chlorine values were reported by Florida Cities during this period of time?
A. I think we have that in the report. I'd have to look at that to be able to identify them. In looking again at the report, essentially .01 was the standard, which is essentially not below detectable levels. I don't recall what the actual limit -- what they were actually -- the numbers were.
Q. Well, the Court has already found that they reported numbers higher than .01 and, therefore, that there were exceedances reported on the DMRs. And the DMRs are -- have already been introduced into evidence.
Can you tell me, sir, what the -- what environmental

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impact, if any, you would anticipate from levels of chlorine residual between .01 parts per million and one part per million?
A. Well, again, chlorine is a bioside of an oxidant, and so when it's introduced into the receiving water, it's going to want to oxidize things. And it will be quickly diluted from the flow of the stream depending on the relative flow. That dilution, along with its active oxidizing strength, would dissipate within fairly short order, again based on the mixing zone of that stream.
Q. Would there be any impact, based upon your analysis of total residual chlorine, by the time the flow of the Satilli Canal reached the north prong of the Sebastian River, which you testified is, approximately, three or four miles away?
A. I would expect it to be dissipated well before it got to the Sebastian Creek.
Q. And can you tell me what you mean by "dissipated"? Does that mean with respect to the magnitude of environmental impact?
A. Right. Dissipated is that it's used up, and it has no oxidizing. It's the HCL -- HOCL. The hydrochloride ion is what is active, and that will essentially be used up, hydrochloride ion, and that this would be gone. And there may be chlorides left in the water, but -- and the impact would essentially, again, be in the mixing zone. It would be one of

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discouraging certain species that may be sensitive to this level of chlorine from entering that mixing zone.
Q. And would the impact downstream of the discharge from the Barefoot Bay facility, before it reached the north prong of the Sebastian River, be detectable?
A. Would the impact be detectable?
Q. The impact of total residual chlorine.
A. No.
Q. You stated that the permit limit is 0.1 parts per million. Your previous testimony was that one part per million is one drop in the 13 gallons. Can you tell us what one tenth of a part per million is?
A. It would be one tenth of a drop in 13 gallons. It's a very small amount.
Q. Do you have experience in evaluating the impacts of total residual chlorine on receiving water environments?
A. Yes, I do.
Q. Can you tell me what impacts, if any, you would anticipate from the discharge from the Barefoot Bay facility at levels of .1 to one part per million?
A. Again, it would be a very minor confined impact to the mixing zone area until it's dissipated. That could be confirmed by field measurement. But from what we've seen, the impacts would be fairly minor compared to -- this is a drainage canal. Depending on what species are there -- they've already

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become accustomed to not swimming into this zone, and essentially it just -- it would be a barrier to some movement in the stream in that area.
Q. You testified earlier that the outfall you viewed in the videotape was above the surface water of the receiving water, the surface of the receiving water. Does that have any impact on the level of total residual chlorine that the outfall would realize in the receiving water?
A. Well, there would be some -- just some off gases from any of the chlorine, just vaporization of it, stripping. The biggest impact is that the water is free falling, and there's some aeration going on. And so, it's making an aerobic environment and, you know, mixed well.
Q. And does that mean that the impact in the receiving water would be higher or lower than if the outfall were under the surface water?
A. I would expect it -- the mixing -- it promotes mixing, and mixing is important to dissipate the chlorine to diminish the amount of impact it would have.
Q. Can you compare the levels of total residual chlorine in the Barefoot Bay effluent with normal drinking water in the state of Florida?
A. Well, drinking water would normally be -- have a chlorine residual of anywhere from one to two parts per million when it leaves the water plant and always has to have a residual in the

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distribution system. So, if you turn on the tap at your house, you would have chlorine in the tap so that it would oxidize the bacteria in the pipes.
MR. JACOBS: Objection. Goes beyond the scope of the report. Move to strike. He's not been qualified as an expert in water or water treatment or water distribution, and I don't believe any of this was in the report.
MR. SCROGGIN: May I respond, Your Honor?
THE COURT: Yes.
MR. SCROGGIN: He has testified that he has experience in water and wastewater treatment. And certainly with respect to the seriousness of the violation, the comparison to other environmental waters such as drinking water is relevant.
THE COURT: Overruled.
BY MR. SCROGGIN:
Q. I would ask you, sir, can you compare the levels of total residual chlorine, that is, how many times the total residual chlorine is there in drinking water compared to the levels in the effluent from the Barefoot Bay water treatment facility during this period of time?
A. Well, anywhere from ten times to -- or two times to ten times or 20 times, as much in drinking water as there would be in the effluent going into this canal.
Q. And did you reach any expert opinion about the expected

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environmental impacts on the Satilli Canal from these TRC exceedances?
A. Yes, we did.
Q. And what was that?
A. We found it to be no measurable impact on the canal.
Q. And did you reach that conclusion with a reasonable degree of scientific certainty to state that there were no impacts on the canal?
A. Yes, we did -- I did.
MR. JACOBS: Misstated the witness's prior testimony that -- the prior testimony was measurable impact, and Mr. Scroggin asked him to confirm that there was no impact. And I think there's a difference between measurable and no impact.
THE COURT: You'll have him on cross. Overruled.
BY MR. SCROGGIN:
Q. I'd like to turn, sir, to the toxicity exceedances at the Barefoot Bay facility and ask you if -- first of all, do you have any experience in -- with respect to the use of toxicity tests to measure effluent?
A. Yes, I do.
Q. And what is that experience?
A. Well, the whole effluent toxicity test is a fairly new measurement of effluent strength and effluent conditions, quality if you will. The idea is that you take effluent in its -- the whole effluent, if you will, a hundred percent

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effluent, and you subject some fairly fragile organisms to living in this whole effluent.
And the idea is to see if these very fragile organisms can live in the whole effluent, such that if it can, then that's good effluent. And if can't, then there may be some reason to look further into the effluent itself. It was an idea, a test that came about, to pick up the impacts of some difficult-to-measure compounds in wastewater treatment plants and effluent.
One of the offshoots of it, however, was that -- what we found was that all of the species, which are generally fat head minnows or silver side minnows or fleas -- or water fleas and shrimp, are also very susceptible to ammonia, which is ubiquitous in wastewater that has not been treated to advanced treatment methods.
And so, when it first came out in the late '80s as a test, then everybody that didn't remove ammonia failed the whole effluent toxicity test. So, we've been struggling with how to use it. It's a difficult test to use and now has become a standard for those with advanced waste treatment, that you need to pass that test.
Q. Is it more common in your experience to have whole effluent toxicity tests for advanced wastewater treatment, AWT facilities, than it is for secondary facilities?
A. Yes.

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Q. Is whole effluent toxicity testing designed to measure actual toxic impacts in the environment?
A. No. The idea is that you take these very fragile organisms, which may or may not live in the receiving waters that you're discharging to, and see can these very fragile organisms live in this effluent all by itself. And if they can, then good. That means that most everything in the stream will live there, too. If it can't, then again you move upstream and see if there's some things you need to remove.
Q. Where are the whole effluent toxicity tests performed if they're not based upon actual observations of the environment?
A. It's a laboratory test under controlled environment and conditions and with repeatable methods and procedures so that you can do them over and be assured of not introducing any other error into the test.
Q. What are those controlled conditions in the laboratory for a whole effluent toxicity test?
A. I couldn't recite them all, Mr. Scroggin.
Q. Do you know, for example, what concentration of effluent is used for the testing done at the Barefoot Bay facility?
A. Well, generally whole effluent – the idea is that it's a hundred percent effluent that this organism needs to live in.
Q. Is any consideration taken of dilution in the environment that actually occurs in doing whole effluent toxicity testing in the laboratory?

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A. Generally not. Although, there's some that are actually – there's some testing done to see what the dilution is in allowing it to live in that condition. But for the testing purposes, it's a hundred percent effluent.
Q. Do you know or have any opinion what caused the toxicity test – whole effluent toxicity test failures of the Barefoot Bay facility during this period of time?
A. Most assuredly I'd say it was ammonia.
Q. And on what do you base that opinion?
A. Well, a couple things. One is, that's what we have found historically in the municipal treatment plants, is ammonia is the thing that causes us to fail. But more specifically on this plant, we've got a period in which it failed the test. We put in some advanced waste treatment, which removed ammonia, and then it passed the test. And the treatment that took place really wouldn't have removed anything else that might have been there, other than some solids or – because they filtered it, and they took out the nitrogen.
And so, there isn't any – you know, still microbial treatment, still bugs doing the same thing. It's just giving them a little longer to do it. So, generally I'd say ammonia is the key thing. I mean, you took out the ammonia, and it passed the test.
Q. Based upon your experience, would you anticipate that the effluent from a well-run secondary treatment facility would

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have sufficient ammonia to fail these new whole effluent toxicity tests that you've described?
A. Yes.
Q. Are you aware of the quality of the effluent during the time of interest for this litigation at Barefoot Bay? Was it, in fact, secondarily-treated effluent?
A. Yes, it was.
Q. And did you conclude with a reasonable degree of scientific certainty that the most likely cause of the failures of the whole effluent toxicity testing at Barefoot Bay was the presence of ammonia in the effluent?
A. That's correct. We did.
Q. Did your analysis reach any conclusions regarding the environmental impact with respect to the whole effluent toxicity test failures?
A. The plant had been discharging this effluent for some time, and whatever was occurring in the canal was pretty much their status quo. So, there's no impact from that – continued during this period from November of '90 through '93, no additional impact at all from not passing those tests.
Q. The record in this case, sir, will – according to EPA is that there has been continuous discharge from this facility since 1983. My question to you is, would you have anticipated, based on your judgment, to have seen some measurable impact after that length of time of operation of this facility?

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MR. JACOBS: Objection to the extent the question mischaracterizes the Government's position. He said continuous discharges since 1983. The testimony was that they began in 1980.
MR. SCROGGIN: I will be glad to amend my question to 1980.
THE COURT: All right.
BY MR. SCROGGIN:
Q. Assuming that there had been continuous discharge of this facility, as the Government has stated, since 1980, would you anticipate finding environmental impacts pursuant to your analysis?
A. Well, again, the water quality monitoring that we saw from '88 to '93, I think it was, by Bionomics indicated the total nitrogen in the canal was quite low, on the order of one or two parts per million. So, I would suspect that the ammonia fraction of that is quite low. And generally we're concerned with the – actually the unionized portion of ammonia that affects fish and these organisms. So, I would expect very, very little impact and probably not measurable, probably not – probably not there.
Q. I'd like now to move to the Carrollwood facility. But before I move to the Carrollwood facility, I will ask you, can you state the conclusion that you've just given with a reasonable degree of scientific certainty?

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A. Yes.
Q. I'd like now to move to the Carrollwood facility and the exceedances which the Court has already found are violations for CBOD: fecal coliform, nitrogen, phosphorous, TRC, Total Residual Chlorine, and Total Suspended Solids, TSS.
Are you familiar with the Carrollwood facility, Mr. Smith?
A. Only by historical reference. It's gone, and I didn't visit it before it was gone.
Q. Do you know the flow from the Carrollwood facility?
A. Yes. It's on the order of .5 MGD.
Q. And based upon your experience, how does that rank among sewage treatment facilities? Is it large or small, or can you describe its flow in terms of magnitude?
A. Again, it's a very small residential plant serving an area of old Carrollwood there, essentially residential and some commercial connections, fairly small.
Q. Do you know for over what period of time the Carrollwood facility had the violations that are alleged in this case, for how long a period of time?
A. I don't remember exactly the number of months, but until they achieved their connection. It's from the period in which they got a permit -- because it was very low permit values based on AWT -- until the time which they ceased discharging. So, during that period they had exceedances.

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Q. You said that it was a very low permit. Can you describe the -- based upon the review you did for your expert report, what kind of permit did Carrollwood have during the period from July 1991 through December 1991?
MR. JACOBS: Objection. He said he hadn't reviewed the permit in preparation of his expert report.
BY MR. SCROGGIN:
Q. Do you know, sir, if --
MR. SCROGGIN: May I ask him the question, Your Honor, does he know what kind of permit?
THE COURT: All right. Yes.
THE WITNESS: Okay. I would characterize it as an AWT -- the effluent limits are like AWT permit limits because they're very low and generally conform with what we know as the Grizzle-Figg Standards on the west coast. All of Tampa Bay is -- anything that discharges into it generally is 5531. I think the actual number was 4.8 per BOD at Carrollwood: three of solids and three of total nitrogen and one of total phosphorous.
BY MR. SCROGGIN:
Q. The discharge monitor reports of the Carrollwood facility, do they contain both the measured values and the permit limits for any particular parameter?
A. Right. That's the way the columns are set up on the reports.

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Q. And you did review the information from the DMRs with respect to the Carrollwood facility?
A. Right. And we plotted those on the graphs, as well.
Q. Can you tell me if you reached any opinion regarding why there were these exceedances at the Carrollwood facility?
A. It was a permit -- the standards are for a plant that is an advanced waste treatment plant, and the Carrollwood plant was essentially a good secondary plant.
Q. You said that Carrollwood is a good secondary plant. Would you anticipate that any good secondary plant would have violations such as those that occurred at Carrollwood if it had the permit limits that were imposed on Carrollwood during this six-month period?
A. Oh, absolutely. I mean, the Carrollwood plant actually did remarkably well, in terms of almost meeting some of the permit limits. Despite it being simply a secondary plant, it had an extraordinary performance record based on those standards.
Q. For some months the Court has found there was not a violation from the Carrollwood plant during this six-month period for TSS. You've testified that the permit limits were for an AWT facility. Would that include the permit limit for TSS?
MR. JACOBS: Objection to the extent that counsel is mischaracterizing the Court's ruling.

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THE COURT: What was your question? That the Court had found that there were not --
MR. SCROGGIN: During the six-month period, Your Honor, from July 1991 through December 1991, for Total Suspended Solids, TSS, and CBOD, Carbonaceous Biochemical Oxygen Demands, there are no violations. And my question to him is --
THE COURT: Wait a minute. There are no violations. Now, was this -- you need to refresh my recollection. Was this based -- what was this finding of the Court based on?
MR. SCROGGIN: The Court's summary judgment order in this case found violations for the Carrollwood facility during the period July 1991 through December 1991 for the parameters that I discussed: CBOD, fecal coliform, nitrogen, phosphorous, TRC, and TSS, but not for every month. Some months there are no violations for TSS and CBOD.
And my question to the witness is whether he would have expected a normal secondary plant to have violated every month.
THE COURT: Well, you can ask him that, but don't characterize my order.
MR. SCROGGIN: Yes, sir.
BY MR. SCROGGIN:
Q. Would you anticipate a well-run, good secondary plant to have violated these parameters every month if it had the

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permit limits that were given to the Carrollwood facility?
A. Yes, I would.
Q. And did you reach any conclusion as to how the Carrollwood plant was able to achieve the higher advanced wastewater treatment limits, the more stringent advanced wastewater treatment limits for TSS and CBOD, at least for some months during this six-month period?
A. Well, yes. I looked at it, and there's a couple of things they could do to optimize the operation in terms of the aeration and how that works. And the more you aerated, the more you treat this sewage within controlled periods, you can actually get better solids/liquids separation. And then they also had a holding pond at the end of it.

And assuming they didn't have any algal growth in the holding pond, they could actually get some additional clarification there to where there are very good treatment. And so, assuming they -- obviously they must have had sufficient aeration capacity and clarification to get down to very low numbers.
Q. Based upon your experience with operations of sewage treatment facilities, can you tell whether -- how would you rate the operation it was able to achieve, at least for some months on at least two parameters the more stringent limits of AWT, when the facility is a secondary facility?
A. Again, really it was extraordinary treatment that was

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being provided by that plant, because it was not intended for that kind of limit.
Q. Extraordinary in which way, sir? Is it extraordinarily good --
A. Extraordinarily good.
Q. --or extraordinarily bad?
A. Extraordinarily good.
Q. Did you reach any conclusion regarding the seriousness of environmental impacts during this six-month period when the Carrollwood facility operated as a secondary facility with an AWT permit? Did you reach any conclusion regarding the environmental impacts of these exceedances?
A. Of the BOD and TSS?
Q. Yes, sir.
A. Our conclusion was it would be essentially not measurable, very little impact on the receiving waters.
Q. And on what do you base that conclusion?
A. Well, the permit limits are written, again, to essentially minimize impact, really on the receiving waters of Tampa Bay. And in this area, this is very high quality treatment, and we would suspect background levels of BOD from just surface runoff to be in the order of what we're seeing from the treatment plant.
Q. And did you reach this conclusion with a reasonable degree of scientific certainty?

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A. Yes.
Q. You've addressed CBOD and TSS. Can you tell me what your assessment of the seriousness of the environmental impact was from the violations of fecal coliform?
A. Well, as I remember, the standards here were essentially zero on fecal coliform. So, if they had any fecal -- which the only way you can get down to zero or 2.2 part -- or 2.2 colonies under the most probable number test is essentially through filtration, and they were not providing filtration. And so, I would not be surprised at all that they would exceed it greater than that for fecal coliform.
Q. And I'll ask you the same question, sir. Did you reach any conclusion regarding the seriousness of the environmental impact regarding the nitrogen and phosphorous exceedances for the Carrollwood facility during this six-month period?
A. Nitrogen -- it seems that there weren't many tests available of nitrogen and phosphorous. But those we had, again ammonia was -- nitrogen is much lower than we would have expected from a secondary plant, that they're obviously achieving some level of nitrification. Nitrification is changing ammonia to nitrate with additional oxidation.

And so, obviously they were getting some of that, and that's what I would expect given the high quality of effluent they were achieving from the treatment process. So, it's much less than what we would expect from a secondary plant

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obviously, but it still exceeded the permit, because it was written from AWT plant.
Q. I'm sorry, sir. You said much less. You mean the environmental impact was much less than you would anticipate from a secondary --
A. The amount of ammonia or amount of nitrogen in the effluent was much less than I would have expected from a typical secondary plant. The amount of environmental impact -- again without looking at direct water quality information, I would suspect that it would be a very minor amount of impact from ammonia in that stream.
Q. And did you reach that conclusion with a reasonable degree of scientific certainty?
A. Yes.
Q. I'd like to move on to the Waterway Estates facility, which has exceedances for toxicity and nitrogen and violations for discharge to the wrong location and discharge without a permit.

Are you familiar, sir, with the Waterway Estates facility?
A. Yes.
Q. Did you visit the Waterway Estates facility before your deposition?
A. Yes. Not inside the fence, though.

THE COURT: What did you say?

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THE WITNESS: I visited, but not inside the fence.
THE COURT: Oh.
THE WITNESS: I told Mr. Jacobs that I viewed through the windshield.
BY MR. SCROGGIN:
Q. Are you familiar with the environs of the Waterway Estates facility on land?
A. Generally, yes.
Q. Are you familiar with the hydrological area around the Waterway Estates facility? And by that I mean are you familiar with the water area, as opposed to the land area, around the Waterway Estates facility?
A. Yes. I mean, it's on a drainage canal adjacent to the Caloosahatchee River. You know, there's marine -- some kind of marine facilities on each side of it, boat docks and whatnot, boat -- boat barns, that kind of thing.
Q. Do you know the flow from the Waterway Estates facility?
A. As I recall, it's just under one million gallons per day during the period of interest.
Q. And do you know the flow of the Caloosahatchee River, the receiving water for which this facility was permitted?
A. I think we reported values in our report of greater than a thousand million gallons per day at the upstream gauging station, upstream of the discharge.
MR. SCROGGIN: With the Court's permission, I would

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like to ask the witness, please, based upon the work that he's done for his expert report, to draw the Waterway Estates facility, which has an unusual location. I would ask, if I might, please, to have the diagram that the witness has already done with respect to the Barefoot Bay facility marked for identification only as Florida Cities 204. And --
THE COURT: Well, you're going to need to make sure it's marked, if you want to do that. It's counsel's responsibility to premark all exhibits.
MR. SCROGGIN: Okay. We can mark it right now, Your Honor, if that's agreeable to the Court.
THE COURT: But my clerk's not doing that.
MR. SCROGGIN: Okay.
THE COURT: You need to do the leg work or have it done by one of your people.
MR. SCROGGIN: I'd like to mark for identification the witness's diagram of the Barefoot Bay facility as Florida Cities 204 for identification.
THE COURT: Put "For ID" on there, if you would. All right.
MR. SCROGGIN: With the Court's permission, I would like to ask the witness to step down and --
THE COURT: You can step down.
MR. SCROGGIN: -- draw the layout of the Waterway Estates facility and its nearby environs.

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MR. JACOBS: Objection to the extent that it goes beyond the report and relies on his visit to the facility itself as opposed to the drive-by windshield view.
THE COURT: Well, let's only have the drive-by windshield view without relying upon your subsequent visit, and I'll overrule the objection otherwise.
THE WITNESS: I'll limit it to outside the plant itself. The Caloosahatchee River flows -- it's kind of -- north is going this way. The plant is located on a little drainage canal that I would guess was built to allow this area to be developed for residential purposes and to allow boat access up and down.
The plant is located right on the canal. There's, as I recall, some other kind of canal and kind of an island that's built out there. There's a restaurant here and a boat barn, and it seems like there's a boat -- something else -- a boat yard over here, and this is "boat barn," "restaurant." Canals kind of go various ways, and the plant is kind of sandwiched in.
I essentially drove up to that point and stopped and looked through the windshield at the plant. That was my windshield tour, and I went back out. So, I think that's a fair collection of what it was. This is the plant here.
BY MR. SCROGGIN:
Q. Can you tell me, sir, how does the size, the land

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area size of the Waterway Estates facility, compare to other facilities with which you are familiar?
A. It's a very tight site, very small, probably less than an acre.
Q. And are there any implications regarding the difficulty or ease of operation of a facility located on a small site?
A. Well, operationally it's not too hard. I mean, actually things are very close together, nice and compact. But it is a very tight site to try to put all the pieces of a treatment plant on it.
Q. In a moment we'll discuss your analysis of the steps described in your report for constructing -- undertaking a construction project on such a site.
And I'll ask you now, are there implications for constructing a new facility on a site of this size that are -- that distinguish it from other sewage treatment facility sites?
A. Well, the plant improvements, as I recall, were something in excess of $2 million. And if you can imagine trying to build a house on less than a one-acre site and spending more than a million dollars or $2 million on the house and yet staying in the existing house that's also on the site -- that's kind of a sense of it. It's very compact, very difficult logistically to try to build something on that site, so -- it's a very difficult site to try to do anything with.
Q. Do you know where the discharge from the Waterway Estates

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facility occurred from the time it was built until July 1991?
A. I believe it just went straight up from the plant into the canal, right here.
Q. Do you know the size of that canal?
A. It's probably 30 – I don't know. 40 feet across, something like that, just a typical boat canal, drainage canal kind of thing, access up into residential areas.
Q. Have you seen similar boat canals elsewhere in Florida?
A. Right. We have them down in South Tampa, all along the Tampa Bay, lots of them, kind of finger canals that go up and allow boat access to slip docks right up by the house. That's the kind of facilities that were built here, as well. So, you know, 30, 40 feet across, probably enough depth so that the boats can get in and out of there.
Q. Do you know whether this canal is tidally influenced or has its own independent flow of water?
A. I think we reported in our report that it is tidally influenced.
Q. Do you know how far the discharge point was from the edge of the Caloosahatchee River?
A. Well, as I mentioned, it goes from – here's the discharge – or was the discharge. The river goes down past the boat barn, and there's another kind of canal that comes in here, and I don't know really where that goes. There's a little island barrier out here, and then the main river is out

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here. I don't know. It's probably a good five iron, at least. I'd say a couple hundred yards, maybe, 180 yards.
Q. Do you know the level of treatment that the Waterway Estates facility achieved during the period of time of relevance to this litigation, which would be from July – I'm sorry – from November 1989 through April 1992?
A. Again, it's a secondary plant actually providing something a little greater than secondary treatment. They were actually providing some nitrogen removal in the plant through its operation.
Q. Does that mean that the effluent – or can you tell me, sir, how you would compare the effluent from the Waterway Estates facility with other secondary-treated facilities with which you have experience?
A. Well, it would be better effluent. As I recall, it also had filters on it at different times, and so the filters would provide even less in the way of solids and BOD. That wouldn't affect nitrogen and phosphorous generally, but it was a well-operated secondary plant achieving some nitrogen removal and excellent BOD and SS removal – TSS.
Q. Do you know of any limitations on the area of the Caloosahatchee River into which this facility was discharging regarding nitrogen and phosphorous?
A. Well, the concern at Caloosahatchee was that you would not discharge too much nutrients, again, to cause the provocation

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of algae. And so, there were measurements taken and work done by the Department of Environmental Regulation at the time to try to determine how much they could put in and develop those amounts. And so, there was concerns about nitrogen and phosphorous going in, because, again, the idea – the basic building blocks of algae – you don't want to formal algae in the river.

MR. SCROGGIN: With the Court's permission, I would like to have the witness refer to a blowup of – which is Exhibit No. 92 from the expert report that has been prepared.

BY MR. SCROGGIN:

Q. I'll ask you, sir, did you prepare this chart as part of the expert report that you – perhaps I should preface that by saying did you prepare a report for the Waterway Estates facility regarding these exceedances and their environmental impacts?
A. Yes, we did.
Q. And is this chart one of the charts that you prepared in your analysis for this facility?
A. Yes, it is.
Q. I would refer you to Florida Cities Exhibit No. 92, which I would like to show the witness at this time. I'll ask you, sir, is this the expert report that you prepared for the Waterway Estates facility?
A. Yes, it is.

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MR. SCROGGIN: I would ask that Florida Cities Exhibit No. 92 be moved into evidence.

MR. JACOBS: Same objection, Your Honor.

THE COURT: Okay. Overruled. It will be received.

(Florida Exhibit No. 92 was received into evidence.)

BY MR. SCROGGIN:

Q. Sir, can you explain this chart, which is from page 24 of your expert report and marked as Exhibit 92 – can you read the title and explain this chart to us, please, for the Waterway Estates facility?
A. The title of the chart is "Nitrogen Discharge To The River," and that's the Caloosahatchee River.

THE WITNESS: If I could, Your Honor.

THE COURT: Yes.

THE WITNESS: The chart is just to indicate the impact in terms of the amount of nitrogen being discharged from this plant into the Caloosahatchee River. There have been some work done to develop how much nitrogen could the river accept and not grow too much algae so as to create an environmental harm. And that number was up here in excess of 1200 pounds of nitrogen per year. Then it –

THE COURT: That's the threshold –

THE WITNESS: Pounds per day.

THE COURT: That's the threshold at which algae would develop?

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THE WITNESS: That's the threshold at which the amount of algae would be an impact. So, they wanted to keep it below that. So, they actually set a limit and said, "Okay. We'll allocate the amount of waste that can be put into the stream to be something on the order of a thousand fifty pounds of nitrogen per day." And so, they allowed the -- they divided this up and gave it to the various treatment plants to say, "You can discharge so much, the total of which can't be more than that," because once it gets more than that -- this is just a safety factor, if you will. And there could be other future things. They want to reserve it for a number of reasons they want to do.

The standard which was given to Florida Cities was actually 25 pounds per day, and that's essentially equal to one million gallons of flow and three parts per million of the nitrogen, total nitrogen in effluent. So, if you multiply it out, it's about 25 pounds per day of this total of over a thousand.

As you can see, these diamonds then are essentially the actual amount of discharge of nitrogen by the plant: less than 200, a hundred. And this goes from 90 through 92, a high of over 200 and clear down here, essentially zero, and again generally around a hundred pounds, which indicates that they were probably discharging about 12 parts of nitrogen rather than three.

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Again, putting it in perspective, it's this much of a total allocation of this much. And so, there's a great deal more capacity in the river than what was being used up by Florida Cities.

Q. Can you tell me from your chart whether or not Waterway Estates was meeting its permit limits for nitrogen during this period from August 1, 1992 on?

A. Generally it wasn't. There may have been one or two times that -- it looks like there's one or two times that it was meeting the limit.

Q. And can you compare the magnitude of the actual nitrogen in the effluent from Waterway Estates with respect to the total potential loading that you described for the river itself?

A. Well, again, the -- on the order of a hundred pounds per day is what Florida Cities -- again, about 12 parts per million over a capacity of a thousand seventy-five. So, they were about a tenth, perhaps, of the capacity of the river in terms of their discharge.

Q. You talked about the capacity of the river and dividing up the capacity of the river. Is that a wasteload allocation?

A. Yes. That's what -- essentially what's the capacity of this river to accept discharges, and then we allocate that capacity to various treatment plants based on relative size and other configurations. And that's allocating waste load, if you will, how much waste you each can contribute to the stream.

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And their allocation was quite small, only 25 pounds. They were in excess of their allocation. But compared to the whole, it's a very small amount.

Q. Does a wasteload allocation already consider the other discharges on the river?

A. Yes. That's part of the -- generally what they would do -- because this is -- you know, this is forever essential. I mean, a stream isn't going to change much. So, I would suspect that the existing -- this is allowing for future capacity in these plants. And so, in the ultimate kind of build-out, it could not exceed that number, but under current situations, it's much less than that.

Q. You testified that one of the consequences of an effluent containing more nitrogen might be producing algae. Is algae a serious environmental problem?

A. Well, it's an undesirable, if you will. It's not a threat to public health. It's not a threat to, you know, welfare or anything like that, but it's an undesirable. It could discolor the water. If there's too much of it, it actually can accumulate and affect other organisms which depend on clean bottomed rivers and so forth or -- not be covered up by the algae, that kind of thing.

Q. Do you know if there ever were observed any such discoloration of the water or algae problems in the Caloosahatchee River based upon your analysis?

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THE COURT: Just a minute.

MR. JACOBS: Objection. Hearsay.

THE COURT: I'll overrule the objection.

THE WITNESS: It's my understanding from work that was done by DER in about 1990, as I recall, they measure essentially chlorophyll-A from the algae. And they're fairly low concentrations, on the order of 15 or 16 micrograms per liter, with as high of about 19 micrograms per liter near the discharge.

BY MR. SCROGGIN:

Q. Were any of these measured values of chlorophyll-A in your judgment attributable to the Waterway Estates discharge?

A. Yes. I believe the spike from 15 to 19 is probably the result of the plant. It was taken near the -- up near the plant in the boundary of the Caloosahatchee River.

Q. Do you know if, in fact, there's any data that you considered in preparing your report that demonstrate any actual environmental harm attributable to the operation of the Waterway Estates facility?

A. Well, the work that was done at that time indicated they actually expected something on the order of 25 micrograms per liter and that this was much less than expected, that they had overestimated the impact by as much as a third, so that the plant had very little impact and certainly not that which was intolerable.

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Q. Did your report analyze the impacts regarding the relocation of the outfall from the canal to the six-foot contraline of the Caloosahatchee River?
A. Yes, we did.
Q. And what conclusions did you reach about the environmental impacts of that change in the outfall's location?
A. We said that it would -- I would say that it would have an improved -- it would improve the water quality generally, because it introduced the flow at a point which was getting very good mixing and dilution at the deepest point and probably the fastest point in the river and -- yes.
Q. Are you aware of any data that actually demonstrated an improvement in the water quality of the Caloosahatchee River during -- before and after the relocation of the outfall?
A. No.
Q. Do you know if there were any impact at all on the Caloosahatchee River attributable to the relocation of the outfall?
A. I'm sorry. Did you say any data or any impact?
Q. Any data of any impacts attributable to the relocation of the outfall at Waterway Estates.
A. I don't recall any right off, no. I mean, our judgment was one more of intuitive engineering judgment, to move it out to the mixing zone, that you're going to get better mixing and less of an impact on the river.

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Q. But did you analyze any data showing a lessening of impact on the river?
MR. JACOBS: Objection. Asked and answered. That's the third time.
THE COURT: Sustained.
BY MR. SCROGGIN:
Q. I'd like to move on to the exceedances for toxicity and nitrogen at the Waterway Estates facility and ask you, sir, if you have any opinion regarding the seriousness of these exceedances for toxicity of the Waterway Estates facility?
A. Much the same testimony as I made on the Barefoot Bay plant. Again, this is toxicity related generally ammonia in the effluent, that this plant did not remove all of the ammonia until it was upgraded. And after it was upgraded, it met the whole effluent toxicity test after it was up and running and in good shape.
So, it was our judgment and my judgment that indeed it was related to the ammonia, the toxicity was, and its failure to meet those tests.
Q. What kind of effluent was the Waterway Estates putting out during the period time of the toxicity failures? That would be from -- the toxicity failures are reported in February through June of 1992.
A. Generally it was very good secondary treatment. Again, it was secondary treatment with some filtration, but not complete

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nitrification. Now, as I recall, the plant was put on line in about April, and it took them a little while to get the nitrification up and running and everything clicking. I don't recall when the last violation was, if it was June. And then after that, they begin meeting the whole effluent toxicity standard, after they got the plant fine-tuned and running properly.
Q. Based on your experience, would you anticipate that a facility upgrading from secondary to AWT such as the Waterway Estates would be able to achieve passage of the toxicity test after the completion of that upgrade?
A. Yes, I do.
Q. And can you tell me regarding the nitrogen exceedances if you have -- if you reached any conclusion regarding the cause of the nitrogen exceedances of the Waterway Estates facility during the period of time of this litigation, which is July '91 through April -- March of '92?
A. Again, the plant was generally not designed for complete nitrogen removal. They had levels of three parts per million, which is very, very low. And so, then they put in additional treatment methods, and they were able to get down below three. And so, they couldn't meet the standard because they didn't have the right treatment methods in place.
Q. Did the effluent coming from the Waterway Estates facility change during the period of time in question, to your

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knowledge?
Let me rephrase the question. Was there any change other than the improvement of the effluent during this period of time, to your knowledge, and based on your analysis?
MR. JACOBS: Objection. Assumes fact not in evidence, that is, to say the improvement of the effluent.
MR. SCROGGIN: Your Honor, he's testified that the effluent improved during this period of time.
THE COURT: Overrule the objection. Answer the question.
THE WITNESS: There would be no other reason for the improvement of the effluent quality except for the upgraded plant. There was no change in the influent, and the treatment processes were essentially the same that had been in place for some time. And so, the effluent quality changed when the new improvements were put in place.
BY MR. SCROGGIN:
Q. Did you reach any conclusion regarding the environmental impact of the toxicity and nitrogen exceedances from the Waterway Estates facility?
A. Very little impact on the Caloosahatchee River. I mean, obviously whether it's measurable or not in terms of -- you could maybe measure it in a water quality fashion, but in terms of environmental impact or other fish or other living organisms impacted, I don't think you can measure it.

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Q. Did you reach that conclusion with a reasonable degree of scientific certainty?
A. Yes.
Q. One of the issues in this litigation is the length of time it took the Waterway Estates facility to upgrade from better-than-secondary effluent, as you testified, to the still cleaner advanced wastewater treatment. And I will ask you did you review the steps that a facility such as the Waterway Estates facility owned by Florida Cities took in order to achieve that upgrade from better than secondary to the still cleaner advanced wastewater treatment?
MR. JACOBS: Objection. Twice he's characterized the effluent as still cleaner, and that's a value judgment that's not in evidence.
MR. SCROGGIN: I believe, Your Honor, that he testified that the AWT effluent was still cleaner, but I'd be happy to ask him that question, if that would clarify it.
THE COURT: All right. Ask him that question.
BY MR. SCROGGIN:
Q. Is the advanced wastewater treatment that the Waterway Estates facility achieved still cleaner than the better than secondary with which they began?
A. Yes. The upgrade allowed them to take out the nutrients of nitrogen and phosphorous. It continued to lower the BOD and suspended solids. And so, yes. It was very high quality

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advanced waste treatments and able to meet the whole effluent toxicity test, as well.
Q. I will try to rephrase my question that I started with. And, that is, did you review the steps that a facility such as the Waterway Estates facility owned by Florida Cities Water Company would undertake in order to achieve this upgrade from better than secondary to the still cleaner advanced wastewater treatment facility?
A. Yes, I did.
Q. In your experience of the last 25 years, can you tell us how long such an upgrade might take for a facility such as this?
A. Well, it varies by wide margins. It varies largely because of the kind of permits that may be required. It's fairly predictable to estimate how much time goes from kind of figuring out the original idea and what options you have and preparing the engineering drawings and all that. That's fairly straightaway. But then once you get into the permitting realm, it becomes very difficult and unpredictable. There's other forces over which you as an engineer designer or an owner have no control.
MR. SCROGGIN: With the Court's permission, I would like to ask the witness if he would please go to the drawing board and describe those steps that are required for a facility such as Florida Cities Waterway Estates facility to upgrade

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from better than secondary to the still cleaner advanced wastewater treatment that they achieved.
THE COURT: Yes, sir.
THE WITNESS: Well, the owner was given essentially a new target. This is the new level of treatment that you're required to meet, essentially a new mission. So, there are a number of steps it has to do to get there. So, first of all, you have the mission defined, and that's the AWT. So, we begin through the process.
First of all, you have to figure out how am I going to do this. So, the first thing you do is evaluate alternatives and -- alternative ways of how I could do that, which would be -- generally what we've come to know what's the most economical, what's the most efficient way of getting there. In order to do that, the water company or an owner like that -- whether it's a municipality or water company -- would have to try to gain the expertise of outside firms to help them to do that evaluation.
So, they have to find and contract and engage this outside firm to develop this alternative evaluation. And from that, they would then interact and come to some agreement. And out of that would come then what is selected option. So, now we have a mission, and now we have an option of how we're going to actually accomplish our mission.
The next step then is, okay, this is kind of a

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concept. Now we have to take this concept and put it into bricks and mortar, concrete and steel. How do we actually put this project in place? So, the next step is some kind of preliminary design document that's going to start putting this together. Again, this requires outside expertise generally from a municipality or water company to do.
They would, again, go out and find and contract and engage some firm, engineering firm, to perform these tasks, and they would complete this preliminary design document. This allows the company or utility to then start planning from a capital point of view costs and so forth, how they're going to accommodate this and timing and so forth.
The next step would be then the detailed design and contract documents. These are the actual plans and specifications from which a contractor would erect and build these facilities. Now, in this case, they may continue to use the same engineer that was doing this part, if they performed satisfactorily. They may have to go out and get a new one. That's at the option of the owner. Generally we'd like to think if we were doing it we'd do a good job and we'd keep on going through.
The fourth step then begins where things start getting sticky, because this begins the permitting phase. During these steps, you have pretty much control of what's going on as the engineer, the owner, what's on the drawings and

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what's being prepared. Now at the permitting phase we start going out to others, to third parties, to see what indeed is being done.

The first permit that is very important is the FDEP or FDER – depending what time – what the department's called – permit to construct. And that allows the state to look at these drawings and see is it really – is what you've designed going to accomplish your mission. That's really the essence of it. And they'll take their judgment and their experience and look at it and see how you got there.

And generally that permitting process takes a fair amount of time. You fill out the permit. You do your job. You send it in. They have about 30 days, I believe, by regulation to reply, and generally that reply is in the form of some kind of question, clarification. You have 30 days to reply to that. They have another 30 days. So, you're kind of out about three months to even – to have a chance. And when there's other issues involved, it often creates other problems, and that may take quite a long time.

In this case, the other permit that was of difficulty was what we called the Corps of Engineers 404 Permit. This is a permit associated with building a pipeline in the Caloosahatchee River. Generally when we're doing a project like this, we get what's called a Nationwide 404 permit. The Corps of Engineers have said, "If you're going in general

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places, we can review your application. We'll give you a *permit, not a problem, 30, 60 days.*"

In this case, we're going to a major drainage way, a major river, the Caloosahatchee River, and we're going out in the middle of it. So, now we've got navigation issues and all the other kind of problems. The Corps of Engineers are notorious for getting bogged into their bureaucracy and taking a very long time for this permit.

MR. JACOBS: Objection. Move to strike. No foundation and way beyond the report, the notoriousness of a U.S. Government agency, Army of Corps Engineers.

THE COURT: I'll deny your motion. Go ahead.

THE WITNESS: Other permits that we may have to get include the – what we call the SWFWMD permit, Southwest Florida Water Management District. That relates to storm water drainage on the site and changes, increases of impervious area, where that's to be drained. We have the local permits for development and meeting concurrency requirements, those kind of things.

All that's done before you even have done anything about engaging a contract. You don't have a contractor yet. This is just preliminaries to that. So, this is very difficult to guestimate in terms of planning. We've seen it from 30, 60, 90 days to take well over a year. And this is a – this is part of Florida's – developing projects in Florida. It's very

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typical of Florida.

From that point, assuming you have been granted those permits, then you'd move ahead to step five, which is actually the bidding of the project. And that's where we take these drawings and specifications. We send it out to the world of general contractors, and we ask them to bid the project: How much will it cost to meet what is going to be done here, and how long will it take you?

Those bids take on the order of 90 days to advertise the bids, to accept the responses, to check out the credibility of those, and then to move ahead. So, it's a minimum – kind of a 90-day period for that bid, unless there's some problems with it: Exceptions taken, they can't meet the contract documents, something like that.

Once that is done and the contract is awarded, the next permit is one that's obtained by the contractor, and that's generally the local building permit. And that's a permit that will go to the local agency, whether it's the county or the city in which the plant is located. And because most cities or counties don't look at sewage plants very often, they often have to engage in outside parties to help them review these plans and specifications.

It's not unusual then for that to take an extra bit of time and have that review done, check to make sure everything meets the codes and requirements. And then a

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building permit would be issued, and that permit would be going to the contractor, the general contractor who is going to build this plant. Now, he can actually begin construction and start building this project according to plans and specifications that has a construction period during which time he's actually putting in the concrete and steel that was described in the drawings.

And then at the end of that time would be a turnover period, a commissioning period, in which the owner would begin operating the plant with the new facilities and trying to get it up to speed to make sure it's meeting those requirements. There would be final permit sign-offs based on the completion of these activities. Essentially all of the permits would have to be certified by either the engineer on the site or the contractor or the owner to say that indeed those things that were promised to be done had been done and those certifications would be complete in this process.

BY MR. SCROGGIN:

Q. Mr. Smith, in describing the permits that are required in Southwest Florida, did you mean that Southwest Florida to include the permits that are required in Lee County?

A. Yes, yes. The area generally from Tampa, Sarasota, Manatee, Lee County.

Q. And can you tell me on, approximately, how many projects in Florida you have been associated with that have had to go

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through such steps for facilities like the – such as the Waterway Estates facility?
A. Actual treatment plant upgrades, we've probably done a dozen or so in Florida, in this general area, all the way up the coast.
Q. And did you review the length of time that it took the Florida Cities Water Company to go through these steps in performing your analysis?
A. Yes, we did.
Q. Did you reach any conclusion regarding whether or not Florida Cities completed the project in a timely fashion or not?
A. Yes, I did. I looked at the times and determined there was a fairly large amount of time that it took when the project was really out of the control of Florida Cities, and that was an exceeding long time. The actual work that was done was done in a reasonable amount of time for the work that was in the scope of that job, both in the design and construction phases and that, you know, it was a reasonable amount of time for the project.
Q. Mr. Smith, I'd like to turn your attention, please, to the Government's – United States Exhibit No. 597, which is the expert report from Mr. Mark Klingenstein, the United States Government – the United States' expert witness in this case.
MR. SCROGGIN: And I'll ask if the witness could

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please be shown that exhibit.
MR. JACOBS: Your Honor, it's my recollection on Monday that we sort of had an agreement that they weren't going to ask – we weren't going to ask Mr. Klingenstein about Mr. Smith's report, and they weren't going to ask Mr. Smith about Mr. Klingenstein's report.
THE COURT: That's my recollection.
MR. HIRD: Your Honor –
THE COURT: There's been a lot of water over the dam. I guess that's – no pun intended.
MR. BULLOCK: May I have just a second?
THE COURT: Yes, sir.
MR. BULLOCK: Thank you.
MR. SCROGGIN: Thank you, Your Honor, for your indulgence. We will be happy not to have him refer to the report, but simply to ask him a brief series of questions regarding these facilities, if that is consistent with the agreement that was reached.
THE COURT: You'd be happy to ask him questions regarding these facilities?
MR. SCROGGIN: I would like to – I have probably four questions, Your Honor, that I would like to ask him to determine whether or not he agrees with certain conclusions without reference to where those conclusions come from.
MR. JACOBS: It sounds like a back door to me, Your

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Honor.
THE COURT: It sounds like a back door.
MR. SCROGGIN: Then I'll withdraw the request, Your Honor, and –
THE COURT: No. I agree – I agree with the United States on that. My recollection is that this was discussed at the inception of the case. And I think that you would be accomplishing the same way – the same thing by doing it in this fashion as you would otherwise. So, I'll sustain the objection.
MR. SCROGGIN: That ends my direct examination of this witness.
Excuse me, Your Honor. There is one of the – Mr. Smith's expert reports which I would ask to move into evidence and have him view, if I might, before I end my direct examination, and that is the Florida Cities Exhibit No. 157, which while we discussed it I failed to have him identify and move into evidence. And if I might have him look at Florida Cities Exhibit No. 157, which is the Florida Cities –
THE COURT: Has he got it in front of him?
MR. SCROGGIN: He will in one second, Your Honor.
THE COURT: Okay.
BY MR. SCROGGIN:
Q. I'm going to ask you, sir, is this the expert report that you prepared for Florida Cities regarding the Carrollwood

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facility?
A. Yes, it is.
MR. SCROGGIN: And I would ask that it be moved into evidence, Your Honor.
MR. JACOBS: Same objection, Your Honor.
THE COURT: Same ruling. I'll overrule the objection. It will be received as Defendant's 157, Defendant Florida Cities 157.
(Florida Cities Exhibit No. 157 was received into evidence.)
MR. SCROGGIN: May I also ask, Your Honor, that the last two pages that the witness has drawn on the chart be marked for identification, No. 205 and 206 for the second page.
THE COURT: All right. Go ahead and mark it.
What we'll need to do is use the exhibit identification tags that you apparently – your associate has there.
MR. HIRD: We're preparing, Your Honor.
THE COURT: Yeah. Okay.
All right. Mr. Jacobs.
MR. SCROGGIN: Your Honor –
THE COURT: Just a moment.
THE WITNESS: Could we take a short break for restroom?
THE COURT: I think we need a – yes, sir.

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MR. HIRD: I have a few questions for this witness. I don't know whether you want the Co-Defendant to go before Mr. Jacobs or after. I have, approximately, five minutes.

THE COURT: You have five minutes. Okay. Well, we'll take Mr. Hird first, and then we'll take you, Mr. Jacobs. And we need to take a -- what time is it? Well, we'll go ahead and take a ten-minute recess.

(Brief recess taken.)

THE COURT: Okay. Mr. Hird.

MR. HIRD: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. HIRD:

Q. Mr. Smith, I believe you testified when you were describing the operations of the sewage treatment plant that in certain plants chlorine is added as a disinfectant toward the end of the process. Do I remember correctly?

A. Yes. That's correct.

Q. Is that the case at the Barefoot Bay treatment plant?

A. Yes.

Q. Now, turning to the exceedances of total residual chlorine at Barefoot Bay, is the chlorine in those exceedances -- was that due to the chlorine added after the process, or was that due to anything in the sewage from the homes of the residents of the Barefoot Bay development?

A. It would be from the chlorine added after the process.

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MR. HIRD: Thank you, Mr. Smith.

Thank you, Your Honor.

THE COURT: Mr. Jacobs.

CROSS-EXAMINATION

BY MR. JACOBS:

Q. Good afternoon, Mr. Smith.

A. Good afternoon, sir.

Q. Isn't it true that the Barefoot Bay plant was designed with the intention of disposing of the total effluent through percolation ponds and a spray irrigation system?

A. Yes, it is.

Q. And when was the plant designed?

A. Somewhere early -- late '70s, early '80s, I believe. Put into operation around 1980, I think, something like that. Let me think.

Q. That's your best recollection?

A. It may have been earlier. I'd have to look at a report to make sure of the actual dates was the dates we started looking at that kind of thing.

Q. Without looking at the Black & Veach report, you don't know when the plant was designed?

A. Beyond -- prior to that time, no. I can't remember if it was -- it may have been put in operation late '60s. What I remember is the operation of the percolation basins in the early '80s and not functioning in about '83 or so. So, that's

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1 the time frame I'm remembering.
2 Q. And the plant, again, to the best of your recollection,
3 was designed when?
4 A. I don't remember exactly what time it was. As I say, it
5 could have been late '60s, early '70s. That's where I'm not
6 sure if it started operation then or if I'm thinking when it
7 actually -- in the early '80s when the perc ponds ceased
8 working very well.
9 Q. Okay. And by "perc ponds," you do mean percolation ponds,
10 correct?
11 A. I mean percolation basins that are located on the plant
12 site, yes.
13 Q. And as far as the Black & Veach investigation is
14 concerned, in the Black & Veach report, you've concluded that
15 there were two percolation ponds; is that correct?
16 A. That's correct.
17 Q. And isn't it true that these two percolation ponds at peak
18 performance could only handle a hundred thousand gallons per
19 day?
20 A. I think on the order of a hundred. I think it may have
21 been something more than that, up to maybe 150 or a hundred,
22 but in that range. That's correct.
23 Q. Are you speculating?
24 A. No. I think that it's not real clear what they did
25 handle, because the water level varies in the ponds. So, the

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1 actual through-put of the ponds is a hard thing to quantify.
2 Q. Might it equally -- is it equally true that they might
3 have been able to accommodate less than a hundred thousand?
4 A. Well, that's what I was saying, yes. The water level
5 rises and falls in there. That's correct.
6 Q. Now, you just testified that the plant was designed to
7 have percolation ponds and a spray irrigation system, correct?
8 A. Yes. That's what you asked me.
9 Q. Okay. And now, isn't it true, though, that a spray
10 irrigation system was not ever put in place at that plant until
11 March of 1990?
12 A. That may be true. I know that the spray irrigation has
13 been used at the plant, and it's a fairly small site. Whether
14 it was in the original design or not I'm not sure.
15 Q. Well, you said it was in the original design. What I'm
16 asking you is whether the -- to the best of your knowledge,
17 sir, when was that design actually first implemented?
18 A. Well, first, I didn't ever use the term "original design"
19 until just now, and the plant as originally designed only had
20 two perc ponds. The spray irrigation system was added because
21 of the perc ponds not being sufficient. When was that put in
22 place -- I'll take your word that it was 1990.
23 Q. You have no understanding of any spray irrigation system
24 ever being installed at Barefoot Bay prior to March of 1990; is
25 that correct?

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A. No. I don't have any understanding of that.
Q. And isn't it true that the spray irrigation system that was put in place in March of 1990 was a 40-acre site, which at, again, peak performance could accommodate 90,000 gallons of effluent a day in dry weather conditions?
A. It's a 40-acre site, and yes, I believe that's generally the amount of flow. It would largely depend on the way it was operated.
Q. And it would also depend, wouldn't it, on weather conditions?
A. Yes.
Q. In fact, it could not be operated at all if it was wet weather conditions, isn't that right, sir?
A. It would be unfavorable to operate it, right.
Q. Now, isn't it also true that in 1990, the same year when the spray irrigation system was first put in place, that the effluent flow from the plant was in the 421,000-gallons-per-day range?
A. It was certainly in the range greater than 400,000, yes.
Q. So, the spray irrigation system that was installed was not sufficient to eliminate the discharge to the Sebastian River; isn't that correct, in 1990?
A. That's correct.
Q. And isn't it also correct that there was no NPDES permit at that facility until 1991?

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A. Yes. I believe that's true.
Q. Now, isn't it also true that because the Barefoot Bay plant was a secondary treatment plant it was incapable of removing sufficient ammonia to regularly pass toxicity tests?
A. Yes. That's correct.
Q. So, since at least 1980 the discharge from the Barefoot Bay plant was bound to fail a sizable number of toxicity tests; is that correct?
MR. SCROGGIN: Objection, Your Honor, with respect to the time of these toxicity tests to which counsel referred.
MR. JACOBS: His report goes back actually to pre-1980, to the design days.
THE COURT: I'll overrule the objection.
BY MR. JACOBS:
Q. Do you recall the question, sir?
THE COURT: Do you remember the question?
THE WITNESS: Yes. Actually whole effluent toxicity tests didn't really come in to play until late in the '80s. So, it wouldn't mean much to have them back in the early '80s. It was a developing technology.
BY MR. JACOBS:
Q. Well, starting from the time that toxicity tests were put in permits, would you say that the Barefoot Bay plant was bound to fail such tests because it was a secondary treatment plant?
MR. SCROGGIN: Objection, Your Honor. Calls for speculation.
MR. JACOBS: Professional opinion.
THE COURT: Well, I'll allow him to answer it for whatever it's worth, if you can.
Can you answer that?
THE WITNESS: Yes. I mean, the issue is that this plant doesn't treat -- doesn't remove ammonia, doesn't change ammonia to nitrate. And as such, as long as it discharges ammonia, it's going to fail whole effluent toxicity tests. That's correct.
BY MR. JACOBS:
Q. Now, to have prevented the toxicity violation, isn't it true the company either needed to upgrade the plant to AWT standards or find an alternative source of discharge other than surface water?
A. To prevent the failure of those tests? Is that what you said at the beginning?
Q. Yes, sir.
A. Yes.
Q. Now, AWT plants existed as far back as the 1970s; isn't that right, sir?
A. The earliest plants were built in Lake Tahoe in the late -- middle '60s, late '60s. And then in terms of really being in place at any large use was kind of mid '70s to late '70s.

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Q. All right. So, there was no technological reason, was there, sir, why the company could not have built an AWT plant at Barefoot Bay before November 1991, correct?
A. That's correct.
Q. And with respect to finding an alternative source of discharge other than surface water, alternatives that could have been pursued were building additional percolation ponds, building a deep well, or using spray irrigation, correct?
A. Those are all alternative disposal methods. That's correct.
Q. But you did not examine any such alternative that the company had available to it in the 1980s, correct?
MR. SCROGGIN: Your Honor, this goes beyond the scope of the direct and also the scope of his report, which does not discuss alternatives.
THE COURT: Which did not discuss alternatives?
MR. SCROGGIN: Yes, sir.
THE COURT: The objection is that examination of the witness regarding alternatives is outside the scope of the report and the direct examination; is that correct?
MR. SCROGGIN: Yes, sir.
MR. JACOBS: Your Honor, what I'm seeking to establish is, in fact, he didn't look at any of the alternatives. So, I'm not sure there's any inconsistency here. I'm confirming that neither he, nor his staff, nor the

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report even looked at any of these other alternatives.
THE COURT: Well, I'll overrule the objection. Go ahead.
THE WITNESS: That's correct. We didn't look at alternatives. It wasn't part of our charge.
BY MR. JACOBS:
Q. You said it wasn't part of your charge.
A. Right. Like mission, your scope.
THE COURT: What he was hired to do.
THE WITNESS: Right.
THE COURT: Isn't that what you meant?
THE WITNESS: Yes, sir.
BY MR. JACOBS:
Q. Hired by the lawyers?
A. That's correct. We were retained by the law firm of Gabeler, Baise & Miller.
Q. And the scope that they gave you was -- did not include looking at the cease discharge alternatives in the 1980s; is that correct?
A. They asked us to look at the effluent quality and its potential impacts on the receiving waters and then the exceedances that occurred.
Q. I'm not quite sure I got an answer. Let me ask you again. Your charge, as you put it, or your scope did not include in the scope -- or the charge given to you by the

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lawyers that hired you in this case, did not include examining any of the potential cease discharge alternatives at Barefoot Bay in the 1980s, correct?
A. I believe that's true. We did not look at alternatives.
Q. Now, Mr. --
THE COURT: So, don't examine him any further on that. That would be beyond the scope.
MR. JACOBS: No. That was it.
BY MR. JACOBS:
Q. Now, Mr. Smith, you state that ammonia is known to be toxic to certain species of aquatic life, correct?
A. That's correct.
Q. And in the Black & Veach report on Barefoot Bay, you essentially conclude, do you not, that the apparent toxicity of the effluent would not have had an effect on the organisms in the receiving stream because the effluent had the same toxic characteristics for years; is that correct?
A. That same ammonia for years, yes.
Q. Well, are we saying the same thing, toxic characteristics? I thought you said on direct that the toxic characteristics are attributable to the ammonia?
A. In the whole effluent toxicity test. I mean, really confined to that very specific test on very fragile species, it's toxic. To characterize ammonia as toxic is just not correct.

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Q. I didn't say it was toxic. I'm using the phrase "toxic characteristics." Isn't that what a toxicity test tests for, toxic characteristics of effluent? Isn't that fair?
A. It's a very narrow test meant to look at its toxicity on very fragile species that could be indicators of some compound in the effluent that may need additional treatment, so -- but ammonia itself, to say it's a toxic compound -- that's what I'm disagreeing with. I don't think I've said that and certainly don't intend to say that.
Q. I didn't use the word ammonia in the --
THE COURT: All right. Just ask your next question.
MR. JACOBS: All right, sir.
BY MR. JACOBS:
Q. In essence, isn't it true that you're saying that any aquatic life that would have been affected by the toxic characteristics of the effluent would have been affected not by these particular violations but by earlier unpermitted discharges?
A. Yes.
Q. Now, moving on to the total residual chlorine violations. Isn't it true that neither you, nor your Black & Veach staff, nor your report expressed an opinion on the possibility of endangered species being affected by the total residual chlorine violations at Barefoot Bay?
A. No. We did not express an opinion as to endangered

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species.
Q. Moving now to the BOD versus the CBOD violations, the monitoring violations. Mr. Smith, these are both tests that -- both of these tests, rather, test the biochemical oxygen demand, correct?
A. That's correct.
Q. But they are two different tests which at any given time would likely result in different values; is that correct?
A. Two different tests, the CBOD test and a BOD test?
Q. BOD and CBOD, what you discussed on direct.
A. Right. I mean, they're different tests, and they measure different things.
Q. And would result in different values, correct?
A. Perhaps, if they're different. I mean, there may not be an NOD. There may not be any difference between CBOD and BOD. It may be exactly the same thing.
Q. In your professional opinion, what's the most likely scenario, that they're going to come out the same or not?
A. It depends on the concentration of BOD in the water and the microorganisms in the water. A very high quality effluent -- below 30, below 20 parts per liter of BOD -- you'll see the influence of nitrogenous oxygen demand.
At higher concentrations, certainly in raw influent, you'd not see any impact of NOD, because it's much stronger, and you wouldn't have any population to incur that NOD. So,

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it's only in the highly-treated flow that you're even going to see an impact like that.
Q. I see. And tell me, is the Barefoot Bay highly-treated flow?
A. Yes.
Q. Okay. So then in the -- narrowing my question to the Barefoot Bay context, these are two different tests which at any given time would likely result in different values; is that correct, sir?
A. Yes.
Q. Now, moving on to your findings with respect to water quality. Isn't it true that in the Black & Veach report on Barefoot Bay you say that the water quality of the drainage canal into the Barefoot Bay -- into which the Barefoot Bay plant discharges is only "fair"?
A. I think that's the term we used, is fair.
MR. SCROGGIN: Your Honor, is there a page reference to the page in which counsel is reading?
THE COURT: Is this from his report that you're talking about?
MR. JACOBS: Do you want me to look it up, or should I move on?
THE COURT: Well --
MR. JACOBS: I'm trying to finish. I don't think --
THE COURT: Yeah. I don't think --

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MR. JACOBS: It's page 6, if that's helpful.
THE WITNESS: The first quality is talking about DO and whatnot in there. It says "fair." That's what it says.
THE COURT: If you're going to read from the report, if you would inform counsel what page.
MR. JACOBS: Fair enough, Your Honor.
BY MR. SCROGGIN:
Q. Now, Mr. Smith, is it fair to say that you have no opinion as to whether the water in the canal met water quality standards during the period 1988 to 1993?
A. Well, we have some of the data that was taken by Bionomics on that canal. I'm not sure as I know what the water quality standards would be on that canal. I recall that the data we had was water of pretty good quality. The reason we said "fair," I think, was related to the dissolved oxygen levels, which seemed to be depressed at different times. We weren't sure of why. The data didn't look real good in that regard, reliable good.
Q. Mr. Smith, I'm going to ask you a question that I asked -- I'm going to read a question that I asked you in your deposition, and then I'm going to ask you -- then I'm going to read the answer and ask you if that is the answer you gave. The question appears on page 85, line 1 of your deposition and reads as follows: "So, you have no opinion as we sit here today as to whether the quality of the water in the Sebastian

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Creek and the drainage canal leading to the creek meets water quality standards or met water quality standards during this five-year period?"
Answer, line 6: "That's correct."
Is that the answer you recall giving, sir?
A. Oh, absolutely. It was Sebastian Creek.
Q. Moving on to the Carrollwood facility, you are aware, are you not, sir, that in 1979 the state of Florida determined that there should be no discharge from the Carrollwood plant into the Sweetwater Creek, correct?
A. I am aware of that. Yes.
Q. And you're aware that at that point in time the state of Florida was interested in reducing the amount of pollution going into the Tampa Bay, correct?
A. Yes.
Q. In particular the nutrient load, correct?
A. Yes.
Q. Which means nitrogen and phosphorous; is that also correct?
A. That's correct.
Q. And those are some of the pollutants that come from wastewater treatment plants, correct?
A. Yes. That is correct.
Q. And, in fact, the discharge from the Carrollwood plant was having an impact on the nutrient load in Tampa Bay, was it not?

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A. Yes. It had an impact.
Q. Now, you are aware, sir, that in 1984 EPA denied Florida Cities NPDES permit renewal application to discharge into the Sweetwater Creek?
A. Yes.
Q. And that the Carrollwood plant continued to discharge in the Sweetwater Creek without an NPDES permit until 1991, correct?
A. That's correct.
Q. And you are also aware, sir, that when in 1991 EPA issued another NPDES permit for the Carrollwood plant effective July 1991, it required that the effluent being discharged from the plant into the Sweetwater Creek be treated at advanced wastewater treatment levels, correct?
A. That's correct.
Q. Now, requiring advanced wastewater treatment, or as we've said, AWT treatment, is a way of minimizing nutrient load, is it not?
A. That's correct.
Q. And in so doing, protecting the Tampa Bay, correct?
A. That's correct.
Q. Now, it's also true, isn't it, sir, that the violations that took place at the Carrollwood plant took place because the effluent was not being treated at AWT levels, correct?
A. The plant was not an AWT plant. In fact, the treatment

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that it was performing was actually comparable to AWT for a number of parameters, even though the plant was not intended to be an AWT plant. It did -- I think the exceedances were in nitrogen and phosphorous and fecal coliform.

MR. JACOBS: Move to strike as nonresponsive, Your Honor. I asked him about the violations, and he's focusing on the nonviolations?

THE COURT: Denied.

BY MR. JACOBS:

Q. Let me ask you this, sir. The violations that took place at the Carrollwood plant took place because the effluent was not being treated at AWT levels, correct?

A. That's correct.

Q. And these violations resulted in a nutrient load to the Tampa Bay above the levels that had been permitted; isn't that correct, sir?

A. Yes. That's correct.

Q. Now, let's talk about the Sweetwater Creek for a moment. This is a relatively small body of water, is it not?

A. Right. I think six and a half MGD is the average annual flow.

Q. That's the average annual flow, but isn't it true, in fact, that during the time that the Carrollwood plant operated, the only flow in the Sweetwater Creek at the point of the discharge was the discharge itself?

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A. No. That's not correct.

Q. Would that statement be correct during dry weather conditions?

A. It could be in dry weather conditions. It's a drainage canal, and so there are times obviously when it rains it's not going to be the only thing. And it heads waters in Island Lipsey Lake. So, it overflows from the lake into the canal, and that depends a large part on rainfall and other run-off conditions. So, when it's dry, it well could be that there's no flow upstream of the plant.

Q. And no flow downstream except for the effluent itself?

A. For a period. I mean, it's in an urban area, so there's all kinds of run-off that impacts this. This is a drainage canal, and it drains all of urban Carrollwood. So, when someone is watering their lawn in a dry period, the run-off would end up in the creek.

Q. Again, I'm going to read from your deposition testimony, sir. The question which appears on page 114, line 18 is, "When you have a stream with essentially zero flow during dry weather, what does that tell you about what's in the stream when the plant is discharging to it in dry weather?"

Answer, line 22: "It's pretty much effluent. I would say 100 percent at the point where it goes in."

Is that the answer you gave at your deposition?

A. Yeah. That was not particularly the Sweetwater Creek.

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But you said if there's a creek with no flow in it.

Q. And is Sweetwater Creek different?

A. Yes. I mean, the -- it's a drainage canal, and there's essentially always a certain amount of water in that canal. It drains a lake and the surrounding urban area.

Q. Are you saying that Sweetwater Creek is not typical of a small creek?

A. There are small creeks in urban areas. Yes. It's typical of a small creek in an urban area, which drains groundwater and which drains surface water.

Q. And on page 5 of your report or the Black & Veach report, don't you say the flow is essentially zero?

A. There are times of the year when it's essentially zero. That's what we said.

Q. And at those times isn't the flow essentially just the effluent from the plant?

A. At the point of introduction.

Q. Yes. At the point of introduction it is essentially just the flow from the plant; is that correct?

A. At the point of introduction it's essentially the flow from the plant. Correct.

Q. Now, the permit limit at Carrollwood for total residual chlorine was .01 milligrams per liter, correct?

A. I believe that's true.

Q. And the TRC levels during the latter half of 1991 were in

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the 1.6 to 2.8 milligrams per liter range, correct?

A. I don't recall those numbers exactly. I'd have to --

Q. Would you like to look at the DMRs?

A. That would be fine, or a report.

MR. SCROGGIN: Your Honor, if I may suggest, Florida Cities would have no objection to the Government using its own summary tables from the -- that have a list of these values, only in the interest of speeding up this process, rather than using the actual DMRs, which are hard to read.

THE COURT: Okay. You want to do that, Mr. Jacobs?

MR. JACOBS: I appreciate the suggestion. I think that we do have these handy tables that are on file with the Court. They were filed at the time of the summary judgment proceedings. And I've asked Mr. Moore to look to see if we have an extra set for the Court to refer to, as well.

THE COURT: Well, okay. Don't hold up on that. If you find one, fine. Don't worry about it.

MR. SCROGGIN: May I ask, Your Honor, if he does decide to use these tables that they be marked as an exhibit.

THE COURT: Well, no. They're not an exhibit. They were a part of the summary judgment process, but they're not a trial exhibit.

MR. JACOBS: I think we did put them in, because Mr. Klingenstein relied upon them, so --

THE COURT: Oh, you did put them in as trial

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exhibits?
MR. JACOBS: Yes, sir.
MR. SCROGGIN: Then I would ask that he use the one that's already been put in as the exhibit.
MR. JACOBS: That would not expedite things, but we could just look for it, or you could just stipulate those were the values, 1.6 to 2.8, Mr. Scroggin.
Would you like to just take a quick look?
THE CLERK: What was the exhibit number, and I can get it out of the box over here?
MR. SCROGGIN: Your Honor, I have no objection to using our DMRs which have been submitted in as exhibits, their tables or their DMRs. We'd just ask they use something that's been submitted.
THE COURT: Okay. Whatever you all want to do let's work it out. I'm not -- whatever will be most expeditious. If there is an exhibit in evidence that can be utilized for that purpose, then find it.
MR. JACOBS: The summary that Mr. Scroggin kindly suggested that we use is, in fact, the Government 255, which has been moved into evidence and accepted. And I would direct the witness's attention to Government Exhibit 255.
THE WITNESS: Yes, sir, I have it.
BY MR. JACOBS:
Q. And the question, sir, is isn't it true that the TRC

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levels during the latter half of 1991 at Carrollwood were in the 1.6 to 2.8 milligrams per liter range?
A. Well, the one that's shown here is 2.5 and 2.0, 1.6, 1.8.
Q. Did you see the 2.8 November '91?
MR. SCROGGIN: Objection, Your Honor. November '91 is not -- no. I'm sorry. I withdraw the objection.
THE WITNESS: Yes, sir, I did. 2.8, there it is.
BY MR. JACOBS:
Q. Okay. Is it fair to say that's the high end of the range and 1.6 is the low end?
A. That looks to be the case.
Q. So, the TRC levels were anywhere from 160 times the permit limit to 280 times the permit limit, correct?
A. That's correct.
Q. And these violations occurred literally every day; isn't that right, sir?
A. These are reported as daily maximums, yes. So, it's hard to tell what was within it. That was the daily max.
Q. These were daily violations, correct?
A. Right.
Q. But you essentially conclude that these violations would not have caused any serious effect on organisms in the Sweetwater Creek because the chlorine levels of the effluent had always been that high; isn't that right?
A. The impact on the stream, as I've discussed earlier, is

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going to be fairly closely tied to the mixing zone and the oxidation of this chlorine. Certainly if there's no water upstream of the plant, there's nothing to impact in terms of the aquatic organisms there.
Q. Well, what about when there is water in the stream and there are aquatic organisms, then they'll be impacted by the higher chlorine?
A. I would say that it would create a barrier for them. They would probably not penetrate this zone of high chlorine.
Q. Okay. So, when you say there would be a barrier, that means the aquatic life would stay away from that area of the stream; is that correct?
A. That's correct.
Q. Now, isn't it true that the effluent at Carrollwood, rather, was not being treated at AWT levels during this point in time because an AWT plant had not been built?
A. Again, I'd say some parts of it was receiving treatment equal to AWT, but again to -- you're correct as to nitrogen, phosphorous, and chlorine, because --
Q. Now --
A. Because it was not built -- the rest of your question. It was not a plant built to treat that. Yes.
Q. So, in a couple of areas, it was providing the equivalent of AWT treatment, but in all the rest of the areas it was not; is that correct?

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A. That's correct. Yes.
Q. Okay. Now, Mr. Smith, there was no technological reason why an AWT plant could not have been built by July 1991, was there?
A. No.
Q. And these violations could have been avoided either by building an AWT plant or by ceasing the discharge; isn't that also correct?
A. Yes. That's correct.
Q. Now, if the city of Tampa had the capacity to accommodate the Carrollwood plant's effluent in 1984, that would have been a good alternative to discharging to the Sweetwater Creek; isn't that right, sir?
MR. SCROGGIN: Your Honor, I object. This is clearly beyond the scope of the direct examination. It is nowhere contained in his report.
THE COURT: Sustained.
BY MR. JACOBS:
Q. Is it true, Mr. Smith, then that you didn't look at the possibility of connecting to the city of Tampa in your report?
MR. SCROGGIN: Same objection, Your Honor.
THE COURT: Sustained.
MR. JACOBS: I'm asking him if he covered that in his report, which is in evidence.
THE COURT: Well -- all right. You didn't cover that

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in your report?
THE WITNESS: No. We didn't get to that.
THE COURT: All right.
BY MR. JACOBS:
Q. You didn't personally cover it, but somebody else at Black & Veach did cover that in the report; isn't that correct, sir?
A. I don't recall that, Mr. Jacobs. But if it's in there, if it's in black and white, then obviously I'm in error.
Q. In your deposition, I asked you on page 125, line 14, "Did somebody else at Black & Veach do that" – and I should back up a question, obviously, to put that question into context. The question on at line 6 is – and I'm paraphrasing for the moment – "did you look at the alternatives that existed during the period 1984 to 1991 that the company could have employed to cease the discharge?"
THE COURT: Could have what?
MR. JACOBS: "could have employed to cease the discharge."
MR. SCROGGIN: Objection, Your Honor. Outside the scope of direct.
MR. JACOBS: It's in the report, Your Honor. The report is in evidence.
THE COURT: The report is in evidence, so – and you presented the – put the report into evidence. And I think, yeah, that's obviously something that the Court can consider.

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So, it's fair game for cross-examination. Overruled.
BY MR. JACOBS:
Q. Your answer at line 10 was "Okay." Do you recall that?
A. I'm sorry. You're asking with regard -- alternatives or to the city of Tampa in particular? I'm sorry.
Q. Well, starting with alternatives in general.
A. Right.
Q. And you answered "Okay" at line 10. Do you recall that?
A. Right. I do.
Q. And then I -- the next question was, "You personally, Mr. Smith?"
Answer: "Did I personally look at those alternatives? No."
Did you recall giving that answer?
A. I do recall that. Yes.
Q. "Did somebody else at Black & Veach do that" -- question.
Answer: "Yes."
Do you recall saying "Yes" to that question?
A. Yes, I do.
Q. Next page, 126, question on line 1: "Now, what were these alternatives, Mr. Smith?"
Answer: "We list them on page 27 of the report."
Do you recall giving that answer, sir?
A. I don't recall it, but if you're reading my deposition, I

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must have said it.
Q. And continuing with the same answer: "It includes underground injections, deep well, land application to spray fields, percolation ponds, urban irrigation, discharge to an adjoining utility."
Do you recall giving that answer, sir?
A. Something like that, right.
Q. Which -- and the next question is, "Which adjoining utilities were examined with respect to this last option, Mr. Smith?"
And your next answer was, "The city of Tampa and Hillsborough County."
Do you recall giving that answer, sir?
A. Again, I don't recall it, but I believe that's true.
Q. Now, Mr. Smith, if the city of Tampa had the capacity to accommodate the Carrollwood plant's effluent in 1984, that would have been a good alternative to discharging to the Sweetwater Creek; isn't that right?
A. It certainly would have been one to examine and see what the conditions for a connection would be.
Q. Would you agree with me that it would have been a good alternative?
A. Good in what respect, sir?
MR. SCROGGIN: Objection, Your Honor, to the characterization of good.

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THE COURT: Well, I'll overrule the objection to that.
THE WITNESS: It was good in terms of it would -- it would be good in that it would meet the discharge permits, yes. Good as to whether it was economical, I don't know.
BY MR. JACOBS:
Q. Now, back in 1983, Florida Cities also retained a contractor to study other possible alternatives, such as percolation ponds, spray irrigation, and deep well injection, correct?
A. I'm sorry. What was the date again?
Q. 1983.
A. Okay.
Q. Is that correct?
A. We reported those dates, yes, in the report. I'm not – I don't have them right at the tip of my tongue.
Q. And that was the Jamal Study; is that correct?
A. Yes. I believe that's true.
Q. Now, there was no technological reason why one of these alternatives could not have been implemented; isn't that correct, sir?
A. Technology -- can it be done physically? Yes. Some of this could physically have been done.
Q. Turning your attention now to the Waterway Estates plant. Mr. Smith, in your 25 years working in the field of wastewater

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treatment, you've either studied or reviewed dozens of wastewater treatment plants; isn't that correct, sir?
A. That's correct.
Q. But in all of your 25 years of experience in this field, aside from Florida Cities, you have never had a client that operated a wastewater treatment plant and discharged into surface waters without an NPDES permit, have you?
A. Not without a permit. I've had clients that have had permits that have been in dispute, but they've had permits.
Q. But you never had a client –
A. That flat didn't have a permit, no.
Q. Aside from Florida Cities; is that correct?
A. That's correct.
Q. Now, the Waterway Estates plant discharges into the Caloosahatchee River; is that correct, sir?
A. It does today, yes.
Q. And you are aware, sir, that a 1990 study conducted by Florida Department of Environmental Regulation which looked at actual measurements of water quality in the vicinity of the Waterway Estates discharge point, revealed that with the treatment levels provided at the time the concentration of algae was about 10 percent higher than target values considered to be satisfactory, correct?
A. No. I think it was actually lower than the values that were predicted under the model, as I recall. It seems that the

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actual measurements were like 15 to 19 micrograms per liter. And they had targeted numbers of like 24 or 25. Again, that's my recollection.
Q. Directing your attention to the Black & Veach report, which has been marked and entered into evidence as Defendant's 92, sir, page 5, last paragraph about two-thirds of the way down.
A. I'm sorry. Page 5?
Q. Yes, sir. Last paragraph, starting with the word "however." Could you read that sentence aloud, please, sir?
A. "However" – let me just go ahead and read the paragraph to myself so I can understand the context.
THE COURT: Sure.
MR. JACOBS: Judge, while he's doing that, I've consulted with my co-counsel – and I'm not sure what your schedule is, but we'll both volunteer to miss our flights to get done with this witness. I've got maybe another half an hour. And I feel badly making that offer since you were kind enough to indulge my previous request.
THE COURT: Well, you know, I have built my schedule around what – I've got two sentencings starting at four o'clock.
MR. JACOBS: It's your pleasure, Your Honor. I'll pick it up Monday morning. I mean that. It's your pleasure.
MR. SCROGGIN: Your Honor, I will have some

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redirect. I would try to keep it brief, but I'll have some redirect based upon his cross-examination.
MR. JACOBS: Maybe we should pick it up Monday morning then.
THE COURT: Yeah, I think so. I wish had I known that.
MR. JACOBS: I'm sorry. We had hoped to be –
THE COURT: Well, we can go until four o'clock, but at four o'clock I'm going to have to –
MR. JACOBS: We'll probably miss the plane.
THE COURT: Oh, all right. Now, I set this schedule in part to accommodate my sentencings, but also you had – if you haven't canceled your flight – we're going to have to carry this over until Monday anyhow.
MR. JACOBS: Yes. That's the point.
THE COURT: I had planned on recessing at 3:45 preparatory to my four o'clock sentencings and also in line with your flight schedule.
MR. JACOBS: And I appreciate that. I thought perhaps we'd finish and –
THE COURT: Well, apparently we're not going to be able to.
MR. JACOBS: I agree, sir. I'm sorry.
THE WITNESS: Should I go ahead and answer your question, Mr. Jacobs?

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THE COURT: Why don't you do that?
THE WITNESS: I've got it in my mind, and I want to get it out.
THE COURT: Grab that thought.
THE WITNESS: Let me just – I'll read your sentence, and I'll tell you where the discrepancy is. "However, actual measurements of water quality in the vicinity of the Waterway Estates discharge points revealed that the treatment levels provided at that time, the concentration of algae, was about 10 percent higher than target values considered to be satisfactory."
Now, what I'm reporting to you, Mr. Jacobs, is that they had also looked at predicting what the impacts of secondary treatment would be, and they had predicted actually that the impact would be much greater than it was. So, you're correct in that it was higher than what they wanted in the stream based on AWT treatments, but it was lower than what they expected from what would have been a secondary plant.
BY MR. JACOBS:
Q. Could you just read the last sentence – I'm sorry – the following sentence, and then I'll be through for the moment?
A. Sure. "It was concluded by FDER that moving the point of discharge would improve the quality of the river" – "of the water in the Waterway Estates canals and in the Caloosahatchee River in the vicinity of the canals and the discharge."

MR. JACOBS: Thank you.
MR. SCROGGIN: Your Honor, may I ask if he's going to finish that sentence that he read the one sentence that follows?
MR. JACOBS: Maybe on his redirect.
THE COURT: Beg your pardon?
MR. JACOBS: I would suggest he could redirect on that issue.
THE COURT: Read that what?
MR. JACOBS: He's asking -- he's now asking that the witness read other portions of the report, and I'm suggesting that that take place during the redirect.
THE COURT: Well, in fairness, it ought to be read now. And, of course, that's a fact issue that I would have to determine, and I don't frankly want to have to pause to do that. So, would you kindly read that, Mr. Jacobs?
MR. JACOBS: The following sentence?
THE COURT: What is it, the following sentence?
MR. SCROGGIN: The sentence begins with the word -- it follows the sentence that was just read -- "Improvements."
THE COURT: Or the witness can read that.
Would you read that?
THE WITNESS: "improvements of this magnitude would be imperceptible and would be expected to take place gradually over many months."

BY MR. JACOBS:
Q. When you say "imperceptible," you mean to the naked eye?
A. In terms of trying to measure it. Obviously they were measured at 10 percent, so -- would not be seen. That's correct.
Q. But it would be expected to take place over a number of months?
A. That's correct.
MR. JACOBS: Thank you.
THE COURT: Okay. Then we will be in recess until 8:45 Monday morning.
(Court adjourned at 3:47 p.m.)

CERTIFICATE

I hereby certify that the foregoing is an accurate transcription of proceedings in the above-entitled matter.

_____ _____
Official Court Reporter Date

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs.
FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS, INC.,
Defendants.

Case No. 93-281-CIV-FTM-21

Monday, April 1, 1996
Tampa, Florida

TRANSCRIPT OF NON-JURY TRIAL
BEFORE THE HONORABLE RALPH W. NIMMONS, JR.,
UNITED STATES DISTRICT JUDGE

Appearances of Counsel:

For the Plaintiff: Mr. Daniel S. Jacobs
Mr. T. Anthony Quinn
Ms. Gwendolen Fitz-Henley

For Defendant Avatar: Mr. David B. Hird
Ms. Joanne Tastas

For Defendant Florida Cities: Mr. Gary H. Baise
Mr. Alexander M. Bullock
Mr. Lance High
Mr. Don G. Scruggin

Reported by: Dennis Miracle
Official Court Reporter

PROCEEDINGS

April 1, 1996

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THE COURT: Morning.

Okay.

Let's see, we had Mr. Smith on the witness stand. Mr. Smith, you can resume. Where is he?

MR. BULLOCK: He's outside, Your Honor.

MR. JACOBS: Your Honor, I just want to thank you on behalf of Mr. Quinn and I. We made our flights and due to the deluge of springbreakers, had we missed those, we never would have gotten home, without exaggeration. I do appreciate it.

THE COURT: Yes, indeed.

All right.

We're on cross examination, you may proceed, Mr. Jacobs.

MR. JACOBS: Thank you, Your Honor.

CROSS EXAMINATION CONTINUING

BY MR. JACOBS:

Q. Good morning, Mr. Smith?

A. Morning, Mr. Jacobs.

Q. Mr. Smith, you're relying on your reports for your testimony, are you not, sir?

A. Yes.

Q. Now, in preparing these reports, Dr. Jernigan and Mr. Westfall reviewed dozens of documents which they relied upon in turn in preparing the reports, is that correct?

A. That's correct.

Q. With the exception of documents that you mentioned on Friday that you personally reviewed prior to your deposition and prior to the preparation of the report, you personally reviewed no other documents prior to your deposition and prior to preparation of the report, is that correct, sir?

A. It's hard to be exclusive on that, Mr. Jacobs. I'm not sure – no other documents, in particular reference to the case or this matter? I mean, you know, it's a very broad kind of question.

Q. Well, implicit at least from my prospective in the question was, documents related to the case, sir?

A. What I reviewed in particular were our project notebooks and, in particular, our report, various DMR's and OMR's and some various memoranda that had been prepared by the company, those kind of documents. This is the business of sanitary engineering. I'm always reviewing documents that have information, technical matters, that certainly have interest to this case, that are always, you know, a part of my daily routine. And I don't want to mislead you to think I don't read things that might impact my thinking on the case just because it wasn't listed or something.

Q. Right. Let me try again.

With the exception of those few documents that you've again just named, DMR's, OMR's, these compilations, the Government's complaint, before your deposition and before the preparation of the report, you personally prepared no – you personally reviewed no other documents, correct, sir?

A. Mr. Klingenstein's report I think was in that group. I don't know if that counts as being one of the things, but I did review his report.

Q. That's fine. Anything else that comes to your mind now, sir?

A. Did I say there were some drawings and whatnot of existing plants? Right, I think that is it.

Q. Okay, thank you.

Now, you were retained to serve as an expert witness in this case in May of 1995, is that correct, sir?

A. Yes.

Q. And your firm is being paid how much to serve in that capacity?

A. We are retained on an hourly rate basis, so there's no set amount. It's based on how much work we do.

Q. Well, let me cut to the grist. Roughly how much has your firm made so far from serving as an expert witness in this case. Let me clarify. I mean for your services, Dr. Jernigan and Mr. Westfall and anybody else, for that matter, on your staff.

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A. I think we've billed --
THE COURT: You mean accrued, accrued or actually been paid as yet?
BY MR. JACOBS:
Q. Fair enough. Accrued. I assume they're getting paid timely. Accrued is a better question. Thank you, sir.
A. What I can tell you, Mr. Jacobs, how much we have been billed -- how much we billed the law firm, I think it's on the order of forty thousand dollars.
Q. Okay.
Now, you and your firm have worked for Florida Cities for years, haven't you, sir?
A. We've worked for them I think for four years, maybe five.
Q. And they're a good client, aren't they?
A. They are a client. They are not -- I don't know what you mean by "good." You know, that's a -- they're -- we have a good relationship with this client, yes.
Q. You do recall at your deposition I asked you the same question and you responded, yes, they're a good client?
A. Right. I'm not sure what your inferring, so I don't know what the good modifier -- we have a good relationship with this client, Mr. Jacobs.
Q. Well, they paid you nearly half a million dollars in the last four or five years, isn't that correct, sir?
A. We have billed them for services in that amount. Of

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course, in prospective, we bill other clients probably thirty million dollars in that same period.
Q. I didn't ask you that, I asked you this client. Roughly half a million dollars in the last four or five years?
A. That's correct.
Q. Now, turning your attention back to Waterway Estates, where we left off on Friday. In terms of a water body's ability to assimilate a pollutant discharge, the greater the dispersion and dissipation, the greater the ability of the water body assimilate the pollutant discharge, correct, sir?
A. It would certainly happen much more quickly and with less immediate impacts. I don't know that it affects its overall capacity.
Q. Let me ask you this. Conditions in most parts of the Caloosahatchee River are unfavorable for the dispersion and dissipation of effluent, isn't that right, sir?
A. No, I wouldn't agree with that.
Q. Do you have your report in front of you?
A. No, sir, I don't.
Q. Directing your attention to the Black and Beach Report, Defendant's 92, in that case, please, in particular, page 28.
A. I'm sorry; page 28?
Q. Yes, sir. Of the Black and Beach Report, third paragraph, last sentence. Would you read that into the record, please, and just as a preamble to the first two paragraphs,

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describe the Caloosahatchee River.
A. Says these conditions are unfavorable for the -- speaking of the conditions in the Caloosahatchee -- are unfavorable for the dispersion and dissipation of the effluent from the Waterway Estates --
THE COURT: A little bit slower for the Court Reporter.
THE WITNESS: I'm sorry.
THE COURT: Would you read that again, a little slower.
THE WITNESS: Certainly. Speaking of the conditions in the Caloosahatchee River, these conditions are unfavorable for the dispersion and dissipation of the effluent from the Waterway Estates Plant.
BY MR. JACOBS:
Q. Thank you.
Now, conditions at the shoreline are particularly poor, are they not, sir?
A. I believe that is what that paragraph was about, actually.
Q. But would agree?
A. Yes.
Q. Okay.
Now, the flow in this river is slow or non-existent at the shoreline, isn't that right, sir?

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A. It's slow and it's tightly influenced, actually goes up and down at times.
Q. Correct or not correct; it's slow or non-existent, the flow, at the shoreline?
A. Correct.
Q. Now, when you have slow or non-existent velocity or flow, you have got unfavorable conditions for the dispersion and dissipation of effluent, isn't that correct, sir?
A. That is what we're reporting, yes.
Q. Okay.
And you agree with your own report, right?
A. Yes, sir, I do.
Q. Okay.
And the conditions in the canal, the boat canal where the previous outfall was, are even more unfavorable than the shoreline for the dispersion and dissipation of the effluent, isn't that right, sir?
A. As a relative matter, yes.
Q. The conditions, to summarize, for such dispersion and dissipation are least favorable in the canal, a little bit better right along the shoreline and best out in the middle of the river, using your term, "relatively speak," isn't that right, sir?
A. That's correct, Mr. Jacobs.
Q. In fact, Mr. Smith, didn't modeling by FDER show the best

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environmental protection of the river was afforded by a discharge to the six foot contour line of the river as opposed to a discharge to the canal?
A. There is absolutely no question about that, Mr. Jacobs. That is the best place for dispersion and dissipation of the effluent.
Q. And you do not debate, sir, as a matter of sound engineering principles, that a discharge to the six foot contour line of the river would therefore afford better environmental protection than a discharge to the canal?
A. There is no question about that.
Q. And would you therefore say as a matter of sound engineering principles that when FDER decided the discharge location should be moved to afford maximum environmental protection, it was making a correct decision?
A. Correct is a value-laden term, sir. I don't know correct -- what you're trying to say.
Q. Well, you're an engineer, you have been qualified as an engineer, from an engineering and environmental engineering standpoint?
A. Correct would be discharging into the canal, Mr. Jacobs. You could correct -- what we're saying is -- what you have described is the most environmentally protective manner would be the six foot contour line, but there's many things involved in that; permitting a pipeline, putting a pipeline in the

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middle of the river, across the river, building the pipe.
Q. The question -- let me read you back the question again.
It related to affording maximum environmental protection. That is the hypothetical, sir, that's the objective. If that is what FDER had in mind when it decided that the discharge location should be moved to afford maximum environmental protection, then it made the correct decision, is that right?
A. That's right.
Q. Now, Mr. Smith, the purpose of mixing, which you discussed in your eloquent, I almost want to say seminar, Friday morning with the illustrations that I was trying to following, the purpose of mixing is to maximize the water quality, isn't that right, sir?
A. Yes, that's correct.
Q. So then the requirement that the discharge point be the six foot contour line maximized water quality?
A. Yes, for those conditions, that's right.
Q. And while you might not be able to see an improvement in water quality with the naked I on a day-to-day basis, it was virtually certain that water quality would improve over time as a result of the relocation of the outfall, correct?
A. Absolutely right. In fact, probably improved the moment it was mixed out there in terms of the local water quality.
Q. In terms of what he call or the FDER report calls localized impacts?

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A. That's correct.
Q. Now, until April, 1992, the effluent discharged from the Waterway Estates Plant was only secondarily treated, correct?
A. Actually it was an advanced secondary plant, removing much more than a normal secondary plant, but not yet AWT.
Q. Okay, fair enough. Let me ask just make sure I understand your answer to my question, it was still secondary treatment, even if it was slightly more?
A. It was not AWT, it was greater than secondary.
Q. It was greater than secondary?
A. Oh yes. It was filter. There was much of the nitrogen removed. It was much better than secondary effluent.
Q. So would you call it sophisticated secondary?
A. I'd call it advanced secondary; something of that effect.
Q. But certainly not AWT?
A. Not AWT.
Q. Okay.
Now, isn't it even more important to discharge at the optimal point in terms of water quality when you have got effluent which is only secondarily treated?
A. If that is your goal, sir, to minimize the impacts on the receiving waters, it would -- that would be a better -- that would be a better environmental choice to do that, yes.
Q. Okay.
Now in 1981, the State determined the Waterway Estates

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Plant would have no wasteload allocation, isn't that correct?
A. I'm sorry, who determined that?
Q. The State of Florida.
MR. SCROGGIN: Objection, Your Honor, this is assuming a fact not in evidence?
THE COURT: Well, if he knows. Do you know that to be a fact?
THE WITNESS: We reported some of those things, Your Honor, but --
THE COURT: I'll overrule the objection.
BY MR. JACOBS:
Q. Do you need to hear the question again, sir?
A. Yes, please.
Q. In 1981, the State of Florida determine the Waterway Estates Plant would have no wasteload allocation, correct?
A. There's some dispute about that, but there's -- there was some issues about that. I think we reported that there was -- the work was going on about the wasteload allocation, it was unclear about whether Florida Cities had or had not one.
Q. But your report said there was none, isn't that correct?
A. That is what I've just said. I said we reported there wasn't one, but there was some dispute about that.
Q. Okay.
But -- I'll move on.
Now, between the time in 1981 that the State, according

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to your own report determined the Waterway Estates would have no wasteload allocation and December 1 of 1987, as far as you know, there was no request for a wasteload allocation, isn't that correct?
A. Not to my knowledge, sir.
Q. Directing your attention to your deposition testimony page 174, question line fifteen, I'm going to read the question and ask you if you gave the following answer, sir. Question, now between the time – that time, referring back to 1981, and 1987, did you and your staff, for that matter, find any evidence of a request for a wasteload allocation.
Mr. Smith, did you give the following answer, not that we've made note of here and not that I know of here today?
A. I think that is just what I said wasn't it? Same thing. Same question; or did I miss something.
THE COURT: Yeah, did I miss something? What was his answer that you're seeking to impeach him from this prior?
MR. JACOBS: The previous question was essentially the same and I don't think he gave the correct answer. I don't think the answer was consistent with the deposition answer.
THE WITNESS: I thought I said I didn't know of any just right now and I thought that is what that you read?
THE COURT: Well, go ahead.
MR. JACOBS As long as that is what he said, I'll just move on.

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BY MR. JACOBS:
Q. On December 1st, 1987, Florida Cities Water Company requested a wasteload allocation, correct?
A. Right. That was – yeah, they were also looking permits and all that, too, yeah. Okay.
Q. And you attribute the fact that Florida Cities Water Company waited until December 1, 1987, to apply for a wasteload allocation to their evaluation of various alternatives, correct?
A. Right. And I think there was some misunderstandings I mentioned earlier about whether they had one or didn't have one or whether the plant was to be joined to another regional plant, all those other things you'll get into later, I'm sure.
Q. Now, after Florida Cities evaluated these alternatives, they chose to continue their discharge, upgrade the plant and relocate the outfall, is that correct, Mr. Smith?
A. That's correct.
Q. Now this alternative they chose was not the fastest compliance alternative, was it, Mr. Smith?
A. There appeared to be a faster opportunity, yes.
Q. Now, couldn't the violations at Waterway Estates all have been avoid simply by connecting the Waterway Estates effluent to another system?
A. If it could have been worked out?
Q. Is that a yes?

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A. Yes, if it could have been worked out, yes.
Q. From a technical prospective?
A. Yes.
Q. You did not personally examine the possibility that the Waterway Estates Plant could have connected to the North Fort Myers Utility Wastewater System before any of these violations alleged in the second amended complaint took place, did you, Mr. Smith?
A. No, all we've done is review memoranda.
Q. And in fact, you don't have an opinion as to whether the Waterway Estates Plant should have connected to the North Fort Myers Wastewater System before any of these violations took place, correct?
A. I think we reported in our report that the cost was excessive and I believe that is we talked about in my deposition that we reported it was an excessive cost, but at the time, I did not know exactly what the cost was.
Q. You reported that the company considered it an excessive cost, isn't that right, sir?
A. Yes, sir.
Q. You didn't personally in your report say that the cost was excessive, correct?
A. I thought that was the term we used, but I'd have to look.
Q. Well, make reference to your report, if you'd like, but

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my understanding was in your report and in your deposition testimony, you did not express an opinion as to whether they should have connected, you might have expressed a historical narrative about how the company considered the cost to be excessive, am I right?
A. I think that is a fair judgment on it.
Q. All right.
Now, you don't have an opinion as to how much it would have cost to connect to the North Fort Myers system, do you, Mr. Smith, you personally?
A. I do.
Q. You do?
A. Yes. I didn't in my deposition, Mr. Jacobs, you're right.
Q. All right.
So you didn't at the time of your deposition, but you do now?
A. Right.
MR. JACOBS: In that case, sir, I move that he not be allowed to express that opinion.
THE COURT: Well, he hasn't given it yet, you haven't asked him for it, nobody's asking for it, so you don't need a motion?
BY MR. JACOBS:
Q. Now, when you say in your report that the North Fort

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Myers option, quote, proved to be infeasible due to high costs, page 38, you really mean to say, and I think we covered this already, the company decided that the cost was too high, correct?
A. The company did decide and in our review, we thought the same.
Q. Now, you don't say that in your report or your deposition though, do you, sir?
A. As I told you, I didn't say it in my deposition. I thought we used the term "excessive," and that's what I'm recalling, Mr. Jacobs.
Q. Directing your attention to your deposition testimony, page 227, line twenty, I asked you the question, on page 38 up at the top, Mr. Smith, you draw the conclusion that the connection to North Fort Myers Utilities proved to be infeasible due to high cost.
Let me ask you first, is this a question of your repeating the company's opinion that the cost was too high to the company or are you drawing your own conclusion here as an expert that the cost was too high. Answer, do you recall, sir, giving this answer, no, this was our review of the ESE report and the company's review of that. So it be – we weren't expressing what our thoughts were as to what was too high or not too high. Correct, is that your answer?
A. I believe that is true.

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Q. Mr. Smith, are you aware that the North Fort Myers System uses spray irrigation and deep well injection with no surface water discharge?
A. I think I'm aware of that. Certainly the deep well I was aware.
Q. And you're aware they have no surface water discharge?
A. Yes, sir, I was aware of that.
Q. Now, your report or the Black and Beach Report evaluates how much time it took Florida Cities to upgrade the Waterway Estates Treatment Plant, correct?
A. That's right.
Q. And the report suggests how much time was anticipated for each task and how much time each task actually took, correct?
A. That's right.
Q. And you do that in table one on page 35, correct, sir?
A. Yes, that's right.
Q. And some of the tasks took longer than Black and Beach thought was normal under the circumstances, correct?
A. That's right.
Q. Now, what you mean by quote "anticipated" duration in table one on page 35 of your report is Black and Beach's opinion of what you thought it would take, correct?
A. We thought it was a reasonable amount of time without undue interruptions.
Q. And some of the delays that took place are attributable

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to Florida Cities and/or its contractors it hired for the project, isn't that correct?
A. Some were, yes.
Q. In fact, sir, all of the delays under preliminary engineering in your table one are attributable either to Florida Cities and/or its contractors, correct?
A. You're using the term "delay," I don't know what you have in mind about delay.
Q. Okay, let me see if I can help you there. Your table as I'm sure you will recall and you can refer to it as you see fit, sir, sets up two columns; anticipated duration and actual duration. So, I'm referring to delay and we can use a more scientific word such as deviation if you're more comfortable with it to represent the difference between the time for each task or series of tasks?
A. How about the difference between anticipated and actual?
Q. You'd like me to use the word "difference"?
A. Delay is kind of a majority word, Mr. Jacobs, and I guess what I'm saying, we set out an anticipated time and then we had an actual time.
Q. Can we compromise and just use deviation?
A. That would be great.
Q. Okay.
More scientific perhaps.
A. Less majority.

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Q. All of these deviations under preliminary engineering in your table one are attributable either to Florida Cities and or its contractors, correct?
A. That is correct.
Q. Now, moving down to the detailed design, quote, unquote, section of your table one, these deviations in the preparation and issuance of the RFP are in fact attributable to Florida Cities, correct?
A. That's correct.
Q. And the, quote, consultant designs facility, quote, unquote, line item, do you see that?
A. I certainly do.
Q. Most of those delays were attributable to either Florida Cities or its consultants, correct?
A. Yes, it's part of their control.
Q. Okay.
Now, most of the contractor delays are attributable to Source Engineering which did the design, correct?
A. No, I don't think I'd agreed with that. Say that again. I heard you to say most of the contractor delays.
Q. Well, okay, maybe I should be more specific.
Source Engineering did the design, right?
A. Yes.
Q. And I'm sorry, 'cause I've -- my outline keeps saying delays and I've agreed to use deviations and I'm not trying to

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slip you up here, I'm going to try to hold true to my bargain.
The deviations between the anticipated time and actual time under design are attributable to Source Engineering, is that correct.
A. Well, actually, no I don't think they're all attributable to Source, there are some disputes between the company and Source about their scope and amending their scope and those kind of things, so, no, I think it's jointly held.
Q. Okay, between the company and Source, not all Source's fault?
A. No, it's just normal business transactions.
Q. I think my question was poorly phrased. I think that what I'm trying to establish is that Source did the preliminary design and to the extent there was a contractor deviation or a deviation for which this contractor was responsible as opposed to the company, that contractor was Source, is that correct?
A. And consultant is the word we use, that's why you through me. Contractor implies to me general contractor, so –
Q. I've been with the Government too long. We always use contractor. Okay.
Mr. Smith, moving right along, based on your twenty-five years experience in this field, and particularly your familiarity with engineering firms in the Tampa area, Mr. Smith, you would not have selected source to do this job, would you?

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A. I probably wouldn't have, no.
Q. In fact, you would have recommended someone else?
A. Probably would have.
Q. And there are many firms in this area that could have done this kind of project, aren't there?
A. Yes, including Source. I mean they were capable. I didn't say they weren't capable just because I wouldn't have chosen them?
Q. Fair enough. But there were firms with greater capabilities in wastewater treatment design in this area than Source?
A. Yes, I would agree with that.
Q. Okay.
Now continuing on down your table to your construction section. The line item that reads, quote, contractors prepare stroke submit bids, unquote. The delay there is attributable to the contractor, correct?
A. No.
Q. No. To the consultant?
A. Usually, what happens there, there are some questions regarding the bid raised by the contractors or issues that have raised during the bidding period, and so the owner or the engineer has to extend the bidding period and that is more than likely what happened during this period. The contractors is actually bound by contract to bid whatever period the owner and

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engineering allow him to bid, so the contractor really has no control over that time, it's the engineer or the owner that control that time.
Q. So that delays either the contractor or consultant or the company, correct?
A. The consultant or the company.
Q. Okay.
Finally, your line item that reads, quote, the contractor achieves substantial compliance, unquote. Here again, the delay is a attributable in part at least to the contractor, correct?
MR. SCOGGIN: Your Honor, Counsel keep using the term "delay," I think we agreed to use the term "deviation".
MR. JACOBS: I stand corrected for what it's worth.
BY MR. JACOBS:
Q. If I slip, Mr. Smith, and say delay because it's Monday morning and I'm looking at my outline, I do mean deviation.
A. Thank you, I understand that, it's clear. The contractor achieves substantial completion is the term, Mr. Jacobs, and there are a number of things that impinged upon his schedule there, and certainly he had charge of it. As I tried to describe, this is a very difficult construction site.
Q. I understand that, and that had to do with the size, if I followed your talk on Friday?
A. That's correct?

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Q. Right. Now when he starts out the contractor knows that's a problem 'cause presumably he goes to the site and takes a look, right?
A. Yes.
Q. Just like we did in the video and Mr. Klingenstein said that's a pretty lot of stuff on just a little site, right?
A. Great deal.
Q. Okay, so then that's something perhaps he can anticipate if he just takes a look in advance; is that fair?
A. Usually, unfortunately, you're giving a contract – given a contract that has a firm completion date such as this one which is given by an order, and the contractor really has no opportunity to negotiate it or disagree with it before he bids the job. He takes the bid, often knowing he's unable to meet that deadline and is going to need to work it out during the period of the contract. Not at all unusual.
Q. Would you agree that before he signs the contract with the completion date that he would normally go take a look at the site?
A. Oh, probably required, in fact.
Q. Okay.
Now, Mr. Smith, if a client came to your firm in Tampa with the project such as the Waterway Estates upgrade and considered the project urgent and was willing to pay a premium to have the project expedited, would you in fact attempt to

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accommodate the client?
A. Yes, we would.
Q. And your timetable would be adjusted accordingly?
A. On those things over which we had control, yes.
Q. In fact, at your deposition, I gave you the same hypothetical question, didn't I?
A. Right.
Q. And what I called and I think we agreed to call the expedited or fast track, quote, unquote, timetable and you then proceeded to elaborate on table one by essentially in your deposition testimony suggesting how long each task would have taken under the expedited or fast track timetable, correct?
A. Right, I remember it well, Mr. Jacobs.
THE COURT: Are you seeking to impeach him based upon his deposition testimony?
MR. JACOBS: Not at all, I'm setting up –
THE COURT: All right. Well, let's – there's no other purpose for harkening back to the deposition testimony. I got enough here in open Court without having to deal with – unless it's impeachment.
MR. JACOBS: No, sir, it was really just to – a lead into the next exhibit.
THE COURT: All right, go ahead.
MR. JACOBS: And the next question, more than anything else. That was not an attempt at impeachment.

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THE COURT: All right.
BY MR. JACOBS:
Q. Directing your attention now to Exhibit 508, Mr. Smith, and does –
MR. JACOBS: Just for the record, this is Government Exhibit 508. I've got terrible eyesight, can I get a little closer?
MR. SCOGGIN: Your Honor, we have objected to the use of this exhibit, it was only made available to us last week. We've never seen it before, was not part of the exhibits presented by the United States as part of this –
MR. JACOBS: Judge, actually it was a couple of weeks ago. What we did as we were preparing for trial, and in particular, preparing to examine Mr. Smith and trying to understand his own table, was what we've done here is illustrate his own table, table one from his report, and the deposition testimony which is why I used that as the lead into this questioning. So, I don't think there's anything unfair here. We're not submitting that exhibit for our own expert to testify to, all we've done is illustrate Mr. Smith's own report and his own table and his own testimony and –
THE COURT: You're not offering that in evidence then?
MR. JACOBS: Well, if he confirms that each of –
THE COURT: Well, it was not timely produced, was it,

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the exhibit?
MR. JACOBS: Well, normally for an expert, you'd product the exhibit at the time you produce his report, but again, this is the adverse expert's testimony and report we're seeking to illustrate after his report and testimony. I don't think there's anything unfair. If he testifies that it's inaccurate, that it doesn't accurately illustrate his own report and his own testimony, then I would –
THE COURT: I'll permit you to use it in a demonstrative manner, but whether I'm going to allow that in as an exhibit is problematic to be received as an exhibit as such.
MR. JACOBS: Very well, sir.
BY MR. JACOBS:
Q. Mr. Smith, would you take a look at what has been marked for identification so far as Exhibit 508?
A. Yes, I am.
Q. And feel free to refer to your table one which I see you have in front of you. Have we – starting from the bottom –
THE COURT: Just a moment. Do we have that microphone that goes around the neck, because he needs both of his hands, I think. There we go. Just put that around your neck. I think everybody can hear you. Assuming it's working.
MR. JACOBS: I could speak up if need be.
THE COURT: Never mind, never mind. Can't get it

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working. Okay, go ahead.
MR. JACOBS: You keep the pointer.
MR. SCOGGIN: Your Honor, may we move to see the chart?
THE COURT: Yes, sir.
BY MR. JACOBS:
Q. Now, we both have a pointer.
Now, starting from the – let's start with the middle line, the anticipated construction schedule and for no other reason than it is the first column in your table one, is that correct?
A. That's correct.
Q. Have we accurately represented your time line for anticipated construction?
A. It looks to be generally in conformance. Obviously, I'm not going to check every detail of it, but generally, it represents our table, but we would have said anticipated would be, yes, that's correct.
Q. Now moving down to your next column, is in fact actual construction schedule, is that correct?
A. Correct.
Q. And have we there again accurately illustrated your own second column of table one.
A. Looks pretty much in conformance, Mr. Jacobs?
Q. Okay. Now this next one might be a little bit tougher.

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What we have done on the top row is we've tried to illustrate your deposition testimony about the expedited or fast track schedule. Can you recall whether we've accurately done so?
A. I wouldn't know without going back and adding up all the days that we talked about in my deposition. Of course, as you recall from that time, this was a very unlikely scenario, but I'm kind of at your mercy.
THE COURT: Mr. Jacobs, you have a habit of smiling in a manner that indicates incredulity when a witness responds in certain ways. That's very distracting to me. And it's unbecoming and you may not even realize you're doing it, but you do it, and I don't want it anymore.
MR. JACOBS: Yes, sir, and I apologize, it's not intended in any disrespectful manner.
THE COURT: Well, what it is, it's a comment, unstated comment by the advocate on the witness' testimony.
MR. JACOBS: Fair enough.
THE COURT: Go ahead.
MR. JACOBS: I apologize.
BY MR. JACOBS:
Q. Well, let's go item by item then perhaps.
It's my recollection that you said in terms of in preparing the RFP had to be done under fast track in seven days, is that correct?
A. Mr. Jacobs, I mean, unless I wanted to look at my

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deposition testimony, I'm kind of at your mercy on this. I don't recall all the dates, I do recall our exchange that on that October 31st day, but that's all, or 30th, whatever date it was.
Q. And on the second item, consultant prepares and submits proposals, do you recall saying that could be done in fourteen to twenty days?
A. Yes.
Q. And insofar as SCWC, evaluating, selecting, negotiating and awarding the contract, you recall that you said that could be done in thirty days?
THE COURT: Well now, you're asking him to recall what he said on his deposition, sir, is that correct?
MR. JACOBS: Yes.
THE COURT: Mr. Jacobs?
MR. JACOBS: Yes.
THE COURT: How is that -- as I told you a few moments ago, I will permit you to impeach his testimony with his prior deposition. But, from a standpoint of substantive evidence, I'm not going to permit that, and frankly, I think that is one of the things that is wrong with that exhibit there. Go ahead.
BY MR. JACOBS:
Q. Let me take the point and rework the question, if I may.
Under FCWC prepares, issues RFP, under a fast track scenario, sir, could that be done in seven days?
A. Yes.
Q. Consultants prepare stroke submit proposals. Under your own fast track scenario, could that be done in fourteen to twenty days?
A. Yes.
Q. FCWC evaluates, selects, negotiates, awards contract. Under your own fast track scenario, could that be done in thirty days?
A. Yes.
Q. Consultant performs study, submits report. Under your own fast track scenario, could that be done in ninety days?
A. Is that possible, yes.
Q. FCWC evaluates report, selects alternative. Under your own fast track scenario, could that be done in thirty days?
A. Thirty days would be certainly expedited, right.
Q. But within reason under --
A. It's possible.
Q. Moving down to the next line item and section. FCWC prepares, issues RFP for design services. Could that be done under a fast track in ten days?
A. That would be a real stretch, but assuming they had prepared for it ahead of time, yes.
Q. Consultant prepares stroke submits proposal. Could that be done in twenty-one days?

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A. Yes.
Q. FCWC evaluates, selects, negotiates, awards contract. Could that be done in forty-five days?
A. Yes.
Q. Consultant designs facility, submits permit aps -- that's applications?
A. That's correct.
Q. To FDER. Could that be done under your fast track scenario in a hundred and eighty days.
A. That would be a real push, but yes.
Q. Under permitting, could you go any faster than your anticipated duration?
A. As it turns out, you can't go that fast, Mr. Jacobs. I just did this under fast track and it took us two hundred and seventy-three days instead of two hundred and eighty-nine.
Q. So your anticipated duration is equivalent to a fast track in your own table here?
A. It's probably unrealistic optimism as it turns out.
Q. 'Cause you just did another one subsequent.
A. Just did one like this plant that took two hundred and seventy-three days. We were hammered on it all the way.
Q. After you did this report?
A. After I did the same kind of workup. Oh, after this report?
Q. Yes.

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A. Right.
Q. So you're relating an experience that took place after this report?
A. Oh, no, no, the work was done prior to the report being submitted, yes. You mean, we're talking about this report right here, the expert report for Waterway Estates?
Q. Yes, sir?
A. Yes, it was done prior to that.
Q. Okay.
But you agree at your deposition that the anticipated duration time 30/30/30/90?
A. Right.
Q. Was the fast track?
A. That was the best you could do, that's right, assuming everything hit. All I'm saying, even that is optimistic.
Q. Now finally, under construction, FCWC reproduces, advertises under the fast track, that could be done in thirty-seven days in conjunction with the contractors prepare and submit bids, correct?
A. That is possible.
Q. FCWC evaluates, bids, awards contracts or contract. That could be done in sixty days under the fast track?
A. Right.
Q. FCWC issues notice to proceed. That could be done in fourteen days under the fast track, correct?

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A. Right.
Q. And finally, contractor achieves substantial completion that could be done even under a fast track in four hundred and eighty days that you anticipated it would take, correct?
A. We thought that was a very aggressive schedule.
Q. So, you didn't change that?
A. Didn't change that.
Q. Right, okay.
Now, having gone through the schedule from table one in association with your deposition testimony, is it fair to say that we have accurately illustrated the fast track scenario or the expedited construction schedule from your own testimony?
MR. SCROGGIN: Objection, Your Honor, the term "expedited" is not the term that was used in questioning the witness. Fast track and expedited are not necessarily the same.
MR. JACOBS: I think they're both used. We could look into that matter.
THE COURT: I'll overrule the objection. Overruled.
THE WITNESS: Mr. Jacobs, it appears that you have accurately squished together all those dates, put them end to end, and as you recall in our deposition, I said that's pretty much impossible. There may be segments of this that you can do and sustain that kind of effort, but to do it all at once is really a misrepresentation. You cannot achieve that schedule

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without – just under normal circumstances, and this takes no account for permitting agency interruptions or interventions, but those – that chart that you have accurately adds up all those dates.
BY MR. JACOBS:
Q. In your own –
A. I believe what you have done in that way is correct.
Q. Okay.
MR. JACOBS: Your Honor, now I move 508 into evidence, please.
MR. SCROGGIN: Objection, Your Honor. We've stated for the record already our objection as to the use of this exhibit.
THE COURT: Sustained.
BY MR. JACOBS:
Q. Mr. Smith, are you aware that Florida Cities actually received a notice of intent to deny the permit renewal back in June of 1986.
A. Yes, I believe that is right. Seems like they applied, they were noticed in April, so that makes sense. I'm not sure of the exact dates. But that sounds correct.
Q. Now, using 508 for illustrative purposes only, your table starts, table one, with EPA denying the permit in 1986, correct?
A. That's correct.

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Q. So, if they new in June of '86 that EPA intended to deny the permit, hypothetically, they could have gotten started under any of these time lines back in June of '86, is that correct, sir?
A. Hypothetically, that's correct, sir.
Q. Now, whether you got started in June of '86 or December of '86, under expedited schedule, you finished before July '91, isn't that correct?
A. Yes, again with the caveats we discussed already.
Q. And now, which is the bigger project, upgrading the plant or relocating the outfall?
A. Construction project, Mr. Jacobs?
Q. Yes.
A. The construction activity associated with the plant would be more difficult. Permitting we thought would be more difficult for the line.
THE COURT: Say that again. I'm not sure I understand you.
THE WITNESS: The physical construction activity we think is more -- would take longer with the plant than the line, but the line required a 404 permit from the Corps of Engineers. That's a very long lead time. We thought it would be less to get a permit for the plant which is an FDER permit.
THE COURT: Okay.
BY MR. JACOBS:

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Q. In point of fact, the contract with Source to design the relocation of the outfall was awarded in February of 1988 at the same time as the contract with Source to design the AWT plant, correct?
A. I believe that is right, as part of the same contract, but I'd have to exhume that again to confirm it.
Q. February '87, both contracts?
A. February '88.
Q. '88, February '88.
A. February 29th, yeah.
Q. Both contracts for the --
A. I believe that is right. Right.
Q. And the outfall had been relocated by July of '91, correct?
A. Yes, physically in place.
Q. But not before?
A. It was right -- July -- just ahead of July 1, it seems or June 30th, or something like that it was completed. Maybe it was an August deadline that was done in July. That may be what it was, Mr. Jacobs. I'm looking for those exact dates. I didn't find the exact date. Was done that summer in July, yes.
Q. Okay.
A. Pipeline was complete.
Q. Now, under expedited schedule, could the outfall have been relocated by March of 1990, as well?

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A. Well, the big problem with that schedule, Mr. Jacobs, it took a year to get a 404 permit. There is no inclusion of that here in that schedule.
Q. The 404 permit, that is what kind of permit?
A. That is a fill -- you asking me -- fill and dredge permit within the waters of the United States covered by Public Law 92500, Section 404, administered by the Corps of Engineers, yes.
Q. This is the same Corps of Engineers that you referred to on Friday as a notoriously slow agency?
A. It is one and the same.
Q. Okay.
If it's notoriously slow, does that suggest, and you know it's notoriously slow, does that suggest you put the permit application in at the first possible instance?
A. You can't apply for the permit until you have your design completed.
Q. And, does that suggest that you do your design at the first possible instance so you can get this permit into the infamously notoriously slow agency?
A. Notorious is my word, Mr. Jacobs, infamous is yours. And you would apply for it as soon as you had the design complete and knew that that was your selected alternative. You have to work through your selected alternatives to make sure you're going to discharge to the six foot *contour* point in the river.

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Once you have that, you proceed with the design, complete your design and, yes, then you would submit your application for permit.
Q. But if you know you have to do all these other things in order to get the 404 permit from the notoriously slow Army Corps of Engineers --
THE COURT: forget the "notoriously slow." I have heard that enough. Just -- I understand what he's testified to on slowness of that agency. Just refer to the Corps of Engineers?
MR. JACOBS: Okay. Let me just move on, skip the Corps of Engineers.
THE COURT: Good.
BY MR. JACOBS:
Q. Since we heard enough about it.
If you know in June of '86 that EPA intends to deny the permit, then you could start all those design and other mechanisms that you need to complete before you applied for the Army Corps of Engineers permit six months earlier, is that correct?
A. If the company chose to move ahead, based on the preliminary intent, you could have moved to schedule ahead, that's right. Again, you still have to go through the steps of choosing alternatives, on and on.
Q. Well, assuming we start six months earlier, under the

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expedited construction schedule, is it fair to say you could ended six months earlier?
A. You could have ended six months earlier than whatever your schedule was. I wouldn't want to imply you could end six months earlier than March of 1990. 'Cause again, I think that's unrealistic in that it doesn't have time for permitting.
Q. Well, your expedited schedule did have time for permitting if you look back at table one as you elaborated upon again.
A. It had one hundred eighty days for the DER permit, doesn't have a year for the Corps of Engineers' permit, nor as we have found out, much longer time for DER?
Q. And the DER permit took a little extra time because DER wasn't satisfied with some of the information that the company had given it, *is* that correct?
A. There was a dispute and they had to understand exactly what the company was proposing.
Q. They asked -- DER asked for additional information, isn't that correct?
A. They certainly did.
Q. And it took some time for the company to get the additional information to FDER; isn't that right?
A. That's typically interchange with that agency.
Q. In fact, the company had a dispute with its contractor over whether -- or consultant over who was going to provide

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that information and whether the company had to pay the consultant to provide that information, isn't that correct?
A. That is part of scoping the job and understanding whether that in the scope or not.
THE COURT: Yeah, but his question is whether that's correct or not.
THE WITNESS: Yes, that's correct.
BY MR. JACOBS:
Q. Now, I posed a hypothetical that the company knows in June of '86 that they're going to get this permit renewal denied. If the company knows in 1981 that it doesn't have a wasteload allocation to discharge to the canal and it's going to have to relocate the outfall and upgrade the AWT standards to 1981, is it possible to complete these projects under any scenario by 1986?
A. If you start --
MR. SCOGGIN: Objection, Your Honor, question assumes a fact not in evidence.
MR. JACOBS: It's a hypothetical.
THE COURT: I'll overrule the objection.
THE WITNESS: I'm sorry, Mr. Jacobs, you said if you know in 1981 that you don't have wasteload allocation?
BY MR. JACOBS:
Q. If you know in '81 that you're going to have to upgrade your plant and relocate your outfall to get your NPDES permit

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renewed when it comes up for renewal in '86, you have got five years, isn't that right?
A. Right.
Q. And under any of these scenarios, expedited, anticipated or actual, you could complete the project, correct?
A. I think that is a reasonable time, although the only caution I'd give you is this -- the technology is changing, the technology that was proposed and caused part of the delays here with DER actually was because technology was changing. You're at the very front-end of when the kind of treatment technology was being put in place in Florida, and you'd actually have been kind of ahead of your time. Might have taken longer just to get it through. That's the only caveat I'd give you there, but it's kind of a raw time line, you'd think five years would be about the right time.
Q. It's just coming in Florida in the early '80's, but it had been out in -- out in Reno in that -- by 1970, is that right?
A. It was in -- Lake Tahoe was kind of a test demonstration site in the early '70's's. Again, not taking -- these are very stringent standards and unusually applied here in Florida and not widely applied throughout taught the U. S. and we're on the cutting edge in the early 1980's?
Q. Any reason you know of that Florida has these more stringent standards?

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A. Legislative fiat.
Q. Now, same hypothetical, if you know in 1982 that the possibility of a regional wastewater treatment plant for that Waterway Estates Plant had considered tying into -- if you knew that plant had fallen through in '82, could you complete the process under any scenario by '86?
A. That would be very difficult, I think.
Q. Four years?
A. Four years. Again, with new technology, selecting alternatives that really could buy off on, you're seven or eight years ahead of what actually happened and when it happened the DER had a great deal of difficulty with the technology questions.
Q. Under your anticipated schedule, it took about four years, isn't that right?
A. Right, but now you've moved it up in time, in history, so now we've got issues that have not yet been addressed by the regulators, and we've got to struggle with those more in terms. That's all I'm saying.
Q. It might have taken four years, might have taken a little bit more because there were new issues, is that what you're saying?
A. Right, exactly.
Q. Now, there were two types of NPDES permit violations at the Waterway Estates Plant; nitrogen and toxicity, correct?

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A. That is correct.
Q. And you do agree do you not that these violations would not have taken place had the plant been upgraded by the time the new NPDES permit took effect, correct?
A. That is correct.
Q. And you do agree do you not that the toxicity violations had an impact on water quality, isn't that right?
A. No, I don't believe that is true. Toxicity test violations had an impact; I don't think so, there's no connection there.
Q. Directing your attention to your deposition testimony, again I'll read you a question, and I'll ask you if you gave the following answer. Page ten, sorry, page 210, line thirteen, question, and from that you concluded that toxicity was not a serious problem with the Waterway Estates Plant. Answer, right. Question, when you say it's not a serious problem, would you say that -- would you say it was a problem but it just wasn't serious, or are you saying it wasn't a problem at all? Did you give the following answer, sir? In terms of water quality impacts, it has some water quality impact, obviously. Its nutrients in the water, and the ammonia is also nutrient contributing to the nitrogen load, so it has some impact. Do you remember giving that answer, sir?
A. Yes, I do.
Q. Next page I asked you, line one --

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THE COURT: Let me ask the witness, just for clarification so I understand. How does that answer differ from the one that you gave a moment ago?

THE WITNESS: If you remember, Your Honor, the toxicity test is this business with this fragile organism in the water, so it's ammonia that impacts that organism. The question was, does the toxicity test connect to impaired water quality. That is what Mr. Jacobs was asking me. Toxicity test really goes to this fragile species, not to the water quality. That is what I was trying to ascertain.

THE COURT: All right.

MR. SCROGGIN: Your Honor, I would object to the extracting of the answer of the witness out of context and ask that the remainder of his answer be read into the record as well.

THE COURT: Any objection to doing that as well, Mr. Jacobs?

MR. JACOBS: If you prefer, Your Honor, as opposed to on cross examination.

THE COURT: I think it would be more helpful to me to have it done now.

MR. JACOBS: Fine, fine. If I might elaborate, the theme is, from what I understand Mr. Smith's testimony, he's saying you can't necessarily extrapolate from the laboratory test?

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THE COURT: You're not testifying, don't characterize his testimony. That can be done in argument or if you want to clarify it, you can ask further questions.

BY MR. JACOBS:

Q. Let he ask you this for clarification sake, Mr. Smith. You're saying that the federally mandated toxicity test because they're done in a laboratory aren't necessarily an indicator of toxicity in a given water body, is that what you're saying?

A. That was part of it. Again, it's toxicity as to this given species which may or may not inhabit the Caloosahatchee River. What you asked me is a water quality question. I see those as separate questions.

THE COURT: Go ahead and ask – read the balance of that.

BY MR. JACOBS:

Q. The balance of the answer to the question, when you say it's not a serious problem, would you say it was a problem, but it just wasn't serious, or are you saying it wasn't a problem at all. I'll read your full answer without extraction and ask you if that's the answer you recall giving.

In terms of water quality impacts, it has some water quality impact, obviously its nutrients in the water and the ammonia is also a nutient contributing to the nitrogen loading, so it has some impact, how great an impact, again it's a very small amount of nutrients, a few pounds, in a river that is one thousand times larger than its flow; is that your complete answer?

A. That sounds correct, yes, sir.

Q. Now, starting again at the top of page 211, question one, so you're saying it had some impact, but a small impact; do you recall saying right?

A. Yes.

Q. And line four, question, and so it might have been a problem, but not a serious one. Is that a fair way to characterize your testimony. Answer, do you recall saying, pretty close. I'm not going to say it's a problem. That's what I'm weaseling on is the problem issue. It has some impact. Whether it's a problem now, and then I am embarrassed to say I interrupt you, and I say, question, I see. You're not willing to say whether it was a problem, you, and then you interrupt me and you give the answer, that is kind of a judgment for regulators to make, not for me. Do you recall giving that answer, sir?

A. I don't actually recall all that exchange, I remember parts of it, but it's in the deposition and it must have been said.

Q. Just a few more questions. Mr. Smith, starting with another one on toxicity, do you know the difference between a major municipal and a domestic wastewater treatment plant and a minor?

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A. Is that a Federal designation or something you're asking me, or you asking me to determine what's a major and a minor? I'm not sure I understand you.

Q. Are you aware of the way those terms are used in – for Federal permitting process?

A. No, I don't know the cutoff between major and minor for Federal permitting purposes, I do not know that, Mr. Jacobs.

Q. Okay.

Are you aware that seventy-six percent of major municipal and domestic wastewater treatment permits in the State of Florida have whole effluent toxicity limit. Seventy-six percent of – I'm sorry?

THE COURT: Read that – sir?

MR. SCROGGIN: I'm just objecting to the time period the question refers to?

THE COURT: Would you state the question again or I can have it read back.

MR. JACOBS: I'll try to state it again.

BY MR. JACOBS:

Q. Are you aware, sir, that in the State of Florida, seventy-six percent of NPDES permits covering major municipal and domestic wastewater treatment plants have whole effluent toxicity limits?

THE COURT: What period are we talking about?

MR. JACOBS: The present?

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THE COURT: Present.
THE WITNESS: Could be, Mr. Jacobs, I don't know surface water discharges. I assume.
BY MR. JACOBS:
Q. Sure.
A. (Witness indicating affirmatively.)
Q. And are you aware that these whole effluent toxicity limits that are put in NPDES permits are put in when there is a reasonable potential that a water quality standard will be violated without such a limit?
THE COURT: Now just a moment.
MR. SCROGGIN: Objection, Your Honor, this witness is not purported to be an expert on permitting reasons for inclusion in the permits of certain limitations?
MR. JACOBS: He was put forth in four different categories. I dare say this would fall under at least one of them.
THE COURT: Well, I'll stretch the point and overrule the objection, receive it for what it's worth.
You remember the question?
Read it back.
(Record read back.)
THE WITNESS: Yes, I'm aware of that, although it's in dispute by several dischargers.
MR. JACOBS: No further questions, thank you, sir.

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THE COURT: Okay.
Redirect, Mr. Scroggin.
MR. SCROGGIN:: Yes, Your Honor.
REDIRECT EXAMINATION
BY MR. SCROGGIN:
Q. Mr. Smith, during your cross examination on Friday, you were asked whether or not you had investigated the alternatives for the Barefoot Bay Facility discharge. And I would ask you, sir, you were asked specifically whether you had looked at building percolation ponds, deep wells, spray irrigation and other alternatives, to the surface water discharge at Barefoot Bay. Do you recall that exchange?
A. Yes.
Q. And I ask you, sir, your response was, no, that was not included in your mission. I would ask you, sir, do you have experience as a real estate appraiser, and are you experienced in such matters appraising property for potential acquisition?
MR. JACOBS: Objection, that is clearly outside the scope of his expert testimony?
THE COURT: You're not going to be eliciting testimony from him as to values?
MR. SCROGGIN: No, sir, I'm not. I'm simply establishing this is clearly outside the scope of his expertise for which he was offered.
THE COURT: I'll overrule the objection. You may

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answer the question.
THE WITNESS: No, I'm not experienced in that.
BY MR. SCROGGIN?
Q. Do you have any personal knowledge regarding the availability of property near the Barefoot Bay Wastewater Treatment Facility that might be suitable for spray irrigation fields or other alternatives?
A. No, I'm not personally aware of it.
Q. You were also asked a question regarding the impact of the Barefoot Bay effluent potentially on endangered species such as the endangered Wood Stork. And this question related to the impact of residual chlorine in the outfall. Do you recall that?
A. Yes.
Q. You also testified on Friday that the residual chlorine in drinking water was several times higher than that of the Barefoot Bay effluent, is that correct?
A. Yes, I believe that is right.
Q. Do you have any opinion, sir, regarding what impact if any there would be on endangered species if the Barefoot Bay Facility were discharging drinking water instead of treated secondary effluent?
MR. JACOBS: Objection.
THE COURT: Overruled.
THE WITNESS: Well, if -- regarding chlorine, I mean

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whether it's drinking water or sewerage, the chlorine still has the same affect on the receiving waters, so it would be worse to discharge drinking water with the high chlorine residual than it would sewerage.
BY MR. SCROGGIN:
Q. And would you anticipate that there would in fact be any impact on endangered species near Barefoot Bay for the discharge of drinking water?
MR. JACOBS: Objection, goes beyond the scope of his testimony and his report.
MR. SCROGGIN: I would suggest, Your Honor, it does not go beyond the scope of the cross examination which specifically suggested there would be an impact on the endangered Wood Stork and from the residual chlorine in the effluent. I'm simply asking him to compare that testimony and response to the cross examination question with his earlier direct testimony comparing the effluent to drinking water.
MR. JACOBS: Judge, he said had no opinion. He's not trying to elicit an opinion.
THE COURT: I'll overrule the objection. You can answer that.
THE WITNESS: Well, again, as to the chlorine, the chlorine residual would be higher I would suspect from drinking water in the stream, and would have the same kind of impact on the stream in terms of the barrier for certain aquatic species.

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Some species will swim through the zone, there's others that are more fragile that won't actually impact it. The more residual just takes longer before it would dissipate as it would move down the stream. As I say, the level that was given in the effluent actually reported as discharge is pretty small and as I think I testified Friday, would probably be dissipated in a matter of a few hundred yards downstream, so I mean, you're talking about a canal that goes three or four miles before it gets to the north prong of the Sebastian River, so there's a lot of room for Wood Storks to go in, but I'm not an expert on Wood Storks, so I don't know.

Q. Are you aware of whether or not the Setilic Island to which the Barefoot Bay discharges, is itself listed as an endangered or protected water body?

A. I'm not aware. I think the Indian River Lagoon is the only one of that group that is.

Q. By the time effluent reached the protected Indian River Lagoon, would you anticipate any impact at all from the chlorine residual in the Barefoot Bay's discharge?

A. No.

Q. Would you have the same answer even if that -- the chlorine residual in the Barefoot Bay discharge were several times higher, even as high as that in drinking water?

A. Yes, same opinion.

Q. I'd like to turn if I could to the Carrollwood Facility.

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You were questioned on Friday about the sources of pollution into Tampa Bay. And I would ask you, sir, if you know what pollutants are of concern to Tampa Bay that gives rise to it being a protected water body?

A. Well, certainly carbon, nitrogen and phosphorus are all of concern.

Q. And what are the sources of those pollutants; carbon, nitrogen and phosphorus, into Tampa Bay?

A. Any number of sources. Regulated sources include several sewerage treatment plants, principally the Howard F. Curen Plant which is operated by the City of Tampa, which has permitted discharge of some sixty-five or sixty-six MGD, and probably -- well, I'd have to calculate the number, hundred thousand pounds of nitrogen permitted from that facility.

But there is also a great deal in our case, unusually we handle a lot of fertilizer on the docks at the Port, that's another source of concern for nutrient loading into the Bay, and it's carefully monitored and try to keep clean.

Q. I'm sorry.

A. And then also, typical storm water runoff from urban areas from irrigated lawns that have been fertilized and wash nutrients into the receiving waters, eventually into Tampa Bay.

Q. Can you compare the magnitude between the regulated point sources of such discharges and the other non-point sources in the -- that would be resulting in pollution in the Tampa Bay

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area?

A. I don't have firsthand knowledge, Mr. Scroggin, of that. It would be a generalization.

Q. Do you know if -- do you have any estimate at all or any relative comparison of discharges from wastewater treatment facilities versus all of the other sources of pollutants in Tampa Bay?

A. I don't. I do know that we've taken out -- we've controlled the point sources from the wastewater treatment plants and we've seen that noticeable impact of improvement in the Bay over the last ten years, and so generally we consider that the non-point source pollution coming from runoff is greater than point sources, but in this case, because of the concentrated discharges that we have, I'm not sure that generalization holds true.

Q. Among the regulated point sources, the wastewater treatment facilities in the bay area, can you rank the Carrollwood Facility among the others?

A. It has to be near the bottom.

MR. JACOBS: Objection.

THE COURT: Just a moment, sir.

MR. JACOBS: I'm sorry, this goes beyond the scope of his report and deposition testimony.

THE COURT: Sustained.

BY MR. SCROGGIN:

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Q. With respect to the three facilities at Barefoot Bay, Mr. Smith, Carrollwood and Waterway Estates, you were asked on Friday for each of these facilities whether or not the pollution from each would have been lessened had they upgraded to an advanced wastewater treatment and your response, I believe, was yes, the pollution would have been reduced had they been upgraded to AWT. And I would simply ask you, first, with respect to the Barefoot Bay Facility, is it correct that the Barefoot Bay Facility began before its current upgrade, that the effluent from the Barefoot Bay Facility was cleaner than secondary and that it was eventually upgraded to the still cleaner advanced wastewater treatment?

A. Yes. It was cleaner than secondary, it had generally very high removals of BOD and suspended solids and achieved some nitrogen removal. So, yes, it was a very well treated secondary effluent.

MR. JACOBS: Your Honor, this sounds very familiar from his Friday direct testimony for what that is worth.

THE COURT: Well, it sounds familiar to me, and please don't have him restate what he's already stated.

MR. SCROGGIN: Yes, Your Honor.

BY MR. SCROGGIN:

Q. There's been a lot of discussion in your testimony regarding discharges into small water bodies such as the canal at Barefoot Bay, Sweetwater Creek and Carrollwood and the canal

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at Waterway Estates. And I would ask you, sir, are there certain conditions under which the health of the water in the small receiving water bodies is actually improved by the discharge of secondary treatment, at least with respect to some measures of the health on receiving water?

MR. JACOBS: Objection, goes beyond the scope of his report, his deposition testimony and the examination that I examined him on.

MR. SCROGGIN: Your Honor, the cross examination specifically directed the witness' attention to the impact on the small receiving water bodies of the pollution with the implication that it was always a negative impact. I'm simply asking the witness if that impact is in fact always negative.

THE COURT: I'll overrule the objection. You can answer that.

THE WITNESS: With respect to Barefoot Bay, that canal has probably got water in it all the time and, you know, even at the worst condition, I'd suspect there's quite a bit of dilution in whatever impact it's going to have, it's going to have. There's always water there. I don't think there's -- increment of additional water is probably inconsequential from the Barefoot Bay Plant.

At Carrollwood on the Sweetwater Creek, there are periods during the year in which the creek water is regulated upstream, and so there is very little if any water in the creek

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upstream. In that case, putting water in that is of relatively high quality is actually going to assist some of the vegetation and aquatic life in the stream downstream. It's not a deterrent to all he aquatic life, just some that are more fragile. Under most conditions, though, that is again a fifteen to one dilution under average conditions in that creek.

In the case of Waterways Estates, it's just imperceptible. That canal, the mass of water in that canal versus what is coming out of the plant is pretty small. I mean, it's certainly not doing anything to enhance the water quality there because there's lots of water there.

Q. A significant portion of the questioning on Friday and today has dealt with what can be done technologically or physically, and I'll ask you, sir, have you ever in your years of experience dealing with the construction and operations of wastewater treatment facilities, had clients who had no cost constraints, who simply asked you the question of what was physically possible as opposed to what was practical or feasible?

A. I have had some that thought they had no cost constraints until they encountered what the real costs were and there's always constraints of some kind on cost.

Q. Do you in your work as a consultant assisting municipalities and companies in constructing and building wastewater treatment facilities, ever plan a project without

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any consideration of the cost?

A. No, that is usually the most important consideration, along with meeting your mission.

Q. Are you -- do you have any familiarity with EPA's funding of certain wastewater treatment facilities in the United States and in Florida?

A. Yes, I do.

MR. JACOBS: Objection, this is beyond the scope.

THE COURT: Sustained.

BY MR. SCROGGIN:

Q. You stated today, sir, that environmental protection would be maximized at the six foot contour line with respect to the Waterway Estates Facility. Is that based on data or on modeling?

A. Based generally on intuition largely, Mr. Scroggin, in that you're going to get the best mixing and deepest segmented and highest velocity of the stream, and so, that is more of an engineering judgment, engineering intuition on my part. I think in modeling, that was done, was unable to show a real increase in water quality.

Q. You made a similar statement today regarding the six foot contour line being the spot in the river that would maximize the water quality. I would ask you the same question with respect to that answer, was that answer based upon data you reviewed or upon your intuition or modeling.

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A. It's again, based on my general understanding of effluent dispersion and dissipation. I've done a fair amount of work in that area and modeling, those things, so I have a good sense of what makes it work and in that case, I think that would be the optimal place of discharge.

Q. You were asked several questions today regarding wasteload allocations, whether or not the Waterway Estates Facility had a wasteload allocation, what its role was in the permitting process. I'll ask you, sir, do you have expertise in the development and use of wasteload allocations for permitting purposes in Florida?

A. I have done a fair amount of work in wasteload allocations. I've not been involved in wasteload allocations in Florida.

Q. Have you any expertise regarding the legal requirements of wasteload allocations to be used in effluent limitations in the State permits?

A. Not in Florida, no.

Q. And were you asked to perform any such analysis in preparing your expert report for this case?

A. No.

Q. You were asked several questions today regarding the deviation from the anticipated schedule for the construction projects, the construction of moving the outfall and the upgrade to AWT at the Waterway Estates Facility. You were

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asked in particular whether or not you had ever in your experience had a client tell you that the matter was urgent and offered to pay a premium. And I ask you, sir, do you have any knowledge or experience regarding how the Florida Public Service's Commission would view the prudency of paying premiums for urgent projects?

MR. JACOBS: Objection, goes beyond the scope. Also calls for speculation.

THE COURT: I'll overrule the objection.

Do you know? What is -- do you know?

MR. SCROGGIN: Do you have -- you want me to ask the question be read back?

THE COURT: Read the question back -- well, let me hear it 'cause I'm not sure I remember all of it.

(Record read back.)

Do you have a view, yes or no?

THE WITNESS: Yes or no? Yes, I would have a view.

THE COURT: Okay.

BY MR. SCROGGIN:

Q. Do you know whether or not the premiums paid for urgent projects are routinely approved by the Public Service Commission?

MR. JACOBS: Same objection, goes beyond the scope and calls for speculation.

THE COURT: I'll overrule the objection.

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THE WITNESS: I don't know about premiums, per se. What I know is that the Public Service Commission looks with excruciating detail at all the costs the company incurs and wants to include in the rate base. That is what I have personal experience with this company.

THE COURT: I'm recede from my previous ruling and sustain the objection and the answer will be stricken.

BY MR. SCROGGIN:

Q. Finally, Mr. Smith, you were asked several questions regarding the table in your expert report for -- regarding Waterway Estates which is Florida Cities' Exhibit Number 92, which has been entered into evidence, and on page 35 of that report, you have listed anticipated duration of days, actual duration of days, and date completed. You were asked several questions about a new column that does not appear on this table. That was characterized as the fast track. And for each one of the entries, you had a shorter period of time than that that is either the anticipated or the actual duration. And I'd ask you, sir, have you ever, in fact, in your experience seen one of those entries in the fast track achieved in practice?

A. One of the entries, you mean one line?

Q. A single one, such as the --

A. Yes.

Q. Very first one, a single entry in one of the rows; have you ever seen that small number of days actually achieved in

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practice for one of the items of the many on the list?

A. I would say it's true for every item by itself.

Q. And have you ever seen a project that requires all of these steps in fact achieve such a small number of days for each one of the many steps?

A. No, I haven't.

Q. Have you ever used the term "expedited schedule" for any of the projects that you have yourself been involved with?

A. Yes.

Q. You think it's fair to call an idealized small number of days for each one of these steps expedited; is that a fair characterization for the smallest number of days added together end to end that you have ever seen for each one of these many steps?

A. Well, what we would -- to look at a fast track or expedited schedule, we would look at the schedule in whole and some things are going to be short and others are going to be long, but we look at the schedule in the continuum and certainly we have dealt with fast track schedules.

Q. Have you ever achieved a schedule in fact for a project such that each one of the entries of these many steps was at its absolute minimum value in the column that you characterize as fast track?

A. No.

Q. Have you ever in your many years of experience known any

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other engineer who has ever been able to achieve an end to end minimization of each of the time required for each one of these steps for a complex project such as this?

MR. JACOBS: Objection, hearsay, calls for speculation.

THE COURT: Overruled.

THE WITNESS: Not that comes to mind right now, no.

BY MR. SCROGGIN:

Q. Do you think that such an idealized minimum time schedule is realistic in any sense?

A. No.

Q. Finally, the construction schedule was discussed in some detail today. I'll ask you, sir, do you know when in fact the -- or let me ask you a preliminary question first, if I might.

The date -- does the construction schedule depend in part on the date that the company knows that it in fact has no choice but to begin construction and move the outfall and by that, sir, I mean, does the beginning date for all of these many steps depend in part on a decision by the company that it must initiate the first step and begin the construction process?

A. Well, not only construction, but the entire investigation process. I mean, that was what Mr. Jacobs was going to. At some point, the company has to decide to go or not -- or to wait.

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Q. And you were asked the question regarding how long would it have taken the company had they made that initial decision to upgrade the outfall, upgrade the plant and move the outfall in 1981, actually, sir, do know the date on which in fact Waterway Estates was formally for the first time required to upgrade to AWT and move its outfall as opposed to pursuing any other alternative?

MR. JACOBS: Objection to the extent that the question calls for a legal conclusion.

THE COURT: Overruled.

THE WITNESS: Well, we had official denial listed as 8 December, '86.

BY MR. SCROGGIN:

Q. But that official denial, are you – do you know the language that is used in the official denial; does the official denial require an upgrade to AWT in moving the outfall or does it require ceasing discharge?

A. I don't recall right now, Mr. Scroggin.

Q. Assuming for purposes of my question that the 1986 denial only requires ceasing discharge without naming the alternative to be chosen to achieve that cessation of discharge in the canal. Do you know the date on which the company was formally required to move the outfall and upgrade?

A. I don't other than obviously they had agreements with the regulators based on the schedules that were negotiated, had

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that agreement with the regulators, so other than those dates which are embodied in the actual orders.

Q. Assuming for purposes of my last question that the first date on which Florida Cities was formally required to upgrade the plant and move the outfall was in late 1988 in the State permit, would that potentially shift from 1986 to 1988, the beginning date for the gaining of permits and construction processes?

MR. JACOBS: Object, beyond the scope. He didn't review those documents prior to his deposition, the State permits or administrative orders. I think that has been established.

MR. SCROGGIN: May I address that Your Honor?

THE COURT: Yes.

MR. SCROGGIN: We talked a lot about time lines and I'm not asking him to interpret, I'm asking him to assume for purposes of my hypothetical that these are the operative dates, and he has reviewed dates and length of time of construction.

THE COURT: I'll overrule the objection.

THE WITNESS: You said spring of '88, Mr. Scroggin?

BY MR. SCROGGIN:

Q. Late 1988.

A. Late 1988. Appears then that their actions were prudent in that they took care of preliminary matters before they had the actual notice, so they were -- they were moving ahead of

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that time. I would hate to think you'd wait right until the time you got the final notice.

MR. SCROGGIN: I have no further questions.

THE COURT: Okay.

Thank you, sir, you may step down.

THE WITNESS: Thank you, sir.

THE COURT: Call your next witness.

MR. SCROGGIN: Florida Cities calls Randy -- Randall Armstrong.

THE COURT: Let's go ahead and take a fifteen minute recess.

(Thereupon, a brief recess was taken.)

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THE COURT: All right. Call your next witness.
THE DEPUTY CLERK: Raise your right hand.
Do you solemnly swear that the testimony you are about to give in this cause will be the truth, the whole truth and nothing but the truth, so help you God?
THE WITNESS: I do.
THE DEPUTY CLERK: Take a seat in the witness stand.
State your name and spell your last for the record, please.
THE WITNESS: My name is Randall Lavoid, L-A-V-O-I-D; Armstrong, A-R-M-S-T-R-O-N-G.

- - -

Thereupon,

RANDALL LAVOID ARMSTRONG,

a witness, having been duly sworn to speak the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCROGGIN:

Q. Good morning, Mr. Armstrong.
Would you please state your current position?
A. I'm executive vice-president of the Phoenix Environmental Group, Incorporated.
Q. And how long have you served in that position?

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A. Essentially for the last six years.
Q. How long have you been with Phoenix Environmental?
A. Well, the first year – I actually set up my own company in 1990, which was Phoenix Environmental Associates. Later that year, my partner and I merged and formed the Phoenix Environmental Group.
So, for a brief time that first year, I was a company of one. But since that time, in 1991, I have held a position with the Phoenix Environmental Group.
Q. What is your educational training in college?
A. I have a bachelor of science degree in biology and education from the Florida State University, received that in 1971.
Q. Okay. And what was the first full-time employment you had after college?
A. For a brief time, in the summer of 1971, I did some research for the National Science Foundation. I was actually under contract with the Orange County School System in Florida to develop curriculum for aquatic studies for Orange County high school students.
Q. Can you tell me your next full-time employment?
A. Yes. For a very brief time, I taught high school in Orange County, Florida.
MR. QUINN: Your Honor, if it will expedite matters, the United States will stipulate to the credentials

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of Mr. Armstrong. As long as we know what the proffer is, we may be able to stipulate to that, too, sir.
MR. SCROGGIN: Your Honor, if I might read the areas in which I will proffer this witness as an expert witness.
THE COURT: All right.
MR. SCROGGIN: I will proffer him in the areas of the technical development of waste load allocations and their use in Florida; second, the use of waste load allocations in the development of effluent limitations in State permits in Florida; third, the sampling and analysis of surface waters and the analysis of water quality data; fourth, computer modeling of water quality impacts on surface waters in Florida.
THE COURT: Computer modeling of what?
MR. SCROGGIN: Computer modeling of water quality impacts on surface waters of Florida.
And fifth, comparisons of water quality data and water quality modeling to the water quality standards of Florida.
THE COURT: Comparisons of water quality data what?
MR. SCROGGIN: Comparisons of water quality data and water quality modeling to the water quality standards of the State of Florida.

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MR. QUINN: Your Honor, those five areas are further than we thought Mr. Armstrong was going to be designated to testify about. In fact, most of those go beyond the scope of his expert report and were not listed in his expert report or in his deposition at the time we took it. The five areas that Florida Cities seeks to have him certified in are beyond it.
My understanding of his report dealt solely with comparisons of water quality data in and around the Caloosahatchee River.
And for that reason, sir, we would object to the qualification of the witness for any of the other four or five other areas. I can't tell...
MR. SCROGGIN: Your Honor, may I suggest one -- I will try to expedite the process as much as I can, but I do believe that we should be allowed the opportunity to qualify him in these areas. He --
THE COURT: Well, you may be able to qualify him in these areas, but the question is whether he's going to be permitted to testify, notwithstanding the fact that he's got qualifications.
The Government has said that he's not entitled to testify in four of the five areas because he has not been proffered for that purpose appropriately under the rules.
MR. SCROGGIN: If I might, Your Honor, I'm

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referring to the joint pretrial statement in which Mr. Armstrong's testimony is characterized, and those areas include the historical water quality of the Caloosahatchee River –

THE COURT: All right. Where is that in the five categories that you have just gone through?

MR. SCROGGIN: That would be in number three, Your Honor, the sampling and analysis of surface waters and analysis of water quality data.

THE COURT: Sampling of surface water –

MR. SCROGGIN: – and analysis of water quality data.

THE COURT: – and analysis of water quality data.

MR. SCROGGIN: That was the third category I read.

THE COURT: All right. Just a moment.

(Pause.)

THE COURT: And that's as to the Caloosahatchee River?

MR. SCROGGIN: Yes, sir. That will be the scope of our questions to him.

THE COURT: All right.

MR. SCROGGIN: We're only going to talk about Waterway Estates with this expert, Your Honor. His analysis will deal only with the lower Caloosahatchee River and the impacts on that water body of the Waterway Estates facility.

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THE COURT: All right. Just a moment.

(Pause.)

MR. SCROGGIN: Reading again, Your Honor, from our -- the joint pretrial statement, he is also being offered for the existence of water quality data, and that would fall within the fifth category which is -- I'm sorry -- to continue reading, the existence or lack thereof of water quality data indicating any impact of any discharges to surface waters from the Waterway Estates wastewater treatment plant.

THE COURT: Yes, and I think the Government recognizes that that falls within his proffer, correct?

MR. QUINN: Yes, Your Honor.

The proffer is set forth on Page 30 of the joint pretrial statement.

THE COURT: I'm looking at it. Go ahead.

MR. QUINN: Okay. It sets forth those two areas. These five areas -- first, I couldn't write them down quick enough, but they sound like they are well beyond anything that is listed on Page 30 or in his expert report.

And for those reasons, we would request that the Court not permit any questioning into those areas.

THE COURT: All right. Go ahead, sir.

MR. SCROGGIN: Your Honor, we've addressed, I believe, the five categories that I listed. Number four --

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and the second quote that I just read I believe falls -- is the fifth category: The existence or lack thereof of water quality data indicating any impact. That would involve the comparisons of the water quality data and the modeling, which is how the data are, in fact, developed with the water quality standards of Florida, which is the fifth category I have given you. So, I believe, sir, we've done four and five so far. Also –

THE COURT: You know, it sure would help on matters that are so technical as this if you could dovetail your statement of what the witness is going to be offered -- the categories that he's going to be offered in to what you're now saying that you intend to offer.

I was writing as fast as I could. I didn't get all these categories down. And I may have to take a recess and get Mr. Miracle to give me a statement of these various categories and make sure that you're not going beyond what you have proffered, legitimately offered previously.

Yes, sir?

MR. QUINN: Your Honor, two points: First, in Mr. Armstrong's expert report, there are two parameters that are listed: One is to review the data for key parameters that are indicative of the overall health of the estuarial system to determine the overall quality of the Caloosahatchee River estuary and to assess whether water

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quality appeared to be changing over time and, two, to attempt to locate water quality data from the area near a previous discharge point from the Waterway Estates domestic wastewater treatment facility to determine if that previous discharge was impacting water quality. That's it. That's all that's in there.

And, sir, this is further complicated by the fact that the Defendants want Mr. Armstrong to be both a fact and an expert witness, and they are expanding the scope of what he's going to testify about as an expert.

MR. SCROGGIN: Your Honor, Mr. Armstrong was questioned at his deposition at great length about the first two areas that I have just mentioned: The waste load allocation technical developments and their use in permitting.

If the Court wishes for him to be a fact witness in those areas and not an expert witness, that might be a way to cut through this potential problem, and we would be willing to accept that.

MR. QUINN: Your Honor, by the Florida Cities stipulation to try to qualify him as an expert witness, they concede that he has to be an expert to talk about it. And if he's going to testify as a fact witness, then they shouldn't be allowed to be mixing like this, sir.

MR. SCROGGIN: Your Honor, he has, in fact, been a

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fact witness in this case and an expert witness in this case. His deposition was consumed almost totally with issues relating to his factual experience rather than the areas in which we had noticed the Department of Justice he would serve as an expert.

The area that -- the last three areas dealing with the sampling, computer modeling and analysis of water quality data clearly falls within the description that we have offered in the joint pretrial statement.

This witness participated personally in the studies and supervised personally the studies that are at issue for water quality sampling, and in that regard he may be regarded as a fact witness by the Court.

THE COURT: Anything else?

MR. QUINN: One more point, Your Honor. He was deposed as an expert witness on the basis of his report. The fact that we may have asked questions about his background and his experience dealt with that experience as it relates to his expertise and doesn't relate to what he was going to testify about in this case.

And I'm advised he wasn't deposed as a fact witness.

THE COURT: Okay. Mr. Miracle, I want this transcribed as quickly as possible.

Where is the report?

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MR. SCROGGIN: I have his report with me.

THE COURT: Is it an exhibit?

MR. SCROGGIN: It is an exhibit. Yes, sir, it is. And I would move it into evidence.

THE COURT: What exhibit is it?

MR. SCROGGIN: Mr. Armstrong's report is Florida Cities Exhibit Number 91.

THE COURT: Okay. Well, we're going to take a recess for a little while. I don't know how long it's going to take for the Court to attempt to parse through this and to determine this issue.

We'll be in recess.

(A recess was taken.)

THE COURT: All right. The witness has been proffered in five categories as an expert, and the Court is of the view that he should be allowed to testify as an expert in the areas which are numbered three, four and five a few moments ago before I recessed.

The third area was the sampling and analysis of surface waters and the analysis of water quality data, and the fourth area was computer modeling of water quality impacts on surface waters in Florida; and fifth, comparisons of water quality data and water quality modeling to the water quality standards of Florida.

It appears to the Court that there has not been a

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sufficient predicate laid procedurally to permit the Defendant to testify regarding the first two areas on which he has been proffered; that is, the technical development of waste load allocations and their use in Florida and, second, the use of waste load allocations in the development of effluent limitations in the state permits in Florida.

Proceed.

MR. SCROGGIN: Thank you, Your Honor.

BY MR. SCROGGIN:

Q. Mr. Armstrong, one of the facilities that is at issue in this case is the Waterway Estates facility, and I will ask you, sir, when you were contacted to undertake work as an expert witness on behalf of Florida Cities with respect to that facility.

A. I was contacted by you, I believe, in late 1992 or probably early 1993 at that time primarily to assist you with gathering information related to this case, if I recall correctly.

Q. And what particular information were you asked to collect?

A. I was asked to gather information primarily from the files of the Department of Environmental Regulation, files related to water quality studies that had been done of the Caloosahatchee River and also files relating to permitting actions that had been taken by the Department or the

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Department was involved with that were being undertaken by the Environmental Protection Agency.

Q. And were you later asked to act as an expert witness in this case?

A. Yes, I was.

Q. And did you prepare a report as part of your work as an expert witness?

A. Yes, I did.

Q. I would ask that the witness be shown Florida Cities' Trial Exhibit Number 91, and I will ask you, Mr. Armstrong, is this the expert report that you prepared for this litigation?

A. Yes, it is.

MR. SCROGGIN: Your Honor, I would ask to move Florida Cities' Exhibit 91 into evidence.

THE COURT: It will be received.

BY MR. SCROGGIN:

Q. Mr. Armstrong, can you tell me what period of time your expert report covers?

A. I looked at all the historical data that I could find on the lower Caloosahatchee River. I focused on the period from 1982 to 1984 primarily because that's where the vast majority of -- the time period during which the vast majority of the water quality information had been collected.

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Q. Were any restrictions placed upon what data you were to review for purposes of your report?
A. No.
Q. Specifically, what instructions were you given with respect to analyzing all available data for the lower Caloosahatchee River?
A. I was asked to attempt to locate any data that I felt would help me evaluate the water quality of the Caloosahatchee River without restriction, basically.
Q. Can you tell me what instructions, if any, you were given with respect to analyzing data regarding impacts of the discharges of the Waterway Estates facility?
A. Yes. Again, I was asked to attempt to locate any data that I could that would help me reach conclusions regarding the impact of the Waterway Estates discharge, essentially again without restrictions on the type or nature of the data that I could pursue.
Q. Were you given any instructions at all regarding what conclusions you should reach in your analysis?
A. No, sir.
Q. Can you tell us specifically what data sources you reviewed in preparation of your report?
A. I researched the files primarily of the Department of Environmental Regulation. That agency has been designated as the repository for water quality data in the State of

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Florida.
And I looked in a number of their files and talked to some individuals there focusing in on three major sources of data: One was the water quality data that is contained in what is called the Storage and Retrieval System. STORET, S-T-O-R-E-T, is the acronym.
The STORET system is the computerized data base that is operated by the Department into which, by far, the majority of their data is stored or placed.
I also focused on the intensive survey documents that had been prepared by the Department documenting water quality data that had been collected by the Department during intensive surveys of the lower Caloosahatchee River both in 1980 and again in 1987, I believe.
Q. Can you describe the 1980 intensive survey to which you referred?
A. Yes, I can. The survey was designed to evaluate water quality data in roughly a 12-to-15-mile stretch, I believe, of the lower Caloosahatchee River. It was conducted by Department staff members, including myself.
Q. What was your own participation in that study?
A. At the time of the study, I was the administrator of the water quality analysis section of the department. That section was responsible for designing and actually implementing the water quality study and then analyzing the

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data.
Upon completion of that study -- the project manager for the study was a Mr. Bruce DeGrove who reported directly to me in my capacity as administrator of the section. I was involved in discussions with Mr. DeGrove relating to the design of the study, how the study was to be executed, and then I actually participated in the fieldwork that was necessary to collect the water quality information.
Q. Did you use the information from the intensive survey in 1980 for any modeling purposes?
A. Yes, we did.
Q. Can you tell me what those purposes were?
A. Yes. We had been asked by our district office in Fort Myers, which at the time was called the Southeast Florida District Office -- excuse me -- South Florida District Office -- the district had asked us to undertake the study in question and supply the results to them in support of both permitting decisions that they were going to be facing in the coming years and also --
THE COURT: Just a moment.
Yes, sir?
MR. QUINN: Your Honor, I'm going to object at this time. It appears that this testimony, although couched as fact, is going into the area of waste load allocations and the use of waste load allocations and the development of

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waste load allocations. For those reasons, I would object.
MR. SCROGGIN: May I be heard, Your Honor?
This witness has been proffered and accepted by the Court as an expert in computer modeling of water quality impacts on surface waters of Florida, which is category number four. It may be helpful to ask the witness the question. The waste load allocation is, itself, one of the products of such computer modeling and is a subcategory of computer modeling. I do, indeed, anticipate asking --
THE COURT: You can be heard in just a minute when he gets through.
MR. SCROGGIN: I would, indeed, Your Honor, expect to ask him some questions of the particular kind of computer modeling in which he has been proffered and accepted as an expert. One kind of computer modeling is waste load allocation.
I could perhaps ask him those questions if there's any question about that technical characterization of a waste load --
THE COURT: Well, let me hear from Mr. Quinn first.
MR. QUINN: I apologize when I stood up earlier, Your Honor. I thought Mr. Scroggin was asking a question about waste load allocation. I was just going to object. I have nothing further on this point, sir.

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THE COURT: Well, ask your questions which you say will support your legal argument here.
BY MR. SCROGGIN:
Q. I ask you, sir, if the information from the intensive survey was used for any modeling purposes?
A. Yes, it was.
Q. And was one of those modeling purposes the development of a model to be used in the development of waste load allocations for the Caloosahatchee River?
MR. QUINN: Objection.
THE COURT: Is this something that he testified to in the deposition?
MR. SCROGGIN: Yes, Your Honor. Virtually his entire deposition was devoted to his personal role in the development of the computer models used in waste load allocations and in the history of the use of those computer models in waste load allocations for the lower Caloosahatchee River.
The deposition lasted approximately three-and-a-half hours. Of that period of time, I would estimate no more than 15 minutes deviated from that single topic.
THE COURT: Mr. Quinn?
MR. QUINN: Yes, Your Honor.
We're getting into his fact testimony; that is,

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what he was a percipient witness on, as opposed to what his expert report relies upon.
To the extent that the two are inextricably linked, it is difficult for us to make objections on this basis, but I would object that all of this information is of a fact nature, and he should not be allowed to testify in his expert capacity to what he did as a fact witness unless it's within his expert report, sir. And this information that is seeking to be elicited is not in his expert report, sir.
THE COURT: Okay. Well, I'm going to overrule your objection, Mr. Quinn.
MR. QUINN: May I add one more point, sir?
THE COURT: Yes, sir.
MR. QUINN: As an additional note, Mr. Armstrong was not disclosed to the United States as a fact witness until after the conclusion of discovery.
In fact, in response to interrogatories filed after the close of discovery, that was the first time that in writing he was notified -- we were notified of his fact witness position. At his deposition was, in fact, the first time we knew that he had any role as a fact witness in any development of waste load allocations.
THE COURT: Mr. Scroggin, you want to be heard on that point?

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MR. SCROGGIN: Yes, I would, Your Honor.
I would ask that my colleague Mr. Alex Bullock speak to this since he was the person personally involved in these interactions.
I will say that it was certainly no secret that Mr. Armstrong was, indeed, the supervisor of the entire waste load allocation process. We assumed that was the reason the Department of Justice devoted virtually the entire deposition to that, much somewhat to our surprise.
We did disclose Mr. Armstrong's dual role as an expert and a fact witness in Florida Cities' amended revised responses to Plaintiff's first and second interrogatories.
A very short paragraph simply reads:
Mr. Armstrong is also listed as an expert witness. Additionally, he was employed by the Florida Department of Environmental Regulation from the early '70's to the late '80's. Mr. Armstrong is a co-author of the 1981 planning document which Connie Kagey used improperly in rejecting Florida Cities' 1986 renewal application for Waterway Estates. Mr. Armstrong has also participated in at least two extensive surveys of the Caloosahatchee River and has personal knowledge of the river in the vicinity of Waterway Estates. That ends our disclosure of his role as an expert in the three areas the Court has designated, also his factual history of involvement which intertwines that

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expertise.
THE COURT: Mr. Bullock?
MR. BULLOCK: Your Honor, Mr. Scroggin has covered most of the material that I was going to speak other than the fact that Your Honor had provided a scheduling order I believe in January of '95 which listed dates in which witness lists would be projected -- I mean when witnesses would have to be served on the opposing sides.
It's my understanding that the Government filed interrogatories seeking who -- exactly who our witnesses would be sometime in May of '95. We objected to having to provide the witnesses at that time.
The Government filed a motion to compel. Judge Swartz did not rule on that motion to compel until November 3rd, shortly before the close of discovery.
I might also point out that the Government did not provide a witness list themselves until the close of discovery as well.
THE COURT: Okay.
MR. BULLOCK: If Your Honor will remember, the case was originally set for trial in October of '95 and then extended until January and now March.
THE COURT: Mr. Quinn?
MR. QUINN: Yes, Your Honor. Just one point: The document that Mr. Scroggin read from the answers to

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interrogatories, that is the document to which I referred, and that was filed after the close of discovery and after a possibility to take any depositions.

MR. SCROGGIN: May I respond, Your Honor?

THE COURT: No, no. I've heard enough.

Well, all right. Go ahead. It may be that the Eleventh Circuit would perhaps be wondering what I cut off, so go ahead.

MR. SCROGGIN: Yes, Your Honor.

BY MR. SCROGGIN:

Q. Returning to the question I believe I was asking you --

THE COURT: No, no. I thought you had something else regarding argument.

MR. SCROGGIN: No -- oh, I'm sorry.

THE COURT: I misunderstood.

MR. SCROGGIN: Yes, I did, Your Honor, and that was --

THE COURT: Sir?

MR. SCROGGIN: I'm sorry, I mistook what you had said. I apologize. I do have one final point with respect to the current issue --

THE COURT: And that's what I said: Go ahead.

MR. SCROGGIN: -- and that is, Your Honor, that the last point Mr. Quinn made was that they didn't have

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notice before the deposition. I would simply remind the Court, as I did earlier, the entire deposition was consumed with nothing but this single subject.

THE COURT: Okay. Well --

MR. SCROGGIN: Indeed, Your Honor, the document at issue was presented to this witness at his deposition and he was questioned on it at his deposition.

THE COURT: Well, I'm going to overrule the objections that have been made to this line of testimony, and I'll permit you to proceed.

Go ahead.

MR. SCROGGIN: Yes, Your Honor.

BY MR. SCROGGIN:

Q. Mr. Armstrong, I was questioning you about the data gathered from the intensive survey of 1980 in which you participated.

Did you also participate in the analysis of that data that was gathered as well as in the physical sampling of the data?

A. Yes, I did.

Q. And what did that analysis of the data involve?

A. We analyzed the data just visually to get a feel for what we're dealing with, but the primary tool used in the analysis of that data was a computer model.

Q. And was that computer model subsequently used in the

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1981 waste load allocation for the lower Caloosahatchee River?

A. Yes, it was.

Q. I would ask that the witness be shown the Government's Exhibit Number 349, which is the 1981 Caloosahatchee River waste load allocation documentation, Lee County.

MR. SCROGGIN: Your Honor, this was also one of our exhibits; but in the interest of avoiding any duplication of exhibits, I'm using the Government's exhibit which I believe --

THE COURT: It doesn't matter whose exhibit it is. It's admissible, usable for all purposes.

BY MR. SCROGGIN:

Q. Would you identify this document, sir?

A. Yes. It's entitled Caloosahatchee River Waste Load Allocation Documentation, Lee County, Water Quality Technical Series, Volume 2, Number 52.

Q. Can you tell me what role, if any, you had in this particular document, in its development and publication?

A. Yes. I was involved in the discussions with our district office over the need and scope of the study. I was involved with Mr. DeGrove and others in the design of the study, and I was involved in the actual analysis of the data, including development of the computer model that's contained -- or on which this waste load allocation

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documentation is based.

Q. Did Mr. DeGrove, the listed author of this document, work for you?

A. Yes, he did.

Q. Did he report to you?

A. Yes, he did.

Q. Did you personally --

THE COURT: Just a moment.

MR. QUINN: Objection, Your Honor. I believe we're going into fact testimony, and I lodge my objection on that basis.

THE COURT: Overruled.

BY MR. SCROGGIN:

Q. Did you personally supervise the various stages of development of this document?

A. Yes, I did.

Q. And did you approve the final draft before it was published?

A. Yes.

Q. Did you make any changes to intermediate drafts that may have been developed in -- before the final was published?

A. Yes.

Q. Can you tell me for what purpose this waste load allocation was developed?

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MR. QUINN: Objection; calls for a legal conclusion, I believe, Your Honor.
THE COURT: Overruled.
THE WITNESS: Yes. The district office -- as I mentioned, the South Florida District Office had asked us to undertake this study for their possible use in the future in making permitting decisions and also as a reanalysis of waste load allocations that would be needed for the development of what's called a 201 facilities plan for this part of the state.
BY MR. SCROGGIN:
Q. What is a 201 facilities plan?
A. The 201 process is a process that was set up to allow counties and cities within the State of Florida to seek federal funding to assist them with the design and construction of municipal wastewater treatment plants for their particular communities.
Part of that process involved the need to develop waste load allocations so that the cities and counties could know what type of facilities they would need to build in the future.
Q. Do you know what happened to this waste load allocation after it was published? And by that I mean, do you know for what purposes it was, in fact, used?
A. Not specifically, no.

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Q. Was it your understanding in developing this document that this document would prescribe requirements against -- to be enforced against dischargers along the Caloosahatchee River?
MR. QUINN: Objection; leading, Your Honor.
THE COURT: Yes, it is leading. Sustained.
BY MR. SCROGGIN:
Q. What was your understanding regarding the uses to which this waste load allocation could be used, if any, for purposes of controlling discharges to the Caloosahatchee?
A. We supplied this document and other similar documents to our district offices around the state for their use as they saw fit. It was not a requirement on our district offices; they could use this in conjunction with any other information that they had available in making their decisions for permitting purposes.
Q. Who makes the decisions for permitting purposes, in your experience, in Florida?
A. The permits for facilities such as these were issued by our district managers in the five different district offices around the state.
Q. Was it your understanding that this document would be a requirement for the district --
THE COURT: Well, don't lead the witness.
BY MR. SCROGGIN:

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Q. What understanding, if any, did you have regarding how this document might be used in the development of permits for dischargers to the Caloosahatchee River?
MR. QUINN: Objection; calls for speculation.
THE COURT: Overruled. You can answer the question.
THE WITNESS: These documents were provided as guidance for the district managers and their staff to make regulatory decisions. They were not requirements.
BY MR. SCROGGIN:
Q. What is your understanding of the difference between guidance and a requirement for the district managers?
A. Well, in my opinion, a requirement would be something that the district managers would turn around and place on the dischargers who were seeking permits; and as such, then those requirements would become binding through the permitting process.
Q. Do you know whether or not this waste load allocation was ever submitted to EPA?
A. I believe it was.
Q. Do you know if there was a response from EPA to this waste load allocation?
A. Not an official response, to my recollection.
Q. Do you know whether or not the development of this waste load allocation was premised upon concern about

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current or imminent water quality violations in the lower Caloosahatchee River?
THE COURT: Do you know? Yes or no.
THE WITNESS: Yes.
BY MR. SCROGGIN:
Q. And was it premised upon concerns about then current or imminent water quality violations in the lower Caloosahatchee River?
MR. QUINN: Objection; leading.
THE COURT: Overruled.
THE WITNESS: The concern, I think, that was expressed to us was that the district office would like assistance in evaluating the health of the river and any trends that might need to be addressed through their permitting process.
To my knowledge, there were not any significant current problems that they felt needed to be addressed.
BY MR. SCROGGIN:
Q. If there were no current problems that they felt needed to be addressed -- by that, sir, do you mean that there might have been future problems that might need to be addressed?
MR. QUINN: Objection, Your Honor. This is a hypothetical question posed to this witness in his fact capacity, and it's improper. Objection.

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THE COURT: Well, I think the question is vulnerable. I'm not sure on that basis, but I'll overrule the objection.
THE WITNESS: Could you repeat the question, please?
THE COURT: Read the question back.
MR. SCROGGIN: I'll rephrase the question, Your Honor.
THE COURT: All right.
BY MR. SCROGGIN:
Q. What does the 1981 waste load allocation, the Government's Exhibit 349, predict, if anything, about future problems in the lower Caloosahatchee River?
A. The study revealed that there were -- there should be concerns over future water quality, and there may be some particular things that would need to be done to protect water quality under future scenarios of design and treatment and discharge.
Q. I would direct your attention, sir, to Page 17 of Government's Exhibit 349 and in particular to the section 3.6 entitled Waste Load Allocation, the two paragraphs that are contained there.
THE COURT: Just a moment.
(Pause.)
THE COURT: Go ahead.

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BY MR. SCROGGIN:
Q. And I would ask you, sir, what does this document say regarding waste load allocations for the Waterway Estates facility?
A. It says in the first paragraph, The allocations for the present design flows and present locations are for Waterway Estates no discharge.
Q. Was it your understanding that that statement required Waterway Estates to cease discharge?
A. No.
Q. And why not?
A. During the study, it was determined that there may need to be some changes made to both the treatment and the location of the outfall for Waterway Estates as well as other facilities. Based on information we had received from our district office, it was felt that Waterway Estates would likely tie in to another facility, as opposed to undergoing those upgrades and possibly relocating the outfall. And the facility was dropped from future -- dropped from the study basically at that point in time. It was not considered further in completing the study.
Q. I would direct your attention to Page 12 of the same document, the last paragraph on the page, the second sentence, beginning, The Waterway Estates treatment plant. Would you mind reading that, sir?

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A. The Waterway Estates treatment plant was eliminated from further modeling due to the assumed tie-in to the Cape Coral facility and the assumed impracticality of upgrading to AWT and relocating the outfall for such a small flow.
Q. Is that statement consistent with the explanation you have just given for why the no discharge waste load allocation did not require the Waterway Estates facility to cease discharge?
A. Yes, it is.
Q. If this 1981 document is not containing requirements, for what purposes has it been used, if any?
MR. QUINN: Objection. It's a leading question, Your Honor.
THE COURT: Overruled.
THE WITNESS: I'm not sure if I know all the purposes for which it's been used. It was offered to our district offices as a planning and guidance document for whatever their needs might be or might have been.
BY MR. SCROGGIN:
Q. In supervising such projects, did you ever have an occasion to have discussions with your staff about when, if ever, dischargers could challenge such waste load allocations developed under your supervision?
A. Yes.
Q. What were those discussions?

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A. There were concerns on the part of our legal staff within the department and concerns expressed by my supervisor and my staff about the nature of the waste load allocations.
MR. QUINN: Objection; hearsay, Your Honor; move to strike that response.
THE COURT: Sustained.
MR. SCROGGIN: May I rephrase the question, Your Honor?
THE COURT: You can try.
BY MR. SCROGGIN:
Q. Did you develop any understanding regarding when, if ever, dischargers could challenge waste load allocations during your tenure at the Florida Department of Environmental Protection?
A. Yes, I did.
Q. And can you tell us what that understanding was?
A. I took the position as the administrator of the section and conveyed that position to our staff and our district offices that the waste load allocations were guidance documents; and since they were not binding and they were not requirements, they were not subject to challenge through the legal process within our agency.
If the documents were used in the permitting process and then as such became binding, the permits themselves, or

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proposed permits, were certainly subject to challenge.
Q. And who, if anyone, would incorporate waste load allocation requirements into a permit?
A. Within the agency, only our district offices.
Q. In such an instance, would a provision of a waste load allocation then become required and binding as opposed to merely planning and guidance?
A. Yes.
Q. Are there other factors that a district engineer would consider other than existing waste load allocations in determining state permit limits?
A. Yes, there are.
Q. What are those other factors?
A. The district offices, in deciding -- in making their permitting decisions, took the information that we had developed into play -- or under review for making their decisions, but they also looked at any existing water quality data. They frequently looked at the incidence of complaints, if any had been filed with the agency, regarding a particular discharger; history of other problems, such as fish kills or odor or color complaints, algae blooms; any other information that they might have on the water body and the discharger in question that might give them an indication of whether or not there were any problems out there that need to be addressed in the permitting process.

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Q. Can you point to anything in this document, sir, that requires Waterway Estates to cease discharging into the canal to which it was discharging at the time this study was conducted?
A. No, sir.
Q. Can you point to anything in this study that requires the Waterway Estates facility to move its outfall from the canal to the six-foot contour line?
A. No.
Q. Can you point to anything in this 1981 waste load allocation study that requires the Waterway Estates facility to upgrade its treatment facility from better than secondary to the still cleaner advanced wastewater treatment?
A. No.
Q. In preparing your expert report, did you reach any findings and conclusions regarding the health and trends in the health of the lower Caloosahatchee River?
A. Yes, I did.
Q. Can you tell me what those conclusions were?
A. Based on primarily the 12 years of data that I described earlier and the intensive surveys and other documents that I reviewed, it is my opinion that the overall health of the Caloosahatchee River I considered to be good.
Furthermore, with respect to trends, I could not determine that there were any trends to indicate that the

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water quality was either improving or declining in the river. It seemed to be pretty much steady throughout the study period.
Q. Did you reach any conclusions regarding whether or not the Waterway Estates facility had any measurable impact on the health of the Caloosahatchee River?
A. Yes, I did.
Q. And what was that conclusion?
A. I could not locate any data that would indicate that there was an impact -- a measurable impact or discernible impact from the Waterway Estates discharge.
Q. Did you reach any conclusion regarding whether or not moving Waterway Estates' outfall from the canal to the six-foot contour line had any beneficial impact on the health of the Caloosahatchee River?
A. Again, I found no data that would indicate that there was any difference in the water quality after moving the outfall. I simply could not find it.
Q. And what is the health of the Caloosahatchee River before and after the events that are at issue in this litigation; namely, the upgrade to AWT at Waterway Estates and moving the outfall of the six-foot contour line?
MR. QUINN: Objection; compound question, Your Honor.
THE COURT: Do you understand the question?

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THE WITNESS: I thought I did.
MR. SCROGGIN: I will rephrase the question if it would be more helpful.
BY MR. SCROGGIN:
Q. What is the health of the Caloosahatchee River which you have testified is unchanged during the period of time of your study from 1982 to 1994?
A. I would consider it good.
Q. And can you tell me what "good" means in terms of apprising the health of a river?
A. Well, I looked at various water quality parameters that I consider indicative of the health of a water body. In the period of record, there were occasions when for some of those parameters values would rise and fall. This is a very dynamic system, as most water bodies in Florida are, so water quality does fluctuate over time.
But in general, those parameters fell within what I would consider to be generally accepted ranges for water bodies such as this. It would indicate basically good water quality, good health.
Q. Can you tell me if you reached any conclusion regarding problems or potential problems with respect to nutrient loadings of the lower Caloosahatchee River during the period of your study?
A. With respect to nutrient loadings, both the nutrient

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concentrations, that is, nitrogen and phosphorus concentrations, and as well the clorophyll concentrations, which are sort of a measure of the productivity of the river, fell generally within good or acceptable ranges. Again, there were sporadic occasions where the values would fluctuate; but overall, I would consider those generally good.

Q. I'll show you, sir, behind you on the easel the enlarged chart that has been previously marked as Florida Cities' Exhibit 92 entitled Nitrogen Discharged to River. This is a table from the expert witness that we -- has previously testified in this case, Mr. Douglas Smith.

I will ask you, sir, do you recognize this table? Have you seen it before?

A. Yes, I have.

Q. And can you tell us the relationship, if any, of this table to the answer you have just given regarding nutrient loadings for the lower Caloosahatchee River during the time of your study?

THE COURT: Just a moment.

MR. QUINN: Your Honor, this chart was not within the expert report of this witness. It was in the expert report of Mr. Smith and at the time -- therefore, at the time he wrote his report was locked into his testimony. He couldn't have --

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MR. SCROGGIN: It's in evidence, Your Honor.

Might I ask him if it's consistent with the conclusions of his report?

THE COURT: I'll sustain the objection.

THE WITNESS: Would you mind repeating the question?

THE COURT: No, you don't have to answer it.

THE WITNESS: Oh, I'm sorry, Your Honor. I misunderstood.

BY MR. SCROGGIN:

Q. Can you tell me what data, if any, you found regarding the health of the canal to which Waterway Estates was discharging until it moved its outfall to the current six-foot contour line?

A. I did not locate any data from the canal system that would indicate that there were any problems. No data existed in the canal.

Q. Based upon your experience in planning, overseeing and taking such data in the past, do you have any opinion as to why certain areas are chosen for data collection and other areas are omitted from data collection?

A. Well, indeed, in this study, we discussed the scope of our study with our district office and within our staff in Tallahassee. It was felt that we would focus on the open water body of the Caloosahatchee River and not focus as much

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on the tributaries with respect to dischargers, such as Waterway Estates. The facility and the discharger were located very close to the river system, and we did not undertake a study of the specific area in the vicinity of the outfall. It just wasn't decided that it was something that we needed to, frankly, worry about in this study.

Q. What criteria would you use -- did you use in determining whether or not to sample the waters of the canal as opposed to the waters of the river?

A. Well, there really were two things that we were taking into consideration: One, of course, as I have already mentioned, was the distance from the facility and the discharge point to the river; that it was such a short distance that given the nature of the study and the size of the study area, we didn't feel that we should focus on such a small distance.

But more importantly, I think, if our district office had had any history of complaints or problems or violations in that canal, we would have included the study and -- that area in the study area. We had, you know, the resources and the expertise to look at the canal; it just simply wasn't an issue with our district office or with us at the time.

Q. Can you tell me what events might have triggered your sampling of the canal for this particular intensive survey?

MR. QUINN: Objection to speculation, conjecture.

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THE COURT: Sustained.

BY MR. SCROGGIN:

Q. What was the closest sampling station in the data you reviewed to the Waterway Estates facility?

A. If I recall, I believe the closest station that I could locate was in, I believe it was, a 1987 intensive survey and it was over a half a mile away.

Q. Would such a station be able to measure the impact of the Waterway Estates discharge?

A. Not in my opinion.

Q. And what's the basis of that opinion?

A. Well, the Caloosahatchee River is a very, very large estuary in this area. The Waterway Estates discharge was a relatively very, very small discharge.

Given the distance and travel time out to that station, I don't believe there would be any measurable impact discernible from the data that I could find.

Q. Did your study look at the risk of environmental harm caused by the Waterway Estates discharge into the Caloosahatchee River or into the canal?

A. Not really; only in a sense that we didn't --

THE COURT: Just a moment.

MR. QUINN: Objection; move to strike everything after "not really."

THE COURT: Sustained. It will be stricken.

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BY MR. SCROGGIN:
Q. Mr. Armstrong, have you reviewed the expert reports submitted by Mr. Mark Klingenstein in this litigation?
MR. QUINN: Objection. This goes beyond the scope of the items as set forth in the report.
MR. SCROGGIN: Your Honor, may we address that, please?
THE COURT: Yes.
BY MR. SCROGGIN:
Q. I will ask you, sir, did you hear his --
THE COURT: Wait a minute. Wait a minute. Can you address that? I thought you wanted to be heard.
MR. SCROGGIN: My understanding, Your Honor, was that the limitation on discussions of expert reports of other -- by each side was limited only to Mr. Smith and did not apply to any of the other experts.
THE COURT: Well, you assumed wrong.
MR. SCROGGIN: Yes, Your Honor.
THE COURT: Sustained.
MR. SCROGGIN: I would like to ask, Your Honor, several questions regarding what he heard in Mr. Klingenstein's testimony, if I might.
MR. QUINN: I'll object to that line of questioning, Your Honor. It's irrelevant. He's here as an expert in certain areas; and if it's not in his report, he

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can't testify to it, so why are we going to ask him what he heard here?
MR. SCROGGIN: I will limit my questions, Your Honor, to those areas in which he has been offered and accepted by the Court as an expert.
MR. QUINN: I will object, Your Honor, on the basis that those opinions will not be within his report.
MR. SCROGGIN: Can I respond, Your Honor?
THE COURT: Yes, sir.
MR. SCROGGIN: They are within the areas of expertise that he has been accepted by -- offered, proffered and accepted by this Court; and they are questions relating to and underlying the conclusions he reached in his own expert report.
THE COURT: Well, I guess we're getting to an issue as to whether an expert should be permitted to sit in the courtroom and listen to the testimony of another expert and then engage in a critique of the other expert's testimony, and I don't believe that's permitted.
Now, if you want to challenge that assumption --
MR. SCROGGIN: No, Your Honor.
THE COURT: -- I'd be glad to hear from you on that.
I'm not sure I'd be glad, but I would be willing to hear you on that.

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MR. SCROGGIN: No, I will not challenge that, Your Honor.
THE COURT: All right.
MR. SCROGGIN: I have no further direct questions of this witness.
THE COURT: Okay. We're going to recess for lunch until 1:35.
(The luncheon recess was taken.)

THE COURT: All right Mr. Quinn.

MR. QUINN: Yes, Your Honor. I don't believe Avatar Holdings has any questions.

MR. HIRD: That's correct.

THE COURT: Very well.

CROSS EXAMINATION

BY MR. QUINN:

Q. Good afternoon, Mr. Armstrong.

Sir, with regard to exhibit United States 349 the, wasteload allocation documentation, Lee County, isn't it true that the allocations in that document were prepared at the request of Fort Myers District Office due to pending requests for permit renewals?

A. I believe that was part of it.

Q. Okay.

And, sir, also, isn't I true that with regard to that same document, it was decided to re-evaluate prior allocations in this 1991 wasteload allocation document, is that correct?

A. That is correct.

Q. Okay.

Sir, isn't it true that in the 349, the wasteload allocation document, the Waterway Estates Treatment Plant was eliminated from further modeling through an assumption it would tie into the Cape Coral Facility?

A. That's correct.

Q. And it was also assumed that it would be impractical to upgrade the plant to AWT and to relocate the outfall, isn't that correct?

A. That's my understanding.

Q. But in fact, the plant did relocate its outfall, isn't that correct?

A. That's correct.

Q. And the plant has upgraded to AWT, isn't that correct?

A. Yes, I believe so.

Q. Sir, the relocation of outfall to the middle of the Caloosahatchee River has improved the dissipation of pollutants, isn't that correct?

A. I would assume so. I don't know if that's been proven, but I would assume it has.

Q. Common sense would indicate there's better dispersion in the middle of the river, isn't that right?

A. That's correct.

Q. Mr. Armstrong, isn't it true there are no water quality data supporting any conclusion about the historical quality of water at the Waterway Estates outfall?

A. At the previous outfall?

Q. At the previous outfall, sir?

A. I could find no data that I could point to that said that there was any impact.

Q. You could find no data at all, isn't that true?

A. I found data, but not in the vicinity of the outfall. The closest data I found were too far away.

Q. My question, sir, is, there is no -- there are no water quality data supporting any conclusion about the impact at the prior Waterway Estates outfall, isn't that true?

A. I agree with that.

Q. Mr. Armstrong, there are no water quality data supporting any conclusion about the historical quality of the water for the canal into which the Waterway Estates Plant used to discharge, are there?

A. That is correct.

Q. And, sir, there are no water quality data supporting, in fact, any conclusion about the historical quality of water for the area at the intersection between the canal and the Caloosahatchee River, isn't that correct?

A. Again, there were no data collected at that point and the closest data I felt were too far away to draw any conclusions.

Q. It is -- there's no data?

A. There is data, there's not data at the receiving points. There's data in the area, but not at that point.

Q. Excuse me, there's no data upon which you can base a conclusion as to either degradation or improvement of the water quality, can you?

A. That's correct.

Q. Sir, the data that you examined in your report had no

bearing whatsoever on localized impacts or effects due to the -- on pollutant discharge, is that correct?

A. I'm not sure if I understand what you mean by "had no bearing on." Could you maybe explain that?

Q. Sure. Let me ask the question, withdraw the question, I'll ask it a different way.

Sir, there was no data that addressed localized impact at either the prior outfall or at the current outfall in the middle of the river, is that correct?

A. That's correct.

Q. And, sir, the data which you did examine, the closest of which you said was about a half mile away, showed no trends in water quality either, improvement or degradation, isn't that correct?

A. That's correct.

MR. QUINN: Thank you.

No more questions, Your Honor.

THE COURT: Any redirect?

MR. SCROGGIN: I have only one question on redirect.

REDIRECT EXAMINATION

BY MR. SCROGGIN:

Q. You were asked regarding data on localized impacts in the cross examination, Mr. Armstrong. Does that mean that there were localized buildups of pollutants in the canal?

A. Not based on the information that I reviewed.

Q. Is there a likelihood there was a localized buildup in the canal if there's no data --

MR. QUINN Objection, calls for speculation. He is beyond the scope of my cross examination.

THE COURT: I'll sustain the objection.

MR. SCOGGIN: I have no further questions.

THE COURT: Thank you, sir. You may step down.

Call your next witness.

MR. BAISE: Your Honor, the Defendant Florida Cities Water Company calls Roger Hartung.

Thereupon,

ROGER HARTUNG,

having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Take a seat in the witness stand, please.

MR. QUINN: Your Honor, if I may be heard.

On Monday last, the Court reserved ruling on the United States' motion to exclude Mr. Hartung's testimony. At this point in time, we'd like to renew the motion.

THE COURT: All right, sir.

MR. QUINN: May I be heard on that?

THE COURT: Yes, sir.

MR. QUINN: If it's okay, I'll speak from here.

THE COURT: I think we can probably hear you.

MR. QUINN: For Mr. Hartung's testimony to be admissible under Rule 702, it must assist the Court to understand the evidence and to determine a fact in issue or to determine a fact in issue you. Mr. Hartung's report does neither. There's no evidence that Mr. Hartung can help this Court to understand the evidence in this case.

Simple and straightforward, Florida Cities has violated the Clean Water Act. It has discharged without permits, it has discharged pollutants in excess of permitted levels and the United States commenced an enforcement action to recover civil penalties.

The Defendants presented their case on mitigation and you may hear testimony that certain discharges didn't really exceed permitted levels or that certain exceedances were unavoidable or there was not any environmental harm or significant environmental impact. Those are the Defendants -- what the Defendants will allege, but Mr. Hartung can't testify to any of these.

In fact, Mr. Hartung's report doesn't even attempt to apply the facts of this case to the EPA policies and procedures that he is going to be preferred as an expert upon.

In addition, his testimony will not assist in the determination of a fact in issue. The only fact in issue is what is an appropriate penalty against Florida Cities in this instance.

My understanding is that Mr. Hartung will not address any issues as to Avetar. In addition, in reaching a decision on the issue of the appropriateness -- appropriate amount of penalty, the Court must apply the statutory factor as set forth in the Clean Water Act. The only factor Mr. Hartung can opine on is the catchall quote, such other factors as justice may require, unlike factors such as economic benefit or environmental harm or seriousness of violation or ability to pay.

That factor goes to the equities of this case which is something that this Court and this Court is totally equipped to decide without resorting to outside experts.

Again, Mr. Hartung doesn't allege that the -- in his report, Mr. Hartung does not allege EPA violated any law or any regulation in bringing this case, nor does he point to any alleged violations of EPA's own policies or any regulations, nor does he attempt to put the facts of this case into any kind of prospective upon which the Court can make a mitigation of penalty.

Your Honor, the United States submits that Mr. Hartung is no more qualified to render an opinion in this case about what the appropriate penalty is than I am, and that for those reasons, we move to exclude Mr. Hartung's -- we renew our motion to exclude Mr. Hartung's expert testimony.

THE COURT: Mr. Hartung, let me -- I may have some

dialogue with the attorneys here. It would probably be best not to have your presence. Would you mind please stepping out into the corridor and we'll be with you in just a moment.

Go ahead, Mr. Baise.

That's all right, you can go ahead.

MR. BAISE: Thank you, Your Honor.

Mr. Hartung has been designated as an expert witness by the Defendant Florida Cities. The Defendant has been on notice for some period of time with regard to Mr. Hartung. In fact, the Defendant even missed the opportunity to take Mr. Hartung's deposition which they were given the opportunity to do, so it strikes me somewhat disingenuous for the Government to indicate they want to strike his testimony when they really do not know exactly what his testimony is going to be, number one.

Number two, with regard to Mr. Hartung, here's an individual who has worked for the EPA, has supervised over fifty thousand permits in their enforcement in the agency, and can, we believe, assist the trier of fact with regard to such other factors as justice may require, and also, the seriousness criterion, Your Honor, because Mr. Hartung will point out the rules, the policies, the procedures with respect to EPA and how it abused those particular procedures in taking this permit away from Florida Cities. Obviously, list he's not going to testify to the facts with regard to Waterway Estates, but he

will lay out what the agency's policies and procedures were with regard to approving wasteload allocations.

This Court has heard a great deal about a 1981 wasteload allocation. Mr. Hartung helped develop the wasteload allocation program in part at EPA. He will point out to Your Honor that wasteload allocations are very important documents, they must go through a very careful screening and a approval process and if they do not go through that careful approval and screening process, they are unusable with an NPDES permit. That would mean that the wasteload allocation used in this permit was improper, unlawful. Therefore, we think it's very important, very helpful to the Court in terms of looking at the seriousness of the violation here.

The Government is accusing Florida Cities of having over a thousand days of discharges without a permit or discharge into the wrong location at the Waterway Estates into the Caloosahatchee River. Well, if the Government does not come in here with clean hands, Your Honor, whether or not it has made a mistake, and granted, our client did not appeal at the time they should have appealed, the engineers were looking at the situation, not lawyers, but the fact is, the Government has an obligation to abide by the rules, its own policies and procedures.

Mr. Hartung can lay this out because he's been through these experiences, he's worked on national committees,

Your Honor, looked at issues such as this and I think can be very helpful. The testimony is, I believe, very helpful in putting the six criteria into context for this Court, one, seriousness, two, such other our factors as justice may require. Thank you.

THE COURT: Mr. Quinn.

MR. QUINN: Yes, Your Honor. Counsel said we don't know what Mr. Hartung is going to testify to and that is patently wrong. Federal Rule of Civil Procedure 26 regarding the disclosure of experts states as follows: The report shall contain a complete statement of all opinions to be expressed and the bases and reasons therefor. And, Your Honor, there are no opinions as to any application of what EPA generally does in Region VI and what actually happened here, therefore, none of those opinions are helpful.

Second, the appropriate manner for these issues to be raised is through argument of counsel as is evident from the arguments here, not through the testimony of a purported expert witness on what EPA could have done without any application to the facts in evidence.

Your Honor, the Court is entirely capable of applying argument to the facts of this case and we don't need the witness here to do it, sir.

MR. BAISE: Your Honor, the Defendant finds it most interesting that EPA or the Defendant Department of Justice and

EPA have not brought forward their witnesses that they could have brought forward to assess to, one, what the policies and procedures of the agency were, even those individuals who were involved in the enforcement action with respect to the three facilities here, so, we felt it incumbent upon to us bring to the Court's attention what EPA's policies and procedures are with regard to how it handles NPDES Permits, how it handles wasteload allocations in those permits, and then, enforcements that can be taken upon those permits.

What Mr. Hartung has done in his report and what I was referring to a moment ago, Counsel, is that the Government had not taken Mr. Hartung's deposition, clearly it has the report. We prepared the report as required by the Court.

THE COURT: I'm going to cut this short and I'm going to overrule the objection. I'm going to permit the testimony. If the Court, as we get into this further and/or even subsequent to his testimony, determines that it is not probative of any of the issues in the case or is otherwise inappropriate for the Court to consider, we don't have a jury and I can recede from that if I find it necessary. I'm a little bit concerned about it. We're not here -- well, enough said. All right.

Ask Mr. Hartung to step back in, please.

THE CLERK: State your name and spell your last for the record.

THE WITNESS: Roger C. Hartung, H-A-R-T-U-N-G.

DIRECT EXAMINATION

BY MR. BAISE:

Q. Good afternoon, Mr. Hartung.

A. Afternoon.

Q. What is your occupation?

A. I'm an environmental consultant.

Q. How long have you worked in the environmental field, Mr. Hartung?

A. About twenty-four years.

Q. What professional degrees do you hold?

A. I have a degree, a Master of Science Degree from the University of Wisconsin in water resource management, and a Bachelor of Science Degree in civil engineering from University of Texas.

Q. When were you first employed by EPA?

A. December, 1971.

Q. So, you worked for EPA approximately twenty-five years?

A. I worked for them for twenty-three years until my retirement on September 30, 1994.

THE COURT: When were you at the University of Texas?

THE WITNESS: University of Texas, I graduated in 1961, January, 1961.

THE COURT: Thank you.

BY MR. BAISE:

Q. Do you have any professional degrees beyond what you received from the University of Texas, Mr. Hartung?
A. No, sir. Well, just the Master of Science at the University of Wisconsin that I mentioned.
Q. Where were you located when you were working for the U. S. Environmental Protection Agency, sir?
A. My career with EPA was spent in the Dallas Regional Office, Region VI?
Q. Did there come a time when you became aware of litigation between the United States and Florida Cities?
A. Yes, I think it was in September of last year.
Q. Were you asked to prepare a report regarding EPA's policies and procedures relating to the Clean Water Act relating to this litigation, Mr. Hartung?
A. Yes, I was.
Q. Did you prepare such a report?
A. Yes, I did.
Q. Did you write the report, Mr. Hartung?
A. Yes.
Q. Did you have any assistance in writing the report, Mr. Hartung?
A. No, I did not.
MR. BAISE: Your Honor, I would like to have identified as Florida Cities' Trial Exhibit Number 1, Mr. Hartung's report entitled, report on procedures used in the

implementation of the national pollutants discharge elimination systems authorized by the Federal Clean Water Act dated November 10, 1995, marked as Defendant's Number 1 and I ask this be moved into evidence, Your Honor.
MR. QUINN: Your Honor, I object on the same basis that I stated earlier.
THE COURT: All right. It will be overruled, it will be received.
BY MR. BAISE:
Q. Mr. Hartung, on page 1, you note that you were employed by Roy F. Weston, Incorporated. Is that still correct?
A. No, I'm no longer employed by them.
Q. Why not?
A. I was a manager there at the Fort Worth office. They no longer have a Fort Worth office. I'm self employed now.
Q. Mr. Hartung, would you briefly describe the position you held at EPA over your tenure with that agency?
A. Yes. From 1971 to about 1974, I was a staff environmental engineer in the water quality planning branch in the water division in EPA Region VI.
In 1974, I was promoted to section chief in that branch. In 1977, I was promoted to the position of branch chief of that same water quality planning branch. I held that position until November of 1981, when I became the chief of the NPDES enforcement branch in the water division. I held that position

for thirteen years until my retirement in 1994. And also, I was on detail at one time, in '87 and '88, a few months in the office of the water enforcement permits at NPDES national office in Washington, DC. I also held a position I think for three or four months at a time, two different occasions, as the deputy water division director of EPA, EPA Region VI.
Q. What experiences have you had in working with EPA Region IV, Mr. Hartung?
A. Uh, I have had experience and worked with them on occasions related to issues that involved both the regions, both in meetings and also conference calls, dealing with water quality issues, enforcement matters, and also I would meet with my counterparts in Region IV twice a year, what was called branch national branch chief meetings were headquarters of EPA and all the regions would attend for about a three day session.
I would meet with them including the other regions, about six days a year, and on occasion, I had the occasion to visit or I was invited over on one occasion to put on a seminar when I was in EPA headquarters down in Destin, Florida. I think it was Destin, and had visited the EPA Region IV offices in Atlanta on two occasions to exchange information about the NPDES program.
Q. What experience have you had serving on the national EPA committees, Mr. Hartung?
A. Quite a bit. I served on national committees that came

up which essentially produced and developed water quality, wrote guidelines for wastewater allocations, water management quality, present guidelines and regulations.
I was also involved in a committee that produced the national oversight NPDES program, oversight guidance. I was on a committee that produced the national enforcement management system that is used by all the regions and States for the NPDES program.
I was co-chair of a national committee once to expedite the processing of civil judicial cases. That was with EPA and Department of Justice.
I was chairman of a national committee dealing with storm water, industrial storm water guidelines. I was on a national committee for several years that worked on the definitions of significant non-compliance that would define what a significant violation of a NPDES permit was.
I was on a national committee, I was chairman of a national committee to come up with national sanitary overflow policies for the agency. I was on a committee on municipal water push prevention that came up with a national policy on that.
I was on a committee to come up with guidance and guidelines for implementing the national municipal policy which was a policy directed at getting most major cities in compliance by July 1st of '88.

And I was on the standing committee, I was chair of that committee for sometime, on the Agency's permit compliance system, computerized data system to track permit compliance and contains all the information about NPDES permits for the United States. I was on some others, but I can't think of them right now.

Q. And has EPA recognized any of your efforts in working in the environmental field over the last twenty some odd years?

A. Yes, I think they did.

Q. How have they recognized your efforts?

A. I received numerous awards including some five bronze medals. I think three of them were at the regional level and two at the national level, for such things as working on the committees that I mentioned.

Q. What are bronze medals so the Court will understand the hierarchy, Mr. Hartung?

A. It's the -- I think it's the highest medal that can be awarded an EPA employee at the regional level. And it's for some accomplishment. I was on a committee which I failed to mention a minute ago that worked on the guidelines for the administrative penalty policy back in '87. I got a bronze medal for that.

I also was working on one committee for municipal water push prevention, and I can't remember the other particular ones, but I also received a regional counsel award in about '88

or '89 and received several, I can't remember how many, what was called regional administrator awards.

Q. Mr. Hartung, in your report, you indicate and you already stated that in '77 you became chief of the water quality management branch and later in '81, the head of the newly created enforcement branch and Region VI was the enforcement branch responsible for overseeing NPDES permit programs?

A. Yes, we were responsible for overseeing the enforcement arena of the permit program.

Q. How many permits were within your oversight, Mr. Hartung?

A. Fifty thousand at the time of my retirement. That includes some Gulf of Mexico oil and gas platforms and some general permits for confined animal feeding operations as well as industrial storm water permits as well as normal discharge permits for industries and cities.

Q. Mr. Hartung, there's been a good deal of testimony in this case about water quality standards. What is your experience in working with the Clean Water Act water quality standards?

A. My initial job when I first joined the agency as a staff environmental engineer as well as section chief and branch chief, I worked for about ten years in the area of water quality standards. My job was to assist the State in implementing the many mandates that came out of the Clean Water Act of 1972 and establishment of the interstate water quality

standards was one of those mandates.

THE COURT: Could I stop you just a second, please? I've got a matter I've got to take up, but I can do it at sidebar independent of this case. Mr. Kunz.

MR. BAISE: You wish us to be excused?

THE COURT: No. Ms., Savage step up to sidebar. I don't need if Reporter.

(Brief pause.)

All right.

Pardon me. Go ahead, Mr. Baise.

BY MR. BAISE:

Q. Mr. Hartung, I'm not sure you were finished with your answer. What is your experience in working with the Clean Water act of water quality standards?

A. I think I was. I worked with the State for ten years and from about '72 through '81 in establishing and revising, upgrading those water quality standards.

Q. What is your experience in working with the Clean Water Act's NPDES permit program, Mr. Hartung?

A. As I mentioned, for the first ten years, '72 through about '81, my experience was in working with the State agency to establish effluent limitations that go into those permits and beginning in '81 through '84, my jobs switched to interpreting those permits and enforcement of them.

Q. What is your experience in working on water quality based

effluent limitations, Mr. Hartung?

A. Almost all of my experience in working with the State is to establish permit limits. We're dealing with water quality based effluent limits, those that had to be more stringent than secondary treatment for cities. Most of my experience dealing with municipals of domestic waste discharges?

Q. What is your experience in working with wasteload allocations in NPDES permits, Mr. Hartung?

A. I wrote the first set of guidelines to the State agencies back in the early '70's to perform those wastewater allocations. This included laying out scopes of services, approving contracts and subcontracts, also approving the final product and also furnishing that information in the permit required for inclusion in the NPDES permits in.

Q. What is your experience in working with the wasteload allocation approval process?

A. Essentially, it was my job for the first ten years of my career with EPA to make sure that these wastewater allocations were done, that they were submitted by the Governors of each of the five States in Region VI to our original administrator for our approval.

I recommended, concurred and reviewed all of these wastewater allocations and recommended approval by the regional administrator, and then it was my job also to make sure they were wastewater allocations which is essentially a water

quality base set of effluent limits were available to be written into the next round of NPDES permits.

Q. What is your experience in working with States in the administration of the NPDES permit program, Mr. Hartung?

A. Quite extensive. None of our States in Region VI until about the late '80's were ever approved or authorized to administer the NPDES program, mostly because of legal reasons. So when I was involved with the program, in those States, it was in a direct enforcement mode, direct implementation mode. That is, our region had to directly track and enforce the NPDES permits, the States had their own State permitting system, and we had to coordinate with the States quite extensively on running two parallel programs.

Q. What is your experience in working with major and minor NPDES dischargers, Mr. Hartung?

A. Most of my experience, I would say about eighty percent was with working with the major dischargers. By major, I mean, for cities and for domestic waste discharges, anyone that has a discharge greater or equal to a million gallons per day is classified as a major, the other dischargers are classified as minor. It's a little bit different system for industrials, it's a rating system, but the majors were the ones we concentrated on because the agency had made a decision to.

THE COURT: Now, this is not responsive to any question, Mr. Baise. He's answered your question.

BY MR. BAISE:

Q. Yes.

What is your experience in working with EPA discharge monitoring reports, Mr. Hartung?

A. Our enforcement program used those almost exclusively to determine -- to detect violation or non-compliance. We used them over compliance inspections. In addition, when I was at the national office of EPA, I was responsible for distribution of all the discharge monitoring reports to all the NPDES authorities, both the States and regions, and for having them pre-printed as far as what the conditions were that the permittee had to meet, either permit conditions or administrator order conditions.

Q. What is your experience with EPA in enforcement responses to violations of NPDES permits, Mr. Hartung?

A. I have had experience with all types of EPA enforcement responses. Most of the responses were informal, either phone calls or meetings, warning letters. That was about eighty percent of our responses. And then we had the formal responses and those consisted of administrative orders. I probably concurred on ten thousand of those in the thirteen years I was in that job.

We initiated some fifty civil -- excuse me -- criminal judicial cases and about two hundred civil judicial cases. I also concurred in and issued, actually had the authority to

issue some three hundred and fifty administrative penalty orders, another form of formal enforcement action.

Q. Mr. Hartung, have you written documents for EPA use and guidelines on water quality standards?

A. Yes, I have.

Q. And what were those documents?

A. Primarily -- you did say water quality standards?

Q. Yes, sir.

A. Primarily guidelines to staff and also to the States on how to paraphrasing the requirements of the laws back when we didn't have regulations and also interpreting EPA regulations.

Q. Would any of these guideline documents go into Region IV?

A. I don't know about the water quality standard documents. No, I don't know.

Q. Have you written documents, guidelines on the NPDES program?

A. Yes, I have.

Q. And what were those?

A. I was a co-author as I mentioned to the administrative penalty policy. And guidance -- actually wrote portions of the national policy and that was distributed to all regions and States that were administering the program.

I've co-authored overflow policy on a national committee which was distributed to all the regions. I've co-authored a municipal water push prevention regional policy which was

distributed nationally prior to the issuance of national policy. I have written all types of boiler plate and things related to administrative orders; how to issue administrative orders, how to issue administrative penalty orders, civil judicial packages that went through the system over at the Department of Justice that were distributed to -- I believe were distributed to all the regions, including Region IV.

Q. Have you written documents, uses, guidelines on wasteload allocations?

A. Yes, I believe I mentioned that I was writing some back in the early days, early '70's, and later on.

Q. What experience do you have in training EPA personnel, Mr. Hartung?

A. Quite a bit.

Q. What are those training items that you have implemented at EPA, Mr. Hartung?

A. In my capacity in the national job that I mentioned earlier, I traveled all over the United States and including Region IV, at their invitation, and trained them on use of the permit compliance system. I have given all types of seminars permittees as well as to States.

I remember specifically we had a round of seminars back in 1987 after one of the amendments to the Clean Water Act where we had a thousand permittees there. I have trained the staff internally in the region, I've trained branch chiefs at

national branch chief meetings, I have trained State legislators at their request, things of that nature.

Q. Branch chiefs you just mentioned in your last answer. Did it include branch chiefs in Region IV, Mr. Hartung?

A. Yes, it did.

MR. BAISE: Your Honor, Mr. Hartung's testimony was -- we laid out in his or in the pre-trial statement was -- Mr. Hartung's testimony will address EPA's general practices and procedures, and internal agency guidance regarding permitting and enforcement matters under the Clean Water Act.

His testimony will address the relationship and interactions between the environmental regulatory authorities of non-delegated States in EPA. It'll also address wasteload allocation approvals, TMDL total maximum daily load development and approval permitting requirements and permit writing, enforcement administrative records, enforcement of NPDES permits, and interpretations of EPA's permitting and enforcement guidance documents and memoranda.

Your Honor, on the basis and by virtue of his specialized knowledge and skill, and with regard to his experience on behalf of Florida Cities, we proffer Mr. Hartung as an expert?

MR. QUINN: We object, Your Honor. First, this is not an area in which expert testimony is normally accepted nor required. And second, on the basis of the reasons set forth in

Daubert versus Merrel Pharmaceuticals, 113 Supreme Court, 2786, we object. In addition, we object on the further basis that Mr. Hartung's expert report which has been entered in evidence as Defendant's Exhibit -- Florida Cities' Exhibit Number 1 contains no opinions regarding any of the facilities at issue in this action.

THE COURT: All right. The objection will be overruled. He'll be permitted to testify.

BY MR. BAISE:

Q. Mr. Hartung, what is your understanding of what the objectives are of the Clean Water Act?

A. Their main objective is, one, is to clean up the waters of the United States to a point where they can be usable for propagation of fish or wildlife and allow for recreation in and on the waters by humans. That is often referred to as the "fishable/swimable goals" of the Act.

Q. How are those objectives implemented?

A. There's a couple more.

Q. Excuse me, I'm sorry.

A. The second main objective is to prevent the discharge of toxic and toxic amounts, that is, to treat it below the toxic level, and the third objective was to set up a national wastewater management planning program that would help to achieve the other two objectives.

Q. How are those objectives implemented, Mr. Hartung?

A. Three different ways. The first way that is achieved is to establish water quality standards as a kind of a base of the pyramid upon which everything is based. Then, to establish what permit limits by the States would establish what permit limits were needed to protect those water quality standards and to issue and enforce those permits.

Q. As noted earlier, we heard a great deal about water quality standards. What is a water quality standard?

A. A water quality standard is a goal set by the State, approved by EPA, but it's a State water quality standard for a particular body of water. The State was required under the Clean Water Act to establish State water quality standards to protect its waters, such as there was a standard on each sub-river or subsection of the streams in the State. It consists of two parts; one is a designated use such as suitable for warm water fishing or contact recreation or things of that nature, and then there is a second part of the water quality standard that is to establish the amount of criteria that would protect that particular designated use, such as establishment of dissolved oxygen levels to protect the propagation of fish.

Q. Why is a water quality standard important?

A. It's important because in the Clean Water Act, it is the legal basis for all the permits that are issued which are -- which can cause cities and industries to build facilities that are wastewater treatment facilities that cost millions and

hundreds of millions of dollars.

Q. How is a water quality standard developed?

A. Well, there was a guidance put out and has been put out for years by the National EPA that was required by the Act that EPA publish some sort of guidance to help the States establish water quality standards. I think there were criteria put out by the national Academy of Sciences on three or four different occasions.

The standards are usually done and the designated uses were a lot of times established by what historically the particular stream segment had been used for, let's say for drinking water supply. For instance, they would put out designated use, drinking water supply, and then this criteria I mentioned had been published by EPA, helped established what numbers, let's say, for fishing, for instance, to what levels dissolved oxygen would be necessary to protect a fishery if that was designated.

Q. All right.

A. So, you establish the water quality standards, then would submit them to the EPA for review and approval.

Q. Why does EPA have to submit water quality standards to EPA for it's approval?

A. You mean the State?

Q. Yes.

A. Well, it's statutory requirements.

Q. How are water quality standards implemented by EPA or the States to protect surface waters, Mr. Hartung?
A. The question was how they implemented?
Q. Yes.
A. Generally through establishment of point source controls, that is, issuance of permits dischargers, industrial and municipal or domestic dischargers, and also through non-point source controls.
Q. Is that what is known as the NPDES Permit Program?
A. The one for dischargers, yes.
MR. BAISE: Your Honor, I would like to have marked as Florida Cities Defendant Trial Exhibit Number 7, training manual for NPDES permit writers.
THE COURT: Well now, they're all marked.
MR. BAISE: You have that in front of you, Your Honor?
THE COURT: Yes.
BY MR. BAISE:
Q. Mr. Hartung, I ask you to turn to Defendant's Exhibit or what has been marked for identification as Defendant's Exhibit Number 7. Do you have that in front of you?
A. Yes.
Q. What is this document, Mr. Hartung?
A. It's the training manual for NPDES permit writers published in May of 1987.

Q. What is the purpose of this document, Mr. Hartung?
A. It was used as a guide to the regional EPA people for actually writing a permit and NPDES permit where the authority rested in the -- at the EPA regional level.
Q. Was there a prior training manual for NPDES required, Mr. Hartung?
A. Yes. As I recall, there was something of this nature, only earlier in the process back in the '70's and early '80's.
Q. Have you used this document in your own work at EPA, Mr. Hartung?
A. Yes, I have.
Q. I direct your attention too page 15 of the training manual. Are NPDES permit writers, Mr. Hartung --
MR. QUINN: Your Honor, objection, if the witness is going to be reading from the exhibit. It's not in evidence. It ought to be.
THE COURT: If he's going to be reading from it, certainly.
Is that what --
BY MR. BAISE:
Q. Is this document published by EPA as far as you know?
A. Yes.
Q. This is an EPA document?
A. Yes. It was written by the office of water enforcement permits in Washington.

MR. BAISE: I move this document in evidence, Your Honor.
MR. QUINN: United States objects on two bases. First, this document is published in May of 1987. The only permit for which is at dispute in this case was denied in 1986, therefore, this document postdates and has little or no effect on that permit. On that basis, we object on the basis of relevance. And that's the only basis, sir.
THE COURT: All right.
Mr. Baise.
BY MR. BAISE:
Q. Mr. Hartung, is it your understanding the document includes any guidance or information for permit writers that was in existance before 1987?
A. Yes.
Q. Any reason to believe this is not a trustworthy document, Mr. Hartung?
A. No.
THE COURT: Well, Okay.
The denial of the NPDES permit was in 1986?
MR. QUINN: January, 1996, Your Honor.
THE COURT: All right.
This is a manual that is dated May, 1987?
MR. BAISE: That is correct.
THE COURT: I have no testimony before me, I don't

believe, that indicates this manual was in effect at the time that the NPDES permit was denied.
BY MR. BAISE:
Q. Mr. Hartung, do you have any reason to believe that the policies set forth in this document were not in effect in January of 19 -- or December of 1986?
A. No, I do not.
THE COURT: Well, still, that doesn't get it. If he has any reason to believe that it wasn't, I don't have any affirmative testimony that, you know, what existed prior to May 1987 in terms of the training manual for permit writers. You want to try to --
MR. BAISE: Your Honor, this was a document provided to us by EPA from its files from Ms. Kadey's files as I recall as the permit training manual. That was the manual that EPA officials used and it was an update of prior manuals and they did not produce prior manuals to us and as Mr. Jacobs notes on the side here, he produced everything that was available to them at the time, so this is the best evidence we have of the training manuals for permit writers during the 1980's.
MR. QUINN: I still object on the basis of relevance, Your Honor. What was available after the permit denial is irrelevant for purposes of analyzing whether EPA did anything wrong or whether there should by any mitigation based on the permit.

THE COURT: Let me ask you this. What did you designate in your objections as to the bases for the objections in the pre-trial submission, Mr. Quinn?

MR. QUINN: May I have a moment, sir?

THE COURT: Yes, sir.

MR. QUINN: Thank you.

Your Honor, I have three bases; irrelevant under 402, hearsay under 802 and hearsay within hearsay under 805.

MR. BAISE: Your Honor, all the Defendant can do is request information from the agency, get it produced in discovery as we asked for and did. This is the permit manual they produced to us as representing the permit training manual that the permit writers used from the agency and it was presumably an update.

THE COURT: Do you have -- what do you have that you're asking the Court to allow you to use this document; on the basis that this -- that you were informed that this is the manual that was used to deny the NPDES permit?

MR. BAISE: Yes or its predecessor. Not this particular one because that would have been impossible, the one as Mr. Quinn pointed out dated May, 1987. But as Mr. Hartung who has already given his experience with regard to dealing with such matters has reviewed this document, it is listed in the documents, he reviewed and he indicated to us that this basically or entirely was the document or type of document that

EPA used for permit writers training in the 1980s.

THE COURT: Well --

MR. BAISE: In fact, may I pose a question to Mr. Hartung?

THE COURT: Yes, sir.

BY MR. BAISE:

Q. Mr. Hartung, you have reviewed this training manual for NPDES permit writers dated May, 1987?

A. Yes, sir.

Q. Have you reviewed prior training manuals for NPDES permit writers?

A. Yes.

Q. In your review of this 1987 document, did you see any changes from any prior manual that you had reviewed relating to training manuals for NPDES permit writers?

A. I didn't note any differences, no.

THE COURT: I'll overrule the objection and I'll receive it.

BY MR. BAISE:

Q. Mr. Hartung, I direct your attention to page 15 of the document in question, the NPDES permit writer' guide. And I direct your attention to page 15, general consideration contents of a permit. Would you summarize your understanding of that particular paragraph, Mr. Hartung?

A. It talks about the particular sections, major section of

a draft permit.

Q. And what are those particular sections that should be in a draft permit, Mr. Hartung?

A. Section concerning effluent limitation of the permit, section about monitoring requirements, other standard conditions and special conditions if there were such things.

Q. So a NPDES permit must have included in them effluent limitations, Mr. Hartung, included in everyone of them?

A. Yes.

Q. I direct your attention to page 16 of the training manual for NPDES permit writers. I direct your attention to the paragraph entitled overview. Would you please summarize your understanding of that particular paragraph, Mr. Hartung?

A. It talks about three methods for determining effluent limitations and they're through effluent limitation guidelines, the establishment of effluent limitations by water quality considerations and another one called best professional judgment.

Q. What is an effluent limitation guideline, Mr. Hartung?

A. Effluent limitation guidelines is what the name implies. These are guidelines that were produced out of our Washington office of EPA that told the permit writer how to put together a technology based permit, that is, this is a set of information about how to write a permit without regard to the receiving waters' water quality.

Q. What is a technology based permit?

A. It's a permit that is written based on a particular -- you apply a certain technology, you get a particular predictable result as far as effluent. As an example, secondary treatment is a technology based set of permit limits.

Q. So all NPDES permits would have to have a technology based limit included in the NPDES permit?

A. As a minimum, the law requires the technology base is the minimum and then processed in was to test to see if the application of technology based permits was enough to protect the water quality standards in a particular water body and then if that was not the case, then water quality considerations came in to bear and the effluent limitations had to be tightened down from the technology based permit.

Q. That is what is known as quality water limited NPDES permit.

A. Yes, the latter that I talked about, yes.

Q. What is the best professional judgment permit, Mr. Hartung?

A. Well, that was used a lot in the early days, back in the early '70's when in lieu of an effluent limitation guideline, the permit writer was left to use his best professional judgment.

Q. So, if you have a technology based permit or a water quality limited permit, you would not be able to write a best

professional judgment permit, Mr. Hartung?
A. That is correct, you would not need to.
Q. I direct your attention to page 28 of this document, Mr. Hartung, section entitled water quality considerations overview. What is your understanding of the purpose of this paragraph, Mr. Hartung?
A. Just a second. (Brief Pause.)
It says that water quality based limitations are necessary to be used in a permit when it's necessary to protect the receiving waters. So water quality standard of receiving waters --
MR. QUINN: Objection, move to strike the answer as non-responsive to the question that was asked.
THE COURT: What was the question that was asked?
MR. QUINN: What was the purpose of the --
MR. BAISE: Your understanding of the purpose of this paragraph, Mr. Hartung.
THE COURT: I'll grant the motion, it's stricken.
What was the -- what was your understanding of the purpose?
MR. BAISE: Yes.
THE WITNESS: The purpose was to instruct the permit writer that in some cases water quality based limitations were required to protect the water quality standards.
BY MR. BAISE;

Q. I direct your attention to page 31 of this training manual, Mr. Hartung, to the paragraph, determination of water quality base limits. What is your understanding of the purpose of this paragraph as it relates to the permit writer, Mr. Hartung?
A. It was to instruct, again, to instruct the permit writer on how to determine water quality based limits.
Q. I direct your attention to the top of page 32, Mr. Hartung, in terms of the water quality based limits, and what is your understanding of the purpose of that paragraph, beginning at the top of page 32?
A. It was to instruct the permit writer on how the process works as far as the establishment of maximum daily loads and how they fit in the permit writing process.
Q. Does it also discuss allocating waste loads, Mr. Hartung?
A. Yes, it does.
Q. What is the purpose of a wasteload?
A. Well, the State has the responsibility of determining how much waste or wasteload a particular body of water can take without violating the State's standards.
So in some cases where the application of the technology based permit limits is not enough to do that, then there has to be an allocation, if you will, a cutback to each of the dischargers and that is what they mean by wasteload allocation. It's actually an allocation, if you want to think of it, of the

cutback or the amount necessary to be taken out of each of the dischargers wasteloads that they're discharging in the stream in order for it to meet the water quality standards.
Q. Mr. Hartung, I direct your attention to page 39 of this training manual to the section captioned, wasteload allocation. You find that, Mr. Hartung?
A. Yes, I have it.
Q. And I direct your attention to the second paragraph or the last paragraph -- second paragraph under wasteload allocation, but the last paragraph on the page. Would you read the first two sentences, Mr. Hartung?
A. A regulatory agency's first step in establishing a wasteload allocation scheme for a water segment is to determine the total maximum daily load, TMDL, of discharges a segment can receive without exceeding the applicable water quality standard. The TMDL established by the State must be submitted to EPA for its approval before incorporated into the State's water quality management plan.
Q. Does this comport with your understanding of EPA's policies and procedures, Mr. Hartung?
A. Yes.
Q. I direct you to the top of page 40. Would you read the first two sentences of the first paragraph at the top of page ;40 in the permit writer's manual.
A. Excuse me, did you say the first two sentences?

Q. Yes.
A. Once the State has determined the amount of discharge that a segment can assimilate without violating water quality standards, that amount less the amount of capacity reserved by the State if any is allocated among dischargers, the States are responsible for establishment and implementation allowable schemes?
Q. Would you like to go to the board there, Mr. Hartung, and draw out the wasteload allocation process and approval process, please?
A. Yes.
Q. And mark that for identification Defendant Florida Cities' 207.
THE COURT: Well, you can if you want it marked, you can put a label up there.
MR. BAISE: Yes, sir, we'll do that during the break, Your Honor.
THE WITNESS: it's going to be a very simply applied, overly simplified explanation here, but let's say for instance this is a stream segment and the water quality standard is the designated use for warm water fisheries. Not a very good looking fish. And the criteria to support the use, the second part of the water quality standard let's say was five parts per million dissolved oxygen, not allowed any discharge or any other thing going, oxygen-demanding material going into that

segment would allow the water quality standard to go below five. The total maximum daily load is comprised of a load allocation plus a wasteload allocation and let's say we had three cities discharging into this, say city A, city B and city C, less some type of non-point source, source of waste or oxygen-demanding material, the load allocation is the sum of the background material, amount of wasteload that comes in upstream, background loading, but any non-point source loading coming off farms or fields, plus a growth reserve. The statement, when you talk about non-point source, you're just talking about non-specified source of discharge.

BY MR. BAISE:

Q. Describe non-point force for His Honor, Mr. Hartung. Is that the term of art under the Clean Water Act?

A. Examples of non-point source would be storm water that contained street runoff. You have certain metals and all that accumulates on the streets, that would go in a culvert, storm water culvert. Another source of non-point sources would be off a field, let's say an insecticide sprayed on a field might wash off when it rained. Non-point source generally only get into the stream when it's raining. It's runoff, street runoff, any type of water that reaches the stream by sheet flow or not coming out of a pipe, let's say.

And we talk about dischargers, normally talk about coming out of a pipe, either a pipe coming out of an industry or pipe

coming out of a waste treatment plant. But this growth reserve is for really reserved for someone else that the State might want to allow to discharge into a stream.

A wasteload allocation, excuse me just a second, is the sum --

THE COURT: Just a moment.

(Brief pause.)

All right, go ahead.

THE WITNESS: The wasteload allocation would be the sum of the point dischargers, that is the A, B and C. Let's say the total maximum daily load for this segment had been determined by the State to be a hundred and thirty thousand pounds per day of BOD or oxygen-demanding material. And let's say the State had reserved for the load allocation of thirty thousand pounds per day. That means that the sum of the point dischargers cannot exceed thirty from a hundred and thirty cannot exceed a hundred thousand pounds per day of BOD.

The first test that is applied for these dischargers when analyzing what you need if you needed a wastewater allocation is to apply technology based permit limits. That is secondary treatment for these three cities. So let's say apply secondary treatment A, B and C, and you get secondary equals, let's say A had sixty thousand pounds per day, B consisted of thirty thousand pounds per day and C another thirty thousand. K stands for thirty.

THE COURT: Stands for thirty?

THE WITNESS: Yeah, in engineer jargon. You can say sixty K, that means sixty thousand. Secondary equals a hundred and twenty thousand pounds per day. Well, as you can see, a hundred and twenty thousand pounds per day exceeds the sum of what is allowed for wasteload allocation or for the dischargers. It exceeds it a hundred -- it's a hundred thousand compared to a hundred and twenty thousand, so that tells you that you must go beyond the technology based permit limits, and the wasteload allocation must equal no more than a hundred thousand pounds per day.

So what you have to do is go in there and say water quality based limits must equal -- the wasteload allocation must not exceed a hundred thousand pounds per day, so you add up, you cutback A, let's say, to fifty thousand pounds, B, twenty-five thousand pounds, and C, to twenty-five thousand pounds. The reason of this previous example of secondary treatment, this was sixty, thirty, thirty, so fifty percent of the available is fifty thousand pounds. This one would be twenty-five percent, this one would be twenty-five percent. Comes out to a hundred thousand pounds per day, so the two match and then you go ahead and apply the water quality based limits and issue your permits. The permits would be issued for these figures here, fifty thousand, not to exceed fifty thousand pounds per day, that comes out to be a certain

concentration, you have flow and concentration and you had loading and the most important is the pounds per day.

BY MR. BAISE:

Q. Who recommends those wasteload calculations in the first instance, Mr. Hartung?

A. I didn't understand the question.

Q. Who generates those wasteload allocations in the first instance that you have just described here, Mr. Hartung?

A. The State is required to generate those by the law. Wasteload allocations is just another way of describing water quality limited effluent limitation permits.

Q. Based on your experience, what is EPA's policy after receiving a State generated wasteload allocation and approving that wasteload allocation before it incorporates the wasteload allocation into an NPDES permit?

A. What is their policy?

Q. Yes, what is the policy, what is EPA's policy with regard to approving wasteload allocations before they go into an NPDES permit?

A. It's required by the statute as well as policy procedures, regulations that the EPA approve or disapprove the wasteload allocations within thirty days of receipt.

MR. QUINN: Objection, Your Honor, move to strike. That calls for legal conclusion. The witnesses has not been qualified as an expert in legal matters.

MR. BAISE: I didn't ask him a legal question. I asked him what EPA's policy was regarding --

THE COURT: I'll overrule the objection except that I'm concerned about the period of time we're talking about here. If you want to limit your question to when the policy he's talking about was applicable, I'll overrule the objection.

BY MR. BAISE:

Q. Mr. Hartung, in 1986, was it EPA's policy to require the approval of wasteload allocations before the wasteload allocation was incorporated into a NPDES permit?

A. Yes, it was. The law established that in 1972 as a requirement.

Q. Was it also EPA's policy in 1981 to require the approval of wasteload allocations before incorporating such wasteload allocation into a NPDES permit?

A. Yes.

Q. In your opinion, Mr. Hartung, why is it important to have an approval process where wasteload allocation --

MR. QUINN: Objection, that's not within Mr. Hartung's expert report.

MR. BAISE: It is within his expert report in terms of his describing policies and procedures relating to approvals of wasteload allocations.

MR. QUINN: Your Honor, if I may, the specific question asked is for his opinion on the importance of an issue

that is not within his expert report and I object to eliciting a response on that basis.

THE COURT: I'll overrule the objection.

THE WITNESS:: In my opinion, it's important that this -- excuse me, could you repeat the question?

BY MR. BAISE:

Q. Yes. In your opinion, why is it important to have an approval process for the wasteload allocation you have just described up here this afternoon?

A. It's important because in some States there are several different agencies that are generating these wasteload allocations, and in order to have an orderly process to make sure it was the official submission by the State designated agency that was designated by EPA to submit, and lastly, it's important because those do, once they're approved, are used in issuance of permits that generate wastewater treatment plants, that cost millions and hundreds of millions of dollars.

Q. Mr. Hartung, with respect to the questions I have just been asking you with respect to this manual, was this the same guidance that was given to permit writers before January of 1987?

A. Yes.

Q. This was the same guidance that was in effect when the permit was denied in December of 1986?

MR. QUINN: Objection, Your Honor, this is assuming a

fact not in evidence and asking this witness to testify about something which was not in his report. We've already established -- well, that's it, Your Honor.

THE COURT: Overruled.

THE WITNESS: Would you restate the question, please?

BY MR. BAISE:

Q. Is this the same guidance to NPDES permit writers that was in existance in December of 1986 when the permit was denied?

A. I don't know anything about permits being denied by --

THE COURT: All right, then just eliminate that part of question. How about the --

THE WITNESS: it was the guidance that was in effect at that time, yes. This guidance or something like this guidance which contained all the basic components which was based on the laws and regulations that was passed back in the '70's.

MR. BAISE: Thank you, Mr. Hartung.

Your Honor, I would like to have marked for identification Defendant's Trial Exhibit Number 4, EPA's review and approval.

THE COURT: All of these are premarked, correct?

MR. BAISE: Correct. Just my standard line, Your Honor.

THE COURT: Which one?

BY MR. BAISE:

Q. FCWC Trial Exhibit Number four, do you have it in front of you?

A. Yes.

Q. Are you familiar with this document, Mr. Hartung?

A. Yes.

Q. Would you describe this document for the record, Mr. Hartung?

A. It's a memorandum from EPA, Washington, D.C., from the monitoring and data support division, dated March 25, 1986, which lays out Epa's review and approval procedures for State submitted total maximum daily loads and wasteload allocations.

Q. Did you use this document in your work, Mr. Hartung?

A. I used previous documents like this. By this time in 1986, I was in the enforcement program.

MR. BAISE: Your Honor, I'd like to move in.

This is an EPA document, Mr. Hartung.

THE WITNESS: Yes.

BY MR. BAISE:

Q. Published by EPA?

A. Yes. We were briefed on it. At the time, there was a national meeting, I think it was in San Francisco, wherein permits, all the national permit branch chiefs from the region as well as enforcement branch chiefs and water quality planning branch chiefs were briefed about this document.

Q. Any reason to doubt the trustworthiness of this document, Mr. Hartung?
A. None.
MR. BAISE: I would move this into evidence, Your Honor.
MR. QUINN: Objection, Your Honor, on two bases. First is relevance as we stated in our papers before the Court. Second, this witness has no personal knowledge of anything within this document. He said he's seen documents like it. For those two bases, we object to the introduction of this document.
MR. BAISE: He said he was briefed, too.
THE COURT: Objection be overruled. What did you say, Mr. Baise, what did you --
MR. BAISE: He was briefed on the document. His testimony --
THE COURT: Were you talking to me?
MR. BAISE: Talking to counsel.
THE COURT: Don't address your remarks to counsel.
MR. BAISE: I know.
THE COURT: I thought that what you said.
MR. BAISE: Yes.
THE WITNESS: I actually had a copy of the document, read the document at the time it came out.
MR. BAISE: And I move this document be entered into

evidence, Your Honor?
THE COURT: Already received it.
MR. BAISE: Thank you.
BY MR. BAISE:
Q. Mr. Hartung, I direct your attention to the fourth page of this document, dated March 25, 1986. Are you familiar with this memorandum dated March 25, 1986, Mr. Hartung?
A. Yes.
Q. Would you please summarize the purpose of this particular memorandum, Mr. Hartung?
A. I believe it was to remind the States as well as EPA regions about the procedures that had been in existence for years and it provided some additional ways to expedite procedures for getting total maximum daily loads and wasteload allocations approved by the regions because there was a national push to get a lot of people under compliance schedules and the wasteload allocation process was slowing things down, if you will.
Q. I direct your attention to the bottom paragraph of page 1, Mr. Hartung, under the subsection entitled purpose.
A. We were on page 4, is that right?
Q. Yes. I'm taking you back to page 1.
A. Can I have page 1?
Q. Last paragraph, first sentence, would you read that into the record, Mr. Hartung?

A. This guidance describes a step by step procedure for the review of State submitted total maximum daily loads and wasteload allocations that are required by the water quality management regulation and in Clean Water Act CWA including a list of questions and answers to focus on the key issues.
THE COURT: Where are you reading from?
MR. BAISE: Page -- this was actually marked page 1, Your Honor. Where the confusion comes, the first three pages are unnumbered. I apologize --
THE COURT: Okay.
MR. BAISE: -- in not giving you the direction on that, that's why the witness was confused.
Page 1, last paragraph, first sentence in that last paragraph on page 1 marked 1. Do you need him to go through it again.
THE COURT: No, no, I see it.
MR. BAISE: Thank you.
BY MR. BAISE:
Q. Does this correctly reflect what you believe this document discusses, Mr. Hartung?
A. Yes, it does.
Q. Mr. Hartung, I direct your attention now to page 2 which has the number 2 on it. Page is entitled overview of the process.
MR. BAISE: You see that, Your Honor?

THE COURT: Yes.
BY MR. BAISE:
Q. Paragraph B, Mr. Hartung, I direct your attention towards, and would you read the first two sentences in that paragraph for the record?
A. As a foundation for all total maximum daily loads slash wasteload allocations prepared by the State, EPA and the State should agree to the process that the States will used to develop the wasteload allocation and prepare a written agreement which describes these procedures.
Such an agreement promotes consistency between projects and between States, i.e., how background data is applied, which models are to be used, how total maximum daily loads are determined, how loads will be allocated, et cetera. See appendix C for sample technical agreements.
Q. Is that your understanding as well, Mr. Hartung?
A. My understanding of what?
Q. Of this paragraph. Does this paragraph correctly reflect your understanding of agreements that have to be prepared between the State and the regions?
A. Yes, sir, it had been in existence since 1972.
Q. Mr. Hartung, I direct your attention to page 3 of the document entitled EPA review and approval procedure for State submitted TMDL's and WLA's. And I direct your attention to the bottom of page 3, EPA reviews the State's TMDL's, WLA's.

A. Okay, I have it.
Q. Would you read the first two sentences from that paragraph, Mr. Hartung?
A. To meet the requirements of section 303(d) of the Clean Water Act and the water quality management regulation, EPA must review and approve all total maximum daily loads. EPA may taylor its review to what is reasonable and appropriate, that is, where a State is clearly described as process in its CPP, that's continuing planning process. EPA may conduct an indepth review of a sample of the State's total maximum daily loads slash wasteload allocations to determine how well the State is implementing its approval process and give a less detailed review of the remaining total maximum daily loads and wasteload allocations.
Q. Do those two sentences reflect your understanding of this particular process, Mr. Hartung?
A. Yes. This was the part that was added, if you will, as far as policy in making this document. The rest of this document was just a reiteration of requirements that had been around forever.
Q. Mr. Hartung, I direct your attention to page 4, subparagraph H, subsection, EPA approves or disapproves State's submission. Would you read the first full paragraph, Mr. Hartung?
A. Yes. EPA either approves or disapproves the State's TMDL

slash WLA within thirty days after submission by the State. And approved TMDL slash WLA is certified, quote, unquote, by the EPA as having been developed in accordance with section 303(d) of the Clean Water Act and a letter of such approval is transmitted to the State.
Q. Does this reflect your understanding of what is required by EPA's policies and procedures relating to wasteload allocation, Mr. Hartung?
A. Yes, and also it's a statutory requirement.
Q. Mr. Hartung, would you read the first sentence of the second paragraph under H on page 4?
A. First sentence?
Q. First sentence only.
A. If EPA approves the State's total maximum daily load slash wastewater -- if EPA disapproves the Stat's TMDL slash WLA, the State -- excuse me, the EPA regional office not later than thirty days after the date of disapproval must develop the total maximum daily load slash wasteload allocation in accordance with section 303(d) and issue a public notice requesting comment on the revision.
Q. Does this paragraph reflect your understanding of EPA's policies and procedures in terms of disapproving State TMDL as wasteload allocations, Mr. Hartung?
A. Yes.
Q. Mr. Hartung, I direct your attention finally to page 6 of

this document. Are you on page 6, Mr. Hartung?
A. Yes. Sorry.
Q. Do you see where it indicates question and answer and then a second question and answer, second Q, where it begins the sentence after a TMDL?
A. Yes, sir.
Q. Would you read both that question and answer into the record, Mr. Hartung?
A. Question, after a TMDL slash WLA is submitted to EPA, what is the time period in which a decision for approval or disapproval is to be made. Answer, the regional administrator shall not later than thirty days after date of submission approve or disapprove the total maximum daily load slash wasteload allocation. This length --
Q. Thank you.
I'm sorry, I told you to read the entire answer. I thought I mentioned only one sentence. Please, go ahead, my fault.
A. This length of time also applies to EPA's review of the listing of the priority ranked segments still requiring total maximum daily loads slash wasteload allocations.
Q. And does this reflect your understanding of EPA's policies and procedures with respect to the approving wasteload allocation examples?
A. Yes, it does.

Q. Mr. Hartung, you testified earlier from this document that agreements were to be developed between the States and EPA on the approval of wasteload allocations?
A. Yes, sir, they were generally called continuing planning processes.
MR. BAISE: Your Honor, I'd like to identify the next exhibit as Florida Cities' Trial Exhibit Number 2.
BY MR. BAISE;
Q. Would you please turn to 2, Mr. Hartung?
A. I have it.
Q. Are you familiar with this document, Mr. Hartung?
A. Yes, I'm familiar with documents like it, plus I believe John Marlar briefed us at a national branch chief meeting when this first came out.
Q. Who is John Marlar, Mr. Hartung?
A. John Marlar was my counterpart as a branch chief in Region IV for years. He was chief of the water quality branch, And then also became like I did, the chief for the enforcement and permitting branch in 1981, so --
Q. Do you know Mr. Charles Jeeter who is addressed at the top of this letter?
A. Yes, I met him.
Q. Who is Mr. Jeeter?
A. He was the regional administrator of EPA Region IV at the time this document was issued in July, 1982.

MR. BAISE: Your Honor, I move this into evidence.

MR. QUINN: We object, Your Honor. As the basis of that, it's irrelevant, also improper, insufficient foundation has been laid and the cover memo is hearsay and was listed as one of our objections as well, and no foundation to that has been satisfied, sir.

THE COURT: Mr. Baise?

MR. BAISE: Your Honor, this again is a document provided to us in discovery by EPA as representing the agreement between Region IV and the State of Florida with regard to procedures relating to the approval or disapproval of wasteload allocations.

Initially, the agency was unable to produce the signed document between the State of Florida and EPA and in the second day or third day of depositions, they brought this to us as representing the official document between the two entities, so it's an official document from the agency. The two cover letters discuss the document. I can certainly go in and ask Mr. Hartung more foundation questions with regard to the agreement itself in order to authenticate it. However, I thought in light of fact the Government had produced this and the fact it is signed by a regional administrator, former regional administrator at EPA and also signed by the secretary of environment for the State of Florida, it's on U. S. Environmental Protection Agency letterhead, it's on State of

Florida letterhead, if that would be sufficient to make an official document.

THE COURT: I'll overrule the objection, be received.

BY MR. BAISE:

Q. Mr. Hartung, I believe you testified that you're familiar with such documents. How are you familiar with such documents as attached to the letter of July 9, 1982?

A. I was personally involved in developing the documents like this for each of the five States in Region VI; Texas, Oklahoma, Arkansas, Louisiana and New Mexico.

Q. Mr. Hartung, I would direct your attention and these pages are not numbered, Your Honor, so, the first two pages are the letter, the third page is the title page, fourth and fifth pages are signature pages, the page identified as general, Roman Numeral I, and it is unnumbered, but obviously is one because the page behind it is two.

MR. BAISE; Did you find it?

THE COURT: Yes.

BY MR. BAISE:

Q. Now, Mr. Hartung, I direct your attention to Roman I, sub

A. Do you see that, sir?

A. Yes, sir.

Q. Would you review the second paragraph and summarize your understanding of that particular paragraph?

A. If you'll give me a moment.

Q. Yes, sir.

A. It goes into the things that that previous document we discussed reiterated.

Q. Would you identify the previous document for the record?

A. Previous document was the headquarters document, I think it was dated 1986, which proscribed the procedures for approving the total maximum daily loads and wasteload allocations. And this paragraph spells out that, again, the mandates and requirements by the States under the Clean Water Act and section 303 of that Act, for developing wasteload allocations that protect the States' water quality standards. And also, that the EPA must approve or disapprove them.

The last part of the paragraph goes into the fact that this procedure has been unnecessarily time consuming, I think is the term used here, and needs to be sped up or expedited or changed to expedite the process.

Q. Mr. Hartung, was this an agreement executed between the State of Florida and EPA Region IV as far as you can tell from your review of the document?

MR. QUINN: Totally beyond the scope of this witness' knowledge.

MR. BAISE: It is before the Court, Your Honor, two letters, which again, as I pointed out, are on what appear to be official stationary. Number two was presented to us in discovery by EPA.

THE COURT: Well, it's in evidence. But, I don't know that this witness knows the answer to your question.

Sustained.

MR. BAISE: May I proceed?

THE COURT: Sustained. Yes.

BY MR. BAISE:

Q. Mr. Hartung, I direct your attention to page 9 of the document entitled State EPA Region IV agreement on the development of wasteload allocation and wasteload water permit limitations.

A. Roman Numeral IV?

Q. Roman numeral IV, page 9. Would you read that paragraph into the record Mr. Hartung?

A. Which paragraph?

Q. First paragraph, page 9, under Roman numeral IV entitled approval of wasteload allocations?

A. The EPA's required by 303(d) of the Clean Water Act to review and approve slash disapprove the allowable wasteloads established by the States within thirty days after submission. And additional thirty days is allowed to make necessary revisions to disapprove the identifications and loads. All final approvals of wasteload allocations are to be incorporated by the States into their water quality management plans through the continuing planning process required under 303(e) of the Act.

Q. And further, Mr. Hartung, I would direct your attention to page 10 of this document, the next page under Roman Numeral V, entitled incorporation of wasteload allocations into permit limitation. You see paragraph A on page 10, Mr. Hartung?

A. Yes.

Q. Would you read that into the record, please?

A. General. The wasteload allocations developed in accordance with this procedure and subsequently approved by EPA are to be directly incorporated into permit limitations unless there are overriding environmental concerns. The current NPDES permit will remain in effect until its specified expiration date. At that time, the approved allocation would be the basis for the permit limitations.

Q. Do those paragraphs you have just read reflect your understanding of EPA's policies and procedures relating to the approval or disapproval of wasteload allocations?

A. Yes, they do.

Q. Thank you.

MR. BAISE: You want to take a break, Your Honor?

THE COURT: Sir?

MR. BAISE: May we take a break?

THE COURT: Yes, we've been here for almost two hours, and we'll take fifteen.

(Thereupon, a brief recess was taken.)

THE COURT: Mr. Baise.

MR. BAISE: Thank you, Your Honor.

BY MR. BAISE:

Q. Now, Mr. Hartung, you have testified earlier about permit programs being run by both EPA and the States. What is a non-delegated State under the Clean Water Act?

A. What is it or —

Q. What is a non-delegated State under the Clean Water Act?

A. Well, the original intent of the Clean Water Act was to have each the States assume the administration of the NPDES Program and the State and the EPA was envisioned as kind of — am I being responsive?

Q. Yes.

A. — as an oversight — overseeing agency, as well as an enforcement backup, but as it turned out, as the State — I think there are still 10 States that never assumed the program, usually for legal reasons, so the law was written in terms of, well, the State would be running the program.

Q. Could you identify the program, please?

A. The program being the NPDES Permits and Enforcement Program.

Q. In such situations does both the State and EPA issue permits to a discharger?

A. Yes, they do.

Q. Why is that?

A. Well, the States have statutes and requirements that they have to abide by and the EPA Regional Office, then, in that situation, would have to carry out the mandates of the Clean Water Act or the Federal requirements.

In my region, it was our job to run the NPDES Program in parallel with five States that ran State programs under State Laws and Regulations.

Q. Do those permits have to assure that water — that water quality stands set for the State are maintained?

A. When you say those permits, which permits?

Q. The NPDES Permits.

A. Yes, they do.

Q. Do the State permits have to assure water quality standards are maintained?

A. Yes, they do.

Q. What is your understanding of whether EPA must give deference to a State-issued water discharge permit?

A. It's my understanding that —

THE COURT: Just a moment.

MR. QUINN: Objection that this is beyond the scope of the expert report, as well, sir.

MR. BAISE: In his expert report he indicates he's going to testify with regard to policies and procedures relating to delegated and non-delegated States, Your Honor.

THE COURT: I'll overrule the objection.

MR. BAISE: You may continue.

THE WITNESS: In my opinion, unless the results have been born out by some papers and policies written by EPA Headquarters, that unless there's some kind of clear error committed by the State in interpreting its water quality standards and issuing its own permit, then the EPA has to give deference to the State permit.

Q. What is your opinion, Mr. Hartung, as to whether EPA could require a no discharge effluent limit in an NPDES permit if such a limit was not in the State Permit for the same facility?

MR. QUINN: Objection. That opinion is not within the report, sir.

MR. BAISE: I would disagree, Your Honor, that this witness can testify — he is an expert, and it talks about the fact that he's going to discuss the policies and procedures with regard to delegated versus non-delegated States and whether those permits can require or have in them certain limitations.

MR. QUINN: That's not the basis of my objection. The basis of my objection is Rule 26, which requires the statement of all opinions to be expressed by the witness, and it is not — this is an opinion and is not in the report, and for that reason I object.

THE COURT: I'll sustain the objection to that question.

BY MR. BAISE:

Q. Mr. Hartung, what is your understanding as to whether or not EPA could require a no discharge effluent limit in an NPDES Permit and if such a limit is not in the State Permit for the same facility?

MR. QUINN: Objection Your Honor, same grounds.

THE COURT: Sustained.

BY MR. BAISE:

Q. Mr. Hartung, would you describe the State's role in administering the NPDES Program?

A. For a delegated State or for both?

Q. For both.

A. For non-delegated State, they still have a major role in the States establish the water quality standards, they generate the effluent limitations based on those standards, and they, also, are required to certify every EPA-issued NPDES Permit as meeting their water quality standards before that permit can be issued.

In the case where they administer the NPDES Program, they take over the permit issuance and enforcement of that permit. EPA, then, has an overview role to make sure that they are following the procedures that's laid out in the laws and regulations, and that the EPA is the

authority — excuse me — to override a State's enforcement action and take EPA action on a violation that they deem fit.

Q. Based on your experience and EPA's Policies and Procedures, does EPA challenge State Permits if they do not assure that water quality standards are being met?

A. They can, yes, and do.

Q. Do EPA-issued NPDES Permits contain wasteload allocations, Mr. Hartung?

A. Yes, they contain water quality limited effluent limitations which are based upon State wasteload allocation studies, yes.

Q. Do those wasteload allocations that are included in those EPA-issued NPDES Permits, do they need to be approved by EPA?

A. Do they need to be approved?

Q. Yes, or must be approved?

A. Yes, they must. Yes.

Q. And why?

A. Because, again, it is required by the Clean Water Act and by the Regulations from that Act.

Q. So it's your testimony that EPA cannot ignore the approval process of wasteload allocations and incorporate the wasteload allocations in the NPDES permits?

MR. QUINN: Objection.

THE COURT: This is your witness. Don't lead him like that.

MR. BAISE: I'm sorry, Your Honor, I didn't hear you.

THE COURT: Don't lead the witness.

MR. BAISE: Thank you.

THE COURT: I realize that a certain amount of that is not offensive and we don't have a Jury here, but that's a little much.

Go ahead.

BY MR. BAISE:

Q. Mr. Hartung, in your expert report you have discussed major and minor dischargers.

Is there any hierarchy of enforcement with respect to major and minor dischargers under EPA's Policies and Procedures?

A. Yes, there is.

Q. What is it?

A. The first priority, as I explained earlier, it's a research concern with EPA, is the issuance and enforcement tracking and enforcement of major industrial permits, major municipal permits, municipal, including domestic waste permit, and then major Federal facilities, that is, like air bases and things of that nature.

The second priority would be the issuance of

permits and enforcement of those permits for minor municipals, minor industrials and Federal facilities.

Probably a third hierarchy would be the issuance and enforcement of what's called general permits that are issued for an entire State or entire region, let's say a County. Those would include some that we had in our region that were offshore oil and gas, permits for the Gulf of Mexico, general permits, general permits for industrial storm water and for confined animal feeding operations.

And then there's a fourth category, which is whatever is left, including domestic — private domestics.

Q. And in your experience with EPA, are all minor dischargers permitted through the NPDES Permit System?

A. There was an attempt early on to permit all of them, but to my knowledge, some of them were never permitted, still have never been permitted in our region, and our region being Region 6.

The problem was that it was an overwhelming job to do that, so the agency generally relied on if there was a parallel program on the State's issuing permits to the minors — State Permits to the minors.

Q. And in your experience, Mr. Hartung, have you ever seen a case where an NPDES Permit was denied to one of your facilities treating human waste and the plant was meeting water quality standards and effluent limitations in the

NPDES Permit?

A. No. I've never — no.

Q. Is your answer no?

A. My answer is no.

Q. And that's based on the review of 50,000 permits, Mr. Hartung?

A. It's based on my experience —

MR. QUINN: Objection.

THE COURT: You can ask him what it's based on.

BY MR. BAISE:

Q. What is that based on, Mr. Hartung?

A. Based on my experience in 23 years and working in this area and EPA Region 6, primarily.

MR. BAISE: That finishes my direct questioning of Mr. Hartung, Your Honor.

THE COURT: Mr. Bird, do you have any questions?

MR. BIRD: Just briefly, Your Honor.

EXAMINATION

BY MR. BIRD:

Q. Mr. Hartung, you testified that you oversaw enforcement in Region 6 for a period of time?

A. For 13 years, yes.

Q. And I believe, if I recall your testimony, you indicated that you oversaw some 50 criminal cases, 200 civil cases, 350 administrative penalty orders and some number of

administrative orders.
A. Around 10,000 administrative orders, yes.
Q. In any of those instances, did Region 6 take enforcement action against the parent corporation of the discharger?
A. No, we did not.
MR. BIRD: Thank you.
No more questions, Your Honor.
THE COURT: Mr. Quinn.

EXAMINATION

BY MR. QUINN:
Q. Good afternoon, Mr. Bartung.
A. Good afternoon.
Q. Sir, in listing the priorities of the Clean Water Act, you missed one, didn't you? Didn't you?
A. I said the three major ones. I thought were the three major ones, yes.
Q. Did you miss the fact that it is an objective of the Clean Water Act — the first objective of the Clean Water Act is that it is the national goal that the discharge of pollutants into navigable waters be eliminated by 1985? Wasn't that a goal of the Clean Water Act, sir?
A. Yes, it was one of the original goals and a commission was set up by the Act to review that goal and that commission met — I don't know —

THE COURT: Well, you've answered his question.
MR. QUINN: Thank you, Your Honor.
BY MR. QUINN:
Q. Sir, in the Permit Writers Guide, which is Exhibit — Florida Cities Exhibit Number 7. I believe you have it in front of you.
A. Yes.
Q. Sir, if you turn to the third page of the Exhibit, please, and I want to ask a question and refer to something, okay? Tell me when you get there.
A. I have it. Page 3?
Q. Yes, sir.
Sir, this training manual is just a guidance, isn't it?
A. That's what it says in front of the manual, that's correct.
Q. It says, in fact, doesn't it say that the material in this manual is for instructional purposes only, it was developed to illustrate the applications of the technical principles of the NPDES Regulations and does not necessarily represent official policy of the USEPA?
A. That's what it says.
Q. Is that, in fact, what it is?
A. It contains a lot of official policy when it refers to the laws and regulations, of course.

Q. But the document itself does not represent the official policy of the USEPA; does it?
A. That's what it says.
Q. Sir, you're not here on behalf of the United States to testify on behalf of the United States today, are you?
A. No, sir.
Q. Sir, on page 1, numbered 1 of that same Exhibit, number 7, under purpose and format, one of the purposes — withdrawn.
It is recognized that each EPA Regional Office or approved State will have NPDES Permit processing procedures which have been specifically adapted for a specific geographical area and which incorporate local requirements. Therefore, it is the purpose of this manual to provide an explanation of those elements of the program which are common to any State or Regional Office which issues NPDES Permits. Particular emphasis will be given to those areas which historically have been difficult steps in the permitting process.
Do you see that?
A. Yes.
Q. Is that what it says?
A. Yes, sir.
Q. It goes on to say, to the extent possible, practical examples are used to demonstrate the concepts which are

discussed. It says that?
A. Yes, sir.
Q. Sir, with regard to the next document, the TMDL Wasteload Allocation, which is Exhibit Number 4, Florida Cities Water Company Exhibit Number 4. Sir, on page C-1, this, again, is a guidance document, isn't it? The Wasteload Allocation, Exhibit Number 4?
A. Are you referring to a particular page?
Q. I want to ask you in general, sir; is this just a guidance document?
A. Yes, it is.
Q. Okay. And on page C-1, doesn't it say, since conditions, procedures and methodologies may vary between EPA Regions and their States, a general outline of an example agreement is provided? Does it say that?
A. Yes, sir.
Q. So differences do exist — withdrawn.
You will acknowledge that differences exist between Regions; is that correct?
A. Oh, yes.
Q. And definitely within States within the Regions, too; right?
A. That's correct.
Q. Sir, on page 4 of that same document, I'd like to talk a little bit about TMDL's.

Sir, in Region 6, about how many streams or other water bodies are there in Region 6, which receive discharges from NPDES permitted facilities?

A. Almost all streams. I don't know the number.

Q. Thousands?

A. Oh, yes, thousands and thousands. Yes.

Q. How many of those streams and water bodies has a TMDL been done?

A. As of this date, probably all of them at least once.

Q. All of them have had TMDL's done; is that correct?

A. That's my understanding, yes.

Q. Sir, with regard to the State EPA Agreement, which is Exhibit Number 2, Florida Cities Water Company Exhibit Number 2.

A. Yes, sir.

Q. This document didn't set up anything required in stone, to your knowledge, did it? These are not in-stone requirements, are they?

A. This document lays out and reiterates what was in the law and the regulations, so it's pretty much in stone, I would say, for most of the things -- for the examples that I read from.

Q. I want to turn your attention to page 4, which is the first signature page that Mr. Cole on behalf of the State of Florida signed. Tell me when you find that, please.

A. Page 4?

Q. Yes, sir, of Exhibit 2.

A. Mr. Cole?

Q. Yes, where he signed off on it, sir.

A. Okay.

Q. Okay. About halfway down the paragraph, above the signature blocks it says, doesn't it, that both parties agree that the provisions of this document are reasonable and are understood to be goals toward which each party will strive. Doesn't it say that?

A. Yes, it does.

Q. It doesn't say anything about them being requirements, does it?

A. No, it doesn't say that.

Q. Thank you.

Mr. Hartung, is there any opinion in your expert report, which has been introduced as Defendant's Exhibit Number 1, is there any reference to the Florida Cities Barefoot Bay facility?

A. No, sir.

Q. Is there any reference in that report to Florida Cities Carrollwood facility?

A. No.

Q. Is there any reference in that report to Florida Cities Waterway Estates facility?

A. No, sir.

Q. Is there any reference to Florida Cities Water Company at all in that report?

A. No, sir.

Q. Thank you.

Sir, is there any reference in your expert report --

A. May I embellish my answer or just --

THE COURT: No, sir.

If counsel for the party calling you wishes to elicit something further, he can.

Go ahead.

BY MR. QUINN:

Q. Sir, is there anything in your expert report regarding the seriousness of the violation or violations alleged against Florida Cities Water Company?

A. No.

Q. Is there anything about the economic benefit, if any, resulting from the violations alleged against Florida Cities Water Company?

A. There is no mention of Florida Cities in that entire report.

Q. There's no mention of economic benefit, either, is there?

A. No, sir.

Q. Is there any mention of the history of such violations against Florida Cities Water Company?

A. No, sir.

Q. Is there any efforts about -- any reference to any good faith efforts to comply with the applicable requirements of the Clean Water Act in your report?

A. Concerning what?

Q. Is there any reference to any good faith efforts by Florida Cities to comply with the applicable requirements of the Clean Water Act in your expert report?

A. No, sir.

Q. Is there any reference in your expert report to the economic impact of the penalty upon the violator, Florida Cities Water Company?

A. No.

MR. QUINN: Your Honor, at this point the United States would again renew its motion to strike the testimony of Mr. Hartung.

THE COURT: Well, denied.

BY MR. QUINN:

Q. Mr. Hartung, how many articles have you published concerning EPA's general practices regarding permitting matters under the Clean Water Act?

A. By "published" what do you mean?

Q. Published in a journal of national distribution.

A. Probably half a dozen.
Q. In all those — each one of those was an article about permitting matters under the Clean Water Act; is that correct?
A. Yes.
Q. Sir, how many articles have you published concerning EPA's general practices regarding enforcement matters under the Clean Water Act?
A. Probably another half dozen.
Q. Sir, other than today, you've never testified as an expert witness on EPA's general practices and procedures regarding permitting and enforcement matters, have you?
A. No. I've given depositions when I was at EPA.
Q. Sir, you never worked in EPA Region 4, have you?
A. No.
Q. You've never supervised wasteload allocations in Region 4, have you?
A. No.
Q. You've never supervised anybody issuing permits in Region 4, have you?
A. No.
Q. You've never supervised any enforcements of Clean Water Act violations in Region 4, have you?
A. No.
Q. Sir, you didn't write the Clean Water Act, did you?

A. No. I would have to say no.
MR. BAISE: Objection, Your Honor. That is just not a relevant question.
THE COURT: Sustained.
BY MR. QUINN:
Q. You didn't write any code for Federal Regulations relating to permitting regulators — withdrawn.
You didn't write any of the permit regulations, did you?
A. No, not per se. No.
Q. Okay. You did not, by yourself, write the October 2nd, 1989, final version of the Revised Enforcement Management System, did you?
A. Say again.
Q. You did not, by yourself, write the October 2nd, 1989, final version of the Revised Enforcement Management System, did you?
A. Not by myself, no.
Q. That was written by a committee of EPA's Office of Water, located headquarters in Washington; right?
A. With input, major input from the regions.
Q. But you did not write, by yourself, the April 18th, 1986, National Guidance for Oversight —
THE COURT: He's already answered that, that he didn't, hasn't is?

MR. QUINN: It's a different question, Your Honor.
THE COURT: It just sounded the same.
All right.
BY MR. QUINN:
Q. Let me start over, Mr. Hartung. I'm sorry.
You did not, by yourself, write the April 18th, 1986, National Guidance for Oversight of NPDES Programs, did you?
A. No. I wrote that with the help of other States and EPA's Headquarters.
Q. That was written by Office of Water, located in headquarters in Washington, too; right?
A. They compiled it, yes.
Q. You didn't write the March 31st, 1992, Civil Penalty Assessment for Clean Water Wastewater Discharge Violations, did you?
A. What was the date?
Q. March 31, 1992.
A. No.
Q. Sir, you didn't write the May 1987, Training Manual for NPDES Permit Writers, did you?
A. No, I did not.
Q. You didn't write its predecessor, the one you were talking about on direct examination, either, did you?
A. No, I did not.

Q. You didn't — withdrawn.
Sir, have you ever supervised permit issuance?
A. Yes.
Q. When was that, sir?
A. The late 70's, when I was acting Deputy Water Division Director, EPA Region 6, and, also, in the early 90's when I was in detailed to that same job.
Q. But you've never supervised issuance of permits in Region 4, have you?
A. No, that's correct.
Q. Sir, can you please tell me what is a point source discharger?
A. Point source discharger is a term that was used to describe the difference between non-point source and point source, so that people could understand when you talk about a point source discharger, you were talking about a discrete point rather than sheet flow coming off of land somewhere.
Q. Is it correct that every point source discharger in the United States must receive an NPDES Permit from either the United States Environmental Protection Agency or a delegated State?
A. That's correct.
Q. Sir, you testified a little bit about a minor facility and I'd like to ask you again, what is a minor facility under Federal Regulations?

A. The minor facility is any facility, if you're talking about sanitary waste dischargers, that is below -- has a flow below one million gallons per day. And if you're talking about industrial minor, there's a point rating system, so many points for toxicity, et cetera, et cetera, and if you get an 80, that declares you a major and if you are below 80 it declares you a minor.

Q. All minor facilities require NPDES Permit, don't they?

A. That's what the law says, yes.

Q. So failure to have an NPDES Permit is a violation of the law, isn't it?

A. That's correct.

Q. The NPDES Permit System is essential to enforcing effluent limitations; isn't that correct?

A. Well, yes. The system -- you issue the permit with the effluent limits and you enforce the permit, which includes effluent limits.

Q. And the NPDES Permit System is essential to maintaining water quality standards, too; is that correct?

A. That's correct.

Q. Sir, whose responsibility is it to assure that a valid NPDES Permit is acquired; the discharger or the regulator?

A. The discharger.

Q. And whose responsibility is it to understand what the requirements of an NPDES Permit are; the discharger or the

regulator?

A. Say it again.

Q. Sure.

Whose responsibility is it to understand what the requirements of an NPDES Permit are; the discharger or the regulator?

A. I would say both, but, of course, it's the responsibility of the discharger.

Q. Sir, an administrative -- withdrawn.

Sir, an EPA-issued Administrative Compliance Order is not an NPDES Permit, is it?

A. No.

Q. An EPA-issued Administrative Penalty Order is not an NPDES Permit, either; is it?

A. No.

Q. And an State-issued Administrative Order is not an NPDES Permit, is it?

A. No.

Q. And a State-issued Permit in a non-delegated State is not an NPDES Permit; is it?

A. That's correct.

Q. And a State-issued Permit in a non-delegated State and an EPA-issued NPDES Permit are two different permits; correct?

A. Yes, that's correct.

Q. And each of those two different permits may have different requirements; isn't that correct?

A. That is, also, true.

Q. And compliance with the State-issued Permit in a non-delegated State does not excuse a violation of an NPDES Permit, does it?

MR. BAISE: Objection, Your Honor. All these questions go to liability. The Court has already found liability with respect to this Defendant.

THE COURT: Well, I'll -- I'll allow the examination. I'll overrule the objection.

THE WITNESS: Can you repeat the last question? I'm sorry.

BY MR. QUINN:

Q. Yes, sir. Incompliance with the State-issued Permit in a non-delegated State does not excuse a violation of an NPDES Permit, does it?

A. No, it's still a violation.

Q. Sir, with all your experience in Region 6, how many enforcement cases have you supervised where the facility had no NPDES permit?

A. Oh, in the hundreds.

Q. And how many, in all of your experience, how many enforcement cases have you supervised?

A. I supervised every enforcement case for 13 years.

Q. How many cases would that be, approximately?

A. Are you talking about including administrative orders which --

Q. Yes.

A. Well, 10,000 of those and 400 of Administrative Penalty Orders, that's 10,400 and 10,000 civil judicial, that would be 10,600, plus another 50 -- 10,650 cases, probably.

Q. So only a hundred out of the 10,650 cases were facilities for which no NPDES Permit was in place; is that correct?

MR. HIRD: Objection. I think that mischaracterises the testimony. I don't believe he said a hundred.

THE WITNESS: I said --

THE COURT: Well, I don't know whether he did or not. I'll overrule the objection.

BY MR. QUINN:

Q. Mr. Hartung?

A. I'm sorry. I keep asking you to repeat.

Q. Sure.

Isn't it correct that only about a hundred facilities out of the 10,650 cases that you've overseen were cases in which no NPDES Permit was in place?

A. That's correct. That's the only ones that we saw fit

to issue formal actions against.

MR. QUINN: Objection. Move to strike everything after "that's correct."

THE COURT: Denied.

BY MR. QUINN:

Q. Mr. Hartung, doesn't the decision to bring enforcement action require the exercise of discretion on the part of regulator?

A. Yes.

Q. Isn't it fair to say that as the level of EPA's enforcement response escalates, additional internal review is required.

A. It's done. I don't know if it's required. It makes sense.

Q. In Region 6, at the time that you retired, what level -- what levels of review were required to issue a warning letter?

A. My section chief signed those -- most of the warning letters, and I would look at them periodically, you know, maybe 10 percent.

Q. Just so I'm clear, is a section chief above you or would that be one of the people that reports to you?

A. No, I had three sections under me. I had a section chief or administrative section that took care of most of that.

Q. In Region 6, at the time you retired, what level of review was required to issue an Administrative Compliance Order?

A. It was reviewed by a technical section chief, administrative section chief and concurred on by myself and signed off on by the water division director above me.

Q. So you didn't have authority by yourself to issue Administrative Compliance Orders, did you?

A. That's correct. No branch chief did that. That's not delegable to the branch chiefs in the Region.

Q. How about with regard to Administrative Penalty Orders; is that the same?

A. No, it's not. For some strange reason I had the authority to issue Administrative Penalty Orders, but I didn't have authority to issue Administrative Orders. That was redelegated to me in about 1991.

Q. So it's a redelegation for Penalties Orders, but not a redelegation for Compliance Orders; is that correct?

A. That's correct. That was forbidden by some order out of Washington.

Q. Sir, in Region 6, at the time you retired, what levels of review were required to refer an action to the United States Department of Justice for enforcement?

A. Essentially the same levels of review, section chief, branch chief, division director, regional counsel, and,

also, the regional administrator and then it had to go forward to the EPA Headquarters before it went to the Department of Justice for their concurrence.

Q. Isn't it a fact, sir, that before a complaint can be filed in a Federal District Court, a trial lawyer and assistant section chief, section chief, deputy assistant attorney general, and the assistant attorney general for the Environment and Natural Resources Division must approve the filing; isn't that correct?

MR. BAISE: Your Honor, objection. He's asking for all of the procedures of the Justice Department in approving an action and that clearly is not in the expert's report nor brought out in his direct examination.

THE COURT: Objection overruled.

Can you answer that?

THE WITNESS: I -- I don't know the answer to your question.

Most of those relate apparently to the Department of Justice approvals.

BY MR. QUINN:

Q. Sir, do you agree that an important goal of the NPDES Enforcement Program is to provide an appropriate deterrent effect to violators?

A. Absolutely.

Q. And a means of establishing a deterrent effect is the

imposition of a civil penalty; isn't that correct?

A. That's one means, yes.

Q. Sir, with regard to permitting, isn't it true that if a State objects to the provisions of a proposed NPDES Permit, it can bring those objections to EPA's attention prior to the time the permit is issued?

A. That's correct.

They're asked to certify the NPDES Permit as protecting the water quality standards.

Q. Once, also, a discharger obtains a final permit denial from EPA, aren't there specific appeal procedures set forth in the Clean Water Act and the Regulations for the permittee?

A. That's correct.

Q. And aren't there specific time limits within which permittees must file their appeals?

A. That's correct.

Q. Sir -- withdrawn.

MR. QUINN: No more questions, sir.

THE COURT: Mr. Baise, do you have any redirect?

MR. BAISE: Yes. Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. BAISE:

Q. Mr. Hartung, counsel asked you about a commission that studied the goals of the Clean Water Act. Please describe

that commission for the record.
A. Actually, I believe I mentioned it, and he was talking about that one of the goals was elimination of — the total elimination of discharge.
My understanding was that the — as I recall, the Clean Water Act set up the commission when the Clean Water Act was passed in 1972, to see if that was a reasonable goal and that commission met and essentially admitted that that was a little bit too lofty a goal, and so that goal was dropped in my understanding.
I don't remember the exact date that everybody said that — in practicality it was dropped in the late 70's, because it was obvious to everyone that we could not eliminate all discharges.
Q. Do you know who was on that commission?
A. I don't recall. I just remember that the impression, it was pretty blue ribbon commission — I don't know why Rockefeller comes to mind. I don't know who was on it, though.
Q. Was this commission created by Congress to review the goals of the Clean Water Act?
A. That's right. That's correct. As part of the statute.
Q. Mr. Bartung, it has been brought out by counsel that a couple of the documents in evidence do not represent

official EPA policy.
Do you remember that question, Mr. Bartung?
A. Yes, sir.
Q. Could you describe EPA's practice and how it puts out documents relating to policies and procedures, if you know?
MR. QUINN: Objection, beyond the scope of direct and beyond the scope of cross.
THE COURT: I'll sustain the objection.
I don't think that's going to be very productive.
Let's move on.
BY MR. BAISE:
Q. Mr. Bartung, you indicated you have published articles?
A. Yes.
Q. Could you identify those articles you have published and the subject matter?
A. I published articles back in the 70's on — in some trade magazines on water quality planning activities, water quality standards, NPDES Permits, NPDES Enforcement Program.
I published one last year, formal paper, presented at a national conference on sanitary sewer overflows.
I published some material through the Dallas Morning News at one time back in the early 80's on wasteload allocations and their impact on the cities in that area.
There probably were more, but I don't recall them.

Q. Mr. Bartung, it's been brought out that you did not write a number of documents that are in question in this case.
Is it ever EPA's policy to have one person issue a document representing agency official or unofficial policy?
A. It is the policy of the agency to have the highest ranking, like the Director of the Office of Water Enforcement Permits, in this case, issue things likes the Oversight Guidance and the Enforcement Management System Guidance. It, generally, would recognize different regions for contributing or different States in some cases.
Q. Do teams of people generally produce documents such as are in evidence in this case, Mr. Bartung?
A. Yes, sir.
Q. Why was it your policy or procedure or EPA's policy or procedure not to permit minor dischargers for a period of time during, say, the last 10 years or 15 years, Mr. Bartung?
MR. QUINN: Objection. Mr. Bartung hasn't worked with EPA for the past two years, and I'm not sure that the purpose of this question — I think is —
MR. BAISE: I'll withdraw the question.
BY MR. BAISE:
Q. Mr. Bartung, did EPA have a policy of not permitting all minor dischargers into the waters of the United States?

A. I don't know that it was a written policy, but it became a practicality that the resources of the agency was spent issuing and reissuing majors and that was the top priority for sure, and so a lot of minor dischargers, if they were ever issued a permit to start with back in the 70's in the first round, never got another permit.
Q. Did it make a difference as to whether the State had permitted the minor discharger, Mr. Bartung?
A. Yes, sir.
Q. Why would that make a difference?
A. It made a difference because we at least knew they were being regulated and the State's generally paid more attention to minors than they did majors, so it's kind of like Jack Spratt and his wife —
THE COURT: Just a moment.
MR. QUINN: Objection, move to strike that response. Beyond the scope of direct and cross.
THE COURT: Overruled.
MR. BAISE: You may continue, Mr. Bartung.
THE WITNESS: I'm through.
BY MR. BAISE:
Q. Mr. Bartung, based on your experience in oversight of NPDES Permits in Region 6, and, also, your extensive experience in working with other regions, have you ever seen an enforcement action taken where EPA had taken an NPDES

Permit or NPDES Permit — discharger's permit away improperly?

MR. QUINN: Objection, calls for legal — sorry — calls for an expert opinion, which was not expressed in the report.

THE COURT: I'll sustain the objection.

BY MR. BAISE:

Q. Mr. Hartung, can you tell the Court and the record whether or not the majority of the enforcement actions that Region 6 or, based on your experience, EPA takes in enforcing NPDES Permits are mainly for injunctive relief?

A. The bulk of them. The purpose of enforcement actions, formal or informal, primarily was to get compliance, and so the bulk of the formal enforcement actions were for injunctive relief as well as sometimes for penalties.

MR. BAISE: No further questions, Your Honor.

THE COURT: Thank you, sir.

You may step down.

THE WITNESS: Thank you.

THE COURT: Call your next witness.

MR. BAISE: Your Honor, the Defendant Florida Cities, calls Mr. Patrick Lehman.

(Pause.)

THE CLERK: Raise your right hand.

Thereupon,

PATRICK LEHMAN,

having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Take a seat in the witness box.

MR. HIRD: Your Honor, before Mr. Lehman begins, last Thursday the Government introduced a document called United States Offer of Proof in Lieu of Testimony of Witnesses that Plead the Fifth Amendment.

There was some discussion at the end of the day on Thursday as to what response, if any, would be required of the Defendants and at what time.

You had indicated at that point that you were taking under advisement as to when or whether any response would be required or how that document would be treated, and you indicated to the Defendants that you would not require a response earlier than Wednesday.

Since the next Court date is Wednesday, I wanted to bring the matter to the Court's attention, so we were aware what our responsibilities are.

THE COURT: Right. I was going to mention that before we concluded the day's proceedings.

Does that have to do with this witness here?

MR. HIRD: No, Your Honor.

If you want to take it up at the end of the day —

MR. BAISE: We just wanted to make sure we had time to take that up, Your Honor, this evening.

THE COURT: Why don't we go ahead and do that now. That is —

MR. BAISE: Do you want to have Mr. Lehman step down while we undertake that, Your Honor?

THE COURT: Well, okay. You can step down, sir. Just have a seat in front of the Courtroom or back of the Courtroom there.

All right. Well, do you want to be heard on the response that the Court will expect?

MR. HIRD: Your Honor, if you have some thoughts you were going to share with us as to what the intentions were —

THE COURT: Not specifically. I was going to afford you the opportunity to respond to the United States' Offer of Proof and whether the Court would receive depositions.

MR. HIRD: Your Honor, I don't think this was in connection with depositions.

THE COURT: It was not. Okay.

Then — well, I thought part of the — I thought part of the proffer was to offer those portions of the depositions listed on page 34 of the joint pretrial statement where the witnesses invoked the Fifth Amendment.

MR. HIRD: I'm sorry. I think now I got confused. You were right, Your Honor.

I thought you were referring to the depositions that were brought up on Friday when asked that question, so you are correct, it's the depositions.

THE COURT: So, that's one — as I recall now, that was one of the things that the Court was going to receive submissions from the Defendants addressing the propriety of the Court's receiving those depositions wherein the witnesses listed on page 34 pled the Fifth Amendment.

MR. HIRD: Your Honor, I think, as I see it, there are three issues. One is the receipt of the depositions, two is whether it's appropriate to draw adverse inferences, and three, the document itself, which as if you recall, Your Honor, we had just had handed to us. We've now had a chance to read it. And appears to be less drawing of adverse inferences from lack of testimony questions, but more the Government's interpretation of the exhibits that it has entered into evidence, and in some instances exhibits which have not been entered into evidence.

I certainly think that we would like to brief for you the question of whether it is appropriate for you to draw adverse inferences. To the extent the receipt of the depositions is connected with that, I would see those two issues linked together.

The third question is a separate question, assuming you were to take adverse inferences, is this appropriate offer of proof, given what this is functionally is an analysis of the documents, and if you look at the documents themselves, in many instances the documents are inconsistent with the conclusions drawn by the Government or the alternative language that can be brought out in the various exhibits.

What I would propose that we do is that we at one stage brief the propriety separately of drawing an adverse inference and admission of the depositions, if that -- if the Court Rules against the Defendants with respect to that, then we should somehow have an opportunity to respond within the documents themselves to show that the conclusions that the Government has drawn from the documents are not consistent with other things within the very same documents.

THE COURT: Okay. Yes.

MR. BULLOCK: Your Honor, along with that, the offer of proof presented by the Plaintiff made no -- had no specific, either evidentiary or case law basis, to make an offer of proof under the auspices that they were attempting to make the offer of proof and I would just join with Mr. Bird in saying we would appreciate the opportunity to brief the issue of whether or not such a offer is actually an offer of proof and is permissible in that form under the

Rules.

THE COURT: Okay. Mr. Jacobs.

MR. JACOBS: Your Honor, I'm not sure whether the Court has any leanings one way or the other in terms of what it's inclined to do.

I would reemphasize that the Government has no objection, whatsoever, to the Defendants interpreting the documents that the are, in fact, discussed in the offer and interpreting them and suggesting whatever inferences they see fit as being attachable to those documents.

I'm instructed that all of the exhibits that are cited in the offer of proof are already in evidence.

MR. BIRD: I think that's one exception, Exhibit 253. That was Mr. Dresner's --

MR. JACOBS: If that's the memo I take Mr. Bird's representation to it being, then I stand corrected, there's only one of many, many, many exhibits that are not already in evidence.

I do quite agree with Mr. Bird, that in large part the adverse inferences that we asked the Court to draw are adverse inferences that we believe are legitimate and appropriate interpretations of these documents.

I have no objection, whatsoever, to one or both of the Defendants briefing as an initial matter, whether they believe an offer of proof of this nature is an appropriate

means to bring to the Court's attention the adverse inferences that should be drawn, and secondly -- so that would be a procedural matter.

And secondly, I have no objection to the Defendants briefing from their own perspective what adverse inferences or what inferences, if they rather characterize it as such, should be drawn from the documents.

As I said, earlier -- early last week, there was -- there's no subterfuge, no trickery involved here. All we want to do is to make our offer, because the witnesses are unavailable, and that's something we've had no control over. It's something that the Defendants have had ultimately quite some say in, which witnesses would be called to testify. And I'm emphasized in the past that the witnesses, particularly the Avatar witnesses that were called to testify by Avatar Holdings, were the witnesses who did not have personal knowledge of the facts and circumstances directly relating to the allegations in the complaint, and it's the witnesses that we would like to call who are unavailable, and that's why we think we should be entitled to make the offer of proof.

THE COURT: Well, we have the issues presented or appear to be extant that as to the admissibility in the first instance of these depositions wherein these witnesses invoked the Fifth Amendment, and I suppose, I'm not sure

that the second issue can -- can or really should be regarded as a separate issue, because the second issue, which we've talked about, is whether it is legitimate for the Government to be entitled to have the Court draw negative inferences from the invocation of the Fifth Amendment.

Now, if the Court were to find against the Government on those issues, then it seems to me we would not have to go further with respect to any matters pertaining to the offer of proof, because the offer of proof would not be an appropriate document.

So, I'm wondering if this briefing should be bifurcated, as I think Mr. Bird had suggested.

MR. JACOBS: Judge, I didn't address the matter of the depositions on -- with respect to the present or former Avatar officers, that is to say, Messrs. Getman, Slaikus and Wilkov. I'm entitled to have those depositions into evidence, either because the person is a current officer of the company or because the person is unavailable as being outside of the jurisdiction, outside one hundred miles.

THE COURT: Well, I'm going to permit counsel for the Defendants to address those two issues; that is, the admissibility of the depositions and the inferences -- the admissibility of the depositions and the issue regarding whether the Court -- whether the Government is entitled to

have the Court draw inferences from the invocation of the Fifth Amendment, and I think the Government probably ought to have the opportunity to respond.

MR. HIRD: That procedure is perfectly satisfactory to us, although I would mention, I believe Your Honor has already ruled on the situation regarding Mr. Wilkov.

THE COURT: Yes, that's true.

MR. HIRD: The only question I guess is the question of the timing, when you would expect it, which may also get into questions about whether we -- quite frankly about how long the trial will be --

THE COURT: Yeah. Well, okay. Well, you tell me; where do you think we are in this trial at the present time?

MR. BAISE: With respect to the Defendant, Florida Cities, Your Honor, we have a number of witnesses left. I haven't counted them up today, but I believe, somewhat like the situation with Mr. Armstrong, Mr. Hartung, our case is going to move along rather rapidly. And frankly, we are looking to see whether or not there are at least a couple of witnesses that we can cut out and attempt to finish this off by Friday. It may be difficult. Obviously, we cannot control the amount of cross-examination time that the Government is clearly entitled to, but assuming it stays within the ranges and bounds we have seen to date, there's

at least a possibility of our completing our case on Friday.

Now, obviously, we're out tomorrow, and we have one witness who's only available on Wednesday, and we may have to put him on out of our preferred order, but there's a possibility we could get on maybe four or five of the witnesses on Wednesday, and if that is successful, we have a real shot at completing on Friday. If that's not successful, it probably will go over a day or two.

THE COURT: Uh-huh.

MR. BAISE: I'm not speaking, of course, for Mr. Hird, who obviously has one or two witnesses that -- well, I'll let Mr. Hird address it.

THE COURT: So, Mr. Baise, you say there's a possibility of you finishing your case by this Friday?

MR. BAISE: Yes, sir.

THE COURT: Mr. Hird?

MR. HIRD: Well, Your Honor, depending on the status of the offer of proof, I have three, what I believe is best described, three plus one. There's a Mr. Allen, who Mr. Baise will be calling in his case, and I had suggested that I would cross -- I'm sorry -- I would examine him with respect to my direct case when he appeared, so he appeared only once. So, if that happens, that would take that witness off.

I would then have two witnesses that I would go

forward with and as long as the status of the offer of proof is in doubt, there would be a third witness I would call. So, that would probably, assuming I can examine Mr. Allen at the time period suggested by Mr. Baise, that might add one more day.

THE COURT: Okay. Mr. Jacobs?

MR. JACOBS: Judge, first of all, I have no objection to Mr. Hird's suggestion that he examine Mr. Allen at the same time, for purposes of his case, as Florida Cities does -- when they examine him. I think that's a fair request and will speed things along.

I, by my count, I think based on the representations that have been made and the witnesses that have been called to date, at this point in time, my best approximation is that the Defendants together have 23 witnesses remaining on their list, 20 for Florida Cities and 3 for Avatar Holdings.

You can tell that we are somewhat shorthanded compared to the other side of the podium, and to the extent that the Defendants would advance us the courtesy, if they are going to cut, as Mr. Baise suggested, witnesses from the list, to the extent they could share that with us at their earliest available point in time, that would probably both facilitate our preparation, as well as expedite the examination of the witnesses when and if they are called.

THE COURT: Mr. Baise.

MR. BAISE: May I?

THE COURT: Yes, sir.

MR. BAISE: I think what Mr. Jacobs is still relying on is an earlier list that had 26 witnesses on it. My original -- excuse me -- the updated list had 18 witnesses on it, of which we have already taken care of Mr. Smith, three of those witnesses are by deposition, and that should take no more than half hour, and we've got Mr. Hartung.

THE COURT: Who do we have left? Let's get specific here.

MR. BAISE: Okay.

MR. BULLOCK: Your Honor, on Monday last we submitted a witness list to the Government that had 19 witnesses, three of whom would be called by deposition. We have already put forward -- let's see -- 1, 2, 3, 4 -- 4 witnesses. We have given them notice on Wednesday for approximately 7 witnesses.

THE COURT: The names? Well, I mean, you've given them the names?

MR. BAISE: In fact, my only list I've given to Mr. Jacobs. I wrote it out right after lunch hour, Your Honor. If he will hand me my list. On -- just the number or the names themselves, Your Honor?

THE COURT: Well, as long as -- since you have it, go ahead, yeah.

MR. BAISE: On Wednesday -- at this point it looks like Mr. Lehman may not be on today, so Mr. Lehman, and then a Ms. Kagey from EPA, who is coming down at our request. So Mr. Lehman, Ms. Kagey and the three depositions, and then Mr. Ron Blackburn, a State Official from the Florida DEP out of Fort Myers, followed by Mr. Mike Acosta, a Florida Cities employee, a Mr. Larry Good, who would talk about the Carrollwood situation, Mr. Bradtmiller, a Florida Cities employee.

MR. JACOBS: Mr. Baise, forgive the interruption. He's available on? I beg your pardon. You said one was available on Wednesday?

MR. BAISE: Mr. Bradtmiller is available only on Wednesday and will be taken out of normal order. Then we would hope to get on Dr. Abdul Ahmadi, another State Official, and finish up the day with Garald Allen.

MR. JACOBS: These are -- I'm sorry -- all 12 of these witnesses, then, on Wednesday?

MR. BAISE: Three of them are depositions and I believe there are 12 -- 1, 2, 3, 4, 5, 6, plus, excuse me -- Kagey and now we have Mr. Lehman, of course. I'm sorry, eight.

That's very ambitious.

THE COURT: Yes.

MR. BAISE: I realize that.

THE COURT: Okay.

MR. JACOBS: May I inquire further which ones, if you know now, you do not intend to call at all of the 19 on the list?

THE COURT: Yeah. Who will you not be calling from that list?

MR. BAISE: Out of the list I read you?

THE COURT: No, from the list that Mr. --

MR. BAISE: We haven't cut anyone yet. In fact, we were going to evaluate where we are this evening and see if there was anyone that we could cut from this, Your Honor.

I am advised by counsel that the Government may have a list that has a Mr. Michael Murphy on it, and we have decided to cut him off of the list. So that might help Mr. Jacobs with respect to the list he has.

MR. JACOBS: Your Honor, considering tomorrow we're not in Court, is it fair to request that we be advised tomorrow by the Defendants of any witnesses who also will be dropped from the list?

THE COURT: Yeah,

MR. BAISE: We can do that, Your Honor.

THE COURT: Yes. Advise them tomorrow of any additional witnesses that you -- and I expect counsel to act

in good faith in doing so, by tomorrow.

MR. BAISE: We have a very good working relationship on these issues, Your Honor.

THE COURT: Now, getting back to the written submissions, counsel, I don't see any realistic way for us to finish this case this week based on what I'm hearing, but --

MR. HIRD: Your Honor, that's why I raised the question, because I think it would make better sense to follow Your Honor's original suggestion and have the briefing on the admissibility and then the briefing on any response to the document if it's accepted to occur after we conclude at least the trial activities this week. If we are going to come back at some later date, we can still be doing that in that hiatus.

THE COURT: Okay. Well -- I'm going to -- can you have your Defendants have their written submissions addressing the admissibility of the depositions listed on page 34 and, also, the issue regarding the entitlement of the Government to the Court's drawing negative inferences from that as a -- well, drawing negative inferences from the invocation of the Fifth Amendment by Wednesday?

MR. HIRD: By a week from --

THE COURT: No, I was thinking in terms of this Wednesday, but I'm throwing that out as a --

MR. HIRD: Honestly, Your Honor, if we had understood that on Friday, I think we could have, and had not having heard direction from you, I don't think we can do that within that time period.

THE COURT: Uh-huh. Okay. Well, I guess I'm thinking now in terms of requiring your submissions later in the week and then the Government's opportunity to respond to that perhaps by the beginning of next week, sometime by Tuesday, say.

I guess maybe I'm asking for the submission -- I don't think it will take a great deal on your part to address those initial issues, and I would like to have that by close of business on Thursday of this week, and then the Government's response to that by --

MR. JACOBS: Thursday of the following week, sir?

THE COURT: No. Tuesday of the following week.

MR. JACOBS: Yes, sir.

THE COURT: And then I'll rule on that. Subject to the Court's ruling, we may not have to deal with the other issue; that is, on the offer of proof that the Government has filed.

MR. BULLOCK: Your Honor, would you object to a joint memorandum from the Defendants?

THE COURT: I would appreciate a joint memorandum. I'm glad you thought of it.

MR. BULLOCK: And Your Honor, would that be, I believe, the standard 20-page limit?

THE COURT: I'll tell you what, since we're going over the time that we scheduled for trial, why don't we say Friday from you guys and Thursday from the Government?

MR. JACOBS: Thank you, Judge.

MR. KIRD: Friday close of business?

THE COURT: Yes, sir.

MR. KIRD: Thank you.

MR. BAISE: Your Honor, may I just bring one more point that's a bit of a clarification, I think? When I mentioned a moment ago I thought that DOJ counsel was looking at an older list. As I look at what we have accomplished to date, I only count 11 witnesses for us to have to put on over three days, not 19, not 23.

THE COURT: Well --

MR. BAISE: Excuse me.

THE COURT: We may be able to do it, and that's my fondest hope. But, even if we do, I am not inclined to feel that that necessitates a revision of this briefing schedule that I've indicated.

MR. BAISE: No, I wasn't suggesting that. I was just bringing the actual number to your attention, so you would have that as background.

THE COURT: Right.

I need to -- these memoranda, how much -- what length are you contemplating?

MR. BULLOCK: Your Honor --

MR. BAISE: Short as possible.

MR. KIRD: I can certainly live within the 20-page limit and my goal is to make it much, much shorter, but I haven't started writing it yet, so I can't project. I certainly don't need an extension of that, and I'm going to try to shoot to do it in 10 pages.

MR. JACOBS: Whatever he shoots for, I'll shoot for.

THE COURT: Shoot for 10 pages, and I will hold you to a 15-page maximum on this, but let's try -- these are -- I think these issues are pretty discrete, isolated issues here, so I think you can do it in 10 pages.

Now, I have a sentencing at 8:45 on Wednesday. It should not be a lengthy sentencing. I think I can do it in 15 minutes and we'll start at 9:00.

Anything else?

Okay.

MR. BAISE: Yes, Your Honor, one item.

First off, we want to thank the Court for allowing the Courtroom Deputy to open the Courthouse at 8:45 -- 7:45. I'm sorry. Because we understand that there has to be certain orders issued for that to occur, and to the extent

that can continue when we have an 8:45 beginning, we would appreciate that.

THE COURT: We'll be starting at 9:00 on Wednesday, and to the extent that I can start earlier, I'll -- let me see -- you got your calendar there for next week?

THE CLERK: The rest of the week we have something early morning first thing.

THE COURT: We have -- I have canceled the sentencing and postponing the 4:00 sentencing for Wednesday, and I have one scheduled for 8:45 Wednesday morning and one 8:45 Thursday morning and one at 8:30 Friday morning. So, I can't be putting off everything that I -- everything else that I have. I've put off an emergency Grand Jury matter that would have taken some of this afternoon, and I'm going to try to hold that off until next week.

Okay. Then I'll see you all at 9:00 on Wednesday morning.

MR. BAISE: Thank you, Your Honor.

THE MARSHAL: All rise.

The Court will be in recess until 9:00 Wednesday.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff,
vs.
FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS, INC., Defendants.

Case No. 93-281-CIV-FTM-21
Wednesday, April 3, 1996
Tampa, Florida
9:00 a.m.

TRANSCRIPT OF NON-JURY TRIAL
BEFORE THE HONORABLE RALPH W. NIMMONS, JR.,
UNITED STATES DISTRICT JUDGE

Appearances of Counsel:

For the Plaintiff: Mr. Daniel S. Jacobs
Mr. T. Anthony Quinn
Mr. Robert Homiak

For Defendant Avatar: Mr. David B. Hird
Ms. Joanne Tsotsos

For Defendant Florida Cities: Mr. Gary H. Baise
Mr. Alexander M. Bullock
Mr. Lance High
Mr. Don G. Scroggin

Reported by: Dennis Miracle
Official Court Reporter

PROCEEDINGS
April 3, 1996
****

THE COURT: Morning counsel.

MR. BAISE: Good morning, Your Honor.

THE COURT: Okay.

Mr. Baise, you may proceed, sir. I think we're on --

MR. BAISE: Mr. Pat Lehman has been called and sworn in.

THE COURT: All right.

He hadn't started testifying as yet?

MR. BAISE: No, he had not.

THE COURT: All right.

MR. BAISE: And before he starts testifying, Your Honor, I would like to move into evidence the exhibit for Florida Cities marked 207 which is the diagram designed on wasteload allocations by Mr. Roger Hartung Friday afternoon about 4:00 o'clock.

If you would pull it back for Your Honor to review and it's where he describes and outlines basically what was in his -- or actually it spells out in greater detail what was in his testimony.

MR. QUINN: We object. It wasn't listed as an exhibit.

THE COURT: Sustained.

DIRECT EXAMINATION CONTINUING

BY MR. BAISE:

Q. Good morning, Mr. Lehman.

A. Morning.

Q. What is your occupation, Mr. Lehman?

A. I'm an environmental engineer.

Q. And can you define what environmental engineer is, Mr. Lehman?

A. My formal education is in wastewater, water treatment, process design.

Q. What college degrees do you hold, if any, Mr. Lehman?

A. I have a civil and environmental engineering degree from the University of Iowa I obtained in 1973, and also a masters degree in environmental engineering from the same University in 1975.

Q. Any particular major subject of study in either one of these degrees, Mr. Lehman?

A. There again, the environmental emphasis was on water and wastewater treatment.

Q. Who is your present employer, Mr. Lehman?

A. Currently, I work for the Peace River Manasota Regional Water Supply Authority.

Q. And please define what that entity is, for the record, Mr. Lehman.

A. It's an inter-governmental agency of four counties;

Manatee County, Sarasota, Charlotte and DeSoto Counties, to formulate a regional water supply system for the four counties.

THE COURT: Would you give me that, please, Peace River what?

THE WITNESS: Manasota, M-A-N-A-S-O-T-A, Regional Water Supply Authority.

THE COURT: All right. Go ahead.

BY MR. BAISE:

Q. Your job title?

A. Be authority engineer.

Q. What is your responsibility at this entity as the engineer, Mr. Lehman?

A. We're currently putting together a CIP program, expansion program. We currently operate a twelve MGD water treatment plant and distribution system. We wholesale water, so it's a transmission system. So I oversee those facilities from an engineering standpoint, and improvement projects, renewal and replacement projects, and also consult on the operations of it. And I'm also involved in the planning and expansion of those facilities.

Q. What is CIP?

A. Capital improvement program.

Q. Thank you.

How long have you been in this present position, Mr. Lehman?

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A. Going on about three and a half years.
Q. Where were you employed before this present position?
A. Before that, I had a, in the summer of '92, I did some consulting work with Haven and Emerson Engineers. Before that, for about three years, I was deputy director of the City of Tampa Water Department.
Q. What were you job responsibilities at the City of Tampa Water Department?
A. To act as an assistant to the director and basically do specific tasks that he would assign. That could basically be just about anything, from production distribution, helping in the financial, whatever aspects needed to be attended to at the time.
Q. And where were you employed before that?
A. That would have been for Florida Cities Water Company.
Q. What years were you employed at Florida Cities Water Company?
A. I started there in June '84 and left I think it was about April '89.
Q. What positions did you hold at Florida Cities Water Company?
A. I was originally hired as operations manager and somewhere in between leaving, I was given the title of vice president of operations some – maybe about a year or two before leaving.

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Q. What were your responsibilities as vice president for operations?
A. That was to oversee the operations of their water and wastewater treatment facilities and coordinate with the division managers and the operation staff as far as operations, maintenance requirements, compliance with the discharge limitation or drinking water quality, depending if you're talking about water or wastewater facilities.
Q. How many of these facilities were wastewater and how many were drinking water facilities, Mr. Lehman?
A. There were, counting up, about ten wastewater facilities throughout the West Coast and into Poinciana and Barefoot Bay on the East Coast, and I think there was about an equal number of water treatment facilities, also.
Q. Could you identify those facilities that you had operational responsibility for in the Sarasota area?
A. Directly in Sarasota?
Q. Just in the area.
A. There was Golden Gate down South, there was Fiesta Village in South Fort Myers, there was Waterway Estates in North Fort Myers, Gulf Gate, South Gate in Sarasota, there was Carrollwood, there were three wastewater facilities in Poinciana and one over in Barefoot Bay.
Q. When did you become familiar with the facility at Waterway Estates?

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A. Soon after being hired, I, you know, tried to become familiar with all the facilities and Waterway Estates being one of them.
Q. Were there files maintained on Waterway Estates in your office?
A. Yes.
Q. And why did you become familiar with Waterway Estates?
A. Obviously, to be in charge of operations, you need to become familiar with the existing permits' data and the actual operation of those facilities.
Q. Did you determine whether or not all the facilities had permits?
A. Yes, I'm sure I did.
Q. What type of permits did Waterway Estates require to operate, Mr. Lehman?
A. They required both an operating permit to discharge from the Florida Department of Environmental Regulation, and also an NPDES Permit issued through the EPA.
Q. And in your review of the files, Mr. Lehman, did you find State permits and NPDES Permits for the Waterway Estates facility when you arrived at Florida Cities in your position?
A. Yes.
Q. I would ask the witness to be presented with Defendants' Trial Exhibit Number 17, which is already in evidence, Your Honor.

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Do you have Florida Cities' Trial Exhibit Number 17 in front of you, Mr. Lehman?
A. Yes, I do.
Q. Please describe this document?
A. It is a discharge permit issued by the Florida Department of Environmental Regulation for the Waterway Estates Wastewater Treatment Facility.
Q. When was this permit issued?
A. It is dated April 1st, 1981.
Q. Is this the type permit that the State of Florida issues to allow discharge from a facility into the waters of the State of Florida?
A. Yes, it is.
Q. I direct your attention, Mr. Lehman, discounting the pages, to the fourth page which is entitled, applicants, A. A. Reeves. And I direct your attention to the paragraph that begins, "to operate." You see that?
A. Yes, I do.
Q. Would you summarize what that paragraph allows Waterway Estates to undertake?
A. It allows it to operate as a contact stabilization process wastewater treatment facility with effluent to a canal to Caloosahatchee River located off of the project site.
Q. Excuse me.
A. And then it gives the actual coordinate location.

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Q. What does contact stabilization process mean, Mr. Lehman?
A. It's a specific activated sludge process.
Q. With respect to this document, Mr. Lehman, it is noted at the bottom of each page, one of four pages, if you'll turn to the next page, two of four, if you will go to page 3 of four. And I direct your attention to paragraph two. Please summarize that paragraph, Mr. Lehman.
A. That is pursuant to the Florida Administrative Code, the permittee will maintain ninety percent of removal of BOD and suspended solids in the treatment process and other provisions of the chapter regarding domestic wastewater treatment.
Q. Are these requirements of secondary treatment, Mr. Lehman?
A. Yes, all the typical requirements.
Q. I direct your attention to the document following page 4 of four, entitled application to operate and construct a domestic wastewater treatment and disposal system. Do you see that page, Mr. Lehman, that's marked March 27, 1981?
A. No, I'm not following that one, I'm sorry.
Q. Okay.
Go to the end of four of four of the Florida permit.
A. Right.
Q. Then the next page should be application to operate and construct a domestic wastewater treatment and disposal treatment.

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A. All right.
Q. You see that?
A. Yes, I do.
Q. In that document, I would ask you to turn to page 3 of that document.
A. Okay.
Q. And page 3 of that document is entitled, general, and then has a listing under it of population. You see that page?
A. Yes, I do.
Q. Would you please summarize the information that is under subsection A there, Mr. Lehman?
A. It's providing the general statistics of population of the service area and the population served by the existing plant which is nine thousand fifty people, the present approved capacity of 1.08 MGD.
Q. And I direct your attention to subsection B-2, beginning with advanced wastewater treatment. Would you please describe what that section means, Mr. Lehman?
A. It specifically identifies advanced wastewater treatment, tertiary treatment provided for and provides check off for various aspects and there's an X indicated next to BOD slash suspended solids removal.
Q. What does that X mean, Mr. Lehman?
A. I'd interpret that as meaning that the removal for BOD and suspended solids is beyond secondary treatment and more

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into the advanced treatment aspect, tertiary treatment provisions.
Q. Does it mean this plant is meeting that level?
A. Yes.
MR. QUINN: Move to strike. It calls for speculation based upon what the plant's actually doing as compared to what it could do.
THE COURT: Overruled.
BY MR. BAISE:
Q. Mr. Lehman, I would ask you to turn two pages over to the page that is entitled, domestic wastewater characteristics. And what does this page mean with respect to the Waterway Estates Facility, Mr. Lehman?
A. It's providing the specific data that the influent concentration had of BOD and suspended solids' level and effluent capabilities of the facility.
Q. And what does it indicate the percent of removal is from that facility, Mr. Lehman?
A. For the five day BOD, it's listed as ninety-three percent removal, for the total suspended solids, it's listed at ninety-seven percent removal.
Q. Does this mean that this was the effluent treatment level the plant was achieving?
MR. QUINN: Objection, this again calls for speculation. This is before the time the witness was working

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for Florida Cities Water Company and anything he's going to testify on would be based on hearsay, too, sir.
THE COURT: Well, I think he's being asked to describe what this document purports to say. It's in evidence. I'll overrule the objection.
Isn't that what you're asking him?
MR. BAISE: Yes, sir.
BY MR. BAISE:
Q. Mr. Lehman, is there any indication or – are you familiar with this document?
A. I'm sure I was. I don't recall it specifically.
Q. Is there any indication in this document, Mr. Lehman, or did you know of any requirement in Florida Cities' permits at Waterway Estates to cease discharge of the effluent in 1981?
A. No.
MR. BAISE: Your Honor, I would ask that the paralegal take the chart, the top one I believe it is, excuse me, the bottom one, and have that marked as Florida Cities' Exhibit for identification 208.
And Mr. Lehman, I would ask that if you would take one of those felt tip pens and just put a circle around 1981, FDER issues an operating permit for Waterway Estates discharge –
MR. QUINN: Objection, Your Honor, several on this document. First, this document was not listed as an exhibit

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anywhere. Second, this document was given to us earlier this week, but it was not disclosed through which witness this document would be used. Third, this document upon examination is hearsay, hearsay within hearsay, and finally, Your Honor, this is a crutch for this witness to testify from.

The document is going to be doing the testifying, not the witness. The witness is here, he's the one who ought to be doing the testifying.

MR. BAISE: Your Honor, I'm only having it marked for identification purposes. I'm not going to move it into evidence. This is a very complicated project. There are a number of events which occurred here. The Government obviously has put in hundreds of documents we believe in order to sort of confuse the situation with respect to Waterway Estates. What we have presented here is a document that will help the trier of fact outline what occurred here at Waterway Estates, and because it is not going to be moved into evidence, we believe we can mark it for identification and for --

THE COURT: I need to know whether basically what you're presenting is this witness' testimony or whether you're basically asking him to testify from this document which you yourself say is not properly to be offered or received as an exhibit.

MR. BAISE: I did not say it was not going to be properly offered, Your Honor, I said it was going to be marked

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for identification.

THE COURT: You said you were not offering it.

MR. BAISE: That's right, I was not going to offer it in evidence, that's correct.

THE COURT: Right. So I need -- I need you to address this basic issue.

MR. BAISE: I'm using this particular writing under Rule 612 to refresh the witness' memory. It has been a number of years since he was involved in this particular project, and all I will do with respect to this witness and two others is merely confirm the dates after I have gone through the documents which confirm exactly what occurred.

So there is no new information, no new documents. It is merely an aid, a demonstrative aid in refreshing the witness' memory of events that occurred fifteen years ago.

MR. QUINN: Your Honor, this is a crutch, as it's going to be doing the testifying instead of the witness. It is not accurately in as a summary under Rule 1006 because the documents upon which it is based, I have no idea what they are, sir. It should not, clearly should not come in evidence, and second, this witness should not be allowed to rely upon it to refresh a recollection which has not even been established is not good right now.

MR. BAISE: I did not use to it refresh his recollection. He already testified with respect to the fact

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that Florida Cities' Waterway Estates had a permit dated April of 19 --

THE COURT: You indicated that part of your purpose of wanting to use this exhibit is that it will refresh the witness' recollection. Now if you want to try to qualify it, you can. He hasn't asked him any questions yet on this document. So, at this time, I'll defer ruling on this and we'll see where we go with it.

MR. BAISE: All I was going to do, Your Honor, is just ask him to mark April, 1981, which is indicated on this chart, FDER issues an operating permit for Waterway Estates. He already testified to this, this document is in evidence. All that marking would indicate is that we have covered that particular point.

THE COURT: Go ahead and mark it.

Mr. Lehman, you can mark that.

(Witness complying.)

BY MR. BAISE:

Q. Mr. Lehman, I direct your attention to Florida Cities' Exhibit Number 18. This, too, is in evidence, Your Honor.

Was this document in the file as you reviewed it when you took over your responsibilities at Waterway Estates and Florida Cities, Mr. Lehman?

A. It is the issuance of the NPDES Permit from the EPA.

Q. Are you familiar with this document?

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A. Yes.

Q. Directing your attention to page 2 of this document, Mr. Lehman, when was it issued?

A. It became effective September 24th, 1981.

Q. And when did the permit expire, Mr. Lehman?

A. The expiration date is midnight September 24th, 1986.

Q. And what are the receiving waters for the Waterway Estates Facility to discharge into?

A. It's listed as the Caloosahatchee River.

Q. I direct your attention, Mr. Lehman, to the third page entitled, effluent limits and monitoring requirements. Are you familiar with these permit limits for the Waterway Estates Facility?

A. Yes.

Q. Is there any limit of no discharge in this permit issued in 1981 by EPA, Mr. Lehman?

A. No, there is not.

Q. Mr. Lehman, I ask you to page through the twelve pages of the permit to the attachment on this document dated September 24, 1981, the NPDES Permit. The attachment is dated July 14, 1981. Do you find that document, Mr. Lehman?

A. Yes, I do.

Q. Please describe this document, Mr. Lehman.

THE COURT: Is this a letter?

MR. BAISE: Yes, it's a letter to Howard Zeller.

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A. So that the two could be coordinated.
Q. Is there any indication in the attachment that the Waterway Estates Facility has a no discharge wasteload allocation in 1986, Mr. Lehman?
A. No.
Q. I direct your attention to Defendants' Exhibit Number 23, dated June 30, 1986. What is this document, Mr. Lehman?
MR. BAISE: Wait just a second, Mr. Lehman. Do you have it, Your Honor?
THE COURT: Yes.
BY MR. BAISE:
Q. Okay.
Go ahead, Mr. Lehman. What is this document?
A. This is a permit denial letter or intent to deny letter on the NPDES application issued from the EPA to Florida Cities Water Company.
Q. Prior to this time, had EPA ever been to visit the Waterway Estates Facility, Mr. Lehman?
A. They typically come around on an annual basis for annual inspections at the facilities, so yes, I'm sure they had been there.
Q. Did State officials also come and visit the facility?
A. Yes. There was always someone from the Florida Department of Environmental Regulation with them.
Q. How frequently would they make these visits to the

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Waterway Estates Facility?
A. Typically annually. That was their goal.
Q. Would you accompany them on these visits?
A. I'd try to be available and normally would be, yes.
MR. BAISE: Excuse me, did you have a question, Your Honor?
THE COURT: No.
BY MR. BAISE:
Q. Excuse me.
On these visits, was it ever indicated that this Waterway Estates Facility had no discharge wasteload allocation?
A. No.
Q. So June 30, 1986, was the first time that you knew that the NPDES Permit might be denied for this facility?
MR. QUINN: Objection, leading, Your Honor.
THE COURT: Yeah. When was the first time is the proper way to ask the question.
BY MR. BAISE:
Q. Mr. Lehman, directing your attention to the third page of the document, dated June 30, 1986, would you summarize what this page represents?
A. This is the fact sheet attached to the letter of intent to deny from EPA outlining the synopsis of the application.
Q. And I direct your attention to page 2 of this document, and paragraph two. And would you please read paragraph two.

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A. Paragraph's entitled, proposed effluent limitation. And the paragraph reads, the final effluent limits for this facility to a canal to the Caloosahatchee River are, in quotations, no discharge.
Q. And would you read paragraph three?
A. Paragraph three is entitled, basis for final effluent limits and permit conditions. And the paragraph reads, the permit denial is based on a no discharge wasteload allocation developed by FDER on January 19th, 1981. The terms and schedule for meeting the no discharge wasteload allocation will be set forth in a forthcoming administrative order.
Q. What was your reaction when you received this fact sheet in 1986, Mr. Lehman?
A. Came as a surprise that all of a sudden we're being told there is no wasteload allocation and especially when it's established by the FDER.
THE COURT: Excuse me, especially what; I didn't hear you?
THE WITNESS: Where the paragraph states that it was based upon studies by the FDER which is the Florida Department of Environmental Regulation.
THE COURT: I see.
BY MR. BAISE:
Q. What did you do immediately upon receiving this document, Mr. Lehman?

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A. Oh, I coordinated with Mr. Reeves.
Q. And who was Mr. Reeves?
A. He was the – let's see, what is his exact title. Would have been executive vice president. He was in charge of Florida Cities.
Q. You recall what you might have told Mr. Reeves with respect to this document?
A. I gave it to him and decided what to do.
Q. I direct your attention to page 3 of the fact sheet you have identified being attached to the June 30, 1986 letter. And directing your attention to paragraph ten, please summarize that, Mr. Lehman, please.
A. Okay.
That paragraph is entitled, the proposed scheduled for permit issuance, and it lists tasks and date timeframes for those task completions. The first one is fact sheet to applicant. And that would be June 30, 1986. The second was State certification request, also June 30, 1986. Public notice of permit denial, the date would be July 31st, 1986. And the last one is permit denial, issued August 4, 1986.
Q. Was there any consideration of shutting the plant down at this point, Mr. Lehman?
A. No.
Q. Why not?
A. There is no way to shut down a wastewater treatment

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plant. You're serving nine thousand people and it's, you know, there's no alternative.
Q. So what did you do, Mr. Lehman, after you received and met with Mr. Reeves with respect to this denial?
A. Well, one of the main things was coordinate with FDER, contact them, arrange to meet with them since the denial was being based on their studies, and find out the facts behind that.
Q. I direct your attention to Florida Cities' Exhibit Number 24. Did you prepare this document, Mr. Lehman?
A. Yes, I did.
Q. And this document being dated August 10, 1986?
A. Correct.
MR. BAISE: Your Honor, I would move this document into evidence because it has not been moved in prior to this time.
THE COURT: Be received.
BY MR. BAISE:
Q. Please describe this document for the record, Mr. Lehman?
A. It's a memorandum from myself to A. A. Reeves, and it is summarizing a meeting held at the Fort Myers district office of the Florida Department of Environmental Regulation in regards to the intent to deny the NPDES Permit.
Q. Did DER advise you in this meeting and does it reflect in this memorandum that the Waterway Estates Facility had a no

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discharge wasteload allocation?
A. At the time the memorandum was written?
Q. Yes.
A. No, there was not a no discharge at that time existing for the facility.
Q. In fact, why don't you read the first paragraph under the attendees, Mr. Lehman, into the record?
A. Okay.
The paragraph reads, the reference meeting was precipitated by the NPDES denial from the EPA. Waterway Estates Wastewater Treatment Plant has a valid DER operating permit with an expiration date of August 2nd, 1988. The DER recognizes the fact and will honor the existing permit.
Q. Did you or anyone at your direction make any calls to EPA to determine why they had issued this no wasteload allocation discharge permit, Mr. Lehman?
A. There probably was, but I don't recall specifically.
Q. Do you recall whether you were ever advised that DER made any phone calls with respect to the no wasteload allocation for the Waterway Estates Facility?
A. Not directly, no.
Q. What next did you do, Mr. Lehman, on behalf of Florida Cities after this meeting?
A. One of the requests and intents to the letter to deny was to develop a schedule to meet the intended no discharge

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compliance.
Q. Did you develop such a schedule?
A. Yes, I did.
Q. I direct your attention to Defendant's Trial Exhibit Number 25 dated September 16, 1986. Do you have that document in front of you, Mr. Lehman?
A. Yes, I do.
Q. And are you the Patrick J. Lehman who signed this letter to Ms. Connie Kagey on September 16th?
A. Yes.
Q. Please describe this letter for the record, Mr. Lehman?
A. This letter was in response to the intent to deny from EPA which requested a schedule for compliance with the no discharge and that is specifically what this letter was, was a proposed compliance schedule.
Q. I note that paragraph eight indicates completion date of 12-31-1988. Why was that date chosen, Mr. Lehman?
A. The completion and construction which is item seven, that was to coincide with expiration of the DER permit, and item eight followed that the following startup and placing the new facilities into service, that you were allowed so many months for compliance which this case allowed approximately four months to certify that the facilities were operating and meeting permit requirements.
Q. Did this list of tasks take into account all the levels

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of permitting that would be necessary for constructing any alternative at the Waterway Estates Facility?
A. It took into account normal permitting which would be FDER and on, you know.
Q. Did it take into account Lee County permitting requirements?
A. No, not anything that would be out of the normal.
Q. Was this a realistic schedule in your opinion at the time it was created by you?
A. It would have been extremely optimistic.
Q. Mr. Lehman, I direct your attention to page 2 of your letter of September 16, 1986. And would you read that paragraph into the record, please?
A. Okay.
That paragraph reads, the existing DER operating permit number DO36-72569 is valid through August 2nd, 1988. The DER has stated that there are no problems with the current operation and existing discharge limitations should remain in effect until expiration of the operating permit in 1988 per chapter 17-3 17-4 and 17-6 FAC for continual secondary wastewater treatment. No nutrient, and in parentheses, nitrogen and phosphorus limits should be placed on the discharge until the existing DER permit expires. Meanwhile, total N and total P will be monitored for effluent samples on a quarterly basis. All parameters will be monitored in

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accordance with Chapter 17-19, FAC.
Q. And what is total N and total P?
A. The N represents nitrogen and the P represents phosphorous.
Q. Thank you.
Mr. Lehman, directing your attention to --
MR. BAISE: Your Honor, I need to move this document dated September 16, 1986 marked as Defendants' 25 into evidence.
THE COURT: It'll be received.
BY MR. BAISE:
Q. Mr. Lehman, directing your attention to Defendants Exhibit, Florida Cities' Exhibit Number 27, do you have that document in front of you?
A. Yes, I do.
Q. Please describe this document for the record, Mr. Lehman.
A. This is a letter dated December 8, 1986 to Florida Cities Water Company, addressed to A. A. Reeves from Bruce Barrett, director of water management division at the EPA. And it is the actual letter notifying denial of the National Pollutants Discharge Elimination System Permit application for the Waterway Estates Facility.
Q. What did you do after receiving this letter, Mr. Lehman? Did you cease -- what did you do after receiving this letter?
A. Sir, coordinated with staff.

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Q. Why didn't you cease discharge at the Waterway Estates Facility since your permit had just been denied?
A. There again, there is no way to stop that. It's sanitary sewer service to nine thousand people. If you turn that off, what do you do?
Q. I direct your attention to five pages into the document. They are not numbered, I'm sorry to say. And the document I direct your attention to is titled, amendment to the fact sheet at the time of final denial. It's the next to the last page. Do you have it in front of you?
A. Yes, I do.
Q. What is this document?
A. It is an amendment to the fact sheet which the original fact sheet was the intent to deny.
Q. Who is it signed by, Mr. Lehman?
A. C. A. Kagey.
Q. Did you ever call Ms. Kagey with respect to this denial?
A. I don't recall if I did specifically, but could have.
Q. Mr. Lehman, would you take your felt tip pen and under the column 1986, circle EPA issues draft denial of Waterway Estates NPDES Permit, the 1986 column.
(Witness complying.)
And also the December notation, EPA issues final denial of Waterway Estates NPDES Permit based upon a no discharge wasteload allocation.

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(Witness complying.)
So Mr. Lehman, what did you and Florida Cities do after receiving this denial?
A. Part of the denial was, there be an administrative order forthcoming.
THE COURT: Say that again, please.
THE WITNESS: There would be an administrative order forthcoming as part of the -- since they denied the permit, that they would issue an administrative order.
BY MR. BAISE:
Q. What else did you do?
A. Started developing how to comply with it.
Q. I direct your attention to Defendants Exhibit Number 26, please. Do you have that in front of you, Mr. Lehman?
A. Yes, I do.
Q. A document entitled ESE at the top, meeting the challenge cover page on it?
A. Yes.
Q. What is this document, Mr. Lehman?
A. This is a proposal submitted from ESE which is an engineering consulting firm to do an investigative study of alternatives for the Waterway Estates Facility.
Q. Why were they submitting this letter to you, Mr. Lehman?
A. Florida Cities had requested from consultants to provide scope of services and costs to do evaluation of alternatives to

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bring Waterway Estates into compliance as to the proposed NPDES Permit.
Q. When did you start that process of seeking responses from engineering firms, Mr. Lehman?
A. It was in the latter part of '86.
Q. Is there a date on this letter?
A. I don't see one specifically.
Q. You know approximately when you received it?
A. It says it's in response to my letter dated November 10, '86, so given various time constraints to prepare it and provide a scope of services, I'm assuming that the very late part of '86 or early '87 timeframe.
Q. Mr. Lehman, directing your attention to paragraph two and would you read that paragraph into the record, please.
MR. BAISE: Excuse me, Your Honor, this has not been moved into evidence and I now propose to move it into evidence.
MR. QUINN: I'm sorry, which exhibit is that?
MR. BAISE: We're still on 26.
MR. QUINN: No objection.
THE COURT: It'll be received.
BY MR. BAISE:
Q. Now, you may read paragraph two, Mr. Lehman.
A. In developing our response to your request, we have focused on what we believe to be the most efficient approach to completing this study. Our analysis will be directed in

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establishing the wastewater effluent disposal and wastewater treatment process that will be economically feasible, environmentally permittable and will have the shortest time for implementation and construction.
Q. Why were you concerned about the shortest time for implementation and construction?
A. Obviously, we had a very short compliance schedule established that we submitted and we were going to make every effort to try to meet the end target of August, 1988.
Q. Mr. Lehman, I direct your attention to what is marked page 2 in a letter to Patrick J. Lehman from ESE. Could you please summarize what this page represents, Mr. Lehman?
A. This is a listing of specific tasks that would be performed in the scope of services by ESE to complete a total analysis and alternative study for various treatment processes for the facility.
It involves contacting the regulatory agency, developing flow projections for the facility, establishing the final technically feasible treated wastewater effluent disposal alternatives, identifying the constraints for each alternative, evaluate the disposal aspects that would be available, the options, and to develop the most appropriate treatment alternative for each feasible disposal alternative selected and to develop estimated capital and operating costs of each alternative, to evaluate the treatment and disposal

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alternatives.
The evaluation will be based on monetary costs, environmental impacts, the flexibility and reliability, constructibility and the implementation, and to select a recommended treatment process that would meet those above constraints. And then to prepare the preliminary design for the selected plan.
Q. Why was this all necessary?
A. It's all the normal process that you have got to start at the very beginning to develop flow projections. You can't just design a facility that is going to be there for twenty years to treat what you have today. You have to provide for the future, also.
And you have to do a very detailed analysis of each alternative. They all have their pros and cons, and site specific constraints. The size of the site was very restrictive. The need to meet a specific deadline provided a very specific timeframe to shoot for. There's just a lot of involvement.
Q. Did you direct ESE as to what alternatives it should consider?
A. We had some in mind that we knew were alternatives, whether they were feasible or not, didn't necessarily know. Plus, we relied on them to brainstorm any other alternatives that through their expertise that they would have available.

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Q. Now, Mr. Lehman, you testified you're a civil engineer. Why didn't you and your staff undertake this project?
A. Well, there wasn't much staff. We were pretty lean. There was myself, Rich Vorhees who was the construction engineer overseeing the construction going on through Florida Cities, and like I said before, there were ten wastewater plants and approximately another ten water treatment plants there that when it comes to significant projects like this, that is where consultants best come in that have the expertise and manpower to use on a specific project.
Q. I direct your attention to page 4 of this document with your name at the top of the page, Mr. Lehman. Beginning with a visit to the plant's site. Do you see that page?
A. Yes, I do.
Q. Please summarize C, D and E for the record, Mr. Lehman.
A. C, D and E?
Q. Yes.
A. These are specifics tasks that ESE had incorporated into their scope. C being, meet with the Florida Department of Environmental Regulation to discuss and obtain their opinion for the following effluent discharge alternatives; deep well injection, land application, reuse and discharge to the Caloosahatchee River. A maximum of a one day meeting is included in our fee. Paragraph D reads, meet with members of the North Fort Myers Utilities to determine the feasibility of

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receiving and treating wastewater flow generated within the Waterway Estates service area. If the North Fort Myers Utilities would agree to accept the wastewater flow, we'll ask them for approximate connection fees and monthly charges. Firm negotiations with utility company are not included in our fee. Paragraph E reads, contact the owners of the existing two golf courses located in the service area to investigate their desire to utilize the effluent for golf course irrigation and to determine approximate fee requirements.
Q. Now, did there come a time, Mr. Lehman, that you or Florida Cities hired ESE to undertake the tax action you have just outlined?
A. Yes. Florida Cities did hire ESE.
Q. When was that?
A. Shortly after this which would have been in the early part of 1987.
Q. So there was a contract signed between Florida Cities and ESE?
A. Yes.
Q. Would you take your felt tip pen and mark March, the first item under March, 1987, please, which reads, contract signed between Florida Cities Water Company and ESE to evaluate alternatives for the wastewater facility.
(Witness complying.)
Mr. Lehman, direct – withdraw that.

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How soon after hiring ESE did they start work, Mr. Lehman?
A. I recall they started immediately.
Q. Directing your attention to Florida Cities' Trial Exhibit Number 28, do you have that in front of you?
A. Yes, I do.
Q. It's a letter dated May 11, 1987?
A. Yes, sir.
Q. Please describe this letter for the record.
A. This is a letter addressed to A. A. Reeves, Florida Cities Water Company, written by John T. Marlar from the EPA. It's regarding the issuance of an administrative order regarding the Waterway Estates Wastewater Treatment Plant.
Q. Why did the Waterway Estates Facility have to have an administrative order, Mr. Lehman?
A. That comes –
MR. QUINN: Objection, calls for speculation as to the requirements for why – objection calls for speculation as to why an order had to be in place. Sorry.
THE COURT: Why don't you ask him first if he knows why. I'll sustain the objection at this point.
BY MR. BAISE:
Q. Are you familiar with 309 Orders from EPA, Mr. Lehman?
A. I became familiar, yes.
Q. Would you turn to the second page of the document. Is

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this an attachment to the letter dated May 11, 1987?
A. Yes, it is.
Q. Please describe this document for the record, please.
A. This is the actual order pursuant to Section 309, Clean Water Act, issued to Florida Cities Water Company, Waterway Estates.
Q. Did you review this document at the time it came in?
A. Yes, I did.
Q. Directing your attention to page 2, paragraph one, and the two columns under activity and due date, what was the purpose of these two columns, Mr. Lehman?
A. It provided activities which were specifically to submit progress reports and due dates listed for those items.
Q. And when was the facility to cease discharging?
A. The final task there is listed as, meet final requirements by ceasing discharge and the due date listed is September 30th, 1988.
Q. Is there anything in the order that suggests that the facility put in AWT facilities by September 30, 1988?
A. No.
Q. I would ask you to take your pen and circle under May of 1987 column, the item, EPA issues an administrative order. (
(Witness complying.)
I direct your attention, Mr. Lehman, to Defendants' Exhibit 194. And it's Plaintiff's Exhibit, Your Honor, 367.

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It's already in evidence.
THE COURT: Plaintiff's 367?
MR. BAISE: 367. Ours is 194.
BY MR. BAISE:
Q. Are you familiar with this document, Mr. Lehman?
A. Yes, I am.
Q. What is this document?
A. This is the preliminary engineering draft report prepared by ESE.
Q. Is this the report that you recently discussed in the letter they sent to you?
A. Yes, this is the report they developed under that contract, yes.
Q. Look at the first page. It says preliminary engineering draft reports. Was there a subsequent report after this one by ESE, Mr. Lehman?
A. I can't remember if there was or not.
Q. Can you read the writing that is below, draft report, which is circled, and make out what that writing is, and is that your handwriting?
A. Draft report, circled, and underneath it, looks like this says, this is final.
Q. When was this report submitted to you and Florida Cities, Mr. Lehman?
A. On the bottom is dated August, 1987, with the eighth

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penciled in.
Q. Is there any doubt in your mind that this is the ESE draft slash final report submitted to you in August, 1987?
A. No.
Q. I would ask you to – excuse me withdraw that.
Mr. Lehman, I direct you to page 1.1 and the page numbers are marked in the upper righthand corner. Do you see that page 1.1, Mr. Lehman?
A. Yes, I do.
Q. And I direct your attention to paragraph one, introduction. Would you please summarize that paragraph?
A. That's giving the basic background that Florida Cities Water Company owns and operates a 1.08 MGD advanced wastewater treatment plant at the Waterway Estates location and provides a present average daily flow is approximately 0.85 MGD with discharge into an adjacent canal flowing into the Caloosahatchee River, and then summarizes that the EPA has ordered Florida Cities Water Company to cease discharge of the effluent into the canal at the earliest date practical, but no later than September 30, 1988.
Q. And I direct your attention to paragraph 1.2, and would you read that into the record, Mr. Lehman?
A. That paragraph is entitled, the purpose?
Q. Correct.
A. The purpose of this report is to develop, study, and

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evaluate new effluent discharge and wastewater treatment process design alternatives and recommend the most cost effective and environmentally permittable alternative for the Waterway Estates Wastewater Treatment Plant.
Q. And I direct your attention to page 1.2, the next page. And would you summarize paragraph three?
A. The entire section here is a scope of services that ESE would do or did do. And specifically paragraph three was, contact the Florida Department of Environmental Regulation, Lee County, and other agencies that could have an impact on the study.
Q. Did ESE do that?
A. Yes.
Q. Directing your attention to paragraph five, what was the purpose of that paragraph?
A. As part of the study, that ESE would establish and define a maximum of five technically feasible treated wastewater effluent disposal alternatives and the major constraints for each alternative.
Q. Who came up with the number of five technically feasible effluent disposal alternatives, Mr. Lehman, if you know?
A. I don't know specifically. I'm sure it was probably a joint effort in negotiation between Florida Cities and ESE.
Q. And I direct your attention to paragraph six. Would you please read that into the record?

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A. Okay.
Paragraph six reads, evaluate all disposal alternatives developed above and select only those alternatives that will be feasible to implement within the time limitations.
Q. And what were the time limitations?
A. There again, by the administrative order and the schedule set forth in that, we were shooting for the target date to comply with, I think it was, September, 1988.
Q. Paragraph nine, would you read that into the record, please?
A. Paragraph nine reads, evaluate the treatment and disposal alternatives, evaluation will be based on monetary costs, environmental impacts, flexibility, reliability, constructibility and implementation.
Q. To your knowledge, were all of these tasks undertaken and completed by ESE and incorporated into this report?
A. Yes, sir.
Q. I next direct your attention to page 2.2. Do you see that page?
A. Yes, I do.
Q. And would you read into the record paragraph C.
A. This is under conclusions of the report?
Q. Yes?
A. Paragraph C specifically reads, water surface discharge of the treated effluent from the new Waterway Estates

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Wastewater Treatment Plant is the most viable alternative for disposal of effluent.
Q. Was this ESE's conclusion or was this your conclusion and ESE's, Mr. Lehman?
MR. QUINN: Objection, leading, Your Honor, and also calls for speculation.
MR. BAISE: Withdraw the question.
BY MR. BAISE:
Q. Whose conclusion was this, Mr. Lehman?
A. It is ESE's conclusion in the report.
Q. Did you have any input into this conclusion?
A. No.
Q. Did Florida Cities have any input into this conclusion?
A. No, it's based specifically on the data within the report.
Q. I direct your attention to page 2.3 under recommendations. You see that page?
A. Yes, I do.
Q. What were the recommendations of ESE to you and Florida Cities in August of 1987?
A. They provided specifically for recommendations listed under this section; the first one being that Florida Cities Water Company should apply to the Florida Department of Regulation for a wasteload allocation to discharge 1.4 MGD into the Caloosahatchee River, and the second recommendation was for

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Florida Cities to make an economic comparison between implementing the proposed AWT facilities and diverting the raw wastewater generated by the service area of Waterway Estates to the North Fort Myers Utility Wastewater Treatment Plant for treatment.
THE COURT: Where are you reading from?
MR. BAISE: It's paragraph B, Your Honor.
THE WITNESS: I'm paraphrasing, not reading.
THE COURT: I understand, I understand.
THE WITNESS: Okay.
The third recommendation is if the construction of the new advanced wastewater treatment plant is more feasible, it is recommended that Florida Cities Water Company authorize the design of the facility as soon as possible.
And the last recommendation was for Florida Cities Water Company to contact the EPA to update the agency on the steps that Florida Cities Water Company is taking to comply with the consent order and also to make a reasonable time extension beyond the established September 30, 1988 date to continue utilizing the existing point of discharge.
BY MR. BAISE:
Q. Why was a reasonable time extension needed beyond September 30, 1988, Mr. Lehman?
A. Based on the findings of this report, there was a lot of -- a lot involved with the process of upgrading the plant, no

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matter which alternative you were to undertake. And the time limitations were significant to doing the actual recommendations here, which was, do some further analysis, go out and solicit, obtain a design consulting firm to do the actual design, to do the permitting involved with that design prior to construction, and then to actually complete construction and certify operation of the facility.

Q. Why couldn't this be done faster, Mr. Lehman?

A. It's a long and involved process. It takes due prudence to complete such a project.

Q. Mr. Lehman, I direct your attention to page 6.1 in the ESE report of August, 1987. And I specifically direct your attention to paragraph 6.3. Do you find that page and that paragraph?

A. The first paragraph of that?

Q. No, 6.3?

A. Right, right.

Q. But it is page 6.1. You find that?

A. Yes.

Q. Okay.

Tell me what 6.3 means, Mr. Lehman?

A. 6.3 is evaluating the surface water discharge alternative for effluent disposal. And specifically it says, the proximity of the Waterway Estates Wastewater Treatment Plant's present site to the Caloosahatchee River will probably offer one of the

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best alternatives to dispose of the treated effluent.

Q. And I direct your attention to 6.2, the third paragraph, beginning with, the FDER. Would you read that into the record, please?

A. Oh, page 6.2?

Q. 6.2, yes.

A. All right.

Q. Third paragraph on page 6.2.

A. That paragraph reads, the FDER has recommended that Florida Cities Water Company applies for a wasteload allocation for the ultimate wastewater treatment plant capacity. Presently the FDER has not allocated all the pollutant loads that can be discharged into the river.

Q. And dropping down to the next paragraph, would you read that paragraph in, the four points under that paragraph?

A. That paragraph reads, as discussed above, this effluent disposal alternative provides good advantages for implementation. The advantages of this alternative offer are, one, proximity of the treatment plant to the river, two, effluent treatment requirements can be achieved, three, water quality simulation model is not required for wasteload allocation, and four, construction and operating permits can be obtained within short period of time.

Q. Was this the alternative eventually chosen by Florida Cities?

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A. Yes, it was.

Q. Did the item four turn out to be true?

A. No, it did not.

Q. Did this report look at other alternatives other than discharging into the river?

A. Yes, it did.

Q. I turn your attention to page 6.3. Do you have that in front of you?

A. Yes, I do.

Q. And I direct your attention specifically to paragraph 6.4.1. Please describe what slow rate means in this paragraph as well?

A. Slow rate is typically referred to as land irrigation where you take large areas of land and apply smaller quantities of water which can be utilized for irrigation and not cause any runoff.

Q. And was this alternative examined by ESE?

A. Yes, it was.

Q. And what factors did ESE examine with regard to offering this alternative to Florida Cities to cease its discharge?

A. Primarily the ability to have the adequate land space available, as I said, that you couldn't have any runoff and it is applied at a low volume which would require larger areas of land availability.

Q. Was the land available for the discharge from Waterway

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Estates under the study conducted by ESE?

A. No, it was not.

Q. What land options did ESE actually evaluate, Mr. Lehman, according to this report?

A. Specifically they looked at availability of golf courses, typically public park lands, landscaped areas, and whether there would be any potential sod or agricultural uses within the area, although that would be minimal on a residential area.

Q. And what conclusion did ESE come to with respect to spray irrigation being used on golf courses and other public lands as an alternative for Waterway Estates' discharge?

A. The basic conclusion was that there was not enough land availability within the service area.

Q. I direct your attention to page 6.5 and the last paragraph on page 6.5, and the last sentence or the last line on 6.5 beginning with, therefore. Does this paragraph still talk about spray irrigation?

A. Yes.

Q. Would you read the sentence at the bottom of 6.5, at the top of 6.6?

A. Yes, sir. That reads, therefore, the application of the treated effluent on to the land at slow rate is not feasible in this project. Did you want more?

Q. No, thank you.

What was the next alternative reviewed by ESE for the

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discharge from Waterway Estates, Mr. Lehman?
A. The next alternative is listed as rapid infiltration.
Q. And what does that mean in layman's language?
A. Those are often referred to as percolation ponds. That is where you build a pond and store the water where the land is more porous and effluent would actually infiltrate into the ground surface.
Q. And what does this report say with respect to how many acres would be needed for percolation ponds for Waterway Estates?
A. It states in here, an area of approximately 8.6 acres is required for the bottom of each pond.
Q. And how many ponds would have been required for Waterway Estates?
A. It's stated, a minimum of three ponds required.
Q. Is Waterway Estates located in a residential area?
A. Yes, it is.
Q. And what conclusion did ESE come to with respect to percolation ponds, Mr. Lehman, as an alternative for Waterway Estates discharge?
A. There again, it would require significant land availability to construct the ponds. And they did not find the land availability within the service area to sufficiently provide for this alternative.
Q. Directing your attention to page 6.7, and specifically

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paragraph 6.5 on 6.7, what is -- please describe what is on page 6.7, Mr. Lehman?
A. This is the alternative for underground injection which is a lot of times referred to as deep well injection. It would be synonymous.
Q. And what was the conclusion of ESE with respect to deep well injection for the discharge from Waterway Estates?
A. They concluded -- their conclusion was that underground injection as an alternative to the disposal of the effluent from Waterway Estates is not to be considered any further as a viable alternative.
Q. And why was that?
A. They have specific reasons stated in the report.
Q. What were those reasons?
A. Identified in the order, the first reason is, high risk associated with the performance of injection system after a large capital investment. Second reason being, a possibility of regulatory agencies opposing the underground injection, and the third reason being, no available time between August, 1987, and September, 1988, to have the injection well in operation and approved by FDER.
Q. Are you reading from the conclusions on page 6.8?
A. Yes, I am.
Q. Mr. Lehman, directing your attention to page 6.10, please summarize for the record this summary of the ESE report. Look

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at section 6.7.
A. 6.7?
Q. Correct.
A. Okay.
That is the summary and conclusions of this report. And it identifies the five effluent disposal alternatives that were considered and the determination for those alternatives.
Q. And look at the paragraph beginning, it was determined. Would you read that paragraph and four points into the record?
A. It was determined that four of the effluent disposal alternatives are not viable alternatives. These alternatives and the reasons that make them unfeasible alternatives are as follows: One, slow rate land application. Land is not available. Two, rapid infiltration. Land is not available. Three, underground injection. Two years minimum to obtain operating permit. High risk associated with the performance of the well. Probably regulatory agencies will not issue deep well injection operating permits after the first five years. And four, wetlands. No wetland available within a three mile radius of the Waterway Estates site.
Q. And the last paragraph, please. Read it.
A. It was concluded that the surface water discharge alternative is the only feasible and achievable alternative to be implemented for this project within the time constraints.
Q. Did you influence any of the conclusions in this report,

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Mr. Lehman?
A. No.
Q. You know of anyone at Florida Cities who influenced the conclusions of this report?
A. No.
Q. Then, Mr. Lehman, I would direct your attention to Defendants' Exhibit Number 60, and to a memorandum attached to Florida Cities' Exhibit Number 60. And while he's getting that document, what happened after Florida Cities received this report in August of 1987, Mr. Lehman?
A. Staff reviewed it and analyzed the alternatives and recommendations that were in -- were put into the report and tried to see if there were any other extenuating circumstances that could be improved upon.
Q. Why was that necessary?
A. Well, one of the items was the deep well injection and the potential to go to North Fort Myers Utilities and to look into that at a more indepth -- take a more indepth look at that aspect. And also, the potential to perhaps utilize some existing facilities and relocate the equipment from other Florida Cities' sites to the Waterway Estates Facility.
Q. Why didn't Florida Cities just start building immediately?
A. You can't just enter into a large project like this blindly. You've got to make sure you have taken the public

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interest into all aspects and are doing a prudent project that provides the best service, both technically and economically, to the public.
Q. I direct your attention to Defendants' Exhibit Number 60, which is, as I noted, Your Honor, has a memorandum attached to it, but this was how the document was produced and there's a memorandum dated May 29th, 1991.
MR. BAISE: Your Honor, I'm advised that the memorandum is from Tompkins to Bradtmiller, is Plaintiff's 371, but that particular memorandum does not have this October 27th, 1987 memorandum attached to it. So, I need to -- excuse me -- it is 371, so both documents are in. Just the second attachment then -- okay, excuse me.
371, that is the French to Reeves memo is 371. Thank you.
Excuse me, Your Honor, it is in evidence.
THE COURT: All right.
So what are you wanting him to look at?
MR. BAISE: I'm going to take him to this memorandum.
THE COURT: All right.
MR. BAISE: 371.
THE COURT: Plaintiff's 371?
MR. BAISE: Yes.
THE COURT: All right.
MR. BAISE: Reason it was confusing, Your Honor, I

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was going to move our 60 in, but since you advised us we didn't have to duplicate the records, I had not gone back and corrected my notes to myself on all my documents.
BY MR. BAISE:
Q. So looking at, Mr. Lehman, you're looking at document 60, which is the same as Plaintiff's 371. Are you looking --
THE COURT: Excuse me. He's looking at 371?
MR. BAISE: You have been given 371. I'm sorry, thank you.
THE COURT: All right.
BY MR. BAISE:
Q. What is that document, Mr. Lehman?
A. This is a memorandum from Bob French to Tony Reeves dated October 27, 1987.
Q. What is the purpose of this? Did you participate in preparing this document, Mr. Lehman?
A. I provided some technical input to it, yes.
Q. What is your understanding the purpose of this document is, Mr. Lehman?
A. It was to provide a further analysis of the alternatives presented by ESE and perhaps some alternatives to those to help reduce costs and have a better project.
Q. Let's go through the alternatives staff evaluated in October of 1987, Mr. Lehman. Look at the bottom paragraph on page 1. It begins, there are two other alternatives that were

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not explored in adequate detail. Are you familiar with that paragraph?
A. Yes.
Q. What were those alternatives?
A. The first alternative was to do a tie-in in the North Fort Myers Utility and utilize their treatment system and disposal system which was deep well. And I believe the second one was utilizing some existing facilities from the Fiesta Village Treatment Plants and to relocate that to the Waterway Estates Facility.
Q. Directing your attention to the bottom of that paragraph, four lines up from the bottom, beginning with the word "there is"; would you read that into the record, please?
A. There is some controversy among leading experts regarding the requirement of the Department of Environmental Regulation for a redundant production well in case of failure of the primary injection well.
Q. Read the next sentence, please.
A. While several utilities around the State have been required to install only one production well, there is concern that the regulations may be modified which would require the additional installation of a redundant disposal well.
THE COURT: Dispose -- all right.
THE WITNESS: Disposal facility. I'm sorry.
BY MR. BAISE:

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Q. The next sentence, please.
A. Since secondary effluent could be injected directly into the disposal zone, the existing treatment process with filtration would be adequate, assuming the plant operated within the appropriate design rating.
Q. And what was the cost assumed for deep well injection monitoring system for effluent reuse that is indicated on that page, Mr. Lehman?
A. There are two bottom line project costs. One, if a single injection well were to be allowable, which would be four point one million dollars, approximately, or if a redundant second injection well would be required, which would increase the total cost to over five point seven million dollars.
Q. Starting with the paragraph after the line total project costs, can you tell us what that paragraph means, Mr. Lehman?
A. Did you want me to read it or summarize?
Q. If you could summarize it? First off, what is the alternative that is being examined?
A. That is alluding to the alternative of connecting to the North Fort Myers utility and this was proposed by that utilities consultant which is Post, Buckley, Shew and Jernigan and it identifies that some internal line improvements and expansions would be required within the Waterway Estates service area as well as construction of approximately two and a half miles of force main outside the service area in order to

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tie-in to the North Fort Myers Utility System.
Q. How many miles would that mean Florida Cities would have to construct to hook up to this system, Mr. Lehman?
A. I think in total, it was somewhere around five miles.
Q. Five miles to hook up to the North Fort Myers Facility?
A. Yes.
Q. What would be the problems of trying to construct the line five miles?
MR. QUINN: Objection, assumes there would be problems.
THE COURT: Well, sustained. He hasn't in his testimony said there would be problems yet.
BY MR. BAISE:
Q. Excuse me, Your Honor.
Mr. Lehman, looking at the bottom paragraph of that page, which is not numbered, is there any indication of what would have to be done to hook up to the North Fort Myers Facility?
A. Yes. That paragraph depicts a layout of, you know, a proposed layout of the force main in order to get from the existing Waterway Facility up to the North Fort Myers Utility Facility.
Q. Why don't you just read that paragraph starting with, the pump station to hookup to the North Fort Myers Facility, Mr. Lehman, covering the five miles.
A. Okay. The entire paragraph?

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Q. Yes, please. I'll tell you when to stop. Start at the beginning of the pump station.
A. Okay.
That reads, the pump station W-1 would be upgraded to provide pump's capability to conveying wastewater collected from south of Hancock Bridge Parkway and pumping initially the entire length of force main to the connection with North Fort Myers Utilities on Bayshore Road. A twelve inch PVC force main thirty-three hundred lineal feet long would connect pump station W-1 with the existing twelve inch force main on Orange Grove Boulevard. A six inch force main, I believe that was B, would connect the Orange Grove Boulevard pump station to the existing six inch PVC, unused in parentheses, force main on Pondella Road and April Lane. Flow from the Orange Grove pump station would be split hydraulically based on the back pressure and flow, either north or south on Orange Grove Boulevard out of the pump station. A fourteen inch ductal iron pipe force main would be constructed on Moody Road between Hancock Bridge Parkway and Pondella Road, then east along Pondella Road. A sixteen inch ductal iron pipe force main would pick up the fourteen inch force main immediately to the east of Hancock Creek on Pondella Road, follow a zig-zag course north and east to the previously mentioned tie-in with North Fort Myers Utilities.
Q. That's sufficient, Mr. Lehman. That would cover

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approximately the five miles you mentioned earlier in your testimony?
A. Yes. I think it was somewhere around five miles of total pipeline.
Q. Would that pipeline have to be constructed through a residential facility area?
A. Absolutely, yes.
Q. Were there permits -- would there be permits necessary to construct all of these facilities through the residential areas?
A. Yes.
Q. What was the conclusion of the Florida Cities staff after evaluating the North Fort Myers option, Mr. Lehman?
A. I believe it was more costly than the other preferred alternative.
Q. And what alternatives did Florida Cities eventually choose with respect to ending the discharge at the Waterway Estates Facility, Mr. Lehman?
A. That was the surface water discharge recommended through ESE's report with some modification by being able to utilize existing facilities from the Fiesta Village Wastewater Treatment Plant and reuse them at the Waterway Estates site.
Q. Why were these decisions not being made sooner and faster, Mr. Lehman?
A. It all takes time in order to make a prudent decision.

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THE COURT: You --
THE WITNESS: As you gather more information --
MR. BAISE: Wait till Your Honor finishes, Mr. Lehman.
THE COURT: That's all right. I thought he was through with his answer. Go ahead.
THE WITNESS: Well, in order to make a prudent decision and gathering of data, it's a costly project and you can't afford to make mistakes you're going to have to live with for years down the road.
THE COURT: Let's take a recess till 11:00 o'clock.
(Thereupon, a brief recess was taken.)

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THE COURT: All right. Mr. Baise.
MR. BAISE: Thank you, Your Honor.
BY MR. BAISE:
Q. Forgive me, Mr. Lehman. We've changed reporters so I couldn't have the last question read back to me, but I will hopefully not propound a duplicate here. But just in case I didn't ask this question, what conclusion was reached by the staff of Florida Cities with respect to an alternative to be used at Waterway Estates in 1987 to end the discharge into the canal?
A. It was to accept the recommendation of ESE's reports for AWT treatment with surface water discharge with some modification by reutilizing facilities that were surplus at the Fiesta Village site and reutilizing them at Waterway Estates.
Q. And why was this decision made by you and the Florida Cities staff?
A. It was based on, number one, the recommendations of ESE in their report; plus after further analysis of the potential to tie in with North Fort Myers and the advantages still -- it was still more advantageous to utilize the -- upgrade the AWT and surface water discharge.
Q. What was the next step you took after -- you and Florida Cities took after making this decision in October of 1987?

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A. With the preferred option of what we wanted to do, then we could solicit and look for an actual design consultant to do the work.
Q. Could you please outline what specific steps were taken after October of 1987?
A. Generally, there would have to be a scope of services developed, a fairly detailed scope of services identifying what you wanted to accomplish in the design, bidding, construction phase by the -- the services to be performed by the consultant, so that they could prepare an adequate proposal that they could perform the work and develop a fee schedule to actually do that work.
Q. How long does that take?
A. To adequately do that can -- two, three, four weeks to make a -- to put everybody's heads together and develop a common scope of services.
Q. So, in October you made the decision to go with the AWT facility. And would you please circle October 1987 on the chart that FCWC reviews the ESE report, develops alternatives and selects the AWT option, under the 1987 column, please.
A. (The witness complied with the request of counsel.)
Q. Then what next happens after the staff has put its head together and come up with alternatives for a scope of work?

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A. Once you have developed a solid scope of services, then you can do the actual solicitation to engineering design firms; and they, in turn, will evaluate the proposed scope and actually pinpoint the exact tasks that they will provide and do that in enough detail that they can identify a cost associated with that so you can develop a contract.
Q. So, why didn't you cease discharging since you knew you were under this order from EPA at this time, Mr. Lehman?
MR. QUINN: Objection. This has been covered before, sir. It was asked and answered.
MR. BAISE: We're at a different period of time. They have taken a number of accounts --
THE COURT: All right. I'll overrule the objection. Go ahead, sir. Answer the question.
THE WITNESS: There again, there's no way to take that out of service until there was some alternative available for treatment.
BY MR. BAISE:
Q. I direct your attention to Florida Cities' Trial Exhibit Number 30. Do you have that in front of you, Mr. Lehman?
A. Yes, I do.
Q. Would you please identify this document for the record, Mr. Lehman?
A. This is a letter dated January 26th, 1988, written by

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myself and addressed to Peter McGarry of the EPA, and it is a progress report which is in compliance with the administrative order that we were operating under.
Q. And why did you have to write Mr. McGarry?
A. As stated previously in the administrative order, there were routine status reports where we would keep the EPA informed as far as our progress.
Q. Were these monthly status reports?
A. No, I don't think they were that frequent. The specific dates are identified in the administrative order. I think they were more quarterly or six months.
Q. Okay. And what did you advise Mr. McGarry on January 26th, 1988, Mr. Lehman?
And you are the same Pat Lehman that signed this letter on January 26th?
A. Yes, sir.
Q. What did you advise him?
A. Specifically, we told him the completion of the items, including the ESE report, which evaluated the alternatives and feasibility of those alternatives, and that the chosen -- or the preferred most feasible option is to upgrade the facility to achieve advanced wastewater treatment with discharge to the Caloosahatchee River as the optimum system, and also informed him that a waste load allocation request had been submitted to the Florida

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Department of Environmental Regulation and it was under review at the time of the writing of this letter; and that engineering design proposals had been solicited in December of '87 and that those proposals were currently under review.
Q. And what is an engineering design proposal?
A. That is proposals from the engineering consultants themselves that would specifically identify the tasks that they would perform, the actual work they would perform in order to do the actual design; prepare the plans and specifications that would allow for construction companies to bid on those plans and specifications, and the engineering fees that would be attached to provide those services.
Q. Why did it take from October 27th of '87 until December of '87 to solicit engineering design proposals?
A. Like I said before, the staff had to develop proposed scope of services, general tasks. And then once you solicit the consultants, they go through it with a fine tooth comb because their fees are based on those specific tasks, and so they have to go through detail by detail of the actual tasks that they see involved and identify those tasks in order to put a proper fee attached to that and that -- you know, that right there, for the consultants to review the proposals and prepare a good submittal -- you know, typically a month turnaround would be the minimum.

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Q. Why couldn't you just eliminate that layer and start building?
A. You couldn't just go out and give a blank check to a consultant. That would just be absurd. It would be, you know, unjust to the public and ratepayers. Business just isn't done that way.
Q. Did there come a time in 1988 when you did hire an engineering firm to design the AWT plant and outfall pipeline, Mr. Lehman?
A. Yes, there was.
MR. BAISE: Your Honor, I would like to move Florida Cities' Trial Exhibit Number 30 into evidence.
THE COURT: It will be received.
BY MR. BAISE:
Q. I direct your attention, Mr. Lehman, to Florida Cities' Exhibit Number 190. Do you have 190 in front of you, Mr. Lehman?
A. Yes, I do.
Q. Tell us what 190 is.
A. This is an agreement for professional engineering services between Florida Cities Water Company and Source, Inc.
Q. Who is Source, Inc.?
A. It's an engineering consulting firm.
Q. How many engineering consulting firms bid on this

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project, if you recall?
A. I know at least two. Typically, we did three. I'm assuming we did at least three, but I'll well aware of at least two.
Q. What does this document represent, Mr. Lehman?
A. This is the actual agreement which sets forth the services that the engineer would provide in order to accomplish the design and construction of the facilities and also the fees that are associated with those services.
Q. I direct your attention to the page marked Number 1 at the bottom and it's titled "Agreement" at the top, which is Page 2 in actuality. Do you have that Page 1 in front of you?
A. Yes, I do.
Q. Is this the page that describes the engineer's services for building the AWT facility at Waterway Estates?
A. Yes, it does.
Q. Would you just quickly summarize the first four paragraphs and what the engineer had to do under this contract?
A. They were responsible for all the boundary and topographic survey that would be associated with the plant and also the outfall pipeline.
They would prepare the permit applications and drawings for construction of the proposed seawall

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construction along the south property line and also fill that would be required with that.
They would prepare and provide documents, drawings, renderings and permit applications for plant site zoning and Lee County development order filing.
They would attend staff conferences, zoning board and County Commission meetings as required by Florida Cities Water Company.
And they would prepare the engineering design, permit, zoning, bid and construction documents, and then those are itemized further in detail.
Q. Why would you have an engineering firm prepare permit applications?
A. The applications themselves typically demand the technical input, the design proposed drawings, the specifications for construction.
Q. Why did the engineer have to prepare and provide documents for zoning for Lee County?
A. There again, they would have all the technical expertise to prepare the technical data that would be incorporated into any permit request.
Q. Why wouldn't you or Florida Cities prepare these documents, Mr. Lehman?
A. We wouldn't have the detailed knowledge that the consultant that we hired had to do those services. They

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have all the background. They have done all the data research, and it's much more prudent for them to proceed with the preparation of those documents.
Q. Wouldn't it be faster for Florida Cities to prepare these permit documents?
A. No, because we wouldn't have had the technical expertise to do it.
Q. I direct your attention to Page 2 and marked Page 2 at the bottom of the page that has a listing of Paragraphs C through J. Do you see that Page 2, Mr. Lehman?
A. Yes, I do.
Q. I direct your attention to Paragraph H. Would you read Paragraph H into the record, please?
A. Paragraph H reads: Preparation and filing of permit applications to the State of Florida Department of Environmental Regulations, U.S. Corps of Engineers and U.S. EPA for construction and effluent discharge permits, including the NPDES permit for discharge to the Caloosahatchee River; includes plans, specifications and permitting for the subaqueous outfall construction.
MR. QUINN: Your Honor, I would move to strike that testimony. This document has not been entered into evidence. However, I will withdraw the objection if it is.
MR. BAISE: My apologies, and I move it into evidence, Your Honor.

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MR. QUINN: Withdraw the objection, Your Honor.
THE COURT: It will be received.
BY MR. BAISE:
Q. Why was this necessary, Mr. Lehman?
A. There again, the permitting requirements, that all appropriate permits would have to be filed for and that the plans and specifications in order to get those permits would have to be prepared, and that would be tasks performed by the consultant.
Q. Was this agreement actually signed between Florida Cities and Source, Incorporated, Mr. Lehman?
A. Yes, it was.
Q. Do you know what day or what month, approximately?
A. I don't know the specific date. I'm assuming in the earlier part of 1988, the first quarter, somewhere in that time frame.
Q. Mr. Lehman, I would ask you to circle under 1988 Source Engineering firm hired to design AWT plant and outfall pipeline, on that exhibit marked for identification purposes only.
A. (The witness complied with the request of counsel.)
Q. How soon after signing this contract did Source begin its work, Mr. Lehman?
A. I'm sure they started immediately upon having a contract.

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Q. Mr. Lehman, I direct your attention to Florida Cities Exhibit 193. Do you have that document in front of you?
A. Yes, I do.
Q. Please identify this document for the record.
A. This is a letter written by myself and addressed to Priscilla Oliver at the EPA. It's dated March 10th, 1988. And this is another progress report on Waterway Estates in accordance with administrative order.
MR. BAISE: Your Honor, I would move this Trial Exhibit 193 into evidence.
THE COURT: It will be received.
BY MR. BAISE:
Q. Specifically, what did you advise Ms. Oliver in 1988? And who is Ms. Oliver?
A. Ms. Oliver, I met her -- she had been down to do some of the inspections on the facilities, and somewhere I must have been directed to forward the progress reports to her. Specifically items within this -- there are eight specific items listed in here as far as updates.
Q. I direct your attention to Paragraph 7, Mr. Lehman.
A. Okay. Paragraph 7 --
Q. And would you read that into the record, please?
A. Yes. Paragraph 7 specifically has: Agreement for engineering services awarded to Source, Inc., to prepare detailed design and specifications for upgrading Waterway

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Estates' wastewater treatment with discharge to Caloosahatchee River.
Q. Does that help refresh your memory as to when the Source contract may have been signed?
A. That was obviously prior to March 10th of '88. Somewhere in that time frame, early '88, the earlier part.
Q. I direct your attention to the second page of that letter, Paragraph 8. Would you read that into the record, please?
A. Paragraph 8 reads: Florida Cities' Water Company letter dated March 1st, 1988, to DER containing proposed compliance schedule for Waterway Estates wastewater treatment plant.
Q. Do you know -- or do you recall what compliance schedule was contained in that letter of March 1, 1988?
A. I don't know right offhand the specifics, but...
Q. Was an extension requested?
A. Yes.
Q. I direct your attention to Florida Cities' Trial Exhibit Number 31.
MR. BAISE: These are the two documents, Your Honor, which have been separated, and the second one is Florida Cities' Number 52. One is the letter of August 31st, 1988, to Mr. Reeves, and attached to it was a Section 309 order, but the two documents got separated in numberi

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BY MR. BAISE:
Q. Mr. Lehman, are you familiar with the letter identified as Defendant's Exhibit Number 31?
A. Yes.
Q. Do you recall reviewing this letter at the time it was received by Florida Cities?
A. Yes.
MR. BAISE: Your Honor, I would move 31 into evidence -- 52 has already been moved into evidence --
THE COURT: It will be received.
MR. BAISE: -- so that we have these two together. Thank you.
BY MR. BAISE:
Q. Mr. Lehman, I direct your attention to 52, Exhibit 52. What is that document?
A. This is an amendment to order pursuant to Section 309, Clean Water Act. It's an amendment to the administrative order which was previously received by Florida Cities Water Company.
Q. And what are the new dates, Mr. Lehman?
A. The revisions for the specific activities were to start construction February 1st, 1989; complete construction May 1st, 1990, and meet final requirements by ceasing discharge November 1st, 1990.
Q. Why was this extension necessary to cease discharging

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at the Waterway Estates facility, Mr. Lehman?
A. Looking at the time constraints and factors involved with what needed to be done, that -- an extension was necessitated.
Q. Mr. Lehman, would you take your red felt pencil and circle under the column 1988 under August EPA modifies construction schedule with administrative order 87-085 to cease discharge by November 1990, please?
A. (The witness complied with the request of counsel.)
Q. Mr. Lehman, I direct your attention to Defendant's Exhibit 33. Do you have that in front of you?
A. Yes, I do.
Q. Please identify this document for the record.
A. This is the temporary operating permit issued by the Florida Department of Environmental Regulation. It's dated September 29th, 1988, specifically for the Waterway Estates facility.
Q. And turning to Page 2 of the document, which is Page 1 of the permit and entitled Permittee: A.A. Reeves, III, do you see that page?
A. Yes, I do.
Q. It's the second page but is identified as Page 1 of 6. Please describe the requirements set forth on this page, Mr. Lehman.
A. Specifically, the -- it provides for temporarily

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operating the existing facility and gives a time schedule of completion dates with the ultimate date being the date that wastewater facilities will be certified in compliance with your permit, November 1st, 1990.
Q. Are you familiar with this document?
A. Yes, I am.
Q. Have you read this document before?
A. Yes.
Q. Is there any place in this document, to your knowledge, that it tells Florida Cities to cease discharging into the canal?
A. No.
Q. And when is the Waterway Estates wastewater facility to be certified to be in compliance?
A. November 1st, 1990.
Q. Mr. Lehman, I would ask you to take your pen again and under the column 1988, under the month of September, circle --
THE COURT: Counsel, you can do that during a recess.
MR. BAISE: Okay.
THE COURT: You know, he's just a tool of yours right now when he does that, and we're wasting time.
MR. BAISE: Okay.
All right. That's my last question, Your Honor,

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to have him finish up with that. Thank you very much.
THE COURT: All right.
I didn't mean to suggest that you're a tool. I'm sure you understood my ruling in that respect.
(Laughter.)
MR. BAISE: Your Honor, I need to move 21 and 27 into evidence. 21 is the permit application from Mr. Lehman to Ms. Kagey.
THE COURT: All right. That will be received.
MR. BAISE: And 27 is the letter from EPA, Mr. Barrett, to the company --
THE COURT: That will be received.
MR. BAISE: -- dealing with that final denial.
THE COURT: All right. Was that your last question, you said?
MR. BAISE: Yes.
THE COURT: All right.
All right. Mr. Hird?

CROSS EXAMINATION

BY MR. HIRD:
Q. Good morning, Mr. Lehman.
A. Good morning.
Q. On examination by Mr. Baise, you discussed the process of considering alternatives for discharge at the Waterway Estates facility, and I believe you discussed the ESE report

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and the memorandum that was prepared internally that followed that report, is that correct?
A. Yes, sir.
Q. In the process of considering these alternatives, did you ever discuss any of these alternatives with any officials of Avatar Holdings?
A. No, not at Avatar Holdings.
Q. Did you ever discuss -- and when you made the selection of these alternatives, was that made by Florida Cities or by Avatar Holdings?
A. As far as I know, by Florida Cities.
Q. Was Peter Sharp involved at all in the consideration of these alternatives, to your knowledge?
A. No, not to my knowledge.
Q. Was Leon Levy involved at all, to your knowledge?
A. No, not that I know of.
Q. Was John Sladkus involved at all, to your knowledge?
A. No.
Q. Was Lawrence Wilkov involved at all, to your knowledge?
A. No.
Q. Mr. Lehman, were you aware of any plan by Avatar Holdings to acquire all the utilities in Lee County?
A. No.
Q. Mr. Lehman, were your operations at Florida Cities

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micromanaged by Peter Sharp?
A. No.
Q. Thank you.
MR. HIRD: No more questions.
THE COURT: Okay. Mr. Quinn?
MR. QUINN: Thank you, Your Honor.
CROSS EXAMINATION
BY MR. QUINN:
Q. Good afternoon, sir.
So I don't mispronounce your name, can you please tell me what your last name is?
A. It's Lehman, long E.
Q. Thank you, Mr. Lehman.
MR. QUINN: Before we start questioning, I'd like Mr. Moore to remove both those exhibits, please.
(Pause.)
MR. QUINN: Thank you.
BY MR. QUINN:
Q. Mr. Lehman, you're not here appearing today under a subpoena, are you?
A. Yes, I am.
Q. Sir, at your depositions in October of 1995, Florida Cities Water Company provided you with personal counsel, didn't they?
A. Yes, sir, I had counsel. Yes.

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Q. Sir, you've been hired by Florida Cities Water Company to testify before, haven't you?
A. For this?
Q. You have been hired before on other occasions to testify, haven't you?
A. Yes.
Q. How many times have you been -- withdrawn.
Please tell me how many times you have been hired by Florida Cities to testify on their behalf.
A. I think it was only once.
Q. Sir, I'd like to draw your attention to Defendant's Exhibit 52, in particular Paragraph 6.
Sir, an administrative order, or an amendment to an administrative order, is not, in and of itself, an NPDES permit, is that correct?
A. No, it's not. It's not an NPDES permit.
Q. Okay. I'd like to draw your attention to Paragraph 6 -- Excuse me. Did you read Paragraph 6 when you got that document, sir?
A. I'm sure I did.
Q. Okay. Paragraph 6 states, does it not, that nothing in this order shall be construed to prevent further enforcement of the violations stated herein, nor shall it preclude institution of administrative penalties or civil litigation based on violations of the Clean Water Act.

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Isn't that what it says?
A. Yes.
Q. Sir, wasn't one of your responsibilities at Florida Cities Water Company to ensure that wastewater plants had NPDES permits?
A. Yes.
Q. And during your five years -- approximately five years of tenure at Florida Cities Water Company, isn't it a fact that Florida Cities Water Company never possessed an NPDES permit for the Barefoot Bay facility?
A. No.
MR. BAISE: Objection, Your Honor; that's outside the scope of his testimony.
THE COURT: I'll overrule the objection.
BY MR. QUINN:
Q. Do you need me to repeat the question, sir?
A. Yeah. Could you say that again?
Q. During your approximately five years of tenure at Florida Cities Water Company, isn't it a fact that Florida Cities never had an NPDES permit for the Barefoot Bay facility?
A. No, I don't think so.
Q. Sir, do you remember giving a deposition in this case?
A. Yes.
Q. And do you remember the following exchange that took

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place between you and the counsel for the United States? Question --

THE COURT: Page and line.

MR. QUINN: Page 26, sir, Line 15.

BY MR. QUINN:

Q. Question: So, it is fair to say that to the best of your knowledge, during your five-year tenure with the company during the years '84 to '89, there was no NPDES permit for Barefoot Bay?

And do you remember giving the following answer: Yeah. Remembering that's a few years back, yes.

Do you remember that?

MR. BAISE: Objection, Your Honor. My direct was solely limited to Waterway Estates. It was solely limited to the permitting situation. It was solely limited --

THE COURT: Well, it was limited to Waterway Estates.

MR. BAISE: Not Barefoot Bay, Your Honor.

THE COURT: That's outside the scope, is it not, Mr. Quinn?

MR. QUINN: Your Honor, this goes to his credibility. He was operations manager at the time, and I'm testing his knowledge about other facts and this evidence is relevant. It has been brought out before.

THE COURT: Well, now, just because the evidence

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is relevant doesn't mean it's within the scope of the direct examination of this witness.

MR. QUINN: Sir, he also testified that it was within his scope of responsibilities to assure compliance with the NPDES permits, and this goes into that, sir.

MR. BAISE: I did not include any questioning with regard to Barefoot Bay, Your Honor. It was all, as you can see, on the Waterway Estates facility.

THE COURT: Okay. I'll sustain the objection, Mr. Quinn, as outside the scope.

BY MR. QUINN:

Q. Moving on, then, Mr. Lehman, do you recall applying for renewal of the NPDES permit for the Waterway Estates plant on May 9th, 1986?

A. Yes.

Q. Okay. And at the time you filed the renewal request, the Waterway Estates plant was discharging into a canal that led to the Caloosahatchee River, is that correct?

A. Yes, it is.

Q. And the permit renewal request sought to continue the discharge into the canal, isn't that correct?

A. Yes, it did.

Q. Sir, doesn't 40 C.F.R., Section 122.21(d) require that an applicant file with EPA an application for renewal at least 180 days prior to expiration of the permit?

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MR. BAISE: Objection, Your Honor. He's asking this witness to come to a legal conclusion, one, based on a document that's not in front of him, and, two, outside of his scope of expertise.

THE COURT: Well, I think I'm going to permit you to ask him, Mr. Quinn, if he is familiar with that requirement. I'll overrule the objection.

MR. QUINN: Thank you.

BY MR. QUINN:

Q. Mr. Lehman, are you familiar with the requirements that an applicant for renewal of an EPA NPDES permit file that application at least 180 days prior to its expiration?

A. I can't recall that right offhand, no.

Q. But you were responsible for assuring compliance with NPDES regulations, isn't that correct?

A. Yes.

Q. And you're not familiar with that particular regulation, is that right?

A. I haven't done that for a long time.

THE COURT: He's answered your question. Let's move on.

BY MR. QUINN:

Q. The permit for which the Waterway Estates plant -- withdrawn.

The permit for which the application was sent in in

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May of '86 was set to expire on September 24th, 1986, isn't that correct?

A. Yes, I believe it was that date.

Q. So, Florida Cities Water Company filed for the renewal late, didn't it?

A. I'd have to count the days of...

Q. Count the days between May and September 24th, is that correct?

A. Yes.

Q. Okay. Sir, on June 30th, 1986, EPA wrote to you to inform you that EPA intended to deny the NPDES permit renewal request, isn't that correct?

A. Yes, sir.

Q. And you received this letter, didn't you?

A. Yes, sir.

Q. Okay. Sir, Florida Cities Water Company did not even write to ESE until November 10th, 1986, isn't that correct?

A. It was somewhere in that time frame.

Q. Okay. EPA clearly informed you that there could be no permitted discharges to the Caloosahatchee River via the canal, isn't that correct?

A. That was in the intent to deny, yes.

Q. Isn't it true that EPA informed you that the permit was also being denied because there was a, quote, no discharge, end quote, waste load allocation for the plant

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that had been developed by FDER?
A. Yes, sir.
Q. And didn't EPA also tell you that Florida Cities had certain appeal rights if it wanted to challenge the permit denial, correct?
A. Yes.
Q. And you personally read that portion of the EPA's letters to you that set forth these appeal rights, didn't you?
A. Yes. I believe they were all attached.
Q. And Florida Cities never exercised those appeal rights, did they?
A. No.
Q. Sir, you knew that the Waterway Estates facility did not have a waste load allocation at that time; that is, in May of '86, isn't that correct?
(Pause.)
A. I never inquired about one because there was a DER permit.
Q. But you knew they did not have a waste load allocation, isn't that correct?
A. Well, I have never seen anything that said they did or didn't. Now, there's a permit to --
Q. So, you don't know whether or not you had a waste load allocation; is that what you're saying?

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THE COURT: Wait a minute.
MR. BAISE: Objection.
THE COURT: Did you finish your answer?
THE WITNESS: Yes.
THE COURT: Okay. What was your objection?
MR. BAISE: Objection. The question has been asked and answered now at least twice.
THE COURT: Well, I'm not sure it has. Go ahead.
BY MR. QUINN:
Q. You don't know whether or not Florida Cities Water Company had -- withdrawn.
You don't know whether or not Florida Cities Water Company had a waste load allocation at that time, is that correct?
A. I inferred that there was one because the State had permitted it to operate.
Q. But you didn't know that for a fact, did you?
A. It was my understanding they wouldn't issue a permit unless an allocation existed or -- yes.
MR. QUINN: Objection; move to strike as non responsive.
THE COURT: I'll deny your request. Ask your next question.
MR. QUINN: Yes, sir.
BY MR. QUINN:

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Q. In fact, Florida Cities Water Company met with Florida Department of Environmental Regulation in an attempt to obtain a waste load allocation for the Waterway Estates plant shortly after it received EPA's permit denial letter, isn't that correct?
A. An allocation to the six-foot contour, yes.
Q. So, they did seek to meet with FDER about that waste load allocation, is that correct?
THE COURT: He said "yes."
Didn't you say "yes"?
THE WITNESS: Yes.
THE COURT: Yes. Go ahead.
BY MR. QUINN:
Q. And you participated in that meeting, didn't you?
A. Yes.
Q. And that meeting occurred on July 29th, 1986, isn't that correct?
A. Yes.
Q. Okay. In fact, you wrote a memo to Mr. Reeves memorializing these conversations, didn't you?
A. Yes, I did.
Q. And in the memorandum -- withdrawn.
Didn't you tell Mr. -- withdrawn.
Didn't you inform Mr. Reeves that there was a potential waste load allocation at the Waterway Estates

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facility, but that Florida Cities Water Company would have to apply for it?
A. Yes. At the six-foot contour, yes.
Q. So, there was no doubt in your mind that the Waterway Estates plant did not have a waste load allocation at that time for the six-foot contour, is that correct?
A. That's correct.
Q. Sir, wasn't it your understanding at the time that in order to obtain an NPDES permit for the Waterway Estates facility to discharge to the Caloosahatchee River, Florida Cities would have to relocate the discharge to the six-foot contour line?
A. Yes, that was my understanding.
Q. And, in fact, DER also informed you during your meeting of the need to relocate the discharge point from the canal to the six-foot contour line, isn't that correct?
A. When the existing permit expired, yes.
Q. But DER told you you would have to move the outfall, isn't that correct?
A. By 1988, yes.
Q. You told -- withdrawn.
You informed Mr. Reeves of the need to relocate the discharge point to the six-foot contour line in the river, didn't you?
A. Yeah. In the memorandum?

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Q. Is it in the memorandum of August 10th, 1986?
A. Yes, sir.
Q. Sir, in addition to obtaining a waste load allocation from FDER and relocating the outfall, isn't it true that Florida Cities also needed to upgrade the Waterway Estates plant if it wanted to continue to discharge to the Caloosahatchee River?
A. Yes, sir.
Q. In fact, Florida Cities had to achieve advanced wastewater treatment at the facility, isn't that correct?
A. As part of the waste load allocation --
Q. Correct.
A. -- with discharge at the six-foot contour, yes.
Q. Now, sir, did you write to EPA to propose a schedule for coming into compliance with the Waterway Estates facility?
A. Yes, I did.
Q. Sir, I'd like to show you Plaintiff's Exhibit 359, which has been marked for identification. Sir, have you ever seen Exhibit 359 before?
A. Yes, I have.
Q. Isn't that the letter you wrote to EPA?
A. Yes, it is.
MR. QUINN: At this time the United States moves Exhibit 359 into evidence.

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THE COURT: It will be received.
BY MR. QUINN:
Q. Sir, did you develop the proposed schedule in that letter by yourself?
A. Yeah, I developed it.
Q. In this letter, Florida Cities is proposing to complete construction and start-up of the facility by August 1, 1988, isn't that correct?
A. Yes, sir.
Q. Sir, in developing the schedule, you relied on your experience as an engineer, isn't that correct?
A. Yes, sir.
Q. And at the time you wrote that schedule, you believed the proposed schedule was realistic when you proposed it, did you not?
A. If everything were to go just perfect, I was very optimistic.
Q. I'm going to read you a question and answer you gave at your deposition from Page 68, Line 17.
THE COURT: You're going to --
MR. QUINN: I'm going to ask him if this was the answer he gave to the question as stated. Page 68, Line 17.
BY MR. QUINN:
Q. The question was: Were these realistic dates, Mr. Lehman, based on your experience?

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And didn't you give the following answer: Yes. I wouldn't have put them down if they weren't?
Isn't that what you testified to, sir?
A. Yes, sir.
Q. So, at the time they were realistic deadlines, isn't that correct?
A. Yes.
Q. In fact, EPA accepted your proposal to complete construction at the Waterway Estates plant by August 1, 1988, isn't that right?
A. Yes, sir.
Q. In fact, EPA used the construction schedule you proposed in an administrative order issued to Florida Cities Water Company, isn't that correct?
A. I'm assuming after their review they incorporated it, yes.
Q. I'd like you to turn to United States Exhibit 364, please. Sir, is this the administrative order that EPA issued?
A. Yes, it is.
Q. And have you seen that administrative order before?
A. Yes, sir.
MR. QUINN: The United States moves Exhibit 364 into evidence.
THE COURT: It will be received.

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BY MR. QUINN:
Q. And this was a construction schedule in this administrative order that you, the operations manager of Florida Cities, believed to be realistic based upon your experience as a professional engineer, isn't that correct?
(Pause.)
Q. It's on Page 2 of that Exhibit 364.
A. Okay. Under "Activities"?
Q. Yes.
A. Oh, I see it.
Q. Would you like me to ask my question again, Mr. Lehman?
A. Okay. The schedule didn't necessarily match the one I had submitted --
Q. But the date --
A. -- because it had progress reports; it's got the highlighted bottom line, yes.
Q. But the complete construction date matches your proposed --
A. Right; just that, yes.
Q. Sir, we talked earlier a little bit about a meeting between Florida Cities and the Florida Department of Environmental Regulation to discuss the need for Florida Cities to request a waste load allocation at Waterway Estates.

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Sir, that meeting occurred on July 29th, 1986, isn't that correct?
A. Yes.
Q. And, sir, in August of 1987, ESE submitted its report regarding Waterway Estates, Plaintiff's Exhibit 267, isn't that correct?
A. Yes.
Q. And Mr. French didn't think that the ESE report was adequate, did he?
(Pause.)
A. I don't recall if he thought it was adequate, but he did some more investigation into it, yes.
Q. Mr. French -- withdrawn.
Was Mr. French your boss at that time?
A. Not immediate. Mr. Reeves was.
Q. Okay. Was Mr. French two levels above you?
A. He was a level above, but not directly through the flow -- organizational flow.
Q. Let me see if I can ask it a better way. Was Mr. French your superior --
A. Yes.
Q. -- at that time?
Mr. French said in his critique of that report that not all of the alternatives were explored in adequate detail, is that correct?

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A. Yes, sir, I think that's what it said.
Q. In fact, ESE looked only at land application and perc ponds within the service area of Waterway Estates, isn't that correct?
A. I believe that's what is stated in the report, yes.
Q. They didn't look at land application or perc ponds outside of the service area, did they?
A. Not to my knowledge.
Q. ESE was constrained in part by cost and expenses, wasn't that correct?
A. Yes. That's part of the evaluation, yes.
Q. And costs were a consideration in ESE's recommendations, isn't that correct?
A. Yes.
Q. At the time in 1987, FDER tended to be favorable, did it not, towards deep well injection as a disposal option?
(Pause.)
A. There were installations of those, yes.
Q. Sir, the ESE report did not consider a connection with the North Fort Myers Utilities, is that correct?
A. No. I think one of the recommendations was for -- to evaluate that.
Q. One of the recommendations in --
A. -- in the ESE report. I think it alluded to that.
Q. Sir, I'd like to show you Exhibit 371, Plaintiff's,

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please, and I'm going to be referring you to the second page of that exhibit, please.
Sir, at the time that ESE did its evaluation and Mr. Reeves critiqued it, did you know that North Fort Myers Utilities had deep wells?
A. I had been told that, yes.
Q. When were you told that?
A. I don't know specifically when, but that was one of the options, to tie in to them, because they had a system in deep wells.
Q. So, you knew that back in '87?
A. Whenever this was going on. I think that's the time frame, yes.
Q. Sir, at the time did you know that North Fort Myers Utility was using spray irrigation as a disposal alternative?
A. I wasn't totally versed in what they had, no.
Q. Well, did you know that they were using spray irrigation?
A. No.
Q. But you did know they were using wells?
A. I had been told that, yes.
Q. Okay.
MR. BAISE: Objection to counsel characterizing North Fort Myers as using wells. I believe the testimony is

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they had one well.
THE COURT: Okay. Mr. Quinn, you want to be heard on that?
MR. QUINN: No, sir.
THE COURT: Okay. You stand corrected, then?
MR. QUINN: I stand corrected, sir.
THE COURT: All right.
BY MR. QUINN:
Q. Now, on or about December 1st, 1987, you wrote a letter to FDER requesting a waste load allocation for the Waterway Estates plant, didn't you?
A. I did sometime, yes.
Q. I'd like to show you what we have -- Exhibit 374, please. Sir, have you seen Exhibit 374 before?
MR. QUINN: This has been entered into evidence, Your Honor.
BY MR. QUINN:
Q. Have you seen Exhibit 374 before?
A. Yes.
Q. That's not your signature, though, is it?
A. No, it's not.
Q. But you wrote the letter, didn't you?
A. Yes, I did.
Q. Okay. So, is it correct to say that on December 1st, 1987, you wrote a letter to FDER requesting a waste load

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allocation for the Waterway Estates plant?
A. Yes.
Q. So, despite knowing in August '86 of the need to apply for a waste load allocation to discharge to the Caloosahatchee River, Florida Cities waited about 16 months to file this application for a waste load application -- allocation, isn't that correct?
A. Yes, sir.
Q. Isn't it true, sir, that on January 28th, 1988, you wrote a letter to Pete McGarry of EPA to update him on the progress of the construction schedule set forth in your earlier letters?
A. Yes.
Q. So, it's more than 16 months since you proposed a construction schedule to EPA. Is it fair to say at this point in time the proposed schedule set forth in your letter of September 16th, 1986, had slipped substantially?
A. Yes.
Q. And on January 28th, 1988, it's pretty clear that Florida Cities will be unable to meet the compliance dates that you proposed in your letter of September 16th, 1986, isn't this correct?
A. Yes, sir.
Q. About five weeks after you wrote to EPA, you also wrote a letter to FDER proposing a completely new schedule

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for coming into compliance at Waterway Estates, didn't you?
A. I did at some time frame in there, yes.
Q. I'd like to show you -- turn to Exhibit 376, which is in evidence, sir.
So, is it correct to say, sir -- do you have that in front of you?
A. Yes, I do.
Q. So, is it correct to say that on March 1, 1988, you wrote a letter to the FDER proposing a completely new schedule for coming into compliance at Waterway Estates, isn't that correct?
A. Yes, sir.
Q. In this letter, you, on behalf of Florida Cities, is proposing -- withdrawn.
In this letter, Florida Cities is proposing a completion of construction date for the Waterway Estates facility of May 1, 1990, isn't that correct?
A. Yes, sir.
Q. And that's Line 11 on that exhibit, is that correct?
A. Yes.
Q. Now, in that letter, it contemplates a 15-month schedule between beginning and completing construction, isn't that correct?
(Pause.)
A. Pardon me. Fifteen months from construction?

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Q. It contemplates a schedule from beginning construction to completion of construction.
I'll show you to Lines 10 and 11.
A. Oh, I see. Yes.
Q. Okay. Just so I can make sure it's clear, in this March 1, 1988, letter, a 15-month schedule between initiation and completion of construction is contemplated, isn't that correct?
A. Yes, sir.
Q. So, was that a reasonable approximation for the amount of time that it would take to construct this project based upon your engineering experience?
A. I think at that time, yes, it was reasonable with the construction to be over a year.
Q. Yet, previously you proposed to EPA a construction schedule of only eight months, isn't that correct?
A. Yes, sir.
Q. Had the scope of the construction project changed so significantly to warrant almost doubling the amount of time that was necessary for completion of this project?
A. There was much more detail available at this time.
Q. But had the scope of the construction project changed?
A. Yes, because there was much more detail available.
Q. And that warranted, in your opinion, an almost doubling of the amount of time necessary to complete the

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construction?
A. Yes, sir.
Q. EPA had agreed to amend its prior administrative order to incorporate the revised time frames that you had proposed, isn't that right?
A. Yes, sir.
Q. I'd like to show you Exhibit 387. Do you have that, sir?
A. Yes.
Q. On March -- is this a memorandum that you wrote, sir?
A. Yes, sir.
Q. And those are your initials, aren't they?
A. Yes, it is.
MR. QUINN: The United States would move 387 into evidence.
THE COURT: It will be received.
BY MR. QUINN:
Q. This is a March 17th, 1989, memo that you wrote to Mr. French discussing a call that you received from EPA, isn't that correct?
A. Yes, sir.
Q. And during the telephone call with EPA, EPA had asked you whether construction had started by February 1, 1989, isn't that correct?
A. Yes, sir.

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Q. Now, the February 1, 1989, date for starting construction was, in fact, the date Florida Cities itself had proposed, isn't that correct?
A. I believe so, yes.
Q. And this February 1989 date for beginning construction of the plant upgrades at Waterway Estates was, in fact, six months later than the date by which Florida Cities had originally proposed to have completed construction, isn't that correct?
A. From the original --
Q. From the original proposal, that's correct.
A. From September? Approximately, yes.
Q. Florida Cities hired a contractor by the name of Source Engineering to perform the plant upgrades -- withdrawn.
Florida Cities hired an engineering firm by the name of Source to analyze and design the plant upgrades at the Waterway Estates facility, isn't that correct?
A. Yes, sir.
Q. And, in fact, you had recommended that Florida Cities hire a different contractor, isn't that right?
A. Yes, sir.
Q. You recommended that they hire ESE Engineering, correct?
A. Right.

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Q. And that was based upon your engineering opinion, correct?
A. Yes.
Q. And your experience as an engineer, correct?
A. Yes.
Q. And your experience with ESE, isn't that correct?
A. Partially, yes.
Q. Sir, now, you believe that ESE was better qualified to perform the work at Waterway Estates at least in part because it had done the preliminary work at the facility, correct?
A. That would have been one of the aspects.
Q. And also you believe that ESE could have potentially completed the work more quickly than Source could have, isn't that correct?
A. Yes, sir.
Q. Isn't it also true that Mr. Rich Voorhess, the construction engineer for Florida Cities, also recommended that ESE rather than Source be given the contract for the work at the plant?
A. Yes, sir.
Q. So, your recommendation that ESE be considered and Mr. Voorhees' recommendation that ESE be considered was rejected, is that right?
A. Yes. It was overridden, yes.

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Q. It was overridden by your superiors, isn't that correct?
A. Yes, sir.
Q. Given the cost of the project, isn't it true that Avatar Holdings was required to approve the selection of the contractor?
MR. BAISE: Objection, Your Honor. That clearly is outside the scope of direct testimony.
MR. QUINN: Your Honor, it is not. Mr. Hird elicited questions about that on whether or not Avatar Holdings had any part in any of the decisions Florida Cities made.
MR. HIRD: I won't object to being --
THE COURT: Wait a minute. Are you through?
MR. QUINN: Yes, I am.
THE COURT: Go ahead.
MR. HIRD: I'm sorry. I won't object as being outside the scope. I do want to object that it would be misleading. Are you talking about approving the contract or selection of the contract? I'm not certain whether that's been --
THE COURT: I'll overrule the objection as outside the scope.
You want to clarify your question, counsel?
MR. QUINN: Yes, sir.

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BY MR. QUINN:
Q. Sir, I'm going to ask you two questions that are similar: First, given the cost of the project, isn't it true that Avatar Holdings was required to approve the selection of the contractor?
A. They approved the contract or -- it was a Conward system where Mr. Reeves was --
THE COURT: A what?
THE WITNESS: It was titled a "Conward."
THE COURT: "Conward"?
THE WITNESS: Conward. That was just the name of document itself.
THE COURT: Short for "contract award"?
THE WITNESS: Yes.
THE COURT: Go ahead.
THE WITNESS: And Mr. Reeves would send it to Miami. I don't know the logistics.
BY MR. QUINN:
Q. Okay. But is it your understanding that Avatar Holdings approved the contract itself?
A. I don't specifically know who approved it as to what their...
Q. Sir, was it your understanding that Avatar Holdings was required to approve the Conward that dealt with the contract based on -- because of the amount of this contract?

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A. I guess someone representing them would sign off on the amount of money to be spent on the contract.
MR. HIRD: Move to strike; outside the witness' personal knowledge.
THE COURT: Well, he said he guesses. I'll strike his answer.
MR. QUINN: Okay.
BY MR. QUINN:
Q. Sir, isn't it correct that Source, Incorporated, had submitted a lower bid for the work than ESE had?
A. I believe they did.
Q. Okay. And in your view, isn't it -- withdrawn.
Sir, is it your view that Source's lower cost played a strong consideration in the decision to hire Source?
MR. BAISE: Objection, Your Honor. This would be outside his knowledge with regard to those people who made the decision on hiring Source.
THE COURT: Well, he can testify if he knows. I'll overrule the objection.
BY MR. QUINN:
Q. Do you remember the question, sir?
A. If cost played a part?
Q. I think we moved on from there.
A. Oh, okay. I'm sorry.
THE COURT: Go ahead and ask the question again.

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MR. QUINN: Okay.
BY MR. QUINN:
Q. Sir, isn't it your view that Source's lower cost bid played a strong consideration in the company's decision to hire Source?
A. I don't know how strong a consideration it was.
Q. Sir, do you remember giving a deposition -- I'm going to refer to Page 33, Lines 4 through 6 -- sir, do you remember the question was asked: All right. Was it a strong -- withdrawn.
Let me just start over: All right. Was it a strong consideration, to your knowledge, Mr. Lehman?
And the answer that you gave was: I'm sure it was.
Is that the answer you gave?
A. If you read it, it probably is. I'm sure it is.
Q. Sir, in fact, this entire project could have been speeded up, couldn't it have?
A. I'm not sure how.
Q. Well, didn't it take about 454 days for Source Engineering to submit the plans and design specifications?
A. I think he got toward the end of my tenure there, so I can't tell you what the final was.
Q. By the time you left, Source Engineering hadn't submitted the design specs and engineering plans, had they?
A. The final ones?

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Q. The final ones.
A. No, I don't believe so.
Q. In fact, in the schedule that you had negotiated with Source Engineering, those final plans and design specs were supposed to have been there by the time that you ultimately left, isn't that correct?
A. I don't know what the time frame specifically was in their contract, but...
Q. Sir, EPA issued Florida Cities its intent to deny the permit renewal on June 30th, 1986, is that correct?
A. Yes.
Q. Okay. And Florida Cities did not apply for a waste load allocation until December 1987, about 17 months later, is that correct?
A. Yes, sir.
Q. That application could have been submitted earlier, couldn't it have?
A. Yes, sir.
Q. And it could have been submitted on time, too, couldn't it have?
MR. BAISE: Objection, Your Honor. We don't know what "on time" means.
THE COURT: Well, do you know what "on time" means?
THE WITNESS: On time for the waste load

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allocation -- are you talking about the waste load allocation submittal?
BY MR. QUINN:
Q. Yes.
A. There is no --
THE COURT: I'll overrule the objection. Of course, you would have to ask him whether he knew what "on time" means.
MR. QUINN: I'll withdraw the question. It's getting too confusing.
THE COURT: Good, good.
MR. QUINN: May I have one moment, sir?
THE COURT: Yes, sir.
(Pause.)
BY MR. QUINN:
Q. Just a few more questions, please, sir.
You were the operations manager of Florida Cities Water Company during your tenure there, is that correct?
A. Yeah; then the title changed somewhere through there, toward the latter part.
Q. I think you said you became an executive vice-president for operations?
A. No.
Q. No? You became a vice-president for operations?
A. Yes, sir.

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Q. Okay. Thank you.
And you reported to Mr. French indirectly, is that correct?
A. Indirectly?
Q. Yes, or -- withdrawn.
How did you report to Mr. French?
A. Through Mr. Reeves, specifically through the organizational chart.
Q. Do you know to whom Mr. French reported?
A. Mr. Reeves.
Q. Mr. French reported to Mr. Reeves?
A. That was -- yeah.
Q. And what position did Mr. Reeves hold?
A. He was -- what was his exact title? Executive vice-president over Florida Cities.
Q. Do you know to whom Mr. Reeves reported?
A. I think it was directly to Mr. Gordon.
Q. And who was Mr. Gordon?
A. His title is -- I think it was -- he was with Avatar Utilities. The specific title -- he was president? I can't be sure. I can't remember exactly if that was his title.
MR. BAISE: Objection, Your Honor.
THE COURT: Just a moment.
MR. BAISE: Objection, Your Honor. The witness obviously doesn't know the clear answers to the questions

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being propounded by counsel, and so I object to that line of questioning unless the witness absolutely knows the answer to the question.
THE COURT: I'm going to overrule the objection. If he knows, he can answer, but don't speculate.
THE WITNESS: All right.
THE COURT: And would you speak a little bit louder, please?
THE WITNESS: Okay.
BY MR. QUINN:
Q. You don't know -- withdrawn.
You personally don't know whether Mr. French or Mr. Reeves or Mr. Gordon had consultations with Avatar Holdings officials about the Waterway Estates discharge alternatives, do you?
A. No, I don't.
Q. Thanks.
MR. QUINN: No more questions, sir.
THE COURT: Redirect?
MR. BAISE: Just a few questions.
REDIRECT EXAMINATION
BY MR. BAISE:
Q. On what occasions have you been hired by Florida Cities to testify for pay, Mr. Lehman?
A. The one occasion I know is Carrollwood had a rate

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case; that was a number of years ago.
Q. Is that the only time you have ever been hired by Florida Cities since you left them to testify on their behalf?
A. I believe so.
Q. Are you being paid by Florida Cities to testify in this particular matter?
A. No.
Q. With regard to the knowledge of the waste load allocation, I believe you testified you believed that there was a waste load allocation for Waterway Estates to discharge into the canal?
A. Yes. There was a permit.
Q. And wasn't the waste load allocation that had to be sought a waste load allocation --
MR. QUINN: That's going to be leading, sir.
THE COURT: Yes, it is definitely leading.
BY MR. BAISE:
Q. Directing your attention back to Government Exhibit 374, Mr. Lehman --
THE COURT: What was the number, again?
MR. BAISE: 374, Your Honor.
THE COURT: All right.
BY MR. BAISE:
Q. Do you have 374 in front of you, Mr. Lehman?

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A. Yes, I do.
Q. Looking at the first paragraph of 374, was the waste load allocation for a million gallon plant or a million point five gallon plant, Mr. Lehman?
A. It was for ultimate capacity of 1.5 MGD.
Q. Did that require a new waste load allocation?
A. Yes. It required an increase.
Q. Did it require a new waste load allocation in the Caloosahatchee River?
A. Yes.
MR. QUINN: Objection; asked and answered.
THE COURT: Overruled.
BY MR. BAISE:
Q. With regard to decisions not being accepted, Mr. Lehman, and with regard to Source being hired rather than ESE, were all of your decisions always accepted by your superiors?
A. No.
Q. Did it come to pass that Source did design the facility at Waterway Estates, Mr. Lehman?
A. As far as I know. It wasn't completed final when I left.
Q. Were the draft plans submitted by Source in April of 1989?
A. There were draft plans, yes.

Q. Did the plant that Source designed end up being approved by FDER, to your knowledge?
A. That I can't tell you.
MR. BAISE: Thank you, Your Honor.
THE COURT: All right. Thank you, sir. You may step down.
We'll be in recess for lunch until, let's say, 1:20.
(The luncheon recess was taken.)

THE COURT: Mr. Bullock.

MR. BULLOCK: Good afternoon, Your Honor.

Florida Cities would call Connie Kagey.

THE CLERK: Raise your right hand.

Thereupon,

CONNIE A. KAGEY,

having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Take a seat in the witness box.

State your name and spell your last for the record, please.

THE WITNESS: Connie A. Kagey, K-A-G-E-Y.

DIRECT EXAMINATION

BY MR. BULLOCK:

Q. Good afternoon, Ms. Kagey, my name is Alex Bullock. May I ask you first to identify for employed?

A. Excuse me?

Q. Could you identify by whom y

A. I am employed by the United Protection Agency, Region IV.

Q. And how long have you been

A. I have been employed there

MR. BULLOCK: Your Hono

employed by the adverse party in this case, I would request the Court's permission to ask leading questions.

THE COURT: Yes, sir.

MR. BOMIAK: No, Your Honor.

THE COURT: Beg your pardon?

MR. BOMIAK: I said, no, Your Honor

THE COURT: Oh, all right. I didn't call — I didn't understand what you were saying — you thought I said whether there was any objection?

MR. BOMIAK: Yes, Your Honor.

THE COURT: Okay.

You'll be permitted to do so.

MR. BULLOCK: Thank you, Your Honor.

BY MR. BULLOCK:

Q. Ms. Kagey, isn't it true you began writing NPDES permits in 1981?

that was probably 1982.

. And isn't it true that there are three ting effluent limitations into NPDES permits? — in writing permits, each limitation is ed on three different methods. nd isn't it true that one of those methods is ed effluent limitation guidelines?

ht. Isn't it true that another method is

NOTE PAGE PATTERN

1 → 2 → 3 → 4

through water quality-based effl

A. In what regards are you cr limitations?

Q. Well, in examination of based on, not on ... guidelines, but on water-quality guidelines?

A. Yes.

Q. Isn't it true that another method is through the use of best professional judgment?

A. Yes.

Q. All right. Ms. Kagey, you were involved in reviewing the 1986 renewal application filed by Florida Cities for the Waterway Estates facility; isn't that correct?

A. I don't remember the exact time line of the application.

Q. All right. Isn't it correct —

THE COURT: Without regard to the time, were you involved in it?

THE WITNESS: I have been involved with Florida Cities Water Waterway Estates permit on two different occasions. I do not remember exactly what the applications were dated.

THE COURT: All right. Go ahead.

BY MR. BULLOCK:

Q. Ms. Kagey, I'd ask you to look at Defendant Florida Cities' number 21, and ask you to turn to the second page of

. There is a — I refer you to there's a date 15, 1986. Isn't it correct this was the date lication was received by the Environmental Agency Region IV?

A. I do not know if this was the received date, but this date was put on the application. I do not know if this was the received date.

Q. Okay. Would you agree with me that Florida Cities filed an application to renew its NPDES Permit in 1986?

A. That's what it appears to be.

Q. All right. Isn't it correct that Florida Cities had received previous Federal NPDES Permits for the Waterway Estates facility in 1975 and 1981?

A. I do not remember the exact date because I was not the permit writer on those.

Q. All right. Would you agree with me, though, that there was an existing NPDES Permit in effect at that time?

A. Yes, as far as I can remember, there was at least one existing permit.

Q. All right. In reviewing permit applications, isn't it true that you rely on various pieces of EPA internal guidance?

A. Yes.

Q. And isn't it also true that you rely upon guidance from other sources, including State permits and State

wasteload allocations?
A. Yes.
Q. Okay. Isn't it true that States develop water quality standards in order to protect the receiving waters from high amounts of pollution?
A. Could you clarify that question?
Q. Certainly. Let me ask you this way: What is your understanding of why States develop water quality standards?
A. Okay. As you say, to protect receiving waters of the State from — okay — from various pollutants, be it high or not necessarily high, but from pollutants.
Q. All right. Isn't it correct that you are not familiar — excuse me. Let me start over again.
Can you identify what a wasteload allocation is?
A. To the best of my understanding, a wasteload allocation is developed by the State for a water body or a particular water stream or segment in order to protect that segment from, be it, for example, DO nutrients or other pollutants of concern.
Q. Okay. Isn't it correct that you are not familiar with EPA's process of approving wasteload allocations?
A. I have just recently come into some knowledge of what I think — what I perceive as possibly being the approval process.
Q. All right. And when did you come into this

information?
A. Within the past year.
Q. All right. And so you did not have any understanding of that process at the time, in 1986, when you worked on the Waterway Estates renewal application?
A. Not that I can remember.
Q. And you did not have any understanding of that procedure at the time of your deposition, taken October 24th, 1994?
A. I do not recall.
Q. All right. Do you remember giving your deposition on October 24th, 1994?
A. I remember giving it in October. I do not know the exact date.
Q. And I'm going to read you a question which was posed to you and your answer, and let me ask you, did you give the following answer in response to the following question: Are you familiar with the process of approving wasteload allocations? And your answer was: No.
Is that the answer which you gave?
A. Without seeing the document in front of me, I would not like to venture a guess.
Q. Okay.
THE COURT: Well, are you talking about — I'm sorry — were you going to hand her a copy?

MR. BULLOCK: I would be glad to hand her a copy of the deposition.
THE COURT: I don't really think — all you are going to be doing is handing her a transcript and she's never seen the transcript before.
You say you don't know whether you testified to that or not; is that correct?
THE WITNESS: Excuse me. I have seen my transcript. I do not recall if I actually said that.
THE COURT: It might help you to see the transcript?
THE WITNESS: Yes, sir.
THE COURT: Go ahead.
MR. BULLOCK: I'm sorry. I should have had one available. I apologize.
Your Honor, I don't know what the Court's practice is about breaking the seal, if you require —
THE COURT: Here's my practice today.
(Pause.)
BY MR. BULLOCK:
Q. Let me ask you, Ms. Kagey, to turn to page 41, and the question which I read to you starting with line 20: Are you familiar with the process of approving wasteload allocations? And your response was: No. Is that the response which you gave?

A. I believe it was, yes.
Q. Are you — Ms. Kagey, let me ask you, are you familiar with the process of developing wasteload allocations?
A. No, I am not.
Q. All right. And isn't it true that you would not utilize a draft wasteload allocation which had not been approved by EPA in writing a permit?
MR. BOMIAK: Objection, Your Honor. At what period of time is the question directed? Is this in general? The permit denial was back in 1986.
THE COURT: All right. Why don't you direct your question to a specific period of time, Mr. Bullock.
BY MR. BULLOCK:
Q. Ms. Kagey, in 1986, would you a used a draft wasteload allocation, which had not been approved by EPA, in writing a permit?
A. No, sir, I do not believe I would.
Q. And that is because the final wasteload allocation may have been different from the draft allocation; is that correct?
A. That would be much in my general understanding, yes.
Q. Okay. Isn't it true, Ms. Kagey, that EPA permit writers are supposed to contact the EPA's wasteload allocation section to determine the status of an applicant's wasteload?

MR. HOMIAK: Your Honor, same objection. I don't know if he's referring to present day or back in 1986.

THE COURT: Sustained.

BY MR. BULLOCK:

Q. In 1986, Ms. Kagey, wasn't it true that EPA permit writers were supposed to contact the agencies wasteload allocation section to determine the status of an applicant's wasteload allocation?

A. I do not recall the formal procedures that were in place back in the 1986 time period.

Q. Isn't it true the EPA permit writers, in 1986, did not make independent assumptions regarding wasteload allocations?

A. In — could you clarify that, please?

Q. Certainly. In terms of — let me ask the question again.

As of 1986, wasn't it true that an EPA permit writer did not make an independent assumption regarding the wasteload allocation section, other than what the wasteload allocation section had determined?

A. Excuse me. I'm having trouble answering the question as asked.

Q. Okay.

A. It's — to the best I can recall, I consulted with the staff of the wasteload allocation back in the mid 1980's. I

do not know the exact time period, and I'm not even sure if that was the correct organizational name.

MR. BULLOCK: Okay. Your Honor, I'll move to strike as non-responsive and —

THE COURT: Well, I'll deny that request.

BY MR. BULLOCK:

Q. Ms. Kagey, isn't it true EPA denied the 1986 NPDES Permit renewal application for Waterway Estates based upon your recommendation?

A. Yes.

Q. Isn't it true that denial of an application to renew a permit is extremely rare?

A. Yes.

Q. All right. Isn't it true that you, yourself, at the time of your deposition only remembered working on one other denial of a permit renewal?

THE COURT: Well, never mind what she remembered at the time of the taking of the deposition.

You can ask her now and then if it's inconsistent to what she testified to before, you can confront her with that.

BY MR. BULLOCK:

Q. Isn't it true, Ms. Kagey, that you only remember working on one other denial of a permit renewal application, other than Waterway Estates, in 1986?

A. There may have been others, but I can only think of one other that I can name.

Q. Isn't it true, Ms. Kagey, that you recommended the denial of Florida Cities' application based upon a purported no discharge wasteload allocation from the State of Florida for the Waterway Estates facility?

A. Could you clarify exactly what you mean? What you were referencing to?

Q. Okay. Let me ask you this: What was the basis of your recommendation of denial?

A. Upon reviewing of my record for deposition and for trial, I had — I had used a cover page and one page of a wasteload allocation that stated, no discharge for Waterway Estates.

Q. All right. Let me ask you to look at Plaintiff's Exhibit 349.

Ms. Kagey, can I ask you to identify for the record what the cover page of Exhibit 349 is?

A. It states Caloosahatchee River Wasteload Allocation Documentation, Lee County, Water Quantity Technical Series, Volume 2, Number 52, Bruce DeGrove —

Q. That will be fine. That's sufficiently identifies it. Thank you.

Isn't it true, Ms. Kagey, the only two pages which you reviewed of this document were the cover page of the

document, which you just read, and page 17?

A. Without having my permit file in front of me, I could only venture a guess, yes, that page 17 is the same one. I do recognize the cover page.

Q. At your deposition, do you remember giving the following answer to the following question: Is this the document that you reviewed in preparation for your 1986 denial of the Waterway Estates permit application —

A. I don't recall without having seen my deposition.

THE COURT: Wait a minute.

Did you give the answer yet?

MR. BULLOCK: No, sir, I haven't.

THE COURT: Wait until he finishes his question.

BY MR. BULLOCK:

Q. According to my records it's the cover page and page 17 of this document which — that was used.

Did you give that answer at your deposition?

A. I do not recall. My deposition was over a year ago.

Q. All right. Let me refer you to page 83 of your deposition, and that's line 17 through 21.

A. That is what I said in deposition.

Q. Thank you.

Isn't it correct, Ms. Kagey, that you made no attempt to review the entire document?

A. As far as I can recall, that is correct.

Q. All right. Isn't it true, Ms. Kagey, that you did not review, at the time you looked at these two pages of the document that we discussed, isn't it true that you did not review any EPA memorandum regarding this document?
A. I do not recall any.
Q. All right. Isn't it true, that at the time you reviewed the document, you didn't know whether this document was ever approved by EPA?
A. Are we still talking about the 1986 time period?
Q. Yes. Uh-huh.
A. Could you ask the question again, or could I have the question repeated?
Q. All right. Isn't it true, Ms. Kagey, that you didn't know whether this document was ever approved by EPA when you were reviewing it in 1986?
A. I don't believe it was, but I can't recall completely.
Q. Isn't it true that you don't recall whether you contacted the EPA Region IV wasteload allocation staff to determine if this was a valid allocation?
A. I do not recall.
Q. All right. Isn't it true, Ms. Kagey, that you usually draft permits in accordance with the -- let me start over again.

For purposes of drafting a Florida permit, isn't it true that you usually draft permits for facilities in

Florida in accordance with FDER effluent limits and operating limits?
A. In a lot of cases Florida standards were used, but it also depended on the type of facility.
Q. Isn't it true that permit writers at EPA, during 1986, were instructed to obtain copies of the current FDER operating permit from the applicant?
A. To the best that I can remember, yes, because I know I personally did it.
Q. You know that you personally did request?
A. Yes.
Q. Isn't it true that Florida Cities included a copy of its 1983 FDER permit with its 1986 NPDES renewal application?
A. I cannot recall if they did.
Q. Was it your usual practice, Ms. Kagey, to contact the wasteload allocation staff to determine whether or not there was a valid wasteload allocation for an applicant, during 1986?
A. I don't entirely recall. I know back in the mid 1980's I did work closely with the wasteload allocation staff.
Q. But back in 1986, you don't remember; is that correct?
A. That's correct.
Q. Let me ask you to look at Defendant's Exhibit 21. Let

me ask you to look at the page 1 of the State permit, which was attached to the application. It would be the third page of the exhibit. Do you see the paragraph in the middle of that page which says, operation of a 1.08 MGD?
A. Yes, sir.
Q. Would you read that entire paragraph, please?
A. Operation of a 1.08 MGD contact stabilization wastewater treatment facility of effluent discharge to a canal to the Caloosahatchee River as depicted in drawings and documentation show on file in this office. Project is located off Inlet Drive, North Fort Myers.
Q. All right. Isn't it true, Ms. Kagey, that the Florida permit attached to Exhibit 21, authorized Waterway Estates to discharge to the canal which flowed to the Caloosahatchee River?
A. The State permit issued by Florida authorized discharge.
Q. Let me ask you also to look at Exhibit 17, and I'm asking you to look at what would be the fourth page of the exhibit, it's the first page entitled 1 of 4 to the document, and you see the paragraph which begins, to operate a 1.080 MGD?
A. Yes, sir.
Q. Would you read the first sentence of that paragraph?
A. To operate a 1.080 MGD contact stabilization process

wastewater treatment facility with effluent canal to Caloosahatchee River located off project site.
Q. Exhibit 16, can I ask you to look back and tell me what the date of Exhibit 16 is?
A. The first page says, January 1981.
Q. All right. Could you tell me what the date of Exhibit 17 is?
A. The first page of that exhibit with the letter to Mr. Reeves is dated April 2nd, 1981.
Q. And looking at the State permit, which is attached to Exhibit 21, can you tell me what the date of issuance of that permit is?
A. The cover page from the State permit appears to have the date of issuance as August 2nd, 1983.
Q. Isn't it true, Ms. Kagey, that Florida issued two permits for the Waterway Estates facility to discharge after the date of Exhibit 16?
A. That appears to be the case.
Q. Okay. Ms. Kagey, let me ask you to look at Exhibit 18. Do you have that in front of you?
A. Yes.
Q. Can you tell me the effective date -- excuse me -- first of all, can you identify what Exhibit 18 is?
A. I'm sorry, I could not understand you.
Q. Could you identify what the effective date of Exhibit

18 is?
A. On the permit cover page it states, this permit shall become effective on September 24th, 1981.
Q. So, isn't it true, Ms. Kagey, that Florida Cities received an NPDES Permit from EPA some eight months after Exhibit 16 was published?
A. That appears to be the case.
Q. Isn't it true, that you failed to consider the State 1983 permit when you recommended the denial of the 1986 NPDES Permit renewal?
A. Could you please repeat the question?
Q. Certainly. Isn't it true that you failed to consider the State 1983 discharge permit when you recommended denying the 1986 NPDES Permit renewal application?
A. No, sir. I took that into consideration.
Q. All right. Let me ask you to look at Exhibit 199.
THE COURT: What was the number?
MR. BULLOCK: 199, Your Honor.
BY MR. BULLOCK:
Q. Can you identify Exhibit 199 for the record?
A. This exhibit is dated May 28th, 1985. It's a letter to Mr. Anthony Reeves, Vice-president, Florida Cities Water Company, P O BOX 5846, Sarasota, Florida, in regards to compliance evaluation inspection, Florida Cities Water Company, Waterway Estates, NPDES FL0030325.

Q. Okay. Let me ask you, what is attached to this letter?
A. It is an NPDES compliance inspection report.
Q. Isn't it true, that this report was a joint report, inspection report with FDER?
A. It appears to be.
Q. All right. Let me refer you to the third page of the Exhibit. Under section E, subsection G, isn't it true that subsection G indicates that Florida Cities' number and location of the discharge points as described in the permit were in compliance?
MR. BOMIAK: Your Honor, objection. There's been no testimony elicited that Ms. Kagey conducts compliance inspections for EPA. The testimony was she writes permits.
MR. BULLOCK: Your Honor — I'm sorry.
THE COURT: All right.
MR. BULLOCK: Your Honor, EPA's internal breakdown in terms of how they allocate out various portions of responsibility really should not impact on whether or not the agency as a whole had knowledge of any particular issue.
This is an official EPA compliance inspection report which indicates the company was in compliance as to where it was discharging. And it was conducted by both Ms. Kagey's own agency and the State of Florida.
THE COURT: I'll overrule the objection.

You can answer the question.
Do you remember the question?
THE WITNESS: No, sir, I do not.
THE COURT: Read the question back.
(Thereupon, the above-referred to portion of the testimony was read back by the court reporter as above recorded.)
THE WITNESS: Excuse me. I'm having a hard time finding which particular section you are talking about.
MR. BULLOCK: Okay. Your Honor may I approach and point it out to her?
THE COURT: You better do that, quickly.
THE WITNESS: It appears that it was marked yes on both of those questions.
BY MR. BULLOCK:
Q. Let me refer you next to Exhibit 200, and ask you to turn to the second page of Exhibit 200, under subsection C, areas evaluated during inspection. Do you see that section?
A. Yes, sir.
Q. All right. The effluent receiving waters have received a satisfactory rating; isn't that correct?
A. Correct.
Q. All right. And satisfactory is the highest rating under that section; isn't that correct?
A. It appears to be, yes, sir.

Q. Isn't it true that these two compliance inspections indicate that EPA considered that Florida Cities was discharging to a proper location during this period of time?
MR. BOMIAK: Objection, Your Honor. Again, there's been no foundation laid that Ms. Kagey's familiar with these compliance inspection reports, and in any way in their preparation. She can't really testify as to what it is they state with respect to where the discharge point is.
THE COURT: I'll overrule the objection.
You can answer.
THE WITNESS: Could you repeat the question?
BY MR. BULLOCK:
Q. Ms. Kagey, isn't it true that based upon these compliance inspection reports, EPA considered the Waterway Estates discharge to be discharged into the proper location?
A. That's what it appears that the compliance officer at the time noted.
Q. All right. Isn't it true that between January 1981, and April of 1986, EPA took no action which directed Waterway Estates to cease discharge —
MR. BOMIAK: Objection, that's clearly beyond the scope of this witness' —
THE COURT: I agree. I'll sustain the objection.
BY MR. BULLOCK:
Q. Ms. Kagey, who is Roosevelt Childress?

A. Roosevelt Childress is presently one of the unit chiefs in our permit section.
Q. Okay. What was his possession in 1986?
A. I do not recall.
Q. All right. How long has he been unit chief?
A. I do not know.
Q. Okay. What are the responsibilities of a unit chief?
A. A unit chief is usually the immediate supervisor of staff members, and in our section, was probably the main contributing hands-on, day-to-day type of person, knowledgeable about permit writing.
Q. Okay. Who is Bruce Barrett?
A. Bruce Barrett at one time was division director. I believe the organization was Water Management Division.
Q. All right. And was he in this position during 1986?
A. I do not recall.
Q. All right. Who is Jim Greenfield?
A. Jim Greenfield is one of my colleagues. I do not know the exact position or organization he's in. I tend to association him with wasteload allocations.
Q. And how long has he been in that position?
A. I do not know
Q. Let me ask you, Ms. Kagey, to look at Defendant Florida Cities' Number 3. Could you identify this document for the record, Ms. Kagey?

A. It's a memorandum dated December 26, 1985, subject, interpretation of State standards for permitting purposes, from Tom DeRose, Assistant Regional Counsel, to James R. Patrick, Chief of the Permit Section.
Q. Is your name on this document?
A. Yes.
MR. BULLOCK: Your Honor, we would move Defendant's number 3 in evidence.
MR. HOMIAK: Objection, Your Honor. It is irrelevant. Second, it's not been established Ms. Kagey received this document. Her name may appear on the cover receipt. It's not been established she's ever seen or has received the document.
MR. BULLOCK: Your Honor, this document was produced pursuant to discovery from the Government, and it came from Ms. Kagey's files.
THE COURT: I'll overrule the objection.
It will be received.
BY MR. BULLOCK:
Q. Ms. Kagey, let me ask you to look at the first paragraph, the second sentence, which begins with, according to this decision. Let me ask you to read the next several sentences and I'll stop you.
A. According to this decision, EPA has authority, indeed, a duty, under section 301-B-1-C to interpret State law,

apply those limitations and conditions which it deem necessary to satisfy the requirements of State law. This is true in the absence of State certification. This is also true where EPA determines that the State has committed clear error in its certification. For example, where State overlooks applicable State water quality standards, citing OTC Opinion 58, March 29, 1977. However, there's no indication that the State has overlooked its standards or otherwise committed clear error -- I'm sorry. I'm going to restart that. However, where there is no indication that the State has overlooked its standards or otherwise committed clear error, EPA must give deference to the State. In short, if EPA and the State arrive at two different but equally persuasive interpretations of a standard, EPA should defer to the State's interpretation when included in the State certification.
Q. Thank you.
Ms. Kagey, isn't it correct that the EPA's regulations state that there are only four reasons for which a facility can have its permit taken away?
A. I do not know the answer.
MR. BULLOCK: Thank you.
THE COURT: Mr. Homiak.
MR. HIRD: I have no questions, Your Honor, of this witness.

THE COURT: Thank you, sir.
MR. HOMIAK: Your Honor, for the record, my name is Bob Homiak. I was introduced on the first day of the trial. I didn't expect to be participating in the trial, but Ms. Fitz-Henley had to leave suddenly. I'm an attorney with the Department of Justice in Washington.
With the Court's permission, I will conduct this examination.
THE COURT: Yes, indeed, you may proceed, Mr. Homiak.
Welcome to the fray.
MR. HOMIAK: It's a pleasure to be here, Your Honor.
THE COURT: You just lost some credibility.
Go ahead, Mr. Homiak.

CROSS-EXAMINATION

BY MR. HOMIAK:
Q. Ms. Kagey, I believe you testified you've been employed by EPA Region IV since 1980; is that correct?
A. That's correct.
Q. And you've begun writing discharge permits in 1982; is that correct?
A. To the best of my knowledge, yes.
Q. Are these NPDES Permits that we are referring to, Ms. Kagey?

A. Yes. National Pollutant Discharge Elimination System.
Q. Approximately how many permits have you written during your tenure at EPA?
A. I'm not even sure of a good approximate number. It could be anywhere between a hundred to two hundred.
Q. Now, Ms. Kagey, do you also review permits that have been written by other members of the NPDES Permits branch?
A. That is not the correct branch name, but, yes, I have reviewed others NPDES Permits that have been drafted and finalized by other permit writers.
Q. And when did you begin reviewing the permits that have been drafted by others, please?
A. I don't recall the year, but I believe I've been doing it for maybe five to six years, at least.
Q. And could you give me an approximation of how many permits that you've reviewed during the past five or six years in this position?
A. It's probably amounted to maybe fifty to a hundred permits a year, based on our cycle of permits, except for this past fiscal year, because Florida has been delegated and we're not issuing as many permits, except for Federal facilities.
Q. Now, Ms. Kagey, Mr. Bullock asked you a number of questions concerning EPA's denial of a NPDES Permit for the Waterway Estates facility back in 1986, and my question was,

to the best of your recollection, was your decision to denial Florida Cities' request for the NPDES Permit renewal for Waterway Estates reviewed by others in Region IV before it became final?
A. To the best of my recollection, it was reviewed by others.
Q. And can you recall who would have reviewed that decision?
A. No, I do not recall.
Q. Ms. Kagey, I want to direct your attention to an Exhibit, Government Exhibit number 354, please.
Do you have that document, Ms. Kagey?
A. Yes, sir.
Q. First of all, I'll ask you if you can identify it, please?
A. This letter is dated June 30th, 1986, going to Mr. Patrick Lehman of Florida Cities Water in regards to the NPDES Permit denial, Waterway Estates, NPDES number FL0030325. It is from myself.
Q. Thank you.
Is that your signature that appears on page 2 of this document, Ms. Kagey?
A. Yes, sir.
Q. Now, Ms. Kagey, if you would, please, read the first paragraph of that letter to Mr. Lehman, please.

A. The Environmental Protection Agency, EPA Region IV, intends to deny your application for a National Pollution Discharge Elimination System, NPDES Permit, from the above referenced facility. In accordance with the Federal Water Pollution Control Act, EPA has tentatively determined there can be no permitted discharges to Calooosahatchee River via canal. The enclosed fact sheet provides the rationale for this decision.
Q. Now, Ms. Kagey, I would direct your attention to the third page of this Exhibit, a document dated June 30, 1986, entitled, Fact Sheet. Do you have that?
A. Yes, sir.
Q. To the best of your recollection, is this the fact sheet that you included in your letter to Mr. Lehman or a copy thereof?
A. To the best of my recollection, this is a copy of the fact sheet.
Q. And I would direct your attention to page number 2 of that fact sheet, please, paragraph number 3. Do you see that?
A. Yes, sir.
Q. Would you read the first sentence, please?
A. The permit denial is based on a no discharge wasteload allocation developed by FDER on January 19, 1981.
Q. Ms. Kagey, turning back to page number 2 of this

Exhibit, please, the sentence at the top of the page, would you read that, as well, please?
A. If you have any questions concerning the rationale for denial or the procedures associated with the NPDES Permit Program, please contact me at 404-347-2156.
Q. Now, Ms. Kagey, to the best of your recollection, did anyone at Florida Cities contact you in response to this letter that was issued in June of 1986?
A. There may have been a letter requesting an extension of time for — based on what we asked them to submit to us.
Q. Well, with the exception of that, Ms. Kagey, do you recall whether representatives from Florida Cities ever contacted you with questions concerning the rationale for denial?
A. No, I do not recall any.
Q. Okay. Now, Ms. Kagey, directing your attention back to page 1 of this document, the last sentence of the —
A. Excuse me. Let me go back. When I said no, I do not recall any, I'm sorry, I misquoted.
From what I remember, going through my stuff prior to the trial, there was — they had requested an extension of time. I believe we gave them some sort of extension of time. They came back in with a proposed proposal and I think they may have commented to the denial, but I do not remember the content of that.

Q. Okay. I want to direct your attention now to page 1, the final sentence, which refers to — says, after the State EPA will go to public notice with this denial action and a compliance schedule will be developed to obtain the cessation of discharge. Do you see that sentence, Ms. Kagey?
A. Yes, sir.
Q. Would you describe to the Court briefly what the public notice process is, please?
A. Public notice process, as defined by Federal Law, requires us to go to public notice to allow permittee or third party to submit comments in relationship to a draft permit.
Q. Did I understand you correctly that not only the permittee, but members of the public may comment on the draft permit in the public notice process?
A. Yes, sir.
Q. Okay. And under EPA's procedures, is there a duty to respond to significant comments that are received during the public notice process?
A. EPA — as far as I can remember, there is law that does require EPA to respond to significant comments received by the permittee or third parties.
Q. And Ms. Kagey, did EPA, in fact, go to public notice in this matter?

A. To the best of my knowledge, yes, we did.
Q. To the best of your knowledge, was Florida Cities notified independently of the fact that EPA was going to public notice with the proposed denial action?
A. From review of my files, yes, I had sent them a copy of the public notice.
Q. To the best of your recollection, Ms. Kagey, did Florida Cities ever object to EPA's proposed action during the public notice process?
A. To the best of my knowledge, they did not submit comments during the public notice period.
Q. Now, let me ask you, Ms. Kagey, if Florida Cities had come to you, either after reviewing your letter of June 30th, 1986, or as part of the public notice process, with conclusive evidence that the Waterway Estates facility, indeed, had a wasteload allocation that was not — no discharge, would you have reconsidered your proposed permit denial?

MR. BULLOCK: Objection, Your Honor, speculation, hypothetical.

THE COURT: I'll overrule your objection.

Can you answer that?

THE WITNESS: Yes, sir.

Yes, I would go back and reconsider.

BY MR. HOMIAK:

Q. Ms. Kagey, I now want to direct your attention to a document that has been identified as Government Exhibit 361. Do you see that document?
A. Yes, sir.
Q. I'll ask you, can you identify this document, please?
A. This is the — a copy of the December 8, 1986 letter to Mr. Reeves, Florida Cities Water, regarding the Waterway Estates NPDES Permit number FL0030325.
Q. And who signed this letter, Ms. Kagey?
A. I do not know. It was someone acting for Bruce R. Barnett, director, Water Management Division.

I believe this is Al Smith, but I'm not certain of that signature.

Q. Ms. Kagey, if you would direct your attention, please, back to page 1 of this document, specifically to the first paragraph, I would ask you to if you would read those three sentences out loud, please?
A. You are here by notified of denial of the National Pollutant Discharge Elimination System, NPDES Permit application for the above referenced facility. This action constitutes the Environmental Protection Agency, EPA final permit decision in accordance with 40 CFR 124.15-A. Any person may contest this decision by submitting a timely request for a hearing to the regional administrator under 40 CFR 124.74 or 124.114.

Q. Okay. Now, Ms. Kagey, directing your attention to the very top of page 2 of this Exhibit, would you read that sentence, please?
A. If you wish to request a hearing under 40 CFR 124.74 or 124.114, you must submit a request, and original and two copies, to the regional hearing clerk within 30 days from the receipt of this letter.
Q. Ms. Kagey, to your knowledge, did Florida Cities file a request for a hearing of this permit denial?
A. No, sir.
Q. Now, Ms. Kagey looking back to page 1 of this document, this is approximately — the date of this document is approximately five months after EPA first informed Florida Cities of its intent to deny the Waterway Estates permit renewal; isn't that correct?
A. Approximately five or six months, correct.
Q. Ms. Kagey, I want to direct your attention at this point to the very last page of what has been identified as Exhibit — Government Exhibit 361. Do you see that?
A. Yes, sir.
Q. Is that your signature that appears above the line, permit writer?
A. Yes, sir.
Q. Ms. Kagey, directing your attention to what's numbered as paragraph number 3, State Certification, the document

waived per 40 CFR 124.15-C. Do you know what that is in reference to?
A. To the best of my recollection, when we cited that, that meant that the State waived by -- waived State certification by not responding to us within the 60 day time period.
Q. And was the State notified of -- the State of Florida notified of EPA's intent to deny the Waterway Estates permit renewal request?
A. Yes, it was, through the State certification request.
Q. And would the State, also, have had an opportunity to comment on the proposed denial during the public comment process that you discussed earlier?
A. Yes.
Q. Ms. Kagey, is it fair to say that Florida Cities had three separate opportunities to bring any alleged errors to EPA's attention before the Waterway -- Waterway Estates permit denial became final?
A. Yes. One informal and two formally.
Q. And what was the informal process you just alluded to, please?
A. In one of my documents that we've already looked at, I believe it was either June or July, where I told that we were intending to deny the permit, and then I go on in the letter saying, we will go to public notice after this date.

Q. Okay. And what were the two formal opportunities to bring -- to object to EPA's decision, please?
A. The first and formal -- the first formal opportunity would be at the time of public notice, during the public notice period, and the second time would be after the issuance of the permit decision, and you could -- they could have requested an evidentiary hearing.
Q. Ms. Kagey, going back to your direct testimony, did you testify that, to the best of your recollection, you did testify with -- I'm sorry -- that you did consult with the Wasteload Allocation Unit before taking action on the Waterway Estates?
A. I do not recall.
Q. Ms. Kagey, going back to your duties to review the permits that are written by others, do you have a formal title? Is there a formal title that goes with that position?
A. No, sir.
MR. HOMIAK: Okay. One moment, Your Honor
(Pause.)
MR. HOMIAK: Your Honor, no further questions of Ms. Kagey.
THE COURT: Any redirect?
REDIRECT EXAMINATION
BY MR. BULLOCK:

Q. Ms. Kagey, let me ask you, in response to questions regarding Exhibit 361, Government's Exhibit 361, which was a letter signed by Bruce Barrett, was Mr. Barrett one of your supervisors in December of 1986?
A. If he was -- if he was the division director, which I put on that letter, and I'm assuming he was, yes, he was my -- a higher supervisor.
Q. Okay. Let me ask you to look, again, at the last page of Exhibit 361. Let me ask you this in general question, and not only to the last page, but the entire document, is there anything in Exhibit 361 or any notification of Florida Cities that they were required to build an AWT treatment facility?
A. There's nothing in this reference to say that they were supposed to build an AWT facility.
Q. Let me ask you, then, to look at Exhibit 354, and it would be the fourth page, although it's headed page 2. You read from paragraph 3, the basis for the final effluent limits and permit conditions.
A. Yes, sir.
Q. All right. And Mr. Homiak asked to you read that paragraph. Can you explain the inconsistency between your finding of the no wasteload allocation from January of 1981 and the State's continued permitting of discharge and the 1981 and 1983 permits?

MR. HOMIAK: Objection, Your Honor, I think that's calls for a legal conclusion.
THE COURT: Uh-huh.
MR. BULLOCK: Your Honor, she's making a legal conclusion in this document that there's no wasteload allocation and they can't discharge.
THE COURT: I'll overrule the objection.
BY MR. BULLOCK:
Q. Can you explain that inconsistency between the continued State permitting and the language which you used in paragraph 3?
A. No, I cannot explain the inconsistency because both were written by Florida, not by us.
Q. All right. Let me ask you to look at Defendant's Exhibit 22. Let me ask you some -- while you're flipping to that, let me ask you some questions.
Mr. Homiak asked you whether or not anyone from -- Mr. Homiak asked you whether or not you remembered contacting the wasteload allocation branch and you said you didn't remember whether you did or not; is that correct?
A. I believe that was my answer.
Q. All right. Well, let me ask you to look at Exhibit 22 and identify it for the record.
A. This appears to be an inner-office memorandum to Bruce DeGrove from Dick Richardson, dated May 27th, 1986, subject,

City of Cape Coral, Sewage Treatment Plant Outfall Pipe Location.

Q. And would you look at page 2 and identify the attachment to that memorandum?

MR. BOMIAK: Your Honor, objection. This is a State document. It's the State Department of Environmental Regulation. There's been no indication who Bruce DeGrove and Dick Richardson are. There's been no testimony that this witness has ever seen this document before or should know anything about it, and I would object to any questioning on this -- any further questioning on this.

THE COURT: Yes, sir.

MR. BULLOCK: Your Honor, I have not really had a chance to identify it with the witness yet, to ask her who -- about the letter that is attached to it. Mr. DeGrove has been identified in this trial.

THE COURT: Well, go ahead, and I'm not sure that I'm going to allow any substantive questions on this as yet, but we'll see where you are going with this. I'll take under submission the -- I'll overrule the objection at this point, but subject to readdressing it.

Go ahead.

BY MR. BULLOCK:

Q. Ms. Kagey, could you look at the second page of this Exhibit and identify it for the record, please?

A. It appears to be a May 7th, 1986 letter from the State of Florida to Mr. Marshall Byatt, Facility Performance Branch, Water Management Division, EPA Region IV, in regards to Lee County, City of Cape Coral Wasteload Allocation and NPDES Permit.

Q. Who is Mr. Byatt?

A. Mr. Byatt has worked in the permit section with me for quite sometime.

Q. Okay. Is the Facilities Performance Branch the branch of EPA Region IV which would have the -- which would be in charge of maintaining records regarding wasteload allocations?

A. That organization no longer exists.

Q. In 1986, was the Facilities Performance Branch the branch of Region IV, which was required to keep information regarding wasteload allocations?

A. I do not recall.

Q. Okay. Have you ever seen this letter before?

A. Yes.

Is there any particular time limit?

Q. Did you see this letter in 1986?

A. I do not recall.

Q. You don't know whether you saw it or not?

A. I don't, no.

Q. And would correspondence regarding wasteload

allocation have been important to you in making a determination of whether a wasteload allocation existed for the Waterway Estates facility?

A. If I had some knowledge of correspondence regarding wasteload allocations, yes, that would be used in my subsequent actions.

Q. And you would have gotten -- you would have obtained information from the Facilities Performance Branch; is that correct?

MR. BOMIAK: Objection. I think this is completely beyond the scope of my examination of Ms. Kagey.

MR. BULLOCK: Your Honor, Ms. Kagey was asked about whether or not she would -- if she received information as to whether or not there was a wasteload allocation, if her decision would have been different.

THE COURT: Asked on --

MR. BULLOCK: On cross-examination, yes, sir.

THE COURT: I'll overrule the objection.

THE WITNESS: Could you repeat the question?

BY MR. BULLOCK:

Q. Yes, ma'am.

Would it have been important for you to have seen information regarding wasteload allocations that was generated by the State of Florida for the Caloosahatchee River and the Waterway Estates facility?

A. If it had concerned the Waterway Estates facility, yes, it would have been important.

MR. BULLOCK: Thank you, Ms. Kagey.

THE COURT: All right. Thank you.

You may step down.

Call your next witness.

(Pause.)

MR. BAISE: At this point, Your Honor, the Defendant Florida Cities proposes to read into the record three deposition transcripts from the depositions that were taken of Mr. Childress at a 30 (b) 6 deposition, deposition taken of Mr. Childress and a 30 (b) 6 deposition taken of Mr. Greenfield and a deposition taken of Mr. Bruce Barrett, whose name has been mentioned in testimony in the last few moments.

We have the certified copies of those depositions, Your Honor, and, again, I'm not sure what the practice is in this Court.

Do you want me to present those certified copies to you at this point?

THE COURT: Well --

MR. BAISE: If you do not want the entire deposition, we have copies of the excerpts.

THE COURT: Well, you are going to be reading them into the record or at least those portions that you are

proffering. I don't have to have them presented to me, if there's no dispute as to the accuracy of what you are reading.

Now, if you have a copy for me, so that I can follow along, that might be helpful, just from a logistics standpoint.

MR. BAISE: Yes. May Mr. High approach the bench?

THE COURT: Yes.

MR. HIGH: I don't know what your practice is, but I'm going to be reading the answers.

THE COURT: Yeah, just go ahead and take the witness stand.

(The following deposition excerpts were read into the record by Mr. Baise reading the questions and Mr. High reading the answers.)

MR. BAISE: Your Honor, this is from the certified transcript of Mr. Roosevelt Childress' deposition, given on May 19th, 1995 and August 14th, 1995.

THE COURT: All right. Just a moment.

MR. BAISE: Starting on page 15, line 20.

THE COURT: All right.

BY MR. BAISE:

Q. Starting with the question on page 15: How does a permit writer know whether or not he or she is required to include any numerical limit from such a document in an NPDES

Permit decision?

A. In the process of drafting an NPDES Permit, we contact the wasteload allocations unit at EPA to ask if there is a valid allocation document to support effluent limitations within a permit, and based on the information we get back form the allocations unit we accept it at face value and write the permit based on what they tell us.

Q. Second question to Mr. Childress: When you make those inquiries to the wasteload allocation unit and get back the information which you then use in such permits is a distinction made between wasteload allocations that are approved by EPA and those that are not yet approved or unapproved?

Ms. Fitz-Henley, objection.

MR. QUINN: Your Honor, I lost the line on that exchange. May I have it, please?

MR. BULLOCK: Excuse me.

MR. QUINN: Page 15?

MR. BAISE: May I, please?

THE COURT: Yes.

MR. BAISE: Page 15, starting at line 20.

THE COURT: We're on page 16 now.

MR. BAISE: We may be up to 16.

THE COURT: Page 16, line 12.

MR. QUINN: Thank you, sir.

THE COURT: Yes, sir.

MR. BAISE: Mr. Fitz-Henley, objection.

THE COURT: Well, go ahead.

A. I rely on the allocations unit to give me the correct information to use in the permit. It's my understanding that they would give us only allocations that have been approved.

Q. Question, to Mr. Childress: To your knowledge, has EPA every relied on wasteload allocations that have not been approved in developing NPDES Permit limitations?

A. Not to my knowledge.

Q. Now to page 17. Question to Mr. Childress: Section 303 of the Clean Water Act discusses two different kinds of wasteload allocations, one submitted to EPA for approval and one submitted to EPA for information.

To your knowledge, has a permit writer at EPA ever relied upon wasteload allocations submitted for information rather than for approval in developing a permit limitation?

A. Not to my knowledge.

Q. Page 30, line 16.

THE COURT: Line what?

MR. BAISE: Page 30, line 16.

MR. QUINN: That's stops in the middle of an answer for me, sir.

THE COURT: Yeah.

MR. BAISE: In fact, I start the question: In your experience, Mr. Childress, would it be usual for a permit writer to rely only on the title page and one page for a wasteload allocation in developing an NPDES Permit effluent limitation?

Ms. Fitz-Henley, Objection.

MR. QUINN: I will also object, Your Honor, as to the assumption that is at the beginning of the sentence.

THE COURT: You mean without reading the assumption?

MR. QUINN: Yes, sir.

THE COURT: You have left out part of the question.

BY MR. BAISE:

Q. Starting at line 13: Assuming that Ms. Kagey's testimony and the objection of her counsel, Mr. Jacobs, are substantially read into this record, in your experience, Mr. Childress, would it be usual for a permit writer to rely only on the title page and one page from a wasteload allocation in developing an NPDES Permit effluent limitation?

Objection, Ms. Fitz-Henley.

MR. QUINN: I object, also, on the basis of it calls for speculation.

And Ms. Fitz-Henley objected, obviously, as to

form, sir.

THE COURT: I don't understand the question, with the assumption that you're making in that question, that is, assuming that Mrs. Kagey's testimony and the objection of her counsel, Mr. Jacobs, are substantially correctly read into this record, in your experience, would Mr. -- would it be usual for a permit writer to rely on the title page and one page from a wasteload allocation in developing an NPDES permit effluent limitation.

What is the assumption you are talking about there?

MR. BAISE: I cannot recall, Your Honor, at the time what the assumption was. That's why I cut out that particular portion of the --

THE COURT: I'm going to sustain the objection.

Go ahead.

BY MR. BAISE:

Q. Page 34, line 11, question: Can you tell me what it is?

MR. QUINN: Objection. I don't know what "it" is either, sir.

MR. BAISE: You can't get there if you've stricken my last answer from Mr. Childress, Your Honor.

THE COURT: Okay. Well, I don't think the 11th Circuit is going to know what "it" is either, if it goes in

like this.

Just a moment.

(Pause.)

MR. BAISE: If I --

THE COURT: Just a moment.

(Pause.)

Well, I think you better go back -- it seems to me like you got to go back a question.

Do you have your transcript?

MR. BAISE: I do not have the transcript. I just had typed out what I had taken from the transcript and turned over to the Government.

Your Honor, I would request reconsideration of your ruling with regard to the question on page 30 starting with the sentence, in your experience, Mr. Childress. The question is very clear. Would it be usual for the permit writer to rely only on the title page and one page. Ms. Kagey already testified that that's what she relied upon was the title page and one page or two pages, to make her determination.

THE COURT: I've already ruled and I'm not going to reconsider that. It's unclear as to what the question is assuming.

Now, let's get on with it, and I'm telling you that your proffered question here from page 34, line 11, can

you tell me what it is, certainly I'm not going to -- well --

MR. BAISE: I would agree, Your Honor. Strike it.

I do not have the line with the question that starts, if a State issues such a State water quality certification -- it's about --

THE COURT: Line 22.

MR. BAISE: Line 22, starting with that question.

Q. If a State issues water quality certification, does it mean that the State has determined that the draft Federal permit will not violate water quality standards in the State?

Ms. Fitz-Henley, objection.

MR. QUINN: I object, as well, Your Honor. It calls for speculation and in the question is omitted the word "such," but with that -- two objections, sir.

THE COURT: All right. Speculation?

MR. QUINN: Yes, sir. And Ms. Fitz-Henley objected on the basis of form.

THE COURT: All right. Just a moment.

Well, who is Roosevelt Childress? Is there evidence in the record as to who he is?

MR. BAISE: Ms. Kagey just gave evidence, Your Honor.

THE COURT: Oh, yes, that's right.

And refresh my recollection as to who she said he was.

MR. BAISE: He was one of the supervisors in the Region IV EPA Office supervising her work.

I cannot tell you his exact title. Maybe one of Government counsel can give you the exact title, but I know Ms. Kagey gave what she thought was his title and responsibilities in her testimony a few moments ago.

And he was designated as 30 (b) 6 witness to respond --

THE COURT: Well, I'll permit, over objection, the question, however, you did leave out the word "such." Read the question over again and --

MR. BAISE: I'm sorry if I left out the word "such."

Q. If a State issues such water quality certification, does it mean that the State has determined that the draft Federal permit will not violate water quality standards in the State?

Ms. Fitz-Henley, objection.

A. Yes.

Q. Does this document makes any mention of no discharge for this facility?

A. No.

Q. Question: And the date of this document is January

14th, 1981, six months after the wasteload allocation of January 1981 referenced earlier; is that correct?
A. That's correct.
Q. Page 48, starting with line 4, question: In looking at the 1981, January wasteload allocation and this document taken together, does it appear to you that the State of Florida is requiring no discharge from this facility, at least during the period of time '81 to '83?
A. The State is not requiring no discharge during that time period, 81 to '83.
Q. During the break I gave you the next Exhibit just for you to review in the interest of time. And the next Exhibit is the 1983 renewal of the State permit for five years, dated August 2nd, 1983, and it's been previously marked as Kagey Exhibit 52. Have you reviewed this document?
A. Yes, I have.
Q. Question: Can you tell me what it is?
A. It is the operating permit for that Florida Cities Water Company facility to discharge wastewater into the canal leading to the Caloosahatchee River effective from the date of issuance, August 2nd, 1983, to the date of expiration, August 2nd, 1988.
Q. Was this permit in effect at the time of EPA's 1986 decision?
A. Yes.

Q. Does this permit make any mention or reference to a State requirement of no discharge?
A. No, it does not.
MR. BAISE: The next deposition that we'd like to read portions of into the record, Your Honor, is involving Mr. Bruce Barrett. Starting on page 3, line 24, and Mr. Barrett, as you may recall —
MR. BOMIAK: Excuse me. What page?
MR. BAISE: Page 3 —
MR. BOMIAK: Your Honor, I object that's not designated as part of the deposition they were going to read into evidence.
MR. BAISE: It was just stating Mr. Barrett's full name and address, Your Honor. So I can drop it. It was just to clarify it's Mr. Bruce Barrett.
THE COURT: Any objection to that?
MR. BOMIAK: None, Your Honor.
MR. BAISE: Ms. Kagey referred to him and the fact he signed the documents so it's just merely introductory.
THE COURT: Go ahead. He's withdrawn the objection.
BY MR. BAISE:
Q. Page 30, 1 through 8: Do you know of any instances where Florida permitted a discharge and EPA decided to mandate no discharge?

A. No.
Q. Would EPA normally defer to a State's judgment therefore regarding whether or not there should be a discharge?
A. Yes.
Q. Page 59.
MR. BOMIAK: I'm sorry. Page 59?
MR. BAISE: 59.
Q. Line 5, question: Mr. Barrett, you have a document in front of you that two months before EPA denied the permit they were sent a letter, which I believe your testimony said indicated that Waterway Estates had a wasteload allocation. Yet EPA's decision in 1986 references one document out of this series and this is the 1981 document.
THE COURT: And that is the —
MR. BAISE: And that is the 1981 document. And it's referenced in the attached FAX sheet, the second page. I believe you'll see no reference to any of the other documents.
My question to you is, in your experience at EPA and now having looked at these series of documents, do you see any inconsistency here?
A. Yes.
MR. BOMIAK: Objection, Your Honor, on the grounds that mischaracterizes the documents and it's misdescribing

and testifying as to the inferences to be drawn from the documents.
THE COURT: I think that's an objection as to the form of the question, and unless asserted at the time of the deposition is being waived.
Overruled.
BY MR. BAISE:
Q. Question: And what is that inconsistency?
A. That the permit issued did not appear to be responsive to the most recent water quality analysis by the State in terms of a wasteload allocation.
Q. Question: Is it relevant that the State had granted and renewed its own discharge permit in 1981 and in 1983, and that in 1986 that latter permit was still in effect?
Mr. Harrison, objection, counsel, assumes facts.
MR. BOMIAK: I would also assert it calls for speculation on the part of the witness, Your Honor.
MR. BAISE: And question presumably be Mr. Harrison here: You may answer.
THE COURT: Excuse me, just a minute.
MR. BAISE: Excuse me.
THE COURT: And your objection, Mr. Bomiak, again was what?
MR. BOMIAK: It's speculation. The question refers to — it appears to refer to State permits that have

been granted and renewed, and it, also, calls for a legal conclusion that those state permits are still in effect.

This is an EPA witness, Your Honor.

THE COURT: I'll sustain the objection.

Go ahead.

BY MR. BAISE:

Q. Question: Would it appear that the State permits were consistent with water quality certification to EPA that you reviewed earlier?

MR. HOMIAK: Excuse me. I lost that, Mr. Scroggin — I mean, Mr. Baise. Were you just continuing?

MR. BAISE: Again, I cannot give you the line number, because I just have it typed in —

THE COURT: He was reading from line 9.

BY MR. BAISE:

Q. Would it appear that the State permits were consistent with the water quality certification to EPA that you reviewed earlier?

A. Yes.

Q. From the documents you have reviewed, is there any basis that, in your experience as a permit writer, you could reach the conclusion that the State of Florida had required no discharge from this facility?

MR. HOMIAK: Again, Your Honor, objection. It

calls for a legal conclusion on what the State of Florida had or had not done.

MR. BAISE: Your Honor, this was a high level, EPA Region IV individual, Mr. Bruce Barrett. There's been testimony here from Ms. Kagey that he, in fact, signed some of the documents that came to Florida Cities denying their permit.

He was familiar with the Florida State permits. This was an individual that was fully competent to testify on these issues, and we had documents in front of him, the '81 and '83 permits, as noted in the earlier question, and the 81 and '83 permits from Florida are in evidence in this case.

THE COURT: All right. Just a moment.

Okay. Well, you know, you've asked him based upon his experience as a permit writer you could reach the conclusion that the State of Florida had required no discharge from this facility.

MR. BAISE: Correct, Your Honor, and he had the documents in front of him.

THE COURT: Yeah, but you're asking him to testify on the basis of his being a permit writer and he says he's not a permit writer.

MR. BAISE: I'm sorry. Who said he was not a permit writer?

THE COURT: He did. He says, well, first of all, I'm not a permit writer.

MR. BAISE: I see.

THE COURT: And there's an objection at that time of lack of foundation in addition to the other objections that have been asserted here, and I don't think I can allow that over objection.

Sustained.

MR. BAISE: I would turn to the Greenfield deposition testimony, Your Honor. Page 3, starting line 15, Mr. Baise: We stipulate this deposition is being taken pursuant to Rule 30 and specifically rule 30 (b) 6, Mr. Quinn: So stipulated.

MR. QUINN: I only note for the record an objection that that was not designated on the page, but I just want to object on that basis, sir.

THE COURT: Well, is that an issue here?

MR. QUINN: No, sir, actually, it's not. I think maybe I should just note it for the record, sir, that that's not —

THE COURT: All right. So noted.

MR. BAISE: Page 63, Mr. Greenfield's deposition, starting at line 2.

THE COURT: Refresh my recollection as to who Mr. Greenfield is. From the record that we have in our

case.

MR. BAISE: Ms. Kagey, again, testified as to his position at EPA, and I believe her testimony was that he was the Wasteload Allocation Coordinator.

MR. HOMIAK: I would object that that characterizes Ms. Kagey's testimony that she gave earlier.

MR. BAISE: Well, I can read in two lines that were not designated: Please tell is your title, Mr. Greenfield.

I am the Region IV wasteload allocation TMDL coordinator.

MR. QUINN: We have no objection to that, Your Honor.

THE COURT: All right. Thank you.

All right.

MR. BAISE: Page 63.

THE COURT: Page 63?

MR. BAISE: Page 63, line 2.

THE COURT: All right.

BY MR. BAISE:

Q. Question: Is it your earlier testimony that you are unaware that the agency must approve wasteload allocations within 30 days after submission by the State?

A. No. I'm aware that is in the regulations. That 30 days was not always met. Let me rephrase that one. We

tried to meet it. Where it was going to be a controversial issue or an issue, a complex issue, we would request the State submit a draft document so that we could then review it.

Q. Question: Do you know of anything in the record which would suggest that the 1981 scenario document, which included several wasteload options, do you know whether it was ever approved within a 30-day period?

A. I do not know.

Q. Then to — appears to Greenfield second day of testimony, page 224, line 13: Do you agree or disagree with this statement: The regional administrator shall either approve or disapprove such listing and loadings not later than 30 days after date of submission to the regional administrator?

Mr. Quinn: Objection.

MR. QUINN: Your Honor, that objection is obviously as to form.

THE COURT: And the specific objection is what?

MR. QUINN: The objection I made at the time was to the form of the question in that it is — it calls — it could have been corrected because there was a lack of foundation at the time, and that, I submit, was an objection that I made at that time.

THE COURT: So your objection as to form is that

there was no foundation?

MR. QUINN: Yes, sir.

MR. BAISE: Your Honor, obviously, we did not put in all of the foundation which would go with these questions or answers or we would be here all day.

THE COURT: We're going to be here all day, anyhow.

MR. BAISE: Or all week.

I was trying to make this as concise and short as possible relating to the issues which have been already brought up to the Court, as to whether or not EPA must approve or disapprove such listings. You had that testimony from Mr. Hartung, and now this is from a 30 (b) 6 witness, speaking for the United States, on whether they agree or disagree with a particular statement.

MR. QUINN: May I clarify, sir? My objection is not as to the foundation as we sit here today. My objection was to the foundation at the time we took the deposition, that there was not foundation then, and because there wasn't foundation then, there, also, can't be foundation today.

THE COURT: I'll sustain the objection, Mr. Baise.

BY MR. BAISE:

Q. Do EPA's records establish, or do you have any knowledge on the agency's behalf that the regional administrator either received or approved or disapproved a

stream segment on the Caloosahatchee River that we are discussing and its listing and loadings not later than 30 days after it was submitted in January of 1981?

A. Are you asking if we approved this report within 30 days?

Q. Question: Any report? Any number? Any document?

A. That was on January 1981?

Q. Correct.

A. Going back through our records, I did not see an approval within 30 days of this document.

Q. Question: Now, the document we are talking about to be clear for the record, is — why don't you identify it?

A. Wasteload Allocation Documentation of January 1981 Completed for the Caloosahatchee River.

Q. Question: And go ahead and identify the Exhibit number again for the record.

A. Exhibit Kagey 38.

Q. Question: Thank you.

Do you agree with the statement, Mr. Greenfield: That if the regional administrator in Region IV approved the listing of the Caloosahatchee River segment we are discussing and its loadings, that the State of Florida shall incorporate that listing and loadings into its current water-quality-management plan?

Mr. Quinn: Objection.

MR. QUINN: My objection at that point in time, sir, was that it was a compound question. My objection at this time is that it calls for speculation.

THE COURT: Okay. I'll overrule the objection.

MR. BAISE: Answer.

A. Section 303 requires that the loadings be approved by regional administrator and incorporated into the plan, yes.

Q. Question: Do EPA records establish or do you have any knowledge on the agency's behalf —

THE COURT: Wait just a minute.

Yes, Mr. Quinn.

MR. QUINN: There's a couple lines in between that which is on line 14, Your Honor, and Mr. Baise — that I believe there's an additional part of the answer at line 9 through 13 that should be, for continuity, be put in there, sir.

THE COURT: Okay. You want to -- you don't have yours there; right?

MR. BAISE: I have mine.

THE COURT: Why don't you show him what he's talking about, sir.

Well, go ahead, read from yours, Mr. Quinn.

MR. QUINN: Question: Do we -- sorry, go ahead.

THE COURT: Then answer.

A. No, I mean, that's what the regulations say. They do

not say specifically this river allocation, but this allocation should be included, should have been included in the Florida's water quality plan.

BY MR. BAISE:

Q. Question: Do EPA's records establish or do you have any knowledge on the agency's behalf if their EPA Region IV administrator approved any listing for the loading in the 1981 document, Kagey Exhibit 38, and that approval, that listing and that loading were incorporated in the State of Florida's water quality management plan?

A. I have no knowledge of that occurring.

MR. BAISE: That completes the deposition testimony we would like to put into the record, Your Honor.

THE COURT: All right.

Call your next witness.

You can have this back.

MR. BAISE: I beg your pardon?

THE COURT: You can have this back here.

Call your next witness.

Where is the deposition this came out of — this envelope that I opened?

MR. QUINN: That was the Ms. Kagey deposition, Your Honor.

THE COURT: Where is that?

I unsealed that and — there it is. Okay.

It needs to be filed.

Wait a minute. Now, wait a minute. I don't — that was read from. That deposition was read from; is that correct?

MR. BAISE: Which deposition are you referring to?

THE COURT: Okay. The deposition that was included in the envelope that I tore open a little while ago.

MR. BAISE: That was Kagey's deposition, Your Honor, for purpose of impeaching when she was on the stand.

THE COURT: For purposes of impeachment?

MR. BAISE: That's right.

THE COURT: That doesn't need to be filed.

MR. BAISE: I do not think so, no.

THE COURT: That doesn't need to be filed.

You tendered it to me, since it was sealed, and I unsealed that and gave the deposition back to you for your use for use in cross-examining Ms. Kagey.

MR. BAISE: That was not a 30 (b) 6 deposition, the way Childress and Greenfield depositions were 30 (b) 6 depositions of the United States.

THE COURT: You are not filing those depositions, either, because the segments have been read into the record.

MR. BAISE: Correct. We didn't want to burden the record.

THE COURT: For the record, I have returned to you the original of that Kagey deposition that I removed from the sealed envelope about an hour ago.

MR. BAISE: Correct, Your Honor.

THE COURT: Okay.

Next witness.

MR. BAISE: Do you want to proceed or take a break, Your Honor?

THE COURT: When did we convene at?

MR. BAISE: 1:20.

THE COURT: Well, why don't we go ahead and take 15 minutes.

THE MARSHALL: All rise.

(Thereupon, a brief recess was taken, after which the following proceedings were had:)

MR. BAISE: Your Honor, because of the travel schedule of one of our witnesses, we're going to be calling Mr. Bradtmiller out of the order.

We had originally submitted to the Court and to Government counsel, and they have been apprised we are going to take him out of order and would request your permission to have him called at this time.

THE COURT: Yes, sir.

MR. BULLOCK: Your Honor, Florida Cities would call Paul Bradtmiller.

THE CLERK: Raise your right hand.

Thereupon,

PAUL H. BRADTMILLER,

having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Take a seat in the witness box.

State your name and spell your last for the record, please.

THE WITNESS: My name is Paul E. Bradtmiller, B-R-A-D-T-M-I-L-L E R.

DIRECT EXAMINATION

BY MR. BULLOCK:

Q. Good afternoon, Mr. Bradtmiller.

Would you please state your educational background beginning with college?

A. Following graduation from high school, I attended Northwestern University in Evanston, Illinois for one year and then entered the US Naval Academy in Annapolis from which I was graduated with a Bachelor of Science Degree and commissioned in the Civil Engineer Corps of the US Navy. In the Civil Engineer Corps I served 20 years in the planning design, construction, maintenance and operation of shore facilities and utilities, and while in the Civil Engineer Corps earned a Bachelor of Civil Engineer Degree at

Rensselaer (Phonetic) Polytechnical Institute in Troy, New York and a Master of Arts Degree at the University of Oklahoma in Norman, Oklahoma.

Q. When did you retire the Navy?

A. I retired from the Navy June 1st, 1977.

Q. Could you briefly outline the job that you've held since you resigned — retired from the Navy?

MR. JACOBS: That calls for a narrative, but we waive it in the interest of time.

THE COURT: All right.

THE WITNESS: Upon retirement I first managed water, wastewater and electric municipal utility in Middletown, Pennsylvania for seven years, then moved to Vermont, where I was the general manager of the Vermont Electric Power Authority and a director of the Electric Power Company for five years and then moved to Sarasota, Florida or Venice, Florida, where I worked for Dames and Moore Consulting Engineer on the Sarasota County Water Improvement Program for a year and following that, joined Florida Cities Water Company in February of 1991.

Q. What was the first position you held with Florida Cities?

A. I joined Florida Cities in the position of Senior Vice-president.

Q. When was the first major project you worked on at

Florida Cities?

A. First major project I worked on was the interconnect —

THE COURT: When did you join Florida Cities water?

THE WITNESS: February 1991. Late in February, I think about the 22nd.

THE COURT: All right.

BY MR. BULLOCK:

Q. And I'm sorry, did you finish your answer about —

THE COURT: No, he didn't.

Go ahead.

THE WITNESS: My first major assignment was work on the negotiations with Hillsborough County regarding an interconnect to its system at Carrollwood.

Q. Who was the lead negotiator for Florida Cities?

A. I was the lead negotiator.

Q. Who did you negotiate with on behalf of Hillsborough County Department of Sanitary Services?

A. I — at that time it was Michael McSweeny, who I believe his title was Director of the Utilities Department.

Q. Was the company examining any other options besides connection with Hillsborough County?

A. Yes. When I came aboard the company, it had already opened bids on constructing an advanced wastewater treatment

plant at the Carrollwood plant site, and the company was reevaluating whether to proceed with the award of that contract or interconnect with the county.

Q. Okay. Did you undertake an analysis of the two options?

A. Yes. Our staff analyzed the cost for either an interconnect or proceeding with the construction and what the result of each course of action would translate into rates for our customers.

Q. Did you reach a conclusion regarding which would be the better option for the company to pursue?

A. Yes. From a rate making point of view for the customers, most prudent approach was to at that time interconnect with the county, based on the terms that the county was offering at that time.

Q. In Hillsborough County, who governs the rates which companies such as Florida Cities would charge?

A. The Board of County Commissioners.

Q. And what procedures does the Board of County Commissioners follow?

A. The Board of County Commissioners follows the — they're governed by the same Florida statute as the Public Service Commission and the Board of County Commissioners follows the —

THE COURT: Just a second.

MR. JACOBS: Hearsay, lack of foundation.

THE COURT: Well —

MR. BULLOCK: I'll be glad to lay one.

THE COURT: I think you better.

BY MR. BULLOCK:

Q. Are you familiar with the procedures which the Hillsborough County Board of County Commissioners uses in determining rates for privately-owned, publically-regulated utilities?

A. Yes.

Q. And what procedures are those?

A. Procedures are essentially those that are followed by the Florida Public Service Commission.

Q. You indicated a minute ago that you recommended connection with the county. What was the basis for your recommendation?

A. I was first — the county, before I came aboard, had reapproached the company on negotiating an interconnect —

THE COURT: Sir?

MR. JACOBS: He said before he came on board. The rest is hearsay. Move to strike.

MR. BULLOCK: Your Honor, he's not testifying as to what the county —

THE COURT: I'll overrule the objection.

Go ahead, sir. Go ahead with your answer.

THE WITNESS: When I came aboard, the county had already requested the company to renegotiate — reopen negotiations for an interconnect. The company had opened bids to build a new plant for three million dollars. The county had asked to reopen negotiations and think were underway.

THE COURT: That's what you understood and that's what you had been told; is that correct?

THE WITNESS: That's correct.

THE COURT: Well —

MR. JACOBS: Renew the motion, Your Honor.

THE COURT: I'll grant the motion. I'll strike his testimony in that respect.

Just go ahead and elicit from him what he knows and what he did.

BY MR. BULLOCK:

Q. How much was the bid proposal for an AWT that Florida Cities offered for bid?

MR. JACOBS: Vague as to point in time.

BY MR. BULLOCK:

Q. When you came on board in 1991, were there bid proposals which had been let from Florida Cities?

A. Yes, bids had been opened and there was a low bid that was conforming.

Q. And how much was the low bid?

A. The low bid was —

THE COURT: Just a moment.

MR. JACOBS: Again, I don't mean to interrupt frequently, I just want to clarify whether he's testifying from personal knowledge or matters that occurred before his arrival and I think we are still vague as to time.

THE COURT: All right.

Was this before or after your arrival, Mr. Bradtmiller?

THE WITNESS: The bid opening was before my arrival.

BY MR. BULLOCK:

Q. Was the receipt of the bid, the low bid, did that occur before or after your arrival?

A. Well, the bids were received and opened before my arrival, yes.

Q. Was the low bid accepted before your arrival?

A. The low bid was determined to be conforming. It had not been accepted as far as awarding a contract, but it was common knowledge in the general office of what that bid was.

Q. In your responsibilities as senior vice-president, did you review the bid?

A. Yes, I knew the bid amount.

Q. All right.

THE COURT: Go ahead. Go ahead. I'll overrule

the objection. He was a senior vice-president.

You can have him on cross.

Go ahead.

BY MR. BULLOCK:

Q. Mr. Bradtmiller, I had asked you to explain the basis of your decision to recommend connection to the county and I believe you just explained that the bid had been — the low bid that came in was at three million dollars.

A. It was a little less than three million dollars, but when you added the engineering, the round figure for the plant investment would have been at three million.

My first assignment was to determine the constructability —

THE COURT: Is this in response to your question?

MR. BULLOCK: Yes.

THE COURT: I think you've answered his last question.

Ask your next question.

BY MR. BULLOCK:

Q. How did you determine that the connection with the county was the appropriate choice?

A. My first assignment was to determine the constructability of an interchange and pumping facility in terms of construction feasibility and the time frame.

Q. Were you able to undertake and reach a conclusion as

to that assignment?

A. Yes.

Q. And what was the conclusion?

A. My conclusion was that if we could reach an agreement by mid-year we could accomplish the project on a fast track by the end of the year.

Q. And that was an agreement with Hillsborough County?

A. No, that was a determination — oh, I'm sorry. You meant reach an agreement?

Q. Yes.

A. Yes, that would have been with Hillsborough County.

Q. Did you undertake another step in your analysis?

A. Well, the next step was to determine the economic feasibility in terms of what would be prudent as a regulated utility in terms of the investment options between interconnecting or building a plant and what the impact of each option would be on the rate-paying customer.

Q. Okay. If you had chosen the AWT facility, what would have been the increase in the rate base?

A. If we built the AWT facility, the increase in the rate base would have been the three million dollars.

Q. Okay. At the time you were making this study, had you chosen the connection with the county, what would have been the increase in the rate base?

A. At that time we were looking at an investment of about

$500,000 for a repump station and interconnecting force main.

Q. Were there any other inclusions in the rate base as a result of examining the option to connect with the county?

A. Yes. The major consideration and the reason that I could go forward with negotiations was that within a few weeks of my becoming involved, the county had agreed that it would not charge the company a five million dollar or five and a half million dollar capacity investment in their plant.

Q. If the county had charged that to the company would the company have included that in its rate base?

A. We would have capitalized that as capacity purchase, yes.

Q. All right. Did you and the county enter any negotiations regarding the connection fee?

A. Yes. We agreed with the county staff that the connection fee of about $5,000 per customer connection would be billed to the customers, they would become customers — our customers would become customers of the county for treatment. They would remain our customers for collection and billing, and we would be the billing agent for the county. But the connection fee would be collected from each of the customers over a period of 18 years for the initial three years, I think it was something between $12 and $13 a

month and for —

THE COURT: This was to pay for the $5,000 charge?

THE WITNESS: Per connection, yes, sir.

THE COURT: All right.

BY MR. BULLOCK:

Q. As a result of your negotiations with the county, what was the county's position regarding the connection fee?

A. As I stated in the agreement it set forth that the customers would pay that to the county over a period of 18 years and we would collect it for them.

Q. So that the — would that, then, be included in the rate base?

A. No.

Q. Was the company involved in any discussions with EPA after February of '91, regarding the Carrollwood wastewater treatment plant?

A. Yes.

Q. Okay. What was the status of these discussions?

A. When I came aboard, the company was under an administrative order, which set forth operating limits for the plant discharge until an NPDES Permit was issued.

We received the intent to issue the permit, but the permit was written for an advanced treatment plant.

Q. Mr. Bradtmiller, what type of treatment plant was Carrollwood when you joined the company in February of '91?

A. Secondary treatment.

Q. What were the effluent limitations contained in the administrative order?

A. I don't recall specifically what they were, but they were definitely for an advanced plant. The secondary plant was not capable of meeting the nitrogen and phosphorus removal.

Q. Did you, yourself, communicate with EPA regarding the application for an NPDES Permit?

A. Yes. When we received the intent to issue the permit, the operations manager, Mr. Tompkins, at that time briefed me on the history of it and had prepared a letter and I signed a letter to EPA that the plant could not meet those effluent limits.

Q. Let me ask you to refer to Florida Cities' Exhibit 135. Is this the — would you identify for the record what this Exhibit 135 is?

A. This is a letter from Florida Cities Water Company, signed by me, to a Martha Hunter in the permit section of EPA Region IV, regarding a revised draft, Carrollwood wastewater treatment plant NPDES Permit, and it's dated March 1st, 1991, in which I state that we are unable to comply with the requirements.

THE COURT: Is this in evidence?

MR. BULLOCK: Yes, Your Honor, it is.

THE COURT: Okay. Go ahead.

Do you want him to continue?

BY MR. BULLOCK:

Q. If you would just characterize what you were asking EPA in the letter?

A. Yes. We accordingly asked and repeated a prior request that the interim limits established in the consent order between the Environmental Protection Commission of Hillsborough County of the State of Florida be incorporated in the NPDES Permit.

Q. All right. To your knowledge, were the interim limits established in the consent order with the State of Florida reflected in the administrative order from EPA at this time?

A. As I recall, yes.

Q. All right. Let me ask you to look at Exhibit 137.

Your Honor, this is, also, in evidence.

THE COURT: Okay.

THE WITNESS: Yes, I have it.

Q. All right. And would you just identify 137 for the record?

A. This is a letter from Florida Cities Water Company to Dianne Barrett, Public Notice Coordinator of Region IV EPA, dated April 1, 1991.

Q. And could you tell the Court in summary what the substance of the letter is?

A. It acknowledges that on March 19th we received the public notice for the referenced permit and restated that the treatment plant could not comply with the effluent limits and, again, requested that those limits be modified to the limits set forth by the Environmental Protection Commission, Hillsborough County and the State of Florida Department of Environmental Regulation.

Q. Let me ask you to look at Exhibit 138.

A. Yes, I have it.

Q. Mr. Bradtmiller, let me ask you to identify this without reading any of the substance of it. First of all, have you seen this document before?

A. Yes. I signed it.

Q. And would you identify the document for the record?

A. It's a letter from Florida Cities Water Company to John T. Marlar, Chief of Facilities Performance Branch of Region IV EPA, dated April 11, 1991.

MR. BULLOCK: Your Honor, I would move Florida Cities' 138 into evidence.

THE COURT: It will be received.

BY MR. BULLOCK:

Q. Would you read the second paragraph into the record, Mr. Bradtmiller?

A. As of this date, Florida Cities Water Company, FCWC, is ready to award a construction contract for the

Carrollwood AWTP. However, we are still involved in negotiations with Hillsborough County Utilities Department on an alternative to transport the Carrollwood flows to Hillsborough County's existing wastewater treatment facilities in order to eliminate this discharge. Negotiations are continuing to progress with the county. FCWC intends to resolve this issue as promptly as the procedures of the county allow.

Q. Let me ask you to look next at Florida Cities' 139. And this is already in evidence, Your Honor.

A. Yes.

Q. Would you identify that for the record, please, Mr. Bradtmiller?

A. This is a certified letter from Florida Cities Water Company, dated May 20, 1991, to John T. Marlar, Chief, Facilities Performance Branch, EPA Region IV.

Q. Okay. And would you summarize the purpose of this letter?

A. This is a progress report on the Carrollwood advanced wastewater treatment project as required under the administrative order at that time.

Q. Let me ask you to look next at Exhibit 141. This is already in evidence, Your Honor.

A. Yes.

Q. All right. Mr. Bradtmiller, is this the agreement

which you were referring to in your May 20 letter to Mr. Marlar?

A. Yes. May 20 letter, we advised Mr. Marlar that the negotiations had been successfully completed with the Hillsborough County staff, and this is a letter from the Board of County Commission, Manager of Records, transmitting officially to the company a copy of the agreement that we had negotiated, which was officially approved by the Board of County Commissioners on June 5th.

Q. What was Florida Cities' responsibilities under the June 5th agreement with Hillsborough County?

A. Our responsibility was to build a repump station and interconnect force main to tie in with the Hillsborough County system by December 31, 1991.

Q. Where did the force main that Florida Cities was responsible for extend?

A. It was to extend from the edge of our old plant site to the boundary of our franchise on the west -- on the west side of Dale Mabry Boulevard at Sweetwater Creek.

Q. And what were the county's responsibilities and duties under this agreement?

A. The county's responsibility was to build a force main connection from its facilities on Gunn Highway, east to the point of connection at Sweetwater Creek.

Q. When did Florida Cities complete its construction?

A. We completed our construction about Thanksgiving time. About Thanksgiving in the last week of November.

Q. And what year was that?

A. 1991.

Q. And when did the county complete its construction phase?

A. The county construction was completed and certified by the DER inspector at the time on the first — I forgot the date, but it was the first Friday in January.

Q. Was the company — did the company connect with the facility on that day?

A. The company was connected, but we did not transfer flow on that date. We were given notice near close of business on that Friday and we held until Monday morning to transfer flow.

Q. Why did you wait until Monday morning?

A. We did not want to transfer flow initially over a weekend when there may be some interruption or break in the line.

The county's line had failed inspection several times during the previous two weeks. That's why the county wasn't ready to take our flow the first part of December when we were ready to transfer.

Q. Mr. Bradtmiller, let me ask you to look at Exhibit 140, which is in evidence.

A. Yes, I have it.
Q. Would you identify this document for the record?
A. This is a letter dated May 28, 1991, from EPA Region IV to Florida Cities Water Company, addressed to me, signed by W. Ray Cunningham, Director of the Water Management Division.
Q. And are you familiar with this document?
A. Yes. This is a letter that transmitted to the company the NPDES Permit for the facility.
Q. Are you familiar with the terms of the NPDES Permit?
A. Yes.
Q. All right. And what type — what level of treatment did this permit require?
A. It required an advanced level of treatment for removal of phosphates and nitrogen.
Q. Mr. Bradtmiller, after this permit went into effect, did you ever correspond with EPA regarding the Carrollwood facility's ability to meet AWT treatment levels?
A. Yes.
Q. And when did you provide this correspondence?
A. With each submission of a DMR we repeated our request that the limits imposed be those in that the secondary plant could meet. When we entered into the agreement, we, also, notified EPA.
MR. JACOBS: I'm sorry. What agreement is he

referring to?
THE COURT: Do you want the answer read back?
MR. JACOBS: The question and answer, if you don't mind.
THE COURT: All right. Mr. Court Reporter read the question and answer back, please.
(Thereupon, the above-referred to portion of the testimony was read back by the Court Reporter as above recorded.)
MR. JACOBS: Move to strike the answer as non-responsive.
THE COURT: Denied.
BY MR. BULLOCK:
Q. Mr. Bradtmiller, let me ask you to look at Exhibit 145.
A. Yes, I have it.
Q. Mr. Bradtmiller, are you familiar with this document?
A. Yes.
Q. Would you just identify, without comment, other than to identify it, what this document is?
A. It's a letter from Florida Cities Water Company, dated August 21, 1991, to Mr. Michael Bon, Chief of the Compliance Section, Region IV EPA.
MR. BULLOCK: Your Honor, I would move Florida Cities' 145.

THE COURT: It will be received.
BY MR. BULLOCK:
Q. Would you summarize this letter, Mr. Bradtmiller?
A. We acknowledge the NPDES Permit. We report that on June 5th, Hillsborough County entered into an agreement with Florida Cities Water Company to treat the wastewater flow, and until such time as the necessary transportation facilities are completed, we again requested that EPA provide release to FCWC from compliance with the NPDES requirements.
Q. Did you ever receive any response to this letter?
A. No.
Q. Did you attach letters asking for similar relief to the discharge monitoring reports through the remainder of the year?
A. Yes, sir.
Q. All right. Let me ask you, Mr. Bradtmiller, to look at Exhibit 140 again, and what I believe is the tenth page of the Exhibit. The title of that page is called an Amendment To the Statement of Basis.
A. Amendment to the Statement of Basis, yes.
Q. Would you read the section under public comment just to yourself.
(Pause.)
Mr. Bradtmiller, after you — after Florida Cities

received this permit, did it ever — strike that. Let me start over again.
Let me ask you to read these two paragraphs under public comment into the record.
A. Item 2, Public Comment: On April 1, 1991 —
THE COURT: An April 1. I thought you said "on."
THE WITNESS: I did and I misspoke.
An, A-N, an April 1, 1991 letter was received from Florida Cities Water Company, FCWC. In this letter FCWC requested that the interim limits established in the consent order of February 4, 1991, entered into by FCWC with the Environmental Protection Commission of Hillsborough County and the State of Florida Department of Environmental Regulation be incorporated into this permit. This request is a compliance matter. A copy of the letter was given to Thomas Pluff in the compliance section on April 8, 1991. The Compliance Section will address the request after final issuance of this permit.
Q. Mr. Bradtmiller, did the discharge monitoring reports, which Florida Cities submitted for July '91 through January of '92, contain any exceedences of the permit limitations?
A. Yes.
Q. Did Mr. Pluff ever contact Florida Cities regarding any of the exceedences which were reported on the DMR's?
A. Not to my knowledge.

Q. Did EPA take any enforcement action regarding these exceedences prior to the amendment of this complaint in May — excuse me — in April of 1995?
A. Not to my knowledge.
MR. BULLOCK: Thank you, Mr. Bradtmiller.
THE COURT: Mr. Bird.

DIRECT EXAMINATION

BY MR. BIRD:
Q. Good afternoon, Mr. Bradtmiller.
I believe you testified you joined Florida Cities as Senior Vice-president; is that correct?
A. Yes.
Q. And you were the principal negotiator on behalf of Florida Cities with respect to the connection to Hillsborough County; is that correct?
A. Yes.
Q. Did you ever discuss any of your negotiations with any of the officials of Avatar Holdings?
A. No.
Q. Did you ever correspond to them about the status of your negotiations?
A. No.
Q. Did you ever receive any comments from any of them about what should be done in the negotiations?
A. No.

Q. You, also, testified that you reviewed or were aware of bids for the construction of the AWT plant at Carrollwood; is that correct?
A. Yes.
Q. Did you ever discuss those bids with anyone in Avatar Holdings?
A. No.
Q. Did you ever receive any comments from anyone at Avatar Holdings about them?
A. No.
Q. Did you ever receive any correspondence concerning those bids from anyone in Avatar Holdings?
A. No.
Q. Mr. Bradtmiller, did Peter Sharp micro-manage your operations at Florida Cities?
A. No, I never knew Mr. Sharp.
MR. BIRD: Thank you.
THE COURT: Okay. Who will be — Mr. Jacobs, you will be examining?
MR. JACOBS: Yes, Your Honor.
THE COURT: Okay. You may cross-examine.

CROSS-EXAMINATION

BY MR. JACOBS:
Q. Good afternoon, Mr. Bradtmiller.
Your personal counsel is here today, is he not,

sir?
A. Yes.
Q. And who is paying his bill?
A. Florida Cities Water Company.
MR. BULLOCK: Objection, Your Honor, relevancy.
THE COURT: Just a minute.
I'll overrule the objection. He's answered it.
BY MR. JACOBS:
Q. Now, you testified that you first joined Florida Cities Water Company in February 1991 as the Senior Vice-president; is that correct, sir?
A. Yes.
Q. So you don't have any personal knowledge of any events relating to this case that transpired prior to February 1991; is that correct? Personal knowledge?
A. Only to the extent that it was not in the official documents of the company that I've read in performance of my duties at that time as Senior Vice-president.
MR. JACOBS: Your Honor, I move to strike as non-responsive. I'm asking him for his personal knowledge. Clearly what he gleaned from documents is not personal knowledge.
THE COURT: I'm not going to strike it, but I'll permit you to probe further, because I'm not sure that you got the full answer to that.

MR. JACOBS: Okay.
BY MR. JACOBS:
Q. Restricting your attention to personal knowledge, Mr. Bradtmiller, you don't have any personal knowledge of anything that transpired prior to 1991, do you, sir?
A. Do you mean by personal knowledge, personal involvement at the time an event occurred?
Q. Yes. I would be willing to define it as that. Yes.
A. Yes.
Q. So your answer is, you don't have any personal knowledge of events that transpired prior to February 1991; is that correct?
A. I was not involved in them, that's correct.
Q. Now, Mr. Bradtmiller, on — have you discussed this case with any of the other witnesses who are testifying here?
A. No.
Q. Including Mr. Blackburn?
A. Not in details of the case, no.
Q. Not in details. But you did discuss the case with Mr. Blackburn; is that correct?
A. The reason why we were both here, yes.
Q. What exactly did you discuss with Mr. Blackburn about the case?
A. That it was a long day for him and me.

Q. Anything else, sir?
A. No.
Q. How long did the discussions with Mr. Blackburn take place for?
A. On this particular issue, a few moments.
Q. How long did your conversation today with Mr. Blackburn take place? How long was that conversation?
A. There were a number of short conversations regarding traffic, uh, the current administration of the DEP under its new secretary, the work load, their staffing, reuse permitting in South Fort Myers. Just general topics that one would discuss with someone in that position.
Q. And nothing specifically relating to this case that you can recall, sir?
A. No.
Q. These discussions all took place today?
A. Out there on the bench, yes.
Q. Now, Mr. Hird asked you about whether you had contacts with officers of Avatar Holdings and I would like to start by focusing you on Avatar Holdings.
To whom do you report, Mr. Bradtmiller?
A. To Mr. Gerald Allen.
Q. And what's his position?
A. His current position is Executive Vice-president of Avatar Utilities and President of Florida Cities Water

Company.
THE COURT: Are we talking about right now?
MR. JACOBS: Yes, sir. And the point is well taken. I'm going to take him back.
THE COURT: I think we better do that, because right now it's not very relevant.
MR. JACOBS: Fair enough.
BY MR. JACOBS:
Q. During the time that you were involved with the negotiations that you said you were involved with, with respect to the interconnection with Hillsborough County at the Carrollwood facility, to whom did you report then, sir?
A. Mr. Tony Reeves.
Q. And what was his position?
A. Executive Vice-president of Florida Cities Water Company.
Q. And do you know to whom he reported at the time?
A. Mr. Gerald Allen.
Q. And do you know what Mr. Allen's position was at that time?
A. Executive Vice-president of Avatar Utilities.
Q. But not President of Florida Cities; correct?
A. That's correct.
Q. And did you, also, at that time, sir, have contact with Mr. Gordon, Robert Gordon?

A. Yes.
Q. And what was his position?
A. His position was President of Florida Cities Water Company and President of Avatar Utilities.
Q. And at that time where was Mr. Allen's office located?
A. Coral Gables.
Q. He didn't have an office at the Florida Cities office in Sarasota, did he, at that time?
A. No.
Q. And where was Mr. Gordon's office located at that time, sir?
A. Coral Gables.
Q. He didn't have an office at the Florida Cities offices in Sarasota, did he?
A. No.
Q. Now, Avatar Holdings and Avatar Properties and Avatar Utilities are all in the same office building in Coral Gables, aren't they, sir?
MR. BULLOCK: Objection, Your Honor, outside the scope.
MR. HIRD: I'd certainly join in the objection.
MR. JACOBS: It's directly related to Mr. Hird's question about his —
THE COURT: I'll overrule the objection.
THE WITNESS: What was the question again?

BY MR. JACOBS:
Q. Avatar Holdings and Avatar Properties and Avatar Utilities are all in the same office building in Coral Gables; is that correct?
A. Yes, I believe so.
Q. Now, back at the time when you became Executive Vice-president of Florida Cities, which I believe you said was February '92; is that correct?
A. In February '92, yes.
Q. To whom did you report from that time forward?
A. To Mr. Gerald Allen.
Q. And what was his position at that time?
A. Executive Vice-president of Avatar Utilities.
Q. And at that time where was his office?
A. Coral Gables.
Q. And —
MR. BULLOCK: Your Honor, this line of questioning is clearly after the time —
THE COURT: I'm sorry?
MR. BULLOCK: This line of questioning deals with issues and matters clearly after the time of which direct examination covered.
MR. HIRD: I join in the objection, Your Honor.
MR. JACOBS: I'm not sure Mr. Hird's direct was so limited.

THE COURT: I'll sustain the objection. I think it's going beyond.

BY MR. JACOBS:

Q. Mr. Bradtmiller, you consider Florida Cities' employees to be Avatar employees, do you not?

MR. HIRD: Objection.

THE COURT: Well, when are you talking about? Now?

MR. JACOBS: I'd be willing to put the question in the context of the time period that was examined more thoroughly on direct. I would prefer to start with now and go back, if necessary.

MR. HIRD: I have several bases for my objection, Your Honor. Number 1, outside the scope. Number 2, the term Avatar is being used confusedly, whether it means Avatar Holdings or whether it means Avatar Utilities, whether it means Avatar Properties. Number 3, Mr. Bradtmiller has not been identified as someone that's thoroughly familiar with the wage and employment structure of any of these companies and, you know, in terms of how -- who's an employee of whom, that would probably come from someone from the human resources department and that's clearly --

THE COURT: You had asked the witness some questions. Would you refresh my recollection as to the area

that you -- so that I can hone in on this --

MR. HIRD: I asked him specifically if he ever had communications with Avatar Holdings' officials, and my intent was that was officers and directors of Avatar Holdings and I asked him about his communications with those and he responded to that question. I, also, asked him the specific question whether Peter Sharp micro-managed Florida Cities' operation.

MR. JACOBS: Your Honor, may I?

THE COURT: Just a moment.

MR. BULLOCK: I would, also, join in and note that the entirety of my questions dealt with the negotiations with Hillsborough County, the company's decisions and the negotiations and communication with EPA.

THE COURT: Well, I understand. I'm more concerned regarding this particular area that Mr. Jacobs wants to go into as to the extent to which Mr. Hird may have inquired of this witness insofar as the corporate relationship here. And Mr. Hird is suggesting and you are, too, I think, Mr. Bullock, that the examination in that area was more closely circumscribed than apparently Mr. Jacobs views it.

Mr. Jacobs, you wanted to be heard further?

MR. JACOBS: I think Mr. Bullock's point is well taken that his focus was fairly narrow and was on

Carrollwood and the connection to Hillsborough County and those negotiations that the witness took place -- took part in, rather, forgive me, took place during that confined period of time.

Mr. Hird's questions about his contacts with Avatar Holdings and his questions about his contacts of what he knew about Mr. Sharp had no time limit and I believe opened the door fairly.

THE COURT: I agree. I will overrule the objection.

Go ahead.

MR. HIRD: Your Honor, I still have the other aspects of my objection, which was that the term "Avatar" is being used in a misleading fashion and that this witness does not have basis of knowledge because there's no discussion about familiarity with the employment practices.

THE COURT: Okay. I will overrule your objection with respect to the last point.

With respect to the use of "Avatar" in a confusing manner, we'll try to -- Mr. Jacobs, try to be more specific than you have been in that respect. And we'll try to be -- I'll try to be vigilant to that area, Mr. Hird, and if you will note your objections as we go along, if we don't respect that, and we'll take those up as we come to them.

Go ahead.

MR. JACOBS: I think if we can just go back to Mr. Levy's testimony, the evidence shows that Mr. Levy refers to Avatar as one big Avatar, without the distinctions and so did the employees, and that's been the testimony and I would like to elicit that.

THE COURT: Well, go ahead and ask your questions and we'll see where we go on that.

BY MR. JACOBS:

Q. Now, Mr. Bradtmiller, you do consider Florida Cities' employees to be Avatar employees, do you not?

MR. HIRD: Same objection, Your Honor. I don't think that clarifies the term "Avatar."

MR. JACOBS: I'll restrict that to Avatar Utilities for the purposes of moving on.

THE COURT: All right. Very well.

BY MR. JACOBS:

Q. Do you consider Florida Cities' employees to be Avatar Utilities' employees, don't you, sir?

A. Yes, we feel ourselves that way.

Q. And, in fact, you consider Florida Cities' employees as well as just part of the Avatar group of employees, do you not?

MR. HIRD: Still objecting on the use of the term "Avatar."

THE COURT: Well, I'll overrule the objection.

THE WITNESS: Only in a very limited sense.
BY MR. JACOBS:
Q. Let me refer you back to your deposition testimony starting on page 26.
MR. BULLOCK: Your Honor, could we have a date and page and line?
THE COURT: Date of the deposition?
MR. BULLOCK: Yes, sir. There were two.
MR. JACOBS: November 21st, 1994, page 26, line 15, question: Have you ever met Mr. Jacobson?
THE COURT: He's asking you do you recall giving the following answers to the following questions and he's going to read them now.
Go ahead.
MR. JACOBS: Thank you, Judge.
BY MR. JACOBS:
Q. Mr. Bradtmiller, have you ever met Mr. Jacobson, and you responded: On two occasions.
Do you recall giving that response?
A. Yes.
Q. And who is Mr. Jacobson?
A. Mr. Jacobson is currently the President of Avatar Holdings.
Q. And then do you recall that I asked you his — forgive me. The question I asked you, line 23, page 26: He makes

regular visits? Do you recall saying, quarterly?
A. At that time he visited quarterly, yes.
Q. And then I asked you quarterly —
THE COURT: Wait just a moment.
MR. BULLOCK: Is he trying to —
THE COURT: I'm not sure, Mr. Jacobs, what you're doing here. This is supposed to be inconsistent with what he's testified to?
MR. JACOBS: It is, but as opposed to just taking a quick splice out of the deposition that I wanted to without any lead-in, I backed up a little bit.
THE COURT: All right. Okay. Well, go ahead and finish your proffer.
BY MR. JACOBS:
Q. Okay. Question, line 25: Quarterly?
Mr. Bradtmiller, did you answer: His goal, as I understand, is to make quarterly visits to the locations in Florida and talk informally to the employees about what the company's doing. Do you recall giving that answer, sir?
A. Yes.
Q. And do you recall then, line 5, on page 27, I asked you: To which employees? Do you recall, sir, answering: To the properties and utilities employees. Do you recall that answer, sir?
A. Yes.

Q. And then question, line 17, Avatar Properties? And you interrupted — do you recall interrupting and answering, yes?
A. I don't recall, but that would be the answer.
Q. Question: And Avatar Utilities employees? Do you recall saying, correct?
A. If it states it there, that's the answer I gave.
THE COURT: This isn't helping me at all, Mr. Jacobs.
MR. JACOBS: One more question and answer.
THE COURT: Well, all right. Let me hear it and then I'll hear the objection and we'll see if it stands.
BY MR. JACOBS:
Q. Then, sir, I asked you the question, line 11: But I thought you told me there were only half a dozen Avatar Utilities' employees. Do you recall, sir, answering: Well, when I speak of Avatar Utilities' employees, I speak of Florida Cities and FUI employees, as well as just part of the Avatar group of employees.
Did you give that answer, sir?
A. If it is there, that's the answer I gave you. I don't recall it. That was a few years ago.
MR. BULLOCK: Your Honor, my only comment, I still don't see how this impeaches —
THE COURT: The latter part, I think, perhaps

justified maybe the preceding questions and answers. So I'm going to overrule the objection. I'll receive it for what it's worth.
BY MR. JACOBS:
Q. Now, Mr. Bradtmiller, as Executive Vice-president of Florida Cities Water Company, you turn to Mr. Getman for legal advice, do you not, sir?
A. Yes. He's our attorney.
Q. Now, when you say he's your attorney, Mr. Getman, in fact, is general counsel for Avatar Holdings, as well as all of its primary and secondary subsidiaries; correct?
A. Correct.
Q. In fact, you have known him to represent both parties to an agreement when both parties are Avatar subsidiaries; correct?
MR. HIRD: Your Honor, I think this is going way beyond the scope of direct. You recall my specific questions had to do with whether he was consulting with respect to his activities in dealing with, in negotiating with Hillsborough County, and whether there was conversation made of the alternatives with Avatar Holdings.
THE COURT: I think this gets a little bit beyond, Mr. Jacobs. I'm going to pull you in a little bit on this.
I'll sustain the objection.
MR. JACOBS: I'll move on, Your Honor.

BY MR. JACOBS:

Q. Mr. Bradtmiller, when you came to Florida Cities in February of 1991, there was no NPDES Permit to discharge from the Carrollwood plant to the Sweetwater Creek; correct?

A. Yes.

Q. And were you involved in the permit application, or had that been submitted prior to your arrival, to your knowledge?

A. I was not involved in the application.

Q. Do you have knowledge of whether the application had, in fact, been submitted prior to your arrival?

A. As I recall, yes.

MR. HIRD: Objection, Your Honor. Mr. Jacobs objected in the beginning about items beyond his knowledge and now he's going back —

MR. JACOBS: I'll rephrase.

THE COURT: You can't have it both ways, Mr. Jacobs.

MR. JACOBS: Sauce for the goose, sauce for the gander. I'll rephrase.

THE COURT: That's a good one. I wish I thought of that.

MR. JACOBS: I think you did a while ago, Your Honor.

THE COURT: Okay. Go ahead.

MR. JACOBS: I'm trying to learn something here.

THE COURT: Okay.

BY MR. JACOBS:

Q. Let me ask you this, Mr. Bradtmiller, was the NPDES Permit application for the Carrollwood plant pending at the time that you arrived at Florida Cities in February of '91?

A. Yes.

Q. And at that time was it your understanding, in February of '91, that the company was going to build an AWT plant at Carrollwood?

A. We were prepared to build one.

Q. Directing your attention to your deposition on November 21st, 1994, page 161, line 24, Mr. Bradtmiller, I'm going to ask you — read back the question I asked you at that time, read back the answer and then ask you if you recall giving that answer. Question: When you came on board in February of '91, was the company anticipating building an AWT upgrade at the Carrollwood plant? Answer: Yes.

Do you recall giving that answer?

A. Yes.

Q. Now, Mr. Bullock took you through a series of Defendant Exhibits and I might just try and summarize those to expedite matters and I'll ask you to agree whether I've accurately summarized these.

There was a March '91 letter, an April '91 letter, Defendant's Exhibits 135, 137, another April '91 letter, which was 138, and the Defendant's 138 and Defendant's 139, it was May, '91, letter. And finally, I'll take you to the May 21st, 1991 letter, in which you tell EPA that you're hooking up to or planning to hook up to Hillsborough County. Have I accurately summarized that group of documents?

A. I lost track of the numbers. I would like to go through them and make sure, but —

Q. We can do that. Let's start chronologically, then, with Defendant's Exhibit 135. Okay. 135, you're telling Ms. Hunter at EPA that you've looked at the revised draft Carrollwood permit and you're going to be unable to comply until such time as an AWT plant is completed; correct?

A. Yes.

Q. But you're not telling her that you're negotiating with Hillsborough County at this point in time, are you?

A. No.

Q. Now, flipping to 137, you're responding, again, Defendant's 137, you're responding to EPA on the public notice and again, you're telling them that the plant you're going to be building, your AWT plant will not be able to or rather that you will not be able to comply with the limits set forth in the public notice on the permit until you build your AWT plant; correct?

A. That's correct.

Q. Okay. Flipping to 138, this is your April 11th, letter 1991 — of 1991, and here you're telling EPA that you're actually involved in negotiations with Hillsborough County; correct?

A. Yes.

Q. And then flipping to Defendant's 139, you tell EPA that you successfully concluded with negotiations with Hillsborough County for the interconnection; is that right?

A. Yes.

Q. And this letter is dated May 20th, 1991; correct?

A. Yes.

Q. Now, EPA issued the permit on May 28th, 1991; correct?

A. I don't recall. I'll have to look.

Q. Okay. Defendant's 140.

A. Yes.

Q. Okay. You never withdrew the NPDES Permit application prior to the final issuance of the permit; isn't that correct, sir?

A. Correct.

Q. And because the plant was never built, the AWT plant, the permit was violated until you finally ceased discharge; is that correct?

A. Yes.

Q. Now, isn't it true that Florida Cities Water Company

wanted to build and own the pipe that connected to the Hillsborough County interconnection point, so that it could put that investment in its rate base and include it in the sewer charges to the Carrollwood customers?

A. That was one reason.

MR. JACOBS: Thank you.

No further questions.

THE COURT: Okay. Any redirect?

MR. BULLOCK: Nothing from Florida Cities, Your Honor.

THE COURT: Mr. Bird.

MR. BIRD: Nothing from Avatar Holdings.

THE COURT: Thank you, sir.

You may step down.

Call your next witness.

MR. BAISE: Defendant Florida Cities calls Mr. Ron Blackburn, Your Honor.

THE CLERK: Raise your right hand.

Thereupon,

RONALD D. BLACKBURN,

having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Take a seat in the witness box.

State your name and spell your last for the record, please.

THE WITNESS: Ronald D. Blackburn, B-L-A-C-K-B-U-R-N.

DIRECT EXAMINATION

BY MR. BAISE:

Q. What's your occupation, Mr. Blackburn?

A. I'm Environmental Administrator for the State of Florida Department of Environmental Protection in the Fort Myers District Office.

Q. Your job title?

A. Environmental Administrator.

Q. What education, if any, do you have post high school, Mr. Blackburn?

A. I have a Bachelor of Arts Degree from Florida State University.

Q. What was your major of study?

A. Liberal Arts.

Q. What are your responsibilities in your present job?

A. Currently, I'm the head of Administrative and Technical Support and I function as the substitute for the district manager in his absence.

Q. Any other responsibilities, Mr. Blackburn?

A. I oversee two branch offices within our district; one in Marathon and one in Punta Gorda.

Q. What do those branch offices do?

A. They do pretty much the same work that we do in the district office in Fort Myers, but they're satellite-type offices.

Q. Prior to your present position, what were your other positions in the Florida Department of Environmental Protection?

A. I've had various positions within the agency since '72. I think at the point we're talking about right now, between '78 and the mid 80's I was the Program Grants Coordinator between Environmental Protection Agency and the State District Office.

Q. What is a Program Grants Administrator?

A. At that point, there were grants available through EPA for funding for municipal wastewater treatment plants to upgrade and make improvements on their facilities.

Q. Are these upgrades known as 201 plans?

A. Yes.

Q. What is a 201 plan?

A. That is the section of the Clean Water Act that made the program or initiated the program in the first place.

Q. And what program are we talking about here?

A. Again, that's the Federal Grants Program that was part of the Clean Water Act.

Q. There is a program to build sewage treatment plants?

A. Yes, sir.

Q. Any particular type of sewage treatment plant?

A. It was just for municipalities and it was for sewage treatment plants and appurtenances, lift stations, force mains.

Q. How long have you worked for FDER or FDEP?

And Your Honor, if I go back and forth it's because the name changed at some point.

When did it change, Mr. Blackburn?

A. Yes, sir, we've changed names three times since my employment. Just about four years ago we changed from DER to DPC.

Q. What are regional waste treatment facilities, Mr. Blackburn?

A. They are municipally or privately-owned facilities that are pretty large size. We have what we call package plants and we have large wastewater treatment plants.

Q. What's your experience with water pollution control issues in the State of Florida?

A. Mainly through the grants program, I became somewhat knowledgeable of the responsibilities for wastewater treatment, how the plants were developed and plans were developed to cover that aspect.

Q. What's your experience with the state permitting program controlling water pollution in the State of Florida?

A. Again, as part of the grants program, any permits we

issued were supposed to dovetail with that effort. In other words, whatever facilities were being built were supposed to -- the permits were supposed to reflect and be in compliance with water quality standards.

Q. What is your experience in working with USEPA on permits for facilities to discharge in waters in the State of Florida, Mr. Blackburn?

A. I have very limited experience, other than knowing about what they call the NPDES Program, which is the Federal program for permitting discharges for surface water permits.

Q. Is Florida now what is known a delegated State for the NPDES Program?

A. It is at this point.

Q. When did the State receive that authorization, if you know?

A. I believe it was this past year.

Q. Do you know why it was not granted until this last year?

A. No, sir. As far as I know, we had petitioned for it for a few years, but I don't know the specifics.

Q. What is your experience in working with private wastewater treatment facilities?

A. Various experience. We regulate private facilities, as well, from small plants to 50,000 gallons up to a million gallons.

Q. Any difference between how private wastewater treatment facilities and public wastewater treatment facilities are regulated by the State of Florida?

A. Yes, sir.

Q. And what are those differences?

A. My understanding, it varies a great deal depending upon the county, but most of the private facilities are regulated through the Public Service Commission, while the municipalities are under home rule.

Q. To your knowledge, any difference between how EPA would regulate a private and public waste treatment facilities in the State of Florida?

MR. QUINN: Objection. Beyond this witness' scope and calls for speculation.

MR. BAISE: I said, to his knowledge.

THE COURT: I'll overrule the objection.

It's an open-ended question as to time. Talking about at the time in question or --

MR. BAISE: He's testified he's been involved in this business since '71, so seems to me his background covers an extraordinarily broad spectrum, Your Honor.

THE COURT: I'll overrule the objection.

Go ahead.

BY MR. BAISE:

Q. Can you answer the question?

A. Could you restate that for me, please?

Q. Do you know if there -- strike that.

Do you know of any differences as to how EPA might regulate private and public waste treatment facilities in the State of Florida as they discharge?

A. Not that I'm aware of. They should be the same.

Q. Can you explain the relationship between Florida DER and EPA and it relates to the permitting of facilities in the State of Florida?

A. The permitting of facilities for surface water discharges must meet the Federal Water Quality Standards Act and to do that, our permits are oversaw by EPA. In other words, when we issue a State permit, it goes through EPA to make sure that water quality has been addressed.

Q. What is the water quality standard in the State of Florida?

A. The water quality standard is site specific.

Q. Is the water quality -- are the water quality standards developed by Florida and approved by EPA?

A. Yes, sir. The standards are developed in Tallahassee.

Q. What pollutants are regulated from wastewater treatment plants in Florida, Mr. Blackburn?

A. There's a variety of them now. They've expanded since my knowledge of them, but used to be BOD, which is biochemical oxygen demand, total suspended solids, nitrogen

and phosphorus, primarily.

Q. Are you familiar with the segment of the Caloosahatchee River where the Waterway Estates facility discharges?

A. Yes, sir.

Q. Within that general area, how many waste treatment facilities discharge into the Caloosahatchee River?

A. In the Caloosahatchee estuary there's two facilities for the City of Fort Myers, there's the Waterway Estates, there's the Fiesta Village facility, which is the sister facility to Waterway Estates and the City of Cape Coral.

Q. When did you first become familiar with the Waterway Estates facility which discharges into the canal leading into the Caloosahatchee River?

A. I would say, late 70's, '78.

Q. What brought that facility to your attention?

A. Again, as part of the grants process, it was under evaluation to note its effects on the receiving bodies.

Q. Did the facility have a State permit?

A. Yes, sir.

Q. Do you recall what that State permit regulated?

A. It regulated the specific discharge. I don't know the parameters specifically.

Q. Did there come a time in 1981, Mr. Blackburn, that the Florida DER developed a document known as the Caloosahatchee

River Wasteload Allocation Documentation for Lee County?
A. Yes, sir.
Q. What was your understanding for the reason for the creation of that document?
A. Basically with all the dischargees into the estuary area, we tried to do a modeling of survey to be equitable and to establish what we call wasteload allocations for the dischargers that would take into account their specific circumstances and yet address water quality issues. As I mentioned, it was done out of Tallahassee through a modeling effort on their part.
Q. Was this a development of the 201 plans?
A. Yes, sir.
Q. Was this what you would call — was this a planning document?
A. Yes, sir. It was a planning document at that point.
Q. Were there any requirements set forth in this document at the time it was created, Mr. Blackburn?
A. I wouldn't use the term requirements. It was outlined that the constituents that were mentioned would be what we would be expecting on future permits.
Q. Did Waterway Estates have a wasteload allocation to discharge into the canal of the Caloosahatchee River in 1981?
A. Yes, sir.

Q. Did the State of Florida issue a permit to the Waterway Estates facility to discharge into the canal to the Caloosahatchee River in 1981?
A. Yes, sir.
Q. And that wasteload allocation was included in that permit?
A. Yes, sir.
Q. Did there come a time in 1983, when the State of Florida issued another permit to this Waterway Estates facility to discharge into the canal into the Caloosahatchee River?
A. Yes, sir.
Q. Did that permit include a wasteload allocation?
A. Yes, sir.
Q. Did the Waterway Estates facility in 1986 have a wasteload allocation to discharge into the canal of the Caloosahatchee River?
A. Yes, sir, it's part of the permit. Same thing.
Q. And did this facility have a wasteload allocation to discharge in 1987 into the canal of the Caloosahatchee River?
A. As long as they were under valid permit the wasteload allocation was included in that decision.
Q. Did there ever come a time that this facility was required to cease discharging into the canal of the

Caloosahatchee River?
A. Not to my knowledge.
Q. Then why did Florida DER or DEP ask Waterway Estates to move its discharge pipe out to the 6-foot contour line in the Caloosahatchee River?
A. As I recall, the other facilities were doing that, Florida Cities had experienced some minor problems along the way, and we issued a temporary operating permit during that time frame, that I recall, to address those problems, but one the issues we felt would be beneficial is for them to extend the pipe out to the 6-foot contour.
Q. Was it a requirement?
A. No, sir, not at that point.
Q. Mr. Blackburn, I'd like to draw your attention to a document noted as Florida Cities' Trial Exhibit Number 19, please.
Are you familiar with this document, Mr. Blackburn?
A. Yes, sir.
Q. Did you author this document?
A. Yes, sir.
Q. I'd like to move this document into evidence, Your Honor.
THE COURT: Okay. It will be received.
BY MR. BAISE:

Q. Would you please summarize this document for the record, Mr. Blackburn?
A. You'll see it's addressed to, at that time, my boss, Phil Edwards, who is the District Director and it's just a combination of the wasteload allocations for the Caloosahatchee River from all the dischargers that discharged into that water body, with the exception of Oakbridge Park, which was a proposed facility, which was not built at that point.
Q. Did Waterway Estates have a discharge allocation into the canal into the Caloosahatchee River in 1983, February 23rd?
A. Yes, sir.
Q. I direct the witness's attention to Florida Cities' Trial Exhibit Number 22, please.
A. Yes, sir.
Q. Are you familiar with this document?
A. I have two documents. I have a cover memo from Dick Richardson to Bruce DeGrove and a letter from Mr. Richardson to Marshall Byatt of EPA.
Q. First question, are you familiar with the cover memo?
A. Yes, sir.
Q. Are you familiar with the attachment to the cover memo?
A. Yes, sir.

Q. Are you CC'd on that document?
A. I'm CC'd on the letter.
Q. On the second document?
A. Yes, sir.
Q. Do you recall receiving or viewing the document at the time it was created?
A. That's been quite a while ago, but I'm sure I did review it at that time.
MR. BAISE: Your Honor, I would move this into evidence on behalf of Florida Cities.
THE COURT: I'll will be received.
MR. QUINN: Your Honor, we object only to the first page of that Exhibit, as a lack of foundation.
THE COURT: Okay. I'll sustain the objection as to the first page.
I'll receive the balance of that Exhibit. Will not receive the memo from Richardson to DeGrove.
MR. BAISE: This is how the document was presented to us, so that's why we did not take it apart, to maintain the completeness of the document.
THE COURT: That memo will need to be removed from the original exhibit.
Now, if you want to preserve that for identification purposes or if it doesn't matter to you, then, that's fine. But if you want to preserve that as a

part on appeal, then you'll need to preserve that. But I don't want it as a part of the exhibits that I review.
MR. BAISE: If fact, what I will do, when Dr. Ahmadi comes on, as he's CC'd on this, I'll bring it in through him at that time.
THE COURT: All right.
BY MR. BAISE:
Q. Mr. Blackburn, this is a letter dated May 7th, 1986. Would you please describe this letter for the record, please?
A. Yes, sir. It just reiterates the wasteload allocations that we had established to Mr. Marshall Byatt of the Water Management Division of EPA Region IV.
Q. Is there any indication in the letter that Waterway Estates has a no discharge wasteload allocation for the canal discharging into the Caloosahatchee River?
A. No, sir.
Q. Did, in fact, on May 7th, 1986, Waterway Estates have a wasteload allocation to discharge into the canal leading to the Caloosahatchee River?
A. Yes, sir.
Q. I direct your attention, Mr. Blackburn, to Florida Cities' Trial Exhibit Number 29.
A. Yes, sir.
Q. Do you recognize this document?

A. Yes, sir. I authored it.
Q. When?
A. June 2nd, 1987.
Q. Would you please read the document into the record — excuse me.
Your Honor, I would move this into evidence.
THE COURT: It will be received.
BY MR. BAISE:
Q. Would you please read this document, Mr. Blackburn, that you sent to Mr. Edwards?
A. This was through Mr. Edwards to Mr. Rick Ricciweitz (phonetic) and it concerns the subject of sewage treatment plant discharges to Charlotte Harbor, Caloosahatchee River and estuary. It covered two estuaries there. Just to follow up on our discussion yesterday, the following are the permitted surface water discharges to the referenced water bodies, Charlotte Harbor, no authorize —
THE COURT: Colon.
THE WITNESS: I'm sorry — colon, no authorized discharge. In parens, technically the City of Punta Gorda —
THE COURT: Wait. Wait. Slow down a little bit for the reporter.
THE WITNESS: Sorry, sir.
THE COURT: He can go fast, but not quite that

fast. It's late in the day.
THE WITNESS: I know.
Technically the City of Punta Gorda, 2.0 MGD, does have a discharge permit, but it is for excess from their spray irrigation/reuse system. Even then, the discharge is not directly to the harbor, end of paren. All other facilities recycle wastewater through ponds or spray irrigation. Now, addressing the Caloosahatchee River Estuary. Fort Myers Central STP, that's abbreviation for sewage treatment plant —
BY MR. BAISE:
Q. You can leave out those numbers?
A. All right, sir.
11.0 MGD, Fort Myers South, Sewage Treatment Plant, 12.0 MGD, Fiesta Village STP, 5.0, MGD, Waterway Estates STP, 1.08 MGD, City of Cape Coral STP, 7.3 MGD. Should you have any questions, et cetera.
Q. Any suggestion in the document that Waterway Estates had a no discharge wasteload allocation into the canal in the Caloosahatchee River on June 2, 1987?
A. No, sir.
Q. Mr. Blackburn, you testified a few moments ago or mentioned water quality standards. Are you familiar with the water quality standards for this segment of the Caloosahatchee River where the Waterway Estates facility

discharges into the canal?
A. Yes, sir.
Q. Did the discharges from the Waterway Estates facility ever — strike that question.
Did the Waterway Estates facility cause violation to the water quality standards in this segment of the water — in this segment of the Caloosahatchee river?
A. They have had problems from time-to-time. They experienced a problem with sluds that I'm aware of a few years prior to this.
Q. Did they violate the water quality standards?
A. Yes, sir, at that point they did.
Q. Did they continue to violate the water quality standards?
A. No, sir, they took corrective actions.
Q. Did the violation that you talked about cause long-term or cause any harm to the water qualities in the Caloosahatchee River?
A. Not of a very significant nature, no, sir.
Q. Any short-term harm caused by their discharges in the Caloosahatchee River?
A. Probably some short-term harm, yes, sir.
Q. How much would that be?
A. Negligible.
Q. Did there ever come a time you had to revoke the

permit to this particular facility?
A. No, sir.
Q. Are you aware of any no discharge permits issued to sewage treatment facilities to cease discharging into any water body in the area of your jurisdiction?
A. Not that I'm aware of, no, sir.
Q. Do you have any information of any improvement to the water quality in the canal since the Waterway Estates' discharge point has been moved from the canal to the river?
A. No, sir.
Q. Did there come a time when Government counsel, Mr. Jacobs, contacted you to be a witness in this case?
A. Yes. Mr. Jacobs — I should say someone from his office called the early part of December and asked if I could meet with Mr. Jacobs this last December '95.
Q. Did you, in fact, meet with Mr. Jacobs?
A. Yes, sir, I met with Mr. Jacobs in Fort Myers.
Q. What did Mr. Jacobs ask you about?
MR. QUINN: Objection, hearsay.
THE COURT: Sustained.
BY MR. BAISE:
Q. Were you aware before that meeting that you had been listed as a witness by Mr. Jacobs?
MR. QUINN: Objection, relevance.
THE COURT: Sustained.

BY MR. BAISE:
Q. What did you tell Mr. Jacobs when you met with him, Mr. Blackburn?
A. I just went over Mr. Jacobs' questions and he had more or less the same sort of questions we are discussing here.
Q. Did you tell him that this facility had a wasteload allocation to discharge in 1986 from the State of Florida?
MR. QUINN: Objection.
THE COURT: All right. What does this have to do with that? Why is this relevant? Why is this admissible?
MR. BAISE: The reason this is relevant, Your Honor, is that the Government had been aware at least since December that this facility had a wasteload allocation to discharge into the canal and as I mentioned in my opening statement, they continued to persist in the pretrail statement that there was no wasteload allocation for this facility to discharge into the canal. State officials put the Government on notice that there was a wasteload allocation. They say there was not. Here are the people who create the wasteload allocation, administer wasteload allocation, and the Government is ignoring that fact.
So, I'm going through Mr. Blackburn here to point out fairly clearly that in December, December of 1995, when the Government had listed Mr. Blackburn as a witness, they went to talk to him, he told them, one, this is a planning

document, the 1981 document, and two, this facility had a wasteload allocation, so why persist in saying that this facility didn't have a wasteload allocation? So, that's why it is relevant, Your Honor. Goes to the seriousness of the violations, such are the factors that justice may require, and we find it —on Florida Cities' behalf, when we found out about this, it's somewhat amazing, there's no work product privilege here between Mr. Jacobs and this witness. They had listed him as a witness. Once Mr. Jacobs talked to this witness, found out the facts, the Government decided not to call Mr. Blackburn. That's when I decided I would call Mr. Blackburn.
THE COURT: All right. Mr. Quinn.
MR. QUINN: Your Honor, this is argument and argument isn't to be introduced in front of a witness and has nothing to do with what this witness is testifying about, sir. And we, also, dispute a lot of the assertions made by counsel, but I don't want to get into that at this point, sir. I'd like to reserve those for argument at the conclusion of the case.
MR. BAISE: The Court asked me why and where I was going and so I believe I had an obligation to advise Your Honor on why I had propounded this line of questions to Mr. Blackburn. And we were talking about facts here of what he told Mr. Jacobs; one, that there was a wasteload

allocation, as I elicited from Mr. Blackburn.

THE COURT: The fact that he has told counsel for the Plaintiff that there was a wasteload allocation —

MR. BAISE: In December of 1995. And the pretrial brief is written and has a line in there that says there's no wasteload allocation. That's just wrong. And we want to bring that out.

THE COURT: Yes, Mr. Quinn.

MR. QUINN: Your Honor, at the risk of going into argument, Florida Cities, as Ms. Kagey testified, had three opportunities to bring this issue to a head, and it was informal and two formal opportunities to bring the existence or non-existence of a wasteload allocation up, so the permit could be appealed, and that was not done.

In addition, my questions, I believe, on cross-examination might shed some light on this, as well, sir, without disclosing what they will be until I ask them.

MR. BAISE: Your Honor, we admit — I mean, we acknowledged or stipulated to the liability. The fact is, the permit was taken away. What we are talking about here, as I said in opening statement, is mitigation, common sense, applying it to the six factors and it's very important for this client to have brought out in this Court in terms of mitigation the fact that the Government knew that there was a wasteload allocation. This is the first time we have been

able to conclusively establish it before Your Honor.

THE COURT: Okay. I'll overrule the objection.

If it becomes apparent to the Court that I have improperly allowed this into evidence, I can rectify that since I'm the trier the fact, also. But as of now, anyhow, I'm going to take the position that it's not inadmissible and I'll overrule the objection.

Proceed.

BY MR. BAISE:

Q. And what did you tell Mr. Jacobs, Mr. Blackburn, with regard to the wasteload allocation at the Waterway Estates facility discharging into the canal into the Caloosahatchee River?

A. Again, as I recall my discussions with Mr. Jacobs, I said any wasteload allocation that we issue you is incorporated as part of our permit. If they have a permit, they have a wasteload allocation inherent in that permit.

MR. BAISE: Thank you very much, Mr. Blackburn.

THE COURT: Any questions?

MR. HIRD: I have no questions, Your Honor.

THE COURT: All right.

MR. QUINN: Just a few, if I may, Your Honor.

THE COURT: All right.

Just a moment.

(Pause.)

All right, Mr. Quinn.

CROSS-EXAMINATION

BY MR. QUINN:

Q. Good afternoon, Mr. Blackburn. My name is Tony Quinn.

Sir, I'd like to draw your attention to Florida Cities Water Company Exhibit Number 19. If you have that in front of you, sir.

A. Yes, sir.

Q. Okay. Mr. Blackburn, are you aware of the treatment levels for advanced wastewater treatment?

A. Yes, sir.

Q. What are the treatment levels for total phosphorus?

A. Anything above — what we usually do for — anything above secondary levels is considered advanced waste treatment.

Q. What are secondary levels, then?

A. Secondary levels are for BOD and suspended solids.

Q. So if there is a treatment level including phosphorus and nitrogen, that would be advanced waste treatment; isn't that correct?

A. Yes, sir.

Q. Sir, I'd like to draw your attention to Exhibit, Florida Cities Exhibit Number 19, the line that says, Waterway Estates. Do you see that, sir?

A. Yes, sir.

Q. Do you see the line under total nitrogen/pounds?

A. Yes, sir.

Q. Does that mean — and the number there is 27.02; is that correct?

A. Yes, sir.

Q. Does that mean that there was advanced waste treatment required for that facility, Waterway Estates?

A. No, sir. That means they could not exceed that loading under that capacity.

Q. You just told me that secondary treatment did not address total nitrogen, didn't you?

A. No, I said secondary treatment was just for BOD and suspended solids. Any further treatment of total nitrogen or phosphorus is advanced waste treatment.

Q. So, if there is a poundage limitation for total nitrogen and a poundage limitation for total phosphorus, then that requires advanced waste treatment, doesn't it?

A. Yes, that would require advanced treatment.

Q. So, Waterway Estates has poundage limitations for total nitrogen and total phosphorus; right?

A. For this document, yes, sir.

Q. And therefore, based on what you just told me, that means they had a requirement for AWT, too; right?

A. No, sir. That doesn't mean that at all. That meant they could not exceed those poundage requirements.

Q. How is that different than what I asked you, sir? You were telling me that --
A. Because the plant was a secondary level plant, there's going to be so phosphorus, there's going to be so much nitrogen. I'm not an engineer, but this was calculated on advanced waste treatment, okay, for the entire estuary and their share of that poundage would be 1.08 MGD and there's the limits and that's why you can see the other limits are much higher because the volume is much higher. The City of Fort Myers has 12 million gallons, 300 pounds limit. So that's the differential.
Q. The limitations of 3.0 milligrams per liter for nitrogen is advanced waste treatment; isn't that correct?
A. Yes, sir.
Q. And 3.0 milligrams per liter calculated out equals approximately 27 pounds of total nitrogen per day, doesn't it?
A. Yes, sir.
Q. So, my question is, for that facility, there was an AWT limitation on total nitrogen, wasn't there?
A. No, sir. There was -- the limitation would be associated with the permit. This has -- this is just for planning purposes right here at this point.
Q. So, for planning purposes, there was a limitation on the total amount of total nitrogen which would have been

introduced; is that correct?
A. That is what we would anticipate in future permits we would have been requesting.
Q. And the same would hold true, also, for the .5 milligrams per liter of phosphorus; is that correct?
A. Yes, sir.
Q. Sir, and at those two poundage limitations and at the flow of 1.08 million gallons per day, they could not have met those poundage limitations without advanced waste treatment; isn't that correct?
MR. HIRD: Objection. I think the witness already stated these are not limitations, it's a planning document.
THE COURT: I'll overrule the objection.
THE WITNESS: If I understand your question correctly, they would have had to make changes to their existing facility to accommodate these allocations.
BY MR. QUINN:
Q. And those changes would have been an upgrade to AWT; is that correct?
A. Yes, sir.
Q. Okay. Sir, also, I'd like to draw your attention to the bottom of the page, last paragraph.
Sir, reference is made to the 6-foot contour or deeper. Can you tell me why there was reference to a 6-foot contour line in the Caloosahatchee River?

A. Basically, that was a consideration that we felt would be fair, for lack of a better term, for all the dischargers, that it would disperse the nutrients at a more stable situation. So, we, again, Tallahassee generated this information. We felt like that all the dischargers would have to meet that.
Q. And it was, also, because -- withdrawn. It was, also, to prevent a localized build-up of those nutrients, too, wasn't it?
A. Yes, sir.
Q. So, discharge to below the 6-foot contour would have left a better dispersion of the nutrients; isn't that correct?
A. Discharge at the 6-foot contour leads to better dispersion. Anything before that could be localized build-up, but it's going to depend on the area.
Q. So, sir, if there was a wasteload allocation for the Waterway Estates facility, it would have to have been for AWT and for discharge at the 6-foot contour; isn't that correct?
A. The wasteload allocation -- we're mixing up things here, but this was a wasteload allocation designed for future facilities. The limits that are established here were for, as you can see, design, Fort Myers South, design, Fort Myers Central. Cape Coral was existing and Waterway

Estates was existing. So, they were calculated in the mix along with people that were designing to expand the facilities.
Q. But the existing line for Waterway Estates requires treatment level at advanced waste treatment for total nitrogen and total phosphorus, doesn't it?
A. Those limitations right there, they could have -- would have been -- 1.08, right. Would have required advanced waste treatment, right, at that point.
Q. And, also, would have required discharge at the 6-foot contour line or deeper; is that correct?
A. When you say requirement, that was calculated as part of the overall calculations for the wasteload.
Q. So, was this a planning document?
A. Yes, sir.
Q. Just like the wasteload allocations; is that what you're saying?
A. Yes, sir.
Q. So, back in 1981, there was no final FDER wasteload allocation; isn't that correct?
A. If I can reiterate, whatever the permit stipulated as requirements was a consideration of the wasteload allocations.
Q. But we're talking -- we're mixing apples and oranges.
A. I know we are.

Q. There's a wasteload allocation; is that correct?
A. Yes, sir.
Q. And sometimes that wasteload allocation is incorporated into a permit, which is, in an of itself, enforcible; is that correct?
A. It should always be incorporated in the permit for any facility that discharges.
Q. With regard to wasteload allocations only and not those incorporated into permits, back in 1981, there was no FDER wasteload allocation for Waterway Estates, was there?
A. There was a permit issued and the basis of it was that any permit we issued would not violate the criteria outlined here.
Q. And that was AWT, wasn't it, sir?
A. The limits outlined would reflect AWT treatment.
Q. And the limits outlined also reflect discharge below the 6-foot contour; is that correct?
A. Right, they reflect that was the case, the 6-foot contour.
Q. If those limits were incorporated into a permit, that would require -- that would require an AWT permit; is that correct?
A. Yes, sir. Any permit that was issued for AWT would stipulate that within the permit specifically for that facility.

Q. But FDER has issued in the past permits that did not require AWT, didn't it?
A. If they don't exceed the poundage that's listed here, they may not need to go to advanced waste treatment.
MR. QUINN: Thank you, Mr. Blackburn.
THE COURT: Any redirect?
MR. BAISE: No further questions.
THE COURT: You may step down.
Call your next witness.
MR. QUINN: Your Honor, we move to strike all the testimony at this point of Mr. Blackburn as it relates to the conversations with Mr. Jacobs.
THE COURT: Well, I'll deny that at this point.
MR. BAISE: How late did you anticipate?
THE COURT: I was thinking about 5:30.
THE CLERK: Raise your right hand.
Thereupon,
MICHAEL ACOSTA,
having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:
THE CLERK: Take a seat in the witness box.
MR. BAISE: Your Honor, may I have the paralegal put those charts up that we had this morning, please?
THE COURT: Yes, sir.

THE CLERK: State your name and spell your last for the record, please.
THE WITNESS: My name is Michael Acosta, A-C-O-S-T-A.
THE COURT: Yes, Mr. Quinn.
MR. QUINN: For the reasons we stated earlier, with the use of these two exhibits that have been marked for identification earlier, we renew those objections at this time, sir.
THE COURT: I know of one.
MR. QUINN: There are --
THE COURT: I saw one after lunch, a second one, I believe, but no reference was ever made to it. And I think I know, what -- yeah, that one there. Nothing was said about that.
MR. QUINN: Nothing was said about that. It was up, however.
With regard to the first one, I lodged a series of objections this morning and I would merely lodge the same objections again for this witness.
THE COURT: All right. So, the record -- the 11th Circuit will know what we are talking about, you are talking about this Defendant Waterway's Exhibit for identification 208?
MR. QUINN: Yes, sir.

THE COURT: Which was this chart we talked about earlier today.
MR. QUINN: My objection, if you would like me to, I could restate them -- one was, it wasn't ever disclosed to us as an exhibit. It's not listed as a trial exhibit. Second, it was given to us later, but it wasn't told through which witnesses it would be used. In addition, it's hearsay. Hearsay within hearsay.
THE COURT: Well, so far, so far, that exhibit which I believe Mr. Baise has indicated he doesn't intend to offer it in evidence, but says that it can legitimately be used as a demonstrative exhibit to assist the witnesses in their testimony. That has not come to pass as yet. In fact, the manner in which 208 has been used sounds to me like, if anything, it would more properly be used during closing arguments as an aid to counsel in closing argument because the documents -- the document was not prepared by the witness and there's no nexus, is what I'm saying, between the witness that testified regarding 208 and you had him drawing these circles around things. So, it's -- the print is so small, I can't even read it from where I am. Now, I'm the trier of fact. And, frankly, I just had in the back of my mind I'd rule on this if and when the time comes.
So, it hasn't been offered into evidence and I, as I told Mr. Baise, I think before lunch, I guess I finally

told him that I didn't want to waste any more time with the witness drawing orange circles around various parts of this exhibit, because I said this is simply a tool of counsel in doing that. So, that's where we are on this thing now, and I don't intend to take any more time with it.

If Mr. Baise wants to draw circles around these, he can do that during recess, and if he wants to use it for some purposes later on, we'll address it at that point. Now, that's a long way around telling you that I'm not real impressed with that right now.

MR. BAISE: Your Honor, this is one of the witnesses who helped prepare that chart.

THE COURT: Oh.

MR. BAISE: I'm sorry to let you go on. I didn't want to interrupt you. He's one of the two witnesses who actually prepared that.

THE COURT: Okay. We'll see where we are, then.

MR. JACOBS: Judge, just an administerial matter as Mr. Hird set precedent yesterday afternoon after Mr. Lehman took the stand and you asked for administerial matters before we adjourned, and I hope it won't take as long Mr. Hird yesterday, but there's an agreement that on the morning of each day of Court we receive a witness list for the next morning, and it's 5 P.M. and it's long past 9 A.M. and we haven't seen that list for tomorrow.

And the other matter that I hesitate to raise in the same vein, but feel like I should, is that the Court would suggest yesterday — sorry — on Monday, that the Defendants indicate to us on Tuesday, that was yesterday, which witnesses they would be cutting from their witness list, and they represented on Monday that they would be cutting, and I have a phone message yesterday to the effect they are not cutting any witnesses, and if that's the case, the record should reflect that, so there's no further confusion. That's the second matter. But the first matter, it's after 5 and the list for tomorrow was due at 9 A.M.

THE COURT: Mr. Baise.

MR. BAISE: Yes, Your Honor, he's absolutely correct. We were just totally unsure of how many of these witnesses we would get through today. I'm not sure whether we will, in fact, given the cut-off time, we probably will not get through Mr. Acosta.

It's at this point, as I said to Your Honor on Monday, I thought there was a slim chance of finishing up by Friday, and I think in light of the progress we have made today, that is becoming more than a slim possibility, it's becoming a moderate possibility of finishing, because we've been able to get through —

THE COURT: Okay, well, I need you to go ahead and get this witness list now for tomorrow. Need to know that

now.

MR. BAISE: May we have a five-minute recess, Your Honor?

THE COURT: Well —

MR. BAISE: We have to determine the order in light of the moving around of Mr. Bradtmiller.

THE COURT: We will take a five-minute recess.

MR. BAISE: Thank you, Your Honor.

(Thereupon, a brief recess was taken, after which the following proceedings were had:)

MR. BAISE: Your Honor, we have provided the remaining list of our witnesses, both for Thursday and Friday, to Government counsel, and I apologize we did not meet that requirement this morning, but with the hectic schedules and trying to determine how to move witnesses around, given their schedules, I, frankly, overlooked that, so I apologize.

THE COURT: All right. Why don't you share that with me? Could you read that list to me?

MR. BAISE: Mr. Jacobs, why don't you read it?

THE COURT: Just hand it to Mr. Baise and let me — I'd like to know where we are going, also.

MR. BAISE: We have Mr. Acosta sworn. The next witness would be Mr. Larry Good.

THE COURT: Hold on just a second. All right.

Go ahead.

MR. BAISE: You have Mr. Acosta on the stand. Then the next witness would be Mr. Larry Good, Mr. Gerald Allen, Ms. Julie Karlaskint, Mr. Charles or Chuck Hill, Mr. Keith Cardey, and Dr. Abdul Ahmadi, A-H-M-A-D-I.

And after Florida Cities rests and Avatar will be calling a Mr. Ed Jacobson, J-A-C-O-B-S-O-N, Ms. Georgia Metcalf, M-E-T-C-A-L-F, and Charles McNairy, M-C-N-A-I-R-Y.

And I think with respect to several of these witnesses, Your Honor, there will be similar to Mr. Blackburn, they will not take more than an hour, hour and a half at most between my direct and I would think their cross, so that's why I told you I thought we had a possibility of making it.

THE COURT: Okay. Thank you.

DIRECT EXAMINATION

BY MR. BAISE:

Q. Mr. Acosta, what is your occupation?

A. I'm an engineer.

Q. What kind of engineer?

A. An environmental engineer.

Q. Would you please define an environmental engineer for the record?

A. Environmental engineering is the study and control of waste or pollutants from several different sources, air,

water, wastewater, and includes the infrastructure to get that water or wastewater to the different treatment facilities.

Q. What college degrees, if any, do you have?

A. I have a Bachelor of Science in Environmental Engineering from the University of Florida.

Q. Any advanced degrees?

A. No, sir.

Q. Any seminars or certificates beyond that point?

A. I am a Registered Professional Engineer in the State of Florida.

Q. What is your present position?

A. I am Vice-president of Engineering and Operations.

Q. For what?

A. For Florida Cities Water Company.

Q. Have you held prior positions in Florida Cities Water Company?

A. Yes.

Q. What are they? Or were they? Excuse me.

A. I held three other positions. Excuse me.

Q. Would you define those positions and the responsibilities for each of those positions?

A. The first position I held was Division Engineer in the Lee County Division of Florida Cities. That involved the engineering of in-house projects and developer-installed

projects throughout Lee County.

The second position that I held was Regional Engineer of the South Region, which includes Collier and Lee County, and that position was similar in scope, but it involved the responsibility for the entire South Region including both counties.

And the position just prior to this position — the position I currently hold, was Manager of Engineering and Construction, and that position involved the responsibility for design and construction of facilities throughout the company, including Collier and Lee Counties.

Q. Are you familiar with the permitting requirements in Lee County as a result of these positions you have held, Mr. Acosta?

A. Yes.

Q. What are those requirements, based on your personal knowledge?

A. To obtain — to build on a site in Lee County, a development order or an exemption from a development order must be acquired from the county, in addition to all the appropriate building permits and zoning requirements, et cetera.

Q. Can you explain or define those appropriate building permits and zoning?

A. Well, the zoning permit would be — the property comes

along with a certain zoning that requires set backs and all of those, the appropriate things to — for the site to be built upon to have the least impact on its neighbors. The exemption or the development order is a document received from the county that includes all of the site plans that are submitted to the county, and must be obtained prior to building on a site.

Q. Which offices have you worked with with respect to permitting in Lee County, Mr. Acosta?

A. I have worked with Development Review, Lee County Utilities, the Department of Transportation, the Department of Natural Resources. All of those.

Q. Are all these offices necessary to work with in obtaining permits to construct a facility in Lee County?

A. For at least some of those offices are required and in some cases all of them are required.

Q. Can you describe those cases where all of those offices would be involved?

A. A case where you have environmental concern, some environmental concern would involve — Natural Resources, Utilities are involved to make sure that adequate service is provided to the property. DOT, Department of Transportation, for the same reason, to get the roads and infrastructure in. And the Codes and Building Department to ensure that building requirements of the county are met.

Q. Did there come a time when you became familiar with the Florida Cities Waterway Estates facility?

A. Yes.

Q. When was that?

A. That was in the fall, late fall of 1987.

Q. And how did you become familiar with the Florida Cities Waterway Estates facility, Mr. Acosta?

A. I was asked to tour perspective engineering firms around the Waterway Estates facility in preparation for their proposals.

Q. What proposal are you referring to, Mr. Acosta?

A. There was a request for proposals for the design and permitting of the Waterway Estates upgrade.

Q. And what did your touring around involve with these particular contractors, Mr. Acosta?

A. I took the engineers that requested that around the facility to get a feel for what the existing facility looked like, and what would need to be done to upgrade the facility to advanced waste treatment.

Q. Do you recall how many engineering firms you toured around the Waterway Estates facility in 1987? Excuse me.

A. I'm sorry. I recall two or three.

Q. Do you recall the individual companies' names?

A. No, not the individual — I remember one individual person, but I do not recall the firm he was with at the

time.

Q. Do you recall any of the companies who looked at the possibility of being involved in the Waterway Estates expansion?

A. Source, I recall, uh, getting phone calls from and Mr. Robart Wright and my memory fails as to which firm he was with at the time.

Q. Why is it necessary for these firms to come and make a tour of the facility?

A. It is generally to get a feel for what facilities are in place, what the lay of the land is, how constrained the site is. Generally, just to see what the facilities are and what will need to be done in order to upgrade the facility.

Q. Did there come a time when Florida Cities hired one of these firms you toured around the facility in -- did you say December of 1987?

A. In the late fall, yes, sir, December.

Q. Excuse me.

So did there come a time when one of these firms was hired by Florida Cities?

A. Yes.

THE COURT: Okay. It's 5:30. Let's go ahead and recess and we'll -- I have a proceeding at 8:30 and I intend to be through with that by 9:00, so we'll convene at 9:00 tomorrow morning. We'll be in recess.

It's 8:45. Let's still plan on 9:00 and I'll try to get through with it.

MR. BAISE: We'll be here by 8:45. We'll be ready.

(Thereupon, the proceedings were concluded.)

C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of proceedings in the above-entitled matter.

_____ _____

Official Court Reporter Date

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS, INC., Defendants.

Case No. 93-281-CIV-FTM-21

Monday, April 4, 1996
Tampa, Florida
9:10 a.m.

TRANSCRIPT OF NON-JURY TRIAL
BEFORE THE HONORABLE RALPH W. NIMMONS, JR.,
UNITED STATES DISTRICT JUDGE

Appearances of Counsel:

For the Plaintiff: Mr. Daniel S. Jacobs
Mr. T. Anthony Quinn
Ms. Gwendolen Fitz-Henley

For Defendant Avatar: Mr. David B. Hird
Ms. Joanne Tsotsos

For Defendant Florida Cities: Mr. Gary H. Baise
Mr. Alexander M. Bullock
Mr. Lance High
Mr. Don G. Scroggin

Reported by: Dennis Miracle
Official Court Reporter

PROCEEDINGS

April 4, 1996

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THE COURT: Morning. All right.

MR. BAISE: Morning.

THE COURT: We have Mr. Acosta, is it?

MR. BAISE: Yes, Mr. Michael Acosta.

THE COURT: On direct examination.

Mr. Baise, you may proceed.

MR. BAISE: Thanks.

DIRECT EXAMINATION CONTINUING

BY MR. BAISE:

Q. Just to repeat the question where we left off last night, Mr. Acosta, because I'm unsure as to whether or not you had an opportunity to answer it before we closed the session for the day; what was your involvement with the Waterway Estates Facility?

A. In late '87, I was the assistant regional engineer. From that point forward in various capacities as helping out generally, getting the permitting through and then once construction started, a much more active role.

Q. Mr. Acosta, I would like to bring to your attention Florida Cities' Trial Exhibit 14-A.

MR. BAISE: Your Honor, this would be a series of photographs?

THE WITNESS: Yes, sir.

BY MR. BAISE:

Q. Do you have photograph Florida Cities' Trial Exhibit 14-A in front of you, Mr. Acosta?

A. Yes.

Q. Can you identify the photograph, Mr. Acosta?

A. Yes.

Q. What is it?

A. It is the Waterway Estates Advanced Wastewater Treatment Plant.

Q. Did you take this photograph, Mr. Acosta?

A. No.

Q. Is this a true and accurate depiction with respect to what is at Waterway Estates discharge into the canal into the Caloosahatchee River?

A. Yes, it is.

Q. Could you please describe the facilities which are in this photograph, Mr. Acosta?

A. Yes. The equalization tank is shown, the two biological treatment units are shown, the digester is shown, the U. V. Disinfectant Facility is shown, the denitrification filters are shown, and the administration building is shown on here.

Q. Is this a depiction of the facility after the construction was completed, Mr. Acosta?

A. Yes, it is.

MR. BAISE: Your Honor --

BY MR. BAISE:

Q. And when was the construction completed on this facility, Mr. Acosta.

A. I didn't hear that.

Q. When was the construction completed on this facility?

A. Construction was completed in 1992, April of 1992.

MR. BAISE: Your Honor, I would move this into evidence.

THE COURT: It'll be received.

BY MR. BAISE:

Q. Mr. Acosta, I direct your attention to Florida Cities' Trial Exhibit 14-C.

MR. BAISE: Your Honor, probably have a complete set, but some of them are just duplicates. In order to save time, I'm going to go through the most important ones.

BY MR. BAISE:

Q. Do you have 14-C in front of you, Mr. Acosta?

A. Yes, sir.

Q. Can you identify this photograph?

A. It appears to be the back right corner of the property at the Waterway Estates Advanced Wastewater Treatment Facility.

Q. Can you be more specific as to the right back corner, I believe you said?

A. Correct. Right back corner being the southwest corner of

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the property.
Q. And what does this photograph depict?
A. It's the property line between Florida Cities, the canal and the adjacent marina.
Q. Does this photograph accurately represent the southwest back corner of the facility at Waterway Estates discharge into the canal, Mr. Acosta?
A. Yes.
MR. BAISE: Your Honor, I would move Florida Cities' 14-C into evidence.
MR. QUINN: Your Honor, I don't think I have an objection. I want to make sure the file copy is not purple like my copy is.
THE COURT: Purple?
MR. QUINN: Yeah. Mine is sort of purple. I wasn't sure if the exhibit that is going to be entered into evidence is purple.
THE COURT: Well, where is the --
MR. BAISE: Mine has a slightly purple tinge to it as well.
THE COURT: Do I have -- do I have the original here?
MR. BAISE: You may have the original.
THE COURT: Is that what is being handed to me or not?
THE PARALEGAL: You have the Court's copy.

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THE COURT: Let me show you what I have got then. I don't know whether that is purple or not.
THE CLERK: Yep, purple.
MR. BAISE: May we approach the bench?
THE COURT: Yes, sir.
MR. QUINN: I think you have got the same color as I do, sir, but I believe Mr. Bullock is going to check to see if the official file copy is the original photograph, in which case I don't think I will have an objection. I want to clarify that for the record.
THE COURT: This is the official exhibit here.
MR. QUINN: Okay.
So then I would object as to the color. This is not a fair and accurate representation of -- this does not appear to be a fair and accurate representation of the relevant scene in this case. I did not interpose that objection in my earlier filings because I thought there would be an original. I thought the purple tinge was something that was just unique to the color copying.
THE COURT: Oh, good.
MR. BAISE: We're not presenting this with respect to trying to move anything in color or algae or anything else.
THE COURT: Okay.
The Court will, since you're concerned about that, Mr. Quinn, the Court will announce that it will disregard the

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purple color and will assume that that was a deficiency in the color processing.
MR. QUINN: Thank you, sir.
THE COURT: All right.
MR. BAISE: And I move --
THE COURT: It'll be received.
MR. BAISE: -- C into evidence.
THE COURT: It'll be received.
BY MR. BAISE:
Q. Mr. Acosta, I direct your attention to Florida Cities' Trial Exhibit Number 14-F as in Frank. Would you please describe this scene, Mr. Acosta?
A. This is a photograph taken, looking southeastward from what appears to be the top of the denitrification filters, shows the U. V. Disinfection Facility in lower left, the canal leading out to the Caloosahatchee River and in the background, the Caloosahatchee River itself.
Q. So this photograph is a true and accurate photograph at the Waterway Estates Facility discharging into the Caloosahatchee River?
A. Yes, it is.
MR. BAISE: Your Honor, I would move 14-F into evidence.
MR. QUINN: Only objection, sir, again is with color.
THE COURT: All right.

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It appears that perhaps then the color processing -- it appears some of the colors appear purple. That probably is not totally accurate, so the Court will disregard that. It'll be otherwise received.
MR. BAISE: It would appear, Your Honor, on most of these, there is this purple on the photographs and certainly we'll stipulate there is a purple tinge that would not normally be there.
THE COURT: All right.
BY MR. BAISE:
Q. Mr. Acosta, I direct your attention to Florida Cities' Trial Exhibit 14-G. You have that in front of you?
A. Yes, I do.
Q. Would you please describe this scene?
A. This again appears to be taken from the denitrification filters. It shows the U. V. Disinfection Facility, the back half of one of the two biological treatment units, the adjacent boat storage marina, and the Caloosahatchee River along with the canal.
Q. Even though the discharge pipe is under water, is there any indication as to how one could tell where the discharge pipe from this facility may be in this photograph and if so, could you identify it?
A. No, not from this photograph.
MR. BAISE: Your Honor, I would move 14-G into

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evidence with the stipulation that we have just discussed.
THE COURT: All right.
It'll be received with that same understanding.
BY MR. BAISE:
Q. Mr. Acosta, I draw your attention to Florida Cities' Trial Exhibit Number 14-H, as in Howard.
A. I have it.
Q. Could you please describe this scene?
A. This is a view of the canal taken from what appears to be the -- adjacent to the gazebo next to the marina. Next to Waterway Estates, you see the high storage boat -- high boat storage on the righthand side, the back half of the biological treatment unit and the canal.
Q. Again, looking at this photograph, is there any marker that would indicate where the discharge pipe might be that you could draw to the Court's attention?
A. I do not see one on this photograph, no.
MR. BAISE: Your Honor I would move 14-H into evidence.
THE COURT: All right.
With the same understanding, the Court will receive 14-H.
BY MR. BAISE:
Q. Mr. Acosta, I draw your attention to Florida Cities' Trial Exhibit Number 14-K, as if kangaroo.
A. I have it.

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Q. Please describe this scene?
A. This again appears to be taken from the back of the boat storage marina, next to the gazebo. It's a view of the exit of the canal and the Caloosahatchee River with the City of Fort Myers on the opposite bank.
Q. Again, is there any marker that would indicate where the pipe discharge into the canal might be in this photograph?
A. No, I do not see one.
MR. BAISE: Your Honor, I would move 14-K into evidence with the stipulation.
THE COURT: All right.
It'll be received with the same understanding as to the purple tinge.
BY MR. BAISE:
Q. And finally, Mr. Acosta, I draw your attention to Florida Cities' Trial Exhibit 14-L. Do you have that in front of you?
A. I do.
Q. Would you please describe this scene and is it a fair and accurate representation?
A. Again, it appears to be taken from the denitrification filters. Shows the U. V. Disinfection Facility, the back half of the biological unit -- of the two biological treatment units, the boat storage area, the canal, the Caloosahatchee River and the City of Fort Myers on the opposite bank and it is a true and accurate depiction of the facilities that are there.

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Q. Is there any indication for or physical item that would suggest to you where the discharge pipe might be coming from the facility in this photograph?
A. The only indication of the pipe exits the back of the U. V. Disinfectant Facility, and then goes underground and subaqueous thereafter.
THE COURT: What --
MR. BAISE: Excuse me, Your Honor.
THE COURT: Where is that you're talking about?
THE WITNESS: The U. V. Disinfection Facility here.
BY MR. BAISE:
Q. Please identify "right here," Mr. Acosta.
A. Right here is the handrailings that you see in the picture, the U. V. Disinfectant Facility is just ahead of that, and the discharge is just there on the other side of that U. V. Disinfection Facility.
THE COURT: All right.
THE WITNESS: That is where the pipe exits the wall and underground subaqueous out.
MR. QUINN: As a point of clarification, are we talking about at the time the photograph was taken or some other point in time or today?
THE COURT: Can you clarify that?
THE WITNESS: At the time the photograph was taken and today, that's as it exists today.

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BY MR. BAISE:
Q. Again, so the record is absolutely clear, Mr. Acosta, the U. V. System stands for what?
A. Ultra violent disinfection.
Q. And is it the white box with the blue screen in the middle of it?
A. No, it's not. That is the sampler. The entire structure is a U. V. Disinfection Chamber.
Q. So the entire structure bracketed by the iron railing fence is presumably painted white with the two blue structures on the left and righthand side, is that the U. V. System?
A. That is correct.
Q. And it has two stand pipes that would appear in the middle of the photograph?
A. Yes, those are the valves.
Q. So, is that the U. V. System there?
A. That whole structure is, yes.
THE COURT: Okay.
Let's move on. You want to offer that?
MR. BAISE: I would move this in evidence.
THE COURT: Be received, with the same understanding.
BY MR. BAISE:
Q. Mr. Acosta, I would draw your attention to Florida Cities' Exhibit 190 which is already in evidence.
A. I have it.

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Q. You have that in front of you?
Mr. Acosta, what is this document?
A. This is the agreement for engineering services between Florida Cities Water Company and Source.
Q. Are you familiar with this document?
A. Yes.
Q. I direct your attention to paragraph three on page 1 marked one of this document. You see paragraph three?
A. Yes, sir.
Q. Could you summarize what paragraph three requires the contractor to undertake?
A. Paragraph three requires the preparation of the drawings, permit applications for the upgrade of the Waterway Estates Facility including the zoning.
Q. And zoning, would you describe what zoning needs be undertaken by the contractor?
A. In this particular case, variance from the zoning had to be acquired in order to build the facility as it exists today. The setbacks were such that they could not be met and include all of the facilities on the site.
Q. Why were you asking the contractor to undertake the zoning work, Mr. Acosta?
A. It is more efficient for the engineering firms to do that work. They have access to the drawings that they're preparing. It's more efficient for them to do it.

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Q. Did Florida Cities and you have staff to undertake the zoning and permit applications in Lee County, Mr. Acosta?
A. We had the staff to do the permitting. We did not have the staff to do the drawings and the design calculations.
Q. When did Source develop drawings and renderings and permit applications for Lee County, Mr. Acosta?
A. The zoning variance was filed in June of 1988.
Q. And why was the zoning variance required to be filed?
A. In order to get a variance from the setbacks.
Q. And what is a setback?
A. A Setback is an amount of land that needs to be left between the edge of a property and the nearest building or structure.
Q. What was Lee County's response to this request for a variance?
A. It was denied in August of '88.
Q. Why was the variance denied in August of 1988, Mr. Acosta?
A. It's not clear why Lee County denied it. We -- Florida Cities appealed that decision. The development order -- exemption to the development order that was filed was also denied because the zoning variance was not in place.
Q. Mr. Acosta, did you help prepare the Waterway Estates timeline that is at your immediate right?
A. Yes.

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Q. Did anyone from Florida Cities help you prepare this document?
A. Yes.
Q. Who were those individuals?
A. Julie Karleskint, primarily.
Q. Mr. Acosta, could you circle August, 1988, Lee County denies development exemption because of no zoning variance. It's the next to the last item on the first column.
A. I need a writing instrument.
Q. Oh, I'm sorry.
(Witness complying.)
What did you do after the zoning variance was denied, Mr. Acosta.
A. It was appealed.
Q. And what happened after the appeal was taken?
A. The zoning variance was ultimately granted.
Q. When was the zoning variance granted?
A. October of '88.
Q. Were there any other permits or zoning orders that the contractor or Florida Cities had to obtain before this project could be constructed?
A. Yes. From Lee County, we still needed a development order or an exemption from the development order.
Q. What is the development order?
A. Development order is a document required by ordinance in

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Lee County that allows you to build on a site. It's typically done for all site development with the exception of a single family residential house.
Q. What impact did the delay of these orders have on the engineers drawing up plans and specifications for this facility?
A. The drawings could not be completed, finalized until the zoning and development orders were in place. All the structures could not be located appropriately.
Q. When did Lee County eventually grant Florida Cities and it's engineer a development order?
A. In April of '89.
Q. 1989?
A. Yes, sir.
Q. What was the impact of Lee County -- strike that question.
Were there any other permits that Lee County needed to grant Florida Cities and its engineer before final plans and specifications could be developed by the engineer?
A. Once the development order was or the exemption to the development order was issued, at that point, no.
Q. Was there a State level of permitting necessary for this facility?
A. Yes.
Q. Why was that State level of permitting not concurrent

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with the permitting program in Lee County?
A. The construction permit for the facility could not be completed until the plans were able to be finalized and that did not occur until Lee County issued their exemption to the development order and the zoning variance.
Q. So when did the engineering firm and Florida Cities initiate their efforts to work with the State of Florida's Department of Environmental Protection or Regulation?
A. May of 1989.
THE COURT: What year?
THE WITNESS: '89. Excuse me, Your Honor.
THE COURT: All right.
BY MR. BAISE:
Q. What approvals did the State of Florida have to grant Florida Cities and its engineer for this project to be initiated?
A. The FDER at the time needed to issue a construction permit for the plant itself and a dredge and fill permit for the outfall line.
Q. The State of Florida had to grant a dredge and fill permit?
A. Yes.
Q. What were the State of Florida's concerns with respect to this facility, Mr. Acosta?
A. The construction permit application must involve all the

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drawings of the final drawings, design calculations to insure the regulator, the environmental regulators that they have reasonable assurance that the facility will meet the design parameters and the effluent limitations that are set out.
Q. What efforts did Florida Cities make to speed up this process of getting Florida State approval for this project?
A. There were meetings with FDER to facilitate the permitting. There is not a terribly lot that the applicant can do once the permit has been filed.
Q. When did these efforts take place, Mr. Acosta?
A. Throughout that, from May through that summer.
Q. That summer being what?
A. The summer of 1989.
Q. Florida Cities had its final plans and specifications from the engineering firm, why didn't it just start construction?
A. I don't believe that based on my experience that it's legal to start construction without having that construction permit from the State in place.
MR. QUINN: Objection, move to strike. It calls for a legal conclusion.
THE COURT: Well --
MR. BAISE: I didn't ask him for a legal conclusion.
THE COURT: I think it may have some relevance as to the state of mind or motivation of the Defendant, rather than

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attempting to elicit a legal conclusion, so I'll overrule the objection.
BY MR. BAISE:
Q. Did a Dr. Abdul Ahmadi ever review the project as it was prepared by Source Engineering, Mr. Acosta?
A. Yes, he did.
Q. Do you know what issues Dr. Ahmadi raised with regard to the Florida Cities' project?
A. I believe that Dr. Ahmadi was initially concerned about the aeration process, the extended duration process. He was not convinced that that process would meet AWT standards.
Q. Were there other individuals at the State involved in this project who expressed concerns about what this project was about?
A. Not that I'm aware of.
Q. When did the State of Florida grants its construction permit for this facility, Mr. Acosta?
A. Sometime ten months later, which would put it in March of '90.
Q. Mr. Acosta, I direct your attention to Florida Cities' Trial Exhibit Number 41.
THE COURT: I've got 41. Is this the Defendant's Exhibit?
MR. BAISE: Yes. You have it, Your Honor?
THE COURT: Yes.

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BY MR. BAISE:
Q. Are you familiar with this document, Mr. Acosta?
A. Yes, sir.
Q. Is this the document you were just referring to?
A. This is the construction permit.
Q. Please describe this document and the date.
A. The last part of that question?
Q. And the date.
A. The date. The date of issue was March 1st, 1990, expiration, November 1st, 1990. And it is the construction permit for the Waterway Estates Advanced Wastewater Treatment Plant's upgrade.
Q. Why couldn't this permit have been obtained before March 1 of 1990?
A. Again, the permit could not have been filed for until the final plans were in place. Those could not have been done until the zoning and the exemption to the development orders or the development order itself were granted by Lee County.
MR. BAISE: Your Honor, I would move Defendants' 41 into evidence.
THE COURT: It'll be received.
BY MR. BAISE:
Q. Mr. Acosta, I directing your attention to the first paragraph of the first page and would you read that paragraph into the record, please?

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A. Enclosed is Permit Number DC36-165119 to construct a modification to the subject sewerage treatment facility issued pursuant to Section 403.087, Florida Statutes.
Q. Thank you.
Mr. Acosta, I direct your attention to Defendants' Trial Exhibit Number 36.
A. I have it.
Q. Are you familiar with this letter of April 19, 1989, Mr. Acosta?
A. Yes.
Q. Who is Mr. Edwards?
A. Mr. Edwards was the director of management, district management at the South District of FDEP.
Q. And who is Mr. Robert H. French who signed the letter?
A. Mr. French was senior vice president for Florida Cities at the time.
Q. Did you work with Mr. French?
A. Yes.
Q. Were you aware of the activities going on at the time that Mr. French is writing about on April 19, 1989?
A. Yes, I was generally aware of those.
MR. BAISE: Your Honor, I would move Defendants' Exhibit Number 36 into evidence at this time.
MR. QUINN: Your Honor, I would -- United States objects on the basis of hearsay. The letter was written by

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Mr. French, who is not here, Mr. Edwards, who is not here. There are a number of other attachments which are hearsay and appear to be hearsay within hearsay because they relate to requests that were made.
MR. BAISE: Your Honor, this is a business record from their files. I believe he testified he was aware of the events that occurred at the time. It is Florida Cities' normal practice to keep these records as part of their normal record-keeping process. Mr. French is in Australia and Mr. Edwards is retired.
MR. QUINN: Your Honor, the United States submits that an improper basis and foundation has been laid to meet the exemption of the hearsay rule through this witness and the United States submits that it can't be met through this witness either.
MR. BAISE: Mr. -- excuse me.
THE COURT: Well, it hasn't been met yet.
BY MR. BAISE:
Q. Mr. Acosta, was this letter recording the events accurately, in your opinion, at the time of these events?
A. Yes.
Q. Was this record made from information transmitted by a person with whom you have knowledge of, Mr. Acosta?
A. Can you repeat that?
Q. Yes.

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Was this letter made by an individual and with information that you were aware of at the time that the information was generated?
A. Yes. I was generally aware of the information that is contained in this letter.
Q. And were letters such as this one dated April 19, 1989, kept in the course of regularly conducted business activity of Florida Cities?
A. Yes.
Q. Was it regular practice of Florida Cities and Mr. French and yourself to make records of your activities?
A. Yes.
Q. And does this report accurately reflect the activities that took place at the time and described on April 19, 1989?
A. Yes.
Q. You have any doubt to these or any reason to doubt the source and circumstances of trustworthiness of this document?
A. No, I do not.
THE COURT: Where is this letter been during the interim between April 19, 1989 and the present, or a copy of it? The original, of course, purportedly went to DER.
THE WITNESS: Letters such as this generally are kept in two ways; one, in the reading file of the individual who generates it, and secondly, in the project file.
THE COURT: All right, just a moment.

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(Brief Pause.)
I'll overrule the objection. I'll receive it as Exhibit 36.
BY MR. BAISE:
Q. Mr. Acosta, I direct your attention to the second full paragraph of the letter dated April 19, 1989, to Mr. Edwards. Sentence – paragraph beginning with the word "while."
A. Yes, sir.
Q. Would you read that paragraph, please?
A. Yes, sir.
While Florida Cities Water Company made every effort, both directly and through legal and engineering consultants, to expeditiously obtain the required zoning and development –
THE COURT: Slow down a little bit, please.
THE WITNESS: Okay.
Excuse me. -- required zoning and development order permits from Lee County.
BY MR. BAISE:
Q. Excuse me. Could you please start over so the record will be clear for the Reporter?
A. Yes, sir.
While Florida Cities Water Company made every effort, both directly and through legal and engineering consultants, to expeditiously obtain the required zoning and development order permits from Lee County, it was not until April 12th, 1989,

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that the final exemptions and approvals were received.
Between August 4, 1988 and August 12th, 1989, there were nearly continuous meetings and correspondence with a variety of Lee County officials in the Planning and Zoning Department. The revision of the plans associated with attempts to comply with all of the often conflicting requirements of Lee County staff substantially delayed the project to the point where we are behind schedule for the milestones specified in the consent order and the temporary operating permit.
Q. Mr. Acosta, I direct your attention to page two of the letter signed by Mr. French, second paragraph. The page not marked two, but it's the second physical page attached to Number 36.
A. Yes.
Q. Beginning with the words, "as you're well aware," would you please read that paragraph into the record?
A. Yes.
As you are well aware, Florida Cities Water Company does not completely control the activities and the achievement of this accelerated compliance schedule. The administrative process of issuing a construction permit is not completely determined by Florida Cities or FDER. It is our intention to utilize the strongest possible language to insure the contractors bid on the plant modifications are able to complete construction in the specified time to permit the accelerated

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completion dates contained in the proposal.
While the consent order contains language that allows for an extension of the completion date for circumstances beyond the control -- beyond and circumstances beyond the control are in parentheses.
THE COURT: In quotes.
THE WITNESS: In quotes, I'm sorry.
-- of Florida Cities Water Company, it is our desire to comply with the date specified and have modified facilities certified in compliance by November 1st, 1990.
BY MR. BAISE:
Q. Thank you, Mr. Acosta.
Is there a sequence of events attached to this document which lays out for the State of Florida what Florida Cities has been undertaking since March of 1987?
A. Yes, there is.
Q. Thank you.
Mr. Acosta, I direct your -- excuse me.
You have testified that the State of Florida issued its permit to allow construction to begin on this project and what month and what year?
A. March, 1990.
Q. Would you take your pen and please mark in the 1990 column under March, FDER issues construction permit for Waterway Estates and wastewater treatment plant and outfall

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line. Thank you.
(Witness complying.)
Mr. Acosta, I direct your attention to Florida Cities' Trial Exhibit Number 37. Do you have that document in front of you, Mr. Acosta?
THE COURT: Yes, sir.
MR. QUINN: Your Honor, at this point, we would request that the testimony regarding Exhibit Number 36 be stricken, in particular the proposed -- the sequence of events which was attached.
In addition, the United States would point out that there is a stamp on the bottom of page 36 which indicates this document in fact came from the records of the Florida DER and not from the records of Florida Cities Water Company and therefore, the hearsay exemption could not have been met, sir.
MR. BAISE: Which page are you referring to, counsel?
MR. QUINN: Excuse me, sir. I'm referring to the first page. There is a stamp dated April 21, '89, DER, South Florida District.
Sir, I have an additional basis, if Your Honor would like to hear that. That is hearsay, one, hearsay as to the attachments to the letter as well as these appear to be self-serving statements by people who aren't here.
MR. BAISE: Is counsel raising an authenticity argument with respect to this document?

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MR. QUINN: No, no, sir. I'm raising, Your Honor -- no, Your Honor, I'm not. I'm raising a hearsay objection. The document is probably authentic and that has nothing to do with any of my objections.
THE COURT: Well --
MR. BAISE: Do you want me to question -- excuse me.
THE COURT: All right.
Now it seems to me that -- that your observation regarding the file stamp showing received April 21, 1989, South Florida District, that would be an objection that seems to go to identification authentication.
MR. QUINN: Your Honor, my objection -- actually, that goes to the -- if it's within the exemption under the hearsay exception, you have to show that the document came from his records. I don't believe -- I did not intend that to be an authenticity objection, but merely to go to the basis of their -- Florida Cities' attempt to assert this document. If it's within one of the narrow exceptions to the hearsay rule for that objection, I object. I'm not saying it's not authentic 'cause it's a document that apparently came from FDER, but I object to using it in this manner because it's hearsay.
MR. BAISE: May I respond, Your Honor?
THE COURT: Yes, sir.
MR. BAISE: By virtue of the fact of the official stamp, South Florida District, it seems to me to further

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authenticate the veracity and authenticity of this document. Mr. Acosta already testified, it seems to me, that there certainly was a present sense impression generated at the time by Mr. French, he's familiar with all of the events which occurred. And he's attested to the validity of those events occurring.

If we follow counsel's suggestion that this document be considered hearsay, then it makes it almost improbable to get regularly recorded business records into evidence when parties are unavailable. And there's no reason to believe, as Mr. Acosta has said, that that document is in any way untrustworthy, and therefore, and with respect to the calendar of events which are attached to the letter, Mr. Acosta -- I didn't ask him a question about the calendar of events. If the Court desires, I will do so.

THE COURT: Just a minute.

(Brief Pause.)

MR. BAISE: And because of the stamp on it, Your Honor, we can certainly argue the other exception to the hearsay rule, that it certainly indicates it is a public record or report that comes from a public office or agency.

THE COURT: Well, I don't think that's a public record or a report under 803.8. I don't think the fact that the South Florida District of DER puts a received stamp on a document that it has received qualifies that under the criteria

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set forth for public records and reports which is part of the hearsay exception set forth in Rule 803, so I don't think that helps you any. Just a moment.

(Brief Pause.)

MR. BAISE: Your Honor, when I was having him testify, I did not have him testify to the first paragraph where it says, this sequence of events attached to this letter. So, I don't know whether that makes any difference in your reviewing this or not. I'm obviously relying on --

THE COURT: Sir?

MR. BAISE: I'm relying on 803.6 is the rule.

THE COURT: Yes, I'm looking for that.

MR. BAISE: Someone have 803.6?

MR. HIRD: Your Honor, would you like a copy of --

THE COURT: No, I've got 803.6. I've been looking at that.

MR. QUINN: Your Honor, based on counsel's representation that he drew no testimony from the attachments, we would move to sever those pages from the exhibit and we would still renew our objection as to the exhibit proper.

MR. BAISE: I would object to that because then we would not have a complete document.

THE COURT: Okay.

Well, I'll tell you when I want to hear from you any further.

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(Brief Pause.)

Okay.

This witness has not qualified this document for admission into evidence under Rule 803.6, and it hasn't been proferred as a qualified document under any other provision of the ruling other than 803.8, and for the reasons I mentioned earlier, that clearly does not satisfy the criteria set forth in 8 as a public record and report.

The Court will recede from its previous ruling and will sustain the objection and not receive 36 and the Court will strike the testimony of the witness insofar as his publishing the contents of that document.

Proceed.

BY MR. BAISE:

Q. Mr. Acosta, I draw your attention to a document dated July 14, 1989, Defendants' Exhibit 37.

A. I have it.

Q. Are you familiar with this document, Mr. Acosta?

A. Yes.

Q. And who is Mr. French?

A. Again, senior vice president of Florida Cities at the time.

Q. And were you aware of the letter at the time it was written?

A. Only generally.

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THE COURT: What was the question, I couldn't hear you.

MR. BAISE: Were you familiar with this letter at the time it was written?

THE COURT: What was your answer?

THE WITNESS: Only generally.

BY MR. BAISE:

Q. Were you aware Mr. French sent a letter to Ms. Pricilla Oliver at the time, USEPA?

A. No.

Q. Do you know who Ms. Pricilla Oliver is?

A. No, I do not.

Q. What is this document regarding?

A. It regards that all the construction permits have been applied for and that we -- that Florida Cities intends to accelerate the schedule to comply by the November 1st, 1990 compliance date.

MR. BAISE: Your Honor, I would move this document into evidence.

THE COURT: Be received.

BY MR. BAISE:

Q. Mr. Acosta, would you read the first full paragraph in this letter to Ms. Oliver at USEPA?

A. Pursuant to your letter of June 21st, 1989, Florida Cities Water Company has applied for all construction permits

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associated with the upgraded above referenced facility.
Additionally, we have applied for an NPDES Permit based on our proposed upgraded AWT facility. We have received bid proposals for the construction of the outfall line of the Waterway Estates Plant to the six foot contour of the Caloosahatchee River and anticipate the completion of a construction bid package which can be advertised for bids on the proposed upgrade to the referenced facility by July 21st, 1989.
Upon issuance of all appropriate construction permits, construction will begin with the facility to be projected to be served by in compliance by November 1st, 1990.
Q. Did there come a time when USEPA did issue a NPDES Permit to the Waterway Estates Facility, Mr. Acosta?
A. I believe so.
Q. I direct your attention to Florida Cities' Exhibit 196. Do you have that document in front of you, Mr. Acosta?
A. Yes, I do.
Q. Please describe this document for the record?
A. It is the NPDES Permit for the Waterway Estates Facility.
Q. And to whom is this letter written?
A. Robert French.
Q. And who is the letter from?
A. It's on page 2 -- I'm sorry. Al J. Smith.
THE COURT: Did you say Al Smith?

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THE WITNESS: Yes.
THE COURT: Of EPA?
THE WITNESS: Yes, sir.
BY MR. BAISE:
Q. EPA, Region IV?
A. That's the letterhead.
Q. Thank you.
And Mr. Acosta, would you turn to the seventh page of this document, that page starting with POTW permit number. Do you find that page?
A. I have it.
Q. Please describe this page for the record, Mr. Acosta.
A. It is the authorization to discharge under the NPDES Permit into the Caloosahatchee River.
Q. And what are the receiving waters named in this permit, Mr. Acosta?
A. The Caloosahatchee River.
Q. And who is the permit signed by?
A. Al Smith.
Q. And the date?
A. September 29, 1989.
MR. BAISE: Your Honor, I would move this permit into evidence, Florida Cities' Exhibit Number 196.
THE COURT: It'll be received.
BY MR. BAISE:

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Q. Back to permitting, Mr. Acosta, were there any Federal permits in addition to the one we have just reviewed that were required for constructing this facility?
A. Yes.
Q. What were they?
A. An Army Corps of Engineers dredge and fill permit.
Q. Please describe an Army Corps of Engineers dredge and fill permit?
A. In order to excavate in waters of the U. S. or bury a pipe, in this case, the Army Corps of Engineers dredge and fill permit must be applied for and received.
Q. When did Florida Cities apply for an Army Corps of Engineers dredge and fill permit?
A. In April of 1989.
Q. And Mr. Acosta, would you take your pen and circle under April of 1989, Florida Cities applies for an FDER and U. S. Army Corps of Engineers dredge and fill permit?
(Witness complying.)
Why was that permit applied for in April of 1989, Mr. Acosta?
A. The Lee County exemption to the development order had just been received and that showed the outfall line and its configuration out through the canal and actually into the Caloosahatchee River.
Q. Why couldn't you have filed for the Army Corps of

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Engineers' permit back in say January of 1987?
A. The final location of the outfall line was not determined until the exemption to the development order was received. It could have changed at any point up to that time.
Q. So, April of 1989 was the first time Florida Cities could apply for this permit?
A. Yes.
Q. What is the process by which the Army Corps of Engineers issues its permit, if you know?
A. I have -- my knowledge is somewhat sketchy. There is a public notice and then the purpose.
Q. Was there a public notice in this case?
A. Yes.
Q. Anyone comment?
A. Not to my knowledge.
Q. Did EPA comment?
A. I don't know.
Q. When was this permit finally issued by the Army Corps of Engineers, Mr. Acosta?
A. A little over twelve months later in April of 1990.
Q. Would you circle under the column, 1990, U. S. Army Corps of Engineers permitted in April?
(Witness complying.)
What did Florida Cities do next after receiving or were there any other permits necessary, Mr. Acosta, before this

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project could proceed?
A. At this point, no. Some other permitting needed to be obtained, but that was to come later when a contractor was onboard.
Q. So did construction start immediately upon receiving the Corps of Engineers' permit, Mr. Acosta?
A. No.
Q. Why not?
A. The bids had just been received for the upgrade to the wastewater treatment plant and they were being evaluated.
Q. How long did it take to evaluate the bids, Mr. Acosta?
A. Notice to proceed was issued in August of 1990 to the contractor.
Q. Why did it take from April of 1990 until August of 1990 to issue a notice to proceed?
A. In a project this complex and intricate as this one, Florida Cities routinely does value engineering to insure the best possible product is being put on line for the ratepayers of Florida Cities Water Company.
Q. But why didn't you start construction immediately?
A. To insure that the best possible product was put out there at the lowest possible cost for the ratepayers of Lee County.
Q. I direct your attention to a document dated May 10th, 1990, and it is Florida Cities' Exhibit 44. You have Florida

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Cities' Exhibit 44 in front of you, Mr. Acosta?
A. Yes.
Q. What is this document?
A. It is a monthly update that was routinely done to EPA regarding the activities of the month just past.
Q. And who is Mr. Williamson?
A. Mr. Williamson was the division manager of the Lee County Division at the time?
Q. And who is the addressee, Mr. Marlar?
A. He is the chief of the facility's performance branch of the management division of the U. S. Environmental Protection Agency, Region IV.
Q. This letter, at least the copy we have, is a little hard to read. Can you summarize what the two paragraphs say, Mr. Acosta?
A. Basically summarizes that the Army Corps of Engineers' permit was received in April of 1990, and that the bids to the modification and improvements to the treatment plant were also received in April of 1990.
MR. BAISE: I would move Defendants' 44 into evidence, Your Honor.
THE COURT: Be received.
BY MR. BAISE:
Q. So, in May of 1990, you were advising EPA of the status of what was occurring. How long did it take to undertake the

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value engineering that you just mentioned a moment ago, Mr. Acosta?
A. From April to early August, when the notice of award and ultimately notice to proceed were issued.
Q. I direct your attention to Defendants' Exhibit Number 46. Do you have this document in front of you?
A. Yes.
Q. What is it?
A. It is a letter from Mr. James Elder to Mr. Kenneth Kwan of USEPA.
Q. And can you describe what the document tells EPA?
A. That there's been unforeseen delays in the zoning and permitting through Lee County, delays in obtaining the Army Corps of Engineers' permit, and that the construction -- the cost of the construction for the project is being negotiated with the contractor.
Q. Is there any indication as to when construction may begin in this letter?
A. I do not see one, no. Oh, I change that. He requests a new construction -- I can't read it.
Q. I asked you whether or not there was a construction date mentioned.
A. Yes.
Q. And what was that date?
A. August 1st, 1990.

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MR. BAISE: Your Honor, I would move Defendants' Exhibit Number 46 into evidence.
THE COURT: Be received.
BY MR. BAISE:
Q. Mr. Acosta, I direct your attention to Defendants' Exhibit Number 47. Do you have that in front of you?
A. Yes.
Q. Please describe this document for the record?
A. This is the notice to proceed to Cardinal Contractors.
Q. Who was Cardinal Contractors?
A. They were the general contractor for the upgrade of the wastewater treatment plant.
Q. Is the hiring of Cardinal Contractors the result of a review that was undertaken from April until August?
A. Yes.
Q. Who is Mr. Elder?
A. Mr. Elder was the manager of engineering and construction for Florida Cities Water Company at the time.
Q. And who is Mr. Bill McDevitt?
A. Mr. McDevitt is the director of Cardinal Contractors.
Q. And who was cc'd on this letter?
A. Stone and Webster and me.
Q. You're the M. Acosta that is mentioned cc on this letter?
A. Correct.
MR. BAISE: Your Honor, I would move Defendants' 47

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into evidence.
THE COURT: It will be received.
BY MR. BAISE:
Q. Mr. Acosta, I direct your attention to Defendants' Exhibit Number 50. Do you have that document in front of you?
A. Yes.
Q. What is it?
A. It is another one of the, in this case, bi-monthly update to EPA.
Q. Why was Florida Cities keeping EPA apprised of its progress, Mr. Acosta?
A. In order that they would know exactly what was going on throughout the project.
Q. And who is Mr. Marlar?
A. He's the chief of the facilities' performance branch, water management Division, USEPA, Region IV.
Q. Larry Griggs?
A. Assistant regional manager and division manager of Lee County at the time.
MR. BAISE: Your Honor, I move Defendants' Exhibit Number 50 into evidence.
THE COURT: It will be received.
BY MR. BAISE:
Q. Mr. Acosta, would you read those two paragraphs in the letter?

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THE COURT: When you say "Lee County," you meant the Lee County Division of Florida Cities?
THE WITNESS: Correct.
BY MR. BAISE:
Q. Would you read those two paragraphs that were sent to Mr. Marlar at EPA on October 22, 1990?
A. Yes.
As you are aware, during August, September 1990, negotiations continued with the apparent low bidder on the Waterway Estates Wastewater Treatment Plant's modification project. These negotiations resulted in an issuance of a notice of award to Cardinal Contractors, Inc. The contractor applied for the Lee County building permit, but without success. This building permit is the only holdup at present, however, the contractor has begun to mobilize to the site in preparation for construction.
Numerous shop drawings have been received and approved so the contractor can begin ordering materials.
Q. Could you read the last sentence again? I believe you did not quote it accurately Mr. Acosta.
A. Numerous shops submittals have been received and approved so that the contractor can begin ordering materials.
Q. Thank you.
MR. BAISE: Excuse me, one moment, Your Honor.
(Brief Pause.)

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BY MR. BAISE:
Q. So when did construction actually start on this project, Mr. Acosta?
A. The contractor did some limited stuff in the October, November area, but actual construction didn't start until after the building permit was issued by Lee County in December of 1990.
Q. So why did this project need a building permit from Lee County since prior permits had already been granted on this project?
A. Once the contractor is aboard, he must apply for a building permit for all the structures on the site. That cannot be obtained by anybody but a licensed general contractor.
Q. Why didn't the contractor start building on August 1 as soon as he was given the notice to proceed?
A. He had to obtain the building permit among other things.
Q. As far as you know, is that a requirement?
A. Yes.
Q. So construction began in what month, what year?
A. In earnest, construction began in January of 1991, after the building permit was secured in late December.
Q. And how long did it take to construct the outfall line?
A. Approximately --
Q. How long did it take to construct the outfall line once

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the permit was granted by Lee County?
A. The outfall line took six months to build.
Q. How long did it take to build the AWT facility?
A. It was completed in April of 1992, so approximately sixteen months.
Q. How long did it take the Army Corps of Engineers to grant this facility the permit, Mr. Acosta?
A. Twelve months.
Q. And how long did it take the State of Florida to grant permits to this facility, Mr. Acosta?
A. Ten months.
Q. And how long did it take Lee County to grant permits to this facility, Mr. Acosta?
A. The exemption and zoning variance were from June of 1988 through April of 1989, so ten months there, and then a three month window to issue the building permit.
Q. Thank you.
Mr. Acosta, I direct your attention to Florida Cities' Exhibit Number 51.
A. I have it.
Q. Please describe this document for the record, Mr. Acosta.
A. The document extends the compliance date to September 1st, 1992, by FDER.
Q. And what are the attachments to the letter of October 30, 1990, Mr. Acosta?

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A. They appear to be the construction permit for the Waterway Estates.
Q. Issued when?
A. March 1st, 1990.
MR. BAISE: Your Honor, this document is already in evidence.
BY MR. BAISE:
Q. Would you read the three paragraphs on page 1 of this letter of October 30, 1990, Mr. Acosta?
A. Yes.
This acknowledges receipt of your correspondence dated October 25, 1990, requesting an extension for the above referenced project. Please be advised that the subject permit is extended until September 1st, 1992. This letter must be attached to the permit number DC36-165119 and becomes part of that permit. All conditions of the permit shall remain the same.
Q. Why did this permit need to be extended until September 1, 1992, Mr. Acosta?
A. Because of the delays in obtaining the permitting through the Corps and through Lee County.
Q. Wasn't there anything you or the contractor could do to speed up the permitting at the Corps of Engineers?
A. No.
Q. Is there anything you could do to speed up the permitting

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from the Florida Department of Environmental Regulation?
A. No.
Q. Why not?
A. It is largely out of the applicant's hands once those applications are submitted. You can make phone calls to the people who are reviewing the permit and that is about it.
Q. Did you in your position make any phone calls or you know of anyone who did?
A. I did not in my position.
Q. Do you know of anyone who did?
A. I believe that Mr. French and Mr. Elder made numerous phone calls.
Q. Mr. Acosta, I direct your attention to Defendants' Exhibit Number 53. Do you have that document in front of you?
A. Yes, I do.
Q. Please describe this document and its date for the record?
A. It is dated November 28th, 1990, it is another summary to Mr. Marlar, of USEPA, Region IV, from Mr. Griggs, and it states a notice of award and a notice of commencement have been given to the Cardinal Construction and that a building permit is in the process of being obtained.
Q. Who is Mr. Griggs?
A. Mr. Griggs was the assistant regional manager and division manager of Florida Cities Water Company, the Lee

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County Division.
Q. And Mr. Marlar is with EPA?
A. Yes, sir.
MR. BAISE: Your Honor, I'd move Defendants' Exhibit 53 into evidence.
THE COURT: Be received.
BY MR. BAISE:
Q. Would you read the last paragraph of the letter dated November 28th, 1990, Mr. Acosta?
A. The building permit is being processed by the Lee County Building Department. Approval by the County has been issued with the exception of the control building which is presently being approved. Also note that the shop drawings are being processed so the contractor can order materials accordingly.
Q. So why couldn't Florida Cities start building the pipeline and the other buildings with the exception of the control building, Mr. Acosta, in November of 1990?
A. The building permit still was not in hand. The other portions of the project had been approved by the building department, but a permit had not been issued.
Q. Mr. Acosta, I direct your attention to Florida Cities Exhibit 54. Do you have that document in front of you?
A. Yes, sir, I do.
Q. Describe this document and its date?
A. It's dated December 11, 1990, the letter is to Mr. Marlar

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of USEPA from Mr. Jack Tompkins, and it requests an extension to September 1st, 1992, to coincide with the extension granted by FDER.
MR. BAISE: Your Honor, I would move 54 into evidence.
THE COURT: It'll be received.
BY MR. BAISE:
Q. Would you read both of those paragraphs into the record, Mr. Acosta?
A. Yes.
Florida Cities Water Company is currently operating under the reference NPDES Permit and administrative order. Due to delays with the construction of our advanced wastewater treatment facility, Florida Cities Water Company has entered into negotiations with the Florida Department of Environmental Regulation in order to arrive at a mutually agreed upon date for completion of this construction.
As a result of these negotiations, Florida Cities Water Company and the FDER have recently concluded an executed and agreed order which provides for certain completion dates for the subject facility. Enclosed is a copy of this agreement.
Q. Please slow down just a little bit.
A. Okay.
Florida Cities Water Company respectfully requests that EPA Administrative Order Number 89- 109 be modified to reflect

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these agreed dates. Specifically, we request that paragraph one of the order be changed to indicate that substantial completion will be achieved September 1st, 1992, and that the facility will comply with the NPDES Permit requirements at the permitted location on November 1st, 1992.
Q. When was the facility known as the AWT facility actually completed, Mr. Acosta?
A. April, 1992.
Q. To your knowledge, did EPA ever respond to this letter?
A. Not to my knowledge, no.
Q. To your knowledge, was the Florida Cities' Water Company ever granted an extension to November 1, 1992, to complete the project?
A. By EPA?
Q. Yes.
A. Not to my knowledge, no.
Q. Mr. Acosta, I draw your attention to Defendants' Exhibit Number 55. Do you have that in front of you?
A. Yes, I do.
Q. Please describe this document and its date?
A. It is dated December 18th, 1990, written to Mr. Marlar of USEPA by Mr. Griggs,.
MR. BAISE: Your Honor, I would move this document into evidence. It's another progress report.
THE COURT: It will be received.

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BY MR. BAISE:
Q. Would you read the last paragraph of this letter dated December 18th, 1990, Mr. Acosta?
A. The Lee County building permit has been issued by the Lee County Building Department. Shop drawings are being processed. The contractor can order materials and equipment accordingly.
Q. Again why was Florida Cities keeping Mr. Marlar and these other EPA officials apprised of what was occurring in this facility?
A. We were just keeping them informed of all that was going on in regards to the upgrade of the facility.
Q. Was there anything you could have done at Florida Cities or you personally could have done to speed up this Lee County building permit process?
A. No.
Q. Why not?
A. Again, once you file the application or once a contractor files the application, it is in the hands of the building department and you can only respond to any questions they might have.
MR. BAISE: I have no further questions, Your Honor.
THE COURT: Okay.
Mr. Hird.
MR. HIRD: Thank you, Your Honor.
CROSS EXAMINATION

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BY MR. HIRD:
Q. Good morning, Mr. Acosta.
A. Good morning.
Q. You described this morning and yesterday evening the process of designing and building the upgrade of the Waterway Estates Plant to AWT and the outfall, is that correct?
A. That's correct.
Q. And you were intimately involved with the process at each stage?
A. By and large, yes.
Q. Did you ever discuss any of the steps of the process with Leon Levy?
A. No.
Q. Did you ever discuss them with Peter Sharp?
A. No.
Q. Did you ever discuss any steps in the process with John Sladkus?
A. No.
Q. Did you ever discuss any steps in the process with Lawrence Wilkov?
A. No.
Q. Did you ever communicate in any way with those individuals about the process?
A. No.
Q. In the course of this process, where your activities

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micro-managed by Peter Sharp?
A. No.
Q. Have you ever met Mr. Sharp?
A. No.
MR. HIRD: Thank you very much.
THE COURT: All right.
Mr. Quinn.
Just a moment.
(Brief Pause.)
All right, Mr. Quinn.
MR. QUINN: Thank you sir.
CROSS EXAMINATION
BY MR. QUINN:
Morning, Mr. Acosta. My name is Tony Quinn.
MR. QUINN: Your Honor at this time, I'd like Mr. Moore to remove the chart, please.
THE COURT: Okay.
BY MR. QUINN:
Q. Mr. Acosta, just so I'm clear, to whom did you report at Florida Cities in the 1990 timeframe?
A. 1990 itself?
Q. Yes.
A. In 1990, I was the assistant regional engineer and had reporting responsibilities to the regional manager, assistant regional manager and to the corporate office in Sarasota which

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is primarily entailed the manager of engineering construction.
Q. And when you say corporate office, you mean Florida Cities Water Company's Corporate office?
A. Yes, in Sarasota.
Q. Thank you.
Sir, in your experience, zoning variances are routinely applied for and granted, aren't they?
A. No.
Q. Zoning variances are not routinely applied for?
A. Zoning variances are routinely applied for, not routinely granted.
Q. Sir, in your experience, how many zoning variance requests have you seen?
A. In my experience at Florida Cities, three.
Q. Sir, zoning variance requests can be applied for at any time, isn't that correct?
A. No.
Q. Zoning variance requests can be filed prior to the actual construction beginning, isn't that correct?
A. Yes.
Q. In fact, it must be, isn't that correct?
A. If a zoning variance is required, it must be.
Q. Let me ask you, if a zoning variance is required, a zoning variance request can be applied for well in advance of the actual construction date, isn't that correct?

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A. Yes.
Q. Sir, and in your experience, building permits are routinely applied for, too, isn't that correct?
A. Yes.
Q. And building permits are routinely granted?
A. By and large.
Q. And construction permits are routinely applied for, too, isn't that correct, sir?
A. From which agency?
Q. From Lee County?
A. Lee County did not issue the construction permit.
Q. Who issued the construction permit with regard to Waterway Estates?
A. FDER.
Q. And so let me ask my question again. Construction permits are routinely applied for to FDER, isn't that correct?
A. Correct.
Q. Sir, and Florida dredge and fill permits are routinely applied for, isn't that correct?
A. Yes.
Q. And they're also routinely received, aren't they?
A. Yes.
Q. And the Army Corps of Engineers dredge and fill permits are routinely applied for, aren't they, sir?
A. Yes.

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Q. Sir, aren't delays in permitting common?
A. That's been my experience.
Q. Sir, couldn't the construction permits, the Florida dredge and fill permits, the Army Corps of Engineers permits have been avoided simply if Florida Cities Water Company had tied the Waterway Estates Plant into the North Fort Myers Utility?
A. No, I don't believe that all of those could have been eliminated.
Q. Sir, how about this. Could the Florida dredge and fill permit have been eliminated if Waterway Estates had tied into the North Fort Myers Utility?
A. Not knowing the route of the force main, I cannot answer that question.
Q. If the route had not gone through water or any estuary, would there have been a need for the Florida dredge and fill permit?
MR. BAISE: Objection, Your Honor. This is outside the scope of direct examination. I didn't ask him or get into anything with respect to North Fort Myers and its impact that I was able to get into with Mr. Lehman, so the questions that counsel is propounding would have been more important for Mr. Lehman than Mr. Acosta.
MR. QUINN: Your Honor, I'm talking about permitting and the question elicited dealt with permitting. I'm saying

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they could have avoided the permitting.
THE COURT: Well, I'm not sure that he's really been, you know, that really hasn't been raised in direct examination and I think if you intend or want to get into that, you'll have to do it with another witness or with this witness if you want to call him. I'll sustained the objection.
BY MR. QUINN:
Q. Mr. Acosta, source incorporated was selected by Florida Cities Water Company to provide professional engineering services for the Waterway Estates Plant's upgrade to AWT and for the relocation of the outfall to the six foot contour, is that correct?
A. Yes.
Q. And the number of days originally allotted to provide the engineering plans and specifications was wrong, wasn't it?
A. I don't recall it was wrong.
Q. Well, it didn't take two hundred days, did it?
A. No.
Q. To submit -- withdrawn -- to provide the engineering plans and specifications?
A. Submit them to whom?
Q. To Florida Cities and have them completed?
A. I don't believe that it did take two hundred days.
Q. No, it took four hundred and forty-five days for Source Engineering, did it not, to actually get usable plans and

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specifications produced, isn't that correct?
A. What do you mean by "usable"?
Q. Plans that were acceptable to the regulatory agencies, isn't that correct?
A. No.
Q. How long did it take Source Engineering to get usable and acceptable plans completed?
A. The regulatory agencies were multi here. The zoning required drawings and those were submitted within a couple of months of Source coming on board.
Q. With regard to the construction permits to FDER, didn't it take almost four hundred and forty-five days for Source Engineering to provide acceptable engineering plans and specifications?
A. I think that it took that long to submit them to the DER. It had nothing to do with producing them at the time, it had to do with the delays in the zoning and the exemptions to the variance.
Q. But there were problems with Source Engineering, weren't there?
A. Some.
Q. What do you mean by "some"?
A. Some in that they were – they wanted to – did not want to attend certain meetings that we had asked them to attend. Nothing in regard to their design and design calculations.

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Q. Well, by the time Cardinal Contractors finally got on the site, they were impacted by the inadequate drawings that Source used and made, isn't that correct?
A. Not to my knowledge, no.
Q. Sir, Florida Cities hired Source, Incorporated to do the engineering work on this case, is that correct?
A. Yes.
Q. Sir, Source, Incorporated was responsible in conjunction with Florida Cities Water Company for submitting the appropriate drawings to the FDER, isn't that correct?
A. Yes.
Q. And in fact, didn't FDER make several requests for further information to Florida Cities Water Company with regard to its application?
A. I believe they did. That's pretty routine.
Q. Sir, if Florida Cities Water Company had submitted a complete application at the time it did, then there wouldn't have been any additional delays related to that application and request for information, isn't that correct?
A. No, it has been my experience in the permitting for wastewater treatment plants that you always get requests for additional information. I have not been through one that did not require an additional request for information.
Q. Sir, have you ever worked where you submitted a complete application, where you submitted a complete application because

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of all the information required was contemplated and put in there by a reputable firm?
A. We have used multiple firms. Every single firm that has applied for a wastewater treatment plant construction permit since I have been involved has had requests for additional information.
Q. The initial, as we were talking about a little bit, or the FDER application was incomplete the first time, wasn't it?
A. I don't know if it was incomplete, they requested additional information.
Q. What's the difference between not being incomplete and request for additional information?
A. Request for additional information can be fine-tuning of a particular number, difference in engineering judgment, all kinds of things like that. It doesn't mean that you left out a piece of paper that needed to be submitted.
Q. Well, let me ask you this. FDER didn't consider it complete at the time you initially submitted it, did they?
A. I believe as soon as they requested additional information, the time tolls on their time to review the permit.
MR. QUINN: Move to strike, Your Honor. That was not responsive.
THE COURT: Yeah. I don't think that was responsive.
Now you're asking him whether FDER considered it complete upon the filing of the application?

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MR. QUINN: The initial application.
THE COURT: Do you know whether they considered it complete?
THE WITNESS: No.
BY MR. QUINN:
Q. You also testified that it took several additional submissions and changes in design -- withdrawn.
Didn't it take additional submissions and changes in design before FDER considered the application complete?
A. I don't believe they were changes in design so much as they were refinements of the design.
Q. Well, isn't a refinement a change, Mr. Acosta?
A. No, not necessarily.
Q. How is a refinement not a change?
A. For instance, if you have a certain amount of variation capability, whether you put in six aerators or seven it's not any particular design change, not in my professional opinion.
Q. Six is different than seven, isn't it?
A. Yes.
THE COURT: Uh, the Court will take judicial notice six is different from seven. Let's move on. This doesn't help me a great deal.
BY MR. QUINN:
Q. I'm sorry, sir.

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Mr. Acosta, in retrospect, the selection of Source Engineering was a poor choice by Florida Cities Water Company, wasn't it?
A. No.
Q. So all the delays were anticipated, all -- withdrawn.
All the delays that were caused by Source were anticipated and accepted by Florida Cities Water Company, is that correct?
A. No, I don't think that Source caused delays.
Q. You don't think Source caused any delays, is that your testimony?
THE COURT: That is what he just said.
MR. QUINN: All right.
BY MR. QUINN:
Q. Sir, you know how long it took for the additional information to be submitted to FDER?
A. No, not off the top of my head.
Q. Sir, didn't Florida Cities have a dispute with Source over who was to submit the additional information?
A. I don't recall if it was a dispute over that particular item, no.
Q. Florida Cities had a dispute with Source, right?
A. In regards to the attendance of meetings, that's my knowledge.
Q. Isn't attendance at meetings indicative that an

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engineering firm was a poor choice if they don't go to meetings?
A. No, not necessarily.
Q. So does Florida Cities expect that engineers that it hires and pays aren't going to attend meetings that are required?
A. It's not uncommon that Florida Cities will attend a meeting at which the engineer is not present and engineers attend meetings in our place. That's not uncommon, no.
Q. Sir, isn't it true that the dispute between Source and Florida Cities Water Company involved at least in part whether Florida Cities Water Company was going to pay Source to provide the additional information that was required for the FDER permits?
A. I believe I've read something along those lines, yes.
Q. Sir, by the time Cardinal got on the job, there was concern that there were going to be delays in completion of the project, isn't that correct?
A. Yes.
Q. And Cardinal was the contractor, the general contractor for the upgrade?
A. Correct.
Q. And relocation of the outfall?
A. No.
Q. No? They were -- there was a marine contractor involved

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in the relocation of the outfall?
A. I don't know if I would term them a marine contractor. It was not Cardinal.
Q. It was not Cardinal, sir. In fact, despite the fact that a notice to proceed was issued on August 24, 1990, as of November 2nd, 1990, Cardinal Contractors was still unable to proceed, is that right?
A. With the construction, that's correct.
Q. Sir, I'd like to show you United States Exhibit 429.
Sir, have you seen this exhibit, document before, 429?
A. No, I have not.
Q. I believe 429 is in evidence. 429 is in evidence.
I'd like to draw your attention to the sentence beginning "notwithstanding." Can you please read that into the record about halfway through in the first paragraph, sir.
MR. BAISE: I object, Your Honor. As I look at 429, assuming I have the appropriate document, which is written by Dennis Getman to J. Landers, it has to deal with the North Fort Myers Homeowners Association lawsuit and what the company should be doing with regard to dealing with this lawsuit. I believe I did not raise anything, one, to Fort Myers, two, any lawsuit, certainly about time and money relating to the success of the petition.
MR. QUINN: I believe also, sir, the caption says it deals with Waterway Estates Wastewater Treatment Plant.

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THE COURT: Well, all right. Well, let's see where we're going with this. I'll overrule the objection at this point.
THE WITNESS: What was the question again?
BY MR. QUINN:
Q. The question was a request.
A. What was the request?
Q. Could you please read the sentence beginning "not withstanding"?
A. Notwithstanding, we do need to get prepared to fight this matter and hopefully all we'll be expending is time and money as the chances of success of the petition do not appear to be very great in my opinion.
Q. Sir, I'd like to turn your attention now to Exhibit 424. A few page back from where --
THE COURT: Just a moment. Before you go further, let me look at something here.
(Brief Pause.)
Okay.
BY MR. QUINN:
Q. Sir, you at 424, Mr. Acosta?
A. Yes.
Q. Okay.
Sir, is this Exhibit 424, which I believe is in evidence, a letter from Cardinal Contracting to Florida Cities Water

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Company, is that correct?
A. Yes.
Q. Okay.
Sir, isn't it true that the causes for the delay of starting construction and actual construction were well known to everybody involved in the construction?
MR. HIRD: I'm sorry, objection, vagueness. I'm not sure what causes we are talking about. I'm not sure who everybody is.
BY MR. QUINN:
Q. Withdraw the question. I apologize, sir.
Isn't it true that the Waterway Estates Plant's upgrade was delayed in getting started through facts well known to Florida Cities Water Company?
MR. HIRD: Same objection. We don't know what facts are being talked about.
THE COURT: Well, I'll overrule the objection. If you know.
THE WITNESS: Say that again, please.
BY MR. QUINN:
Q. I'll withdraw the question.
Would you please read the first paragraph?
A. The one that begins with "the reference"?
Q. Yes.
A. The reference project has been delayed in getting started

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through facts well known and arising from one, an incomplete set of construction drawings, two, changes in scope -- in the scope of the project which are still continuing, and three, in the administrative tasks left undone which were needed to facilitate the permitting process.
Q. Okay, sir.
With regard to item one that is referenced in this paragraph, who was responsible for providing a complete set of construction drawings?
A. I believe it was Source.
Q. And Source did not provide them to Florida Cities, a complete set of construction drawings to Florida Cities as of November 2nd, 1990, isn't that correct?
A. No, I disagree with the letter.
Q. Sir, Cardinal thought that an incomplete set of construction drawings had been provided, didn't they?
A. I presume that they thought that, based on this letter.
Q. Sir, there were changes in scope of the project which were continuing as of November 2nd, 1990, weren't there?
A. I don't know of any changes in scope. The project was to upgrade the advanced wastewater treatment plant as it -- from what it existed. That's what the scope originally was and what it was on November 2nd.
Q. Sir, didn't Cardinal also present an opportunity for Florida Cities Water Company to accelerate the construction

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schedule?
A. Is that in this letter somewhere?
Q. Yes. Well --
A. Point it out.
Q. I'll ask you to read paragraph two then at the bottom of page one.
A. Okay.
The one bracketed by number two?
Q. Yes.
THE COURT: You want him to read that to himself or outloud?
MR. QUINN: I'd like him to read it to himself and then I'll ask him the same question.
THE COURT: All right.
BY MR. QUINN:
Q. While you're reading it, my question was, didn't Cardinal offer to accelerate the schedule?
A. Yes, they did. It appears that they did offer to accelerate.
Q. It said two of the ways they offered to accelerate the schedule were, one, having the current staff work overtime, is that correct?
A. It just says work overtime.
Q. Work overtime. Okay, isn't -- well one of the opportunities was for people to work overtime, isn't that

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correct?
A. Correct.
Q. The other one was to get more people, additional manpower, is that correct?
A. Correct.
Q. Now, manpower and people involved money, isn't that correct?
A. Typically.
Q. Okay.
Florida Cities Water Company did not choose to accelerate the schedule, did they?
A. Not to my knowledge, no.
Q. Sir, also in this letter, I'm going to ask you a question -- withdrawn.
Cardinal was getting upset with the casual dismissal of its warnings, threats, pleadings and grovelling, isn't that correct?
MR. BAISE: Objection, Your Honor, with regard to the characterization of the question. There's been no suggestion of any grovelling brought forth in any direct testimony here.
THE COURT: Well, all right.
Well, I don't know, there may be some grovelling going on that hasn't been brought out on direct and he's entitled to bring it out if there is.
BY MR. QUINN:

Q. Sir, I'd like to turn your attention to the second page and -- I withdraw the question.

Underneath the inset that says, one and two, please read the paragraph that begins "it is imperative."

A. It is imperative that the terms of how Cardinal is going to proceed on this project be worked out now. The casual dismissal of our warnings, threats, pleadings and grovelling --

THE COURT: Oh, there it is.

THE WITNESS: -- is no longer acceptable. A clear understanding of the responsibilities, duties, liabilities must exist between all parties involved.

THE COURT: Let's take a fifteen minute recess.

(Thereupon, a brief recess was taken.)

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THE COURT: Mr. Quinn?
MR. QUINN: Thank you, Your Honor.
BY MR. QUINN:
Q. Sir, wasn't Cardinal Contracting distressed by the slowness of shop drawing review and turnaround?
(Pause.)
A. I don't know that I see that in this letter. I don't recall that from the time, no.
Q. Wasn't Cardinal concerned that the project was being injured due to inordinately long shop drawing turnaround?
A. I don't recall that being the specific issue back then, no.
Q. Sir, I'd like to show you United States Exhibit 431, which has been entered into evidence. Do you have that in front of you, sir?
A. Yes.
Q. Please read the first sentence.
A. It says: Confirming our telephone conversation of today, we are quite distressed at the slowness of the shop drawing review and turnaround.
Q. Please read the first sentence of the second paragraph.
A. The project and Cardinal Contractors are being injured by the slow shop drawing review process.
Q. So, Cardinal was concerned that the project was being

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injured, is that correct?
A. I would take that from the letter, yes.
THE COURT: He doesn't --
MR. QUINN: Withdraw the question.
BY MR. QUINN:
Q. Sir, Cardinal was concerned about the return of other shop drawings, too, weren't they?
A. What does "other" mean? This says "shop drawings." That's pretty general.
Q. Well, they were -- withdraw that question, then.
Cardinal was concerned about the specific delays with regard to the turnaround of individual shop drawings and designs, weren't they?
A. I would gather that from the letter, yes.
Q. Sir, I'd like to show you United States Exhibit 431.
A. That's where we're at.
THE COURT: That's the exhibit we're on.
MR. QUINN: I'm sorry. Wrong page.
I'm sorry. United States Exhibit 443.
I'm sorry. 442. Excuse me, sir.
BY MR. QUINN:
Q. Isn't it true, sir, that there are -- there was -- withdrawn.
Isn't it true that there was a delay of approximately 59 days related to the methanol tank drawings?

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A. That wasn't a delay. That had been the elapsed time since it was submitted.
Q. Submitted to whom?
A. I presume it was Stone and Webster.
Q. But there was a 59-day elapsed time for review of methanol tank drawings, isn't that correct?
A. That's what this letter says.
Q. And then each one of those dates -- there are 41 days for instrumentation. There was an elapsed time for review of those, isn't that correct?
A. That's what the letter says.
Q. And there was a 39-day elapsed time for Formica drawings, F-O-R-M-I-C-A, right?
A. That's what the letter says.
THE COURT: Well, do you know? Do you know?
THE WITNESS: Beyond what this letter says, no, I do not.
THE COURT: All right.
BY MR. QUINN:
Q. And, sir, as to a different aspect of one of Cardinal's concerns, wasn't Cardinal also concerned that delays in the administration of the contract change orders was also injuring project completion?
A. I don't know that they were so much concerned about change orders injuring project completion as project payment

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schedules to them.
Q. Sir, you testified earlier during the cross examination and then earlier during direct examination that the permits which were required for the Waterway Estates project were related to each other. Is that a fair summary of what you said?
A. They are not so much related to each other as you can't proceed with one without the other.
Q. Okay. I appreciate the clarification. Thank you.
Now, which was the first permit or authorization that was required to proceed with the Waterway Estates upgrade?
A. I believe the zoning was the first thing that was needed.
Q. And the zoning application could have been done earlier, couldn't it?
A. No.
Q. Why not?
A. From the time that Source was engaged to the time that the zoning variance was submitted was a matter of a couple of months, two or three months.
Q. So, is it your testimony that you couldn't have done it earlier with -- withdrawn.
Is it your testimony that you could not have applied for the zoning variance earlier because you didn't have the drawings; you didn't know what you were going to do?

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A. Right. The drawings had not been prepared. The site plans had not been prepared prior to engaging Source.
Q. Is that the only reason?
A. Well, the application had obviously not been done, but that was the primary reason, is the site layout was not in place.
Q. So, if you hired Source earlier to do -- if you had hired Source earlier -- withdrawn.
Could you have hired Source earlier?
A. Not based on what I have read that the -- we request proposals in December, no.
Q. If you had requested proposals earlier than December, you could have hired Source earlier, couldn't you?
A. Yeah. Theoretically, of course.
Q. I'm sorry?
A. Yes. Of course.
Q. But you didn't seek bid proposals on that earlier, did you?
MR. BAISE: Objection, Your Honor. I believe this is outside my scope of direct. I believe he testified that he was brought into this project around December of 1987 to start showing the contractors around the facility so that they could see it, so he was not involved for, I believe the testimony was, December of 1987.
THE COURT: I'll sustain the objection.

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BY MR. QUINN:
Q. One final question: If Source had been engaged earlier and had submitted the drawings earlier, then the zoning variance could have been sought earlier, isn't that correct?
MR. BAISE: I believe that's running the same question around the same barnyard, Your Honor.
THE COURT: I'll sustain the objection. I think the answer to that is pretty obvious anyhow.
MR. QUINN: With that, then, I'll sit down.
Thank you, sir.
THE COURT: All right. Redirect?
REDIRECT EXAMINATION
BY MR. BAISE:
Q. Mr. Acosta, Mr. Quinn asked you about zoning variances being routine and routinely granted. Could you explain how routine it is to file a zoning variance for an advanced waste treatment facility in Lee County in the State of Florida?
A. It is my experience that there are, I believe, three advanced wastewater treatment plants in Lee County, period. Two of them belong to Florida Cities; the other one, the City of Cape Coral.
To my knowledge, they are not routinely granted. Obviously, advanced wastewater treatment plants --

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THE COURT: Say that again. I missed that.
MR. BAISE: Yes, the noise, and I couldn't hear it either for the jackhammer, Your Honor, so please speak up, Mr. Acosta.
THE WITNESS: Advanced wastewater treatment plants are obviously not a routine thing to be submitted to zoning, building, development order review. None of that stuff is routine for wastewater treatment plants.
These folks are generally seeing site plans for subdivisions, commercial establishments, those kind of things; not wastewater treatment plants.
BY MR. BAISE:
Q. So, the granting of zoning variances for housing projects would be routine?
MR. QUINN: Objection; leading.
THE COURT: It is leading. Sustained.
BY MR. BAISE:
Q. What would be a routine zoning variance, in your opinion? Strike that.
Moving on to the amount of time Source took to develop its plans -- final plans and specifications, Mr. Acosta, Mr. Quinn elicited that it took approximately 445 days. What delayed Source in getting its final plans and specs completed?
A. The zoning had to be in place. The development order

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had to be in place before the drawings could be finalized for submission to DER.
THE COURT: Have I not heard this so far? Haven't I heard this before, or not?
MR. BAISE: I --
THE COURT: Okay. Well --
MR. BAISE: I don't know. I was responding to the question.
THE COURT: Let's not duplicate.
In other words, you could respond to everything he said, but I just don't want you to have him repeat what he's already testified to.
MR. BAISE: Sure.
BY MR. BAISE:
Q. Did this facility ultimately work that Source designed, Mr. Acosta?
A. Yes.
Q. How well did it work?
A. Extremely well.
Q. Is this plan and specification for the Waterway Estates facility an easy project, complicated project or what?
MR. QUINN: Objection. This goes beyond the scope of direct and cross. Easy or not, it was what it was, and this wasn't elicited on direct, and I didn't ask him whether

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it was easy on cross.
THE COURT: Well, I'll overrule the objection.
BY MR. BAISE:
Q. Describe the construction of this AWT facility versus a secondary treatment facility, Mr. Acosta.
A. This particular --
MR. QUINN: I'll object to that, too, sir. I didn't cover that on cross either.
THE COURT: What was the question?
MR. QUINN: I think it was the difference between secondary and advanced wastewater treatment.
MR. BAISE: It was just talking about how much time it took to complete this project.
THE COURT: I think this goes beyond the scope of cross. I'll sustain the objection.
BY MR. BAISE:
Q. Mr. Acosta, it was raised on your cross about Source refusing to attend meetings. Can you please describe that situation?
A. In most engineering contracts, a certain number of meetings are planned in the design to attend with regulatory agencies. Once those were attended, Source wanted to not attend further meetings without being compensated for them.
Q. With respect to the plans being submitted to the Florida Department of Environmental Protection and the

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Florida Department of Environmental Protection asking for additional information, does the Department have a deadline upon which they have to respond to an application?
A. Yes.
Q. And what is the State of Florida's -- what is your experience with the State of Florida with regard to asking for additional information due to these deadlines?
A. It is routine. They have 90 days to issue a permit or deny a permit, and they must ask within 30 days for additional information.
Q. With respect to the questions raised by Mr. Quinn regarding Cardinal Contracting, could you please describe your experience with contractors when they have a fixed price contract?
MR. QUINN: Objection, Your Honor. This could have been covered on direct. I don't think I covered it on cross.
MR. BAISE: It is raised in your Exhibit 442 with regard to "Cardinal reserves its rights to recover time and money due to inordinately long shop drawing" --
THE COURT: I'll overrule the objection.
BY MR. BAISE:
Q. Could you please describe the relationship between the person wanting the facility constructed and the contractor during this period of time, Mr. Acosta?

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A. It is routine banter between contractors and owners. Contractors typically will send all kinds of letters establishing that everything is delaying them other than themselves and will build a file, if you will, to try to collect additional dollars later on in the contract.
MR. BAISE: No further questions, Your Honor.
THE COURT: Thank you, sir. You may step down. Call your next witness.
MR. BULLOCK: Good morning, Your Honor. Florida Cities calls Larry Good.
THE DEPUTY CLERK: Come forward and be sworn. Raise your right hand, please.
Do you solemnly swear that the testimony you are about to give in this cause will be the truth, the whole truth and nothing but the truth, so help you God?
THE WITNESS: I do.
THE DEPUTY CLERK: Take a seat in the witness stand.
State your name and spell your last for the record, please.
THE WITNESS: Larry L. Good, G-O-O-D.
THE COURT: All right. We have some work obviously being done somewhere outside the Courthouse area, specifically a jackhammer, and it is somewhat distracting.
I'm going to have that checked out to see who is

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doing it and what their schedule is. I, frankly, am not inclined to put up with that for the whole day.
And in the meantime, while we're checking that out, keep your voices up, and I would ask, Mr. Good, if you could speak loudly and close to the microphone there.
THE WITNESS: Yes, sir.
THE COURT: All right.
- - -
Thereupon,
LARRY L. GOOD,
a witness, having been duly sworn to speak the truth, the whole truth and nothing but the truth, was examined and testified as follows:
DIRECT EXAMINATION
BY MR. BULLOCK:
Q. Mr. Good, what is your current position?
A. Regional manager.
Q. And who are you employed by?
A. Florida Cities Water Company, Poinciana Utilities, Inc.
Q. Mr. Good, what professional licenses do you hold?
A. Hold a Class A water treatment plant operator, State of Florida, and a Class A wastewater treatment plant operator, State of Florida.
Q. All right. Were you employed by Florida Cities in

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1983?
A. Yes, I was.
Q. What was your position with Florida Cities in 1983?
A. Regional manager.
Q. All right. Mr. Good, to your knowledge, had Florida Cities' Carrollwood plant been able to connect with Hillsborough County's facilities by 1983?
A. No, they were not.
Q. All right. Was the company under any order regarding connection to Hillsborough County?
A. Yes, they were.
Q. Okay. What order do you refer to?
A. The Department of Environmental Protection, or DER at that time, Department of Environmental Regulation.
Q. And what did the FDER order state?
A. Basically that we were to tie in to Hillsborough County utility system.
Q. In 1983, had the company -- excuse me.
In 1983, did the company examine any other alternatives to connection with Hillsborough County?
A. Yes.
Q. What other options did the company consider?
A. We proposed to build an advanced wastewater treatment plant with a discharge into Sweetwater Creek.
Also, we looked at possible percolation ponds on-site

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or off-site along with reuse to golf courses.
Q. Did the company in 1983 have other advanced wastewater treatment plants?
A. Yes, we did.
Q. All right. Had you had any involvement in any of these other advanced wastewater treatment plants?
A. Yes, I did.
Q. What involvement had you had?
A. Before that, I was the chief operator of two advanced waste treatment facilities in Sarasota County and then became the division manager over those operations in late -- early -- late '79.
Q. Did FDER accept the company's proposal regarding AWT?
A. No, they did not.
Q. Did they inform the company as to why they rejected this proposal?
A. They could give us no technical reasons, as I remember.
Q. You indicated that the company looked at off-site storage?
A. Percolation ponds.
Q. All right. Was the company able to determine whether percolation ponds was a valid option?
A. They were an option at that time, yes.
Q. Okay. Did the company find any land to construct a

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percolation pond?
A. I believe there were three off-sites out of the Carrollwood franchised area that we looked at.
Q. How far away from the Carrollwood plant were these sites?
A. The closest, I believe, was approximately about two and a half miles.
Q. Was the company able to -- did the company purchase any of these sites?
A. No.
Q. Why not?
A. The cost was inhibitive.
Q. All right. Did the company examine any other options for reuse?
A. Yes.
Q. And what options were those?
A. We contacted several golf courses in the area to have them take our effluent for reuse for spraying on the golf course.
Q. Were the golf courses able to accept the effluent?
A. No.
Q. And why not?
A. They had already had contracts with Hillsborough County.
Q. Let me back up just a second. Did you examine any

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other options in 1983?
A. We also looked at the on-site percolation ponds.
Q. Okay. And were you able to construct an on-site percolation pond?
A. No. The site wasn't large enough to handle the flow.
Q. All right. Any other options which the company reviewed?
A. The City of Tampa.
Q. Okay. Were you involved in discussions with the City of Tampa?
A. Yes.
Q. All right. With whom did you have discussions from Tampa?
A. After several contacts with different people at the City of Tampa, Mr. Schafer was finally the initial contact to discuss this.
Q. Did the City represent whether or not it had capacity?
A. At the time, yes, they said they had capacity.
Q. All right. Did the City indicate whether or not there were available connection points?
A. They gave us three options of connection.
Q. Did they give any one of those three as the preferable option?
A. Yes.
Q. Which one of those three?

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A. I believe that was Armenia, about three miles away, or something like that.
Q. All right. Did the City provide costs for connection?
A. They gave us a tentative number of $800.
Q. And what would that $800 figure apply to?
A. Per residential connection.
Q. All right. Were there other costs associated with connecting with the City?
A. Yes.
Q. What were those costs?
A. To build a forced main and a lift station to pump the effluent from the treatment facility to the treatment -- collection system of the City of Tampa.
Q. Did the City offer to pay for any of the costs to connect to their facility?
A. No.
Q. Did the City ever provide a firm figure to Florida Cities about the cost to connect?
A. No.
Q. Did the company seek a firm figure from the City?
A. Yes.
Q. Was it possible for the company to make a decision on the viability of this option without a firm figure?
A. No.
Q. Thank you, Mr. Good.

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MS. TSOTSOS: We only have a few questions, Your Honor?
THE COURT: All right.
How do you pronounce your name?
MS. TSOTSOS: Tsotsos.
THE COURT: Tsotsos?
MS. TSOTSOS: Uh-huh.
THE COURT: T-S-O-T-S-O-S?
MS. TSOTSOS: Yes. That's it.
THE COURT: Just like it's spelled, huh? Okay.
MS. TSOTSOS: Very difficult to pronounce.

CROSS EXAMINATION

BY MS. TSOTSOS:

Q. Good morning, Mr. Good.
A. Good morning.
Q. You testified this morning regarding your involvement with various issues related to the Carrollwood wastewater treatment plant, is that correct?
A. Yes.
Q. Did you ever discuss any of these issues relating to the Carrollwood wastewater treatment plant with Leon Levy?
A. No.
Q. Did you ever discuss any of these issues relating to the Carrollwood wastewater treatment plant with Peter Sharp?
A. No.

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Q. Did you ever discuss any of these issues relating to Carrollwood with Lawrence Wilkov?
A. No.
Q. To your knowledge, did Peter Sharp micro manage the operations of the Carrollwood wastewater treatment plant?
A. Not to my knowledge.
MS. TSOTSOS: No further questions.
THE COURT: All right.

CROSS EXAMINATION

BY MR. HOMIAK:

Q. Good morning, Mr. Good. My name is Bob Homiak. I'm representing the United States in this matter.
Mr. Good, in order to discharge a treated pollutant to surface waters, a facility needs to have both a state and federal permit, isn't that correct?
A. Yes.
Q. And if a particular body of water had a zero waste load allocation, then you couldn't discharge into that body of water, isn't that correct?
A. Yes.
Q. Now, at least as early as August of 1983, Florida Cities was informed by the State of Florida that it had to cease discharging to Sweetwater Creek by January 1st, 1985, isn't that correct?
A. Yes.

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Q. And as you testified earlier, Florida Cities examined a number of options for ceasing discharge to Sweetwater Creek, is that correct?
A. Yes.
Q. Now, in fact, one of the options, as you testified earlier, concerned connection to the City of Tampa, and isn't it true that on August 23rd, 1983, you wrote a letter to Mr. Elton Smith, director of the City of Tampa's wastewater office, inquiring about the possibility of connecting to the Tampa system?
A. xx To my knowledge, yes, that was about the time frame.
Q. Okay. And as you've testified earlier, you had conversations with a Mr. Schafer of the City of Tampa, and let me ask you: Did those include a meeting on or about December 7th, 1983, to discuss tying into the City's system?
A. The exact date I'm not sure of, but we did meet with them, yes.
Q. And, in fact, you actually discussed some dollar figures with Mr. Schafer, is that correct?
A. There was dollars mentioned, yes.
Q. Now, at the time Carrollwood had a customer base of about a thousand, isn't that -- at the time that you were discussing with Mr. Schafer about the possibility of connecting to the City of Tampa system, Carrollwood had a

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customer base of about 1,000, isn't that correct?
A. The residential and commercial customers would be about 1,150 altogether.
Q. Well, approximately how many hook-ups would you have been talking about?
A. About 1,150.
Q. So that the figure of $800 per home that Mr. Schafer mentioned during that discussion would have meant that Florida Cities would have incurred costs of roughly $880,000 to connect to the City's system, is that correct?
A. That's one of the costs, yes.
Q. All right. Now, that figure that Mr. Schafer quoted to you was a reasonable figure in your mind, wasn't it?
A. To us it was reasonable but -- yes.
Q. And as you've testified, Mr. Schafer wrote you on December 29th, 1983, setting forth three different options for hooking up to the Tampa system, is that correct?
A. Yes.
Q. Okay. And as you've testified, one of those options was available immediately, correct?
A. Yes.
Q. So, in January of 1984, Florida Cities could have hooked up to the Tampa wastewater system and ceased discharging to Sweetwater Creek, isn't that correct?
A. No.

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Q. It was not technically possible to connect to the Tampa wastewater treatment system at the end of -- in January 1984?
A. The City never made a final offer of any site, no.
Q. Mr. Good, isn't it true that Mr. Schafer asked Florida Cities to provide some information to him if Florida Cities was interested in hooking up to the Tampa system?
A. There was information they wanted in that letter that they would like to have.
Q. And you referred that letter to Mr. Reeves, isn't that correct?
A. Yes, I did.
Q. And who was Mr. Reeves at that time, please?
A. He was the vice-president of Florida Cities Water Company.
Q. And did you have the knowledge to respond to the questions that Mr. Schafer was asking of you in his letter of December 29th?
A. Yes. I knew where to get the information.
Q. You knew where to get the information.
Did you, in fact, ever obtain this information and provide it to Mr. Schafer?
A. No, I did not.
Q. Do you know whether anyone at Florida Cities Water Company ever obtained this information and provided it to

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Mr. Schafer?
A. No, I do not.
Q. But Florida Cities chose not to comply by hooking into the Tampa treatment system because it perceived the cost as being too high, isn't that correct?
A. We could never get an exact cost.
MR. BULLOCK: Chose not to comply as to what? I'm sorry, the question is unclear.
THE COURT: Restate your question.
MR. HOMIAK: I'll restate it. I'm sorry, Your Honor.
BY MR. HOMIAK:
Q. Isn't it true that Florida Cities chose not to tie in to the Tampa system because it perceived the cost as being too high?
A. We never were able to get the cost, exact cost.
Q. Well, Mr. Good, do you recall in your deposition of October 10th, 1994, Page 72 -- do you recall Mr. Jacobs asking you the following question?
Do you have any recollection of why the Carrollwood waste wasn't then transferred to the City of Tampa instead of continuing to be discharged into Sweetwater Creek?
Answer: I would say -- excuse me. Probably, I would say, due to costs.
Do you remember giving that answer, Mr. Good?

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A. Yes.
Q. Okay. And do you remember the follow-up question from Mr. Jacobs?
The cost being too high?
Answer: Yes.
Do you remember that?
A. Yes.
Q. Now, in order to hook up to the City's system, Florida Cities would have had to construct a forced main to the connection point that was being proposed by Mr. Schafer, correct?
A. Yes.
Q. And is it correct that you estimated the cost to construct that forced main to be approximately $600,000?
A. That's a possible figure. I'm not sure. I would have to think about that a minute.
Q. Mr. Good, do you recall that question being put to you at your deposition on Page 76? Actually, the question begins at the bottom of Page 75.
By Mr. Jacobs: So, help me. We're talking about a total maximum for running that forced main of roughly 600,000, is that correct?
Answer: Uh-huh.
Question: Is that a yes?
Answer: Yes.

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Do you recall that testimony, sir?
A. Yeah. That would be for the forced main, yes.
Q. Okay. And you further estimated it would have cost about one and a half million dollars for Carrollwood's waste to have been transferred to Tampa in late 1983 and to get out of Sweetwater Creek at that time, isn't that correct?
A. That's a possible figure, yes.
Q. I believe you testified earlier that in August of 1983, the Florida DER had ordered Florida Cities to cease discharging to Sweetwater Creek by no later than January 1st, 1985, is that correct?
A. Yes.
Q. Now, despite the State's order to cease discharge by January 1st of '85 and the City of Tampa's immediate availability to accept the sewage, Florida Cities chose not to tie in to the Tampa system, isn't that correct?
A. Yes.
Q. But instead entered into a series of negotiations with Hillsborough County?
THE COURT: Is that correct?
MR. HOMIAK: Is that correct?
THE COURT: That's a question now.
MR. HOMIAK: Yes. I'm sorry, Your Honor.
THE WITNESS: Yes.
BY MR. HOMIAK:

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Q. Now, Mr. Good, I would like to show you what has been marked as Government Exhibit Number 263. Do you have that exhibit in front of you, sir?
A. Yes, I do.
Q. Can you identify it?
A. It's a letter to Mr. Reeves from Bruce Kennedy, County of Hillsborough.
Q. Sir, I would direct your attention to the first paragraph, second sentence, the sentence that begins, We anticipate.
A. Yes.
Q. I would ask if you would read that out loud, please.
A. We anticipate a time frame of late 1985 at the earliest before we could consider providing the service.
Q. And is this service for the Carrollwood discharge?
A. Yes.
Q. Okay. Now, late 1985, as set forth in the letter, is already beyond the date on which Florida Cities had been ordered to cease discharging to Sweetwater Creek, isn't that correct?
A. I believe so, yes.
Q. Excuse me?
A. Yes.
Q. Now, Mr. Good, I would like to show you at this time what has been marked as Government Exhibit Number 265. Do you have that, sir?
A. Yes, I do.
Q. Do you recognize that document?
A. Somewhat, yes.
Q. Okay. Would you identify the document for the record, please?
A. It's a memo to file from A.A. Reeves concerning the Hillsborough County temporary operating permit, modifications and conditions at Carrollwood wastewater plant.
Q. And does this memorandum to the file recount the events of a meeting that took place on August 22nd, 1983, between Florida Cities and the DER?
A. Yes, I believe it does.
Q. And you attended that meeting, is that correct?
A. Yes, I did.
Q. And that meeting was also attended by a Mr. William J. Harper of the Hillsborough County Environmental Protection Commission, is that correct?
A. Yes.
Q. Mr. Good, I'd like to direct your attention to Page 2 of that exhibit, please, and ask if you would read the first sentence on the top of Page 2, please, out loud.
A. Mr. Harper suggested that we look for the spray irrigation sites, including any adjacent golf courses, and

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connect the City of Tampa and ask if we could connect to their system.
Q. So, the County itself suggested to Florida Cities that maybe it should contact the City of Tampa about connecting to the City treatment system, isn't that correct?
A. The County Environmental Pollution Control did.
Q. Now, isn't it correct, Mr. Good, that based upon your discussions with Hillsborough County about the possibility of connecting the Carrollwood treatment plant into the County system, you came to the conclusion that the County was not a reliable tie-in point in 1984?
A. Yes.
Q. But despite those misgivings, Florida Cities applied to the County for wastewater service in April of 1984, isn't that correct?
A. Yes.
Q. Did the County inform you subsequent to your filing of the application specifically on September 6th of 1984 that it would not be able --
MR. BULLOCK: Objection, Your Honor. This is outside the scope. My direct was limited to 1983 and January of 1984 in connection with the City of Tampa. He's asking about subsequent '84 discussions with Hillsborough County.
THE COURT: Sustained.

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MR. HOMIAK: Your Honor, may I --
THE COURT: Briefly.
MR. HOMIAK: -- respond to that?
Mr. Good has obviously discussed the options that were available in terms of connecting to Hillsborough and the City of Tampa, and the issue that Mr. Good is really testifying to goes to good faith efforts of Florida Cities to comply with the law, which is one of the factors that this Court is going to be applying in determining to what extent, if any, to mitigate the penalty.
I would submit that I should be entitled to ask questions that tend to show the lack of good faith in pursuing a particular option because it undercuts the mitigation case that Florida Cities is putting on.
THE COURT: Mr. Bullock, do you want to be heard further on that?
MR. BULLOCK: Your Honor, I would renew the objection about scope.
Also, given the fact that this -- the limitations that were on this witness' testimony, I think to argue that something happened a year or two years later and he can address whether or not it's an issue of good faith, again, is outside the scope.
THE COURT: I'm going to adhere to my original ruling. That's not to say that the Government, if he has

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him under subpoena, can call him in rebuttal, but I think technically the objection is well taken. I'll adhere to my ruling.
Proceed.
MR. HOMIAK: Your Honor, if I may ask -- I want to make sure I understand the Court's ruling -- is it that the cross examination is limited to the 1983 time frame?
THE COURT: Well, with respect to the efforts with the City of Tampa. If the efforts with the City of Tampa goes beyond 1983, I think that would be properly within the scope of direct examination.
MR. HOMIAK: And with respect to efforts with the County of Hillsborough?
THE COURT: I've sustained that objection.
(Pause.)
BY MR. HOMIAK:
Q. You testified earlier --
THE COURT: Just a moment, please, counsel.
Florida Cities Water has called this witness and has examined him for the purpose of eliciting testimony regarding Florida Cities Water in its efforts to find an alternative discharge mechanism, and counsel has confined the examination to the City of Tampa system as a possible alternative.
I have heard testimony at some length regarding

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those efforts. Frankly, I think it's a close question as to whether the Defendant should be permitted to restrict examination of this witness to that one area, that one alternative.
The witness is being presented to attempt to persuade the Court that Florida Cities has exerted -- well, this, of course, is on mitigation.
I'm concerned that perhaps this may be an undue restriction of the Plaintiff's examination or right to take issue with this testimony that has been proffered, offered for the purpose of showing that Florida Cities has exhibited good faith in exploring alternative avenues of discharge.
MR. BULLOCK: Your Honor, I'll withdraw the objection.
THE COURT: Thank you. And I'll recede from my ruling.
MR. HOMIAK: Your Honor, I have to confess, I forgot what question is on the table. Could I have it read back, please?
THE COURT: Read the question back, Mr. Miracle.
(Record read back.)
THE COURT: The question wasn't completed. You can pick up there.
MR. HOMIAK: I'll complete it.
BY MR. HOMIAK:

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Q. Mr. Good, in my prior question, I asked if you had applied for wastewater service in April of '94, is that correct?
A. Yes.
Q. And on September 6th, 1984, Florida Cities was informed by Hillsborough County that it would not be able to accept wastewater from the Carrollwood facility until at least June of 1987, isn't that correct?
A. I believe those were the dates, yes.
Q. Now, that June 1987 date is two and a half years after the Florida DER has ordered the company to cease discharging into Sweetwater Creek, isn't it?
A. Yes.
Q. Moreover, the June 1987 date was not definite but was contingent upon the County expanding the River Oaks plant, isn't that correct?
A. Yes.
THE COURT: Contingent on what, did you say?
MR. HOMIAK: The County of Hillsborough expanding the River Oaks wastewater treatment plant.
THE COURT: Okay.
BY MR. HOMIAK:
Q. Now, I believe -- withdraw the question.
EPA had issued an administrative order to Florida Cities for the Carrollwood treatment plant, isn't that

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correct?
A. I believe so, yes.
Q. And based upon Florida Cities' representations that Hillsborough County would not be able to connect the Carrollwood plant until June of '87, EPA amended that order to give Florida Cities until June of '87 to cease discharge, isn't that correct?
A. I believe that's right, yes.
Q. All right. Now, did you subsequently learn that Hillsborough County had pushed back the possible connection date from June of 1987 to fall of 1988?
A. Yes.
Q. Okay. So, under the revised schedule, fall of 1988, Florida Cities isn't even going to be able to meet the June '87 deadlines set forth in EPA's amended order, isn't that correct?
A. Yes.
Q. And you were worried about this, weren't you, Mr. Good?
A. Yes.
Q. And you informed Mr. Tony Reeves that the County's projected connection date had, once again, slipped, isn't that correct?
A. Yes. He was aware of that.
Q. Mr. Good, you testified that an FDER permit required

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Florida Cities to connect to Hillsborough County -- to the Hillsborough County collection system, is that correct?
A. Yes.
Q. Didn't Florida Cities, in fact, request a permit modification from FDER so that it would not have to connect to Hillsborough County?
A. Yes.
Q. Okay. Mr. Good, I would like to direct your attention to an exhibit that's been marked as Florida Cities Water Company Exhibit Number 97. Do you have that exhibit in front of you, sir?
A. Yes, I do.
Q. What is the date of that letter, please?
A. August 8th, 1983.
Q. Can you identify this letter for the record, please?
A. It's a letter from the Department of Environmental Regulation to Mr. A.A. Reeves concerning the Hillsborough County Carrollwood operation.
Q. Would you read the first full sentence of that letter, please?
A. We are in receipt of your request for modification of permit conditions. The conditions are changed as follows.
Q. Okay. Now, I want to refer your attention, please, to Page 2 of this exhibit, which is labeled Attachment A. Do you have that, sir?

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A. Yes.
Q. I would direct your attention to Paragraph D and ask you to read that, please.
A. If an agreement with Hillsborough County is not made by the deadline in Paragraph B, the permittee shall submit a construction application to provide an alternate effluent disposal method by July 1st, 1984.
Q. What date is referred to in Paragraph B, please?
A. April 1st, 1984.
Q. Now, on April 1st, 1984, Florida Cities had no agreement with the County of Hillsborough to connect to the County system, isn't that correct?
A. Yes.
Q. That is correct?
A. That is correct.
Q. Did Florida Cities submit an application to the State Department of Environmental Regulation to provide an alternate effluent disposal method by July 1st, 1984?
A. Not to my knowledge, no.
Q. Okay. I want to direct your attention to Paragraph E of that attachment, please, and ask if you would read that.
A. The discharge to Sweetwater Creek shall cease no later than January 1, 1985.
Q. So, the State still wants the discharge ceased by January 1st, 1985, correct?

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A. Yes.
Q. So, in fact, at least as of August 8th, 1983, the State of Florida was telling Florida Cities Water that if connection could not be made to Hillsborough County, it should look elsewhere, isn't that true?
A. Yes.
Q. And specifically connection to Hillsborough County by a date certain being -- well, if there was no agreement reached by April 1, 1984, that Florida Cities should look for options -- other options, isn't that correct?
A. Yes.
Q. Yet, you still continued to pursue connection to the County wastewater treatment facility long after January of 1985, correct?
A. Yes.
Q. Despite the fact that you viewed them as being not reliable as a source of connection?
A. Yes.
MR. HOMIAK: Your Honor, at this point I would like to continue my examination of Mr. Good moving on to a different facility, Barefoot Bay; and I would offer as a rationale for being allowed to continue this the same argument I made earlier.
I don't know whether Mr. Bullock is going to renew his objection at this point.

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MR. BULLOCK: Your Honor, as to scope and Barefoot Bay, I would renew that objection.

THE COURT: Yes. I perceive a distinction there. I was willing to allow you to inquire with respect to those matters that you have been asking Mr. Good about of late, but I think that would be beyond the scope.

MR. HOMIAK: Your Honor, if I might? I think Your Honor really hit upon the point earlier when you questioned the fairness of allowing Florida Cities, which has designated something like 19 different witnesses, to pick and choose and define very narrowly what they will be allowed to testify on -- testify to on direct examination in order to prove their penalty mitigation case.

Mr. Good is a regional manager with Florida Cities, and he's quite familiar with the activities at Barefoot Bay and I believe that --

THE COURT: Well, nevertheless, we operate under the same rules as we do in any other case, and I'm doing my best to apply those rules here. And I firmly believe that we would be going beyond permissible scope of the direct examination to permit you to do that. Over objection, I'm not going to allow it.

All right.

MR. HOMIAK: Thank you, Your Honor.

THE COURT: Are you through? Is that all?

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MR. HOMIAK: I'm sorry. I have no further questions, then, Your Honor.

THE COURT: Okay. Mr. Bullock, do you have redirect?

MR. BULLOCK: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. BULLOCK:

Q. Mr. Good, who would have paid the costs of the construction and the hook-up fee, the connection fee at Carrollwood?

A. Ultimately, the customer.

Q. All right. Would there also have been any costs associated with plant abandonment?

A. Yes.

Q. Who would have paid those costs?

A. Ultimately, the customer again.

Q. All right. Who regulates the rates for the Carrollwood customers?

MR. HOMIAK: Your Honor, at this point I would object. Who regulates the rates at Carrollwood is clearly beyond the scope of my cross examination of Mr. Good.

I hesitate to make the objection having sought to go beyond what Mr. Bullock thought was the scope of his direct examination, but there has been no mention of Public Service Commission or --

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THE COURT: Well, for what purpose do you seek to elicit this information?

MR. BULLOCK: Your Honor, Mr. Homiak delved deeply into the issue of costs and why costs were a decision factor.

THE COURT: Yes, and that's the reason why I think that -- well, why I think it was appropriate for you to ask the preceding questions, and I think this is probably just an extension of that, so I'll permit you to go briefly into that and I'll overrule the objection.

BY MR. BULLOCK:

Q. Mr. Good, who regulated the rates for Carrollwood customers?

A. Hillsborough County Commissioners.

Q. All right. Who regulated -- who issued permits for discharge facilities at Carrollwood?

A. The Florida Department of Environmental Regulation.

Q. Okay. Was there any County oversight of the wastewater treatment plant?

A. Yes.

Q. And what branch of the County Government issued -- oversaw discharges?

A. Hillsborough County Pollution Control.

Q. All right. And which portion of the County dealt with -- strike that. Let me start again.

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In 1983 -- excuse me. In 1984, what other options were available to -- in July 1, 1984, what other options were available to Florida Cities for the Carrollwood effluent?

A. Again, we were looking at the City of Tampa, Hillsborough County, building an AWT plant with discharge to Sweetwater Creek, percolation ponds, spray irrigation.

Q. Based on the information which you had received from Tampa, was the company ever able to determine whether or not the cost to connect to Tampa would have been prudent?

A. No.

Q. To your knowledge, in 1983, could the City of Tampa have in any way voided the provision of the FDER permit which required connection to Hillsborough County?

MR. HOMIAK: Your Honor, objection. This calls for a legal conclusion about what the County could or could not do.

THE COURT: Well, if I thought that testimony was being offered solely for the purpose of proving what the law was, I think your objection would be quite well taken.

I am dealing, however, with some subjective motivations, and that sort of thing, and perhaps to some extent what the -- what they -- what the witness may have perceived may play into it, so for that reason, I'm going to overrule your objection.

Do you remember the question?
THE WITNESS: No, sir.
THE COURT: I don't either.
BY MR. BULLOCK:
Q. Would any action -- in 1983, would any action taken by the City of Tampa have removed the requirement to connect to the Hillsborough County facility?
A. Yes.
Q. Okay. What would that have been?
A. If we were able to connect to their system.
Q. All right. And would any action on the part of the Hillsborough County Department of Sanitary Sewers -- or Sanitary Services have changed the requirement of the FDER permit?
A. Yes.
Q. And did, in fact, Hillsborough County in '83 have capacity?
A. I don't believe so.
Q. All right. Thank you.
THE COURT: All right. Thank you, sir. You may step down.
All right. We'll recess for lunch until 1:25.
(The luncheon recess was taken.)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs.
FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS, INC.,
Defendants.

Case No. 93-281-CIV-FTM-21

Friday, April 5, 1996
Tampa, Florida
9:05 a.m.

TRANSCRIPT OF NON-JURY TRIAL
BEFORE THE HONORABLE RALPH W. NIMMONS, JR.,
UNITED STATES DISTRICT JUDGE

Appearances of Counsel:

For the Plaintiff: Mr. Daniel S. Jacobs
Mr. T. Anthony Quinn
Mr. Robert Homiak

For Defendant Avatar: Mr. David B. Hird
Ms. Joanne Tsotsos

For Defendant Florida Cities: Mr. Gary H. Baise
Mr. Alexander M. Bullock
Mr. Lance High
Mr. Don G. Scroggin

Reported by: Dennis Miracle
Official Court Reporter

PROCEEDINGS

April 5, 1996

****

THE COURT: Morning.

MR. BULLOCK: Good morning, Your Honor.

THE COURT: All right.

I believe we were starting or about to start redirect.

Mr. Bullock, you may proceed.

MR. BULLOCK: Thank you, Your Honor.

REDIRECT EXAMINATION

MR. BULLOCK:

Q. Good morning, Mr. Allen.

A. Good morning.

Q. Mr. Allen, Mr. Jacobs asked you questions about costs for providing effluent or charges that Florida Cities would provide for the effluent. I believe your testimony was there was no specific rule for the Public Service Commission. Why was Florida Cities concerned about the price if any to be charged for the effluent?

A. Related to the impression that it would leave on the other ratepayers as well as with the Commission. Under the fundamental rules of regulated utilities, you're not permitted to discriminate amongst customers, so if you give service to one customer in a particular class, then there's an obligation

to provide service without charge to other customers in the same class.

Q. Mr. Allen, let me ask you now questions, Mr. Jacobs asked you questions about the issue of when you were attempting to come to agreement with the grove owners about providing effluent, you discussed price. I believe you and Mr. Jacobs determined that you had actually come to an agreeable price. Were there other issues that killed the deal?

A. Yes, sir.

Q. What were those issues?

A. Basically, the indemnification issues.

Q. And how did the indemnification issues kill the deal?

A. Because the seller was demanding indemnification far beyond what was considered reasonable.

Q. Was it possible to put a dollar figure on the amount of indemnification which the grove owners were seeking?

A. No, sir, not the indemnification, the breadth of the indemnification that the sellers were demanding.

Q. Let me ask you, Mr. Allen, to take a look at Exhibit 307, as Plaintiff's 307. Let me ask you to refer to page 5 of Exhibit 307.

Mr. Allen, what were the issues that were underlying the meeting that this memo deals with?

A. This memo dealt with the, I believe a meeting with the USEPA regarding Carrollwood.

Q. Were the violations at Carrollwood at this meeting addressed?

A. Yes, there were alleged violations.

Q. And what were those violations for?

A. I'll have to refer to the memorandum. I believe it related to discharges to Sweetwater Creek.

Q. Were the issues or the violations which were discussed in this meeting which this memoranda memorializes, were these violations resolved with EPA?

A. Yes.

Q. And how much was the fine for those violations?

A. The final resolution resulted in a fine of fifteen thousand dollars.

Q. All right, sir.

Let me ask you then to turn to Plaintiff's Exhibit 570. Mr. Allen, would you read paragraph one of 570?

A. The fact pattern involved with the City of Cape Coral is substantially worse in nature than that occurring with FCWC.

Q. Mr. Allen, what was the fact pattern with the City of Cape Coral?

A. It's my understanding that the discharges from the Cape Coral Wastewater Treatment Plant which led to some action by EPA were about eight times the discharges from the Waterway Estates Plant.

Q. Do you know the daily discharge capacity for the City of

Cape Coral?
A. I believe it was something on the order of eight million gallons a day, six to eight million gallons a day, if I recollect; average.
Q. What are the receiving waters for the Cape Coral Plant?
A. The Caloosahatchee River.
Q. And what was the fine which --
MR. JACOBS: I'm sorry, could we have a timeframe for that? Were you asking him where the discharge is at this time or --
THE COURT: You're asking the Court to ask counsel to put a timeframe on that. You ask me and I'll --
MR. JACOBS: Forgive me, sir. That's what I'm --
THE COURT: All right.
BY MR. BULLOCK:
Q. Mr. Allen, do you know? The question that I asked you previously was what was the receiving waters for the Cape Coral Plant. Do you know what the receiving waters for the Cape Coral Plant was?
A. Yes, sir.
Q. And what were they?
A. Caloosahatchee River.
Q. And is that true during the entire -- from 1988 forward?
A. Well, it was certainly true in 1988. I believe that that discharge may have been eliminated subsequently or at least

reduced.
Q. All right.
Do you know the amount of the fine that Cape Coral paid?
A. Yes, sir.
Q. And what was the amount of that fine?
A. Seven hundred and fifty thousand dollars.
MR. BULLOCK: Thank you.
I'm sorry, Your Honor, no further questions.
THE COURT: All right, Mr. Hird.
REDIRECT EXAMINATION
BY MR. HIRD:
Q. Good morning, Mr. Allen.
A. Good morning.
Q. Mr. Jacobs asked you questions about where you received your check. During the time period in this case, from 1988 to 1993, who paid your check?
A. This was Avatar Utilities.
Q. And prior to 1993, did Avatar Utilities have a separate employment staff?
A. Yes.
Q. Now, Mr. Jacobs asked you about your recent change in position and change in July of last year to becoming president of Florida Cities. You know why you obtained that promotion?
A. Well, Mr. Robert Gordon, who is now president of Avatar Utilities, Florida Cities and the other Avatar Utilities'

subsidiaries, plans to retire and this change was merely a transition into his retirement plans.
Q. Did the promotion have anything to do with this case?
A. Absolutely nothing to do with this case.
THE COURT: Mr. Hird, this is -- this is recross for you?
MR. HIRD: No, Your Honor, its redirect.
THE COURT: Oh, you called him on direct, also?
MR. HIRD: Right, if you recall.
THE COURT: Okay, okay.
MR. HIRD: I'm sorry, Your Honor, for the confusion.
THE COURT: All right.
BY MR. HIRD:
Q. Now, Mr. Jacobs asked you several questions concerning Dennis Getman. What role does Dennis Getman have with respect to -- strike that.
What position does Dennis Getman have with respect to Florida Cities?
A. Mr. Getman is the general counsel for Florida Cities.
Q. Is Mr. Getman also the general counsel for Avatar Holdings?
A. Yes, sir.
Q. Is Mr. Getman the general counsel for Avatar Utilities?
A. Yes, sir.
Q. Does Mr. Getman have any business or operational

responsibility for Florida Cities?
A. No, sir.
Q. Does Mr. Getman have any business or operational responsibilities for Avatar Utilities?
A. No.
Q. If you were bringing an in-house lawyer to a meeting affecting Avatar Utilities or Florida Cities, who would you bring?
A. Mr. Getman.
Q. I'd like to have you take a look at Government Exhibit 400, if you would. Do you have that, sir?
A. Yes, sir.
Q. Yesterday, Mr. Jacobs asked you some questions about this and I believe you said that the CONWARD discussed in this Exhibit did not deal with Waterway Estates Treatment -- Wastewater Treatment Facility, is that correct?
A. That is correct.
Q. What did the CONWARD have to deal with?
A. The CONWARD had to deal with the Waterway Estates Water Treatment Plant.
Q. How do you know that?
A. Well first, the engineering firm discussed in the memorandum, Dire-Riddle, had nothing whatsoever to do with the Waterway Estates Wastewater Treatment Plant, but they were the engineers for designing a planned expansion of the Waterway

Estates Water Treatment Plant.

Furthermore, the budgeted amounts do not match those for the Waterway Estates Wastewater Treatment Plant.

Q. I'd like you to turn to the last two pages of the exhibit. Is that a memo from you?

A. Yes, sir.

Q. And does that memo discuss the water treatment system as opposed to the wastewater treatment system?

A. That is correct.

Q. Mr. Allen, was Mr. Sharp confused when he wrote this memo?

A. Yes, indeed.

Q. I'd like to have you take a look at Government Exhibit 4, if you would. Mr. Jacobs questioned you about this memo, do you recall?

A. Yes, sir.

Q. What is the date of this memo?

A. July 2nd, 1991.

Q. Wasn't this the same month that the outfall at Waterway Estates was completed?

A. That is correct.

Q. Now, at the time this memo was written, was Mr. Sharp still chief executive officer of Avatar Holdings?

A. No, sir, Mr. Sharp was, I believe, the chairman of the executive committee.

Q. But he had resigned as chief executive officer?

A. I believe that is correct.

Q. How soon after this memo did Mr. Sharp die?

A. Mr. Sharp died in April, 1992, so some eight, nine months following this memo.

Q. Now, did you -- I'd like you to look at the line called ref and CB script notation on A6/2491, Sharp to Gordon. Were you responding to a handwritten note from Mr. Sharp?

A. Yes, sir.

Q. How often did you correspondence with Mr. Sharp in the course of your activities at Avatar Utilities?

A. Very infrequently.

Q. How often did he correspond to you?

A. Very infrequently.

Q. In this letter, you talk about a meeting with EPA concerning an enforcement action, is that correct?

A. That is correct.

Q. Is an EPA enforcement action a usual or unusual event for Florida Cities?

A. Well, it's unusual to the extent that I believe this may have been probably the second such meeting that I was involved in, at least.

Q. And did you tend to write Mr. Sharp about usual or unusual events?

A. Very unusual events.

Q. Okay.

Now, one last question, Mr. Allen. Why did you change your mind and decide to testify rather than invoke the Fifth Amendment?

A. I felt personally very uncomfortable with asserting my Fifth Amendment rights. I felt that from the company's standpoint, it was important that I come forward and testify and as time went on, I became personally more uncomfortable with that assertion.

Q. Was this a personal decision or a company decision?

A. Absolutely personal decision. The company had nothing to do with it, sir.

MR. HIRD: Thank you very much, Mr. Allen.

THE COURT: Mr. Jacobs, you have recross?

MR. JACOBS: Very brief, Your Honor.

THE COURT: Well, make sure that it's proper recross.

MR. JACOBS: Yes, sir.

RECROSS EXAMINATION

BY MR. JACOBS:

Q. My recross is limited to one exhibit that Mr. Bullock asked you to look at, Mr. Allen, Exhibit 570, and the comparison he asked you to make with the City of Cape Coral.

Now, he asked you whether the City of Cape Coral effluent was discharged to the Caloosahatchee River and at first you said yes, and then I believe you said that part of the

discharge may have been eliminated.

Let me ask you, sir, isn't it true that the City of Cape Coral has a one hundred percent reuse system and has no discharge whatever to the Caloosahatchee River?

A. No, sir, I'm not aware that there is no discharge. I he presumed there was probably a zero discharge permit, but I really don't know.

Q. A zero discharge permit, that means no discharge, correct?

A. No, sir, it doesn't.

Q. What does it mean to you?

A. It means that there -- a discharge is allowed only uncertain storm events, certain rainfall events, normally a rainfall with a return frequency of ten years.

Q. So, very, very rare, is that correct?

A. That would be correct, yes.

Q. Once in ten years?

A. Well, I couldn't say -- couldn't limit it to once in te years. It would be any time there's a rainfall event that qualifies for a once in ten year event, a discharge would be allowed, yes, sir.

Q. Okay.

But otherwise, with that exception, the City of Cape Coral has no discharge to the Caloosahatchee River or at lea it has a one hundred percent reuse system with that exceptio

is that correct?
A. Sir, I'm just not sure. I'm not that familiar with their permits. I do know they have a reuse system.
Q. And isn't it also true that the City of Cape Coral has offered to buy from Florida Cities Water Company all of the effluent discharged from the Waterway Estates Plant to the Caloosahatchee River to use in that reuse system so the Waterway Estates would have no discharge at all?
A. No, that is not correct.
THE COURT: Thank you, sir. You may step down.
Call your next witness.
MR. BULLOCK: Your Honor, our next witness will be Julie Karleskint. Mr. Scroggin will handle that.
While Ms. Karleskint is coming, I needed to inform the Court, we had given the Court a list of witnesses yesterday, one of who was Charles Hill. Mr. Hill is an employee of the Florida Public Service Commission. We were informed after Court yesterday that Mr. Hill, I believe it was yesterday, suffered an attack of diverticulitis and is not going to be able to be here today. We gave notice of that to counsel yesterday as best we could. We FAXed them a letter to the U. S. Attorney's Office in Tampa, and I believe Mr. Quinn acknowledged that they got that letter this morning.
If there is an additional day of testimony at some point in time, we would reserve the right if possible to bring

Mr. Hill that day.
THE COURT: Very well. We'll see where we are.
MR. BULLOCK: Thank you.
THE COURT: When we get through this day.
THE CLERK: Raise your right hand.
Thereupon,
JULIE KARLESKINT,
having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:
Take a seat in the witness box. State your name and spell your last for the record.
THE WITNESS: Julie Karleskint. I'm sorry, can you repeat?
THE CLERK: Spell your last for the record.
THE WITNESS: K-A-R-L-E-S-K-I-N-T.
DIRECT EXAMINATION
BY MR. SCROGGIN:
Q. Good morning, Ms. Karleskint.
A. Morning.
Q. Would you please state your current position.
A. I'm the operations manager for Florida Cities Water Company.
Q. And how many years have you served in that position?
A. A little over four years.

Q. To whom do you report?
A. I report?
Q. In that position?
A. I report to Mike Acosta and also to Paul Bradtmiller and Gerald Allen.
Q. And can you describe your responsibilities as operations manager for Florida Cities Water Company?
A. I'm responsible for overseeing the operations and the maintenance of the water and wastewater treatment facilities as well as regulatory compliance for those facilities.
Q. Ms. Karleskint, what communications if any do you have with others at Florida Cities Water Company regarding environmental compliance?
A. I have -- I work with the division managers who oversee directly the water and wastewater facilities at that division. I work with the wastewater superintendents and the water superintendents and I also keep Mike Acosta, which is my direct supervisor, informed of what is happening.
THE COURT: Can you pull the -- position yourself so that you're closer to the microphone?
THE WITNESS: Okay.
BY MR. SCROGGIN:
Q. And what communications if any do you have with the environmental regulatory agencies regarding environmental compliance at Florida Cities Wastewater Treatment Facilities?

A. I have frequent communication with them on an as needed basis and also just to let them know what is happening at Florida Cities so they're not caught by surprise.
Q. What role if any do you play in the submission of discharge monitoring reports to EPA pursuant to the NPDES Permits held by some of these facilities?
A. I review those on a monthly basis before the division fills them out and then I review them and we submit them from our office, Mike Acosta will sign them, and then we'll make sure they're sent out on a monthly basis.
Q. Do those responsibilities include Barefoot Bay and Waterway Estates.
A. Yes, they do.
Q. Do those responsibilities ever include the Carrollwood Facility up to the time it went out of business?
A. I believe Carrollwood went out of -- quit discharging as soon as I became operations manager in '92, so I don't remember in my job as operations manager reviewing Carrollwood monitoring reports.
Q. Do you have any procedures to assure that the submissions to EPA are accurate and correct?
A. I try to verify the information provided by the divisions that it is, that the forms are filled out correctly.
Q. I believe you referred to a transition in your responsibilities at Florida Cities Water Company. Can you tel

me what your previous position was for Florida Cities Water Company?
A. My previous position was not with Florida Cities Water Company, it was with Avatar Utilities. I was the environmental auditor or environmental engineer for Avatar Utilities and I audited the facilities, the Missouri City Water Company and Florida Cities Water Company, and I also provided technical assistance to those facilities on an as needed basis.
Q. Can you describe what the environmental audit program was at Avatar Utilities, Incorporated?
A. It was basically -- we call it the environmental assurance program. And that is what I was brought to Avatar Utilities to do. Gerald Allen had come there the previous year and he had developed this program for assuring environmental compliance and what we did, we took a look at all the rules and regulations and developed a checklist and went to all the facilities and did an audit of those facilities and looked at all the present rules and regulations.
We also looked at proposed rules and regulations and how they may impact the utility operation. We reviewed the permits, we did a walk-through of the facilities, and we try to perform comprehensive audits and report those findings to Mr. Allen.
Q. What recommendation if any did you make based upon the environmental audits that you conducted for Avatar Utilities?

A. I made numerous recommendations. Basically, what we -- fencing in all the wells, putting -- developing special areas for hazardous chemicals, letting them, you know, upgrading the underground storage tanks with respect to the U. S. -- the rule that had just come into effect. Just, I mean, we just looked at all the rules and regulations and how they impact the utility and made recommendations pursuant to that.
Q. And you worked for Avatar Utilities conducting the environmental audit program for how many years?
A. I believe three years.
Q. What were those years?
A. 1989 -- I came in January, '89, and I started my job as operations manager in January of '92.
Q. And you're operations manager today at Florida Cities?
A. Yes, sir.
Q. Having been there approximately four years, can you very briefly telling us what educational and professional training you have relative to your current positions with Florida Cities?
A. Upon graduation from high school, I went to the University of Oklahoma. I attended them till 1982, and I graduated with a BS in environmental science. Upon graduation, at O.U., I went on to Oklahoma State University and received my masters of science degree in bio-environmental engineering.
A few years later, I worked full time for the State of

Kansas, but I also attended the University of Kansas and received my civil engineering degree from the University of Kansas in 1988.
Q. Can you tell me what professional licenses you hold?
A. I'm a professional engineer in the State of Florida, Kansas and Missouri. And I also hold a Class A Wastewater Operators license in the State of Missouri.
Q. Since college, have your responsibilities been related to water quality and the treatment of either drinking water or sewerage?
A. My primary focus has been water and wastewater.
Q. Can you tell me what instructions if any you gave other personnel at Florida Cities regarding the notification of regulatory agencies if events or incidents occurred at any Florida Cities Facilities?
A. I always told them they need to notify the regulatory agencies when they ever had any abnormal events and I believe they have been very good at that and also notify me and letting me know what was going on, also.
Q. What agencies did you instruct them to notify?
A. Primarily, I had them notifying State agencies. If there was reason to notify EPA, I told them to notify me and then I would be the responsible party.
Q. Why did you tell them to notify first the State agencies rather than EPA?

A. Because we had a very good working relationship with the State agencies. The State agencies were there, I mean, they inspected the facilities on a recurrent basis. They knew the operators at that facility, and that is basically who we -- the State and county agencies, who we believed were the proper agencies to call.
Q. Can you compare the frequency of contacts that Florida Cities Facilities had with EPA versus the Florida Department of Environmental Protection or its predecessor, the Florida Department of Environmental Regulation?
A. EPA contact was very infrequent. The EPA personnel would probably come to the facility once a year to perform an annual inspection and they had usually come with the DEP or DER as it was, so they usually performed joint inspections, but that is basically all we -- the discharging facilities, the non-discharge facilities, we never saw EPA.
Q. Were there any differences in the level of scrutiny or the stringency of regulations given by these two agencies to the wastewater treatment facilities of Florida Cities?
A. Yes. The State regulations seemed to be a lot more stringent, and they also seemed to -- they just appeared much more often, so we had a much more frequent contact with them.
State regulations basically mean we had the Indian River Lagoon Act which basically requires no discharge into the Indian River Lagoon. We have the Grizzle-Figg up in this area

which requires advanced levels of wastewater treatment, and then in the central district, there's also a no discharge push by the State of Florida and EPA just usually followed along with whatever the State requirements were.

Q. Can you tell me what Grizzle-Figg is to which you referred?

A. Grizzle-Figg is a bill that was passed by two legislators, here in Florida. Primarily, in this area here, in Tampa Bay, was concerned with the treatment of the water quality of Tampa Bay, so it basically required that everyone that discharged into Tampa Bay, every facility that discharged into Tampa Bay have an advanced level of wastewater treatment if they were to discharge.

Q. Do you know what year Grizzle-Figg was passed, approximately?

A. I would have known. Right now, I'm a little nervous. I think it was like 1987, but I may -- I'm not sure.

Q. Did you ever make any recommendation regarding environmental compliance to Florida Cities Water Company that were costly to the company?

A. Yes, I did.

Q. Can you give any examples of those recommendations that were regarding environmental compliance that were costly to the company?

A. Basically -- well, the most costly ones were upgrading

the treatment plants which Florida Cities Water Company was already in the process of doing at the time of doing the audits. So, they were making those improvements as I was doing the audits. They were in the process of working through getting the permits and getting that done.

So, a lot of my recommendations were just in -- like for the Carrollwood Facility, putting in a post-aeration tank even though we knew that facility was going to abandoned. We also built laboratories so we could improve the treatment of that facility and improve the process so we could try to meet it as best we could. It was a secondary plant and we did our best to meet the limits in the permit, and so we made some improvements to that, even though we knew it was going to be abandoned in six to eight months.

Q. And when you worked for Avatar Utilities prior to your current position with Florida Cities, did you make recommendations to Avatar Utilities that were costly to Avatar Utilities?

MR. HOMIAK: Objection, referring to plants.

BY MR. SCROGGIN:

Q. Any issue relating to the environmental audit program you administered?

A. Almost all the recommendations that I made that dealt with environmental compliance, regardless of cost, it was something that was required for that to meet environmental

regulations or even for safety. They, Avatar Utilities, Florida Cities, they went through and they did make those improvements.

Q. In your entire history at Avatar Utilities and now at Florida Cities, have you ever made a recommendation that you believed was required for environmental compliance that was overruled by your superiors for cost considerations?

A. Never.

Q. Have you ever felt, in your tenure at Avatar Utilities or at Florida Cities, pressure in any way to downplay taking steps to address in timely fashion the implementation of procedures necessary or required for environmental compliance?

A. No.

Q. I'd like to turn to, Ms. Karleskint, to the exceedences that are alleged for the three facilities in this case, Barefoot Bay, Carrollwood and Waterway Estates. Do you know what kind of effluent was being discharged throughout your tenure at the Barefoot Bay Facility?

A. Yes, sir.

Q. And what was that kind of effluent?

A. It was secondary treated effluent.

Q. Are there different degrees of secondary treatment?

A. Yes. There are --

THE COURT: Well, he hasn't asked you a question. You answered the last question. Go ahead.

BY MR. SCROGGIN:

Q. Can you tell me what level of secondary treatment the Barefoot Bay Facility had?

A. I believe that we exceeded for the most part the BOD and TSS limitations, I mean requirements, for secondary treatment, and in most cases, you would see that it actually met the BOD and TSS, actually met advanced wastewater treatment levels.

Q. I'll ask you, Ms. Karleskint, to be shown Florida Cities' Exhibit Number 192, which is the final permit for the Barefoot Bay Facility. This document is already in evidence. I'll ask if you recognize this document.

A. Yes, I do.

Q. And I would direct your attention to the permit requirements that are on the fourth page of this Exhibit 192, with the title, part one, effluent limitations and monitoring requirements. Do you see that?

A. Yes, I do.

Q. And can you tell me -- the focus of these questions is going to be BOD. Can you tell me what is required by this permit for the Barefoot Bay Facility to test for and report?

A. It requires an annual BOD of twenty milligrams per liter, monthly average of thirty milligrams per liter and a daily maximum of sixty milligrams per liter.

Q. During the period of time from November, 1991 through November, 1993, do you know what the Barefoot Bay Facility

tested for and recorded on its discharge monitoring reports with respect to the BOD requirement in this permit?
A. Yes. I believe they were testing for carbonaceous BOD.
Q. And what is the difference between carbonaceous BOD and BOD which is described in the permit?
A. This says a five day BOD, and then we were testing for carbonaceous BOD. Back I believe in 1989, the State went from testing requirements for a five day BOD to a carbonaceous BOD because they believed that test to be -- well that test is a more accurate BOD test for a five day period.
Q. Which test is more accurate?
A. The carbonaceous BOD.
Q. And is that the test that you were in fact reporting to EPA?
A. Yes, the EPA permit was, yes.
Q. Why were you reporting the more accurate CBOD test to EPA when the permit required reporting of BOD?
A. Basically, it was a mistake. It was a laboratory mistake. The laboratory was performing carbonaceous BOD for the State permit and they were -- when they were reporting it to, they were reporting it as BOD and it was -- it was an error. We thought we were getting BOD results and we actually were getting carbonaceous BOD results from our outside laboratory.
Q. How was the mistaken misreporting of BOD when the permit

-- I'm sorry, CBOD, when the permit required CBOD detected?
A. We immediately --
Q. I asked you how was it detected.
A. Through the EPA performance inspection, audit inspection
Q. And what if anything did Florida Cities do upon being notified that there was the accident in this misreport of CBOD when the permit required a report of BOD?
A. We immediately informed the laboratory they needed to be testing for both BOD and carbonaceous BOD.
Q. And why did you test for both?
A. Because the permit, the State permit required carbonaceous BOD testing and the Federal permit required BOD testing.
Q. Have you reviewed the numbers reported for BOD that were actually CBOD on the DMR's?
A. Yes, sir.
Q. And can you tell me, based upon your knowledge of the difference between BOD and CBOD, would the effluent have complied for each month at issue for this particular parameter it reported correctly, BOD instead of CBOD.
THE COURT: Just a moment.
MR. HOMIAK: Your Honor, objection. I think this calls for an expert opinion as to the testing difference between CBOD and BOD and Ms. Karleskint has not been offered as an expert in these analytical procedures and I would object to

her testimony as merely her opinions.
MR. SCOGGIN: May I be heard?
THE COURT: Yes, sir.
MR. SCROGGIN She has many years experience in analysis and operation of these facilities. I'm simply asking her, based upon that experience which is before the Court, if she made a determination of whether or not these numbers, had they been correctly reported, would have been less than the permitted limits. That is her job, is to make such determinations on a regular basis.
MR. HOMIAK: Your Honor, I'm not quarreling unnecessarily. Ms. Karleskint could have been offered as an expert to testify about the differences between BOD and CBOD, but she wasn't, and I think she's not submitted an expert report, offered her opinion on this issue, and I think --
THE COURT: I agree, I'll sustain the objection.
BY MR. SCROGGIN:
Q. Did you take any -- did Florida Cities take any other steps regarding the BOD/CBOD issue other than starting to report BOD correctly to EPA?
A. Yes, we did. We examined a permit notification to the EPA to test for CBOD in lieu of BOD so we didn't have to do the test twice.
Q. And I would ask that the witness be shown Florida Cities' Exhibit Number 176. I will ask if you recognize this document?

A. Yes, I do.
Q. Can you identify the document?
A. It's a letter to EPA requesting that the five day BOD test required by the above referenced permit be changed to the five day carbonaceous BOD test since the Florida Department of Environmental Protection has changed the permit requirements to consider BOD.
Q. Did you review the letter before it was sent to EPA?
A. I believe I actually drafted the letter.
MR. SCROGGIN: I'd ask that 176 be moved into evidence.
THE COURT: Be received.
BY MR. SCROGGIN:
Q. Ms. Karleskint, Exhibit 176 you testified is the request of Florida Cities that EPA change the requirement from reporting BOD to instead requiring CBOD. What was the response of EPA, if any?
A. They changed the permit and basically used the exact same permit limitations they had for the BOD test for the carbonaceous BOD test.
MR. SCROGGIN: I would ask the witness be shown Florida Cities' Exhibit Number 177 and also Number 90. Just to speed things up, these are two closely related exhibits, Number 177 and also Number 90.
BY MR. SCROGGIN:.

Q. First, Number 177, I'll ask if you recognize this document?
A. Yes, I do.
Q. Have you seen it before?
A. Yes, I have.
Q. And what is this document?
A. It's the intent to modify the Barefoot Bay permit from using the test of BOD to CBOD.
MR. SCROGGIN: I would ask that 177 be moved into evidence?
THE COURT: Will be received.
BY MR. SCROGGIN:
Q. And I would turn your attention now, Ms. Karleskint, to Florida Cities' Exhibit -- I'm sorry, I misspoke, Florida Cities' Exhibit Number 179, please. We'll get to 90 in a second.
Can you tell me what Exhibit 179 is?
A. It's the final modification of the Barefoot Bay permit which required testing for carbonaceous BOD in lieu of BOD.
Q. And did you review this document when Florida Cities received it from EPA?
A. Yes, I did.
MR. SCROGGIN: And I'd ask 179 be moved into evidence.
THE COURT: It'll be received.
MR. SCOGGIN: Ms. Karleskint, what do these sequence

of documents -- how did these documents change the requirements for reporting to EPA either CBOD or BOD for the Barefoot Bay Facility.
A. There was no change.
Q. Well, the permit began with requiring the reporting of BOD and I believe your testimony was that EPA changed the permit to now require the reporting of CBOD, is that correct?
A. I'm sorry, I misunderstood the question.
Yes, the change was from testing for five day BOD to testing for five day carbonaceous BOD with no change in permit limits or monitoring requirements.
Q. Did you have any other experiences with EPA changing permits from BOD on CBOD?
A. Yes. I believe at the same time, we requested that the Waterway Estates Facility and the Fiesta Village Facility permits be changed from five day BOD to five day CBOD since we were already testing for those. Also, they were State requirements.
Q. And I'll direct the witness' attention to Florida Cities' Exhibit Number 90 at this time and ask if you recognize that document?
A. Yes, I do.
Q. And what is that document?
A. It's the intent to modify the Waterway Estates permit from BOD to CBOD.

Q. And was there any further steps taken by EPA to make that draft determination final at the Waterway Estates Facility?
A. Yes, they did finalize that modification.
Q. Did you make any determination regarding the seriousness of the environmental harm that might have been caused by this accidental misreporting?
MR. HOMIAK: Objection, Your Honor. I believe the issue of environmental harm calls for an expert opinion and again, Ms. Karleskint has not been offered as an expert in anything.
MR. SCROGGIN: May I be heard, Your Honor?
THE COURT: Yes, sir.
MR. SCROGGIN: I'm not asking her expert opinion, Your Honor. Part of her job responsibilities, she has testified, is to assist and make recommendations to her company regarding steps that must be taken to assure environmental compliance. I'm asking her if she did in fact make any determination herself based upon her experience and pursuant to her responsibilities recording the seriousness of this with respect to making such recommendation.
THE COURT: Yes.
MR. HOMIAK: Your Honor, I think there's a fundamental difference between determining what the regulatory requirements are and whether or not there is environmental harm that may or has resulted from a particular discharge. I think

the latter requires some demonstrated expertise.
THE COURT: All right.
Well, I'll hear the testimony on proffer and then I'll determine whether it's appropriate or inappropriate, given the fact that she has not been offered as an expert, that is, given the fact that there's not been compliance with requirements under Rule 26. Go ahead.
BY MR. SCROGGIN:
Q. Ms. Karleskint, did you make any determination regarding the seriousness of this accidental misreporting of CBOD when the permit initially required BOD?
A. I don't remember if I signed the letter, but I did draft a response to EPA upon --
THE COURT: Did you make a determination as to the seriousness. I think that is the question that -- you can answer that and then you can explain.
THE WITNESS: Okay. Thank you.
I did not believe that there was any impact to the environment --
THE COURT: No, no, did you make a determination as t the seriousness of this mistake; yes or no?
THE WITNESS: Yes.
BY MR. SCROGGIN:
Q. What was that determination?
A. My determination was there was no impact to the

environment due to the difference in the CBOD test versus the BOD test.
Q. Does it make any difference to you, Ms. Karleskint, in the level of urgency of the recommendation you make to Florida Cities whether or not you think that there is environmental harm related to the operation of these facilities?
A. Not really. EPA requirements requires that if you have actual environmental -- if you have harm to the environment, you need to notify them within -- if there's actual harm to the environment, you need to notify them within twenty-four hours.
It's my position and Florida Cities' philosophy is to comply with every regulation there is and to respond as quickly as possible to anything, regardless of whether it just be something on paper or environmental impact, but --
THE COURT: Okay, okay, counsel, she's offering an opinion here based upon, as you say, her experience and whatever else, her education, and you should have -- you should have complied with Rule 26 if you wanted to elicit that information. So I agree with the Government, I think that is not appropriate, so I'll strike her answers to the last couple of questions.
MR. SCROGGIN: Yes, Your Honor.
BY MR. SCROGGIN:
Q. I'd like to move on to the TRC, total residual chlorine issues at Barefoot Bay, and I'll ask you, Ms. Karleskint, do

you know what test method was being used to test for total residual chlorine at Barefoot Bay during the period of September, 1992, through March of 1993?
A. Yes, sir. We were using the DPD colorimetric method as specified in our NPDES Permit.
Q. And I would direct your attention, if I might, Ms. Karleskint, to the numerical values that were reported for TRC at Barefoot Bay during this period and for this purpose, I suggest we use the DOJ charts that were attached to the Government's summary judgment, and that exhibit number I believe is Government Exhibit 1, and ask that the witness be shown Government's Exhibit 1.
Ms. Karleskint, do you remember what the permit limit was for TRC at the Barefoot Bay Facility?
A. Yes, it was .01 milligrams per liter.
Q. With the Court's permission, I would like to ask this witness, since this is a mathematical issue, if she might be allowed to draw on the sheet while she -- as part of her answer in terms of illustrating the differences between the permit limit and the reported numbers, and I'll ask you again, first, what was the test method being used, Ms. Karleskint?
A. The DPD colorimetric method.
MR. HOMIAK: Your Honor, I'd like to reserve my ability to object to this if it's offered in evidence.
THE COURT: What, this document here?

MR. HOMIAK: This document that is being created.
THE COURT: Well, it's not been offered in evidence, and so certainly, there is no problem with the witness using the pad to illustrate his or her testimony.
BY MR. SCROGGIN:
Q. And can you illustrate the difference between the permit limit of .01 and on that chart so that the we may be able to see more clearly the difference between reported values and the permit's limit?
A. Yes, sir.
Q. Ms. Karleskint, may I ask you to just describe what these lines are after you draw whatever it is you're drawing. You've written on your chart the numbers .01 .1, .2, .3. Can you tell us what the units are for those numbers, Ms. Karleskint?
A. All units are in milligrams per liter for parts per million.
Q. And would you draw a line on the chart showing what the permit limit was for TRC?
A. The permit limit was .01 which is the very bottom line on the chart.
Q. Would you now put on the chart perhaps with a little X or some different symbol what actual numbers were reported to EPA as being measured with the DPD method taken from the Government's Exhibit 1, and would you read off those numbers, please, the reported values that you just placed on the chart

above the .01 permit limit?
A. These are maximum values that were reported for the month. The values -- maximum values were, there's .1, .08, there's a .05 and there's a .06, I believe, and some of those were reported twice for several of the months.
Q. Did EPA inspect the Barefoot Bay Facility during the time the DPD EPA method was being used to test for TRC?
A. Yes, they did.
Q. Did you review all those inspection reports you received from EPA?
A. Yes, I did.
Q. What instruction if any did you receive from EPA regarding how to record numbers for TRC?
A. They did not make any suggestions with that whatsoever.
Q. Did EPA make any suggestions that you change the way the the numbers were being reported to EPA?
A. No, they did not.
Q. Do you know today what the detection limits of the DPD method that was being used at this time at Barefoot Bay?
MR. HOMIAK: Objection. I believe once again this gets into the field of expert testimony. What the detection limits of a particular analytical procedure, I believe, is the subject of expert testimony unless there is some document that has already been offered into evidence that sets forth what th limits of a particular procedure is, and once again,

Ms. Karleskint hasn't been offered as an expert in this field and has not followed the order pursuant to Rule 26 and I object.

MR. SCROGGIN: May I be heard?

THE COURT: Yes.

MR. SCROGGIN: Ms. Karleskint testified her responsibilities include, on a daily basis, having to make such determinations, to check for the accuracy and correctness of the numerical numbers being submitted to EPA, part of those responsibilities including whether or not they're reliable.

I'm asking her if she knows whether or not these numbers being submitted to EPA were, pursuant to those responsibilities, correct and reliable. A component of that, I would be glad to lead her through a series of questions in determining the reliability of such numerical data, is knowing the detection limit for whatever method is being used.

THE COURT: All right.

Go ahead, and I'll take under submission the objection.

BY MR. SCROGGIN:

Q. Do you know the detection limit for this EPA approved method?

A. Yes, I do.

Q. And what is that?

A. It's 0.2.

Q. Would you draw that on your chart, please?

THE COURT: How do you know that?

THE WITNESS: I recently have done some research into that and it's based upon the EPA method, 330.5 which is referenced in the Code of Federal Regulations, this DPD colorimetric method and it is accurate from .2 to 4 million gallons per liter.

THE COURT: Where did you determine that from, specifically?

THE WITNESS: This is an EPA document, chemical analysis for water and wastewater.

MR. SCROGGIN: Your Honor, if I might, can I ask the Court to take judicial notice of the Code of Federal Regulations which referenced this test method and the EPA treatise which is incorporated by reference into that reference that is the document that is being referred to?

THE COURT: That should have been -- has that been something that has been divulged to the Plaintiff in this case, that is, that you're asking the Court to take judicial notice of a document?

MR. SCOGGIN: Yes, Your Honor. I have a copy of this document to Plaintiffs earlier this week, told them I would be using it or it was being referred to by Ms. Karleskint's testimony.

THE COURT: Earlier this week. I'm talking about

timely.

MR. SCOGGIN: Your Honor, this document came to our attention only this week. It is --

THE COURT: How did it come to your attention?

MR. SCROGGIN: Came to our attention from Ms. Karleskint. It was a document specifically requested pursuant to our discovery requests of the Government on two separate occasions. It was never produced by the Government. We became aware of it this week. We provided a copy of it to the Government and it is a reference as to specific limits --

THE COURT: How did you request it? Was there a document that was filed, a motion to produce or are you saying it was requested twice before and they failed to produce it? I'm simply asking, is there any question about that, as to whether there was a request for production?

MR. HOMIAK: Yes, Your Honor. I do have some question about that. I would point out that --

THE COURT: It's a matter, it doesn't surprise me. Go ahead. I didn't mean to cut you off, Mr. Homiak.

MR. SCROGGIN: Your Honor, in our first --

THE COURT: Mr. Homiak, I asked you a question and I cut you off. I didn't mean to.

MR. HOMIAK: Well, Your Honor, I'd point out the document that Mr. Scroggin is referring to is a public document and there is certainly no duty to produce documents.

THE COURT: So you declined the request to produce it because it's a public document. Is that what you're telling me?

MR. HOMIAK: If it was requested, Your Honor, and I can't say right now that it certainly was or was not, I'd have to review the discovery request. There certainly was no motion made to compel the production.

THE COURT: All right.

Go ahead, Mr. Scroggin.

MR. SCROGGIN The reason there was not a motion to compel was because we were unaware of the document, but in our first document request --

THE COURT: That was the reason there was not a motion to compel?

MR. SCROGGIN: That's correct. We were unaware of it. We did specifically request on January 12th, 1994, in our initial document request, all documents relating to EPA's procedures including internal guidance or manuals regarding the procedures for the review and interpretation of water quality data as well as for all documents including studies, evaluations, tests or reports regarding health or environmental effects of discharges of wastewater from the Waterway Estates facility. This clearly is such a manual regarding test procedures. In our second document request, we again requested manuals, guidance from EPA.

THE COURT: Ma'am, you can have a seat there, this may take a while.

MR. SCROGGIN: This document was not produced. We were unaware it and had we been aware of it, we would have included it in our exhibits for this trial, sir.

THE COURT: So you're asking the Court to take judicial notice of what now?

MR. SCROGGIN: Of a public document that is specifically incorporated by reference into the Code of Federal Regulations, it is referred to in part one -- in part 136.3 of 40 CFR table 1-B, refers specifically to test method 330.5. This is the official EPA document containing the information that Ms. Karleskint has just discussed for that test method. It is the document that EPA makes public of which we were unaware that is specifically referenced and we would argue incorporated by reference in the Code of Federal Regulations, it is EPA's own test manual, sir, that we're asking to be referred to.

THE COURT: So that she can give her opinion on the detection. Well, for what purpose?

MR. SCROGGIN: For the purpose, sir, of demonstrating that had Ms. Karleskint been timely made aware of this document, she would not have reported as she did on these DMR's and there would be no exceedences for TRC pursuant to EPA's own guidance.

She's testified that -- she's testified that she received no instructions from EPA during -- EPA instructions regarding the use of this test method which EPA itself prescribed. Had she received these instructions, she would have reported differently on the DMR's and we would not be here on this particular case. That is with respect to TRC, all the TRC exceedences would vanish and not be before the Court had Ms. Karleskint been given the guidance from EPA that she was not aware of is the importance of this.

THE COURT: Mr. Homiak.

MR. HOMIAK: Your Honor, I have a number of points. First of all, I don't see how Mr. Scroggin can say they were unaware of the document and then rely on the Code of Federal Regulations which allegedly referenced this document and incorporates it by reference.

According to Mr. Scroggin, certainly, Florida Cities was on notice of what the requirements of the Code of Federal Regulations are. I would also point out, Your Honor, that in the -- that the copy that was given to me by Florida Cities, there is a date stamp on the cover page which says received October 12, 1992. This document obviously came from, is being produced by Florida Cities, and so, someone obviously had it in October of 1992, so I don't see how Mr. Scroggin can claim that it was just recently discovered. It is a 1987 document, Your Honor.

I would also point out that the pages of this exhibit -- of this document that were given to me contain a cover page and three pages, the first page of which is numbered 330.5-1 which suggests to me that this is a document that is several hundred pages long. And we've received three pages of it. I think it would be very unfair at this point for Mr. Scroggin to introduce this document not having offered it as a trial exhibit before and expect us to be aware of a document that is clearly several hundred pages in length, so I would object.

I think that if the company wanted to use this exhibit, it should have designated it as a trial exhibit, alternatively, made some sort of an emergency motion to this Court setting forth the facts of this instead of relying, waiting until Ms. Karleskint is on the stand and trying to introduce it at this point.

MR. SCROGGIN: May I be heard, Your Honor?

THE COURT: Yes.

MR. SCROGGIN: The date reference of October 12, 1992, I think does require clarification, but I think Ms. Karleskint can best answer that if you wish to know why that date is there.

The indication it was the date received by Florida Cities, I would proffer to the Court, is that is incorrect. Second, the Government is essentially seeking to suppress its own guidance so it will not be before the Court. Surely, if we

are obligated to gather all test methods published in the Code of Federal Regulations as counsel has argued which would be in the tens of thousands of such documents, surely the Government itself cannot argue that these documents are not before the Court as being incorporated into the Code of Federal Regulations, and therefore, a public document that the Court may at its discretion take notice of.

THE COURT: No, sir, I've heard all I'm going to hear on this issue. I'm going to overrule the objection. I'm going to take judicial notice of the Code of Federal Regulations and the document that it purports to incorporate. I'll overrule the objection on the ground that -- stated ground that the witness is stating opinions in violation of Rule 26, at least for purposes of testimony that I have so far heard. Proceed.

MR. SCROGGIN: I would just state, Your Honor, that the reason we provide only three page are those -- we believe are the only three relevant pages from this document. The other test methods are not relevant.

THE COURT: Now, have you got the document?

MR. SCROGGIN: Yes.

THE COURT: You referred to the CFR provision. Now, have you got a copy of that, by chance, the pertinent portion of it, or are you going to rely upon just an incorporation by reference?

MR. SCROGGIN: I have a copy of -- one copy of the

Code of Federal Regulations. We have the CFR, but if it incorporates by reference -- and I do have copies of other documents prepared for insertion into the notebooks pending approval of the Court.

THE COURT: All right.

I have received that over objection, but I need to make sure you've got it there for presentation.

MR. SCROGGIN: I do, sir. And the documents number would be Florida Cities' Exhibit Number 209, and I'll provide a copy to the Court, the courtesy copy to Your Honor and to the other, the Government, and I would ask that Exhibit 209 be moved into evidence which is these three pages taken from the document.

THE COURT: Received over objection. Now let's move on.

BY MR. SCROGGIN:

I would ask that the witness be shown the Florida Cities' Exhibit Number 209. If I may have just a moment, I will give these to the appropriate people.

(Brief Pause.)

BY MR. SCROGGIN:

Q. I would direct your attention, Ms. Karleskint, to Exhibit Number 209, to page 3 on .5-1. My first question to you is, do you know why this page is numbered 330.5, why the page number begins with that?

A. I believe it's referring to the method which is 330.5?

Q. And is that the number of method referred to in the Code of Federal Regulations?

A. Yes, it is.

Q. Would you please read the very first paragraph, the very first sentence in this document. I'm sorry, strike that.

Would you please identify how you used -- how you would have used this document?

A. This is a document that the people in the laboratory and wastewater facilities used. It talks about how to do the different tests required in the permit.

Q. Is this -- are these the instructions for how to do the DPD colorimetric method?

A. Yes, they are.

Q. And is that the EPA approved method that appeared in the Barefoot Bay permit?

A. Yes, it is.

Q. And would you please read the first sentence of instructions on how the EPA gives -- on how to do this -- perform this method?

A. DPD colorimetric method is applicable to natural and treated waters at concentrations from 0.2 to 4 milligrams per liter.

Q. Ms. Karleskint, on your chart, would you please show where 0.2 to 4 milligrams per liter would appear?

A. Right here is 0.2, 4 milligrams per liter would be probably up at the ceiling there and I don't have enough paper.

Q. Did you reach any conclusion regarding how you would report using this method now that you know the detection limit from the EPA manual, did you reach any conclusion regarding how you would report future values of TRC from the wastewater treatment facilities that were below 0.2?

MR. HOMIAK: Objection, Your Honor. I think this -- Mr. Scroggin's statement mischaracterizes the statement that the witness just read. It says the DPD colorimetric method is applicable to natural and treated waters and --

THE COURT: Going too fast for the Court Reporter. Back up and read it again.

MR. HOMIAK: Your Honor, the basis of my objection is that I believe that Mr. Scroggin has mischaracterized the sentence that the witness has read into the record, that the sentence reads, that DPD colorimetric method is applicable to natural and treated waters at concentrations from 0.2 through 4 milligrams per liter. It does not say that is the detection limit.

THE COURT: Does not say what?

MR. HOMIAK: It does not say, as Mr. Scroggin indicated, this constitutes the detection limit of this method.

MR. SCROGGIN: Ms. Karleskint --

THE COURT: Well, wait a minute. I'll sustain the

objection.

MR. SCROGGIN: Sorry, Your Honor, I'll reframe the question.

BY MR. SCROGGIN:

Q. Ms. Karleskint, pursuant to the EPA instructions saying that this test method is applicable to natural and treated waters from .2 to 4, what does that tell you, if anything, regarding its applicability to the values you've written on your chart as measured from the Barefoot Bay Facility?

MR. HOMIAK: Objection. I think that clearly is calling for an opinion by the witness and she's not been offered as an expert in detection levels for the DPD colorimetric test.

MR. SCROGGIN: May I be heard, Your Honor?

THE COURT: Go ahead, yes.

MR. SCROGGIN: Ms. Karleskint's responsibilities on a daily basis are to make determinations of how to write numbers into the discharge monitoring reports submitted to EPA. My question to her relates to pursuant to EPA's instructions, how would she write those numbers. Seems to be clearly related to her current responsibilities.

THE COURT: Well. I'll take under advisement the objection.

Read the question back.

(Record read back.)

You can answer the question.

THE WITNESS: These numbers are not valued.

MR. SCROGGIN: Can you explain that?

THE COURT: What numbers are not valued.

THE WITNESS: The numbers that we detected with our DPD method are all below the detection limit indicated in that guidance and that these numbers are all below the applicable detection for that test method.

THE COURT: Sir.

MR. HOMIAK: Your Honor, she's assuming again that the fact that it's applicable means this is the detection method and there is -- she has no expertise that's been offered that she really has any -- excuse me -- has no expertise in the detection limits of this particular method. She's just saying applicable in her mind means detection limit and I object to that. I think that mischaracterizes the document which is not been fully produced as required under Rule 106 and I object.

MR. SCROGGIN: I'll be happy to rephrase the question.

THE COURT: Rephrase it then, let's see where we go.

BY MR. SCROGGIN:

Q. Ms. Karleskint, pursuant to EPA's instructions, this test method is applicable from .2 to 4 milligrams per liter. Did you make any conclusion regarding its applicability the numbers that you in fact reported for Barefoot Bay; is it applicable?

A. No.

Q. And why is it not applicable?

A. Because the permit limit was well below the detection limit of the test procedure used.

THE COURT: Sir.

MR. HOMIAK: I move to strike the conclusion that this is below the detection level.

MR. SCROGGIN: Your Honor, if I may be heard.

THE COURT: Yes.

MR. SCROGGIN: Ms. Karleskint uses technical terms on a daily basis. I cannot direct her how to use these terms. These are the terms she uses in her profession and in her interactions with the agency.

I would be happy to ask her if she believes that the -- that the fact that this test method is applicable to .2 to .4 and it is not applicable below .2 means that that is the detection limit, but we need not reach that unless Your Honor wishes.

THE COURT: Well, I don't know, maybe I have put us on a road that is allowing you to elicit testimony, opinion testimony from a person who, although qualified by training, experience, and education to render such opinions, nevertheless, the procedures have not been followed to alert your opposition to the fact that this would be done, but the Court having previously ruled as it has, I will adhere to my previous ruling, and I'll overrule the objection.

BY MR. SCROGGIN:

Q. Ms. Karleskint, I would direct your attention to Florida Cities' Number 158, and ask if you --

THE COURT: Well now, we didn't get an answer to the last question, did we? Did you get an answer to the last question?

MR. SCROGGIN: I believe we did, Your Honor, but I'll be happy to rephrase it.

THE COURT: Was there an answer? Read it back.

MR. SCROGGIN: If I may, I believe we had a motion to strike the answer, so I think we did have the answer.

THE COURT: I'd like to have the answer read back to me.

(Record read .)

All right.

The Court will deny the motion to strike. Ask your next question.

BY MR. SCROGGIN:

Q. Ms. Karleskint, I direct your attention to Florida Cities' Exhibit Number 158 and ask if you recognize this document?

THE COURT: Yes, ma'am, just a moment.

(Brief Pause.)

Go ahead.

158, did you say?

MR. SCROGGIN: Yes, Your Honor.

BY MR. SCROGGIN:

Q. Can you identify, Ms. Karleskint, what this document is?

A. Yes, it's a memo from the chief of the facilities performance branch of EPA to the permit section staff.

Q. Have you seen this document before?

A. Only in preparation for this trial.

Q. Had you seen this document during the period in which the TRC levels of concern to this Court were being reported to EPA?

A. No, sir, I had not.

Q. I would direct your attention to page 4 of this exhibit. The first full paragraph beginning with the words "the NPDES Permit conditions," and ask you to read that paragraph and then I would ask you to read into the record beginning with the second sentence whose first words are "depending on the wastewater."

A. Depending on the wastewater, these tests may not detect --

THE COURT: Wait, wait, wait, where are you reading?

MR. SCROGGIN: On page 4, Your Honor, the first full paragraph which begins with the words "the NPDES Permit."

And the second sentence, I believe, beginning with the words "depending on the wastewater."

THE COURT: All right, go ahead.

THE WITNESS: Depending on the wastewater, these

tests may not detect chlorine down to a 0.01 milligram per liter level. A minimum detection level of 0.02 has been suggested. Therefore, in those cases, the permittee need only report not detectable using one of these tests to be considered in compliance. As detection levels improve over time, more accurate comparisons will be possible.

BY MR. SCROGGIN:

Q. Ms. Karleskint, how would you have reported the TRC values on the discharge monitoring reports submitted to EPA during the period of November, 1991, to November -- I'm sorry -- during the period of September, 1992, through March, 1993, had you been given these instructions and guidance from EPA?

A. After I discussed it with EPA, I would have reported it as not detectable.

Q. And what would your understanding be regarding the number of exceedences for TRC that would remain during this period of time had you reported NTD instead of the numerical values you have written on your chart?

A. We would have been in compliance with the permit requirements.

Q. I'd like to turn to the Barefoot Bay toxicity exceedences in this case. And I'll ask you, Ms. Karleskint, do you know why the Barefoot Bay Facility failed its toxicity test during the period October, '92, May, '93 and September, '94?

A. I believe that it was probably due to the fact that the

Barefoot Bay Wastewater Treatment Plant at that time was a secondary wastewater treatment plant. According to EPA guidance, the primary causes of toxicity, one of the primary causes is ammonia. Since the plant was a secondary treatment plant, it was not treating for ammonia and therefore that could have caused the toxicity at the Barefoot Bay Treatment Plant.

Q. Based on your experience with Florida Cities and other wastewater treatment facilities, is it difficult for a secondary plant discharging secondary effluent to comply with such toxicity tests?

A. It's very difficult.

Q. And if the plant upgrades to advanced wastewater treatment, is it easier for those plants to comply with the same toxicity test?

A. It usually does become easier as you upgrade the plants.

Q. What is the current status of the Barefoot Bay Facility with respect to its discharge effluent?

A. We are presently -- we are -- we've just finished the upgrade of the Barefoot Bay Plant to AWT and we're in the startup mode of the AWT processes.

Q. The permit for the Barefoot Bay Facility which you reviewed earlier, did it have any provision under -- I'll be happy for you to review it again, if you don't remember, regarding ceasing discharge from the Barefoot Bay Facility?

A. Yes. The original permit issued back in '89 I believe

required to cease discharge by July of '95.

Q. And did the Barefoot Bay Facility in fact cease all discharge by July of 1995?

A. No. We submitted a permit application for the discharge to EPA a hundred and eighty days prior to that permit's expiration in accordance with the rules and regulations.

THE COURT: Did you say 1995?

THE WITNESS: Yes, I did.

MR. SCOGGIN: I intended to say 1995.

THE COURT: All right, okay.

MR. SCROGGIN: I think I did.

THE COURT: You did.

BY MR. SCROGGIN:

Q. And what was the response of EPA to this request, if any?

A. If I recall, we did get a letter from EPA that said our permit application was considered complete, and that until a permit was issued, this usually is a standard letter we get from EPA, but you may continue to discharge until a new permit is issued in accordance with your old permit.

Q. What role if any did the State of Florida Department of Environmental Protection play in Florida Cities' request to continue discharging from the Barefoot Bay Facility?

A. The FDEP assumed delegation for the EPA NPDES program in May of 1995. Therefore, EPA was sort of out of the picture. They worked for the State of Florida, but we now responded.

Florida was handling the renewals of all the permits. We got a letter in July of '95 from the State of Florida that indicated that although our NPDES Permit had expired, we may continue to discharge in accordance with the second amended consent order with the State of Florida and that a new permit would be issued. Once the plant was -- once the AWT plant was complete, a new permit would be, I think they said, would be -- they would -- it would have the new permit conditions at that time.

Q. Was it your understanding that this gave Florida Cities authority to discharge from the Barefoot Bay Facility?

A. Could you repeat the question?

Q. Was it your understanding that this response from the Florida Department of Environmental Protection gave Barefoot Bay authority to continue discharging under Federal law?

A. Yes, sir.

MR. HOMIAK: Objection, it calls for a legal conclusion. I'm also not sure what the relevance is to the discharges. I think, Mr. Scroggin, are you talking about after the periods of time that were alleged in the complaint?

THE COURT: Well, I'll overrule the objection, it's highly leading, but the question wasn't made on that basis. You remember the question.

THE WITNESS: No.

THE COURT: Okay, read the question back.

(Record read back.)

THE WITNESS: Yes it did.
BY MR. SCROGGIN:
Q. You testified earlier that you interacted pursuant to your responsibilities to insure environmental compliance, both with EPA and the State. Has that level of interaction, the relative level of interaction with these two agencies changed since the State of Florida Department of Environmental Protection received delegation in 1995 to implement and enforce the Federal NPDES program?
A. EPA still does come down with the State of Florida to do joint performance audit inspections, so they do visit the facilities.
THE COURT: Well, is that a yes or no?
THE WITNESS: I apologize, Your Honor.
Could you repeat the question and I'll try to answer it.
THE COURT: Read the question back. It's either yes or no. In necessary, you can explain.
(Record read back.)
THE WITNESS: Yes.
BY MR. SCROGGIN:
Q. How has that relative interaction with these two agencies changed?
A. EPA does not seem to be coming down nearly -- they come down very rarely. They do come every once in awhile with a

joint -- with the State to do a joint performance audit inspection. Besides that, we get very little correspondence from them or calls from them or very little interaction with them at all.
Q. Has there been any change in the level of interaction with the State now that the State has assumed the responsibilities of implementing the Federal permitting program?
A. Yes.
Q. And how -- what are those changes?
A. The State has added on considerable more staff and that staff comes down and inspects the facilities on a much more frequents basis.
Q. I'd like to turn now to the Carrollwood facility, and the exceedences that have been found for this facility. I'll direct your attention, Ms. Karleskint, to Florida Cities' Exhibit Number 140 which is already in evidence which is the Carrollwood Facility's NPDES Permit. Ms. Karleskint, do you recognize this document?
A. Yes, sir.
Q. Can you tell me what kind of facility this permit is for? Can you tell from looking at it?
A. Yes, sir.
Q. What kind of facility is that for?
A. It's for an advanced wastewater treatment facility.

Q. And how can you tell that by looking at the permit?
A. Due to the permit limits for carbonaceous BOD, total suspended solids and nutrients as well as residual chlorine.
Q. While you keep that exhibit in front of you, I would also ask you to look at Government Exhibit 255 which are the charts prepared for the Government's summary judgment motion that lists the reported numbers that led to the exceedences for these various parameters which Ms. Karleskint referred.
I'm not going to ask you to tell us, I'm asking you if you reviewed these numbers and verified indeed there were exceedences for all the parameters that you mentioned?
A. Yes, sir.
Q. And do you have any explanation for why the Carrollwood Facility violated these parameters that you say are appropriate for an advanced wastewater treatment facility?
A. The Carrollwood Facility was a secondary wastewater treatment plant and the permit limitations were for an advanced wastewater treatment plant.
Q. I'd ask the witness be shown Florida Cities' Exhibit 146 and also 155, they're two similar documents. Do you recognize these documents, Ms. Karleskint?
A. Yes, sir.
THE COURT: 146 and what?
MR. SCROGGIN: 155, Your Honor.
BY MR. SCROGGIN:

Q. What are these two documents?
A. It's a letter from Paul Bradtmiller to --
Q. Excuse me for interrupting. Refer to 146. What is 146?
A. Exhibit 146 is a letter from Paul Bradtmiller, senior vice president of Florida Cities Water Company, to Mr. Michael Hom of the compliance section of EPA.
Q. Did you draft this letter or --
A. I don't believe so.
Q. Did you review it before it was sent to EPA?
A. I don't believe so.
Q. Were you familiar that this request had been made to EPA?
A. No, sir.
Q. Okay.
Were you in any -- were you personally involved in any way in the management of the Carrollwood Facility during the period of time for which -- the six months period of time for which these exceedences were reported?
A. Yes, sir.
Q. And can you describe what that involvement was?
A. Gerald Allen had asked me to take a look at the Carrollwood Facility and the EPA permit for that facility, also an inspection report I believe that had been done by EPA and see what we could do at the Carrollwood Facility since we did have a permit that had advanced levels of wastewater treatment to see if was there any improvements we could make to improve

the facility to meet as best we could the advanced wastewater treatment limitations.
Q. Do you have any -- you've testified that the Carrollwood Facility was a secondary facility but had an advanced wastewater treatment, a much more stringent permit. Do you have any explanation therefore as to how Carrollwood, being only a secondary facility, did not violate TSS and BOD every month during this six months period?
A. I think a lot --
THE COURT: Just a moment.
MR. HOMIAK: Well, objection, Your Honor, I think we're getting into a field of opinion testimony as well. Ms. Karleskint is opining on the operation of the specific --
THE COURT: I don't know what the basis of her knowledge would be on that, and until you've laid some kind of foundation, I'm not going to permit her to answer that question.
MR. SCROGGIN: I'll be happy to lay a foundation, Your Honor.
BY MR. SCROGGIN?
Q. Ms. Karleskint, can you describe the steps that you took regarding the operations at the Carrollwood facility during this six months period.
A. I believe it started before that six months period, the steps I took.

Q. Can you describe what those steps were?
A. Right. I made several visits to the Carrollwood Facility and met with the division manager there, Derwood Horak and the wastewater treatment plant operator, Dennis McDowell. We sat down and we went through the EPA performance audit inspection. I wrote several memos that had been shown to me during my deposition concerning the treatment of that facility. And I also made recommendations on ways we could improve the performance of the treatment facility.
Q. And did you improve the performance of the treatment facility through these steps that you implemented?
A. I believe that the treatment facility, the performance of the treatment facility performance did improve.
Q. Can you say in what regards it improved.
A. With respect to the process of carbonaceous BOD and TSS.
Q. Based upon your experience with Florida Cities and with other wastewater treatment facilities, is it unusual for a secondary plant to be able to achieve the very stringent AWT requirements for TSS and BOD?
A. Yes, but that is dependent upon many factors about the treatment plant, whether or not it has excess capacity, if it's operating at capacity, and such other factors.
Q. I'd like to move on to the Waterway Estates Facility. I'll ask the witness be shown Florida Cities' Exhibit Number 196.

MR. SCROGGIN: Your Honor, if I might ask, does Your Honor intend to take a break this morning?
THE COURT: Yes, I will be taking a break about 11:00 o'clock. Why? You want to take a break now?
MR. SCROGGIN: That's up to Your Honor.
THE COURT: Well, if there's a -- if there is a physical or otherwise need, then I certainly want to be sensitive to that.
MR. SCROGGIN: No, Your Honor.
THE COURT: Okay.
BY MR. SCROGGIN:
Q. I would direct your attention to Florida Cities' Exhibit 196 and ask if you recognize this document?
A. Yes, sir.
Q. What is it?
A. It's the final issuance of the NPDES Permit for Waterway Estates.
Q. And would you look at the effluent limitation requirements that are contained in this permit and tell us where you find them, what page of the exhibit are the effluent limitations found on? Count pages back to the first page of the exhibit, no matter what the number written on the page is.
A. Page 8.
Q. Can you tell from these effluent limitations what kind of plant this permit is intended for?

A. Based upon the nutrient limitations, it's intended for advanced wastewater treatment.
Q. And do you know, during the period of time at question for this case, what kind of facility the Waterway Estates Facility was, and by that, I mean with respect to the exceedences that are reported from July, 1991, through March, 1992, for toxicity and total nitrogen?
A. I'm sorry, you're going to need to repeat the question.
Q. Can you tell me what kind of facility Florida Cities Waterway Estates Facility was during the period of time of the toxicity and total nitrogen violations?
A. Yes, it was a secondary treatment plant.
Q. Is this -- and how do you explain that a secondary plant cannot achieve the AWT limits?
A. A secondary treatment plant does not have the capability to normally remove the nutrients, primarily nitrogen and phosphorus, so it's very difficult for a secondary treatment plant achieve the nutrient removal required within this permit.
Q. Once the Waterway Estates Facility achieved AWT status, did it then comply with the toxicity and nitrogen limitations in this permit?
A. Yes, sir.
Q. I would ask that the witness be shown Florida Cities' Exhibit Number 80, and ask if you could identify that document?
A. Yes, sir.

Q. What is this document?
A. It's a letter from myself to Mr. Ken Kwan of the EPA indicating to him the biological treatment unit number two for the Waterway Estates was put into service.
MR. HOMIAK: Excuse me, Your Honor, I'm confused. I think he said number --
MR. SCROGGIN: Number 80. I'm sorry.
MR. HOMIAK: Oh, 80. Thank you.
BY MR. SCROGGIN:
Q. You've testified that once the Waterway Estates Facility achieved AWT status, that the violation for toxicity and total nitrogen stopped occurring?
A. Once it wasn't -- yes, but the toxicity, we did not meet the toxicity limitation until we had both biological treatment units on line which was basically I think the end of June, 1992. This indicates that the large BTU unit was put into service, but the way we constructed the plant, it was two facilities and we only -- we had to keep one operating while we redid the work on the other facility.
MR. SCROGGIN: I would ask that exhibit be moved into evidence.
THE COURT: Be received.
BY MR. SCROGGIN:
Q. I'd turn the witness' attention to Florida Cities' Exhibit 86, and ask if you can identify this document?

A. It's a letter from Al Herndon of the EPA to Paul Bradtmiller of Florida Cities Water Company advising him that the terms agreed to in the October, 1992 administrative order for testing of toxicity, uh, will be done in an accelerated manner in order to shorten the period of the administrative order.
Q. Was this an enforcement action by EPA taken because of the toxicity failures?
A. Yes, sir.
THE COURT: Just a moment.
MR. HOMIAK: Objection. First of all, I think whether or not this is an enforcement action calls for a legal conclusion. I would also argue that if Mr. Scroggin is referring to the exhibit, I think he mischaracterized it as being an enforcement action.
MR. SCROGGIN: I'll be happy to withdraw the question and rephrase if that would speed things up.
THE COURT: All right.
BY MR. SCROGGIN:
Q. Ms. Karleskint, did EPA initiate enforcement action because of the toxicity failures?
A. Yes, sir.
Q. And does this document number 86 make reference to that enforcement action?
A. Yes, sir.

MR. SCROGGIN: I would ask that 86 be moved into evidence.
THE COURT: It will be received.
BY MR. SCROGGIN:
Q. Finally, Ms. Karleskint, I direct your attention to Florida Cities' Exhibit Number 88, and ask if you recognize this document?
A. Yes, sir.
Q. Have you seen it before?
A. Yes, sir.
Q. Can you tell me what it is?
A. It's a letter from EPA to Mr. Bradtmiller at Florida Cities advising him Administrative order number 92-093 issued in September of '92 has been placed in an inactive status.
Q. And how did you interpret this document when you received it?
A. That we had complied with the terms and the administrative order and that it had between activated.
MR. SCROGGIN: And I'd ask 88 be moved into evidence.
THE COURT: Be received.
BY MR. SCROGGIN:
Q. Ms. Karleskint, during the period of time when the toxicity violations were occurring, did Florida Cities take any temporary measures with respect to reducing nitrogen?
A. Yes, sir, we did.

Q. Can you describe what those measures were?
A. Yes. We tried to accelerate the construction schedule based on the denitrification filters, to have them completed so that we could try to denitrify out of the original treatment plant.
We started feeding methanol out of five gallon drums to provide a food source for the denitrifiers to provide denitrification. Basically, in order to remove nitrogen, you have to nitrify all the ammonia and organic -- you have nitrify it and denitrify it so it's -- so you're going through the nitrogen chain to convert it to nitrogen gas which is released into the air.
Q. Why did you take temporary measures to try to reduce nitrogen when the Waterway Estates Facility was already under construction to build AWT that would remove nitrogen?
A. We wanted to comply with the administrative order as soon as possible.
MR. SCROGGIN: I have no further questions.
THE COURT: All right.
We'll take fifteen minutes.
(Thereupon, a brief recess was taken.)

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THE COURT: All right, Mr. Hird.

CROSS EXAMINATION

BY MR. HIRD:

Q. Good morning, Ms. Karleskint.

You testified that you -- your first project for Avatar Utilities were working on audits of individual facilities, is that correct?

A. Yes, sir.

Q. Did you prepare audit reports?

A. Yes, sir.

Q. Did you ever provide these audit reports to Leon Levy?

A. No, sir.

Q. Did you ever discuss the contents with him -- with Mr. Levy?

A. No, sir.

Q. Did you ever provide these reports to Peter Sharp?

A. No, sir.

Q. Did you ever discuss the contents of those with Mr. Sharp?

A. No, sir.

Q. Did you ever provide them to John Sladkus?

A. No, sir.

Q. Did you ever discuss the contents of them with Mr. Sladkus?

A. No, sir.

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Q. Did you ever provide them to Lawrence Wilkov?

A. No, sir.

Q. Did you ever discuss the contents with Lawrence Wilkov?

A. No, sir.

Q. Now, you testified today about certain exceedences at the Barefoot Bay treatment plant. Have you ever discussed those exceedences with any of the four gentlemen that I mentioned?

A. No, sir.

Q. You also testified about exceedences at Carrollwood. Have you ever discussed those with any of those four gentlemen?

A. No, sir.

Q. Finally, you discussed exceedences at Waterway Estates. Have you ever discussed those -- I'm sorry.

You testified today about exceedences of the Waterway Estates permit. Have you ever discussed those exceedences at all with any of those gentlemen?

A. No, sir.

Q. During your work for Avatar Utilities and Florida Cities, did you ever receive any direction from Peter Sharp to do anything?

A. No, sir.

Q. Did you ever communicate with Mr. Sharp?

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A. No, sir.

Q. Did you have a sense -- any sense that Peter Sharp was micro managing your operations?

A. No, sir.

Q. Thank you very much, Ms. Karleskint.

THE COURT: Mr. Homiak.

CROSS EXAMINATION

BY MR. HOMIAK:

Q. Good morning, Ms. Karleskint. My name is Bob Homiak and I'm representing the Government in this action.

Ms. Karleskint, Mr. Scroggin asked you during direct examination whether you had ever made recommendations regarding compliance to Florida Cities that were costly -- that required costly upgrades to the wastewater treatment plants. Do you remember that?

A. Yes, sir.

Q. And your testimony was that those requests had never been declined?

A. Yes, sir.

Q. Now, compliance with the law is not an option, is it, Ms. Karleskint, in your opinion?

A. No, sir.

Q. So, those expenditures had to be made to come into compliance, isn't that true?

A. Yes, sir.

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Q. With respect to the BOD versus CBOD reporting issues at Barefoot Bay, you indicated that the State permit required you to report CBOD, correct?

A. Yes, sir.

Q. And, of course, the EPA NPDES permit required you to report BOD?

A. Yes, sir.

Q. Now, did you, in fact, inform the laboratory -- did Florida Cities inform the laboratory that was doing the testing of the two differing requirements: One for CBOD, one for BOD?

A. I don't know the answer to that, sir.

Q. Well, would you agree, Ms. Karleskint, that it's the permittee's duty to understand the terms and conditions of their various permits pursuant to which it operates?

A. Yes, sir.

Q. So that Florida Cities should have notified, at any rate, the laboratory doing the analyses of the two different permitting requirements, shouldn't it have?

A. They may have, sir. I do not know.

Q. Did you know what data was being reported by the laboratory?

A. Now I do, yes.

Q. Was only CBOD being reported?

A. At that time, yes.

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Q. So, either the laboratory didn't know of the BOD requirement, or Florida Cities was not monitoring the results very carefully; wouldn't that be correct?
A. I don't know, sir. That was a division responsibility.
Q. Now, Ms. Karleskint, I'd like to direct your attention to the Barefoot Bay permit that you testified to earlier. And this is Government Exhibit 399, although you may have been using the Florida Cities exhibit earlier.
I'd like to direct your attention again, Ms. Karleskint, to the page of this exhibit that is designated Roman numeral one dash two. Do you see that?
A. Yes, sir.
Q. Now, directing your attention to the third paragraph in what is numbered two, I believe you testified earlier that the DPD method was specified in the permit. Was that your prior testimony?
A. Sir, I have the Waterway Estates permit in front of me, and Paragraph 3 has to do with ph.
Q. I apologize, Ms. Karleskint, and to the Court. It's Government Exhibit 185. I apologize for the confusion.
Do you see the paragraph I'm referring to, Ms. Karleskint?
A. Yes, sir.
Q. Was it your prior testimony that the DPD method was specified in the permit?
A. Yes, sir.
Q. Now, the DPD method is not specifically required by this permit, is it?
A. No, sir.
Q. The permit, in fact, provides the permittee with a number of options, isn't that correct?
A. Yes, sir.
Q. Okay. So, it was Florida Cities' decision to use the DPD method as opposed to one of the other allowable methods under the permit, isn't that correct?
A. Yes, sir.
Q. Now, Ms. Karleskint, wouldn't you agree that it is the permittee's duty to ensure that the proper testing and analytical procedures are being used to measure compliance with NPDES permits?
A. Yes, sir, and we had -- when EPA was there to do a performance audit inspection, we asked them if we were using --
THE COURT: Well, you've answered his question.
THE WITNESS: Okay.
THE COURT: If counsel wants on redirect to elicit that --
THE WITNESS: Okay.
THE COURT: -- then perhaps they can.

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BY MR. HOMIAK:
Q. Ms. Karleskint, I want to refer you to what was marked as Defendant's Exhibit 209, the methods for chemical analysis of water and waste.
THE COURT: Defendant's Exhibit 209?
MR. HOMIAK: Yes.
THE COURT: I don't have that.
MR. HOMIAK: Your Honor, that's the three or four page exhibit that we argued about this morning.
THE COURT: Okay, okay. Yes. All right.
BY MR. HOMIAK:
Q. Ms. Karleskint, when did you become aware of the existence of this document?
A. I probably used this document -- I probably seen it before back in college, to be honest; but I specifically became aware of this document with respect to looking up -- looking it up for DPD.
I just recently found this and was looking it up this past week -- maybe last Thursday or Friday or Monday; I can't recall -- but it's been very, very recently.
Q. Were you directed to look this up in preparation for trial?
A. I wasn't exactly asked to look it up. When we prepared for trial, we were looking for a document that would reference what the detection limit was for total

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residual chlorine.
So, when I was doing some review, I noticed that this method was referenced in an EPA inspection report, so I went to it and I realized I had this book and I went and looked it up.
Q. Does Florida Cities use the DPD method to measure total residual chlorine at any of its other facilities?
A. I believe we are using it at some of our non discharging facilities, like in Poinciana, yes, sir.
Q. But not at Waterway Estates or Carrollwood, is that correct?
A. We don't have a plant at Carrollwood, but we do not -- we use amperometric titration at Waterway Estates -- no, actually, we don't use -- we just started using chlorine at Waterway Estates.
Q. Ms. Karleskint, did you testify earlier that the laboratory that you used was familiar with this manual?
A. The laboratory was not doing this test.
Q. Where was the test being performed; right at Florida Cities' property?
A. It was being done by the plant operator.
Q. I'd next like to direct your attention to what has been designated Florida Cities' Water Company Number 158
Ms. Karleskint, I'd direct you to Page 4 of that exhibit and specifically to the sentences that you read into

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the record earlier, which begins at the middle of Paragraph Number 2: Depending on the wastewater, these tests may not detect chlorine down to zero point zero one milligrams per liter level. Do you see that?
A. Yes, sir.
Q. Would you read the next sentence, please, the parenthetical?
A. Yes, sir. A minimum --
THE COURT: What page are we on?
MR. HOMIAK: Page 4 of the exhibit, Your Honor.
THE COURT: Okay, okay.
THE WITNESS: A minimum detection level of zero point zero two milligrams per liter has been suggested.
BY MR. HOMIAK:
Q. Doesn't that suggest to you, Ms. Karleskint, that the detection level of the DPD method is really zero point zero two rather than the point two you mentioned earlier?
A. No, sir.
Q. It doesn't?
A. No, sir.
Q. What does this level -- what does this sentence mean, to your understanding?
A. Well, I know from -- I now know that they are referring to the amperometric titration level, and that's the minimum detection level of amperometric titration.

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Q. But we're not talking about amperometric titration.
A. I know, sir.
Q. Are you saying that this memo is simply in error?
A. No, sir. What I'm saying is, this memo is talking about -- it's talking about either the amperometric titration method or the DPD colorimetric method, if you look at the very first sentence, and that for the amperometric titration method, the detection limit is zero point zero two.
Q. Well, Ms. Karleskint, you indicated earlier the testing that was being done for TRC was being performed by Florida Cities' personnel, isn't that correct?
A. Yes, sir.
Q. And that Florida Cities' personnel had a duty to understand the terms and conditions of the NPDES permit, isn't that correct?
A. Yes, sir.
Q. Then they should have taken care to use an appropriate test method, shouldn't they?
A. They did verify with EPA that they were using the correct method.
MR. HOMIAK: Move to strike, Your Honor.
THE COURT: Well, I'll deny the motion.
If you want to ask the question again -- I'm not sure that you got a response to your question.

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BY MR. HOMIAK:
Q. Now, Ms. Karleskint, you've testified earlier that one of your jobs at Florida Cities is to review DMR's for accuracy, isn't it?
A. Yes, sir.
Q. But Mr. Acosta actually signs them?
A. Yes, sir.
Q. I want to direct your attention to Florida Cities' Exhibit Number 185 -- it's the Barefoot Bay permit -- and I want to direct your attention to that same paragraph we looked at earlier, the third paragraph in number two.
A. I'm looking at a federal income statement right now.
Q. Excuse me. I'm sorry.
(Pause.)
A. Yes, sir.
Q. I want to direct your attention to the sentence that begins after the underlined reference to standard methods, the sentence that starts, If chlorine.
A. You would like me to read it?
Q. Do you see that sentence?
A. Yes, sir.
Q. Would you read it, please?
A. Yes, sir. If chlorine is not detected using one of these methods, the permittee shall report on the discharge monitoring report the analytical results for chlorine as

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being measured at less than the detection level for the test method selected.
Q. And, in fact, Florida Cities detected chlorine in the effluent samples at Barefoot Bay between September '92 and March of '93, didn't it?
A. Using the DPD method, they did, sir.
Q. And you reported, then, to EPA on your DMR's of September '92 to March '93, correct?
A. Yes, sir.
Q. And the levels that you reported exceeded the allowable concentration for total residual chlorine, or zero point zero one, did it not?
A. Yes, sir.
Q. At any time between September 1992 and March '93 did you ever consider using a different test method to test for TRC at Barefoot Bay?
A. I don't recall when we decided to change the test method, but when we first started detecting -- I'm sorry, sir.
Q. In fact, you became concerned at some point, did you not, about the validity of the DPD method?
A. Yes, sir.
Q. And you became concerned, as I understand it, because you were reporting TRC violations or exceedences in your DMR's, isn't that correct?

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A. Can I explain the --
Q. Let me rephrase the question. After reporting the TRC levels that you did between September '92 and March of '93, did Florida Cities take steps to reduce the level of total residual chlorine in the effluent?
A. Could you repeat the question?
Q. Well, after reporting the TRC violations that you did between September of 1992 and March of 1993, did Florida Cities take any steps to reduce or eliminate what it perceived as being excessive TRC from the effluent?
A. Yes, sir.
Q. And what steps did it take?
A. Once we detected chlorine with the DPD colorimetric method, we believed that there was actually traces of chlorine and, therefore, we went through the permitting steps and the construction of sulphur dioxide facilities to assure that there would be no chlorine whatsoever.
Q. And you installed a sulphur dioxide, or SO-2, unit at Barefoot Bay, did you not?
A. Yes, sir.
Q. Do you recall when that was installed?
A. Did you say we had the --
Q. I'm asking if you recall when the sulphur dioxide unit was installed.
A. Right now, because I'm nervous, I cannot tell you the

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Q. And subsequent testing that you did using the amperometric titration method showed levels that were with permit limits, correct?
A. Yes, sir.
Q. And where were these effluent -- where were these samples taken?
A. They were taken prior -- we made a lot of modifications to the Barefoot Bay treatment facility also during that time. We had a chlorine contact chamber for -- prior to putting in the SO-2, we had ponds that we were using for dechlorination; then it would go into the old contact chamber, and then there was the outfall that discharged into the agricultural drainage ditch.
We were testing for the total residual chlorine at the discharge point from this -- from the old contact unit. There was an old Cohen contact unit, and we were testing for it right there at that discharge as -- there was a weir there, and that's where we were testing for the chlorine residual.
Q. Now -- I'm sorry.
A. What happened, though, is after we put in the SO-2 unit, we no longer needed to use those ponds for dechlorination, so we started bypassing the ponds since we did not need that detention time in them.
Q. Now, the question, though -- let me rephrase the

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exact date it was installed.
Q. But it was sometime after March of '93, was it not?
A. Yes, sir.
Q. Now, after you installed the sulphur dioxide unit, you continued to get TRC readings in excess of permitted limits, didn't you, using the DPD method?
A. Yes, sir.
Q. And this puzzled you because the sulphur dioxide unit should have removed the total residual chlorine, is that correct?
A. I knew that the sulphur dioxide had removed the residual chlorine.
Q. So, at that point, as I understand it, you switched to another test method to test for chlorine, is that correct?
A. Yes, sir.
Q. And what method did you switch to?
A. Amperometric titration.
Q. But your switch to the amperometric titration method was clearly subsequent to the installation of the SO-2 unit, right?
A. Yes, sir.
Q. And the purpose of the SO-2 unit was to reduce or eliminate the total residual chlorine from the effluent, isn't that true?
A. Yes, sir.

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question because I'm not sure that you've answered it.
A. Okay.
Q. After switching to the amperometric titration method, were you taking your chlorine samples, TRC samples you were reporting to EPA, after the effluent had been through the sulphur dioxide unit?
A. Yes, sir.
Q. Again, the sole purpose of that unit was to remove TRC from the effluent?
A. Yes, sir.
Q. So that the non existence or the levels of chlorine that were being reported after you went to the SO-2 treatment system and the amperometric -- well, let me withdraw that and re-ask the question.
The levels of chlorine that you were detecting after you installed the SO-2 unit, dechlorination unit, really are not representative of the chlorine levels that preceded installation of that unit, isn't that correct?
A. I'm not sure I quite understand what you're asking.
Q. Well, the point is, you installed a sulphur dioxide unit to eliminate total residual chlorine?
A. Yes, sir.
Q. And you've tested your total residual chlorine after you've installed the SO-2 unit?
A. Yes, sir.

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Q. And those levels were below the permitted levels, is that correct?
A. With what test method?
Q. With the amperometric test method.
A. With the amperometric titration test method, yes, sir.
Q. So, the existence or the fact that the effluent passed the TRC levels after installation of the SO-2 unit really tells you nothing about TRC levels before installation of the unit, isn't that correct?
A. No, sir. What we did find out is, when we were using the DPD test method, when we first put it -- installed the SO-2 system, even though we were feeding an excess of SO-2, we still detected chlorine with the DPD colorimetric method.
It was at that time that we contacted HACH, the maker of the test kit, for the DPD test method, and they had indicated to us at that time that the detection limit was point one milligrams per liter.
I had not referred to this EPA manual that I just recently had found. I wasn't even aware of that at that time. I was just -- we had the detection limit from using the little spectrophotometer. And that is when we decided, Hey, we have to change our test method. We realized that the DPD was not an accurate test, and we ordered all the equipment for the amperometric titration.
Q. So, then, your first understanding of the detection

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level of the HACH method that you just referred to was based upon discussions with HACH representatives, wasn't it?
A. Yes, sir.
MR. HOMIAK: Your Honor, as you know, we have a continuing objection to whether or not the Defendant's Exhibit 209, in fact, should be admitted and, in fact, indicates that point two represents a detection level for the DPD method.
And I would move to strike the witness' testimony about the detection limit for the DPD method being point one based upon her discussions with HACH representatives as being hearsay.
THE COURT: Yes, sir?
MR. SCROGGIN: Your Honor, counsel elicited this with a direct question. It's hard for him to discount the answer at this time by calling it hearsay.
THE COURT: Okay. I'll overrule the objection and deny the motion.
BY MR. HOMIAK:
Q. How was chlorine administered to the wastewater at Barefoot Bay?
A. Through a chlorine gas injection system. I'm trying to explain it. There's a --
Q. Well, I'm not sure that that's necessary.
How is the amount of chlorine that's injected into the

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water regulated?
A. By a rotameter.
Q. Excuse me?
A. It's sort of difficult for me to explain to you, but you have a chlorine gas cylinder, and then you have a water line that feeds into it. The chlorine gas sort of rises into it.
You have a regulator on the chlorine cylinder. And I think in this case we had -- there's different types of systems, and I'm not quite sure which one we have at Barefoot Bay. But I think the regulator is attached directly on to the chlorine cylinder.
And then you have a rotameter up on the wall that you say how many pounds of chlorine you're going to use, and that pulls the chlorine -- you have a vacuum system and it pulls a certain amount of pounds of chlorine, injects it with the water, just regular potable water, and then it goes -- the solution -- the chlorine solution is fed into the wastewater stream.
Q. But in terms of setting the amount of chlorine that will be injected into the waste stream, is that a determination that's made by the plant operator?
A. Yes. You're basically required by the State of Florida -- we also have what you call --
THE COURT: Do you want this?

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MR. HOMIAK: Not particularly, Your Honor.
THE COURT: Okay. You've answered the question. The answer is "yes."
BY MR. HOMIAK:
Q. So, it's up to the operator, if I understood your testimony, to set the amount of chlorine that will be injected into the effluent?
A. Yes, sir.
Q. And the equipment that you previously described carries that out and injects the proper -- or the preset amount of chlorine into the effluent, is that correct?
A. Yes, sir.
Q. Now, do chlorine levels in the effluent typically increase and decrease over time?
A. Yes, sir.
Q. Ms. Karleskint, turning now to the permit toxicity violations at Barefoot Bay, how many violations did the company report for toxicity?
A. I don't recall at the moment.
MR. SCROGGIN: Your Honor, the number of violations is already a matter of record as found by the Court in the summary judgment.
MR. HOMIAK: Well, Your Honor --
THE COURT: That's noted. Go ahead.
BY MR. HOMIAK:

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Q. Ms. Karleskint, were you asked to assist in the preparation of Florida Cities' responses to the Government's interrogatories that were served in this action?
A. Yes, sir.
Q. And, Ms. Karleskint, in those interrogatories, do you recall indicating that for whole effluent toxicity at Barefoot Bay, there were at least eight violations since the complaint was filed?
A. I may have, sir, yes.
Q. Well, Ms. Karleskint, isn't it true that the number of -- that there were -- since the complaint was filed, there have been five more failures of whole chronic effluent toxicity tests; two of the routine samples and three of the follow-up samples failed while the plant is presently under construction for the upgrade?
A. Yes, sir.
Q. Now, for Waterway Estates --
THE COURT: Just a moment.
MR. SCROGGIN: Your Honor, I'd move to strike this last answer. It's not part of this case. The complaint has not been amended to include these alleged violations. And they are irrelevant to any of the mitigation factors. Certainly a history of such violations, for example, would not be read, I would suggest, to include alleged violations after -- in the future of those alleged in the complaint.

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MR. HOMIAK: Your Honor, I believe in her direct testimony, Ms. Karleskint testified that there were three whole effluent toxicity violations and -- simply pointing this out as to the existence of a discrepancy between the witness' testimony and what the company has reported in its responses to interrogatories.
THE COURT: I'll overrule the objection.
BY MR. HOMIAK:
Q. For Waterway Estates, Ms. Karleskint, you spoke earlier of certain temporary measures that the company took to comply with the administrative order while it was in the process of upgrading to advanced wastewater treatment, isn't that correct?
A. Yes, sir.
Q. Now, wouldn't you agree the compliance with an EPA administrative order is not optional?
A. Yes, sir.
Q. Ms. Karleskint, do you know whether the North Fort Myers Utilities Company had -- I'm sorry. Strike that, Your Honor.
Do you know, Ms. Karleskint, whether the City of Cape Coral wastewater treatment plant has offered to take the effluent from the Waterway Estates plant for use in its reuse system?
THE COURT: Just a moment.

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MR. SCROGGIN: Objection, Your Honor. This is beyond the scope of direct examination. There was no mention of the Cape Coral facility in my direct examination.
MR. HOMIAK: Your Honor, Mr. Scroggin on direct clearly went into the compliance or non compliance issues at all three facilities, including Waterway Estates.
THE COURT: Well, we're not going to expand things any more than they already are. I'm going to sustain the objection.
MR. HOMIAK: One moment, Your Honor.
(Pause.)
MR. HOMIAK: Your Honor, I have no further questions for this witness. Thank you, Ms. Karleskint.
THE COURT: Any redirect?
REDIRECT EXAMINATION
BY MR. SCROGGIN:
Q. Ms. Karleskint, in response to counsel's questions regarding the status of the DPD method, you testified that the DPD was approved by EPA and listed in the permit, is that correct?
A. Yes, sir.
Q. Did you review any documents in which EPA had reviewed the use of the DPD method at the Barefoot Bay facility?
A. Yes, sir. They had --
Q. Can you tell me what those documents said?

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A. Yes, sir. EPA had performed a performance audit inspection of the Barefoot Bay wastewater treatment plant, and they did look at the test method we were using for chlorine residual.
Q. And what was the test method that EPA looked at --
A. DPD.
Q. Excuse me. One moment. Let me finish my question.
What was the test method you were using -- that Barefoot Bay was using when EPA reviewed the testing for TRC at Barefoot Bay?
A. DPD.
Q. You testified also that you no longer use DPD at Barefoot Bay, is that correct?
A. Yes, sir.
Q. You now use what method?
A. Amperometric titration.
Q. You were also asked whether or not making tests now with amperometric titration are relevant since you are testing after sulphur dioxide is being added to the effluent.
My question for you is: Did you perform any other tests that would give you information regarding whether or not the DPD tests were giving you false alarms or real information?
MR. HOMIAK: Object. It's not clear what time

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frame Mr. Scroggin is referring to.
THE COURT: Okay. Well, let's see if you can put a time frame to your question.
BY MR. SCROGGIN:
Q. After changing from the DPD method to the newer amperometric method, did you do any tests with the DPD method to determine its sensitivity at low levels of chlorine?
A. Yes, sir.
Q. And what were those tests, and what were the results?
A. We had done several tests with this -- since this case with the spectrophotometer of question just for our own knowledge.
We followed the standard methods in the test and did a set of seven tests to determine what the -- based upon standard methods, and after discussions with HACH on the actual detection limit using the standard methods method to determine what the detection limit was on that spectrophotometer.
This was done sometime after Barefoot Bay was, but recent tests show the spectrophotometer that hasn't been used in a while is -- the detection limit is point five milligrams per liter.
Q. Do you do any tests with water that you knew absolutely, positively had no chlorine in it?

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A. Yes, sir.
Q. And what were the results of those tests?
A. Yes, sir. We tested with deionized water that we knew that had no chlorine residual and found -- we found traces of chlorine -- the DPD methods picked up levels of up to point zero six milligrams per liter of chlorine, and we knew that there was -- after calibration, we knew that there was no chlorine whatsoever in that deionized water.
Q. If you're using the DPD method to do tests on water -- deionized water that you know has absolutely no chlorine and yet still get readings that indicate chlorine, did you reach any conclusion regarding the value of those readings?
A. Yes. We determined that they -- the DPD colorimetric method was not the method to be using to determine levels up to point zero one; that it was not accurate and those levels were not valid.
Q. During the time you were using the DPD method, you used it for what reason?
A. We used it to determine what the total residual chlorine was in our effluent.
Q. No. I'm sorry. For what reason? Why did you use the DPD method during the time that it was being used as the means of reporting values to EPA?
A. It was shown in the permit to be an EPA acceptable method. And when we questioned it with EPA if we were using

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an acceptable method, they indicated that it was an acceptable method.
Q. You received several questions during cross about the magnitude of chlorine. That's what we have been discussing for some time. You also have experience, do you not, pursuant to your testimony, with drinking water facilities? Can you tell me the relative magnitude of total residual chlorine that we're talking about on your chart behind you and that were reported for Barefoot Bay and compare those with that from a drinking water facility?
MR. HOMIAK: Objection, Your Honor. This is clearly beyond the scope of the cross examination.
THE COURT: Sustained.
MR. SCROGGIN: I have no further questions, Your Honor.
THE COURT: Okay. Thank you. You may step down.
MR. HOMIAK: Your Honor, simply for the record, we would renew our objection to the admission of Defendant's Exhibit 209 into evidence and any testimony of Ms. Karleskint that called for opinions since she was not designated as an expert witness in accordance with this Court's order and the provisions of Rule 26.
THE COURT: Okay. Your renewed objection will be overruled, and your motion will be denied.
Call your next witness.

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MR. HIGH: Good morning, Your Honor.
Florida Cities calls Keith Cardey.
THE DEPUTY CLERK: Raise your right hand, please.
Do you solemnly swear that the testimony you are about to give in this cause will be the truth, the whole truth and nothing but the truth, so help you God?
THE WITNESS: I do.
THE DEPUTY CLERK: Take a seat in the witness stand.
State your name and spell your last for the record, please.
THE WITNESS: Keith Cardey. The last name is spelled C-A-R-D-E-Y.
- - -
Thereupon,
KEITH CARDEY,
a witness, having been duly sworn to speak the truth, the whole truth and nothing but the truth, was examined and testified as follows:
DIRECT EXAMINATION
BY MR. HIGH:
Q. Good morning, Mr. Cardey.
A. Good morning.
Q. Mr. Cardey, what educational experience do you have?
A. I'm a graduate of the University of Wisconsin in

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electrical engineering and the University of Kentucky School of Law.
Q. When did you graduate from Wisconsin?
A. 1949.
Q. And when did you graduate from Kentucky?
A. 1951.
Q. What work experience do you have since 1952?
A. Since 1952?
Q. Yes, sir.
A. Well, let me start out -- let me start back a little farther.
I worked for Kentucky Utilities Company up until 1949, I believe; and at that time -- I went to law school at the same time and then went to Illinois Power Company. From there, I went to Consolidated Water Company in Chicago. Consolidated Water Company, by the way, was the parent of Florida Cities Water Company.
After that, I started my own consulting and concurrently with that acquired a water company near Chicago. It's water and wastewater. And I was president and major stockholder in that company and did consulting work -- and am still doing it to some extent -- but in 1975, I was also made president of Florida Water Utilities Company which operated several subsidiaries on the east coast of Florida.

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Q. Approximately when did you begin your career as a consultant?
A. In the '60's.
Q. As a consultant, did you have any clients in Florida?
A. Yes. I think percentage wise I probably did more work in Florida than any other state.
Q. And in what field of expertise were you consulting?
A. Primarily in the regulatory field; and when I say that, probably more in the ratemaking area than any other.
Q. In what type of industry were your clients?
A. Utility companies.
Q. Do you have any clients that were wastewater treatment plants?
A. Yes. Just about all of the companies in Florida had both water and wastewater.
Q. Approximately how many rate cases have you appeared in throughout your career?
A. First, I haven't kept track of them; but if I said 150 to 175, I'm -- I may even be on the low side there.
Q. Approximately how many rate cases in Florida have you appeared in?
A. Probably 75, somewheres in that area.
Q. And approximately how many rate cases for Florida Cities Water Company have you appeared in?
A. Well, if I said 40, 45, it's probably reasonable. The time period was 1965 to 1972, so during that period.
Q. In reports that you prepare in rate cases, do they involve comparisons of actual versus pro forma earnings?
A. Yes, they do.
Q. Is that like the report you have done in this case?
A. Yes.
MR. HIGH: Your Honor, I would offer Mr. Cardey as an expert in the areas of Florida Public Service Commission regulation and in the economic effects of PSC regulation on privately-owned, publicly-regulated utilities.
MR. QUINN: We don't have an objection, but I don't believe a foundation has been laid for Florida Public Service Commission regulations.
THE COURT: You don't have an --
MR. QUINN: I don't have an objection to proffering the witness at some point in time as an expert witness in those areas, but I do not believe an appropriate foundation has been laid at this time, sir.
THE COURT: All right. Well, proceed.
MR. HIGH: Your Honor, Mr. Cardey has stated that he's appeared in some 200 cases in front of the Florida PSC, and I believe in that duty he would have to at least --
THE COURT: Well, you go ahead and proceed; and if there are objections to specific questions, then they can raise them and then we'll see at that point whether a

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sufficient predicate has been laid.
MR. HIGH: Okay.
BY MR. HIGH:
Q. Mr. Cardey, what instructions were you given for your report?
A. I was asked to study the operations of Florida Cities Water Company and to express an opinion of whether the delay in the construction of these wastewater plants benefitted Florida Cities Water Company.
Q. And who selected the dates?
A. Legal counsel selected the dates.
Q. And did you make that request to counsel?
A. Did I?
Q. Yes.
A. Yes. I did.
Q. Did you review documents in preparing your report?
A. Yes. I did.
Q. Who selected the documents that you reviewed?
A. I selected all the documents.
Q. And how did you select the documents?
A. Well. I made requests to the company for specific information.
MR. HIGH: I would ask that the witness be shown Florida Cities' Exhibit Number 184.
BY MR. HIGH:

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Q. Mr. Cardey, what is this document?
A. This document is a study that I made to demonstrate that Florida Cities did not benefit in the delay in construction -- I mean did not benefit through the delay in construction of the wastewater plants.
Q. Do you express any opinions in this document?
A. Yes, I do.
Q. Are these opinions your own?
A. Yes.
Q. Did anyone other than yourself have any input as to the opinions reached in this report?
A. No.
MR. HIGH: Your Honor, I would ask that Number 184 be moved into evidence.
THE COURT: Okay. It will be received.
BY MR. HIGH:
Q. Mr. Cardey, what is your opinion as to the amount of economic benefit received by Florida Cities from non compliance?
A. No benefit.
Q. Do you express any opinion in this report on Florida Cities' ability to pay a civil penalty?
A. No.
Q. In preparing this report -- what steps did you take to prepare this report?

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A. They are a part of the development of a rate case, so it's -- all the rate cases that I developed in Florida that are subject to regulation by the Florida Public Service Commission.
Q. Could you please summarize Subparagraph 2 of Section 367.081?
A. It sets out the basis for rate regulation; and I think from this case, one of the things that is important is that where capital improvements are mandated by regulatory authorities, it permits the company to recover the cost of those improvements.
In addition to that, it also -- since, you know, it has the best -- has the benchmark for regulation; namely, a utility is entitled to a fair return on its rate base utilized in providing public service.
Q. Do you know what the standard is by which the Public Service Commission will judge a rate case?
A. Well, the standard is that it covers all costs -- and here we're talking about operating costs, depreciation, taxes -- and then a fair rate of return on property used and useful in providing public service.
Q. I'd ask you now to turn to Page 74 of your report, please. I'd ask you, what is this document?
A. This applies to Hillsborough County and it's the rate making code for rate cases in that county.

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A. The basic procedure was this: First, I took the actual operations of the division during the dates shown on the exhibit; and on that I superimposed the cost associated with the construction of a wastewater treatment plant. The costs include both operating and capital costs. And I did that each year for the period shown in the exhibit.
Q. Okay. Did you make any assumptions about the costs of construction?
A. Yes, you always make assumptions, assumptions as to the capital cost, assumptions as to the level of operating expenses.
Q. Okay. Once you superimposed the construction costs of the wastewater treatment plants, did you then account for the regulatory climate?
A. Yes. The way that it is developed follows the framework of the regulation in Florida.
Q. Mr. Cardey, I'd ask you to turn to Page 30 of your report, and I'd ask you, what is this document?
A. I didn't hear what you said.
Q. What is this document contained within your report?
A. This document is a part of the Florida Statute. It involves the procedure for fixing rates and charges of water and wastewater companies in Florida.
Q. Approximately how many times have you referred to this document throughout your career?

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I might say that in Hillsborough County, it's the County Board that regulates rates; it's not subject to the jurisdiction of the Public Service Commission.
Q. To the best of your knowledge, are the standards equivalent?
A. Very similar, yes.
Q. Mr. Cardey, what period of time did you perform an analysis for for Waterway Estates?
A. The dates are set forth on the first page.
Do you want me to read those dates?
Q. Please.
A. For North Fort Myers, it's October 1, 1988, to June 30th, 1992.
Carrollwood, November --
Q. In performing -- okay. I'm sorry. Continue.
A. -- November 1984 to December 31, 1991.
Barefoot Bay is April 1990 to October 31, 1991.
Q. In performing your analysis for Waterway Estates, from what documents did you get information that you would utilize in your report?
A. The actual operations, of course, were from the books and records of the company.
The cost of the wastewater treatment plant and the operations were taken from a rate case the company prepared for this division.

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Q. And after applying the methodology that we spoke about previously, what is your opinion about the --
A. My opinion is that the delay in the construction of the plant did not benefit the company. And if they had constructed a plant and had it in service by October 1, 1988, the earnings of the company would have been increased by a million nine hundred ninety-seven thousand dollars more than the actual operation.
Q. And is that because -- strike that.
Is one of your assumptions that the rate increase would have gone into effect as soon as the AWT plant had gone into service?
A. Yes, that's true.
Q. Okay. Turning your attention to the Carrollwood plant --
A. May I back up just a shade?
The Commission would have issued an order approximately the time the plant went into effect. In jurisdictions under the Florida Commission, there's roughly a 30-day period before the rates go into effect.
Q. Turning your attention to the Carrollwood plant, from what documents did you gather information regarding the costs of the Carrollwood plant?
A. Again, the actual figures are from the books and records of the company. The cost of the plant and the

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estimated cost of operation were provided to me by the company.
Q. What is your conclusion with respect to the Carrollwood plant?
A. Again, with respect to Carrollwood, if the plant had been built and in service by November 1st, 1984, that operation would have generated a million eight hundred and twenty-seven thousand dollars more than they actually experienced during that period.
Q. So, is it your opinion that there was no economic benefit by delaying compliance at Carrollwood?
A. That's correct.
Q. Turning your attention to Barefoot Bay, Mr. Cardey, from what documents did you receive information that you included in this report?
A. Again, the actual financial data is from the books and records of the company.
The cost of the AWT treatment plant was from a preliminary rate case the company was preparing, and it included both the capital cost as well as their operating cost.
Q. What is your opinion regarding whether Barefoot Bay benefitted by delaying compliance?
A. Well, again, there is no benefit. But if they had constructed the plant and had it in service by April 1,

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1990, they would have generated $803,000 more than they actually did experience.
Q. Can you say with a reasonable degree of certainty that there is no economic benefit for delaying compliance from the publicly-regulated utility?
A. Yes, that's true.
MR. HIGH: Your Honor, I have no further questions.
MR. HIRD: I have no questions, Your Honor.
THE COURT: Okay. How long do you think you'll be, Mr. Quinn?
MR. QUINN: Your Honor, I have the proverbial 20 questions, so I don't think I'll be that long. I believe 15 minutes is all I need, sir.
THE COURT: All right. Well, why don't we go ahead and finish with this witness and then we'll recess for lunch, or if we can...
MR. QUINN: Yes, sir.

CROSS EXAMINATION

BY MR. QUINN:
Q. Good afternoon, Mr. Cardey.
A. Thank you.
Q. Mr. Cardey, you're self-employed currently, aren't you?
A. Yes.

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Q. And since 1989, Florida Cities Water Company has been your largest client, isn't that correct?
A. In 1989, I think they -- that's true, I think, yes.
Q. And at the time of your deposition back in October, sir, you had only three clients altogether, is that right?
A. That's all I want, yes.
Q. Sir, losing your largest client would decrease your personal income, wouldn't it?
A. I think it will all be decreased to zero after this year.
Q. You're going to retire, sir?
A. I think so.
Q. Sir, your report addresses certain operations, and I'm going to ask some questions about those.
Sir, Florida Cities continued to operate at a profit during the times that you examined, is that correct?
A. Total -- Florida Cities in total are you talking about?
Q. Yes, I am.
A. Yes. Uh-huh.
Q. And during those time periods, they did not lose any money, is that correct?
A. In total, that would be true, yes.
Q. And, sir, by not upgrading the facilities, that is, the three wastewater treatment plants, Florida Cities did

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not lose any money, did they?
A. In total?
Q. In total, sir.
A. Yes, that's true.
Q. Sir, isn't it just the case that Florida Cities just didn't increase its profit in total during the period of time that you examined?
A. Well, that's what my studies said; they would have increased it more, yes.
Q. Thank you.
Sir, you're familiar with the statutes regarding the Public Service Commission, is that correct?
A. Yes.
Q. Particularly as they apply to wastewater utilities, is that right?
A. Yes.
Q. And you're also familiar with the Hillsborough County rules and regulations governing ratemaking for wastewater utilities, is that correct?
A. Yes.
Q. Sir, what authority does the Florida Public Service Commission have to prohibit a wastewater utility from making an expenditure which would not be included in the rate base?
A. I don't believe they have any authority to prohibit any expenditure, but they do have the authority to determine

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whether it's in the rate base.
Q. But if an expenditure was made and not -- and no attempt was made to include it within the rate base, then the Florida Public Service Commission would have no authority over that decision, is that correct?
A. If it's attached to the utility system and it's a part of the utility system, certainly they have jurisdiction once it's in service.
Q. But if it is not attempted to be included as portion of the rate base, then they have no authority to prohibit it, is that correct?
A. I don't understand your question.
Q. Let me try to ask it again, sir. Isn't it true that the Florida Public Service Commission has no authority to prohibit a wastewater utility from making a capital expenditure so long as that capital expenditure is not included in the rate base?
A. No, I don't believe that statement is quite true.
Q. Why is that not true, sir?
A. I don't believe they have authority to regulate capital expenditures period.
Going to the second part, they do have authority to judge whether any capital expenditure is in the rate base.
Q. Just so I understand what you said, sir, the Florida Public Service Commission has no authority to prohibit

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capital expenditures?
A. I think that's true, yes.
Q. Does the Hillsborough County equivalent have any authority to prohibit capital expenditures?
A. I don't believe so.
Q. Sir, in your experience with both Hillsborough County and the Florida Public Service Commission, is there a mechanism in those rules and regulations that would allow a public utility to request some sort of preliminary determination of whether a capital expenditure would be allowable as includable in the rate base?
A. Yes.
Q. And what is that procedure, sir?
A. I don't know whether it's set out in the rules, but there is a procedure that permits that. And I might indicate to you that Florida Cities actually did that in the development of a water system in Lee County.
Q. Sir, did Florida Cities ever do that with regard to any of the upgrade alternatives for wastewater plants, to your knowledge?
A. Yes, they did with the south Lee County system.
Q. When you say "south Lee County system," which facility are you talking about, sir?
A. They call it the Fiesta Village plant.
Q. Let me ask the question a little bit differently.

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With regard to the Waterway Estates, the Carrollwood and th Barefoot Bay facilities, did Florida Cities ever exercise that mechanism to get a preliminary determination of whether a capital expenditure would be includable within the rate base, to your knowledge?
A. In Carrollwood, of course, at the -- in 1992, they arrived at that decision with the County board with the abandonment of the sewer plant and the inclusion of some forced mains and lift stations in the rate base.
On the other two, I'm not a part of those cases, so I can't tell you that, but I don't believe they did.
Q. Thank you.
Sir, doesn't a public utility have a general obligation to give adequate service at the lowest possible cost consistent with public policy?
You want me to ask that again?
A. No, no. I got it. The "consistent with public policy," I -- I'm -- I think I generally agree with that, yes.
Q. Sir, would you also generally agree that public policy requires compliance with law?
A. I think so, yes.
Q. Are recoverable costs in a rate application -- withdrawn.
Recoverable costs in a rate application typically

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include the recovery of costs of capital in the rate base and depreciation as well, is that correct?
A. That's true.
Q. And sometimes a ratemaking authority may deny an application for an increase in a rate, is that correct?
A. That's true, yes.
Q. And by doing that, they would not include the capital expenditures which have already occurred into the rate base?
A. No, that's not -- you carried your example too far.
Q. Okay.
A. They will either approve or deny a rate request after making a thorough study on whether the costs are recovered, depreciation recovered, taxes are recovered, and whether the operation provide a fair return upon property used and useful in providing service.
Q. Okay. Thank you.
Sir, isn't it true that if a ratemaking authority did not find that an expenditure was recoverable, that the utility would be required to bear a portion of those costs of the improvement itself and not be able to pass them on to the ratepayers?
A. Florida -- the question isn't quite clear. In certain cases what you say is true. In certain other cases, if there is excess capacity, the Florida Public Service Commission has a provision that allows you to recover those

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costs from future developers. In other words, the excess capacity is for the benefit of future developers, and they pass that cost on to that group of people.
Q. Let me ask you a question: With the exception of excess capacity, isn't it true that if the ratemaking authority does not find that an expenditure was recovered, then the utility would be required to bear the costs of improvement itself?
A. Yes, that would be true.
Q. Sir, isn't it true that Florida Cities Water Company was and is capable of financing the addition of -- the additions at wastewater -- I'm sorry. Let me try that again.
Sir, isn't it true that Florida Cities Water Company was and is capable of financing the additions at Waterway Estates, Carrollwood and Barefoot Bay?
A. Well, I can go along with the "was," but the "is" -- I can't tell you about the future; but historically in the past, they have been capable of financing those plant additions.
Q. Let me move the question back in time a little bit, sir. At the time that you prepared your report, isn't it -- wasn't it your opinion that Florida Cities Water Company was and is capable of financing the AWT addition at the Waterway Estates, Carrollwood and Barefoot Bay wastewater treatment

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plants? And that's on Page 13 of your report.
A. Yes. Uh-huh.
Q. Sir, was that your opinion at the time you wrote the report?
A. Yes.
Q. Thank you.
MR. QUINN: I have no more questions -- well, I have one more question apparently, sir.
(Pause.)
MR. QUINN: Thank you. No more questions.
MR. HIGH: No redirect, Your Honor.
THE COURT: No redirect?
All right. Thank you, sir. You may step down.
All right. Let's recess until 1:30.
(The luncheon recess was taken.)

THE COURT: All right. You may call your next witness, Mr. Baise.

MR. BAISE: Yes, Your Honor.

Defendant Florida Cities calls Dr. Abdul Ahmadi.

THE CLERK: Raise your right hand.

Thereupon,

ABDUL B. AHMADI,

having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Take a seat in the witness box, please.

State your name and spell the last for the record, please.

THE WITNESS: My name, Abdul B. Ahmadi, A-H-M-A-D-I.

DIRECT EXAMINATION

BY MR. BAISE:

Q. Good afternoon, Dr. Ahmadi.

A. Good afternoon, Mr. Baise.

Q. What is your occupation?

A. I'm a professional engineer in charge of the domestic wastewater, drinking water, industrial wastewater facilities for the State of Florida, South District.

Q. How long have you held that position?

A. I held that position since 1990.

Q. What positions have you held before 1990?

A. Prior to that, I was working with the same agency and I was in charge of the water program, which did include the domestic wastewater facilities.

Q. What is your education background, if any, post high school, Dr. Ahmadi?

A. I have a Bachelors of Science in Civil Engineering from the University of Kabul, Afghanistan. I have a Masters in Civil and Sanitary Engineering from the University of Cincinnati and a Ph.D in Environmental Engineering Sciences from the University of Florida.

Q. What are your responsibilities in your present position with the State of Florida?

A. Currently, I'm in charge of the permitting compliance and enforcement of State Rules as they apply to water facilities, which includes wastewater facilities, domestic, industrial and drinking water, surface waters and ground waters.

Q. Do you have additional training beyond your formal training in the field of environmental engineering?

A. I have attended several professional seminars, several dozen and attend one or two every year.

Q. What is your experience in interpreting State water law requirements?

A. I have extensive experience in that regard.

In 1981, upon graduation from the University of Florida, I joined the Department of Environmental Regulation as a Staff Engineer and my work primarily involved review of permit application for domestic wastewater and drinking water.

I remained in that position until 1983. At that time I passed the Professional Engineers Exam in the State of Florida and became a Registered Engineer and was promoted to the Chief of Permitting for the District.

In 1988 — I remained there until 1988, at that position, and in 1988, we had a reorganization and I was given some more responsibilities. And then in 19 — in addition to what I had. And then in 1990, we had yet another reorganization and I was given the current responsibilities.

Q. Could you speak just a little more slowly for the Court Reporter?

A. I certainly could. Thank you.

Q. Thank you.

Any additional current licenses or certifications you hold Dr. Ahmadi?

A. Yes, basically, the professional engineer's, and I do give lectures to the universities, professional groups, the DEP Staff on a statewide basis.

Q. How many people work for you, Dr. Ahmadi?

A. Currently, I have 33 people working for me, which comprises professional engineers, chemists, biologists, environmental scientists and managers.

Q. How is your office organized in terms of departments?

A. The State of Florida basically has divided the entire State into six districts and we are one of the six districts and it has seven counties. And we are located in Lee County, we have two branch offices, one in Marathon that handles Monroe County, the Florida Keys and one in northern part of Charlotte County, which handles the Charlotte Harbor area.

Q. Is Waterway Estates located in one of those counties?

A. Waterway Estates is located in Lee County, Florida.

Q. How is your personal office organized? If I'm not using the correct word — sections or department?

A. Yes, we have different sections in the Division of Water Facilities and we have a Domestic Wastewater Section, which is headed by a profession engineer who reports directly to me, and I have two professional engineers in that section and four engineers and five or six chemists, biologists-type people, inspectors.

And then we have an Industrial Wastewater Section that is the smallest in our district. We have three people there; two professional engineers, in fact, and one

secretary.

And then I have a *Drinking* Water Section with five staff professional engineers and two non-professional engineers and two environmental specialists and one secretary.

And then an Ambient Surface Water Section. And then have I some people in the fields that report to us on compliance issues.

Q. What is an Ambient Water Section, I believe you said?

A. Those are the surface water monitorings on strategic locations periodically to see how the waters are doing.

Q. Is this to determine water quality?

A. Basically to determine water quality and they produce a biannual report to see how the waters have maintained their quality, whether they degraded or they got better or they remained the same.

Q. Do you publish a biannual report on the Caloosahatchee River?

A. Not on the Caloosahatchee River. They are primarily — the resources are limited for the State as is the case with most Governmental agencies. They are prioritizing other bodies of water which has more ecological significance and importance than the Caloosahatchee River water.

Primarily our points are in Charlotte County, in the

Charlotte Harbor area, and in the Marco Island area, Naples — Naples way. We do not have any monetary stations on the Caloosahatchee River.

Q. Again, speak slowly for the reporter, please.

Have you had an opportunity to teach any courses in environmental engineering or science or the area that you are —

A. Yes, I have. I graduated from the college, I was an Assistant Professor, prior to coming to the United States, and then I attended the University of Cincinnati for two years. Upon return back to Afghanistan, I taught there at the University in Kabul, Afghanistan until 1975.

I taught Public Health Engineering, Wastewater Engineering, Drinking Water Engineering courses.

Then I came back to the United States for pursuing further studies and graduate studies at the University of Florida.

Q. Have you had an opportunity to publish in the field of environmental engineering?

A. Yes, I have several publications.

Q. Could you describe at least two or three of them for the Court, please?

A. My Master Thesis at the University of Cincinnati was on — included demands on natural and polluted waters. My Dissertation at the University of Florida was Aqueous

Activity of Metals and Corrosion Control, and secondly, two or three papers I coauthored on that subject.

I've given lectures at the Water Management Districts on ground water issues and have given lectures at the University of Florida this year, in fact, twice, on Wastewater and Drinking Water State-of-the-Art Technology.

Q. And Dr. Ahmadi, in the testimony we have had a Florida Statute mentioned on several occasion by the name of Grizzle-Figg. Are you familiar with what Grizzle-Figg is?

A. Yes. It's a legislative act that was passed in the State of Florida for a specific area. Generally when a rule is passed, it's statewide. In certain cases the resources demand that because of ecological significance and importance of a given body of water, the usual rules may not be sufficient, so they design specific rules for the specific geographical area.

The Grizzle-Figg Rule established the Tampa Bay and the Charlotte Harbor area, designated those two as the waters that need to be protected above and beyond what the rules apply to all other waters in the State. And any wastewater discharging to those two bodies of water must meet the highest standards before they discharge to those bodies of waters.

Q. Another Act that has been mentioned is the Indian River Lagoon Act. What is that?

A. That is parallel to the Grizzle-Figg Act, primarily in the Orlando area where the Indian River Lagoon is located. Because of the importance of that body of water, they created specific rules for the protection of that body of water. They are geographic specific, it applies from what point to what point, in which directions. If you're outside those limits, it does not have any relevance.

Q. When did you become familiar with the facility known as Waterway Estates discharging into a canal into the Caloosahatchee River, Dr. Ahmadi?

A. I guess since my starting with the DEP, maybe in the first year or so.

That was in 1981.

Q. Dr. Ahmadi, I would direct your attention to Florida Cities Exhibit Number 15.

Now, Dr. Ahmadi what is the State classification of the Caloosahatchee River in the vicinity of the Waterway Estates wastewater treatment plant?

A. The water there is classified as a class 3 body of water.

Q. What does that mean?

A. Basically all waters of the State are classified into five groups, class 1, class 2, class 3, class 4, and class 5. 1 is considered the most important water in terms of its use and that's considered potable water classification,

water used for drinking purposes. Now, it would be used as a source of drinking water, that's class 1.

Class 2 are the next higher class of water, which is used for propagation of shell fish and recreational uses.

Class 3 are generally all other waters that are not classified as 1 and 2. So, it's an intermediate in terms of quality.

Class 4 is agricultural waters, which the quality is really not that important, as long as there are no salts in them for agricultural uses.

Class 5 is industrial and a navigation waters.

Q. When you say class 4, agricultural, is that like agricultural canals?

A. Agricultural canals, irrigation water, yes, for growing plants and vegetables and trees and nurseries and so forth.

Q. Directing your attention to the exhibit I've had put in front of you, are you familiar with this document?

A. Yes, I am.

Q. What is this document?

A. This is the Lower Florida River Basin Water Quality Management Plan that DER created and published in December 1975.

Q. Have you read this document before?

A. I believe I've seen certain sections of it. Read

certain sections.

Q. Is this a State of Florida official publication?

A. Yes, it is.

MR. BAISE: Your Honor, I would move this document into evidence.

MR. QUINN: Your Honor, we had listed an objection of relevance in that this is a 1975 document. For that reason, we maintain that objection of relevance.

THE COURT: Okay.

MR. BAISE: May I speak to that, Your Honor?

THE COURT: Yes, sir.

MR. BAISE: Your Honor, this is the beginning of the story.

This is the document that lays out the beginning wasteload allocation for Waterway Estates.

It also describes that wasteload allocation, which was carried over into Federal permits, so it is clearly relevant to the background of there being a wasteload allocation in this case, and the fact that there never was a termination of the wasteload allocation, so we think it is quite relevant.

THE COURT: I'll overrule the objection.

It will be received.

BY MR. BAISE:

Q. Dr. Ahmadi, I would direct your attention to page

Roman Numeral I-18 entitled, Implications of Basin Plans for Local Units of Government.

Do you see that page with that title?

A. Yes.

Q. Directing your attention further down to the last paragraph on that page, do you see that paragraph, sir?

A. Yes. The one starts with, "in contrast"?

Q. Yes.

And directing your attention further down to the sixth line that begins on the right hand side, "in some cases," would you read that into the record, please?

A. In some cases water quality may be so sensitive to pollution that any discharge may result in a violation of State requirements for water quality. In these extreme cases, no discharge of pollutants to surface waters will be allowed and wastewater treatment plants which are currently discharging to surface waters will eventually be required to convert to a form of non-surface disposal such as land spreading.

Q. Thank you, Dr. Ahmadi.

I direct your attention further toward the back of the document to a page entitled, Roman Numeral III-242, entitled, Effluent Limitations-Load Allocations.

A. Yes.

Q. Do you find that page, Dr. Ahmadi?

A. Yes. Table 20.2 AA-12.

Q. Would you describe what this table means, Dr. Ahmadi?

A. This is a summary of the wasteload allocation or effluent limitations for five facilities that are contained on this table.

Q. And is Waterway Estates one of those facilities in 1975?

A. Yes, Waterway Estates is listed as the fourth facility.

Q. And what is the receiving water for the Waterway Estates in 1975?

A. The receiving water is designated as the Caloosahatchee River.

Q. And what are the load allocations for Waterway Estates in 1975?

A. The design capacity is 1.08 million gallons per day.

Q. What does "UOD" mean? Because that is a term that has not been defined in the Court, Dr. Ahmadi.

A. That's the ultimate oxygen demand, which is a pollution load, actually.

Q. Would that be I equivalent to biological oxygen demand today?

MR. QUINN: Objection, leading.

MR. BAISE: I was just seeking a clarification for the Court.

THE COURT: I'll overrule the objection.

Do you know?

BY MR. BAISE:

Q. Do you know, Dr. Ahmadi?

A. No, it's different.

THE COURT: Yes, sir.

MR. QUINN: Also, object that this witness is not an expert. He's not been qualified as an expert. This seems to require a little bit of expertise to answer that question, too, sir.

MR. BAISE: If he can't answer the question, that's fine.

MR. QUINN: Yes, sir.

Well, whether he can answer the question or not, he hasn't been qualified as an expert and this requires an expert opinion.

In order to be — a lay witness can't testify to expert opinions unless they're rationally based under Rule 701, and we haven't laid a foundation for him to give any of this stuff, sir.

THE COURT: Well, I don't know that it takes an expert opinion to testify as to whether UOD is a term that is equivalent to today's term or subsequent term of BOD.

Is that the question? Do you know that, sir?

THE WITNESS: It is defined on the bottom of this

page, Your Honor. UOD pounds per day equals the design flow of the plant times the —

THE COURT: It's your witness and your question, so —

MR. BAISE: Let's just — I'll drop the question. I was just doing it for the Court's clarification, since BOD and CBOD had been such a point of contention.

BY MR. BAISE:

Q. Dr. Ahmadi, in the second column it is noted that the Caloosahatchee River is the receiving water for Waterway Estates; is that correct?

A. Yes.

Q. Dr. Ahmadi, I would direct your attention to Roman Numeral III-227, please. I'm sorry. It's 229. My copy is barely —

A. Okay.

Q. It's entitled, 7, Load Allocations and Effluent Limitations. Do you see that page?

A. Yes, sir.

Q. And that's Roman III-229?

A. Yes.

Q. Dr. Ahmadi, would you read the paragraph beginning with the two words, "this segment"?

A. This segment contains the Caloosahatchee River from the W.P. Franklin Lock and Dam at Olga to its mouth at San

Carlos Bay, a distance of approximately 30 miles. Five wastewater treatment facilities (WTF) discharge directly to the river in the vicinity of Fort Myers and seven other facilities discharge to tributaries, as listed in Table 28.2 AA-6. The locations of the discharges are shown in figure 28.2 AA-4.

Q. So there are five facilities discharging directly to the Caloosahatchee; is that correct?

A. Right.

Q. Would you turn to page Roman III-207, please?

Do you see that page, Dr. Ahmadi?

A. Roman III-207?

Q. Yes.

A. Yes.

Q. Describe what that page represents, Dr. Ahmadi.

A. It is a Waste Source Inventory.

Q. And does it name Waterway Estates in one column?

A. Yes, Waterway Estates is listed here and is the fourth facility.

Q. And what is the receiving discharge point for the Caloosahatchee River?

A. The discharge point is listed as the Caloosahatchee River.

Q. I direct your attention down to the J. Colin English School. What is the discharge point for that facility?

A. Says canal to Powell Creek.

Q. Thank you.

Since you've worked for the Federal Department of Environmental Protection, Dr. Ahmadi, has the water quality of Caloosahatchee River improved or been degraded?

A. I've been working with the State of Florida and since I've been with the agency we have not documented any degradation in the water quality in the Caloosahatchee River.

Q. Are water quality standards met in the Caloosahatchee River in the area of the discharge of the Waterway Estates facility, Dr. Ahmadi?

A. Yes, sir.

Q. Dr. Ahmadi, I direct your attention to Defendant's Exhibit 16.

And it's Plaintiff's 349, also, in evidence, Your Honor, depending on which notebook you have.

THE COURT: I've got it in the form of Defendant's Exhibit.

BY MR. BAISE:

Q. Dr. Ahmadi, what is a 201 Plan?

A. It is a facility's planning which will list what to be done with a facility in terms of treatment, expansion, design, future plans, effluent disposal.

Q. How do 201 Plans and regional facilities connect

together?
A. Generally with the passage of the Clean Water Act back in the early 70's, a lot of money became available to local facilities, particularly governmental entities, cities, counties and so fourth, to come up with a facilities plan and try to improve their wastewater treatment practices and operations and either eliminate discharges or improve treatment so they could lessen the impact on receiving waters under the NPDES Program.
A lot of money was available and in those 10 to 15 years some 50 billion dollars of Federal money was spent on that program. So this is in relation to that.
Q. Is this document prepared in part for a 201 Plan for a regional facility?
A. Yes.
Q. What regional facility was this document prepared for, Dr. Ahmadi?
MR. QUINN: Objection.
THE COURT: Just a moment.
MR. QUINN: Objection, sir.
I believe this goes beyond the actual personal knowledge. We've been talking about it for a while and it has not been offensive to the United States, but goes beyond the personal knowledge of Dr. Ahmadi.
He testified that he came to work — I believe he

testified that he came to work for the State in 1981, and this document was worked on before that.
I don't believe that he's testifying from his own personal knowledge, and he lacks personal knowledge to talk about it.
If what he's testifying about is an opinion, then it's an expert opinion and he hasn't been qualified to talk about that.
In addition, he can't even give an opinion on it because he does not have a personal perception of it at the time that it was done, sir.
MR. BAISE: May I respond?
THE COURT: Yes, sir.
BY MR. BAISE:
Q. Dr. Ahmadi, are you familiar with this document?
A. Yes, I am.
Q. Do you use this document in your work at — in your present position?
A. Yes, we do.
Q. Any reason to believe that this document is not a trustworthy document?
A. No, I have no doubt about it.
We work closely with our section in Tallahassee in production of these documents.
THE COURT: I'll overrule the objection.

It will be received.
BY MR. BAISE:
Q. Is this what is known as a planning document, Dr. Ahmadi?
THE COURT: It's already received.
You were objecting to his testimony?
MR. QUINN: Yes, sir.
THE COURT: I'll overrule the objection.
BY MR. BAISE:
Q. You may answer.
A. Yes, sir, it's a planning document.
Q. Are there any requirements in this document?
A. There are certain steps and plans for the future of the Lee County -- the Waterway Estates plant is located on the northern side of Lee County. There are several facilities that were on the southern side. There was another plant on the north side, which was the Cape Coral -- City of Cape Coral. The county at that time was planning to have a regional one or two facilities for the entire northern part and that plan did not become implemented.
Q. Dr. Ahmadi, I direct your attention to Florida Cities Exhibit 198.
Are you familiar with this document, Dr. Ahmadi?
A. Yes, I am.
Q. What is this document?

A. It's a letter that's written by the United States Environmental Protection Agency, Region IV, dated January 22, 1981, and signed by William Cloward, Chief of Permits Section.
Q. Who is CC'd on the document, Dr. Ahmadi?
A. Mr. Mickey Bryant of the Florida DER.
Q. Is that Florida DER your office?
A. Yes, the State DER, our predecessor agency of the DEP.
Q. Turning to page 2, with respect to this document, does it indicate what the receiving waters are to this --
MR. QUINN: Objection. I don't believe this document is in evidence, Your Honor, and I have AN objection as to this witness' competence to talk about this document.
THE COURT: All right.
MR. BAISE: May I comment on it?
THE COURT: Yes.
MR. BAISE: This is the permit from the United States. It is a document that has attached to it a reference to one of the documents we have just referred to, the 1975 study, which is the '75 study that gives the wasteload allocation, and I will get to that in just a moment. But he says he is familiar with this document, his office received it, he is --
THE COURT: Well, at this point are you offering it in evidence? Is that what you're going to do?

MR. BAISE: I'm going to get ready to offer it in evidence, Your Honor.

BY MR. BAISE:

Q. Dr. Ahmadi, have you read this document before?

A. Yes, I have.

Q. Have you read documents similar to this before?

A. Yes, in almost all surface water discharge cases.

Q. Do you review Federal NPDES draft permits and final permits in the normal course of your work?

A. Yes, if we are copied and receive a copy we review that.

THE COURT: Say again, please, sir.

THE WITNESS: Yes, if we are copied and it's sent to us, we review those documents.

MR. BAISE: I would move this into evidence, since it is a United States Environmental Protection Agency document, Your Honor. It's the draft permits into Florida Cities in 1981, on January 22nd, it has attached to it the draft EPA NPDES Permit, the permit limitations, and attached to that, of course, is the wasteload allocation. So, it is certainly an official document of the US EPA, to the best of our ability to determine it, and it was, to my knowledge, produced by EPA in our request for production of documents.

MR. QUINN: I have an objection to the introduction of the document through this witness.

This witness does not have personal knowledge of this particular document. He might have seen documents like this before.

My objection as stated in our earlier filings was relevance and I would renew that objection, as well.

THE COURT: Let me ask you this: Have you registered an objection regarding the authentication of this document?

MR. QUINN: No, sir, we did not, because we did not because we didn't know it was going to come in --

THE COURT: Excuse me?

MR. QUINN: If this came in through the proper witness -- it's an authentic document, sir. We have no objection to its authenticity. We have an objection to using the document with this witness.

THE COURT: Well, the document -- all right -- and the objection that you have listed in your objections is relevancy?

MR. QUINN: Yes, sir.

THE COURT: All right.

MR. BAISE: My objection -- excuse me, Your Honor.

THE COURT: Let me hear you on your objection regarding relevancy independent of this witness' testimony.

MR. QUINN: The relevance objection deals with the fact this is a 1981 draft document and our violations in

this case are talking about 1986, for this facility, sir.

THE COURT: Okay. Mr. Baise.

MR. BAISE: I find that somewhat disingenuous, Your Honor, whether or not the Government has gone back to --

THE COURT: Never mind whether you find it disingenuous, but tell me what your response is.

MR. BAISE: My response is, Your Honor, that this document is the only document the Government produced to us with respect to wasteload allocations in 1981, so you can track that 1981 wasteload allocation through '83, '86 and into the 90's.

And with regard to the actual permit that is given to the discharger, EPA does not attach the fact sheet to their final permit, and this particular fact sheet is the one that points out the wasteload allocation given to this facility in 1981, comes from the 1975 document. So, there is a history step-by-step of where the wasteload allocation comes from, and how it's incorporated into both the Federal and State permits. So, that's why it is relevant, Your Honor.

MR. HIRD: Your Honor, may I say something in support of Mr. Baise's position?

THE COURT: Yes, sir.

MR. HIRD: On the first day of trial we objected

to the introduction of the numerous Government documents that predated the violations at issue, and over objection I think hundreds of documents were admitted into evidence.

I think the Defendants should have the right to introduce historical documents that explain mitigation or lack of viability, and for those reasons, I would support Mr. Baise's position.

THE COURT: Okay. Anything further?

MR. QUINN: Nothing further, sir.

THE COURT: All right. I'll overrule the objection.

I'll receive the document in as 198.

BY MR. BAISE:

Q. Dr. Ahmadi, I direct your attention to page 12 -- I'm sorry, it is a not numbered on your document, but count 12 pages to the page of the draft EPA permit dated January 22, 1981. The page is entitled, Final Effluent Limitations. And do you find that page?

A. Yes, sir.

Q. Do you find that page?

A. Yes, sir.

Q. Directing your attention to paragraph 5, would you read paragraph 5 into the record, please?

A. It says number 5: Final effluent limitations were derived from wasteload allocation given in Lower Florida

River Basin Water Quality Management Plan, page III-242.
Q. Is that the same Roman III-242 that you referred to in the 1975 document?
A. Yes, sir.
Q. Is this the wasteload allocation for the Florida Cities Waterway Estates facility located on the canal discharging into the Caloosahatchee River in 1981?
A. Yes, sir.
Q. Dr. Ahmadi, I direct your attention to Florida Cities Trial Exhibit Number 17.
This is already in evidence, Your Honor.
Do you have that document in front of you, Dr. Ahmadi?
A. Yes, sir.
Q. What is this document?
A. This is a State permit for the Waterway Estates to operate their facility and discharge their effluent to the Caloosahatchee River.
Q. Is there any zero discharge limitation in this permit, Dr. Ahmadi?
A. No, it authorized them to discharge.
Q. Would you turn to page 1 of 4? It would be the fourth page in on this document.
A. Yes, sir.
Q. Do you see that page?
A. Yes, sir.

Q. Department of Environmental Regulation letterhead?
A. Yes, sir.
Q. Would you read that paragraph starting with, "to operate" into the record?
THE COURT: Just a minute
MR. BAISE: Hold on, Dr. Ahmadi.
THE COURT: What page?
THE WITNESS: Page 1 of 4.
MR. BAISE: 1 of 4, but the fourth page in, Your Honor.
THE COURT: Okay.
BY MR. BAISE:
Q. Would you read that paragraph?
A. Yes, sir.
Q. Up to where it says, "location of the project." That's not necessary.
A. To operate a 1.080 million gallons per day contact stabilization process wastewater treatment facility with effluent to canal to the Caloosahatchee River located off project site.
Q. Is there anything in this document that says there's a zero discharge for this project into the canal to the Caloosahatchee River on April 2, 1981, Dr. Ahmadi?
A. No. This is their authorization to discharge to the river.

Q. Does this mean there's a wasteload allocation for this discharger to discharge into the canal, Dr. Ahmadi?
A. Yes, sir.
Q. Turning your attention to Defendant's Exhibit Number 2, Dr. Ahmadi.
By the way, did EPA ever challenge that permit that was issued in 1981?
A. No.
Q. EPA ever comment on that permit issued in 1981?
A. No.
Q. Turning your attention to Defendant's Exhibit Number 2, what is this document, Dr. Ahmadi?
And this is, also, in evidence, Your Honor.
A. Yes, this is State of Florida letter that's written and signed by Terry Cole, who was the assistant secretary at the time to Mr. Charles Jeter of the EPA.
Q. Are you familiar with this document?
A. Yes, I am.
Q. You worked with this document?
A. Yes.
Q. I direct your attention to page 9 of this document, Dr. Ahmadi. Page 9, Roman Numeral IV.
A. Okay.
Q. Would you read that first paragraph into the record, Dr. Ahmadi?

A. Roman Numeral IV: Approval of Wasteload Allocations. The EPA is required by 303 (d) of the Clean Water Act to review and approve/disapprove the allowable wasteload established by the State within 30 days after submission. An additional 30 days is allowed to make necessary revisions to disapprove identifications and loads. All final approvals of wasteload allocations are to be incorporated by the States into the water quality management plans through the continuing planning process required under 303 (e) of the Act.
Q. Do you have any knowledge as to whether or not the '81 wasteload allocations suggested by the planning document for the Caloosahatchee River was ever approved under this paragraph?
A. No, I don't. I think it was not approved.
Q. Thank you.
Turning to Defendant's Exhibit number 20, Dr. Ahmadi.
This, too, is in evidence, Your Honor.
Do you have number 20 in front of you?
A. Yes, sir.
Q. What is this document?
A. This is a State of Florida permit to operate the Waterway Estates facility.
Q. Is there any no discharge wasteload allocation in this document, Dr. Ahmadi?

A. No. Basically this says that the utility is allowed to discharge to the river, and this was issued on August 2, 1983.
Q. And what was the expiration date of this permit, Dr. Ahmadi?
A. It was the maximum five years to August 2, 1988.
Q. Did Waterway Estates have a wasteload allocation to discharge into the canal of the Caloosahatchee River in 1983?
A. Yes, the permit was for a 1.08 MGD contact stabilization process, wastewater treatment facility with effluent discharge to a canal to the Caloosahatchee River as depicted in drawings and documentation on file in this office.
Q. Did the Waterway Estates facility have a wasteload allocation discharge into the canal in 1984?
A. Yes, sir.
Q. In 1985?
A. Yes, sir, through this permit.
Q. 1986?
A. Yes, sir.
Q. 1987?
A. Yes, sir.
Q. 1988?
A. Till August of 2, 1988, yes, sir.

Q. Did the EPA comment on this permit?
A. No.
Q. Did EPA challenge this permit?
A. No.
Q. Did EPA work with the State of Florida on joint inspections of this facility?
A. Yes, sir.
Q. Did EPA ever raise this issue of not having a wasteload allocation to you or any of your staff?
A. No.
Q. Was this facility meeting water quality standards in 1983?
MR. QUINN: Objection.
THE WITNESS: Yes, sir.
THE COURT: Wait a minute.
MR. QUINN: I think that calls for an expert opinion.
THE COURT: Okay. It sounds like it to me.
MR. BAISE: May I comment?
THE COURT: Yes, sir.
MR. BAISE: The State of Florida and this office and this gentleman had the responsibility, Your Honor, for maintaining and achieving water quality standards. They developed data. He has individuals who develop data. They have to make conclusions all the time with regard to whether

or not each and every facility meets water quality standards.
If they do not need water quality standards, that's how you get into what we've been discussing, wasteload allocations. So, it's mean a fact question for him, not an expert opinion.
It is a situation that's clearly covered by 701, where a lay person has to have certain facts at his fingertips and disposal to come to conclusions. Clearly this data allows him to determine whether water quality standards are met.
THE COURT: Yes, sir.
MR. QUINN: I'm just saying, sir, this is an expert opinion. I still maintain it's an expert opinion. If they wanted to list him as an expert they could have done it. He's not an expert before the Court.
Whether something satisfies water quality standards or not is -- the United States' position is that requires an expert opinion and for that reason we object.
THE COURT: Okay. Well, I'll overrule the objection.
You can answer the question.
THE WITNESS: The State of Florida --
BY MR. BAISE:
Q. I think you answered, but would you repeat your

answer, please?
A. The State of Florida is, through Chapter 403, Florida Statute, is required to deny a permit if they do not meet any water quality standards for any reasons. We are requiring all facilities to submit to us monthly operation reports --
THE COURT: What was your question "yes"?
THE WITNESS: Yes, the question is they have complied with the Rule and not --
THE COURT: You've answered the question, sir.
MR. BAISE: Thank you.
BY MR. BAISE:
Q. I'll repeat this question: Was the facility meeting water quality standards in 1984?
A. Yes, sir.
Q. '85?
A. Yes, sir.
Q. '86?
A. Yes, sir.
Q. '87?
A. Yes, sir.
Q. And '88?
A. Yes, sir.
Q. Thank you.
MR. QUINN: I just object to all that and move to

strike.

THE COURT: The same ruling. Deny the motion to strike.

BY MR. BAISE:

Q. Dr. Ahmadi, why did Florida DEP require in 1988 the Waterway Estates facility to move its discharge point to the middle of the Caloosahatchee River?

THE COURT: Did you say why?

MR. BAISE: Yes.

THE WITNESS: BY that time it became evident to the State that the planning is not going to be implemented for regional facility on the north side of the county, which included the Waterway Estates plant, and, also, because of the consistency and uniformity with other facilities, we requested that Waterway Estates' facility be upgraded to the advanced waste treatment and, also, relocate their discharge point.

Q. So you asked Waterway Estates to move its discharge point for consistency reasons?

THE WITNESS: Yes, sir.

MR. QUINN: Objection, leading.

THE COURT: Sustained.

MR. QUINN: Move to strike.

THE COURT: Granted.

BY MR. BAISE:

Q. Dr. Ahmadi, I direct your attention to Defendant's Exhibit Number 3.

Do you have that document in front of you, Dr. Ahmadi?

A. Yes, sir.

Q. This document is already in evidence, Your Honor.

Dr. Ahmadi, I'd like to draw your attention — first off, are you familiar with this document?

A. Yes, sir.

Q. I'd like to draw your attention to the fourth line of that document and have you read starting with the word "according."

A. According —

Q. Go ahead. I'll tell you when to stop.

A. According to this decision, EPA has authority, indeed a duty under section 301 (b) (1) (c), to interpret State Law and apply those limitations and conditions which it deems necessary to satisfy the requirements of State law. This is true in the absence of state certification; this is also true where EPA determines that the State has committed clear error in the certification, for example, where a State overlooks applicable State water quality standards.

Q. You can skip citing OGC and start with "however."

A. However, where there is no indication that the State has overlooked the standards or otherwise committed clear error, EPA must give deference to the State.

Q. Continue.

A. In short, if EPA and the State arrive at two different, but equally persuasive, interpretations of a standard, EPA should defer to the State's interpretation when included in a State certification.

Q. You can stop there and got to the last paragraph starting with the two words, "the question," please.

A. The question then arises as to what interpretation the Region should write into permits when there is no certification, but the State has expressed its interpretation in a State-issued permit.

Q. Continue.

A. This question arises because of Region IV's agreement with the State of Florida to consider State-issued permits as interpretation of the State Law in view of certifications.

Q. Would you turn to page 2 of this document dated December 26, 1985?

I'm not sure what the first word is on my copy. The printing is blotted out and I assume it's the same with Your Honor. I assume it means, the agreement. Mine is unclear.

Can you tell, Dr. Ahmadi?

A. The same with this, only the "e" is there. I assume it's "t-h."

The agreement should only be construed to require EPA

to impose in its permits the interpretation of State Law which the State has embodied in permits it has issued unless those State interpretations are clearly erroneous or EPA has a strong scientific or technological support for a different interpretation, such that EPA's interpretation is more persuasive than that of the State.

Q. Does this memorandum represent your understanding of the relationship between your office and Region IV EPA on handling permits?

A. Yes, sir.

Q. Dr. Ahmadi, I direct your attention to Defendant's Exhibit Number 23.

This, too, is in evidence, Your Honor.

Dr. Ahmadi, what is this document dated June 30, 1986?

A. This is a notification of the NPDES Permit denial by EPA for the Waterway Estates.

Q. Are you familiar with this document?

A. Yes, sir.

Q. Have you seen this document before?

A. Yes, sir.

Q. Do you recall seeing it in 1986?

A. Yes, sir.

Q. Now, Dr. Ahmadi, I direct your attention to page 2 of the attached fact sheet. Go over to the fourth page. Do you see the page where it is numbered 2, 3, 4, 5, and 6?

A. Yes, sir.
Q. I direct your attention to paragraph 2, Proposed Effluent Limitations. Would you read those into the record please?
A. Number 2: Proposed Effluent Limitations. The final effluent limits for this facility to a canal to the Caloosahatchee River are no discharge.
Q. Paragraph 3, please.
A. Basis for Denial Effluent Limitations and Permit Conditions. The permit denial is based on a no discharge wasteload allocation developed by FDER on January 19, 1981. The terms and schedule for meeting the no discharge wasteload allocation will be set forth in the forthcoming administrative order.
Q. On June 30, 1986, Dr. Ahmadi, did the State of Florida have a no discharge allocation requirement for this project discharging into the canal into the Caloosahatchee River?
A. No, the State didn't have a no discharge. They were authorized to discharge by permit.
Q. Are these two paragraphs incorrect, Dr. Ahmadi?
MR. QUINN: Objection.
THE WITNESS: Yes —
THE COURT: Wait a minute. Wait a minute, sir.
MR. QUINN: Objection. That calls for an opinion. Calls for a legal conclusion and calls for an opinion from a

lay witness.
THE COURT: Well, I'll sustain the objection.
Go ahead.
Proceed.
BY MR. BAISE:
Q. Dr. Ahmadi, I direct your attention — well, strike that.
Dr. Ahmadi, in June of 1986, was the effluent from the Waterway Estates facility meeting State water quality standards?
A. Yes.
Q. Was it meeting Federal water quality standards?
A. It should have. Generally, the State requirements are stringent than the Federal.
Q. I beg your pardon. More stringent did you say?
A. Generally.
Q. Was this discharger, Waterway Estates, meeting its effluent limitations in June of 1986?
A. Yes, they were.
MR. QUINN: I object as to the qualification as to referencing State or Federal effluent limitations.
MR. BAISE: State.
THE COURT: State.
Same answer?
THE WITNESS: Yes, sir, State.

BY MR. BAISE:
Q. Would the Federal effluent limitations have been any different?
A. Generally, as I say, the Federals are less stringent than the State, in most cases.
Q. Federal standards are less stringent than the State's?
A. Yes, sir.
Q. Dr. Ahmadi, I direct your attention to Defendant's Exhibit Number 32.
Do you have that in front of you?
A. Yes, sir.
Q. Did there come a time when the State of Florida did request Waterway Estates to move its discharge from the canal to the Caloosahatchee River 6-foot contour line?
A. Yes, sir.
Q. Did Waterway Estates eventually move their discharge to the 6-foot contour line?
A. Yes, they did.
Q. What did they have to do in order to move their discharge to that contour line?
A. By Florida Statutes, they are required to obtain a permit from the State for upgrading the treatment and, also, extending the line from the point of discharge from the canal to the middle of the river.
Q. So, once they are ordered to move their discharge

pipe, they cannot just immediately start construction, even if they wanted to do so?
A. No, they can't.
Q. Directing your attention to this Exhibit 32, are you familiar with this document?
A. Yes, I am.
Q. Are you the Dr. Ahmadi referred to in the first paragraph?
A. Yes, sir.
Q. What discussions were you holding in approximately September of 18 with Mr. William Harrop and any other individuals regarding this project, Dr. Ahmadi, if you recall?
A. Yes, they were — Harrop was retained as the consultant for the Waterway Estates facility and the Florida Statutes require that for design of a facility a professional engineer, who is registered in the State, must apply for the permit, and we were discussing the operating of the plant to AWT.
Q. What role does your office or do you, personally, play with respect to approving a project for construction such as the one at Waterway Estates, Dr. Ahmadi?
A. The State Statutes clearly require application to the State and then, also, requires a timely review by the State of Florida DEP.

Q. What is a timely review?
A. The timely review is we are obligated to review the application within the first 30 days and then generate a letter for additional information.
Q. Do you routinely grant permission to start these projects within 30 days?
A. No. It's almost impossible in most cases, if there is a necessity for explanations or omissions and clarifications and so forth.
Q. Why is it next to impossible?
A. Because it's a complicated process. The design of a facility, the treatment units, the choice of the chemicals, the equipment, and all this has to be in compliance with the Rule and we should have been given reasonable assurances that that would work once it's constructed.
In order to reach that point, we have to correspond several times back and forth, until such time that we are satisfied that what's proposed is going to meet the intent of the Rule.
Q. You reviewed the plans and specifications for this project, Dr. Ahmadi?
A. I did review certain parts of the application, yes, sir.
Q. Can you give us some idea --
MR. QUINN: Withdrawn.

BY MR. BAISE:
Q. Can you describe the nature of this particular project?
A. Yes. The project is located in the middle of a residential area on a relatively tight site. There is not much room really to design and place structures.
Q. Why is that important?
A. It's important from the point of view of expanding the facility from the conventional treatment which was there to an advanced wastewater treatment. They were building more units, more capacity, more volumes, more pumps and they required a permit not only from us, but from other governmental entities, as well.
But as far as the DEP's responsibility is concerned, we are to make sure what they are proposing will achieve the end result.
Q. Did Florida Cities or its engineering consultants provide you the information you needed to make your decision on a timely basis?
A. Most of the time they did, yes, sir.
Q. Any time they did not?
A. No.
Q. Can you describe or do you know, Dr. Ahmadi, looking at the second paragraph of this letter, what options and alternatives are being discussed by Mr. Harrop in this

letter to Mr. French as a result of this conversation with you in, say, roughly September of 1988?
A. This the September 14, 1988 letter?
Q. Yes, it is.
A. Bill Harrop writes to Robert French of the Florida Cities Water Company and says, it is apparent from our recent discussion --
Q. You can't read. I was just asking you with regard to paragraph 2 about the options and alternatives that might have related to the conversation you had with these gentlemen.
A. The options were that they had to consider some other alternatives for the plant design. We were questioning that certain units were very similar to a conventional treatment and that necessitated an advanced waste treatment process design.
Q. Thank you, Dr. Ahmadi.
I direct your attention to a letter dated October 11th, 1988, Defendant's Exhibit Number 34, please.
A. Number 34?
Q. Yes. Defendant's Exhibit 34.
A. Goes from 32 to 53.
Q. Defendant's Exhibit, Trial Exhibit Number 34.
A. Sorry for that.
Q. Would you please identify this letter, Dr. Ahmadi?

A. Yes, sir. This is a letter written by the DEP to Robert French of Waterway Estates Utility by me and copied the consulting engineer and Tony Reeves, the vice-president.
Q. Can you summarize --
Your Honor, I would move this letter into evidence.
THE COURT: It will be received.
BY MR. BAISE:
Q. Could you summarize your concerns that were raised during your meeting with the Florida Cities official, Mr. French?
A. Primarily after consulting with our engineers, some ten issues that were relevant to this project, including irrigation/production, reliability, chambers, and flow equalization, and we told them those needed to be addressed before we could issue a permit.
Q. Can Florida Cities' engineer develop final plans and specifications until these ten items were specified?
A. No, they cannot.
Q. Why not?
A. Because they would be wasted. If we are not satisfied to give them a permit, they cannot do that. And if we object to it or if we deny their permit, it's a waste of resources and time.
Q. So Florida Cities and its engineer had to satisfy each and every one of these items?

THE COURT: Sir?

MR. QUINN: No. Sorry, sir.

BY MR. BAISE:

Q. How long did it take Florida Cities and its engineer to satisfy FDER's concerns, Dr. Ahmadi?

A. I believe from the time they applied for the permit until we issued, was close to nine months.

And that's not an unusually high time for these kind of projects.

Q. Dr. Ahmadi, I draw your attention to a letter dated November 1st, 1988, Florida Cities Exhibit Number 35.

A. Yes, sir.

Q. Are you familiar with this letter, Dr. Ahmadi?

A. Yes. This is a letter in response to the previous letter that we wrote to Florida Cities. Mr. French responded.

Q. And you're the Dr. Ahmadi in the addressee block?

A. Yes, sir.

MR. BAISE: Your Honor, I would move this Florida Cities Exhibit Number 35 into evidence.

THE COURT: It will be received.

BY MR. BAISE:

Q. In the interest of time, Dr. Ahmadi, could you summarize this document for the Court?

A. Mr. French indicated in this letter that they have

retained Mr. Barth, who is a well-known authority on wastewater process, that he would be reviewing their process.

Q. Who is Mr. Barth and why was he retained?

MR. QUINN: Objection.

BY MR. BAISE:

Q. Who is Mr. Barth?

A. He was a wastewater treatment processing engineer expert.

Q. Did you request Mr. Barth be retained?

A. No, we didn't. We, basically, told the utility that we need those ten concerns that are addressed in our letter adequately responded to, and their response was that they could hire a different consultant to review that aspect of the application.

Q. Was there anything Florida Cities or its consultant could do to speed up your review process, Dr. Ahmadi?

A. Could you repeat that?

Q. Was there anything Florida Cities or its consultant could have done to have speeded up your review process?

A. For a project of that size, that particular process, probably not.

Q. Dr. Ahmadi, did your office ever order Waterway Estates to cease discharging into the canal into the Caloosahatchee River?

A. No, we didn't.

Q. Why not?

A. There was several reasons. One, the Caloosahatchee River was studied by the State a couple of times and it maintained its quality. And second, the facilities that are currently discharging up to this date are well below their permitted design capacity, so they are — the river is receiving half of its wasteload, actually, and that's another reason. And third, there was really no alternative.

Q. I direct your attention to Defendant's Exhibit Number 36.

Do you have that in front of you, Dr. Ahmadi?

A. Yes, sir.

Q. Please describe this document for the record, doctor.

A. This is also a letter that is written by Bob French of Florida Cities Water Company to the District Manager Phil Edwards on April 19, 1989.

Q. Who was Phil Edwards?

A. My supervisor and the district manager of the South District.

Q. Have you seen this letter before?

A. Yes, sir.

Q. Did you see it in April of 1989?

A. Yes, sir.

MR. BAISE: I move this into evidence, Your Honor.

MR. QUINN: Objection. We say this document is hearsay and hearsay within hearsay as to the attachments. We talked about this the other day.

The sequence of events and the proposed compliance schedule contain hearsay and hearsay within hearsay and the cover letter itself dated to Mr. Edwards contains hearsay.

MR. BAISE: May I respond?

THE COURT: Did I sustain your objection?

MR. BAISE: Yes, you did, and I withdraw the document because this is the one that had on it the stamp received and there was some concern about whether Mr. Acosta had gotten it out of Florida Cities' files, and the issue went off on the fact that this was stamped received April 21, 1989, South Florida District. And since Dr. Ahmadi said he saw it at the time it came in, he worked for Mr. Edwards, he reviewed the document at the time, and certainly represents the events as they were occurring at the time accurately and honestly.

MR. QUINN: I object to the characterization of how this letter sets out the events accurately and honestly. It does what it does and we think it's hearsay.

THE COURT: Okay. Well, let's talk about it a minute.

MR. BAISE: I would move, Your Honor, it comes in under 803-6.

THE COURT: As an exception to the hearsay rule?

MR. BAISE: Correct. Particularly in light of his testimony.

THE COURT: Well, do you want to tell me how this qualifies under the requirements of the rule as a business record?

MR. BAISE: It's certainly a memorandum or a record, it's acts and events that were made at or near the time, and information transmitted by a person with knowledge, who would have been Mr. French. The document was kept in the course of regular conducted business by the Florida DER office a indicated by the stamp, April 21, 1989, and the only thing Dr. Ahmadi has not testified to is whether or not it was the regular practice of that business to make a memorandum or report of this sort and keep it within the custodian of a qualified witness.

THE COURT: Well, how about that?

MR. BAISE: Dr. Ahmadi, are these records kept by a qualified custodian in your offices?

THE WITNESS: Yes, they are. In fact, we are required by Florida Statutes to permanently keep all permitting letter — documents.

THE COURT: Well, who does that? That is, who keeps the records?

THE WITNESS: The records are kept by the — we

have a file clerk, Your Honor.

MR. BAISE: Five or file clerk?

THE WITNESS: Uh-huh.

MR. BAISE: Excuse me.

MR. QUINN: We still submit that the exceptions requirements have not been met.

The recording of the acts, events, conditions, opinions or diagnoses have to be made at or near the time. You know, we don't know what Mr. French was talking about here, sir. Mr. French isn't here. That's why it's hearsay.

Dr. Ahmadi said file clerks, and if they wanted to get the document in as a business record, they could have brought the file clerks in.

We're not submitting that it's not authentic, we're just submitting that they haven't met the requirements under this aspect of the exception to the hearsay rule.

MR. BAISE: Your Honor, we were told about Judge Swartz we did not have to bring custodians forward to authenticate these documents and maintain — and to assure that they were maintained in the ordinary course of business at the offices, so seems to me that Judge Swartz has dealt with that issue.

MR. QUINN: I'm not objecting to authenticity, sir. They're probably authentic.

THE COURT: Just a moment.

MR. BAISE: Your Honor, there's an 11th Circuit case called Beech Aircraft where it's stated that the United States bear the burden of showing there's a lack of trustworthiness with regard to this document —

THE COURT: Now, that case deals with public records and reports under subsection 8, doesn't it?

MR. BAISE: I've just been given a note from someone who is looking and trying to provide me information, Your Honor.

THE COURT: Well, give me just a moment here.

Okay. I'm referring to the pretrial conference before Magistrate Judge Swartz on December 28th, 1995, referring to the list of custodian of records.

He says: I want those witnesses eliminated and I want any documents that they were to authenticate approved for the purpose of authentication and I need a supplement to this, and I will give you ten days to get it supplemented.

Mr. Bullock: Would Your Honor also consider that for any EPA documents?

The Court: That's both ways.

Mr. Bullock: Thank you.

The Court: All exhibits have got to be examined and this Court is going to get a supplement to this that says there's are no objections to authenticity unless there is a document that you absolutely contend is not a true

document.

So, the Court led counsel to believe that there would be no need to bring in a custodian of records.

We've been talking about a requirement of the business records as evidence, provision of 803, which requires a custodian of records to properly establish the document's authenticity and, of course, a custodian of records would be expected to satisfy some of the requirements of the business records as evidence provisions of 803 Sub 6.

Do you want to be heard on that?

MR. QUINN: No, sir. For purposes of this document, the United States will concede as to what the Court read about authenticity.

However, I will address some of the points of 803-6 and other hurdles that have to met. It has to be established that the document was made at or near the time, by or from information transmitted by a person with knowledge. We don't have anything here today, sir, about Mr. French's personal knowledge.

MR. BAISE: This would, also, qualify as a public record, as well, given the fact it's got this stamp on it and would qualify as an exception to hearsay under 8.

MR. QUINN: May I be heard on that?

THE COURT: Wait a minute. This — I think I

mentioned the other day that I don't think that this is the kind of a record that is contemplated under 8. This isn't a public record that can report -- just a moment, let me read this again.

(Pause.)

Subsection 8, public records and reports. Records, reports, statements or data compilations in any form of public offices or agencies setting forth, A, the activities of the office or agency, or, B, matters observed pursuant to duty imposed by law as to which matters there was a duty to report excluding, however, in criminal cases, matters observed by police officers and other law enforcement personnel, or, C, in civil actions and proceeding, and against the Government in criminal cases. Factual findings resulting from an investigation made pursuant to authority granted by law, and thus the sources of information or other circumstances indicate lack of trustworthiness.

MR. BAISE: B., Your Honor, I was referring to.

THE COURT: Sir?

MR. BAISE: B., matters observed pursuant to his duty imposed by law.

THE COURT: No, I don't believe that subparagraph 8 is applicable here. I disagree with you.

MR. BAISE: Okay.

THE COURT: And I don't believe that this record has been adequately qualified as a business record, so I'll sustain the objection.

BY MR. BAISE:

Q. Dr. Ahmadi, I draw your attention to Defendant's Exhibit Number 33.

A. Yes, sir.

Q. Do you have that document in front of you?

A. Yes, sir.

Q. This, too, is in evidence, Your Honor.

Please describe this document for the record, Dr. Ahmadi.

A. This is a September 14, 1988 letter that's written by William Harrop, Jr., P.E. of Source, Incorporated to Bob French with copy to Tony Reeves.

Q. And what is attached to this letter?

MR. QUINN: Can I have a clarification as to what document?

THE COURT: This is Exhibit 33.

MR. BAISE: Defendant's Trial Exhibit 33, State of Florida Permit, dated September 2th, 1988.

THE WITNESS: I'm sorry. I read the 32.

MR. QUINN: Thank you.

THE COURT: He was describing another document.

THE WITNESS: I was reading it erroneously.

BY MR. BAISE:

Q. What is attached to the letter sent by Mr. Phil Edwards?

A. I'm sorry. For the number 33 is State of Florida document dated September 29, 1983.

Q. Is it '88? It's hard to see.

A. Hard to read.

Q. What is attached to this letter of September 29th, 1988, Dr. Ahmadi?

A. The temporary permit, six pages.

Q. And could you please look to page 2 and describe what Florida Cities is to undertake, starting with paragraph or line 1 at the bottom of the page of 1 of 6?

A. Starting with 1, date?

Q. Yes.

Please summarize that for the record.

A. Date when planning is expect to be complete. It says completed.

Date when engineering will be complete. September 23, 1988.

Source of funds. Invested-owned utility.

Number 4, Date construction application will be submitted to upgrade or eliminate the existing plant. October 8, 1988,

Number 5, Date construction contract will be let.

January 9, 1989,

Number 6, Date construction will commence. February 1, 1989.

Number 7, Date construction is to be complete and so certified. May 1, 1990.

Number 8, Date that wastewater facilities will be certified "in compliance" with your permit. November 1, 1990.

Q. To your knowledge, was Florida Cities able to meet this November 1, 1990, deadline, Dr. Ahmadi?

A. Yes.

Q. Are you aware of any additional delays that Florida Cities met with regard to meeting this date of November 1, 1990?

A. There were some delays from zoning from Lee County and permitting from the Army Corps of Engineers.

Q. Is there any order to cease discharge from the Waterway Estates in this permit issued on September 29, 1988, from the State of Florida?

A. No.

Q. Turning your attention to the exhibit for the Defendant, Number 51.

Do you see this document of October 30, 1990?

A. Yes, sir.

Q. This, too, is in evidence, Your Honor.

Dr. Ahmadi, please look to paragraph 2 of this letter to Mr. Reeves, and please read that paragraph into the record.

A. The letter is signed by Mr. Phillip Edwards, Deputy Assistant Secretary, to A. A. Reeves. Please be advised that the subject permit is extended until September 1, 1992.

Q. Why was that necessary for this particular facility, Dr. Ahmadi?

A. This was necessary due to the delays that were beyond the control of the utility due to permitting and involvement of the different governmental entities.

MR. QUINN: Objection, move to strike, calls for opinion and goes beyond the actual personal knowledge of the witness, goes to opinion and expert opinion, as well, sir.

MR. BAISE: Do you have personal —

THE COURT: Well, I'll sustain the objection.

BY MR. BAISE:

Q. Do you have personal knowledge of this date, Dr. Ahmadi?

A. Yes, sir.

Q. And do you have personal knowledge as to why it was extended?

A. Yes. It was reasonable that there were delays that obviously they could not go ahead with construction without a permit from the appropriate agency, otherwise they get in

trouble for violation of the permit, or the activities that they engage in.

Q. And did Waterway Estates still have a wasteload allocation to discharge in the canal on October 30th, 1990?

A. Yes, sir, through this permit. Through the earlier permit.

Q. Dr. Ahmadi, did this discharge cause any environmental harm as they were discharging into the canal in the Caloosahatchee River in 1990?

A. No measurable harm.

MR. QUINN: Move to strike again.

THE COURT: Just a moment.

MR. QUINN: Objection, move to strike, that environmental harm calls for an expert opinion.

THE COURT: Sustained. And it will be stricken.

BY MR. BAISE:

Q. If this facility had remained discharging into the canal leading into the Caloosahatchee River, could it still be discharging and meeting water quality standards, State of Florida?

A. In my opinion, due to the other --

THE COURT: Wait a minute. Wait a minute.

Yes, sir.

MR. QUINN: Objection. He said, in his opinion, and that will elicit an expert response.

THE COURT: Read the question back to me, again, please.

MR. BAISE: I can rephrase the question, Your Honor, to speed it up.

THE COURT: all right.

BY MR. BAISE:

Q. Dr. Ahmadi, do you have any facts or any data that would suggest that Waterway Estates could still be discharging into the canal without causing water quality standards violations?

THE COURT: Yes or no? Do you have any facts?

THE WITNESS: No. We don't have any facts that — could you repeat that?

BY MR. BAISE:

Q. Do you have any facts showing any water quality harm in the canal in 1990?

A. No, we do not have any facts.

Q. Do you have any facts showing any environmental benefit by moving the pipe to the Caloosahatchee River in 1990?

A. No, we don't have that.

Q. In 1991?

A. No.

Q. 1992?

A. No.

Q. Therefore, could the facility still be discharging into the canal without violating water quality standards?

A. Yes.

MR. QUINN: Objection, move to strike. First, it calls for speculation, and second, speculation of an expert.

THE COURT: All right. Read the question back.

(Thereupon, the above-referred to portion of the testimony was read back by the Court Reporter as above recorded.)

THE COURT: I'll sustain the objection.

BY MR. BAISE:

Q. Did EPA comment on the permit that was issued by the State of Florida in 1988, Dr. Ahmadi?

A. No.

Q. Did EPA ever challenge that permit issued in 1988?

A. No, nobody did.

Q. And the Waterway Estates facility had a wasteload allocation to discharge in the canal up until it moved its pipe in 1991?

THE COURT: Don't lead the witness. This is your witness.

BY MR. BAISE:

Q. Dr. Ahmadi, was there ever a time that Waterway Estates did not have a wasteload allocation to discharge into the canal?

A. No, not from the State. All the time they did.

MR. BAISE: Thank you.

THE COURT: Is that all, Mr. Baise?

MR. BAISE: Yes, sir.

MR. HIRD: I have no questions for this witness.

THE COURT: Mr. Quinn.

CROSS-EXAMINATION

BY MR. QUINN:

Q. Good afternoon, Dr. Ahmadi. My name is Tony Quinn. I represent the United States.

A. Good afternoon.

Q. Sir, when did you first start with the Florida Department of Environmental Regulation?

A. That's the first place where I applied for a position and was interviewed. There were two positions and I was offered both of them.

Q. And what year — what date was that?

A. That was in September 1981.

Q. So when did you start work for FDER?

A. In September of 1981.

MR. QUINN: Your Honor, at this time the United States would move to strike all the testimony of Dr. Ahmadi which relates to his personal observations made on or before the date he started work in September of '81.

THE COURT: Motion denied.

BY MR. QUINN:

Q. Sir, prior to the delegation to Florida, NPDES Permits and State permits were different requirements, weren't they?

A. It was a parallel program, yes.

Q. But they were requirements that were separately enforcement, weren't they?

A. Yes.

Q. And prior to the delegation of the NPDES Program to Florida, a facility discharging pollutants to a surface water required both a State permit and a Federal NPDES Permit; is that correct?

A. Yes.

Q. Sir, in Florida, do permittees have a right to appeal a State permit denial?

A. Yes, they do.

Q. Are you familiar, now that Florida has been delegated the NPDES Program, are you aware whether permittees have a right to appeal permit denials?

A. Yes, we give them the point of entry, and on receipt of the permit they have certain amount of days to appeal for a permit, object to it if they dislike any of the conditions.

Q. So it's a permit appeal process; is that correct?

A. Yes.

Q. Sir, prior to the delegation of the NPDES Program to

the State of Florida, do you know whether permittees had the opportunity to appeal permit denials of NPDES Permits?

A. My understanding is that they would have.

Q. So, if a permittee thought that a permit was wrongfully denied, it could have appealed; is that correct?

A. Yes.

Q. Sir, you mentioned during your discussion with Mr. Baise the Cape Coral facility. My question deals with that facility.

Doesn't the Cape Coral facility currently have one hundred percent use of its effluent on land application?

A. No, it doesn't.

Q. Does it have any surface water discharge?

A. Yes, they do.

Q. Only during wet weather; isn't that correct?

A. Yes.

Q. Other than only during the wet weather discharge, Cape Coral has land application for its effluent in entirety; is that correct?

A. Yes. About three years ago the city, after several years of referendums and a lot of pros and cons, the citizens decided they are going to embark on a project that will deliver water to each home —

MR. QUINN: Objection. Move to strike everything after "yes."

THE COURT: All right. Stricken.

BY MR. QUINN:

Q. Sir, can you tell me what is the wet weather discharge storm event that allows the wet weather discharge?

A. Any time the land cannot accept effluent due to excessive rainfalls, such as this last year we had close to 75 inches of rain in our area, our part of the State, they are authorized to discharge their entire effluent or portion of to it the river.

Q. What is the trigger that allows them — withdrawn.

What is the triggering event or the triggering amount of rainfall that authorizes a surface water discharge from the Cape Coral facility, if you know?

A. We have an application rate of 2 inches per week. Anything above and beyond that will soak the land and the land will not accept it and create surface water runoff.

Q. Sir, is it the State of Florida's position — withdrawn.

Does the State of Florida encourage land use application for wastewater facilities?

A. Yes, we do.

Q. And does the State of Florida discourage surface water discharges?

A. Where we use as feasible, yes.

Q. Why does the State of Florida discourage surface water

discharges?
A. For two reasons: One is the conservation of the resource, it eliminates the need for additional potable water or ground water of high quality, and that's normally used for irrigation, it would be safe to be used for other purposes, and second, it will not be a direct discharge to a surface quarter stream.
Q. Because a direct discharge of pollutants to the water might have an environmental impact?
A. Well, it does — in fact, it could be debated both ways. If ground water is contaminated, it is extremely difficult to clean up that water. If surface water gets contaminated, due to the natural reactions, currents, and so forth, it is easier to get cleaned up.
Q. Do pollutants — withdrawn.
Does pollutants discharge to a surface water body have a tendency or a possibility of impacting environmentally on that water body?
A. It would, depending on what the pollutants are and what concentrations are.
The State Rules, all of them, allow certain amount of pollutants to be discharged to the ground water or to the surface waters.
Q. Thank you.
Sir, we talked a little bit about the 1981

Caloosahatchee Wasteload Allocation document. I'm not going to ask you any specifics about them, I'm just going to ask you in general about it.
You didn't write the 1981 Wasteload Allocation document, did you?
A. No, I didn't. We have a separate section in Tallahassee, which is the technical department and they do it for the entire state and they are headquartered in Tallahassee and we work closely with them.
MR. QUINN: Objection, move to strike everything after, "no, I did not."
THE COURT: I'll deny the motion to strike.
Go ahead.
BY MR. QUINN:
Q. Sir, all your knowledge about the purpose of the wasteload allocation document came after it was written; isn't that a fact?
A. After I joined the DEP, that was part of my job requirement, to review the Statutes and the Rules, Administrative Codes and implement those in the permitting process.
Q. So people told you about the wasteload allocation document at that time; is that right?
A. That was part of my job, as I said.
Q. Okay. Sir, does the Florida Department — withdrawn.

The Florida Department of Environmental Protection or the Florida Department of Environmental Regulation, I'm not sure exactly which one it's going to be based on the time, but either FDEP or FDER required that the Waterway Estates' outfall be moved to the 6-foot contour line because there was more dispersion of pollutants at that location; isn't that correct?
A. That was the premise for all of them, for all of the dischargers to that body of water.
Q. So we talked about a little bit about wasteload allocations, and we talked a little bit about permits on your direct examination.
A wasteload allocation is different than a permit, isn't it?
A. A permit is the authority to discharge and in that it contains certain conditions and under what conditions.
Q. And the wasteload allocation is a condition which is enforcible through a permit; isn't that correct?
A. If it has been determined that a facility is granted a specific wasteload, then that is contained in the permit and only enforcible if it's in the permit.
Q. So a wasteload allocation which is not in a permit is not enforceable; is that correct?
A. Right.
MR. QUINN: Excuse me, one moment, sir.

(Pause.)
BY MR. QUINN:
Q. I'd like to turn your attention, please, if I may, to Florida Cities Water Company Exhibit Number 32.
This was the document between Source and Mr. French that Dr. Ahmadi talked about a little bit, Your Honor.
Do you have the document in front of you, Dr. Ahmadi?
A. You said 34 or —
Q. I'm sorry. 32 is the one I'm talking about.
A. Yes, sir.
Q. Okay. Sir, with regard to your conversations with Florida Cities Water Company and Source Engineering, isn't it true that the Florida Department of Environmental Regulation needed to make requests — withdrawn.
Isn't it true the Florida Department of Environmental Regulation needed to make four requests for additional information regarding this project?
A. I'm not sure of the exact number, but there was several requests back and forth.
Q. On direct testimony you said, I believe in response to a question, that you didn't think there was anything that could be done to have sped up the review process; isn't that correct?
A. Yes, I said that it took approximately nine months and that's not an unusually long time.

Q. Sir, wouldn't submission of a complete and accurate application have speeded up the review process?

MR. BAISE: Objection to the characterization of accurate application. There's been no suggestion that there was an inaccurate application submitted here; only an application which, as he pointed out, there are always questions with regard to any application such as this, that is as complicated as this project was.

MR. QUINN: I'll rephrase the question, sir.

THE COURT: All right. I'm not requiring you to, but go ahead.

MR. QUINN: I think I will, just to save a little time.

BY MR. QUINN:

Q. Sir, wouldn't submission of a complete application the first time have speeded up the application review process?

A. It would, but it's not customary. As I said, in 99 percent of cases there is need for additional information in all such cases.

MR. QUINN: Objection, move to strike everything after "it would" as non-responsive.

THE COURT: Read it back to me, please.

(Thereupon, the above-referred to portion of the testimony was read back by the Court Reporter as above recorded.)

THE COURT: Denied.

BY MR. QUINN:

Q. Sir, in 99 percent of the cases are four additional information requests usually sent?

A. Yes, sir.

Q. Four times it is —

A. Four or more.

Q. Has the Department of Environmental Regulation ever requested that applicants do a better job in submitting applications the first time?

MR. BAISE: Objection. That's outside the scope of my direct.

THE COURT: Well, I don't know. I'm kind of curious, myself.

THE WITNESS: Well, the application on the very top says, in fact, that it should be fully executed and supporting documents given to us. But, there are a lot of factors to be considered; chemical, biological, process, equipment, and others, layout. Unless we are satisfied that the process they proposed will give us that degree of confidence that they will meet the standards, we will not be able really to decide on the merits of what has been proposed, and that's, as I said, customary in all such treatment process.

BY MR. QUINN:

Q. One final line of questions for you, Dr. Ahmadi.

Sir, are you familiar with something called the Anti-degradation Rule?

A. Yes, sir.

Q. Sir, if a wastewater treatment plant had a complete construction permit application with FDER before the effective date of the Anti-degradation Rule, isn't it a fact the required treatment levels set forth the Anti-degradation Rule would not be required?

MR. BAISE: Objection.

THE COURT: Wait, wait.

MR. BAISE: I certainly didn't bring the Anti-degradation Rule on direct, Your Honor.

MR. QUINN: He did not, but this goes to knowledge about the delays we've been talking about, so I believe it is within the scope.

In addition, the Anti-degradation Rule came up in earlier testimony as one of the mitigating factors.

THE COURT: I'll overrule the objection.

Do you remember the question, sir?

THE WITNESS: Yes. The Anti-degradation Rule, when it was passed, had a cut-off date. It was only applicable to future projects and expansion only. The expanded portion. This facility did not expand. The expansion that took place — actually, there was an

expansion, but it was through reuse of land application. The facility was downgraded, in fact, as to discharge. It was 1.08 and came to 1.0 for the surface water discharge. The balance of that, which is 1.5, goes to land application and reuse.

BY MR. QUINN:

Q. So if the application for the upgrade of the Waterway Estates' treatment plant had been submitted and been deemed complete prior to the effective date of the Anti-degradation Rule, none of those requirements would have been applicable to that construction project; is that correct?

A. What requirements?

Q. The requirements of the Anti-degradation Rule.

A. There are no additional requirements under the anti-degradation that will be retroactively applied to a facility. Only to expansion or new construction.

Q. So my question goes to that, though, sir. If the application had been submitted after that cut-off date, then the Anti-degradation Rule could not have been applied retroactively to it; is that correct?

A. Yes. The anti-degradation is not an issue at all here because they did not expand the facility to discharge surface waters. The expansion is to land application reuse site.

MR. QUINN: Thank you.

I have no more questions, Dr. Ahmadi, sir.

THE WITNESS: Thank you.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. BAISE:

Q. Dr. Ahmadi, in talking about the Cape Coral facility, did I hear you correctly in saying it could discharge over if two inches of rain was received within a certain time period?

A. No, I said the rate of application of effluent on land for irrigation purposes is two inches per week. If we get, let's say, two or three inches per week of rain, then the land cannot accept any additional water.

Q. How frequently does this area receive two to three inches of rain per week?

A. In our part of the State, beginning in late May to October, it's 7, 8, 10 inches a week.

Q. How frequently, then, does Cape Coral discharge into the Caloosahatchee River?

A. As soon as the rain hits, they're partially starting discharge and sometimes one hundred percent discharge.

Q. I'm sorry. One hundred percent?

A. Right, of what they produce is discharged.

Q. How many gallons is that?

A. Currently they have to two facilities. They are

permitted for close to 14 million gallons.

Q. 14 million?

A. Yes, sir.

Q. How many gallons is Waterway Estates' discharge?

A. Waterway Estates discharge is limited to one million gallons, so it would be one over 14th of that or 7 percent.

Q. Regarding wasteload allocations, are those included in the Florida permits when they are issued, Dr. Ahmadi?

A. Yes. When the permits are issued, it lays out all the conditions, what they can and what they cannot do and what type of treatment they need to achieve.

Q. What other ways, if any, besides an operating permit, does FDER use to authorize discharges to surface waters?

MR. QUINN: Judge, I think this is beyond the scope of my cross examination.

THE COURT: Read the question back to me.

(Thereupon, the above-referred to portion of the testimony was read back by the Court Reporter as above recorded.)

THE COURT: Mr. Baise.

MR. BAISE: I was just going back to the Cape Coral situation, which has struck me as interesting when counsel drew out that Cape Coral could be discharging into the Caloosahatchee River --

THE COURT: I'll overrule it.

MR. BAISE: -- These enormous amounts --

THE COURT: I'll overrule it.

Go ahead

BY MR. BAISE:

Q. Do you understand the question, Dr. Ahmadi?

A. No, there's no other way, other than the permits.

Q. Dr. Ahmadi, how many private waste treatment companies or facilities do you work with?

A. Close to 700 in our district.

Q. Could you compare those facilities' performance with Waterway Estates' performance?

A. I not compare one to the other, but I have a generalized feeling --

THE COURT: I think this is beyond the scope.

MR. BAISE: I'll withdraw the question, Your Honor.

BY MR. BAISE:

Q. How many permit applications does your office review in a year's time, Dr. Ahmadi?

A. Only the facilities which I log in personally, and then assign it to the engineers. Close to one thousand per year.

Q. How many of those permit applications are granted upon the first application submitted to your office?

A. Some applications which are on the -- not the

process -- like the distribution system or collection system or pump station, those are simple. They could be complete, we could deny them right away or we could issue them right away. There's a different time limit of 30 days. So, if you exclude those, the others all of them would require, and some of them 1, 2, 3 years, in fact, to finalize.

MR. BAISE: Thank you very much.

THE COURT: All right.

We'll take a 15-minute recess.

(Thereupon, a brief recess was taken after which the following proceedings were had:)

THE COURT: Call your next witness, Mr. Baise.

MR. BAISE: Your Honor, Florida Cities rests with the exception of calling Mr. Charles Hill, the PSC person that turned up ill today and could not make it. So, we have no further witnesses to call on behalf of Florida Cities, but Avatar, of course, has three witnesses that I've advised the Court that it would be calling for the remainder of the afternoon.

THE COURT: Okay.

MR. BAISE: Do you want Mr. Hird to begin?

THE COURT: Yes, sir.

MR. BAISE: Thank you.

THE COURT: Now, are you -- you're resting. Did I understand you correctly to ask for leave to rest subject to calling Mr. Hill at some other time?

MR. BAISE: Correct, Your Honor.

THE COURT: Uh-huh. (Indicating affirmatively.) Well --

MR. BAISE: I assume we're not going to finish this afternoon and, therefore, we will have to look at your calendar or whatever decision you make with regard to the way we can do that.

THE COURT: I'll take that under submission and we'll --

MR. BAISE: Sure.

THE COURT: -- press on.

MR. BAISE: Thank you.

THE COURT: Okay.

Mr. Hird, you may call your first witness.

MR. HIRD: Thank you, Your Honor.

Avatar Holdings calls as its first witness Edwin Jacobson.

Thereupon,

EDWIN JACOBSON,

having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Take a seat in the witness stand. State your name and spell your last for the record, please.

THE WITNESS: Edwin Jacobson, J-A-C-O-B-S-O-N.

DIRECT EXAMINATION

BY MR. HIRD:

Q. Good afternoon, Mr. Jacobson. Are you associated with Avatar Holdings, Incorporated?

A. Yes.

Q. What position do you hold with respect to Avatar Holdings?

A. President and chief executive officer.

Q. When did you first become associated with Avatar Holdings?

A. June, 1992.

Q. Now, you testified that you're chief executive officer of Avatar Holdings. Are you chief executive officer of any other companies?

A. Yes.

Q. Could you identify those companies, please?

A. Chicago Milwaukee Corporation, Heartland Partners and Milwaukee Land Company.

Q. For purpose of convenience, I'm going to call those three companies that you mentioned the Chicago companies. Is that acceptable to you?

A. Yes.

Q. Okay.

Do any of the Chicago companies have an ownership interest in Avatar Holdings?

A. No.

Q. Does Avatar Holdings have an interest in any of the Chicago companies?

A. No.

Q. Where do you maintain your offices, sir?

A. I maintain two offices; one in Coral Gables, Florida, and the other in Chicago, Illinois.

Q. And you split time between those offices?

A. Yes.

MR. JACOBS: Can we just ask that he lean a little

bit less? I realize he's probably, in good faith, trying to expedite this.

THE COURT: All right.

BY MR. HIRD:

Q. Sir, what are your duties as chief executive officer of Avatar Holdings?

A. To establish a vision for the corporation, to communicate that vision both to the employees of the company as well as to people outside the company, investors and others, to develop plans in connection with the company's vision, to develop an organizational program to provide the structure, to implement the plans, to recruit people from outside the company, as well as develop people within the company to support the organizational structure, to monitor the implementation of the activity in connection with the company's vision and then to measure performance against those plans.

Q. Could you describe Avatar Holdings' business, please, sir?

A. Avatar Holdings is a diversified real estate company with essentially an autonomous water and wastewater utility subsidiary. The principal focus is home building, which is conducted at numerous locations in Florida, including Orlando, Hollywood, Florida, Cape Coral, as well as Rio Rico in Arizona.

Additionally, the company has a developing vacation ownership business which is in Tennessee, in Pigeon Forge,

where the company is building a new vacation ownership resort, in Poinciana, where it's developing an existing resort, as well as pursuing a search for a third resort on the East Coast.

Additionally, the company operates resorts in Cape Coral, Florida, which it has recently renovated, as well as a major resort in Rio Rico, Arizona. The company operates a retail lot business, as well as engaging in various activities related to commercial real estate in addition to the water utility business.

Q. Is the emphasis of Avatar Holdings' business on the real estate business or on the utility operations?

A. The emphasis is on the real estate business.

Q. Now, does Avatar Holdings operate through subsidiaries?

A. Yes.

Q. What are its principal subsidiaries?

A. The principal subsidiary is Avatar Properties.

Q. And what does Avatar Properties do?

A. Well, Avatar Properties is engaged in the many real estate activities that I've described earlier; home building, vacation ownership activities, retail lot sales, commercial real estate, as well as the resorts.

Q. Is the Barefoot Bay Development a real estate operation of Avatar Holdings and its subsidiaries?

A. Yes.

Q. And is that a major or minor real estate development?

A. It's not a material aspect of the company.

Q. Why do you say that?

A. The Barefoot Bay community is nearing completion. I believe that approximately ninety-five percent of the home sites have been sold and are occupied, so there is a limited amount of activity with respect to the community. We do operate a golf course. We have a small retail center and, in addition, we have some commercial real estate.

Q. Over the last several years, has Barefoot Bay been a major profit center for the company?

A. The only significant profit that Barefoot Bay has contributed is its golf course and that is not a significant factor in terms of the overall company.

Q. Now, in the last few years, did Avatar Holdings sell any of its utility operations?

A. Yes, it did.

Q. What operations were sold?

A. The company sold its midwest facilities which were located in Missouri, Indiana, Ohio and Michigan.

Q. And what effect did that sale have on the size of Avatar Holding's utility operations?

A. It reduced it materially.

Q. Did you participate in that sale?

A. Yes, I did.

Q. Other than your participation in the sale of Midwest

Utilities, what has your involvement been in Avatar -- well, strike that.

You mentioned that Avatar Holdings has a utility business. What is the principal subsidiary that runs that business?

A. Well, there are four levels of subsidiaries. Avatar Utilities is the first line subsidiary, then there is Consolidated Water Company and Florida Cities Holding Company and then, Florida Cities.

Q. Okay.

Other than your participation in the sales in the Midwest Utilities operations, what has your involvement been as Avatar Utilities in Florida Cities' business?

A. Principally, capital investing and funding in connection with capital investment. Then, additionally, I have encouraged the management of Avatar Utilities to pursue a contract management business and I've had conversations and discussions with them in connection with that activity.

Q. Have you ever been involved in the operation of any of Florida Cities' wastewater treatment plants?

A. No.

Q. Have you ever been involved in any environmental compliance issues at Florida Cities' wastewater treatment plants?

A. No.

Q. Prior to this, the initiation of this lawsuit, were you aware of any of the alleged violations at the Barefoot Bay Treatment Plant?

A. No.

Q. Prior to the initiation of this lawsuit, were you aware of any of the alleged violation at the Carrollwood Plant?

A. No.

Q. Prior to the initiation of this lawsuit, were you aware of any of the alleged violations at the Waterway Estates Treatment Plant?

A. No.

Q. Other than yourself, who else is an officer of Avatar Holdings?

A. Mr. Charles McNairy, who is the company's chief financial officer, Mr. Dennis Getman, who is the company's general counsel, Mr. Pat Settles who is the company's assistant general counsel, Mr. Lawrence Goldus, who is the company's controller and Ms. Juanita Kerrigan, who is the company's secretary.

Q. Does Avatar Holdings have any employees?

A. No.

Q. Why not?

A. That is not the way the company is structured.

Q. Now, you mentioned Mr. Getman. What are Mr. Getman's duties?

A. As the company's general counsel, he is responsible

principally for the legal activities of the company and its subsidiaries. In addition, he has two other responsibilities; customer service and land and housing registration.

Q. Can you explain what you mean by "customer service"?

A. Customer service is provided in connection with the sale of home sites as well as vacation ownership intervals which are sold on a installment basis. Customer service is involved with the collection of those receivables, as well as communication to the individuals.

Q. And what do you mean by "land registration"?

A. Most states require that a project be registered in their state and meet certain requirements before residents of their states can be solicited for the sale of those properties.

Q. Does Mr. Getman have any business responsibilities with relationship to the utility operations?

A. No.

Q. Now, does Mr. Getman have an additional title besides general counsel?

A. Yes.

Q. What is that title, please?

A. Executive vice president.

Q. And what does that title represent?

A. That represents that he is a senior officer of Avatar Holdings.

Q. Does that title come with any additional duties?

A. No.

Q. Are you familiar with Robert Gordon?

A. Yes.

Q. Who is Mr. Gordon?

A. Mr. Gordon is the president and CEO of Avatar Utilities.

Q. Is Mr. Gordon an officer of Avatar Holdings?

A. No.

Q. Is he a director of Avatar Holdings?

A. No.

Q. Is he an employee of Avatar Holdings?

A. No.

Q. Are you familiar with Gerald Allen?

A. Yes.

Q. Who is Mr. Allen?

A. I'm sorry?

Q. Who is Mr. Allen?

A. Mr. Allen is the president and CEO of Florida Cities.

Q. Is Mr. Allen an officer of Avatar Holdings?

A. No.

Q. Is Mr. Allen a director of Avatar Holdings?

A. No.

Q. Is Mr. Allen an employee of Avatar Holdings?

A. No.

Q. Mr. Jacobson, were you familiar with Peter Sharp?

A. Yes.

Q. How did you know Mr. Sharp?

A. When I was recruited for the position of president and chief executive officer of Chicago Milwaukee Corporation, Peter Sharp was one of three directors who were then members of the executive committee of Chicago Milwaukee who interviewed me for the position.

Q. And did you subsequently assume that position?

A. Yes.

Q. Did you deal with Mr. Sharp in the course of your activities as chief executive officer for the Chicago companies?

A. Yes.

Q. In that role, did -- were you micro-managed by Mr. Sharp?

A. No.

Q. What was Mr. Sharp's involvement with the Chicago companies?

A. As a director and a member of the executive committee, his principal focus was major financial events.

Q. Are you aware that Mr. Sharp is dead?

A. Yes.

Q. Did you meet with Mr. Sharp during the last year of his life?

A. Yes.

Q. Could you describe the circumstances under which you met with Mr. Sharp?

A. After Mr. Sharp became ill, he did not attend board meetings, so, on some occasions when I was in New York, following those board meetings, I visited him and discussed the details of the board meetings.

Q. About when was this?

A. I recall one meeting at his apartment that took place either in late '91 or early '92. I don't recall the exact time period.

Q. At the time, was Mr. Sharp visibly ill?

A. My only recollection of his physical state, he did not look well and he had very swollen feet.

MR. HIRD: Thank you, Mr. Jacobson. No more questions.

THE COURT: Mr. Jacobs.

CROSS-EXAMINATION

BY MR. JACOBS:

Q. Good afternoon, Mr. Jacobson.

A. Good afternoon.

Q. Mr. Hird asked you about your affiliation with what he's now called for short the Chicago companies. You're, in fact, the CEO of C.M.C. Heartland, one of those Chicago companies, correct?

A. Yes.

Q. And in that capacity, you make three hundred and fifty thousand dollars a year; is that correct?

A. No.
Q. What is your salary?
A. Two hundred and seventy-five thousand.
Q. Has it gone down since your deposition?
A. Yes.
Q. And as CEO of Milwaukee Land Company, do you still make ninety thousand dollars a year?
A. Yes.
Q. And as president and chief executive officer of Avatar Holdings, do you still make three hundred and twenty-five thousand dollars a year?
A. Yes.
Q. Now, Mr. Hird also asked you whether there was any relationship between these Chicago companies and Avatar Holdings, and I believe you said no; is that correct?
A. My recollection of the question is he related it to cross investment, and my answer was no.
Q. Let me ask you this. Are you familiar with the firm called Odyssey Partners?
A. Yes.
Q. And is that firm, Odyssey Partners, substantial investors in C.M.C. Heartland?
A. Yes.
Q. Isn't it also true Odyssey Partners are substantial investors in Milwaukee Land Company?

A. No.
Q. At the time of your deposition, were Odyssey Partners substantial investors in Milwaukee Land Company?
A. Yes.
Q. Odyssey Partners are also substantial investors in Avatar Holdings, correct?
A. That is correct.
Q. And in fact, Mr. Levy is the managing general partner at Odyssey Partners, correct?
A. I would characterize him as a general partner, not the managing general partner.
Q. Would you characterize him as a managing general partner?
A. A general partner.
Q. Do you recall, has that status changed since your deposition, Mr. Levy's position with Odyssey Partners?
A. No.
Q. Let me read you a question I asked you at your deposition and then I'm going to read the answer from the transcript and ask you if you recall giving that answer. All right, Mr. Jacobson?
A. Certainly.
Q. And for the Court's reference, I'm on page 136 of Mr. Jacobson's deposition given in Chicago, Illinois on the 26th day of June, 1995, line twenty.
Question: How would you describe Mr. Levy's occupation?

Answer: He's a managing general partner of a boutique investment company.
Do you recall giving that answer, sir?
A. Yes.
Q. Question, line 24: This boutique is Odyssey?
Answer: Odyssey Partners.
Do you recall giving that answer, sir?
A. Yes.
Q. Would you agree with me now he's a managing general partner of Odyssey Partners?
A. No.
Q. Did you think you had it wrong at your deposition?
A. I subsequently saw a legal document that characterized Mr. Levy as a general partner.
Q. And from that document, you've now decided that he's a general partner rather than a managing general partner?
A. Yes.
Q. What was the basis of your testimony at the time of your deposition, that he was a managing general partner?
A. At that time, that was my understanding.
Q. And what was the basis of that understanding?
A. Pardon?
Q. What was the basis of your understanding at the time of your deposition that he was a managing general partner?
A. That was my understanding historically, that he and

Mr. Jack Nash were the managing general partners. Subsequently, I became aware of the fact that Mr. Nash is the managing general partner and the other partners are characterized as general partners.
Q. Now, when you were in New York to see Mr. Levy, you'd see him at his Odyssey Partners offices, correct?
A. Generally.
Q. And you'd take that opportunity to brief him on matters relating to C.M.C. Heartland, Milwaukee Land, what we're now calling the Chicago companies, as well as Avatar Holdings, correct?
A. No.
Q. Do you recall at your deposition I asked you -- and this is page 135, line sixteen: You're at his office at Odyssey anyway to discuss Chicago Milwaukee business?
Answer: Yes.
Do you recall saying that?
A. Yes.
Q. So, you take the opportunity to brief him, and then you interrupt, and your answer is, as a matter of courtesy.
Do you recall giving that answer?
A. Yes.
Q. And then, the question is: On Avatar business?
Do you recall answering right?
A. Yes.

Q. Now, was there any connection between Peter Sharp and C.M.C. Heartland and Milwaukee Land Company, the Chicago companies?
A. Yes.
Q. What was that connection, sir?
A. Peter Sharp was a director and member of the board's executive committee.
Q. Of the Chicago companies?
A. Yes.
Q. And was that also the case for Mr. Levy?
A. At one point, that is correct. He was not a member of the executive committee, but he was a member of the board of directors during the first few years of my tenure with the Chicago companies.
Q. Now, on -- I believe you testified that you first became associated with Avatar Holdings in June of 1992; is that correct, sir?
A. That is correct.
Q. And is it also true that at that time you became the director and chairman of the executive committee of the board of directors?
A. Yes.
Q. But you didn't actually become president and chief executive officer of Avatar Holdings until March of 1994, correct?

A. That is correct.
Q. Is it also fair to say that you have no personal knowledge of events relating to Avatar Holdings and its subsidiaries which occurred prior to June of 1992?
A. That is correct.
Q. And you have no personal knowledge of what Mr. Getman's duties were with Avatar Holdings prior to June of 1992; is that correct?
A. I have no personal knowledge.
Q. And is that also true with respect to what Mr. Sladkus' responsibilities were with Avatar Holdings?
MR. HIRD: Objection. I think there was no discussion about Mr. Sladkus in my direct.
MR. JACOBS: I think he opened the door by inquiring about the responsibilities of one of the Avatar Holdings' officers and I don't think I should be restricted to only asking about the responsibilities of that one officer.
THE COURT: I'll sustain the objection.
BY MR. JACOBS:
Q. Mr. Hird asked you about Mr. Gordon, correct?
A. Yes.
Q. And I believe you said he's the president of Avatar Utilities, correct?
A. Yes.
Q. At the time of your deposition, did he also hold another

position?
A. He may have. I don't recall it.
Q. Are you aware that Bob Gordon was president of Florida Cities Water Company at one time?
A. I don't have any recollection as to the time of when he held that position.
Q. Okay.
Let me ask it a different way. Do you know whether Bob Gordon was ever president of Florida Cities Water Company?
A. My recollection is that at one point he was.
Q. And you just don't know at what point?
A. Yes.
Q. Now, you maintain an office in Chicago and also in Coral Gables, correct?
A. Yes.
Q. And the office you maintain in Coral Gables is located at 255 Alhambra Circle?
A. That's correct.
Q. And that is the location of Bob Gordon's office as well, correct?
A. That is correct.
Q. And Mr. Gordon's office is actually at Avatar Holdings' suite of offices, correct?
A. Well, it occupies space within an office that Avatar Holdings also has space.

Q. Is that a yes?
A. Pardon?
Q. Is that a yes?
A. Would you repeat the question.
THE COURT: Read back the question.
(Record read back.)
THE WITNESS: The answer is yes, but many of our subsidiaries are headquartered in that space.
MR. JACOBS: Move to strike everything after yes, Your Honor.
THE COURT: I'll deny the motion.
BY MR. JACOBS:
Q. Mr. Gordon reports to you correct, Mr. Jacobson?
A. Yes, he does.
Q. Now, since you became president of Avatar Holdings, has he always reported to you?
A. Yes.
Q. Now, Mr. Getman's office is in that same Avatar Holdings suite, correct?
A. Yes.
Q. And Mr. Getman is executive vice president of Avatar Holdings in addition to being the general counsel, correct?
A. Yes.
Q. And he's also executive vice president of Avatar Development, correct?

A. Yes.
Q. And he is, as well, executive vice president of Avatar Properties, correct?
A. Yes.
Q. Do you know whether, before Mr. Getman became executive vice president of Avatar Holdings, he was a senior vice president of Avatar Holdings?
A. Yes.
Q. And do you know whether, before he became a senior vice president of Avatar Holdings, he was a vice president of Avatar Holdings?
A. My recollection is that that was his title prior to becoming senior vice president.
Q. Is that a yes?
A. Yes.
Q. And Mr. Getman reports to you, correct?
A. Yes.
Q. Now, Mr. Allen is executive vice president of Avatar Utilities, correct?
A. I don't have any personal knowledge of that.
Q. Do you know whether Mr. Allen is affiliated with Florida Cities Water Company?
A. Yes.
Q. At the time of his deposition -- or rather, your deposition, was Mr. Allen executive vice president of Avatar

Utilities?
A. I don't recall his position at the deposition.
Q. Let me again go through this procedure where I'll read you a question and ask you if you gave a certain answer. For the record, I'm on page 71 of Mr. Jacobson's deposition.
Question, line eight: Does Avatar Utilities have a vice president?
Answer: I'm aware of an executive vice president.
Do you recall giving that answer?
A. Yes.
Q. Question, line eleven: And who is that?
Answer, line twelve: Gerald Allen.
Do you recall giving that answer, sir?
A. Yes.
Q. Now, until recently, Mr. Allen's office was in the same suite of offices as Avatar Holdings, correct?
A. On the same floor, yes.
Q. Now, is it fair to say that one of the persons at Avatar Holdings or any of its subsidiaries who you would identify as having personal knowledge of the functioning of the wastewater treatment plants operated by Florida Cities you would identify as Mr. Allen and Mr. Gordon?
MR. HIRD: I object to the form of the question. I think it's --
THE COURT: Okay.

Did you understand the question, sir?
THE WITNESS: Not totally.
THE COURT: Okay.
Why don't you restate it.
BY MR. JACOBS:
Q. I'll restate it.
Mr. Jacobson, who would you identify as the persons at Avatar Holdings or any of its subsidiaries who would have direct knowledge? You said you didn't have direct knowledge, as I recall, of the Florida Cities?
A. That's correct.
Q. Right. Okay.
Which people at Avatar Holdings or any of its subsidiaries would you say had personal knowledge of the function of wastewater treatment plants operated by Florida Cities?
A. I would not designate anybody at Avatar Holdings. I believe that Mr. Gordon and Mr. Gerald Allen would have such knowledge.
Q. And that was the same answer you gave at the deposition, correct?
A. I could only respond to that if I saw the deposition record.
Q. Now, Mr. Jacobson, Mr. Hird asked you about your involvement with the wastewater treatment plants and I believe

he asked you about involvement prior to the filing of the lawsuit.
Subsequent to the filing of this lawsuit, you have had meetings and discussions with Avatar Utilities and Avatar Holdings' officers about the lawsuit, correct?
A. I've had discussions with Mr. Allen, Mr. Gordon, Mr. Getman and the company's outside counsel.
Q. Now, I'm not asking you about discussions you had with the outside counsel. Just for the record, you did have discussions with these other folks you identified and the focus of those discussions was whether the case should be settled before Avatar Holdings was named as a Defendant; is that correct?
A. The discussions were held at all occasions with the participation of counsel.
Q. Outside counsel?
A. Outside counsel and the company's general counsel.
Q. Do you recall on deposition I asked you about such a meeting? I'm on page 143, line two. Question: Who was there?
Answer: Gordon, Jacobson, Wilkov, Getman. I'm not sure whether Allen attended or not. There was a letter that related to it, but we attended face to face as well and my recollection is there was an attorney, as I mentioned earlier, on the phone to explain the case to us. And the purpose of the meeting was to determine whether we should pursue a settlement.

Do you recall giving that answer, sir?
A. Yes.
Q. Now, these meetings that you've held to discuss whether the case should be settled have not included Florida Cities' officers, have they?
A. Well, first of all, I didn't hold these meetings; I participated in them. At that point in time, I was not the president and chief executive officer of the company; I was chairman of the executive committee.
THE COURT: Well, did Florida Cities Water people participate, that's the question, in such meeting?
THE WITNESS: I recall one meeting Mr. Allen participated in.
BY MR. JACOBS:
Q. But at that time, Mr. Allen was not an officer of Florida Cities Water Company; isn't that correct, sir?
A. I don't recall whether he was or was not at that point in time.
Q. The meeting that we're talking about, do you recall when that took place, sir?
A. I'm sorry?
Q. The meeting that we were discussing, do you recall when that took place?
A. It took place at our office in Coral Gables.
Q. And do you recall when, sir?

A. No, I don't recall the exact dates.
Q. Do you recall whether it followed shortly after a meeting between representatives of EPA and the Justice Department in December of 1992?
A. My recollection is that it occurred after such meetings, but I don't recall the dates.
Q. Would you say it occurred within the same month or two after that meeting?
A. I really don't recall.
Q. Let me direct your attention, then, to Government Exhibit 494. Do you have that in front of you, sir?
A. Yes, I do.
Q. Do you recall receiving a copy of this?
A. I don't recall receiving a copy of it.
Q. But you're listed as cc?
A. Yes.
Q. Any reason to believe you didn't receive a copy of it?
A. No reason to believe I didn't.
Q. Is it fair to say that this memorandum from Mr. Allen reports to you on the meeting I referred to just a few moments ago between EPA and Justice Department officials and Avatar Utilities and Florida Cities officials?
A. Yes.
Q. Now, the meeting that you -- or the decision -- you subsequently had to be briefed about this meeting that you said

took place in Coral Gables. I ask you again, how long after this memorandum was written do you believe that meeting took place?
A. I don't have any recollection of the timing.
Q. Would you give me your best estimate in months?
A. I can't really give you an estimate, I don't know. It occurred after this, but I don't recall the sequence of time.
Q. Within the following year?
A. Oh, certainly.
Q. Now, Mr. Hird asked you on direct examination about the sale of the Avatar Holdings Midwest Utilities. Do you recall that?
A. Yes.
Q. And this sale took place in September, 1993, correct?
A. Correct.
Q. And the price was roughly sixty million dollars, correct?
A. Approximately.
Q. And these were water and wastewater utilities, correct?
A. Correct.
Q. Would it be fair to say, sir, that prior to September 19, 1993, Avatar Holdings had substantial utility holdings?
A. Yes.
MR. JACOBS: Thank you. No further questions.
THE COURT: Redirect, Mr. Hird.
MR. HIRD: Yes, sir.

REDIRECT EXAMINATION
BY MR. HIRD:
Q. Mr. Jacobson, Mr. Jacobs asked you whether you were aware of Mr. Getman's duties prior to your coming to the company. Do you recall that?
A. Yes.
Q. Since you came to the company, do you recall any action that changed Mr. Getman's duties?
A. There was one change.
Q. And could you describe that?
A. That was the assignment of customer service to Mr. Getman.
Q. And do you recall any other action that changed Mr. Getman's duties?
A. That is correct.
Q. Now, Mr. Jacobs asked you about meetings concerning -- about your attendance in a meeting concerning the Government's claims in this case. Do you recall?
A. Yes.
Q. And did you say that Mr. Gordon was in attendance at the meeting?
A. Yes.
Q. Do you know, sir, whether Mr. Gordon was president of Florida Cities Water Company at the time?
THE COURT: What was the question -- excuse me --

whether he what?
BY MR. HIRD:
Q. Whether Mr. Gordon was president of Florida Cities Water Company at the time?
A. My recollection, best recollection, is he was at that point.
Q. Now, Mr. Jacobs turned your attention to Exhibit 494. Do you have that in front of you, sir?
A. I'm not sure. Is this the document you have reference to? Yes.
Q. Does this document refer to an impending lawsuit by the Justice Department against Florida Cities?
A. Yes.
Q. I'm sorry?
A. Yes, that would be my interpretation.
Q. Could you turn to page 3 of the document, and could you read the first sentence in the last paragraph?
MR. JACOBS: Relevancy.
THE COURT: Overruled.
BY MR. HIRD:
Q. Can you read it into the record, please, sir, the first sentence of the last paragraph on page 3?
A. Page 3: Mr. Jacobs explained his intent to bring suit in Federal Court demanding the statutory penalties unless a settlement agreement could be reached immediately.

Q. Thank you.
Now, is a lawsuit against an Avatar Holding's subsidiary -- strike that.
Is a lawsuit brought by the Justice Department against an Avatar Holding's subsidiary a usual or unusual event?
A. A very unusual event.
Q. And would you expect, in the course of normal business operations, such an unusual event to be brought to the attention of a parent corporation?
A. Yes, I would.
Q. And would you expect it to be brought to your attention personally?
A. Yes.
Q. And at this time, is Mr. Wilkov president of Avatar Holdings?
A. Yes, he was.
Q. And would you expect to it be brought to his attention?
A. Yes, I would.
MR. HIRD: Thank you. No more questions.
THE COURT: Thank you, sir. You may step down.
THE WITNESS: Thank you.
THE COURT: Call your next witness.
MR. HIRD: Your Honor, before I call my next witness -- well, actually I'll do that later. The next witness we will call is Georgia Metcalf.

Thereupon,
GEORGIA METCALF,
having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:
THE CLERK: Take a seat in the witness box. Please state your name for the record and spell your last.
THE WITNESS: My name is Georgia Metcalf, M-E-T-C-A-L-F.
DIRECT EXAMINATION
BY MS. TSOTSOS:
Q. Good afternoon, Ms. Metcalf. Are you associated with Barefoot Bay Development Corporation?
A. Yes, I am.
Q. What position do you hold with Barefoot Bay Development Corporation?
A. I'm president of Barefoot Bay Development Corporation.
Q. When did you start working for Barefoot Bay Development Corporation?
A. 1984.
Q. What does Barefoot Bay Development Corporation do?
A. Barefoot Bay Development Corporation is in the business of developing and selling manufactured housing and lots.
Q. What is manufactured housing?
A. Manufactured housing is housing that is built to HUD

standards. It is shipped to the site in separate modules, it has the wheels and axles removed on the site and is permanently attached to the land.
Q. Who are Barefoot Bay Development Corporation's typical customers?
A. Our typical customers are retirees between the ages of fifty-five and sixty-five.
Q. Is Barefoot Bay Development Corporation a subsidiary of any company?
A. Yes, it is.
Q. What is the name of that company?
A. Avatar Properties, Incorporated.
Q. How many lots in total are there at Barefoot Bay?
A. There are five thousand eleven plotted lots. Actual remaining built -- or actual buildable lots are four thousand nine hundred forty-nine.
Q. Could you please jot down that four thousand nine hundred forty-nine figure on the scratch pad and indicate what that represents?
A. (Witness complying with the request of counsel.)
Q. When you first came to Barefoot Bay in 1984, how many lots with preconstructed homes had Barefoot Bay Development Corporation sold?
A. Lots with homes on them were one thousand eight hundred one.

Q. Could you indicate that number on the pad?
A. (Witness complying with the request of Counsel.)
Q. Prior to the time you came to Barefoot Bay Development Corporation, had the company also been selling lots without homes?
A. Yes, they had.
Q. About how many lots without homes had been sold prior to your arrival in 1984?
A. Approximately one thousand eight hundred fifty-six.
Q. Can you also jot that number down on the pad and indicate what that figure represents?
A. (Witness complying with the request of counsel.)
Q. So, as of 1984, how many lots in total had been sold at Barefoot Bay Development?
A. About three thousand six hundred and fifty-seven.
Q. Can you indicate that number on the pad?
A. (Witness complying with the request of counsel.)
Q. As of 1984, what was the number of Barefoot Bay hookups?
A. Utility hookups as of -- or effective 1984, were, I think, two thousand four hundred thirty-eight.
Q. So, as of 1984, which was greater; the number of utility hookups or the number of lots sold?
A. The number of lots sold.
Q. Why was the number of lots sold greater than the number of hookups as of 1984?

A. Because the company had sold lots to builders and individual residents who had not put homes on those lots yet.
Q. With respect to the lots without homes that had been sold, did the purchasers have the right to build their own homes on those lots?
A. Yes, they did.
Q. If a lot purchaser built a home on that lot, would Barefoot Bay Development Corporation get any additional payment?
A. No, they would not.
Q. If a lot purcheser built a home on a lot, would the purchaser have the right to hook into the sewage system provided by Florida Cities Water Company?
A. Yes, they would.
Q. Could Barefoot Bay Development Corporation prevent a lot purchaser from tying into the Florida Cities treatment works?
A. No, they could not.
Q. During the period from 1984 to 1991, did the owners of these lots construct homes?
A. Yes, many of them did.
Q. Did they tie-in to Florida Cities treatment works?
A. Yes, they did.
Q. After you arrived in 1984, did Barefoot Bay continue to sell lots without preconstructed homes?
A. No, the company did not.

Q. Why didn't they?
A. They -- the company would have been competing with itself in trying to sell house lot packages.
Q. Between 1984 and 1991, about how many lots with preconstructed homes were sold at Barefoot Bay?
A. I'm sorry. The years, 19 --
Q. Between 1984 and 1991.
A. Barefoot Bay Development Corporation sold seven hundred and forty-five homes between that time period.
Q. Did Barefoot Bay Development Corporation ever sell a customer two lots with a single home?
A. Yes, it did.
Q. What do you call those?
A. Those are double lots.
Q. About how many double lots did Barefoot Bay Development Corporation sell?
A. Approximately thirty-nine to date.
Q. When Barefoot Bay Development Corporation sold a double lot, how many utility hookups would there be?
A. One.
Q. About what percentage of total lots at Barefoot Bay were sold between 1984 and 1991?
A. I'm sorry. Could you repeat the question?
Q. About what percentage of the total lots at Barefoot Bay were sold between 1984 and 1991?

A. Barefoot Bay Development Corporation sold probably sixteen percent of those lots.
Q. In the years 1992 and 1993, how many lots were sold at Barefoot Bay?
A. Thirty-three and twenty-nine respectively.
Q. And in total?
A. In total -- I'm sorry, I'm nervous -- thirty-three and twenty-nine.
Q. I would like to direct your attention to Avatar Holdings' Exhibit 5. Could you identify Exhibit 5 for the record?
A. Yes. It is an exhibit that I put together.
Q. Did you prepare this document from information contained in your files at the Barefoot Bay Development Corporation?
A. Yes, I did.
MS. TSOTSOS: Your Honor, I would like to move into evidence Avatar Holdings' Exhibit 5.
THE COURT: Be received.
BY MS. TSOTSOS:
Q. Ms. Metcalf, did Barefoot Bay Development Corporation ever consider acquiring a piece of property called the Herndon Property?
A. Yes, it did.
Q. What did Barefoot Bay Development Corporation plan to do with this property?
A. The intent was to build a golf course housing community.

Q. Was Florida Cities ever asked to provide wastewater services to the proposed Herndon Property?
A. Yes, it was.
Q. Would Florida Cities' Barefoot Bay Plant have provided wastewater services to the Herndon Development?
A. Yes, it would have.
Q. If Florida Cities had provided these services, what effect would it have had on the volume of water discharged from the Barefoot Bay Plant?
A. At build-out, it would have had a negative impact on the amount of water discharged.
Q. Why didn't it go through?
A. The engineering and the permitting took much longer than anticipated, so that by the time it was complete, the economic climate had changed. The market was no longer there for the amount of houses that would have to be sold. The initial impact financially was too great to try to recover that with eighteen months of sales, which economically were not there.
In addition, the three seats on the county commission had changed and the political climate was no longer friendly for development.
MS. TSOTSOS: Thank you, Ms. Metcalf.
THE COURT: Mr. Quinn.
MR. QUINN: No questions, Your Honor.
THE COURT: Thank you, ma'am. You may step down.

Mr. Hird.
MR. HIRD: Yes, Your Honor. Before we call our last witness, I'd like to move into evidence Avatar Holdings' Exhibit 4, which is the Government's responses to Avatar Holdings' interrogatory requests.
MR. QUINN: No objection, Your Honor.
THE COURT: Okay.
It will be received.
MR. HIRD: Thank you, Your Honor.
Avatar Holdings calls Charles McNairy.
Thereupon,
CHARLES MCNAIRY,
having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:
THE CLERK: Take a seat in the witness box. Please state your name and spell your last name for the record.
THE WITNESS: My name is Charles McNairy, M-C-N-A-I-R-Y.
DIRECT EXAMINATION
BY MR. HIRD:
Q. Good afternoon, Mr. McNairy.
A. Good afternoon.
Q. Are you associated with Avatar Holdings, Incorporated?
A. Yes, I am.

Q. What position do you hold, sir?
A. I'm currently executive vice president, treasurer and chief financial officer.
Q. When did you first become associated with Avatar Holdings?
A. I joined Avatar in January of 1985.
Q. In what position?
A. As the vice president of finance.
Q. And could you describe your further career with Avatar Holdings?
A. Yes. I stayed in that position until the first week of April, 1987, at which time I left the employ of Avatar, and went to work for a company by the name of J.I. Gizlack Mortgage Corporation as vice president and controller.
Q. And how long were you with that company?
A. I stayed there for approximately eighteen months, until October of 1988.
Q. What did you do then, sir?
A. At that point, I returned to Avatar as vice president of finance.
Q. And were you subsequently promoted?
A. Yes, I was. In September of 1992, I was promoted to senior vice president, treasurer and chief financial officer.
Q. Are you a certified public accountant, sir?
A. Yes, I am.

Q. And in what states, sir, are you licensed to practice accountancy?
A. I'm licensed both in North Carolina and in Florida.
Q. Now, are you involved -- do your duties as chief financial officer involve the preparation of financial statements in Avatar Holdings, 10-K and 10-Q submissions to the Securities and Exchange Commission?
A. Not so much the preparation as the review of said statements.
Q. Do your duties involve the review of financial statements in Avatar Holdings' annual reports?
A. Yes, it does.
Q. Mr. McNairy, does Avatar Utilities have a seperate accounting system from other Avatar Holdings' operations?
A. Yes, it does.
Q. I'd like you to take a look at Avatar Holdings' Exhibit 1, if you would, please.
MR. HIRD: Your Honor, this is already in evidence.
BY MR. HIRD:
Q. Can you recognize Exhibit 1, sir?
A. Yes, I do.
Q. What is it, please?
A. It is Avatar Holdings' 1994 annual report to shareholders.
Q. Could you turn to page 39, please. Do you have that in

front of you, sir?
A. Yes, I do.
Q. I'd like you to look at the second column running across. Does that indicate the loss or gain from operations during each of five fiscal years?
A. It indicates an operating loss for the three years of 19 -- it's difficult to read this -- of 1991, 1992 --
THE COURT: Can you speak a little louder, please, sir?
THE WITNESS: Sure. It indicates a loss in the years of 1991, 1992 and 1994.
BY MR. HIRD:
Q. And let me refer you to the year 1990. What does it indicate?
A. It indicates, in effect, a pretax income of eleven million one hundred thirty-two.
Q. Now, is that gain due to any unusual event that occurred that year?
A. Yes, it is. In June of 1990, the company sold certain property in California known as Woodland Hills, resulting in a pretax gain of approximately twenty-five million dollars.
Q. And if that sale had not gone through, would the company have had a loss in that year?
A. Yes, it would have.
Q. Approximately how much of a loss would it have had?

A. On a pretax basis, approximately fourteen million dollars.
Q. Now, you mentioned that there was also a gain indicated for the year 1993; is that correct?
A. That is correct.
Q. Was there also an asset sale that year?
A. Yes, there was.
Q. What sale was that?
A. In fact, the Midwest Water and Wastewater Utility Companies were sold that year, resulting in a pretax gain of approximately twenty-two million dollars.
Q. And was there any other events, unusual events, that occurred that year that may have affected loss or gain from operations?
A. Yes, there was. We recorded a four and-a-half million dollar reversal of an expense that had been accrued in 1987 into other income.
Q. Now, putting aside those two unusual events, would there have been a loss or a gain in the year 1993?
A. There would definitely have been a loss absent those two transactions.
Q. And approximately how much of a loss would there have been?
A. Approximately eight and-a-half to nine million dollars.
Q. Could I ask you to look at Avatar Holdings' Exhibit 9 for

a moment?
A. Okay.
Q. Could you tell us what Exhibit 9 is, please, sir?
A. Exhibit 9 is the company's September 30th, 1995 10-Q as filed with the Securities and Exchange Commission.
Q. Now, Mr. McNairy, could you look at page 4 of Exhibit 9?
A. Yes.
Q. What is page 4?
A. Page 4 is the consolidated statement of operations for the nine months and the three months ended September, '95, and 1994.
Q. In the first nine months of 1995, did Avatar Holdings have a loss or gain?
A. The company had a consolidated loss of five million four hundred forty-four thousand dollars.
Q. And in a similar nine-month period in 1994, did the company have a loss or gain?
A. It had a loss of six million seventy-seven thousand dollars.
Q. And what was the final loss that it had for the year total in 1994?
A. '94 or '95?
Q. '94.
A. Uh --
Q. You can refer back to page 39 of Exhibit 1.

A. All right, sir.
For 1994, the loss was fourteen point six million dollars.
MR. HIRD: Your Honor, just so the record is clear, by stipulation of counsel, we have stopped with accounting information for Avatar Holdings as of the nine-month period in 1995. Avatar Holdings has just filed its new annual report, but in discussions -- I'm sorry -- its new 10-K, which indicates its final figure for the year, but by stipulation of counsel, we're not going beyond that figure.
MR. QUINN: That is correct, Your Honor. The discovery had been provided and our accountants couldn't look at it, so we had ended at this point in time.
MR. HIRD: The 10-K was filed during the course of the trial, Your Honor.
THE COURT: All right.
BY MR. HIRD:
Q. Now, do your duties as chief financial officer of Avatar Holdings involve you in Avatar Holdings' effort to borrow money?
A. Yes, it does.
Q. And does it involve you in the efforts of Avatar Holdings' subsidiaries to borrow money?
A. On the real estate side, yes. On the utilities side, no.
Q. But you're informed of borrowing on the utilities side,

correct?
A. Yes, I am aware of those activities.
Q. What types of lines of credit does Avatar Holdings have, Avatar Holdings and subsidiaries?
A. Well, Avatar Properties currently has three lines of credit secured by its contracts and mortgage receivables.
Q. Are there -- is there a difference between corporate lines of credit and project lines of credit?
A. Well, yes. In addition to those credit facilities that I just described, it also has a line of credit secured by the investment portfolio. I would describe those lines as being corporate lines of credit.

Then, Avatar Properties has various construction and development lines of credit, the proceeds of which can be used only to develop the property that has been pledged as collateral for those lines of credit.
Q. So, with respect to the development lines of credit, that money is earmarked for specific projects?
A. Yes, it is.
Q. And that money could not be used for other purposes?
A. Absolutely not.
Q. That money could not be used to pay a civil penalty?
A. Absolutely not.
Q. With respect to the corporate lines of credit, can you describe those for us, please?

A. Well, the investment portfolio is secured by a thirty-six million dollar line of credit, which is fully drawn, so there is no additional availability under that line of credit facility.

There are two lines of credit secured by the notes and mortgage receivables which are fully utilized, meaning that there is no availability under those two lines of credit.

There is a third line secured by certain notes and mortgages which has a current availability of two million dollars.
Q. So, among those three lines of credit, there's only two million dollars available?
A. Available, that is correct.
Q. Now, you indicated that the portfolio that one of the -- strike that.

You indicated that there is a thirty-six million dollar line of credit that is secured by a portfolio of investment; is that right?
A. That is correct.
Q. How much is that portfolio worth in excess of the thirty-six million dollars line of credit?
A. Approximately six million dollars.
Q. And do you have any investment fees that will be due on that portfolio?
A. Yes, we do.

Q. How much are those?
A. Approximately a million dollars.
Q. So, the net available assets in that portfolio is about five million dollars?
A. That's correct.
Q. So, you have the five million dollars excess in the portfolio and the two million dollars available under the unused portion of the line of credit; is that correct?
A. That's correct.
Q. That makes a total of seven million?
A. Correct.
Q. Are there any planned expenditures that Avatar Properties is going to make in the coming year?
A. Yes, there are.
Q. And what are those expenditures?
A. Well, among other things, we have planned approximately eight million dollars of committed land development expenditures in both Poinciana, Florida and Rio Rico, Arizona.
Q. And you have eight million dollars of mandated expenditures?
A. Approximately, yes.
Q. And this is mandated by whom?
A. By the, in the case of Florida, the Division of Land Sales for the State of Florida along with the respective counties in which the projects are located. In the case of

Arizona, State of Arizona and Santa Cruz County, which is the county in which the project is located.
Q. And will you use the excess value of the portfolio to satisfy those mandatory obligations?
A. To the extent that it's necessary, we certainly will.
Q. And would you use the excess availability in the line of credit to satisfy those obligations?
A. Yes, sir.
Q. In all, between those two sources of funds, you have seven million?
A. Correct.
Q. And you have eight million dollars' worth of mandated expenditures?
A. Yes.
Q. How are you going to make up the rest of it?
A. We would anticipate covering the rest of it through additional borrowings which have yet to be negotiated or committed to by various lenders. We would also anticipate operating cash flows to cover the deficiencies.
Q. And have you any other additional expenditures on the Avatar Property sites other than that eight million dollars in mandated expenditures?
A. We have significant operating expenses, yes, we do.
Q. Approximately how much?
A. Well, let me run down; we have property taxes of

approximately five and-a-half million dollars. We have various insurance costs for things like liability insurance, workers compensation of, say, two million dollars. We have three million dollars of interest expense related to our debentures that were issued back in 1980 that have virtually nothing to do with current operations. And then we have standard, what I call overhead expenses, that are several million dollars beyond that.

Q. And how much in total are these expenses that you foresee in the future?

A. Well, over and above the eight million dollars, I would say in the neighborhood of twelve to fourteen million dollars beyond that for this year, for 1996.

Q. Now, turning to the Avatar Utilities' side of the house, does Avatar Utilities and its subsidiaries have any lines of credit?

A. Yes, it does.

Q. And is there any availability under those lines of credit?

A. Yes, there is. Currently, under the Florida Cities' line of credit facility, there is an availability of approximately ten million dollars, and on Avatar Utilities' line of credit facility, there's an availability of approximately two million dollars.

Q. And are Avatar Utilities and Florida Cities planning any

expenditures in the coming year?

A. Yes, they are.

Q. What are these expenditures?

A. Capital expenditures of approximately seventeen million dollars are planned for 1996.

Q. And what is this seventeen million dollars devoted to?

A. It reflects enhancements and improvements and expansions to existing plants, that is, water treatment plants, wastewater treatment facilities, expansion of the lines that service the community in which the utilities operate.

Q. And do you plan to use the availability under these two -- does Avatar Utilities and Florida Cities plan to use the availability under these two lines of credit to satisfy this obligation?

MR. QUINN: I believe this goes beyond the scope of this witness' knowledge, talking about Florida Cities and Avatar Utilities. This witness is the chief financial officer of the parent Avatar Holdings.

MR. HIRD: Your Honor, I'm somewhat surprised since the Government's whole contention is the two are the same, but I believe he's the chief financial officer for the entire -- for the holding company, and his responsibility is to prepare and review financial statements.

THE COURT: I'll overrule the objection.

THE WITNESS: To answer the question, the answer is,

yes, we would intend to use available lines of credit on the part of Avatar Utilities and Florida Cities to finance the expected capital expenditures.

BY MR. HIRD:

Q. That would exhaust the entire twelve million dollars that is available?

A. More than -- yes, it would.

Q. Now, does Avatar Holdings or its subsidiaries have any land assets that have not been used as collateral for debt?

A. Yes, it does.

Q. Could you describe these land assets, please?

A. We have significant land holdings that, for the most part, are undeveloped and are debt free.

Q. Could these assets be used as collateral for debt?

A. On a practical level, the answer is no.

Q. Why not?

A. Because in this day and age, a lender has two basic requirements; in order to lend money against a given asset, A, there has to be a specific loan to value ratio which we could meet and we do meet the test, but secondly and more importantly, a lender will not lend money against an asset unless that asset generates cash flow. Undeveloped land does not generate cash flow, so there would be no cash flow from these hypothetical loans which could be used to repay the loans.

Q. Mr. McNairy, has Florida Cities Water Company issued preferred stock?

A. Yes, it has.

Q. To whom has it issued preferred stock?

A. It issued preferred stock to its parent company, which is FCWC Holdings, Inc.

Q. And has FCWC Holdings, Inc. issued preferred stock?

A. Yes, it has.

Q. And to whom has it issued the preferred stock?

A. To Allstate Insurance Company.

Q. Does Florida Cities have an obligation to redeem its preferred stock?

A. Yes, it does.

Q. And does FCWC Holdings have an obligation to redeem its preferred stock?

A. Yes, it does.

Q. Would the proceeds of the redemption of Florida Cities' preferred stock be used to redeem FCWC Holdings' preferred stock?

A. Yes, it would.

Q. Do you know what the cost redemption -- the price of redemption will be?

A. The mandatory redemption requirements as outlined in the annual report are one million eight hundred thousand dollars per year beginning in 1997, through the year 2001, which will

equal the total outstanding balance of approximately nine million dollars.
Q. Now, you said "as outlined in the report."
A. Yes.
Q. In the annual report that is Avatar Holdings' Exhibit 1?
A. I'm sorry. Could you repeat the question?
Q. Is that Avatar Holdings' Exhibit 1?
A. Yes, it is.
Q. Could you turn to the page in the report and just identify which page that is?
A. Yes, I can. If you'll look on page 27, under notice, the first full paragraph there under the table outlines that the mandatory redemption of a million eight per year commences in March of 1997.
Q. Page 27, notice?
A. Correct, 27, notice.
Q. And the number there, that reads one -- that looks like one thousand eight hundred dollars, is really one point eight million dollars?
A. Yes, it is. If you look at the headings, we have said the numbers are in thousands, so that is one million eight hundred thousand dollars.
Q. Mr. McNairy, could Avatar Holdings or its subsidiaries borrow to pay a penalty in this action?
A. No, it could not.

Q. How do you know that?
A. Because I've talked with the various lenders and the lenders have indicated unwillingness to lend money to fund a fine.
Q. Does Avatar Holdings have available funds to pay a significant penalty in this action?
A. No, it does not.
MR. HIRD: Thank you, Mr. McNairy. No further questions.
MR. QUINN: May I have a moment?
THE COURT: Yes, sir.
(Brief Pause.)
MR. QUINN: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. QUINN:
Q. Good afternoon, Mr. McNairy. My name is Tony Quinn and I met you during your deposition.
Sir, as of the end of the third quarter of 1995, Avatar Holdings was current in meeting its debts and obligations; isn't that correct?
A. That is correct, yes.
Q. And Avatar Holdings is a publically traded corporation; isn't that correct?
A. Yes, it is.
Q. If Avatar Holdings, at the end of the third quarter of

1995, anticipated that it was unable to meet its current obligations, would there be some obligation on it to report this financial condition?
A. Yes, there would be.
Q. And did Avatar Holdings report anything about an inability to meet its obligations?
A. No, it did not.
MR. QUINN: Thank you. I have no questions, sir.
MR. HIRD: No redirect.
THE COURT: Thank you, sir. You may step down.
I believe you said this was your last witness.
MR. HIRD: Yes, Your Honor. If you can just give me a moment.
THE COURT: Okay.
MR. HIRD: I just want to take a moment to just double check there are no additional exhibits I need to move into evidence, Your Honor. If I can confer with Government counsel for just a minute.
(Brief Pause.)
Your Honor, I move in Avatar Holdings' Exhibit Number 2.
THE COURT: The Government concurs?
MR. QUINN: Yes.
THE COURT: Okay.
It will be received.

MR. HIRD: Your Honor, Avatar Holdings rests.
THE COURT: All right.
Any rebuttal?
MR. JACOBS: May I inquire, before I answer, as to what the Court's schedule is for the rest of the day?
MR. BAISE: I would have the same inquiry, Your Honor, with regard to how you would like to proceed.
THE COURT: Well --
MR. JACOBS: I'm happy to tell you where I'm going with this, if that helps.
THE COURT: All right.
MR. JACOBS: I anticipate my rebuttal case lasting, at most, fifteen minutes. I would be prepared immediately following thereafter to give my closing argument and that way obviate the need for any of us to see each other again for a while perhaps.
THE COURT: I assume you're talking about one witness?
MR. JACOBS: Yes, which we're just going to read in, so there won't be any -- it's a deposition, so we won't have cross-examination. That's why I can tell you it would be at most fifteen minutes.
THE COURT: Well --
MR. JACOBS: But I don't want to give my closing argument if the other side is not going to give theirs right

afterwards. I don't want them to have a chance to ponder that for a while.

MR. BAISE: And I guess I am curious that you're going to read in a deposition after you have rested.

MR. JACOBS: Rebuttal, Mr. Baise. Rebuttal, Your Honor.

THE COURT: Talking about rebuttal here. Mr. Baise, you have a loose end here.

MR. BAISE: Yes.

THE COURT: And so, I suppose the issue is whether the Court is going to leave open the evidence in this case. That's the issue.

MR. BAISE: Yes, Your Honor. As explained to Your Honor this morning, Mr. Hill has diverticulitis, I guess it is, and was unable to come and he's the witness that we need to discuss the Public Service Commission aspect of this case.

THE COURT: Well, we've already had a significant amount of testimony regarding the Public Service Commission. I've given you a lot of latitude.

MR. BAISE: Yes. Yes, you have.

THE COURT: And frankly, I'm not inclined to bring us back here for any further testimony.

MR. BAISE: I can't say that I am looking forward to it either, Your Honor. It's just we had planned --

THE COURT: Well, I tell you what I'm going to do.

I'm going to go ahead and finish the testimony in this case and then we'll talk about submissions after that. I know that there may need to be some motions made at the conclusion of all of the evidence. But I want to go ahead and finish the evidence.

MR. BAISE: Okay.

THE COURT: And so, I'm not going to leave open the evidence in the case after we've heard from the rebuttal witness.

Frankly, I had intended to recess by 5:00 o'clock today, but that was with the assumption we would have a substantial amount of testimony remaining and that is not the case here.

So, this is Good Friday and it's regrettable that I have felt necessary to take up the full day and then some with work when many of us would feel a need to be elsewhere, but in an effort to try to accommodate everybody, as well as the Court, in finishing the evidence in this case, I felt it necessary.

And in view of the fact there is very little time the Court has to predictably reschedule the conclusion of this trial, I want to go ahead and take what time we have today to just give a full day to this case. All right.

Yes, sir.

MR. BAISE: Let me offer this suggestion without

having consulted with counsel about it. If they can go ahead and put in their rebuttal and schedule closing arguments for a subsequent day when the Court's calendar would accept that -- and the reason I ask for that is that the Government, in this case, has put in approximately, I think it's five hundred to six hundred exhibits. Many of those exhibits, as Your Honor knows, go back over the entire history of Barefoot Bay. We did not believe that all those would be allowed in in terms of the history.

So, unlike Mr. Jacobs, I cannot say I'm prepared to offer closing argument with regard to that massive number of exhibits they have put in and comments that I'm going to make with respect to those exhibits.

THE COURT: Well, I'm not going to hear closing arguments --

MR. BAISE: Oh, you're not. Excuse me.

THE COURT: -- this evening. We'll talk about whether I'm going to entertain oral closing arguments or whether the Court will ask for written submissions.

MR. BAISE: Do you normally request post-trial briefs with respect to a matter such as this, Your Honor, so we can start thinking about that, if that's your direction?

THE COURT: Let me think about that a little bit and determine how we can best deal with the interests you have and summing up, as it were. And the interest that the Court has in

obtaining from you meaningful assistance in resolving the Court's resolution of this case. So, let me go ahead and hear the rebuttal and then we will talk about this a little bit further.

MR. JACOBS: Your Honor, the United States calls Jack William Tompkins by deposition. With the Court's permission, Mr. Moore will act in Mr. Tompkins' role in terms of reading responses to questions.

MR. BULLOCK: May I be heard on this matter?

THE COURT: Yes, sir.

MR. BULLOCK: May I ask to whom the rebuttal is being addressed?

THE COURT: Well, what do you have to say about that, Mr. Jacobs? We've got two Defendants.

MR. JACOBS: I would say that Mr. Tompkins was the former operations manager. I would suspect that the rebuttal would be addressed primarily to the issue of the alternatives that were available and the good faith efforts with which those alternatives were addressed, and in particular, the speed with which those alternatives were addressed.

Mr. Tompkins is, unlike many of the witnesses called, a former company employee with no dog in the fight, to use the expression that I heard earlier. And specifically, in response to Mr. Bullock's question, I would proffer he would probably rebut some of what Mr. [illegible]miller said, some of what Mr. Allen

said, probably what Ms. Karleskint said, off the top of my head.

MR. BULLOCK: Two points on that. Initially, in this matter, Florida Cities, since all the liability has usually been found against it, bears the burden of proof which Plaintiff conceded in the trial brief. We would argue, since Florida Cities bears the burden of proof, rebuttal evidence against Florida Cities would be improper.

Secondly, Mr. Tompkins' deposition was designated in the pre-trial order as one of the Government's witnesses. Mr. Jacobs has already offered proof about good faith, speediness of any response in his case in chief. The proper place to have brought that type of evidence would have been in his case in chief. That is the same type of evidence which he offered Mr. Klingenstein, his expert testimony. I would contend that's improper rebuttal evidence. This is evidence which should have been brought in his case in chief.

MR. JACOBS: Judge, may I be heard?

THE COURT: Yes.

MR. JACOBS: I believe there's a suggestion by Mr. Bullock that Mr. Tompkins' testimony, although we haven't even begun here yet, might be cumulative. I dare say, if anybody presented cumulative evidence in this case, it's been the Defendants, not the Government.

THE COURT: Well --

MR. JACOBS: And we have yet to call a single Florida Cities Water Company employee or ex-employee, for that matter.

THE COURT: Well, he's pointed out that the -- that the Defendant Florida Cities has the burden of proof, correct, on the --

MR. BULLOCK: Mitigation issue.

THE COURT: -- mitigation issues. Well, I don't know but what we might have -- ought to have started out with Florida Cities going first if that is -- you know, I sit up here and I try cases day in and day out and I guess that I'm just attuned to the fact that, you know, one side goes first and the other side and we've got possible rebuttal by the other side.

Well, it had occurred to me at one point when we commenced this trial as to what the order of proof would be because I read that the liability has been determined and that Florida Cities has the burden of proof on mitigation.

But the fact of the matter is that we've gone, I don't know -- I guess I assumed that with this army of lawyers involved in this case and nobody seemed to object to the manner in which we were proceeding procedurally, that is, with the Government going first, that who was to question that.

So, anyhow, Mr. Bullock, you want to respond to that?

MR. BULLOCK: Well, Your Honor, I don't mean to -- I did raise this issue on the first day of the trial that there

should be no rebuttal evidence.

THE COURT: You did?

MR. BULLOCK: Yes.

THE COURT: I guess it's my early Alzheimer's Disease, maybe not so early. You did?

MR. BULLOCK: You raised a question about whether or not there would be rebuttal witnesses. I raised at that point in time the issue we had the burden of proof and that there shouldn't be rebuttal witnesses against us.

THE COURT: I'm sorry.

MR. BULLOCK: You didn't respond one way or the other, but looked kind of like --

THE COURT: I had a blank look on my face?

MR. BULLOCK: I wasn't going to say that.

THE COURT: Go ahead.

MR. BULLOCK: The other issue is that providing the fact that these designations which the Government is suggesting that they now read into evidence to rebut was something that was available to them in their case in chief, it's the same type of evidence which they presented in their case in chief. It's all the questions and all the six factors they went through with Mr. Klingenstein. To say now that they have -- that they can rebut using the same type of evidence that was available to them and that he strategically chose to not read it at that point in time is, I believe, outside the scope of

what would be proper rebuttal.

MR. JACOBS: Judge.

THE COURT: Yes, sir.

MR. JACOBS: We had the opportunity to read these in last Friday and in the interest -- in fact, if you look at pages 32 to 34, I believe, of the joint pre-trial statement, you'll see we did quite extensive deposition designations. And I think the Court may rule that what we said at the time -- by the way, I have absolutely no recollection, as I join the Court's Alzheimer's, if that is what happened.

THE COURT: I'm glad to hear you say that.

MR. JACOBS: I have no recollection whatsoever of -- Mr. Quinn's checking the transcript from the first day right now -- I don't recall this issue ever being addressed, but what I do specifically recall is Friday morning, in the effort to move the case along, the Government said, well, we won't read any of these long depositions into the record.

Now, the Court had mentioned that it had had a bad experience in this respect and we said, well, we'll just reserve the right, then, to read what we think we need to in as rebuttal and I promised the Court at the time that we'd only read in what we needed to. And if you look at 32 and 33, you'll see we --

THE COURT: Now, that's where I believe I made a comment about if this is -- if this is deposition testimony

that is properly to be presented during your case in chief, you can't just wait until later on and just throw it in as rebuttal. I do remember that.

MR. JACOBS: I remember you saying something quite along those lines. It was, if it's properly rebutted, then you don't need to reserve the right, would be my recollection. And we can pull that transcript as well.

But I respectfully suggest we've spent ten minutes discussing it and it will only take about ten or fifteen minutes if the Court would like to read it. If the Court would like to reserve judgment as to whether it's legitimate rebuttal --

THE COURT: Well, let's go ahead and hear it and I'll reserve ruling on whether it's proper rebuttal or not. I tried to avoid reserving a lot of stuff because that can get away from you very quickly, but I think I would go ahead and reserve ruling on your objections that you have made, Mr. Bullock.

MR. BULLOCK: All right, sir.

THE COURT: All right.

MR. JACOBS: Starting on page 14, line fourteen.

BY MR. JACOBS:

Q. Do you wish to have your personal --

MR. HIRD: Excuse me. Is this -- Your Honor, could we ask whether this is volume one or volume two?

MR. JACOBS: It's volume one. Sorry.

MR. HIRD: Thank you.

BY MR. JACOBS:

Q. Do you wish to have your personal attorney present, Mr. Tompkins?

A. No. Mr. Scroggin serves as my attorney also.

Q. Okay.

So, it's your understanding that Mr. Scroggin represents both Florida Cities Water Company and you personally in this matter?

A. That's correct.

Q. Okay.

Did you, in fact, retain Mr. Scroggin to be your personal attorney in this matter?

A. Yes, when I was contacted by Mr. Scroggin concerning this and Mr. Scroggin offered to represent me at no cost.

Q. I see. Did he tell you he was just doing it out of the kindness of his heart or did you get the impression somebody else was paying the bill?

THE COURT: Wait, wait, wait, sir.

MR. BAISE: Objection, Your Honor. This goes to really no issue that has been raised in this trial with regard to Mr. Scroggin representing this client and I would object on the grounds of 403, that although relevant evidence may be excluded if it's --

THE COURT: All right. All right. All right.

Just a moment.

MR. BAISE: Confusion of the issues.

MR. JACOBS: Judge, we had a lot of testimony about who is paying the bills and I want to establish that every single --

THE COURT: Overruled. Proceed.

MR. JACOBS: Mr. Moore, would you read the answer, please then, line six?

THE WITNESS: Well, I indicated there is a contract between me and Mr. Scroggin that indicates that Florida Cities Water Company is paying the bill for his services on my behalf.

MR. JACOBS: Thank you. Skip to page 36, line seventeen.

BY MR. JACOBS:

Q. I see. And at what time did you go to work for Florida Cities Water Company?

A. Yes, I did.

MR. JACOBS: I'm sorry. I misread the question. Let me go back.

BY MR. JACOBS:

Q. I see. And at that time, did you go to work for Florida Cities Water Company?

A. Yes, I did.

Q. And what months of 1989?

A. I believe that that was in August of 1989. I'm not

exactly sure.

MR. JACOBS: Skipping to page 40, line twelve.

BY MR. JACOBS:

Q. Now, you made reference to the period of your employment with Florida Cities Water Company. Just for the sake of the record, I think at this point in time, I need to ask you when you stopped working there so we have a timeframe.

A. I believe that that was in September of '91.

MR. JACOBS: Next page, line five.

BY MR. JACOBS:

Q. Tell me what your responsibilities were, please, sir, with Florida Cities Water Company.

A. Initially, I was hired at Florida Cities as their construction manager. The purpose of that position is to assist Florida Cities in completing construction of their capital improvements projects.

Shortly after I started work, I was then moved to the position of operations manager, which the purpose of that is to manage the operations, plant operations and system operations of Florida Cities Water Company.

MR. JACOBS: Next page, page 42, line nineteen.

BY MR. JACOBS:

Q. To whom did you report when you worked for Florida Cities Water Company?

A. I reported to Bob French initially and Bob subsequently

left the company and a Paul Bradtmiller replaced him.
MR. JACOBS: Next page, line eleven.
THE COURT: That's an answer.
MR. JACOBS: Yes, I'm sorry, that's an answer. Let me back up to line eight. Thank you, Your Honor.
BY MR. JACOBS:
Q. What would you say were your major projects during the course of your employment with Florida Cities Water Company?
A. As operations manager, I wasn't involved with what I would call major projects. My function was more to oversee the day-to-day operations of the facilities.
Q. And how many facilities were there that you oversaw?
A. I can't remember the exact number. There was the Fort Myers facilities, the Golden Gate facilities, the Carrollwood facilities, Barefoot Bay and Poinciana Utilities. I think that's -- and Sarasota Utilities.
Q. Did you have responsibilities both for the water and the wastewater treatment facilities?
A. Yes, I did.
Q. And were you the operations manager for all of the Florida Cities Water Company wastewater treatment facilities during the course of your employment with the company?
A. Yes, I was.
MR. JACOBS: Line sixteen.
BY MR. JACOBS:

Q. Did your responsibilities include permitting matters?
A. Yes, permitting was certainly involved in the operation there.
MR. BAISE: Objection. Can we have just a moment to catch up with them on the computer, please.
THE COURT: Yes. What page are you on?
MR. JACOBS: 44.
THE COURT: Still 44.
(Brief pause.)
MR. JACOBS: If it would facilitate matters, I invite Mr. Baise to look on with me at the podium.
MR. BAISE: May I, Your Honor?
THE COURT: Yes, sir.
BY MR. JACOBS:
Q. Did your responsibilities include permitting matters?
A. Yes, permitting was certainly involved in the operations there.
Q. And what was your role in permitting?
A. In permitting, I would review existing permits, apply for new permits, things like that.
Q. And were you responsible for submitting to various Government agencies reports required by such permits?
A. Yes, I was.
Q. What were some of the reports?
A. Typically, any reports that were required by the various

Government agencies, discharge monitoring reports, operating reports, just the whole gamut of required reporting.
MR. JACOBS: Skip to -- go to line 69 -- page 69, rather, line twenty-five.
BY MR. JACOBS:
Q. Now, was there a delay in transmitting this information to DER that can be attributed to the fact that Florida Cities Water Company and the design engineer were having a fee dispute?
THE COURT: The design engineer Source were having a fee dispute.
MR. JACOBS: Thank you, Judge.
THE WITNESS: Yes, there was.
BY MR. JACOBS:
Q. And do you know how long that delay was?
A. No, I don't.
Q. We're going to take a look at that a little bit more. I take it that you can't -- I take it you can't tell me, without my refreshing your recollection a little bit more, how long it took for you all to finally get that resolved; is that correct, or can you take a stab at it?
A. Well, shortly after this issue came up. And as I mentioned earlier, I moved into the operations end and I did not have further involvement with that issue, I don't believe.
Q. Well --

A. At least not much.
Q. Maybe you'd like to think you didn't, Mr. Tompkins, but I think you did for at least a little while.
A. Okay.
Q. Correct me if I turn out to be wrong. I wish you would. But I've got some more paper with your name on it. We're going to start with Exhibit 309, which takes us into August. Let me ask you first, sir, do you recognize Exhibit 309?
And for the record, Exhibit 309 is the deposition, is trial Exhibit 393 which is in evidence.
A. Exhibit Number 309 is a FAX from source to myself dated August 9, 1989.
Q. Do you recall receiving this FAX about or on August 9, 1989?
A. No, sir, I don't specifically recall receiving this FAX. We got an awful lot of FAX'es. I have no doubt that this FAX was received, but I just don't specifically recall getting this FAX.
Q. Okay.
Let's look at the first page of Exhibit 309. It seems to be, does it not, the DER letter of June 16th of '89?
A. That is, I think, Source's basis for additional funds. Whether that is the true issue or not remains -- I don't know. I suspect that it probably wasn't, but that is speculation on my part.

Q. Mr. Tompkins, I'm not asking you to speculate and I'm not asking you necessarily, yet at least, to tell me whether Source was right or wrong and I'm not -- I'm certainly not going to referee whether Source was right or wrong. All I'm trying to do here is reconstruct a timeline and I think you've probably --

A. Very good. Very good.

Q. I think you've probably caught on by now that that's all I want to do. Do you have a recollection of a June 16th, 1989 letter from DER that sort of was the precipitant of this fee dispute?

A. I recall that DER issued a comment letter and the consulting engineers utilized that as a basis for requesting additional fees.

Q. And it took a while to get this ironed out, didn't it?

A. I believe that is correct, sir.

Q. Okay.

And by "this," I mean the fee dispute. It took awhile to get the fee dispute ironed out and you couldn't provide the information to DER until you got the fee dispute ironed out; isn't that correct?

A. I think that is correct.

Q. Okay.

And now we're into August of '89, so it's still not yet resolved; isn't that correct?

A. That is correct.

Q. Okay.

Do you recall for how long after August of '89, FDER considered your application incomplete because it was still missing this information that was the basis of the fee dispute?

A. No, sir, I do not recall.

Q. I'm handing you Exhibit 310.

For the record, that is trial Exhibit 406, which is already in evidence.

Do you recognize that?

A. Exhibit Number 310 is a letter from FDER to Mr. French stating the application is incomplete.

Q. And do you recall receiving a copy of this letter?

A. Again, I'm sure I did. I have no specific recollection of it.

Q. Would you look in the upper righthand corner of the exhibit?

A. Yes, sir.

Q. That is Exhibit 310, and tell me if your initials appear in the upper righthand corner?

A. I cannot make out what is up there. It looks like there was something on my copy of it.

Q. There is something on my copy of it, too, and I apologize. Unfortunately an important part seems to have been obscured, that is to say, the second letter of your initials.

A. Yes, sir.

Q. Well, were these types of letters generally routed to you and were they routed by initials in the upper righthand corner?

A. Yes, the routing was normally done by initials in the upper corner. Whether or not this one was routed to me, I do not recall.

Q. Okay.

Is it your recollection that the FDER permit application was still incomplete as of November 17, 1989?

A. Based on looking at this letter, I would say that that is true.

MR. JACOBS: Skipping now to page 79, line twenty.

BY MR. JACOBS:

Q. All right.

We started with a conversation you had in June of '89, which we're guessing, I think, is about the time you started, and here we are in November of '89, six months later and the permit application is still incomplete; is that correct?

A. Yes, sir.

MR. JACOBS: Skipping now to page 99, line fifteen.

BY MR. JACOBS:

Q. Okay.

Are those your initials on the upper righthand corner of Exhibit 317?

A. Yes, they are.

MR. JACOBS: For the record, exhibit 317 at the deposition trial is Exhibit 411, which is also in evidence.

BY MR. JACOBS:

Q. And is this a checkmark by your name?

A. Yes, it is.

Q. Okay.

Do you know if this one went from into out without your looking at it or did you look at this one?

A. I most likely would have looked at this one. I don't have any specific recollection of it, but I normally -- on DER types of correspondence, they were read pretty carefully and thoroughly and certainly the same goes for the EPA.

Just for your clarification, when you refer to a checkmark being there and it not having been looked at, you know, we get a lot of junk mail and things like that and sometimes that gets checked and gone on before people would, you know, go without really an indepth view, but on this type of correspondence, it would be reviewed pretty in-depth.

Q. Do you recall whether you had reason, at the time of your review of this exhibit, to question Mr. Edwards' assessment that the company incurred a ten-month delay to respond to the agency's request for information?

A. No, I don't, sir.

MR. JACOBS: Skipping now to page 105, line fourteen.

BY MR. JACOBS:

Q. You didn't have a permit to discharge in the canal at this time, did you?
A. No, sir.
Q. And that is where you were discharging at this point in time?
A. That's correct. I believe that is correct.
MR. JACOBS: Skipping to page 116, line seventeen.
BY MR. JACOBS:
Q. At this point in time, Mr. Tompkins, when you were in charge of operations and you have got a facility which isn't meeting its permit and it's about to miss the deadlines in the administrative order, do you sort of keep that to yourself or are you the kind of guy who tells your manager?
A. Well, hopefully I was able to advise my manager, you know, when appropriate. I considered it part of my job.
Q. Okay.
And did you, in fact, keep not only your manager apprised of this situation, but some fairly high-level folks both at Florida Cities Water Company and Avatar?
A. Yes, I did.
MR. HIRD: Objection, Your Honor. The question is vague and is misleading as to what is meant by Avatar.
THE COURT: Just a moment.
MR. JACOBS: That might be an objection as to form, which could have been obviated if made at the time of

deposition, in addition to which, this was the common -- what evolved in all these depositions and what evolved in even Mr. Levy's testimony, everyone refers to everything as just Avatar. The distinctions that Mr. Hird is careful to make, and I don't fault him for making them, are not made on a day-to-day basis by the employees. That's been established in the evidence at trial.
MR. HIRD: I'd like to point out that that deposition was taken before Avatar Holdings was a party in this case, so there was no opportunity to make comments at the deposition. I certainly disagree with Mr. Jacobs' characterization about the use of the word "Avatar."
THE COURT: I'll overrule the objection.
MR. JACOBS: Is the answer in evidence? Line six.
BY MR. JACOBS:
Q. Do you recall who you kept apprised of the situation?
A. No, I don't.
Q. I'm handing you Exhibit 324.
For the record, that is trial Exhibit 432, also in evidence.
Does that refresh your recollection with respect to whom you kept apprised of the --
A. Yes, it does.
Q. Who did you keep apprised of the situation?
A. Mr. Elder, Mr. Reeves, Mr. Allen and Mr. Getman.

MR. JACOBS: Moving on now to volume two and picking up with page 120, line ten.
BY MR. JACOBS:
Q. Were you concerned at the time you wrote this memorandum that you were still not discharging at the permitted location?
A. Right. The intent of this is to basically speed up compliance.
MR. BAISE: Objection, Your Honor. We have really no idea what the memorandum is referring to or any foundation for the memorandum I see prior to the --
THE COURT: Yeah. What memorandum are we talking about here?
MR. JACOBS: Exhibit 324, which -- at the deposition that is, which is 432, which is in evidence.
THE COURT: Well -- how do we know that?
MR. JACOBS: From page 118.
THE COURT: From page 118?
MR. JACOBS: Yes, sir, line seven.
MR. BAISE: What is the memorandum about? Again, Your Honor, I would renew my objection that this brings home -- the point is this is confusing, cumulative and misleading with regard to what occurred.
THE COURT: Well, all right.
It's apparent that --
MR. JACOBS: I'm sorry. I can cure it. It refers --

324 was the last exhibit that I referenced in volume one.
THE COURT: And that was on page?
MR. JACOBS: 117. I'm handing 324 to you to refresh your recollection, who did you keep apprised? Answer --
THE COURT: Right, right, right. All right.
It's apparent to the Court that you're referencing Exhibit 324, so I'll overrule the objection.
MR. JACOBS: And as I look back, I apologize, I skipped two questions on page 119. If the Court would permit me to go back to volume one.
THE COURT: Go ahead.
MR. JACOBS: Line nine, question.
BY MR. JACOBS:
Q. And would you include somebody like Mr. Allen or Mr. Getman at Avatar?
MR. HIRD: Same objection, Your Honor.
THE COURT: Overruled.
THE WITNESS: Because of the significance of the issue, I felt that it was important to bring in the parent company.
BY MR. JACOBS:
Q. Did you have a lot of dealings with Mr. Allen and Mr. Getman?
A. I had several dealings with them, yes.
MR. JACOBS: Now, picking up with 120, should I read

that question again, Judge, where we left off where the objection was?

THE COURT: Yes. Go ahead.

BY MR. JACOBS:

Q. Were you concerned at the time you wrote this memorandum that you were still not discharging at the permitted location?

A. Right. The intent of this is to basically speed up compliance.

MR. JACOBS: Skipping to page 122, line eighteen.

BY MR. JACOBS:

Q. Well, what this memorandum again is --

MR. JACOBS: I'm sorry. I went to an answer. The question is, and were you getting frustrated by that point in time that you couldn't get the facility into compliance fast enough, because that sure is what it sounds like from this memorandum?

MR. BAISE: I would object that 122, fourteen is not designated.

THE COURT: It's not designated. Don't read it.

MR. JACOBS: The answer is -- I'm sorry. Do you want me to just read the answer?

THE COURT: Well --

MR. BAISE: The answer is not in context.

THE COURT: Don't read the answer because that is not -- that is not proper.

MR. JACOBS: I think we're talking about the same memorandum.

THE COURT: Well, I don't care whether we're talking about the -- you know, you've got to -- well, just a moment.

I'll sustain the objection.

MR. JACOBS: Next question, line twenty-two.

BY MR. JACOBS:

Q. Okay.

Did you get any kind of response from Mr. Getman?

A. No, I didn't.

Q. Well, didn't he write somebody a memo about your memo? Here, look at Exhibit 325.

And for the Court's reference, this is trial Exhibit 434 also in evidence.

A. Okay.

He did.

Q. And did you get a copy of it?

A. Yeah, I'm copied on this distribution list, yes, sir.

Q. Okay.

And do you recall getting this memorandum?

A. Yes, I do.

Q. Okay.

A. I sure do.

Q. Even though it doesn't have your checkmark you know you saw this?

A. I believe so, yes, sir.

Q. Okay.

Does anything in particular stand out about it that makes you so sure that you recall it?

A. The wording in here on the documentation is probably what makes me recall it.

Q. Okay.

And at the time you saw this memorandum, what did you understand Mr. Getman asking you to do, if anything?

A. To extensively document all the issues related to this project.

Q. For what purpose?

A. Because of the possibility of future litigation.

MR. JACOBS: Skipping to page 132, line twelve.

BY MR. JACOBS:

Q. I'm handing you Exhibit 332.

For the record, that's trial Exhibit 438, also in evidence.

Do you recognize that, sir?

A. I do.

Q. Okay.

Would you describe it for the record, please?

A. Certainly. This is a letter from Paul Braatmiller to Mr. Peter McGarry of EPA, dated March 14, 1991, responding to a notice of violation.

Q. You have seen this letter before, I take it?

A. Yes.

Q. Did you write it?

A. Most likely I did write part of it, sir.

Q. Directing your attention to page two, item number three, which reflects EPA's dissatisfaction with the compliance schedule because the current project construction completion date is more than a year past schedule.

Did you write the line that says, quote, Florida Cities Water Company is making all possible efforts to work with the contractor and project engineer as to advance the construction schedule?

A. I don't recall if I wrote that particular line or not, sir.

Q. Is that particular line true? Was it true at the time?

A. I don't know how to address that one.

Q. Truthfully?

A. Well, there's a possibility that some additional efforts could have been made that weren't made.

Q. Okay.

Would you tell me what those were, please?

A. Well, there is -- you could do temporary facilities, for instance.

MR. JACOBS: Next page, line nineteen.

BY MR. JACOBS:

Q. I'd be very happy with specific examples. I guess I'm asking you to tell me if this statement is truthful and I think you're telling me it's not truthful, that FCWC really wasn't making all possible efforts, all possible effort to work with the contractor and project engineers to advance the construction schedule?
A. Well, I --
Q. Isn't it fair to say that that is an exaggeration based on what you've just told me?
A. Probably so.
Q. And did you keep -- well, let me ask you this. Who was your immediate supervisor at this point in time at Florida Cities?
A. Mr. Bradtmiller.
Q. And did you keep him apprised of your conversations with Mr. Kwan?
A. Yes, I did.
Q. Did Mr. Bradtmiller express a concern at any point in time of the things that -- excuse me -- that things were over a year behind schedule from EPA's perspective?
A. I don't recall such a conversation.
Q. Well, were you concerned, you personally?
A. Yes, I was concerned.
Q. Okay.
Did you express that concern to Mr. Bradtmiller?

A. Yes, I did.
Q. On one occasion, more than one occasion?
A. I'm sure on at least one occasion, if not more.
Q. Okay.
And did you find him to be responsive to your concern?
A. Somewhat responsive, I'd say.
Q. Is it fair to say that you would have liked him to have been more responsive?
A. Oh, absolutely, absolutely.
Q. And is it fair to say that, looking back at Exhibit 327, that that was not the only time, that is to say, February of 1991, was not the only time that you personally tried to push things ahead here or speed things up, to use your words?
A. I'm sure that that was not the only time.
Q. In fact, you wrote a similar letter again on April 1st of '91, did you not?
A. Yes, I did.
Q. And is Exhibit 333 --
And for the record, that's trial Exhibit 444, also in evidence.
-- which I'm handing you -- that letter, sir?
A. Yes, it is.
Q. And again, is the purpose of this letter to again try to speed things up at Waterway Estates?
A. Let me --

MR. BAISE: Objection, Your Honor, with respect to the relevancy of this line of reading any of this material which we're talking about.
February 8, 1991, the project is already underway and being constructed. In February of 1991, the pipeline is being constructed, the AWT facility is being constructed. This doesn't have any relevance to speeding up the project. At this point, the project is now in the hands of the contractors.
MR. JACOBS: That's exactly what this testimony is about, how to speed up the completion of the project. That's the whole point.
MR. BAISE: But this --
MR. JACOBS: That he made recommendations that would have resulted in the project being completed faster in compliance, completed sooner.
MR. BAISE: Final plans and specifications had been approved. The contractor got underway in January of 1991, constructed the pipeline in six months and the remainder in sixteen months, Your Honor.
THE COURT: Well --
MR. BAISE: I do not see how this is relevant with respect to Florida Cities' official speeding up when it already had been locked in in terms of final plans and specifications and is approved by FDER and the Army Corps of Engineers and Lee County.

THE COURT: I'll sustain the objection, Mr. Jacobs.
MR. JACOBS: In that case, I'll move on to page 139, line twelve.
BY MR. JACOBS:
Q. Question: I'm now handing you Exhibit 335.
And for the Court's reference, this is trial Exhibit 446, also in evidence.
Would you tell me if you recognize that, sir?
A. Yes, I do.
Q. Would you identify it for the record, please?
A. This is a letter from -- or excuse me -- a memorandum from myself to Mr. Bradtmiller dated May 17, 1991.
Q. And are there attachments to that memorandum?
A. Yes, there are.
Q. And what are the attachments?
A. The attachments are a quote from a company called Chlorinator Replacement Parts for installing a supinator, a draft letter to Mr. Phillip Edwards, Department of Environmental Regulation, dated March 28, 1991.
Q. What is the issue here?
A. It's going to take me a few minutes to read through all this.
Q. Take your time.
A. The issues in this memorandum are, again, looking for ways to get this facility into compliance as quickly as

possible, and in this case, I am proposing some temporary measures that can be taken to improve our effluent quality and also I'm proposing a modification to the existing facility to allow construction to proceed quicker.

Q. How do these items relate to the completion of the new outfall line?

A. To the extent that the new outfall line would be placed in service, it was my intention to maximize treatment to attempt to meet the new effluent limits.

Q. Okay.

Is it fair to say that what you're recommending here would achieve compliance sooner than what was being done at the time?

A. Yes, sir.

Q. In fact, at the very end of your memo you say, quote, if approved by FDER, we will have substantially reduced construction time for the project, unquote; is that correct?

A. That is correct.

Q. Now, did you receive authorization to proceed in the manner that you recommended in this memorandum?

A. Uh, to be honest with you, I don't recall.

Q. Well, you would have had to receive authorization from Mr. Bradtmiller; is that correct?

A. Yes, it is.

Q. Who is his boss?

A. Mr. Reeves.

Q. If you look at the third page of Exhibit 335, there's a handwritten notation in the upper righthand corner. Do you know whose handwriting that is?

A. Yes, that is in my handwriting.

Q. What does it say, sir?

A. It says, quote, draft not sent per A.A.R., unquote.

Q. Who is A.A.R.?

A. That is Mr. Reeves.

Q. Does that refresh your recollection as to whether or not your recommendation was accepted?

A. Well, if you look at the date on that draft letter, it's March 28, 1991, versus my memorandum, which is May 17, 1991. It may be that the March 28th draft was something that I proposed earlier and was not approved and I was proposing it again. I don't know. I mean, the dates don't match up very well.

MR. BAISE: Again I would object that this is certainly confusing. It's not relevant to the time period. Actually we are talking about the contract that is, as stated earlier, was underway, the pipeline was constructed within a very quick and timely manner.

MR. JACOBS: Judge, he's testifying. The issue -- what is going on here is we're still before the compliance date and they're still out of compliance. This relates directly --

THE COURT: I tell you what we're going to do. We're not going to read anymore tonight and I'm going to let you submit a copy of the balance of the portions that you want the Court to consider, and I will allow counsel to state their objections to the balance of the deposition.

MR. BULLOCK: Do I need to renew my motion to strike at this time or may I -- do you want me to?

THE COURT: You can do that when you file your submission objecting to not only the deposition itself, basically, but also portions that Mr. Jacobs is designating.

And, Mr. Jacobs, I would ask that you file your designations specifically by Wednesday of next week. And counsel for the Defendants, now this will -- you'll need to submit to the Court a copy unless you want to leave this with the Court.

MR. JACOBS: I think the original actually has already been filed with the Court and I'm happy to --

THE COURT: Well --

MR. JACOBS: -- leave that one as well, sir.

THE COURT: All right.

Then, all you'll need to do is just to designate a document. I know that you've got that in the pre-trial statement, but in order to make sure that the designations are accurate, I would ask that you file your written designation by -- I think you can do that actually by Tuesday, do that by

Tuesday, and then the Defendants can have until the following Tuesday, whatever date that is, to file your objections to the designations, but we're not going to sit here any longer. It's five till 6:00 now.

MR. JACOBS: I apologize. I obviously underestimated how long it would take, Judge. Do you want me to just list the designations?

THE COURT: Yes, sir. The remaining designations will be sufficient and that starts, I guess, with page 142.

MR. JACOBS: Yes, sir.

THE COURT: Okay.

I tell you what I'm inclined to do is instead of my telling you, I'd like to give counsel the opportunity to maybe put their heads together, including counsel for both sides, and proposing what you would recommend -- what you would suggest to the Court in terms of additional oral and/or written submissions in terms of final arguments, including any motions that you want the Court to consider. And I've done this before and it's worked fairly well.

I have received the Defendant's joint memorandum addressing the Fifth Amendment, invocation of the Fifth Amendment by certain witnesses and I have already indicated to the Government that they will have until a certain time to file their response to that.

But I think at this point, I would suggest that and

would ask that counsel assimilate what we have procedurally remaining, including the issues that are addressed by the joint memorandum that I just referred to. And it may be that the Court -- apparently the Court is going to need to resolve those issues before the Court receives -- reasonably can expect to receive anything further from counsel.

But I would suggest that you put that in the mix and come up with a recommendation as to how you feel that the Court should procedurally deal with the balance of what remains to be done, including, as I say, any -- if you feel that we ought to reconvene for purposes of hearing oral arguments, summation, then include that in your written submission.

Now, it may be that counsel for the Government and the Defendants can come to joint recommendations regarding these procedures and recommendations for written submissions, and all the better.

I had an admiralty case that was pretty complex and pretty involved and this is a little reminiscent of that, and they were able to come up with an effective plan, which I modified to some extent, but it was very helpful to the Court. I think it's helpful to counsel to have an opportunity to come up with a recommendation regarding that.

Do you all have any objections or questions regarding that?

MR. JACOBS: That sounds fine. I'm willing to

suggest something right now or we can work it out later and get back to the Court.

MR. BAISE: I would suggest we work it out later.

THE COURT: I think so.

MR. BAISE: We had a long day. We might -- I thought we would not, but obviously --

THE COURT: Yeah. I will ask that you file your submissions by -- how much time do you want?

MR. JACOBS: Well, Judge, I have to do a brief by next Thursday on what I've just received today on the Fifth Amendment issue. May I propose the following: Thursday or Friday, two weeks from today, for these suggestions?

MR. BAISE: That would be acceptable to me. A couple of us are going to take some time to go fishing, so we're going to be out of pocket.

THE COURT: So you're suggesting, Mr. Jacobs, what would the date be?

MR. JACOBS: The 19th of April to file.

THE COURT: All right.

I will expect to receive -- to have you file with a courtesy copy to chambers your hopefully joint recommendations. And to the extent that you can't concur on your --

MR. BAISE: We can file them both places, I heard her question.

THE COURT: File a courtesy copy, yeah, because I'm

going to probably be in Jacksonville, still be in Jacksonville at that time, so, yeah, a joint recommendation. And to the extent that you can't agree, then your individual variations of what you're suggesting. Yes, sir.

MR. HIRD: Just for clarification, you reserved on our motion on Rule 52(c). I assume that's part of what we will be discussing in the submissions.

THE COURT: Right. You'll be -- I reserved on that, and I assume that a renewed motion will be made.

MR. HIRD: I certainly will, Your Honor.

THE COURT: And as a part of your considerations, you may want to include what you are recommending regarding how the Court will consider such motions and whether you want to address those in writing, including a briefing schedule on that.

Now, the Rule 52 motion, that will need to be resolved before -- before your summations -- before your final arguments, for obvious reasons. So, I'd like for you to take that into consideration when you -- when you deal with the procedures of the additional presentations to make to the Court.

If need be, I will reconvene and hear arguments, but I'm going to leave that to you all to initiate a plan in that respect, taking into consideration both the motions as well as summations.

MR. HIRD: And one more thing that I assume would be included, just for clarification. I assume the Court will rule on the Fifth Amendment issue, and if the ruling is adverse to the Defendants, they will have an opportunity to respond to the Government's offer of proof based on --

THE COURT: Yeah. You will recall that I did suggest that you address the Fifth Amendment issues, which you have apparently done, and the Court is going to need to rule on that and give the Defendants -- assuming that I rule adversely to the Defendants on that issue, then I will need to give counsel for the Defendants the opportunity to address the proffer.

And again, I think you need to take that into consideration in devising a meaningful organized briefing or procedural manner, a suggested procedural manner for finishing out what remains to be done.

Yes, Mr. Quinn.

MR. QUINN: Final question, sir, about the bench copy of the exhibits. Do you want to keep that in addition to the original, sir, for your use?

THE COURT: Yeah. Well, let's see. Actually, I'm not sure that that is necessary. The Court will have available to it the original exhibits which are also bound in three ring binders.

MR. QUINN: No, sir, the United States' Exhibits are not bound.

MR. BULLOCK: The binders in the corner are Florida Cities' and I believe -- I don't know if Avatar Holdings' are over there or not.

THE COURT: I think probably the Court better retain the copies that are presently bound. We'll find a place for them where we can keep them and have ready access to them until we're through.

Yes, sir.

MR. BAISE: Going back to the Charles Hill witness that Your Honor will recall, obviously -- going back to the Charles Hill matter, because he was unable to attend because of illness, and as you indicated, there certainly has been some testimony with regard to the PSC issues. I'm trying to think of a way of possibly providing like an affidavit or summary memo with regard to what he would have testified to.

Obviously, counsel will have a response to that if we deem it necessary. I mean, we need to go back and look at what has been testified to with regard to the PSC testimony in order to stop any further testimony.

THE COURT: No, we're -- unless counsel wants to stipulate to that.

MR. BAISE: Okay.

THE COURT: We're --

MR. BAISE: I wanted that clarified. Thank you.

THE COURT: All right.

Anything further?

MR. BAISE: I beg your pardon?

THE COURT: Anything further? All right.

MR. BAISE: Thank you very much, Your Honor.

THE COURT: We'll be in recess.

(Thereupon, the proceedings were concluded.)

CERTIFICATE

STATE OF FLORIDA)
COUNTY OF HILLSBOROUGH)

I, CLAUDIA M. FRY, DENNIS MIRACLE and JAMES M. SPANGLER, Official Court Reporters for the United States District Court, Middle District, Tampa, Division,

DO HEREBY CERTIFY, that we were authorized to and did, through use of Computer Aided Transcription, report in shorthand the proceedings and evidence in the above-styled cause, as stated in the caption hereto, and that the foregoing pages numbered 1 to 290, inclusive, constitute a true and correct transcription of our shorthand report of said proceedings and evidence.

IN WITNESS WHEREOF we have hereunto set our hand in the City of Tampa, County of Hillsborough, State of Florida, this 5th day of April, 1996.

CLAUDIA M. FRY, RPR, CSR, CP, CM
DENNIS MIRACLE
JAMES M. SPANGLER

DCN: R474G-0289.013

Review of the
Software Requirements Specification
for the

TACJAM, QUICKFIX, TRAILBLAZER MAINTENANCE TRAINER

Contract No. DAAB07-87-D-B008 D.O. 2056

22 February 1989

Prepared for:

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1 INTRODUCTION

1.1 Purpose

This report presents the results of a review of the Software Requirements Specification (SRS) for the TACJAM, QUICKFIX, TRAILBLAZER Maintenance Trainer Programs, Specification No. C5160201, dated 30 January 1989. This specification was submitted as CDRL Sequence No. A01T/B01T/C01T under Government Contract No. DAAB10-87-C-0070.

1.2 Scope

This SRS was reviewed for the following purposes:

a. To determine conformance of the SRS with requirements of DOD-STD-2167 and Data Item Description DI-MCCR-80025, Software Requirements Specification.

b. To assess the internal consistency and understandability of the SRS.

c. To assess the technical adequacy of the SRS for proceeding with software development.

d. To assess the technical adequacy of the SRS from a software support perspective.

e. To assess the traceability of SRS requirements to superior specifications.

1.3 Referenced Documents

Documents referenced for this review included:

a. Prime Item Development Specification for the TACJAM MAINTENANCE TRAINER PROGRAM, Specification No. C5158784, 10 February 1989.

b. Prime Item Development Specification for the QUICKFIX MAINTENANCE TRAINER PROGRAM, Specification No. C5158785, 7 February 1989.

c. Prime Item Development Specification for the TRAILBLAZER MAINTENANCE TRAINER PROGRAM, Specification No. C5158786, 14 February 1989.

d. DOD-STD-2167, Military Standard, Defense System Software Development, 4 June 1985.

e. DI-MCCR-80025, Data Item Description, Software Requirements Specification, 4 June 1985.

2 REVIEW COMMENTS

The table that follows lists comment(s) and/or recommendation(s) that are applicable to specific portions of the Software Requirements Specification for the TACJAM, TRAILBLAZER, QUICKFIX Maintenance Trainer Programs.

Item No.	Section	Comment/Recommendation
1.	Section 2.1	The publication dates listed for each of the Prime Item Development Specifications (PIDS) are incorrect. The dates should be modified to reflect the latest releases of these specifications.
2.	Section 3.2.1	Except for the Instructor Station and Student Station disk subsystems, Section 3.2.1 specifies memory and input/output channel reserve requirements only. Memory and input/output channel capacity requirements should be stated.
3.	Table 3.4.1.1-1	The table of Control Operations inputs does not list all inputs described in Section 3.4.1.1.2, Control Operations Processing. Inputs not listed include the wraparound messages from Student Stations, SSANs, password/system manager access code, instructor updated data and time.
4.	Section 3.4.1.1.2 l)	This section does not specify or reference any criteria used to determine the "severity" of a hardware failure that can cause a system shutdown.
5.	Section 3.4.1.1.2 m)	This section does not indicate whether the computer "up-time" is determined and stored periodically, or is determined and stored as a result of the detection of system shutdown or other conditions.
6.	Table 3.4.1.1-2	The table of Control Operations outputs does not list all outputs described in Section 3.4.1.1.2, Control Operations Processing. Outputs not listed include the logged date and time, the wraparound messages to Student Stations, the Student Station main menu, the Instructor Station main menu, and the computer up-time.

Item No.	Section	Comment/Recommendation
7.	Table 3.4.1.2-1	Change "...Add/Delete and Instructor..." to "Add/Delete Instructor...".
8.	Table 3.4.1.2-1	The table of Maintain System Integrity inputs does not list all inputs described in Section 3.4.1.2.2, Maintain System Integrity Processing. Inputs not listed include SSANs, password/system manager access code, name, and class number.
9.	Table 3.4.1.2-2	The table of Maintain System Integrity outputs does not include the "invalid class error message".
10.	Section 3.4.1.4	The sense of the second sentence implies that the word "independent" should be replaced with "dependent".
11.	Section 3.4.1.4.2 g)	This section references but does not completely specify requirements pertaining to the display of queued error messages. The section does not indicate the duration of display of each message, whether the operator must acknowledge each message before it is replaced with the next message, or the disposition of messages if the operator does not request their display.
12.	Section 3.4.1.4.2 h)	This section references but does not completely specify requirements pertaining to the dump of display data to the printer. The section does not indicate whether text only or text and graphics data will be dumped.
13.	Section 3.4.1.4.2 i)	This section references but does not completely specify requirements pertaining to a help key. The section does not indicate whether help data will be context sensitive.
14.	Figure 3.4.2-1	The label for object 2.2 should be Maintain Class.

Item No.	Section	Comment/Recommendation
15.	Section 3.4.2.2.2 c)	COI description appears to have been omitted from the list of Maintain Class parameters that can be modified.
16.	Table 3.4.2.2-2	Attendance record data is not listed as a Maintain Class Data output.
17.	Table 3.4.2.3-1	The output data item, Statistical Display, is listed as an input to Perform Statistical Analysis. It should be deleted from this table and added to Table 3.4.2.3-2.
18.	Table 3.4.2.3-2	The input data item, Statistical Request, is listed as an output to Perform Statistical Analysis. It should be deleted from this table and added to Table 3.4.2.3-1.
19.	Table 3.4.2.3-1 through Table 3.4.2.6-2	The input/output data items identified as transferred from/to the Control User Interface subfunction are not listed explicitly in the corresponding output/input tables for that subfunction (Tables 3.4.1.4-1 and -2). The same comment applies to many of the input and output tables for the Author Courseware, Perform Built-in-Test, and Perform Maintenance Training subfunctions.
20.	Section 3.4.3.1.2 o)2 (page 52)	Define the acronym FLFC when it is first used.
21.	Section 3.4.3.3.2 j) (page 58)	Change references to COI deletion or modification to "(in h)" and "(in i)", respectively.
22.	Section 3.4.4	Clarify the sentence "BIT software tests the operational readiness of equipment that either have no built-in tests or stand-alone built-in tests and do not interface with the Maintenance Trainer.".

Item No.	Section	Comment/Recommendation
23.	Table 3.4.4.1-1	The table of Level-A Test inputs does not include responses from devices tested, such as described in Section 3.4.4.1.2 b) and following.
24.	Figure 3.4.4-1	The BIT Data Flow Diagram does not depict data flow to/from devices tested.
25.	Table 3.4.4.1-2	The table of Level-A Test outputs does not include test stimuli to devices tested, such as described in Section 3.4.4.1.2 b) and following.
26.	Section 3.4.4.1.2	Failure conditions identified for all wraparound type tests should include both 1) received data different from transmitted and 2) messages not received. Section 3.4.4.1.2 b) properly includes both conditions. Section 3.4.4.1.2 d) and others do not.
27.	Section 3.4.4.1.2 i)	This section does not indicate the method used to test the plasma display internal processor and RAM.
28.	Section 3.4.4.2	Remove the comma from the first sentence.
29.	Section 3.4.4.2.2	It is unclear from the descriptions of tests requiring operator assessment, e.g., comparison of printer output with test pattern, whether any subsequent operator entry is used for status reporting, statistics, or archiving. Clarify. Any such operator entry should be added to the input table.
30.	Table 3.4.4.2-2	This list of Level-B Test inputs includes Student Station Available Disk Space. The Level-B Test processing description in Section 3.4.4.2.2 does not include requirements for this measurement. A section similar to Section 3.4.4.1.2 h) should be added here.
31.	Table 3.4.4.2-2	Table caption should be "Level-B Test Outputs".

Item No.	Section	Comment/Recommendation
32.	Table 3.4.5.4-1	The source of the input item. Excecution Information. should be Control Training Lesson.
33.	Section 3.4.5.5.2 f)7	This section should cite a specification for replica CRT display requirements, as done in the preceding section for the plasma displays.
34.	Section 3.5.1 a) & c)	Change "Appendicies" to "Appendices".
35.	Table 3.8-1	The Software Requirements Traceability Matrix is not consistent in its allocation of Prime Item Development Specification requirements. For example, PIDS Section 10.0 is listed for SRS Para No. 3.4.3.1.2.b, but not for related requirements. SRS paragraphs pertaining to processor reserves are traced to System Specification requirements only; they do not reference similar PIDS requirements. The procedure used to construct the matrix should be provided. The explanation should address why requirements are traced to one or both superior specifications and should explain precedence, if any.
36.	Section 4	The discussion of qualification requirements is essentially a restatement of the DI-MCCR-80025 preparation instructions. This section should be rewritten such that it meets the intent of the DID. Qualification methods (and techniques, tools, and tolerance limits, where applicable) should be specified for each requirement.

Item No.	Section	Comment/Recommendation
37.	Appendix I	The discussions of interfaces and interface data tables should address the following additional areas: - response time requirements - data validation/error detection - data correction - retransmissions - reaction if no response - priorities - method of synchronization - protocols - handshaking - resolution/prevention of contentions - message IDs - message lengths - message blocking/packing/format - data formats, units, scaling - data types, ranges - memory buffer requirements - hardware interface control/status data. - device addresses

3 SUMMARY AND CONCLUSIONS

The following sentences summarize the results of the review of the SRS against each of the stated objectives:

a. If it is assumed that interface requirements are adequately addressed in a separate Interface Requirements Specification, the SRS meets the intent of DOD-STD-2167 and Data Item Description DI-MCCR-80025.

b. The SRS is generally consistent and understandable.

c. The SRS was found to be technically adequate for proceeding with software development.

d. The SRS was found to be technically adequate from a software support perspective.

e. Because the System Specifications cited in Section 2.1 of the SRS had not been received prior to the conduct of this review, the review did not attempt to validate the SRS Requirements Traceability Matrix.

4 RECOMMENDATIONS

It is recommended that the Software Requirements Specification be modified to correct all deficiencies identified in this report. It is also recommended that the revised SRS be reviewed for requirements traceability once the SRS cited System Specifications have been received.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,) Case No. 93-281-CIV-FTM-21
Plaintiff,)
vs.) Wednesday, March 27, 1996
) Tampa, Florida
FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS, INC.,)
Defendants.)

TRANSCRIPT OF NON-JURY TRIAL
BEFORE THE HONORABLE RALPH W. NIMMONS, JR.,
UNITED STATES DISTRICT JUDGE

Appearances of Counsel:

For the Plaintiff: Mr. Daniel S. Jacobs
Mr. T. Anthony Quinn
Ms. Gwendolen Fitz-Henley

For Defendant Avatar: Mr. David B. Hird
Ms. Joanne Tsotsos

For Defendant Florida Cities: Mr. Gary H. Baise
Mr. Alexander M. Bullock
Mr. Lance High
Mr. Don G. Scroggin

Reported by: Dennis Miracle
Official Court Reporter

PROCEEDINGS

THE COURT: Good morning.

All right. I think we're ready to proceed. Where is Mr. Jacobs?

MR. QUINN: Mr. Jacobs is on his way, Your Honor, but I'm going to carry on with the exhibits.

THE COURT: All right.

MR. QUINN: Avatar Holdings prepared over the night a stipulation which I'm in the process of reviewing. It seems to list all of the documents which we listed seriatim yesterday.

The stipulation puts in the Code 1, Code 2 and Code 3 objections. I believe it is acceptable.

It merely states that the objections are indicated in the following manner and that there are a few exhibits that the Government seeks to admit through the testimony of Mark Klingenstein that are not the subject of this stipulation. Defendants will raise the individual objections to these exhibits on Wednesday, today. These exhibits are identified as Government's Exhibits 172, 350, 510, 511 and 512.

I believe this stipulation is acceptable, so we can proceed with those five objections, Your Honor, and address those documents rather than the whole list that we had the other day. Maybe it will save some time.

MR. HIRD: Your Honor, we prepared this over night in order to save time.

I just want to note for the record that in addition to the exhibits that were admitted on Monday, the Government is seeking through Mr. Klingenstein to get in a total of 331 additional exhibits.

We have noted our objections for the record. We think a lot of these exhibits go way beyond the history of the violations and the information Mr. Klingenstein needed in order to state in his reports.

And we want to make very clear our sense that we feel that it is inappropriate for these exhibits to come in this way.

I'm sorry, Your Honor. I gather you're having trouble hearing me?

THE COURT: Well, I have heard you. I --

THE COURT SECURITY OFFICER: The court reporter has to hear you.

MR. QUINN: With the Court's permission, Mr. Jacobs is going to sign off on the stipulation and then we can address those five exhibits right now. We'll handle distributing these at the next break, Your Honor.

THE COURT: All right.

MR. QUINN: The next exhibit is Exhibit Number 172.

MR. HIRD: Your Honor, this exhibit appears to be handwritten notes. It does not appear to be an express business record, and I think our objection to this exhibit has to do with hearsay.

THE COURT: All right.

MR. JACOBS: Good morning, Your Honor.

THE COURT: Good morning.

By the way, the jackhammer will terminate at 9:00 o'clock, as I understand it.

MR. JACOBS: Thank you, Your Honor. I apologize for running a little late this morning.

This is a business record --

THE COURT: Is or is not?

MR. JACOBS: It is a business record from Florida Cities' own files.

THE COURT: I need to see the exhibit, please.

(Pause.)

MR. JACOBS: Just looking at the Bates number, this was produced by Florida Cities. It is a business record. It reflects a telephone conversation with the then executive vice-president of Florida Cities, Tony Reeves, if you look at the top of the exhibit.

THE COURT: Who is Tony Reeves?

MR. JACOBS: The former executive vice-president of Florida Cities who pled the Fifth Amendment.

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THE COURT: I'll overrule the objections and receive Exhibit 172.

MR. HIRD: The next exhibit, Your Honor, is Exhibit 350. Your Honor, this is a memorandum concerning the Florida Cities Fiesta Village wastewater treatment plant. That's not a facility in this case, and our objection is that it's irrelevant.

MR. JACOBS: Judge, it's not the first page of the memorandum, per se, but the attachment which contains important admissions by Florida Cities with respect to their knowledge of matters specifically relating to a waste load allocation at the Waterway Estates plant.

THE COURT: That was what number, 350?

MR. HIRD: 350, Your Honor.

THE COURT: 350.

MR. JACOBS: And the reference to Waterway Estates is on Page 3 of the exhibit.

Again, Exhibit 350, Page 3, you'll see references right up at Paragraph 7 to Waterway Estates. Then you'll see a reference in Paragraph 8 to the Caloosahatchee waste load allocation documentation which Mr. Klingenstein referred to in his testimony and, again, another reference in Paragraph 8 to Waterway Estates, so it's highly relevant.

THE COURT: Say that again. I just got the exhibit.

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MR. JACOBS: I'm sorry, Your Honor.

Exhibit 350 –

THE COURT: Right.

MR. JACOBS: – directing the Court's attention, if I may, to Page 3, Paragraphs 6 and 8 in particular, both reference the Waterway Estates plant. So does Page 4, for that matter.

The document references the waste load allocation study performed by the State of Florida in 1981 that Mr. Klingenstein referred to yesterday in his testimony.

THE COURT: Yes, sir?

MR. BULLOCK: If the Court please, Your Honor, this has somehow been represented as a document which Florida Cities admits knowing that it had no waste load allocation. We object to that characterization of the document. We don't believe the document says that. The document...

THE COURT REPORTER: Judge, could counsel go to the microphone? I'm having a very difficult time hearing them.

THE COURT: Mr. Miracle is having a difficult time. Is the microphone working at your table? No?

I tell you what, do we have the portable microphone? Do we have the portable, hand-held microphone?

THE DEPUTY CLERK: Yes, sir.

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THE COURT SECURITY OFFICER: It's working now.

THE COURT: It's working? All right.

MR. JACOBS: Your Honor, I might also say this: This is a petition of the Florida Cities Water Company, again, directing the Court's attention not to the cover page, but this was a publicly filed document apparently with Florida Department of Environmental Regulation. It's the petition itself signed by Florida Cities' own counsel that we ask be entered into evidence.

If the objection is specifically to Page 1, I could perhaps understand the basis of the objection, but not to a publicly filed document.

THE COURT: Mr. Bullock?

MR. BULLOCK: May I speak to that, Your Honor?

THE COURT: Yes, sir.

MR. BULLOCK: Your Honor, let me, first of all, refer you to Paragraph 8 on Page 3, the parenthetical that says, Except that the Respondent did not model its Caloosahatchee River waste load allocation documentation because of the assumed tie-in to Cape Coral, and the rest of the document -- the rest of the assumptions that are in that parenthetical.

If that parenthetical is removed – which, in fact, what happened is, there was no tie-in to the Cape Coral facility, then the assumptions which follow are

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incorrect, so what happened is the design conditions for -- or the underlying purpose for Waterway Estates not being included in the 1981 document didn't happen, so there is no evidence from this or from any document that Florida Cities lost its 1981 waste load allocation.

MR. JACOBS: Your Honor, he's arguing the merits. We would obviously have a different interpretation. The objection is relevancy. It relates directly to Waterway Estates. It's a publicly filed document. It's written by Florida Cities' own counsel.

THE COURT: All right. I'm going to sustain the objection as to the first page of this document, which is a memorandum. I'll receive the balance of it.

MR. HIRD: Your Honor, the last three exhibits are 510, 511 and 512 and they are all -- they are very similar. These are statements from depositions in which witnesses took the Fifth Amendment.

Our objection is we can't -- A, it's irrelevant and, B, we can't understand how this has anything to do with Mr. Klingenstein's opinion and how this would shape his views as to the seriousness of the violation or any other issue by looking at pages where individuals asserted their Fifth Amendment rights.

MR. JACOBS: In a civil case --

THE COURT: Wait, wait, wait.

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MR. JACOBS: I'm sorry, Your Honor.
THE COURT: Are you through?
MR. HIRD: I'm not finished.
Your Honor, the Court, while Mr. Jacobs --
THE COURT: I'll tell you what, I'll call on you -- I'll determine when counsel is through, and then I'll call on you, then you can start speaking.
MR. JACOBS: Yes, sir.
MR. HIRD: Mr. Jacobs may argue that you're entitled to draw an inference -- and we have a dispute with that -- but there is no question that Mr. Klingenstein has no particular power to draw an inference.
And the idea that he was somehow influenced by people taking their Fifth Amendment in his expert opinion is absurd.
THE COURT: All right. Just a moment.
Now, the exhibits we're talking about are 510, 511 --
MR. HIRD: -- 511 and 512.
THE COURT: -- 511 and 512.
All right. Just a moment.
(Pause.)
THE COURT: All right. Mr. Jacobs?
MR. JACOBS: Well, Your Honor, this is a civil matter in which adverse inferences, as the Court is well

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aware, can be drawn from the invocation by the Defendant's officers of the Fifth Amendment.
If the specific objection is to introducing it in the context of Mr. Klingenstein's testimony, we would be happy to reintroduce it during the testimony, or the lack of testimony, of the individuals who --
THE COURT: Well, I'm inclined to agree with Mr. Hird at least as to introducing these exhibits in connection with Mr. Klingenstein's testimony. We can address the balance of the objections if and when you proffer those exhibits again. But I'll sustain the objection at this point.
By the way, just so I'll understand, 510, 511 and 512 in my notebook simply state the -- make the statement, Upon the advice of counsel, I respectfully decline to answer and invoke my rights under the Fifth Amendment.
You're obviously saying that this pertains to a certain witness' invoking a Fifth Amendment privilege, and one cannot tell from looking at the exhibit in my notebook as to who is asserting that. I can't tell anything from this. That's just for future reference, I guess, but that's what's in my notebook.
MR. JACOBS: Yes, Your Honor.
The witness list itself will identify 510 as the statement of Gerald Allen, 511 as --

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THE COURT: Well, you see, the witness list is not really an exhibit as such. It's an aid. So, any exhibits that we've got in here need to stand on their own. That's for future reference --
MR. JACOBS: Thank you, Your Honor.
THE COURT: -- in this case.
MR. HIRD: Your Honor, if I may, just to make the record complete, we have a further objection with respect to 510, the statement of Mr. Allen. Mr. Allen ultimately did testify in deposition and will be a trial witness in this case.
THE COURT: Mr. Allen, did you say?
MR. HIRD: Yes, sir.
THE COURT: Okay.
All right. Are we ready for Mr. Klingenstein to retake the witness stand?
MR. JACOBS: Yes, Your Honor.
THE COURT: All right.
Yes, sir. You may proceed.
MR. JACOBS: Your Honor, no further questions of Mr. Klingenstein at this time.
THE COURT: All right. Mr. Bullock, you may cross-examine.
MR. BULLOCK: Thank you, Your Honor. Good morning.

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MARK JAMES KLINGENSTEIN,
being previously duly sworn, testified as follows:
CROSS EXAMINATION
BY MR. BULLOCK:
Q. Good morning, Mr. Klingenstein.
A. Good morning.
Q. Mr. Klingenstein, as I believe you testified in your direct testimony, you are currently employed by SAIC, is that correct?
A. Yes, that is.
Q. SAIC, for the most part, exists to provide expert witness and other services to EPA and DOJ, is that correct?
A. SAIC as an entity exists to provide a variety of high-tech consulting services to a variety of both Government and private clients.
Q. And one of your major clients is, in fact, EPA and another is DOJ, is that correct?
A. They are certainly very significant clients.
Q. As a matter of fact, your current duties include working on work assignments in which SAIC provides expert witness services to EPA and DOJ, is that correct?
A. Yes, that is correct.
Q. And you have previously managed a group of about 20 individuals all of whom are dedicated to providing expert witness and related services to EPA and DOJ, is that

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correct?
A. Expert witness services and other services related to U.S. EPA programs.
Q. Including enforcement actions, enforcement services?
A. Yes.
Q. All right. In the calendar year 1995, can you tell me how much of your time was spent working for EPA and DOJ on these work assignments?
(Pause.)
A. I couldn't tell you exactly. Certainly more than 50 percent of my time.
Q. And can you tell me how much in billable time you, yourself, generated for SAIC working on work assignments for EPA and DOJ?
A. I would assume that would be the same answer, which would be more than 50 percent of my time, which we work a 40-hour work.
Q. Can you tell me in dollar figures how much that was billed to EPA and/or DOJ?
A. Not off the top of my head.
Q. Can you give me a ballpark estimate?
A. Well, the billing rate -- my billing rate would be approximately 94, $95, $96 an hour, so that fraction of a year times $96.
Q. Okay. Now, you are also a vice-president, an

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assistant vice-president of SAIC?
A. Yes, an assistant vice-president.
Q. And as part of that, you would consider yourself part of management of SAIC?
A. Yes, that's true.
Q. All right. And can you tell me in dollar figures how much the enforcement unit that you used to manage generated for SAIC in 1995 as a result of working for EPA and DOJ?
A. Well, I didn't -- the portion of the company that's doing actual enforcement work, under my direction last year, we did just about a million dollars worth of work.
Q. Okay. Was that a similar figure for 1994?
A. Pretty close, roughly.
Q. Okay. How many times in the past five years have you worked as an expert witness or a consultant on behalf of a defendant in an environmental enforcement action?
A. I'm sorry, counsel. What do you mean "how many times"?
Q. How many times in the last five years have you been employed as an expert witness or a consultant on behalf of a defendant in an environmental enforcement action?
A. You mean how many different actions?
Q. How many contracts have you performed in which you have provided expert witness or expert consultant services for a defendant in an environmental enforcement action?

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A. Well, in terms of contracts, it would be two. We have one contract with EPA and one contract with the U.S. Department of Justice.
THE COURT: With a defendant, did you say?
MR. BULLOCK: With a defendant.
THE WITNESS: I'm sorry, sir. I --
MR. JACOBS: I'm sorry. For clarification, is it for the Defendant? I thought Mr. Bullock first asked --
THE COURT: I think he said "a defendant." Did you mean any defendant?
MR. BULLOCK: I meant any Defendant.
THE WITNESS: I'm sorry, sir. Did you mean working for the Defendant?
BY MR. BULLOCK:
Q. That's correct.
A. None.
Q. Thank you.
THE COURT: And that's any defendant, not just the Defendants in this case, is what his question pertains to. You understood that?
THE WITNESS: Yes. Thank you.
BY MR. BULLOCK:
Q. Let me refer you, if you have it in front of you, to your resume which is attached to the back of your report. You, on Page 2 of 7 --

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MR. BULLOCK: Your Honor, I believe it is Appendix A.
THE COURT: I've got it.
BY MR. BULLOCK:
Q. Mr. Klingenstein, you list a number of cases in which you have provided expert support. That would be the third paragraph down.
A. Yes.
Q. All right. Fort Smith, Arkansas, what type of case was that?
A. That was a Clean Water Act case.
Q. And who was the defendant?
A. Was the City of Fort Smith, Arkansas.
Q. A municipal facility?
A. Yes.
Q. The PennTech Paper Company, I assume, was a manufacturing facility?
A. Yes, that's correct.
Q. Menominee Paper was a manufacturing facility?
A. It was a manufacturing facility, but the case involved the Menominee municipal case -- facility as well.
Q. The Tyson's Chicken case was a manufacturing facility, correct?
A. Yes, that's correct.
Q. The Purnell Sausage and Gorton's of Gloucester, both

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of those were manufacturing facilities?
A. Yes, they were.
Q. O'Donell-Usen, what was that case?
A. That's a manufacturer.
Q. Okay. Terra Haute, Indiana?
A. Is a municipal facility.
Q. Winchester, Kentucky?
A. Was municipal.
Q. Okay. Hawaii Kai -- I'm not going to begin to pronounce that -- but Hawaii Kai?
A. Hawaii Kai. That is a municipal facility.
Q. All right. Bumnell?
A. Is a municipal facility.
Q. And Metro Dade Citizens Authority?
A. Involved the authority in Miami.
Q. All right. Taracorp?
A. It is an industrial facility.
Q. Gulf Chemical?
A. It's an industrial.
Q. And Jefferson County?
A. Is municipal involving the county authority.
Q. All right. You have never been employed by a privately owned, publicly regulated utility, have you?
A. I was employed by the City of Philadelphia while I was an intern in school.

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Q. Okay. Is the City of Philadelphia owned privately?
A. Oh, I'm sorry, sir. No.
Q. Okay. So, the answer to my question is, you have never been employed by a privately owned, publicly regulated utility?
A. No.
Q. All right. Have you ever provided consulting services for a privately owned, publicly regulated utility?
A. No, I don't believe so.
Q. All right. You have never designed a plant for a privately owned, publicly regulated utility?
A. No.
Q. All right. You have never sought to permit a facility like -- which is a privately owned, publicly regulated utility, correct?
A. That's correct.
Q. All right. And that would include any facility -- you have never permitted a facility in the state of Florida, is that correct?
A. That is correct.
Q. All right. You're not an engineer licensed in the State of Florida, are you?
A. No, I'm not.
Q. All right. Do you hold any operator licenses in the State of Florida for plant operations?

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A. No, I do not.
Q. Do you hold any licenses for plant operation in any state or political subdivision in the country?
A. No, I do not.
Q. Have you ever in any way overseen the construction of a facility for a privately owned, publicly regulated utility?
A. No, I have not.
Q. Have you ever provided any engineering or consulting services for any company who is regulated by the Florida Public Service Commission?
A. No, I have not.
Q. All right. And isn't it true that you really have no knowledge of the procedures and practices of the Florida Public Service Commission?
A. I have knowledge of their procedures based on the documents that I have reviewed as a result of my involvement in this particular case.
Q. Can you tell me which documents that involve the Public Service Commission you have reviewed?
A. Primarily correspondence that -- from Florida Cities, parties either to various outside entities, such as the State of Florida, or internal documents that have discussed Public Service Commission issues.
Q. Have you reviewed any of the statutes or regulations

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which govern the Florida Public Service Commission?
MR. JACOBS: Objection, Your Honor; beyond the scope of direct on the Public Service Commission.
THE COURT: Overruled.
THE WITNESS: No.
BY MR. BULLOCK:
Q. Have you reviewed any communication between Florida Cities and the Public Service Commission, or vice versa?
(Pause.)
A. That I can't recall.
Q. Let me turn now and ask you, what experience have you had performing modeling studies of river flows in the State of Florida?
A. None.
Q. You testified on Monday that you had interviewed EPA Region 4 employees about this case, is that correct?
(Pause.)
A. I don't specifically recall saying that on Monday.
Q. I believe you testified that you interviewed some EPA employees, isn't that correct?
A. My point, counsel, is I don't recall specifically whether EPA employees were identified as opposed to other individuals.
Q. Well, let me ask you this way, then: Have you ever interviewed any EPA Region 4 employees about -- well, we'll

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start with Waterway Estates -- and the claims that surround Waterway Estates?
A. I have had conversations with EPA Region 4 employees.
Q. About Waterway Estates?
A. Yes.
Q. Okay. Can you tell me who they were?
A. Mr. Ken Kwan and Ms. Gwen Fitz-Henley and Mr. Roger Pfaff.
Q. Let me turn with you now and talk about the 1981 waste load allocation study. In your report on Page 14, you have stated that the river was unacceptably impacted by nutrients from dischargers, the third paragraph up from the bottom.
A. Yes.
Q. Isn't it true, Mr. Klingenstein, that there is no actual data which supports this statement?
THE COURT: What paragraph? What does it start with?
MR. BULLOCK: FDEP's January 1981 Caloosahatchee River...
THE COURT: All right.
MR. BULLOCK: And, Your Honor, it is the last sentence of that paragraph.
THE COURT: All right.
THE WITNESS: My interpretation of the waste load allocation document was that the Florida agency was of the

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opinion that the overall nutrient loads to the river were a concern.
BY MR. BULLOCK:
Q. My question, Mr. Klingenstein, is, isn't it true that there is no actual data which supports this conclusion in your report?
(Pause.)
A. My belief is that the State agency came to this conclusion based on data available to them.
Q. Okay. And what data have you reviewed that support your conclusion that the river was unacceptably impacted?
A. Well, certainly even up through the present 1994 305(b) Florida State Water Quality Study, there are notations made that there is concern on the part of the State based on data from the last -- well, since, I believe, 1989 -- that there are still unacceptable nutrient loads to the river.
Q. All right. Well, let's go through some of this, then. The 1981 study, that was a modeling study, wasn't it?
A. Yes.
Q. All right. The 1990 study which was based on the 1989 information that you just spoke of was also a modeling study, wasn't it?
A. Yes, it was.
Q. Isn't it true, Mr. Klingenstein, that modeling is

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merely an attempt to predict possible impacts based upon certain assumptions of future water quality conditions under assumed scenarios of water flows, treatment and disposal options used in the river?
A. Not entirely to the extent that it doesn't necessarily have to be modeling future, at some far, distant point in time. A modeling effort is carried out typically using available data to calibrate the model, in effect to make the model as carefully represent as possible conditions in the river, and then a variety of different scenarios can be modeled. Both existing scenarios can be modeled as well as future or predicted scenarios.
MR. BULLOCK: Your Honor, I'm going to be referring to Plaintiff's Exhibit 349, or we have marked it as Florida Cities' Exhibit 16.
THE COURT: 349 is in evidence?
MR. BULLOCK: And I'll be glad to hand a copy of that, if you would like. It's our 16.
THE COURT: Same as Plaintiff's 349?
MR. BULLOCK: That is correct, Your Honor.
THE COURT: All right.
MR. JACOBS: Just for the record, Your Honor, it's not exactly the same.
THE COURT: All right.
MR. JACOBS: The first page is not the same.

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MR. BULLOCK: We'll be glad to give you our copy of Plaintiff's 349. The substance of the document is the same.
MR. JACOBS: I suspect that would be the case, Your Honor.
THE COURT: All right. Well, go ahead.
MR. BULLOCK: Thank you, Your Honor.
THE COURT: 349 is in evidence. And if he refers to something that's not in evidence, you can point it out.
MR. JACOBS: Thank you.
BY MR. BULLOCK:
Q. Mr. Klingenstein, who was this study prepared for?
A. I'm sorry, sir. Who was it prepared for?
Q. Who was it prepared for?
(Pause.)
Q. Well, let me move on a little bit. Let me refer you to the second paragraph of Page 1, beginning "These allocations." Isn't it true that this document was prepared for the Fort Myers District Office of the Florida Department of Environmental Regulation?
A. Yes, that would be the indication of that paragraph.
Q. All right. Who is it in the FDER or which section in the FDER actually issues discharge permits for the State of Florida?
A. I couldn't give you their formal name.

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Q. Okay. Do you know whether or not the discharge permits are issued from Tallahassee or from the regional offices?
A. I could not tell you.
Q. All right. Well, assume with me, then, that the district offices are the offices which issue the discharge permits. Under that scenario, then, this would have been -- the language in the paragraph which I just pointed out to you indicates that this study was generated due to pending requests for permits from -- at the Fort Myers office?
MR. JACOBS: Objection, Your Honor. I think this is an improper hypothetical for this witness. He's already testified he doesn't have personal knowledge of exactly which offices prepare these.
THE COURT: I'll overrule the objection.
THE WITNESS: I'm sorry. Could you repeat the question?
BY MR. BULLOCK:
Q. Assume with me, then, that the regional offices are the offices which issue the discharge permits; then the language of this document -- isn't it true that this document states that it was generated for the regional offices in preparation or due to pending requests for permit renewals?
A. Given that hypothetical, that would be the implication

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of that paragraph, yes.
Q. All right. Let's turn now to the study. I asked you a minute ago about the different scenarios -- whether or not modeling was based on assumed scenarios. You would agree with me that modeling is based on assumed scenarios, is that correct?
A. I agree that modeling can be based on assumed scenarios, but it can also be based on actual scenarios.
Q. All right. In real life, many of these assumed scenarios are unlikely to occur, is that correct?
A. That, I guess, would depend on what particular situation you were modeling, how likely the scenarios are to occur.
Q. Well, the 1981 study that we're looking at, the modeling study was based upon the predictions of certain design conditions simulated by DER in their computer program, isn't that correct?
A. Yes.
Q. Okay.
MR. BULLOCK: Your Honor, I realize we keep flipping back and forth between DER and DEP – and I know that is a little confusing -- but during this time it was FDER, and I think early -- in the early '90's it became FDEP, so I may say the same thing.
BY MR. BULLOCK:

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Q. One of the design conditions of this study, Mr. Klingenstein, was that all four facilities in this area of the river were all discharging at full capacity simultaneously?
A. Yes, I believe that's true.
THE COURT: Just a moment, please.
I'm looking for Plaintiff's 349.
(Pause.)
THE COURT: Go ahead.
BY MR. BULLOCK:
Q. If I might, Mr. Klingenstein, let me ask the question again: Isn't it true that the design conditions of this study were based upon the presumption that all four of the facilities in this area of the river were all discharging at full capacity simultaneously?
A. Yes, I believe it was.
Q. All right. Just as an aside, Mr. Klingenstein, how much time did you actually spend in reviewing this report -- in reviewing this study to generate your report?
A. I couldn't tell you an exact amount of time.
Q. Isn't it true, Mr. Klingenstein, that during the projected time of this study, that these -- the four facilities which discharge into this portion of the Caloosahatchee River never discharged at full capacity simultaneously?

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A. Well, I haven't reviewed data for all of these facilities, so I couldn't answer that question for all the facilities.
Q. All right. So, the answer to the question is, you don't know whether or not they discharged to full capacity simultaneously between 1980 and 1990?
A. As I said, I have not reviewed data for all the other facilities.
THE COURT: And so you don't know --
THE WITNESS: I do not know.
THE COURT: – because you haven't reviewed, correct?
THE WITNESS: Yes. Yes.
THE COURT: All right.
BY MR. BULLOCK:
Q. Have you reviewed data from Waterway Estates?
A. Yes, I have.
Q. And what years of data did you review?
A. I've reviewed flow data – I couldn't tell you every specific year -- but from the period of time of this study up until the present.
Q. And Waterway Estates never discharged at full capacity, did it?
A. That's correct.
Q. All right. So, in a sense, one -- right away, we can

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tell that one of the four design criteria for this modeling study never occurred?
(Pause.)
A. Well, the actual flows were not as high as the number that was used for this particular scenario, no; that's correct.
Q. Thank you.
You rely, on the bottom of Page 14 of your report, the 1990 study --
MR. BULLOCK: That is Plaintiff's 422, Your Honor.
THE COURT: Are you basically through with 349?
MR. BULLOCK: Your Honor, no, sir. You might want to keep it close.
THE COURT: Okay.
BY MR. BULLOCK:
Q. Mr. Klingenstein, you rely on the 1990 study for confirmation of the 1981 study in your report?
A. Yes.
Q. Okay. In fact, the 1990 study is another computer model, isn't that correct?
A. It reports the results of another modeling effort, yes.
Q. And the modeling effort in the 1990 study is -- actually, the 1990 study is a model of proposed expansions of all of the discharges on the Caloosahatchee River?

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A. I don't recall whether expansion of every one was proposed.
Q. How much time did you spend reviewing the 1990 study in preparing your report?
A. Again, I couldn't give you an exact figure.
Q. Okay. The 1990 study is assumed on all of the dischargers discharging at full capacity, isn't that correct?
(Pause.)
A. I know that the specific discharge assumptions were made in the report; without that document in front of me and having the ability to refer to it and compare that to the design capacity of each of those plants at that point in time...
Q. Okay.
MR. BULLOCK: Your Honor, what I have is the Defendant's exhibit that I can hand him. It's in evidence as a Plaintiff's exhibit. It's Plaintiff's 422.
THE COURT: All right. Hand me up Plaintiff's 422.
That's also Defendant's exhibit what?
MR. BULLOCK: I'm sorry. It is not a Plaintiff's exhibit.
THE COURT: Okay. Okay.
MR. JACOBS: I'm sorry to interrupt, Your Honor.

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For the record, are we looking at Plaintiff's 422?
MR. BULLOCK: That's correct.
MR. JACOBS: Thank you.
Does the witness have it in front of him?
THE WITNESS: I'm sorry. No, I don't.
THE COURT: What's the question?
MR. BULLOCK: Your Honor, I'm asking him whether or not the 1990 study was based on the -- whether or not any of the -- the 1990 study was based on assumptions that all of these facilities were discharging at full capacity.
THE COURT: Okay.
THE WITNESS: That appears to be true.
BY MR. BULLOCK:
Q. And, again, I believe you said that you have no knowledge of whether or not in fact these facilities have discharged at full capacity between 1990 and today?
A. I'm sorry. Could you repeat that?
Q. I said, I believe you have said earlier that you have no knowledge of whether or not the four facilities modeled in this study actually discharged at full capacity from 1990 until today?
A. Other than having seen some flow data for Waterway Estates...
Q. Has Waterway Estates ever discharged at full capacity between 1990 and today?

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A. Certainly recalling the data, its average flow has been below its capacity.
Q. Okay. The answer to the question is, you don't even know whether Waterway Estates or not has ever discharged at full capacity, correct?
A. Well, the answer is, I can't recall each individual day's data to say with certainty that on any one day it may not have reached its capacity flow, but its average flow has been below its capacity flow.
Q. So, you don't know?
THE COURT: I think I understand his answer. Go ahead.
MR. BULLOCK: Thank you, Your Honor.
BY MR. BULLOCK:
Q. Isn't it true that your testimony as to risk of harm of discharges from the Waterway Estates facility is based upon computer studies of information -- excuse me -- computer studies of situations which, in fact, never came to pass?
A. My opinion as to the potential for harm came from a combination of the findings of these studies and the specific information that they provided about the flow characteristics in the Caloosahatchee River particularly in the area of the Waterway Estates discharge and from my professional opinion based on having inspected the facility,

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having seen the characteristics of that canal and what the likelihood was of the effluent building up in that canal.
Q. My question was -- and let me rephrase it slightly, then -- in part, your opinion is based on these computer models and the reports generated as a result of these computer models, correct?
A. Yes, that's correct.
Q. You can't say whether or not the situations that are forecast in -- or the presumptions that these computer models are based upon actually happened, can you?
A. In terms of having seen data in that canal, no. To my knowledge, such data doesn't exist.
Q. Okay. The data exists about what that flow was for all four facilities, doesn't it, Mr. Klingenstein?
A. Yes.
Q. All right. You haven't looked at that data for all four facilities that discharge in -- that this study is based upon, have you?
A. I have certainly possibly seen some data, but I have not looked at it in detail.
Q. All right. So, you can't say whether or not the predictions that the model predicts actually occurred because you don't know whether or not the scenarios assumed in the model ever existed or not, correct?
A. I believe that certain characteristics indicated by

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the model, particularly the build-up of effluent in the area of the Waterway Estates, occurred regardless of whether or not those plants discharged at exactly the flows that were put forth in this model.
Q. But the data -- but you haven't reviewed the data to support the model?
A. I have reviewed data regarding water quality in the river.
Q. You have testified that you believe the 1981 study provides a zero discharge for Waterway Estates, is that correct?
A. I believe those are the exact words from the document itself.
Q. All right. In the same document, the study also suggests that the company should build a new outfall for the plant, isn't that correct?
A. I believe there's mention of the fact that the outfall would need to be relocated.
Q. All right. Isn't there a logical disconnect here between a zero waste load allocation and then demanding that the company build an outfall for a plant that has a zero -- a new outfall for a plant that has a zero waste load allocation?
MR. JACOBS: Objection to the mischaracterization of the document.

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THE COURT: Overruled.
THE WITNESS: My read on the document was, and continues to be, that in carrying out the study, the State of Florida looked at the technical need to relocate the outfall and then, based on its understanding of what Florida Cities' intentions were, i.e., to tie in to a regional facility with Cape Coral, decided not to continue the modeling effort looking at the relocated outfall and so, therefore, assumed that no waste load allocation would go to the Waterway Estates facility because it would be tied in to the Cape Coral plant.
BY MR. BULLOCK:
Q. In fact, the next year, in 1982, that Cape Coral plant was cancelled or was never built, is that correct?
A. I don't know if it was in exactly 1982, but it seems in the 1982, 1983 time frame, that agreement fell apart.
Q. So, that scenario didn't occur either, did it?
A. No, apparently not.
Q. All right. Are you familiar with the State of Florida's laws and regulations that address permitting for facilities such as the Waterway Estates plant?
A. No, not in any detail.
Q. Can you tell me whether or not this document was binding upon the Fort Myers office in its ability to grant a permit to the Waterway Estates facility?

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MR. JACOBS: Objection to the extent that the question calls for a legal conclusion, Your Honor.
MR. BULLOCK: Your Honor, he has --
THE COURT: Well, I'll permit him to answer the question, if he knows. Overruled.
THE WITNESS: No, I don't know.
BY MR. BULLOCK:
Q. In fact, later in 1981, isn't it true that the Fort Myers office of the FDER granted permission to continue discharging at the Waterway Estates facility after the 1981 waste load allocation study was published?
A. I believe a permit was issued.
MR. BULLOCK: If I may, I would like to show the witness Defendant's Trial Exhibit Number 17.
BY MR. BULLOCK:
Q. Let me refer you to what would be the third page of Exhibit 17. Isn't it true that this is a State of Florida DER operation permit for Waterway Estates?
A. Yes, it is.
Q. And the date of issuance is 1981 -- excuse me -- April 1, 1981?
A. Yes, it is.
Q. All right. And the next page, which is at the bottom of the page, set forth as Number 1 of 4?
A. Yes.

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Q. This page authorizes Florida Cities to operate a 1.08 MGD wastewater treatment plant to discharge effluent to the Caloosahatchee River – into a canal to the Caloosahatchee River, is that correct?
A. That is what is written there, yes.
Q. Didn't EPA also grant a permit to discharge to Waterway Estates in 1981?
A. I believe it was in 1981.
Q. Let me show you Defendant's Trial Exhibit, Florida Cities, Number 18 and refer you to the second page of that exhibit.
Isn't this a permit to discharge – an NPDES permit to discharge for Waterway Estates?
A. Yes, it is.
Q. Okay. Isn't it true that in 1983, the Florida Department of Environmental Regulation renewed the Waterway Estates discharge permit?
A. Yes, I believe that's true.
Q. Let me refer you to Defendant Florida Cities' Trial Exhibit Number 20 and refer you to Page 2 of that exhibit. Again, this is authorization to operate a 1.08 million gallons a day treatment facility and to discharge into the canal which leads to the Caloosahatchee River, correct?
A. Yes, that is true.
MR. BULLOCK: Your Honor, we would move

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Defendant's 17, 18 and 20 into evidence.
MR. JACOBS: No objection, Your Honor.
THE COURT: It will be received.
BY MR. BULLOCK:
Q. Referring to Exhibit 20, can you tell me what the expiration date of Exhibit 20 is? And I'm referring to Page 4 of 5.
A. All of the pages would indicate an expiration date of August 2, 1988.
Q. Thank you.
In investigating this claim, Mr. Klingenstein, you had access to the files of EPA Region 4 --
A. Yes.
Q. -- is that correct?
You had access to the materials put forth in discovery by Florida Cities, is that correct?
A. Yes, that is correct.
Q. You have worked on enforcement inspections of facilities for NPDES compliance, have you not?
A. Yes, I have.
Q. All right. Let me ask you to look at Florida Cities' Trial Exhibit 199. Can you identify what type of document 199 is?
A. 199 is what would be known as a CEI, or compliance evaluation inspection report.

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Q. All right. Was this report done jointly with the Florida Department of Environmental Regulation?
A. Yes, it was.
Q. All right. And let me refer you to Page 2 of 4 in the actual document.
A. I'm sorry. That would be Page 2 of 4 of the form itself?
Q. That's correct.
And on Line F -- excuse me -- Line G, would you read Line G?
A. Number and location of discharge points are as described in the permit.
Q. And the answer which was checked off?
A. Was "yes."
Q. All right. And would you read Line H?
A. Correct name and location of receiving waters.
Q. And that was checked off as a "yes" as well?
A. Yes.
Q. Is it unusual to have joint State and Federal inspections?
A. It's not uncommon.
MR. BULLOCK: Your Honor, we would move that Defendant's 199, Florida Cities, be moved in evidence.
MR. JACOBS: No objection, Your Honor.
THE COURT: It will be received.

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Why don't we have an understanding that if there is no objection, you need not say anything. And I'll pause for a moment to –
MR. BULLOCK: Thank you, Your Honor.
BY MR. BULLOCK:
Q. Mr. Klingenstein, let me refer you to Florida Cities' Exhibit 200. Could you tell the Court what 200 is?
A. 200 is another compliance evaluation inspection report.
Q. And this was done jointly by FDER and EPA?
A. Yes, it was.
Q. All right. Let me refer you to Section C of the second page of this exhibit. And under the heading Effluent slash Receiving Waters, what grade was that given?
MR. JACOBS: Your Honor, this hasn't been moved into evidence yet. We object to questioning the witness about the document.
THE COURT: Correct.
MR. BULLOCK: I'm sorry, Your Honor. I would move for Defendant's 200 to be --
MR. JACOBS: Here we would object, Your Honor. The document is incomplete. There should be an attachment to it, as we understand it. The objection then would be based on Federal Rule of Evidence 106. We believe it's irrelevant. The objection would be based on Federal Rule of

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Evidence 402. We believe it's hearsay, and the objection would be based on Rule 802. Hearsay within hearsay, Rule 805.

MR. BULLOCK: Your Honor, it's my understanding this document was produced out of EPA's own compliance files. The document clearly states what it is.

The attachments which are attached to it have no bearing on the issue that it's being offered for. We sought this document in discovery requests, and this is a document which was produced to us.

THE COURT: I'll overrule the objections. If the Government wants to at a later time offer the balance of this for any purpose, the Court will entertain that at that time.

BY MR. BULLOCK:

Q. Mr. Klingenstein, let me refer you again to Section C and the sub question that addresses Effluent slash Receiving Waters. What mark was that given?

A. An "S."

Q. And "S" under the key code means?

A. Is listed as being equal to satisfactory.

Q. And under Section C, satisfactory is the highest grade that can be given?

A. Yes.

Q. Thank you.

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Isn't it true, Mr. Klingenstein, that at any time during the 1980's, the Florida Department of Environmental Regulation could have withdrawn its permission for Florida Cities to discharge from Waterway Estates?

A. I can't speak on behalf of FDER, FDEP.

Q. In preparing your opinion or preparing to testify, did you interview any FDER or now FDEP officials?

A. Yes, I did speak to a number of them.

Q. Do you remember who you spoke to?

A. I certainly recall speaking to Mr. Ron Blackburn, and I believe I also spoke to a former FDER employee which would have been Mr. Bruce DeGrove.

Q. Okay. You had characterized Florida Cities' discharge without a permit between 1987 and 1989 as serious violations. The seriousness of those violations is based purely upon the fact that they didn't have an NPDES permit during that period, isn't that correct?

A. And my belief that discharge was taking place at the wrong level of treatment and to the wrong location.

Q. Again, the issues about the wrong level of treatment are based on the 1981 study and your analysis of that study, isn't that correct?

A. And my understanding and belief on what would have been the impacts of that secondary discharge on the particular point of discharge.

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Q. All right. You have no data which points out that, in fact, that area was actually impacted, do you not?

A. I have not seen data. In fact, I believe your Mr. Smith in his report did, in fact, refer to some data that might have existed that indicated there were impacts in that area of discharge.

Q. But you'll defer to Mr. Smith's testimony on that, won't you?

A. I have not seen data for the canal.

Q. In fact, isn't it true that the Plaintiff has admitted that there is no -- that they have no evidence of environmental harm?

THE COURT: Well, now, wait a minute -- well, go ahead.

MR. JACOBS: I'll object to the extent that the question calls for a legal conclusion here.

THE COURT: Yes. You know, the Plaintiff is the United States, and I think I'll sustain the objection, at least as framed.

BY MR. BULLOCK:

Q. Did you assist the Plaintiff in preparing any of its discovery requests -- responses to its discovery requests?

MR. JACOBS: Objection to the extent that the question invades the attorney work product privilege. Mr. Klingenstein served both as an expert witness and also

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as an expert trial consultant. The work that he did with respect to -- in his capacity, rather, as an expert trial consultant I believe would be protected.

MR. BULLOCK: Your Honor, I have not asked him the content of any work or conversation.

THE COURT: I'll overrule the objection at this point.

Ask the question again.

BY MR. BULLOCK:

Q. Mr. Klingenstein, did you participate in responding to any of the discovery requests which were propounded to the Plaintiff?

(Pause.)

A. Yes.

Q. All right. Have you read the actual discovery responses which the United States filed in this case?

MR. JACOBS: Objection, Your Honor. There have been numerous responses. If counsel could possibly pinpoint one or two for the witness so the record is accurate...

MR. BULLOCK: Sure. I'll be glad to.

BY MR. BULLOCK:

Q. Either the United States' responses to Avatar Holdings' second set of interrogatories, or responses to Florida Cities' interrogatories.

A. I believe I may have read portions of one or both, but

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I could not tell you specifically.
Q. Okay. Isn't it true that in the United States' responses to the Defendant Avatar Holdings' second set of interrogatories and in response to the Defendant Florida Cities' interrogatories, the United States has stated that --
MR. BULLOCK: Your Honor, may I withdraw that?
THE COURT: Yes, sir.
MR. BULLOCK: Just a moment, please, Your Honor.
(Pause.)
MR. BULLOCK: Let me withdraw that question, Your Honor, and ask it in a different way.
BY MR. BULLOCK:
Q. Isn't it true that in responses to Avatar Holdings' second set of interrogatories, the United States responded that it was aware of only potential and not actual harm or damage?
MR. JACOBS: Could I ask that the witness be shown the document before he responds?
THE COURT: I think that's fair.
MR. BULLOCK: This would be Avatar Holdings' Trial Exhibit Number 8.
MR. HIRD: Your Honor, I believe there's an exhibit book for the witness that we can provide for our exhibits so that we don't need to take it out of the binder.

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THE COURT: All right. That's one binder?
MR. HIRD: Yes. We have one binder.
THE COURT: All right. Here it is.
What number is that?
MR. BULLOCK: Number 8.
MR. JACOBS: Your Honor, I might assist in moving things along. The Government has, indeed, stipulated that we do not have evidence of actual environmental harm. The theory of our case is that there is the potential for environmental harm, and that was the substance of the testimony yesterday, if that's helpful to...
THE COURT: All right. Well, if that's helpful, fine.
MR. BULLOCK: I'll accept that stipulation and move on, Your Honor.
THE COURT: Okay.
BY MR. BULLOCK:
Q. Let me refer you to Page 1 of your report, the first paragraph under Section 2, Background, the last sentence where you said, By requiring receipt of a permit prior to discharge, the NPDES system allows EPA to determine whether a receiving water has the capacity to assimilate a pollutant discharge and, if so, at what particular point in the water body and for what quantities of particular pollutants. Is that correct?

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A. Yes, that's the word.
Q. All right. And the other point is, it allows EPA to know exactly what dischargers are in the various waters of the United States and what the substance of their discharge is?
A. That's the intent of the system, yes.
Q. Okay. Between January 1987 and November '89, isn't it true that the Waterway Estates facility remained within the EPA regulatory framework?
MR. JACOBS: Objection; vague.
THE COURT: What was your objection? Objection what?
MR. JACOBS: Vagueness, Your Honor.
THE WITNESS: In what sense, sir?
THE COURT: Wait.
You said "date"?
MR. BULLOCK: No, Your Honor. My question --
THE COURT: I'm sorry, I didn't understand what the -- you said objection what?
MR. JACOBS: On the grounds of vagueness, Your Honor. The question is vague and ambiguous.
THE COURT: Oh, vague, vague. I'm sorry, I didn't understand that. I thought you said "date." Vague.
All right. What was the question, please?
MR. BULLOCK: Your Honor, the question was,

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between January 1987 and November of '89, wasn't the Waterway Estates facility still within the regulatory framework of the EPA, of the NPDES system?
THE COURT: I'll overrule the objection.
Can you answer that?
THE WITNESS: My response would be, in what sense, sir?
BY MR. BULLOCK:
Q. Well, every month they sent in a discharge monitoring report, didn't they?
A. That's my belief.
Q. All right. And the facility was under an administrative order or a series of administrative orders issued by EPA, isn't that correct?
A. Yes.
Q. All right. So, every month EPA knew what was being discharged into the Caloosahatchee River, didn't it?
MR. JACOBS: During what period of time?
THE COURT: All right. Can you be more specific?
BY MR. BULLOCK:
Q. Between January '87 and November '89.
A. I can't speak for EPA's knowledge.
Q. Well, you said you believed they received discharge monitoring reports, isn't that correct?
(Pause.)

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A. That – I'll correct myself. I'm not sure.
Q. Okay. In general, a discharge monitoring report is the method by which EPA learns what a discharger is actually discharging through its effluent, correct?
A. Yes, that's correct.
Q. All right. So, if the evidence demonstrates that Florida Cities continued to submit discharge monitoring reports to EPA during the period of time from January '87 through November of '89, you would agree that EPA knew what was being discharged and the effluent?
MR. JACOBS: Your Honor, compound; calls for speculation. The witness has said he doesn't know whether the DMR's were submitted during that period. He testified yesterday that he reviewed the ones where violations were indicated, but he hasn't testified that he's reviewed all of the DMR's so –
THE COURT: Well, he's asking him in a sense a hypothetical. This is an expert witness. I'm going to allow him that latitude. I'll overrule the objection.
Do you remember the question?
THE WITNESS: If you could repeat it, please?
BY MR. BULLOCK:
Q. Certainly.
Assuming with me that the evidence indicates that Florida Cities submitted discharge monitoring reports to EPA

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Region 4 between January 1987 and November 1989, EPA would have been aware of the substances reported as being discharged in the effluent, correct?
A. Again, if such reports were submitted, EPA would have received them. I can't speak for who within EPA would have been aware of that information.
Q. Okay. Who normally receives discharge monitoring reports, Mr. Klingenstein; what branch of the EPA?
A. Typically, the compliance branch.
Q. Okay. And so here, the compliance branch of EPA Region 4 would have received any discharge monitoring reports sent by Florida Cities, correct?
A. I would have assumed, but I can't speak for Region 4's compliance branch.
Q. Have you ever interviewed anyone in EPA Region 4's compliance branch regarding this lawsuit?
MR. JACOBS: Asked and answered, Your Honor.
THE COURT: Overruled. Go ahead.
THE WITNESS: My only recollection of specific discussions with regard to this case has been with Mr. Kwan and Ms. Fitz-Henley.
BY MR. BULLOCK:
Q. Mr. Kwan works for which branch?
A. I believe he's in enforcement.
Q. All right. And is enforcement different than

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compliance in Region 4?
A. I can't speak to Region 4's exact organization.
Q. And Ms. Fitz-Henley is one of the legal counsel for EPA Region 4?
A. Yes.
Q. All right. It was within EPA's power to shorten the period of time that Florida Cities was discharging secondarily treated effluent, was it not?
MR. JACOBS: Objection to the extent that the question calls for a legal conclusion.
THE COURT: Read the question back, Mr. Miracle.
(Record read back.)
THE COURT: Overruled.
THE WITNESS: I can't speak for EPA's particular control of that situation.
BY MR. BULLOCK:
Q. They had the authority to grant administrative orders and permits, didn't they?
A. Yes.
Q. And in the administrative orders, at some point in time they could have said, You will cease secondary discharge, correct?
MR. JACOBS: Same objection, Your Honor.
THE COURT: Overruled.
THE WITNESS: That would be my expectation that

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they could.
BY MR. BULLOCK:
Q. Have you reviewed the administrative orders relevant to Waterway Estates between 1987 and 1991?
A. I have looked at those orders.
Q. All right. In fact, those orders authorize discharge at secondary levels until October 1, 1991, or until the outfall was moved, isn't that correct?
MR. JACOBS: Objection, Your Honor. If he's going to be asked to discuss the administrative orders, first of all, I would ask that they be presented.
Secondly, I take strong issue to the word "authorize." That word does not appear in the administrative orders, and I'll object on the grounds that the question therefore calls for a legal conclusion.
MR. BULLOCK: Your Honor, I'll withdraw that and rephrase it.
BY MR. BULLOCK:
Q. Let me first refer you to Defendant's 28. Let me then refer you to Page 3 of Exhibit 28, Page 3 of the actual administrative order.
Paragraph 2 states --
THE COURT: Have you reviewed this order?
THE WITNESS: Yes, I have, sir.
THE COURT: Okay. Go ahead.

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BY MR. BULLOCK:
Q. Paragraph 2 states that this should be in no way considered a permit to discharge. However, if the Respondent does discharge to the waters of the United States in violations of the Act, the Respondent's discharge of treated wastewater shall at least comply with the effluent limitations monitoring schedule and other requirements contained in its previous permit.
Is that an accurate depiction of the document?
MR. JACOBS: I'm sorry. It's incomplete.
Paragraph 2 starts with, This should in no way be considered a permit to discharge. However...
MR. BULLOCK: I believe I read that, Your Honor.
THE COURT: I don't recall whether you did or not.
BY MR. BULLOCK:
Q. The point of my question, Mr. Klingenstein, is, EPA didn't have to state that the Respondent should at least comply with secondary discharge if it continued to discharge, did it?
(Pause.)
A. Could you repeat the question, counsel?
THE COURT: Do you want it read back, or do you want to repeat it?
MR. BULLOCK: I'll repeat it, Your Honor.
BY MR. BULLOCK:

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Q. EPA did not have to include this provision which stated that the facility should at least continue -- if it was going to discharge, should at least continue to comply with the effluent limitations monitoring schedules and other requirements of its previous permit?
A. Well, without offering a legal opinion as to whether this has to be included, I think EPA included this to specifically make the point that this does not operate as a permit.
Q. My question was, they didn't have to put the language in there about secondary treatment, correct?
A. When you say "secondary treatment," with regard to its previous permit?
Q. Correct.
You're familiar with the previous permits, are you not?
A. I have reviewed its permit.
Q. All right. Those are secondary treatment permits, are they not?
A. As I recall.
Q. All right. Let me refer you to Defendant Florida Cities' 195.
MR. BULLOCK: Your Honor, while he's doing that, I would move Exhibit 28 into evidence.
THE COURT: It will be received.

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BY MR. BULLOCK:
Q. Mr. Klingenstein, have you reviewed Exhibit 195 previously?
A. Yes, I have.
Q. All right. Let me refer you to Page 4 of the administrative order itself, Paragraph 2. Paragraph 2 contains the same language that was found in the previous exhibit, isn't that correct?
A. Yes, that is.
Q. All right. And, again, you have been involved in a number of EPA enforcement actions, correct?
A. Yes, I have.
Q. All right. EPA could have directed the company to shut down and cease secondary discharge, couldn't it?
MR. JACOBS: Objection to the extent that the question calls for a legal conclusion.
THE COURT: I'll permit him to answer it if he can. Overruled.
THE WITNESS: EPA could have directed them to do such a thing.
BY MR. BULLOCK:
Q. Exhibit 195 also contains a construction schedule, does it not?
A. Yes, it does.
Q. And this was a construction schedule to construct an

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AWT, or an advanced wastewater treatment facility, correct?
A. And to relocate the outfall.
Q. And to relocate the outfall, isn't that correct?
A. Yes, it is.
Q. All right. So, at the time EPA issued this order, isn't it correct that EPA knew that the facility was continuing to discharge secondarily treated effluent?
A. Yes.
Q. And you have reviewed discharge monitoring reports between 1989 and 1991, have you not?
A. Yes, I have.
Q. All right. And those discharge monitoring reports came out of the files of EPA Region 4?
A. Yes.
Q. So, it's clear in your mind that EPA Region 4 was informed as to the character and the constituents of the effluent?
A. Yes.
Q. EPA did not require the advanced wastewater treatment plant to be completed under the schedule in this administrative order until September of 1991, isn't that correct?
A. I believe the date of compliance shown is October 1.
Q. October 1.
If EPA had thought that there was a serious risk of

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environmental harm from continued secondary discharge between 1989 and 1991, it was within their authority to shorten this construction schedule?
A. I cannot speak to the process that generated this construction schedule.
Q. Okay. The State of Florida actually has in a sense the front line on developing water quality standards, is that correct?
A. Within the State of Florida.
Q. Yes. And we're talking in this case only about the State of Florida, correct?
A. Yes.
Q. The State of Florida continued to authorize this, to continue secondary discharge, until September of 1992, isn't that correct?
A. I believe that's correct.
Q. All right. If the State of Florida had had serious concerns about continued discharge of secondarily treated effluent, they could have ordered the cessation prior to September of 1992, isn't that correct?
A. Again, not being able to speak for the State of Florida, but I would expect they would have had the ability under their State permitting system.
Q. Okay. Does EPA independently establish water quality standards for the State of Florida?

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(Pause.)
A. Not that I'm aware of.
Q. Okay. So, if it's done through EPA at all, it's done in conjunction with the State of Florida?
A. That's my understanding.
Q. All right. Let me ask you to assume with me that before May of 1986, there was no requirement to cease discharge of secondarily treated effluent into the canal adjacent to the Caloosahatchee River.
Under that scenario, isn't it true that Florida Cities had no technically available option to cease discharge by January of 1987?
A. I'm sorry. Your start date was --
Q. -- was May of '86.
A. If, in fact, their first notice of needing to cease discharge was May of 1986, it would have been very difficult to cease discharge by January of 1987.
Q. What technically feasible options would have been available?
A. Probably the most technically feasible would have been to connect to another authority.
Q. And was there another authority available between May of 1986 and January of 1987?
A. Not that I'm aware of.
Q. All right.

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MR. BULLOCK: Your Honor, at this time I would also move Defendant's 195 into evidence.
THE COURT: It will be received.
BY MR. BULLOCK:
Q. Do you know whether or not EPA ever challenged Florida's granting of the Waterway Estates permits in 1981, 1983 or 1988?
A. I'm not aware of whether such a challenge took place.
Q. All right. In fact, if there was no technically feasible alternative to discharge available to Florida Cities in January of '87, isn't it true that they could not cease discharging?
A. It would have been basically impractical.
Q. As a matter of fact, it would have been a public health hazard, wouldn't it?
A. Unless some alternate means of disposal was provided.
Q. Okay. We're assuming that -- first of all, you haven't identified an alternative that was available during that period of time, isn't that correct?
A. I have identified alternatives that were available during that period of time. The question I believe you had asked, sir, was whether if, in fact, their first notice took place in mid 1986, whether that alternative could have been implemented by January 1987.
Q. That's correct.

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A. That's a different question.
Q. And the answer to that question was no, it couldn't?
A. Would be difficult.
Q. All right. You have not been able to identify any alternative that, in fact, was available under the scenario that I proposed to you in January of '87?
A. The other possibility would have potentially been if a spray irrigation site could have been identified, an agreement made and wastewater transported to that spray irrigation site.
Q. Again, you have not identified any area where, in fact, that could have occurred between May of '86, January of '87, correct?
A. I have not seen documentation that would show me such an option existed within that six-month period that would have -- that could have been implemented within that six-month period.
Q. All right. Florida Cities operates Waterway Estate under a franchise agreement with Lee County, isn't that correct?
A. I believe that's correct, yes.
Q. Florida Cities provides wastewater treatment pursuant to permission from the Florida Public Service Commission, isn't that correct?
A. Yes, that is correct.

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Q. Well, to have ceased to provide treatment in January of 1987 would have been a violation of its franchise and its agreements with the Public Service Commission, isn't that correct?
A. I have not reviewed those agreements in detail, so I couldn't speak to that.
Q. All right. And isn't it true that ceasing to discharge with no viable alternative would have -- in January of '87, under the scenario that I have given you, would have created a public health hazard?
A. Again, without an alternative form of handling the wastewater, in effect, to shut the plant off, yes.
Q. Okay. I believe you testified that you had access to all of the materials which Florida Cities produced through discovery?
MR. JACOBS: Objection to the extent that the question mischaracterizes the witness' previous testimony. He said all of the documents, which there are hundreds of thousands of --
THE COURT: All right. Well, rephrase the question.
MR. BULLOCK: I'll withdraw it.
BY MR. BULLOCK:
Q. Were you given free rein to look at whatever discovery materials were in the possession of the Plaintiff which had

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been produced by Florida Cities?
A. No, I was not given free rein.
Q. Were you not allowed to look at some material?
A. Materials were sent to me for review.
Q. Okay. And is that the normal method that you as an expert witness use is you rely on someone else's judgment as to what you need to review to generate your opinion?
MR. JACOBS: Objection to the extent that this particular witness -- he's not asking this particular witness what he did; he's asking about expert witnesses in general, common procedures, and I don't know that this witness is qualified to answer that.
THE COURT: Well, I don't know. I think he can examine him concerning his customary mode of operation in playing a role in the determination of what documentation he may need, so I think that falls basically within proper cross.
MR. JACOBS: I understood the question to refer to expert witness testimony in general, not particular -- not this particular witness. I have no problem with examination regarding this particular witness' mode of operation.
THE COURT: Yes, I think we need to limit it to his --
MR. BULLOCK: Yes, Your Honor, and I intended it to be limited that way.

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THE COURT: Okay.
BY MR. BULLOCK:
Q. Is it normal for someone else to select what you review when you're rendering an expert opinion?
A. To the extent that in many of the cases we work on, files and documents for our review are provided to us rather than us going into and myself going into either EPA or State offices and, in effect, going through the State or the EPA files to look for materials.
Likewise, we rarely receive discovery materials directly as part of our support on a case. So, I would say no, having -- being sent materials is fairly common.
Q. Did you ask to see any other materials other than what was provided to you?
A. Certainly at various points in times, conversations took place where I -- where we asked whether certain materials were available, I'm sure.
Q. All right. Do you remember what additional information was forwarded to you?
A. No.
Q. Okay. Who selected the information that was sent to you?
A. I couldn't specifically say.
Q. Okay. Who signed the cover letter that came to you?
A. A certain amount of material was received from

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Mr. Jacobs; certain material was received from Mr. Kwan.
Q. Anybody else?
A. I'm trying to recall. I believe some of the materials that I received were signed by Mr. Bartlett.
Q. By Mr. --
A. -- Byron Bartlett. I believe that was materials received from the County.
Q. All right. Who did you have phone conversations with about whether or not other information existed?
A. Probably Mr. Jacobs and Mr. Kwan.
Q. Did you review the Environmental Sciences and Engineering August 1987 report to Florida Cities?
A. That would have been the preliminary engineering report?
Q. Correct.
A. Yes.
Q. Okay. The ESE report examined various options, isn't that true?
A. Yes, that is true.
Q. And these were options regarding how -- what would -- how the Waterway Estates effluent would be disposed of, isn't that correct?
A. Yes.
Q. All right. Let me refer you to the report which is Florida Cities' Trial Exhibit 194.

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Let me first ask you, this is the report we've referred to a few minutes ago?
A. Yes, this appears to be it.
Q. And you reviewed this in preparation of providing your opinion on behalf of the Plaintiff?
A. Yes.
Q. All right.
MR. BULLOCK: Your Honor, I would move that Florida Cities' 194 be moved into evidence.
THE COURT: It will be received.
BY MR. BULLOCK:
Q. Let me first discuss the issue of spray fields and/or percolation ponds.
First of all, the Waterway Estates facility is in a residential district, is it not?
A. Yes, it is.
Q. Do you have any opinion about how large a percolation pond, or ponds, would have been required to handle the Waterway Estates effluent?
A. Without seeing specific percolation tests for the area, in other words, for the soil characteristics of the area, I couldn't give you an estimate.
Q. Have you performed any tests yourself?
A. No.
Q. You are not, by background, a hydrogeologist, are you?

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A. No, I'm not.
Q. And you have no particular experience with the hydrogeology in Florida, do you?
A. No.
Q. Now, let me refer you to Page 6.6 of the exhibit, the ESE report.
MR. BULLOCK: Your Honor, the page numbers are in the upper right-hand corner.
Your Honor, can I hand this to the Clerk? I didn't know if you wanted her to have a copy of it or not.
THE COURT: Yes.
MR. BULLOCK: Okay.
I just handed a copy of the report to his Law Clerk.
MR. JACOBS: It's an additional copy of the same --
MR. BULLOCK: Of the ESE report. It's the same exhibit.
THE COURT: So that you won't think that there is some impropriety here, I asked a few minutes ago for retrieval of a duplicate copy of a report so that my Law Clerk could follow along, Ms. Lasso, and that's what he was offering to do.
So, if you have an extra copy, if we're going to spend any time on a document, I would appreciate it, if

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there is a spare document that is convenient, or if there are duplicates, Plaintiff's and Defendant's, then you can go ahead and tender another copy so we can follow along -- so she can follow along as well.
MR. BULLOCK: And I saw that, Your Honor; that's why I went ahead --
THE COURT: I understand.
Apparently Mr. Jacobs didn't understand that.
MR. JACOBS: No, I didn't understand.
THE COURT: I wanted to make sure that there was no suggestion of any impropriety there.
MR. JACOBS: I didn't think there was, Your Honor; I just wanted to know what was going on.
THE COURT: Right.
MR. JACOBS: Thanks.
BY MR. BULLOCK:
Q. Referring again to Page 6.6, ESE did calculations for the size, number and configuration of percolation ponds that would be necessary at Waterway Estates, isn't that correct?
A. Yes, that is correct.
Q. Okay. And the pond system required, according to ESE's calculations, 140 acres, isn't that correct?
A. Yes.
Q. And as you said a minute ago, you haven't performed any alternative calculations, isn't that correct?

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A. Yes, that is correct.
Q. All right. You testified that Florida Cities could have -- excuse me.
Your report on Page 21 states that Florida Cities could have constructed adequately-sized percolation ponds to handle the Waterway Estates flow.
Is that a correct reading of page -- that portion of Page 21?
A. Yes, that's a correct reading.
Q. All right. Isn't it true that ESE found that there was not adequate acreage available for the Waterway Estates facility to build percolation ponds?
A. Well, ESE found that there was not adequate acreage, as the report describes, within the service area. So, my interpretation of the report was that the limits of the investigation was, in fact, the Waterway Estates service area itself, and not the areas surrounding the service area.
So, not finding myself limited to that particular area, I did not see a reason to believe that there was not the possibility of an area outside that immediate service area for construction.
Q. But you didn't investigate to determine where that land might be, did you?
A. I did not carry out an investigation to specifically identify what pieces of property might have been available

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at that point in time.
Q. Okay. Do you know what the closest piece of property that might have been available at that time was?
A. No, I do not.
Q. So, you don't have any idea about how far away from the plant these ponds would have been?
A. No, because, again, Florida Cities and its consultants didn't apparently carry out such an investigation, or at least I have not seen documents to that effect, so no, I did not have that information available.
Q. All right. Are you aware of whether or not there are any Lee County ordinances that would be relevant to percolation ponds in a residential district?
A. I'm not specifically aware of what Lee County's ordinances are in that regard, no.
Q. All right. Are you aware of any FDER regulations regarding perc ponds in a residential district?
A. Excuse me. To the extent that there are certain requirements to protect the public as far as buffer zones and that sort of thing.
Q. Okay. Do you know how large the buffer zone would have to be?
A. It would depend on the size of the pond and the characteristics of the wastewater, I believe, put into it; but I couldn't tell you exactly what buffer zone would be

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required.
Q. You stated that permitting should not have been overly burdensome. I believe you just testified a minute ago that you're not aware of what the Lee County requirements would have been to permit this facility, are you?
A. Not specifically, but that was my belief.
Q. Okay. So, you really don't have any basis for your opinion that permitting this facility would or would not be burdensome, isn't that correct?
A. That was based only on the understanding of fairly widespread use of ponds in Florida, and those ponds being located in -- or in relatively close proximity to residential areas.
Q. But as to this particular permitting, you don't have any basis for this statement?
A. Other than that just stated.
Q. Aren't most percolation ponds right on the site of a treatment facility?
A. I couldn't speak for "most percolation ponds." Those I have seen have been.
Q. In your general experience, they have been?
A. Yes, in my experience.
Q. And how far away from a plant is it practical to have a percolation pond?
(Pause.)

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A. Depending on the characteristics of the terrain, a pond could be located quite some distance, since the terrain would tend to influence pumping costs.
In an area such as Florida where, in fact, the land is quite flat, I wouldn't see any reason that such a pond couldn't be located a number of miles away.
Q. That would require construction of a forced main between the plant and the pond?
A. Yes.
Q. All right. And you would have to construct a forced main at Waterway Estates through a residential neighborhood, wouldn't you?
A. Yes.
Q. Which would require other permits, would it not?
A. Yes.
Q. You have no opinion as to how much building perc ponds at Waterway Estates during this period of time would have cost, do you?
A. I have not carried out such a detailed estimate, no.
Q. You indicated that Florida Cities, in your words, on Page 21 appeared to have readily identified two golf courses capable of accepting AWT treatment effluent. And, again, that's in the second bullet point on Page 21.
A. Yes, I see that.
MR. BULLOCK: Your Honor, we have another copy of

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this report. I don't know if we should hand one up for your Clerk or --
THE COURT: That would be helpful.
You're talking about this witness' report, Mr. Klingenstein's report?
MR. HIRD: Your Honor, the copy that's being handed up is mine, and I would hope that -- and the tabs are tabs that I have put on it, so I hope that I could retrieve it for my cross.
THE COURT: Yes, sir. Certainly.
MR. JACOBS: Your Honor, if Mr. Hird needs his -- all the originals are in a box, I believe, at the hands of the Deputy Clerk, or thereabouts, and if the Law Clerk wants to make reference to those, we'll be happy to fetch them.
MR. HIRD: I have no problem with her using it now, Your Honor. It's just when I do my cross, I will need it.
THE COURT: Okay. Thank you.
Ignore the stickies, Maria.
THE LAW CLERK: Okay.
MR. BULLOCK: That would be better than trying to read my handwriting, Your Honor.
MR. JACOBS: No objection to the stickies, Your Honor.
THE COURT: Okay.

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BY MR. BULLOCK:
Q. Let me refer you in the next series of questions to Page 6.5 of the ESE study.
First of all, in order to discharge treated effluent onto a golf course, wouldn't Florida Cities have had to build an AWT upgrade at Waterway Estates anyway?
A. Yes.
Q. Now, ESE identifies on Page 6.5 two golf courses: El Rio, which is a 30-acre golf course, and Lochmore, which is an 18-hole track of 93 acres, is that correct?
A. Yes.
Q. All right. ESE goes on to note in the middle of the page, the last sentence of that middle paragraph, During dry weather, the golf courses apply approximately 200,000 gallons a day on Lochmore and 50,000 gallons a day on El Rio. Isn't that correct?
A. Yes, that is.
Q. All right. Do you have any opinion about how much they apply when it rains?
A. They would apply less.
Q. As a matter of fact, they may not apply anything at all on rainy days, isn't that correct?
A. That's entirely possible.
Q. Now, the minimum area of land needed to handle the Waterway Estates plant, according to ESE, was 220 acres,

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which includes 180 acres of wet area, five acres of storage, and a 35-acre buffer zone, isn't that correct?
A. Yes.
Q. The golf courses together only add up to 123 acres, if my math is right?
A. Yes, that's correct.
Q. All right. And that is approximately a hundred acres less than the land that was actually needed, isn't that correct?
A. Yes, that is.
Q. All right. And that would not have allowed discharge every day particularly during wet weather, isn't that correct?
A. That is correct.
Q. All right. So, these two golf courses together would have been inadequate to handle spray irrigation from Waterway Estates, isn't that correct?
A. Yes, that is correct.
Q. All right. The other area identified was identified as a 159-acre tract owned by Gerald and Mary Moody, isn't that correct?
A. Yes.
Q. And isn't it true that ESE approached the Moody family about selling this land?
A. That's the characterization of the report.

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Q. And isn't it true that the Moodys were not interested in purchasing that land?
MR. JACOBS: Objection. The witness can testify from the report, but he can't testify as to facts about whether ESE approached the Moody family. He has no basis.
THE COURT: Well, I don't know whether he does or not. He may have talked to those people and may have formed the basis of his report. If he hadn't, he can testify.
MR. BULLOCK: I'll withdraw the question, Your Honor, and ask it again.
THE COURT: All right.
BY MR. BULLOCK:
Q. Mr. Klingenstein, did you ever talk to the Moody family?
A. No, I did not.
Q. All right. And does the report indicate that ESE talked to the Moody family?
A. The report indicates that Florida Cities talked to the Moody family.
Q. Okay. And does the report indicate whether or not the Moody family was interested in selling the property?
A. It indicates -- would indicate that they were not.
Q. Okay. 159 acres would have been inadequate to handle the discharge from Waterway Estates, wouldn't it?
A. It would appear to have been, yes.

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Q. All right. Because even during extremely dry weather, 159 acres was below the minimum of 220, correct?
A. Yes.
Q. And it would have been even less effective during wet weather?
THE COURT: Is that correct?
THE WITNESS: Yes, that would be correct.
THE COURT: You need to put your questions in the form of questions.
MR. BULLOCK: Yes, sir.
THE COURT: Let's take a ten-minute recess.
(A recess was taken.)

MR. HIRD: Your Honor.
THE COURT: Yes, sir.
MR. HIRD: Before Mr. Bullock resumes, Avatar Holdings would designate as its corporate representative Mr. Leon Levy. When he comes in the Courtroom, I will identify him. He should be in some time today.
THE COURT: Very well. Thank you.
All right, Mr. Bullock.
MR. BULLOCK: Thank you, Your Honor.
BY MR. BULLOCK:
Q. Going back to page 6.5 of the ESE study, you stated that Florida Cities never seriously pursued spray irrigation as an option on page 21 of your report.
Isn't it true that the ESE report presented sufficient information for Florida Cities to have determined that spray irrigation was not a viable option for the Waterway Estates Facility?
A. Based on my review of the report, I did not glean sufficient information to ascertain that other sites were not available, particularly those outside of the Waterway Estates service area, and that if such sites were available, whether or not they would be practical to use.
Q. Okay.
So you didn't do any research on that yourself either?
A. Not as to what was available at that point in time, no.

Q. All right.
Nor did you do any research or calculation about how much it would have cost to move the effluent from outside of the service area on a spray field or golf course; you don't have any opinion about that, do you?
A. Well, that would depend. Such cost would depend on the particular location of the site identified, so without specific sites being identified, it would not be practical to carry out such an evaluation.
Q. Okay.
I believe I may have asked this earlier, let me ask specifically, the next topic we want to discuss about is do deep well injection -- have you ever attempted to permit a deep well in the State of Florida?
A. No, I've not.
Q. Have you undertaken any research about the hydrology in the Lee County area as to its suitability for deep wells?
A. To the extent that I have had conversations with FDER personnel with regard to -- with regard to that possibility.
Q. Can a deep well be used as a primary disposal of treated effluent?
A. I believe reuse, surface reuse is also typically required.
Q. If -- all right.
Is deep well -- if you have a deep well as a primary

source of discharge, do you have to have an additional deep well as a backup in Florida?
A. I don't believe that specifically a second deep well has to be installed.
Q. All right.
Let me refer you to page 6.7 and the word "underground injection." Would you read the heading, first two sentences, please.
A. Underground injection at the WTP requires two, one, parentheses, one MGD capacity class one effluent disposal wells. The second injection well will serve as a backup as required by the FDER.
Q. This paragraph goes on to say that FDER is presently favorable toward deep wells, correct?
A. Yes, it does.
Q. All right.
This paragraph goes on to say that the public opinion in North Fort Myers would likely be strongly opposed to deep wells, does it not?
A. That is the report's characterization.
Q. All right.
The report also characterizes the South Florida Water Management District as being somewhat concerned about the proliferation of deep wells in this area of Florida, isn't that correct?

A. That is the report's characterization.
Q. And this concern is characterized because the South Florida Water Management District was concerned about, that the water injected in the deep wells is basically a non-recoverable resource, correct?
A. Yes.
Q. All right.
What is the South Florida Water Management District?
A. It is one of the local water management districts within Florida.
Q. And can you tell me what regulatory authority it has?
A. I believe such authority is as granted to it by the State.
Q. Have you reviewed in fact what regulatory authority is granted to the water management districts?
A. I know I'm not fully aware of all of its regulatory authority.
Q. All right.
And you indicated that reuse was a requirement when deep wells were involved, is that correct?
A. I believe some form of backup or some form of firm disposal is a requirement.
Q. Okay.
And that would be in case the deep well failed?
A. I believe so.

Q. All right.
And who would have required the reuse?
A. I would believe it would be likely the water management district.
Q. All right.
And the reuse would have required sufficient backup to handle the capacity of the plant?
A. Yes.
Q. And ESE has already identified that according to their report -- let me start over again.
Isn't it true ESE was unable to find any suitable discharge for surface water or, in this instance, for spray such as spray fields, golf courses, et cetera?
MR. JACOBS: Objection, it's one thing again to ask him to testify about the report, but when he gets into exactly the underlying investigation that ESE or ESE might not have done, I believe it's beyond the scope of this witness' expert testimony.
THE COURT: Well, I'll overrule the objection. If he doesn't know, he doesn't know.
THE WITNESS: Not having a contact with ESE with regard to what investigations they might have carried out, I would say only given the limitations that are of the investigation.
BY MR. BULLOCK:

Q. Isn't it true in their report that their report states they were unable to find adequate spray irrigation pockets?
A. I believe the way the report characterizes it, these were the particular locations that were identified within the service area.
Q. The facts indicated that that area was inadequate for the discharge of the capacity of the plant, isn't that correct?
A. That those sites that were identified were inadequate, yes.
Q. Okay.
You also -- strike that.
Isn't it true, Mr. Klingenstein, there was no State requirement to upgrade Waterway Estates to an advanced wastewater treatment plant until 1988?
A. I believe there was a State requirement for them to upgrade the plant by 1988.
Q. And where do you find that requirement?
A. I believe there may have been a requirement in the previous permit.
Q. Which permit would that have been?
A. I couldn't say for certain.
Q. You have reviewed the 1981 State permit, have you not?
A. I'm sorry.
Q. Earlier to this morning, we reviewed the 1981 FDER permit for Waterway Estates, correct?

A. Yes, we did.
Q. And we reviewed the 1983 permit for Waterway Estates issued by FDER, correct?
A. Yes, we did.
Q. Let me refer you to Trial Exhibit 33 which is the 1983 permit which we've already looked at before. I'm sorry, I told you the wrong number.
Let me refer you to Exhibit 20 which is the 1983 permit. You have Exhibit 20 in front of you?
A. Hold on.
Q. Florida Cities Exhibit 20?
A. Hold on for a minute.
Q. Would you take a minute and identify for me where in the 1983 permit there is a requirement for Waterway Estates to upgrade to advanced wastewater treatment.
A. No, there's no requirement.
Q. Let me show you -- let me ask you to look at Exhibit 17 which was the 1981 permit, and ask you whether or not you can find a requirement in the '81 permit to upgrade AWT?
A. No, there was no requirement.
Q. Let me refer you then -- strike that.
First, isn't it true then there was no requirement before 1988 from the State of Florida for the Waterway Estates Plant to be upgraded to advanced wastewater treatment?
A. I can't answer that from memory.

Q. All right.
Let me refer you to Exhibit 33 which is the 1988 State permit. Let me refer you to actually the second page of the exhibit, it's entitled page 1 of 6. This is the first permit -- excuse me -- isn't this the first permit that requires an upgrade to advanced wastewater treatment?
A. This permit does require upgrade to advanced wastewater treatment.
MR. BULLOCK: We would move Defendants' 33 in evidence.
THE COURT: It'll be received.
BY MR. BULLOCK:
Q. Let me also refer you to Defendant Florida Cities' 51. Can you identify Exhibit 51?
A. Yes, this is -- this is covered by cover letter October 30, 1990, and it is apparently an extension of the Waterway Estates permit.
Q. And this extension grants an extension, isn't it true, this extension grants an extension of the construction of AWT until September 1, 1992?
A. The permit was extended until September 1, 1992.
MR. HIRD: The corporate representative of Avatar Holdings, Mr. Leon Levy, is now present.
THE COURT: Yes, sir.
BY MR. BULLOCK:

Q. Now, are you aware of any other permits issued by the State of Florida to Waterway Estates between 1983 and 1988?

THE COURT: Would you ask that question again, please.

BY MR. BULLOCK:

Q. All right.

Sir, we have looked at the permits, Mr. Klingenstein, 1981, 1983, 1988 and 1990. Are you aware of any other permits between 1980 and 1990 from the State of Florida to the Waterway Estates Facility?

A. Not that I'm aware of.

Q. All right.

MR. BULLOCK: Your Honor, we would move that Florida Cities' 51 be admitted in evidence.

THE COURT: It'll be received.

BY MR. BULLOCK:

Q. Isn't it true, Mr. Klingenstein, that you're unaware of any other requirement of the State of Florida to upgrade the Waterway Estates Treatment Plant, AWT, other than the 1988 and 1990 permits?

A. Trying to refresh my memory as to whether there was another State requirement; perhaps under an order to have this take place by the end of the term of the permit which expired in 1988.

Q. But in fact, you don't remember whether or not that

existed or not as you sit here today, do you?

A. At this moment, I do not recall.

Q. Let me refer to what has already been admitted in evidence as Florida Cities' Exhibit 195. Let me refer you to page three of the administrative order.

Isn't it true that paragraph one on page 3 of this exhibit contains a construction schedule for the construction of an advanced wastewater treatment plant at Waterway Estates?

A. Yes, it does.

Q. All right.

Are you aware of any earlier requirement other than this administrative order from EPA which required the construction of an AWT facility at Waterway Estates?

A. Not that I'm aware of.

Q. On page 21 of your report, you have stated that Florida Cities could have avoided discharge to an unpermitted location by extending the outfall in a timely manner; that would be the bottom paragraph.

A. Yes, that's correct.

Q. All right.

Isn't it true that Exhibit 195 contained the first requirement from EPA to Florida Cities to move the outfall at Waterway Estates?

A. Florida Cities' first notification of the need to address their situation would have come, in my mind, when the Cape

Coral Facility became non-reality and they should have recognized the need to have addressed their situation and put in place measures to have allowed them to discharge at the proper location.

MR. BULLOCK: Your Honor, I move to strike as non-responsive.

THE COURT: Ask the question again.

BY MR. BULLOCK:

Q. Isn't it true that the first requirement from the Environmental Protection Agency to Florida Cities to move the outfall of the Waterway Estates Plant occurred in Exhibit 195?

THE COURT: I'll grant your request and strike the answer.

THE WITNESS: Certainly with regard to notification from EPA, in my mind, the tentative denial of the permit and the basis for that denial should have put Florida Cities on notice that they had need to take action and, in fact, correspondence indicates such that Florida Cities was aware at that point to the need to take such action.

MR. BULLOCK: I would also move to strike, too, there is no requirement in the 1986 permit denial.

THE COURT: I'll let it stand for what it's worth.

BY MR. BULLOCK:

Q. Okay.

Did any of the earlier administrative orders issued by

EPA in 1987 and 1988 order Florida Cities to move the outfall?

A. I would need to refresh my memory by looking at those orders.

Q. As you sit here today, though, you can't remember whether or not they did or not.

A. As I said, I need to see those orders to refresh my memory.

Q. Let me refer you to Florida Cities' Exhibit 23. Could you identify Exhibit 23?

A. This is a letter dated June 30, 1986. It is to Mr. Patrick Layman and it's from Ms. Connie Kagey and it is a letter that is entitled NPDES Permit Denial, Waterway Estates, NPDES Permit Number.

Q. Can you identify where in this document there is the language that directs Florida Cities to move its outfall?

A. There is not language specifically requiring Florida Cities to move its outfall.

Q. So my question which we go back to is, isn't it true that the September 26th administrative order, September 26, 1989 administrative order, which is 89-109, is the first requirement from the Environmental Protection Agency for Florida Cities to move the outfall; yes or no?

MR. JACOBS: Again, Your Honor, I'd ask that the witness be permitted to look at all the administrative orders and not skip over some.

THE COURT: Well, if he needs to, if he has to do so, then I'll permit him to do so.

THE WITNESS: I would like to see the additional administrative orders, if I could.

(Pause.)

THE COURT: You're -- never mind.

BY MR. BULLOCK:

Q. Let me refer first --

THE COURT: You don't recall at this time; is that correct?

THE WITNESS: Yes, Your Honor.

THE COURT: All right.

Now if you want to, on redirect, to present him with those documents, you can. I think that is a better way to handle it at this point.

MR. BULLOCK: Your Honor, may we refer him to the documents? I'll handle it either way.

THE COURT: Your -- I'll permit you to do that if you want to.

MR. BULLOCK: I don't want to hold us up needlessly.

THE COURT: Okay.

BY MR. BULLOCK:

Q. Let me refer you first to Florida Cities' Exhibit 28 and then Exhibit 52, and ask you if in those documents you find any direction for Florida Cities to move the outfall of this

facility?

MR. JACOBS: Your Honor, objection to 52. It's one page of -- it's just one page, doesn't seem to be complete.

THE COURT: Well, he's asking him to -- well -- I don't know. What is 52? That's not in evidence, is that correct?

MR. BULLOCK: Not yet, Your Honor.

Your Honor, 52 is an amendment to Exhibit 28.

MR. JACOBS: I'll withdraw the objection with the understanding that it's incomplete, if that would assist in moving things along.

MR. BULLOCK: Your Honor, it's also Plaintiff's 382.

THE COURT: One page?

MR. BULLOCK: That I do not know, but our Exhibit 52 is their 382.

THE COURT: Well, take a look at Plaintiff's 382 and see what we have got because what I have in my binder is one page of what purports to be an amendment to the order.

MR. JACOBS: Your Honor, I withdraw the objection.

THE COURT: All right.

Do we have a question on the floor?

BY MR. BULLOCK:

Q. Is there anything in the '87 administrative order or the amendment thereto which directs Florida Cities to move the outfall of this facility?

A. Certainly not with regard to 52, not on that page and there's nothing in Defendants' Exhibit 28 that specifically requires the movement of an outfall or relocation of outfall.

MR. BULLOCK: Your Honor, I would note for the record the Plaintiff's version of this exhibit is also one page, I believe.

THE COURT: Okay.

I think that is why he withdrew his objection.

BY MR. BULLOCK:

Q. Isn't it true that the 89-109 administrative order gave Florida Cities until August 1, 1991 to complete the construction of the outfall?

A. I believe that was the date. We have unfortunately taken that exhibit away. Yes, I recall that was the date.

Q. Okay.

A. I'm sorry, that was the completion of outfall or upgraded facility.

Q. Completion of outfall?

A. Could I see that again, please.

Q. Exhibit 195.

A. I believe the date complete construction ceased discharge at current location, August 1, 1991.

Q. Isn't it true that the outfall was completed and put into service on July 14, 1991?

A. I recall it was in July of 1991, yes.

Q. All right.

That would be ahead of the schedule put forth in Exhibit 195, the construction schedule?

A. That would be ahead of that date.

Q. Isn't it true that in order to move the outfall, Florida Cities had to have a Section 404 Dredge and Fill Permit from the Army Corps of Engineers?

A. Yes.

Q. All right.

And in your experience, would it ever be possible for a construction project such as the Waterway Estates outfall to be moved to the six foot contour line without a Section 404 Permit?

A. I'm not aware of how that would be done.

Q. Isn't it true that Florida Cities filed for a dredge and fill permit on April 7, 1989?

A. I can't recall the date that they filed.

Q. Isn't it true that the Corps of Engineers did not grant this permit until April 11, 1990?

A. I believe it was in April, 1990, that if memory serves.

Q. Let me refer you to Exhibit 42, Florida Cities'. Would you identify Exhibit 42?

A. It is a letter from the Department of Army enclosing the construction permit with notice of authorization.

MR. BULLOCK: Your Honor, we would move Exhibit 42 in

evidence.

THE COURT: Be received.

BY MR. BULLOCK:

Q. Isn't it true that Florida Cities was required to obtain building permits from Lee County before it began construction on either the AWT upgrade or the plant outfall?

A. Yes, that was true.

Q. Are you aware of how many permits the Florida Cities Waterway Estates Project had to obtain in order to construct the outfall and upgrade the plant?

A. I couldn't give you an exact number.

Q. Okay.

Do you know how many different permitting facilities Florida Cities had to apply to to obtain permits to construct the outfall and upgrade the plant?

A. I'm aware they had to get the permitting through the Army Corps of Engineers for the outfall, State permit and county permit.

Q. Do you know which county permit?

A. No, I'm sorry. County permits, in other words, that was a permit required from the county.

Q. Do you know how many permits from the county were required?

A. No, no, I do not.

Q. If you assume with me that the first requirement to move

the plant outfall came on September 26, 1989, isn't it true that it was physically and legally impossible to move this outfall by November 1, 1989?

MR. JACOBS: Objection, calls for a legal conclusion.

THE COURT: I'll permit him to answer it if he knows.

THE WITNESS: I'm sorry, your starting date was again?

BY MR. BULLOCK:

Q. If you assume with me the first time Florida Cities was required by the Environmental Protection Agency to move the outfall was September 26, 1989, wasn't it both physically and legally impossible to have the outfall moved by November 1, 1989, the effective date of the NPDES permit?

A. Assuming that no action had been taken on Florida Cities up to that point in time, yes, that would have been very unlikely.

Q. Are you familiar when Florida Cities applied to Lee County for a zoning variance to expand the building for the AWT construction?

A. I would need to refresh my memory on that, Counsel.

Q. Okay.

But as you sit here today, you're not aware of it?

A. Not the exact date, no.

Q. Did you review the Lee County applications for zoning variances?

A. I don't know if I reviewed the entire applications.

Q. All right.

Are you aware of when Florida Cities applied for a development ordinance exemption?

A. I would also need to refresh my memory.

Q. Do you even know what a development ordinance exemption is?

A. It is obviously exemption that is granted by that particular body with regard to certain ordinances involving facilities that are being built within the particular area, but I can't tell you specifically what is being exempted.

Q. You're just speculating as to what those are, is that correct?

A. In fact, I'm not speculating as to what those are.

Q. You've never filed any permit applications or anything like that, though, have you, in Lee County?

A. No, I have not.

Q. Are you aware of whether or not Florida Cities could have started construction of the AWT upgrade or the plant outfall before they received permission from Lee County?

A. I believe it needed Lee County's permission.

Q. Let's move now to the permits, exceedences of the NPDES permit. Isn't it true that the only parameters which were actually exceeded after the plant outfall was moved was nitrogen from August through April of the next year?

A. I believe, if I recall, yes, it was nitrogen violations.

Q. In fact, Florida Cities was meeting the other removal of the other pollutants in the effluent at AWT levels, isn't that correct?

A. I believe they were complying with their other permit requirements.

Q. And isn't it true that even during the interim in which there were actual exceedences of nitrogen, the Florida Cities had raised its level of nitrogen removal above secondary treatment levels.

A. I'm sorry, could you repeat that?

Q. Isn't it true that between August of '90 and April -- August '91 and August -- April of 92, that even though there were nitrogen exceedences, Florida Cities had raised the level of nitrogen removal in its effluent to above secondary treatment levels?

A. I believe there was an improvement in nitrogen removal.

Q. The answer to the question is yes?

A. Yes.

Q. The effluent limitations that were in effect between November 1, 1989 and August of '91 were contained in the administrative order that you've looked at earlier which would be Exhibit 195?

A. I'm sorry, that was within -- between which two dates?

Q. November 1, '89 -- or excuse me, it would be September 26, '89 through August of '91?

A. That should be true.
Q. All right.
And isn't it true there were no violations of these administrative order effluent limitations?
A. Yes, I believe that was true.
Q. All right.
Isn't it true that the State of Florida through the FDER allowed Waterway Estates to discharge secondary treatment levels until September of 1992?
A. I would need to go back and again refresh my memory on that document as to the specific date, but --
Q. Well, we looked earlier at the 1988 and 1990 State permits, correct?
A. Correct.
Q. And the 1988 and '90 State permits contained construction schedules, do they not?
A. Correct.
Q. And the 1990 permit was an extension of the construction deadlines, correct?
A. Yes, it was.
Q. Let me refer you to Exhibit 51. Isn't it true that Exhibit 51 in fact extends the construction schedule until September 1, 1992?
A. Yes. The subject permit was extended until September 1, 1992.

Q. In reviewing the decisions that Florida Cities made regarding the Waterway Estates Wastewater Treatment Plant, isn't it true that you don't take into account any consideration that Florida Cities was required to make regarding the Public Service Commission of the State of Florida?
A. No, I would not say that is true.
Q. Okay.
What considerations do you refer to in your report regarding the Florida Public Service Commission?
A. I don't recall whether I specifically made reference to the Florida Public Service Commission in my report.
Q. And I believe you testified this morning that the only information that you reviewed regarding the Florida Public Service Commission was correspondence back and from Florida Cities, I believe, to FDER; I'm not sure that I remember exactly the characterization.
A. Correspondence regarding issues regarding the Florida Public Service Commission.
Q. But you never reviewed any correspondence regarding the Florida Public Service Commission?
A. No, I believe I said I reviewed --
Q. I'm sorry.
A. Yeah.
Q. I'm sorry, let me withdraw that, sir.

You never reviewed any correspondence between Florida Cities and the Public Service Commission?
A. I can't tell you that. I don't recall exactly whether it was included correspondence between the Florida Public Service Commission and Florida Cities.
Q. Do you know whether or not the Florida Public Service Commission ever ruled on the prudency of Florida Cities' decision to expend the -- upgrade the AWT and the corresponding construction?
A. I'm aware of documents that discussed or indicated some testimony had been given at rate hearings, so I would assume there is likelihood that they did.
Q. Okay.
And you don't know the outcome?
A. I don't know the exact outcome, no.
Q. All right.
Earlier in your testimony, we reviewed some of the other cases that are listed in your resume for cases that you previously provided either expert testimony or consulting, and I believe that a number of those involved manufacturing facilities, isn't that correct?
A. Yes, it is.
Q. A manufacturing facility has different financial considerations than a privately owned publicly regulated utility, does it not?

A. I would say it has some that are similar and some that are different?
Q. All right.
And one of the -- how would you distinguish the differences?
MR. JACOBS: He's not being offered as an expert for purposes as it goes into finances. They objected when I got into that with him.
MR. BULLOCK: Your Honor, he's offered opinions about the motivations of why the company did or did not undertake certain activity. He's offered motivational opinions about whether or not the company was following the Clean Water Act and why it was and why it wasn't. I believe that --
THE COURT: All right.
What is it you're seeking to elicit from him now?
MR. BULLOCK: Shall I rephrase the question?
THE COURT: Yeah.
BY MR. BULLOCK:
Q. All right.
Isn't it true, Mr. Klingenstein, that a manufacturing facility -- that it behooves a manufacturing facility to not spend money on upgrades for environmental related construction?
THE COURT: All right.
I'll permit him to answer that.
THE WITNESS: I don't know that I would completely

agree with that.

THE COURT: Well, now, I think we're getting a little afield here. Now you have questioned him regarding his experience in some of the instances in which he has performed consulting services which relate to other than public/privately owned wastewater treatment facilities. But I think we're getting a little afield here. You want to be heard any further on this?

MR. BULLOCK: Your Honor, my only comment would be that he is offering opinions as to why Florida Cities made certain decisions and I would like to investigate whether or not he knows the differences between regulated utilities and the other types of facilities that he's investigated to determine whether or not his assumptions on why certain decisions were made are valid.

THE COURT: Yes, sir.

MR. JACOBS: The assumptions he made and the question I posed yesterday had to do with technology and whether an option was technologically feasible. I didn't get into this area of analyzing the difference between a publicly operated wastewater treatment plant, a privately upgraded wastewater treatment plant. We just didn't open the doors to those types of questions, Your Honor.

MR. BULLOCK: Your Honor, there are several references in his opinion.

THE COURT: Well, I'm going to allow it for what it's worth and if you want to get into it further on redirect, Mr. Jacobs, you can.

All right, go ahead.

BY MR. BULLOCK:

Q. Mr. Klingenstein, isn't it true that the only way that a regulated utility can earn a return on investments is to have that included in its rate base -- capital investment included in its rate base?

A. I would assume with the exception of any investment they might make that they might be able to later sell for profit, perhaps, but I would assume that in terms of when they own the investment, it would need to be on a rate base.

Q. So that isn't it true then that there is no benefit from an avoid cost of not spending money on capital expenditures for environmental protection?

A. Again, to the extent that I'm qualified to answer the question, my understanding of the process is that such an entity has to go to its regulatory body and in effect obtain approval for the inclusion of that expenditure in the rate base and that there is often concern on the part of such an entity as to whether or not the particular expenditure will be found appropriate for inclusion in the rate base.

And to the extent that an expenditure would be made, say that would be more expensive, but would be more timely and

therefore would meet a particular deadline, but would end up resulting in a higher cost to be passed along to the users, those in the rate base.

I would assume there is a risk that that additional cost might have to be borne by the company itself.

Q. But you would agree with me that the company's legitimate concern is that the Public Service Commission find that its expenditure is to be prudent?

A. I'm certain from a business standpoint, not being qualified as an expert in business matters, but as a business matter, I would assume it's of concern to them.

Q. Thank you.

Let's turn now to the Carrollwood facility. Did you interview anyone at EPA Region IV about Carrollwood?

A. Mr. Ken Kwan.

Q. And did Mr. Kwan state whether or not he had investigated the Carrollwood Facility during the period of time at issue in this lawsuit?

A. I can't remember specifically whether he used the word "investigated," but we discussed the facility.

Q. Did he indicate to you whether or not he had visited the Carrollwood Facility while it was in operation?

A. That I don't recall.

Q. Did you interview Mr. Thomas Pfaff?

A. No, I don't believe Thomas Pfaff and I have ever spoken

about Carrollwood.

Q. The NPDES permit which was effective July 1, 1991 for Carrollwood was an advanced wastewater treatment facility, correct?

A. The permit limits that it included would typically be expected to require an AWT Plant in order to meet them.

Q. Have you ever seen a secondary plant with the limitations contained in the July 1, 1991 permit?

A. Not that I recall.

Q. All right.

Isn't it true that it would be technically impossible for a secondary treatment plant to consistently meet all of the parameters in the July 1, 1991 permit?

A. Would certainly be very unlikely.

Q. Isn't it true that between July 1, 1991 and January, 1992, the Carrollwood Plant in fact met some of the limitations, particularly those for total suspended soilent and biological oxygen demand?

A. Yes. As I recall, they did meet some of those.

Q. Are you familiar with the measures which Florida Cities took which enabled the plant to meet some of the 1991 effluent limitations in that permit?

A. I don't recall which specific measures they took.

Q. Okay.

Do you know of any data which demonstrates that the

discharges from the Carrollwood Plant between July 1, '91 and January, 1992, caused any environmental harm to Sweetwater Creek?

A. Certainly I've seen data that I believe is from the -- what's known as the STORET System, that looks at the data from I believe mid-1989 through 1994 and splitting that data at the point in time at which the discharge was ceased.

There are noticeable reductions in both phosphorus and nitrogen load in the creek, these from a point several miles downstream from the site of the treatment plant.

Q. And have you made a survey of what other dischargers discharge into this particular body of water?

A. As I recall from the description in Florida Cities' contractor's report, LTI, I don't believe there were any substantial discharges.

Q. There was nine point source runoff in this area?

A. I would suspect there would be some, yes.

Q. This in fact is a heavily urbanized area, is it not?

A. Fairly well developed.

Q. Okay.

Are you able to, sir, with a reasonable degree of scientific certainty, more probably then not, that you can trace the effects you found in the STORET data specifically to the Carrollwood Plant?

A. Not specifically.

Q. Okay.

When did EPA first require Florida Cities to build an AWT Plant at Carrollwood?

A. I can't recall from memory when the first actual requirement to construct might have taken place.

Q. Isn't it true that the first -- strike that. Let me start over again.

Isn't it true that before the July 1, '91 NPDES permits, EPA never took any action which mandated an upgrade to AWT at Carrollwood?

A. As I said, I can't recall.

Q. So your answer actually is no?

A. Well, certainly I can't recall.

Q. Carrollwood had received -- and isn't it true that Carrollwood received an NPDES permit in 1975?

A. I believe that is true, yes.

Q. Isn't it true that between 1975 and January, 1992, the Carrollwood Facility was always authorized to discharge by the State of Florida?

A. I believe the facility operated under a series of permits.

Q. So the answer to my question is yes?

A. Yes.

Q. And are you aware of the Wilson-Grizzle Legislation in Florida?

A. To a certain degree.

Q. And what is your understanding of Wilson-Grizzle?

A. My understanding -- actually my understanding probably relates more to I think what is described as Grizzle-Figg.

Q. My question is about Wilson-Grizzle?

A. Other than being aware that I believe it predated Grizzle-Figg, not in detail.

Q. You don't know the specifics of that legislation?

A. No, not the specifics of that.

Q. Did Florida Cities apply for a renewal of its State discharge permit in 1979?

A. I would assume they did, but I would need to be refreshed as to the specifics of that application.

Q. Okay.

And did the State in fact grant a renewal?

A. That is my recollection.

Q. All right.

Isn't it true that at some point in time in 1979, FDER required that in the future, Florida Cities connect the Carrollwood Plant to a Hillsborough County Plant at a subsequent date?

A. Again, as I said, I recall that there was a reissuance, but I would need to have my recollection refreshed.

Q. Are you aware of whether or not in 1979 there was adequate capacity in any Hillsborough County Facility to accept

the Carrollwood flow?

A. My recollection based on correspondence between Hillsborough County and Florida Cities is no, there was not.

Q. And isn't it true that Hillsborough County is different from other sections of Florida in that Florida has delegated some of FDER's responsibility to Hillsborough County?

A. I couldn't speak for all the sections of Florida. That is apparently the case in Hillsborough.

Q. Let me refer you to Defendants' Exhibit 94. Have you located Exhibit 94?

A. Yes, I have.

Q. Would you identify it, please?

A. It's a letter dated February 14, 1983, to a Mr. A. A. Reeves, and it is on Hillsborough County Environmental Protection Commission letterhead. It's from a William J. Harper. It is a letter that basically states that Florida Department of Environmental Regulation Permit TP29-29206 requires connection to the Carrollwood Wastewater Treatment Plant to the Hillsborough County System by June 30, 1983.

MR. BULLOCK: Your Honor, I would move Defendants' 94.

THE COURT: Be received.

BY MR. BULLOCK:

Q. In fact, to your knowledge, was there capacity in the Hillsborough System by June 30, 1983?

A. Based on correspondence I see, no.
Q. Florida Cities -- let's back up a second.
Florida Cities applied to renew its NPDES permit in 1980, is that correct?
A. 1980 or 1979.
Q. 1980 --
A. Again, I need to have my recollection refreshed.
Q. All right.
Isn't it true that in order for EPA to issue a NPDES permit in a non-delegated State such as Florida, EPA must obtain State certification of the permit?
A. That is my understanding, yes, that's how the system works.
Q. All right.
And to your knowledge, was Florida able to certify --
A. I'm sorry, which year?
Q. Let me finish my question.
A. I'm sorry.
Q. To your knowledge, was Florida able to certify the 1980 application to renew the NPDES permit?
A. I've not seen such or I don't recall anyway seeing such certification, but I understand that a permit was issued.
Q. You understand the 1980 NPDES permit was issued?
A. There was a permit.
Q. Isn't it true that actually that permit application was

denied in 1984?
A. Yes.
Q. All right.
And in fact, wasn't it denied because the State would not certify the permit?
A. If I recall correctly, yes.
Q. Now, you testified that Florida Cities had another option in 1983 to divert the effluent coming into the Carrollwood Plant, is that correct?
A. Yes.
Q. That would be with the City of Tampa, correct?
A. Yes.
Q. And the City of Tampa -- isn't it true that the City of Tampa identified a connection point into its system at approximately fifteen thousand feet from the Carrollwood Plant?
A. I believe they identified three connections, but the fifteen thousand foot connection was available at that time.
Q. Okay.
And fifteen thousand feet is approximately three miles?
A. Yes, sir.
Q. Have you calculated what the cost would have been to build a three mile force plant?
A. I have not carried a detailed calculation of that cost.
Q. Have you visited the area in which the Carrollwood Plant was located?

A. Yes, I believe as I've indicated in my direct testimony we did visit the site of the former plant.
Q. Would you identify the surroundings of the Carrollwood Plant?
A. A residential area.
Q. Is it a relatively upscaled residential area?
MR. JACOBS: Relevancy, Your Honor.
THE WITNESS: I can't --
THE COURT: Wait, wait, wait, wait.
THE WITNESS: I'm sorry.
THE COURT: What's the relevancy?
MR. BULLOCK: Your Honor, during the direct, they were discussing whether or not there were alternatives available. One of the alternatives would have been apparently not drive a three mile force main through a residential --
THE COURT: Overruled. You remember the question?
MR. JACOBS: I'm sorry, I wanted to make my objection a little bit clearer. My point was that there is no -- the point is it's not relevant whether this was an upscale community or not in terms of putting a force main through it. That's the relevancy part of my objection.
THE COURT: I understand. Overruled.
BY MR. BULLOCK:
Q. I'm sorry, the answer to the question was?
A. Could you repeat it.

Q. Was this a relatively upscaled neighborhood?
A. Other than having a general impression of it being a relatively pleasant area, I don't have a particular memory of what type of housing was in there.
Q. Have you performed any calculations about the costs of land condemnation or eminent domain proceedings or easements which Florida Cities would have needed to receive to build a three mile force main?
A. No, I have not.
Q. Do you have any idea what permitting requirements Florida Cities would have had to undertake to build a three mile force main through Carrollwood?
A. Well, certainly construction permits would have been required probably from both local and county.
Q. The City of Tampa was going to charge a connection fee for each of the hookups from -- excuse me -- connection fee of a certain figure per household that discharged into the Carrollwood System, isn't that correct?
A. Yes, I believe that was correct.
Q. And in fact, isn't it true that the tentative figure from the City of Tampa to the Carrollwood facility was approximately eight hundred --
A. I'm sorry, how much?
Q. Was approximately eight hundred dollars per customer?
A. I recall hearing that figure.

Q. All right.
Isn't it true there would have been other fees as well as the connection fee?
A. I would assume, yes.
Q. All right.
Do you have a complete figure about how much it would have cost to construct a force main and hookup to the City of Tampa?
A. No.
Q. Isn't it true that Florida Cities would have had to submit this proposal to the Florida Public Service Commission or -- excuse me -- or to the Hillsborough County equivalent of the Public Service Commission?
A. I would assume they would have.
Q. All right.
And in that submittal, wouldn't Florida Cities have been required to demonstrate that hooking into Tampa would have been a prudent decision?
A. To the extent that they would have been able to recover the cost as opposed to pay for it out of their own pocket, I believe so, yes.
Q. All right.
During the 1980s, did Hillsborough County ever develop adequate capacity to accept the Carrollwood effluent?
A. Based on the representation in the correspondence, no.

Q. All right.
You have testified that there were other options which the company could have used as disposal methods at Carrollwood, correct?
A. Yes.
Q. All right.
One of the options was percolation ponds. Have you performed any calculation as to how large the percolation ponds would have been required at Carrollwood?
A. No, not independent.
Q. Have you performed any investigation of whether or not there was adequate land in the area at Carrollwood to build percolation ponds?
A. I've not, beyond what I have seen in the 1980 Jamal Report which I believe was entered yesterday.
Q. Did you yourself perform any hydrogeologic studies to determine whether or not there were any suitable sites for percolation ponds?
A. No.
Q. Is the Carrollwood residential subdivision densely populated?
A. I believe it's a reasonably well developed area.
Q. All right.
Do you know how much vacant land was in the area immediately around the plant during the 1980s?

A. Not beyond that which was characterized in the 1984 report.
Q. And how much did the '84 report state?
A. It identified a number of potential sites that had been looked at. It was not inclusive as to whether they were the only available sites in the area.
Q. I believe you identified there were some golf courses which would have -- which the company could have connected to the discharge effluent?
A. I believe the 1984 report looked at one golf course.
Q. Do you know whether or not these facilities were already accepting effluent from other locations?
A. That I can't recall.
Q. Okay.
Again, a golf course can only accept the maximum load during dry weather, isn't that correct?
A. Yes, that is true.
Q. And during wet weather, there would need to be other resources, correct, for disposal?
A. I would assume either storage -- adequate storage or other disposal objectives.
Q. Was there adequate storage available at the Carrollwood Facility?
A. Certainly not as it was constructed.
Q. And in order to discharge effluent to the golf courses,

that would have required AWT treatment?
A. Yes.
Q. Are you aware of whether or not Florida Cities requested permission in 1979 to construct an AWT Plant at the Carrollwood Facility?
A. I would need my memory refreshed as to whether they specifically requested permission to construct.
Q. As you sit there today, you have -- you can't answer one way or the other?
A. I have a recollection there may have been some discussion about AWT, but I can't recall whether they specifically requested the permission to construct.
MR. BULLOCK: The Court's indulgence just a second, Your Honor.
BY MR. BULLOCK:
Q. What materials were made available to you regarding the enforcement issues at Carrollwood?
A. Files from USEPA and files from Hillsborough County. I don't recall whether separate FDER files were reviewed.
Q. All right.
Let me refer you to Florida Cities Trial Exhibit 201.
A. I'm sorry, this is 200, I'm sorry.
MR. BULLOCK: Your Honor, is it in --
THE COURT: No, I don't have that volume.
THE CLERK: That's the one you just gave me.

THE COURT: I thought that went to 200. I thought you said 201.

THE CLERK: It goes to 202.

THE COURT: Oh, I'm sorry.

Well, okay.

(Brief Pause.)

MR. BULLOCK: This is the official copy, it's 201.

THE COURT: Yeah, I have 201.

MR. BULLOCK: I'm sorry.

THE COURT: I didn't think I did. I thought it just went through 200, but I found it now. Thank you.

BY MR. BULLOCK:

Q. Mr. Klingenstein, would you identify Exhibit 201?

A. This is entitled notes on the proposed penalty assessment and it appears to be undated.

MR. JACOBS: Objection to the use of the exhibit before it's been received in evidence, if in fact it is.

THE COURT: Well, hasn't been offered yet. It may well be offered, but I don't know, he hasn't.

BY MR. BULLOCK:

Q. Were you provided the -- we've discussed briefly what you looked at regarding Carrollwood. Were you provided the entire enforcement file for the Carrollwood Enforcement Facility?

A. I was provided materials from the enforcement file. I don't know if I was provided the entire enforcement file.

Q. One of the important aspects in the enforcement file would be the reports from the individuals from EPA that you actually investigated who actually investigated the facility, is that correct?

A. Certainly, yes.

Q. And I believe we established earlier that you never saw this facility when it was in operation, correct?

A. Yes, that is correct.

MR. BULLOCK: Your Honor, we would move Defendants' Trial Number 201 into evidence, the notes and proposed penalty and assessment which were produced from the Plaintiff's own enforcement files.

MR. JACOBS: Your Honor, here we would object on a couple of bases. First of all, the notes appear to be incomplete. Secondly, the Court already found in its November 22nd, 1995 order that the consent agreement that was entered into between EPA and Defendant Florida Cities with respect to the previous violation at the Carrollwood Plant, that that consent agreement should be construed within its four corners. I'm reading from page 12, footnote ten of the Court's November 22nd, 1995 order.

And I further quote, thus the consent agreement, within its four corners, the Court finds there's no indication that the notes are part of or are incorporated into the consent agreement, so, we would say they're irrelevant.

MR. BULLOCK: Your Honor, this was part of the Carrollwood Enforcement File which was produced pursuant to discovery, it was produced from EPA Region IV's own files. I believe that alone qualifies under Rule 803(a) as a public report.

THE COURT: This was in whose enforcement file?

MR. BULLOCK: EPA's Enforcement File for Carrollwood. Judge Swartz had directed that -- basically the tone of his order was that we would not have any authentication questions and he struck all the custodian of records as witnesses. I don't believe there's any argument that this is actually the document that was contained in the enforcement file regarding Carrollwood that the Government produced pursuant to discovery.

THE COURT: Yes, sir.

MR. JACOBS: Judge, I'm not arguing the document is not authentic, I'm arguing that the Court has already found it to be irrelevant and I'm also arguing that the document is incomplete.

Again, the Court found that the notes are -- there's no indication that the notes are a part of or are incorporated into the consent agreement and it's the consent agreement that is relevant and not any internal notes written by an EPA employee that related to whether or not the agency should accept the consent agreement.

MR. BULLOCK: Your Honor, this is not being offered

to somewhat contradict the consent agreement. Mr. Klingenstein has testified that in some part his opinion is based on his review of the EPA files which would include the enforcement files that came from Region IV.

THE COURT: I agree. I'll overrule the objection. Be received over objection.

BY MR. BULLOCK:

Q. Let me refer you to page 2 of this exhibit, and ask you to read paragraph six under other matters that justice may require.

A. Other matters that justice may require; penalty reduction is justified due to the re-evaluation of wasteload allocation by the State of Florida indicating discharges permissible under stringent requirements. In July, 1987, Grizzle-Figg Legislation became effective allowing discharges to certain streams provided specific conditions were met. The Grizzle-Figg provisions are applicable to Sweetwater Creek and the DER has modified its wasteload allocation to allow for discharges into the Sweetwater Creek. In 1988, Respondent retained and consultants conducted a minimum negative impact study.

Would you like me to continue.

Q. Yes.

A. The study indicated that discharges could be allowed but with stringent effluent limitations imposed to discharger. And

wastewater treatment -- I'm sorry -- and application was submitted to DER for construction of an advanced wastewater treatment AWT upgrade in November, 1989.

In July, 1990, DER issued Respondent a construction permit for the construction. On July 31, 1990, Respondent submitted an application for an NPDES permit. EPA plans to issue an NPDES permit to Respondent.

Q. Would you also read paragraph four under economic benefit?

A. The economic benefit realized by Respondent was --

THE COURT: Just a moment.

MR. JACOBS: I'll object again, beyond the scope of the witness' not being offered as an economic benefit expert, again technology and technological, but not economic benefit.

MR. BULLOCK: Your Honor, he's testifying as to the seriousness of violations. One of the issues under serious violation would be what kind of avoid cost or what kinds of economic benefit were gained from this.

THE COURT: He hasn't been offered as an expert in that area nor has he testified.

MR. BULLOCK: I'll withdraw it, Your Honor.

THE COURT: All right.

Let's recess for lunch. We'll reconvene at 1:15.

(Thereupon, a luncheon recess was taken.)

All right, Mr. Bullock.

MR. BULLOCK: Good afternoon, Your Honor.

BY MR. BULLOCK:

Q. Mr. Klingenstein, let me refer you to Defendants' 97. Could you identify this document, please?

A. This is --

MR. JACOBS: I'd object to the request that the witness be asked to identify documents. There's been no foundation laid that he has seen it before and should know how to identify it.

THE COURT: Can you identify this exhibit?

BY MR. BULLOCK:

Q. Mr. Klingenstein, can you identify Exhibit D-97?

A. Certainly on the basis of appearance and contents. I don't know whether I recall I specifically read the document or not.

Q. If you will turn to page 2 which is an attachment, isn't it true this -- strike this first.

What does this document purport to be?

A. By its appearance, it's a modification of the permit for the Carrollwood Plant from FDER.

Q. And if you would turn the page and see subparagraph A; isn't it true this states the connection from the Carrollwood Plant should be made to the Hillsborough County Dale Mabry System?

A. Yes, it does.

MR. BULLOCK: Your Honor, I would move D-97 into evidence?

THE COURT: It'll be received.

BY MR. BULLOCK:

Q. Let me refer you to Florida Cities' Exhibit 96. Are you familiar with this document?

A. Yes, I am.

Q. And would you identify what this document is?

A. This is a letter dated June 28, 1983, to Mr. A. A. Reeves. It's on County of Hillsborough letterhead and it's signed by Mr. Bruce E. Kennedy and the subject is connection of Carrollwood WWTP to County WW System.

Q. And this letter indicates that Hillsborough County did not have adequate capacity to accept the Carrollwood effluent, is that correct?

A. Yes, that is correct.

MR. BULLOCK: I would move D-96 into evidence.

THE COURT: Be received.

BY MR. BULLOCK:

Q. Mr. Klingenstein, let me refer you to Defendants' 108. Have you reviewed this document before?

A. Yes, I have.

Q. All right.

And would you identify for the record what the document is?

A. This is a -- this is a permit from the State of Florida Department of Environmental Regulation, date of issue, 4-5-88, for the Carrollwood S-DWWTP.

Q. And that would be the Carrollwood Wastewater Treatment Plant?

A. Yes.

Q. And page 2 of this exhibit sets forth specific limits for the effluent, is that correct?

A. Yes, it does.

Q. And those are secondary limits?

A. If you mean under paragraph four, yes, they would be consistent with the secondary plant's performance.

MR. BULLOCK: I would move D-108 in.

THE COURT: It'll be received.

BY MR. BULLOCK:

Q. Mr. Klingenstein, let me direct you to D-125, and ask you if you've ever seen this exhibit?

A. Yes, I have.

Q. And would you identify what this exhibit is?

A. This is a letter on the Board of County Commissioners, Hillsborough County, Florida, Office of the County Administrator letterhead, and it is a letter dated July 27, 1990, it's to Mr. A. A. Reeves, and it is from Mr. Michael W. McNeeny.

Q. And it has no subject listed?

THE COURT: I'm sorry, you looking at Defendants' 125?
THE WITNESS: I'm sorry, I believe that was --
THE COURT: Letter dated July 27, 1990?
THE WITNESS: I believe so.
THE COURT: Okay.
MR. BULLOCK: I'm sorry, Your Honor, we were intending to put in the 1990 permit to construct.
THE COURT: Well, my 125, apparently Mr. Klingenstein's is just what he described.
MR. BULLOCK: Until we can identify it, let me withdraw that line of questioning.
BY MR. BULLOCK:
Q. You testified this morning that you, Mr. Klingenstein, that you were familiar with the Grizzle-Figg Legislation?
A. To a degree, yes.
Q. Okay.
What is your understanding of the purpose of Grizzle-Figg Legislation?
A. My understanding of its purpose was to -- is that its purpose was to allow for the discharge of effluent from wastewater treatment plants to certain bodies of water as long as certain conditions were met, those conditions being a certain level of treatment and minimum negative impact being demonstrated.
Q. Do you know when Grizzle-Figg was passed?

A. My belief is 1987.
Q. All right.
Prior to that time, excuse me -- let me start over again.
Do you know what water bodies Grizzle-Figg affected?
A. Not, I can't recall inclusively.
Q. Isn't it true that prior to the passage of Grizzle-Figg, Florida Cities would have been unable to build an AWT Plant?
A. It's my understanding that Grizzle-Figg is the piece of legislation that enabled them to, so that would be my understanding.
Q. Okay.
And isn't it true that once Grizzle-Figg was passed, Florida Cities requested that they be allowed to build an AWT Plant at Carrollwood?
A. Yes, that's my understanding.
Q. And isn't it true that the FDEP required that a minimum negative impact study be performed?
A. Yes, they did.
Q. All right.
And was that study in fact performed?
A. Yes, it was.
Q. All right.
Let me refer you to exhibit -- Defendants' Exhibit 116, and ask you if you've seen this study before?
A. Yes, I have.

Q. And would you identify the study for the record?
A. Well, this is a cover letter from Florida Cities Water Company dated June 19, 1989 to Florida Department of Environmental Regulation from Mr. Robert French and it is to the attention of Mr. Bruce DeGrove, environmental supervisor, and it is a letter, cover letter transmitting the results of a minimum negative impact study.
Q. You have in fact reviewed the minimum negative impact study that is attached, isn't that true?
A. Yes, that is true.
Q. This is what is known as a Limno-Tech Study?
A. Yes.
MR. BULLOCK: Your Honor, we would move Defendants' 116 in evidence?
MR. JACOBS: The only part of that I'd object to is the cover page, Your Honor. He's reviewed the report, I'm not sure he's seen the cover page which is hearsay.
BY MR. BULLOCK::
Q. Have you in fact reviewed the cover page?
A. Yes, I have seen the cover letter.
MR. JACOBS: Withdraw the objection.
THE COURT: It will be received, 116.
BY MR. BULLOCK:
Q. Florida eventually accepted the minimum negative study that Limno-Tech put forth, isn't that correct?

A. Yes.
Q. And on that basis, Florida Cities was issued a construction permit to construct an AWT Facility.
A. Yes, after certain concerns, initial concerns were satisfied, yes.
Q. Isn't it true also that in 1988, Hillsborough County informed Florida Cities that it would have available capacity in 1990?
A. I'm sorry, that was in which year.
Q. 1988?
A. I believe there was correspondence from Hillsborough in that year regarding when capacity would be available. I would need to refresh my memory as to exactly what year they represented.
Q. You have read correspondence, though, the 1988 correspondence informing them?
A. I recall reading correspondence in that timeframe that discussed when capacity might be available, but I don't recall specifics as to exactly when.
Q. Let me refer you to Defendants' 106. Have you seen this document before?
A. Yes, I believe so.
Q. And this is a document we were speaking of a few minutes ago from 1988?
A. Certainly possibly one of them.

MR. BULLOCK: Your Honor, I move Defendants' 106 in evidence?
THE COURT: Be received.
BY MR. BULLOCK:
Q. Let me refer you to page 2 of this exhibit. Isn't it true that page 2 contains a capacity fee of approximately five point five million dollars?
A. Yes, it does.
Q. And that would be divided among the twelve hundred customers of Carrollwood?
MR. JACOBS: Objection, lack of foundation as to the number of customers.
THE COURT: Well, I don't know whether he knows or not to testify to that. I'll overrule the objection at this point.
BY MR. BULLOCK:
Q. Mr. Klingenstein, have you reviewed data about how many customers the Carrollwood Plant served?
A. I certainly have, but I can't recall exactly what that number was.
Q. All right.
Would you disagree -- assume hypothetically that the plant served approximately twelve hundred customers.
A. Yes.
Q. You would then divide the capacity fee among -- the five

point five million dollars among the customers of the plant?
MR. JACOBS: Same objection, Your Honor.
THE COURT: Okay, well --
MR. JACOBS: Or slightly similar to the improper hypothetical at this point. Not offered again for the financial reasons, but for technological reasons.
THE COURT: If there's no evidence regarding the number of customers, I think it is vulnerable to objection. I'll sustain the objection.
BY MR. BULLOCK:
Q. All right.
May I also then refer you, Mr. Klingenstein, to Exhibit D-125. And let me ask you, are you familiar with this document?
A. Yes, I am.
Q. And would you identify what this document is?
A. This would be the July 27, 1990 letter that had been previously identified from an Board of County Commissioners, Hillsborough County, Florida, letterhead, from Mr. Michael McWeeny to Mr. A. A. Reeves.
Q. All right.
Isn't it true this document states that the Hillsborough -- the capacity for Carrollwood to hook into the Hillsborough System would be available during the first quarter of 1991 -- excuse me, sometime after the first quarter of 1991?

A. Yes, it does.
Q. All right.
THE COURT: During the first quarter of 1991; isn't that what it says?
MR. BULLOCK: Well, it's expected to be commissioned during the first quarter of 1991, then after the startup capacity, would be --
THE COURT: Oh, okay.
BY MR. BULLOCK:
Q. Isn't it true then, Mr. Klingenstein, that the first time that Hillsborough County would have had capacity to accept the Carrollwood -- I guess the technical term is influent, would have been sometime after -- during or after the first quarter of 1991?
A. That is my understanding based on a review of the documents and the correspondence.
MR. BULLOCK: I would move Defendants' 125 in evidence.
THE COURT: Be received.
BY MR. BULLOCK:
Q. Isn't it true, Mr. Klingenstein, that Florida Cities in fact applied for an AWT Permit at the Carrollwood Facility sometime in June or July of 1990?
A. In that timeframe.
Q. All right.

Let me refer you to Defendants' 126. Have you reviewed this document before?
A. I don't recall that I have specifically seen this document.
Q. Can you identify what this document is?
A. Its covered by a letter dated July 31, 1990, it's addressed, one, Florida Cities Water Company, and addressed to NPDES Permit Section, Environmental Protection Agency, and it is signed by Mr. Jack Tompkins and the subject is Carrollwood WWTP NPDES Permit Number FL0029319.
Q. Is this form an application form for an NPDES permit?
A. Yes, it is.
MR. BULLOCK: Your Honor, I would move D-126 in evidence.
THE COURT: It'll be received.
BY MR. BULLOCK:
Q. Let me refer you to Defendant Florida Cities' 129, Mr. Klingenstein, and ask you if you have seen this document before?
A. I believe so.
Q. All right.
And isn't it a letter from Florida Cities to EPA advising EPA that it could not meet the limitations contained in the draft permit -- I'm sorry -- I should -- continues to say as the plant was presently construed?

A. Yes.
Q. Isn't it true this letter also requests that interim limitations be established that would allow the plant to continue to operate until AWT Plant was brought on line?
A. Yes, it does.
Q. And doesn't it also state that the plant would not be in operation until January of 1992?
A. Yes, that is the date stated.
Q. Let me refer you next to Defendants' 131.
MR. BULLOCK: Your Honor, while he's looking at that, may I move Defendants' 129 into evidence?
MR. JACOBS: Your Honor, we'd object on the basis of the grounds that it's a letter -- purports to be a letter to EPA, but it doesn't have an EPA receipt stamp and it's not signed, so I'm not sure it ever was sent.
MR. BULLOCK: Your Honor, it's listed as Plaintiff's 311. If they would have more preference to use it, we'll be glad to move theirs in evidence as well.
MR. JACOBS: One moment.
Objection is withdrawn.
THE COURT: It'll be received.
MR. BY BULLOCK:
Q. Mr. Klingenstein, have you seen Exhibit 131 before?
A. Yes, I have.
Q. And would you identify the letter and what's attached to

it?
A. It is a letter to Ms. Martha Hunter, it's on Florida Cities' Water Company letterhead, it is from Jack Tompkins, and it is regarding the NPDES Permit for the Carrollwood Wastewater Treatment Plant.
Q. Isn't it true this letter again points out that the draft permit is for AWT limitations and that the company would not be able to meet those limitations at the Carrollwood facility until January, 1992?
A. Yes.
MR. BULLOCK: Your Honor, we would move Defendants' 131 into evidence?
THE COURT: Be received.
BY MR. BULLOCK:
Q. Let me ask you next to look at Defendant Florida Cities' 132. Have you seen 132 before?
A. I believe so.
Q. Let me refer you to page 3 of 11 in Exhibit 132, paragraph eight. Let me refer you to what is the sixth line down in paragraph eight, beginning with this consent order, and ask you to read that sentence?
A. This consent order authorizes and requires Respondent to continue to operate the WWTP.
THE COURT: Continue to what; operate?
THE WITNESS: I'm sorry, to continue to operate.

THE COURT: You're on paragraph --
THE WITNESS: I'm sorry, this is --
MR. BULLOCK: Your Honor.
THE COURT: You're on paragraph eight, page 3 of 11?
MR. BULLOCK: Yes, sir.
THE WITNESS: I believe I was on the sixth line down, Your Honor.
THE COURT: Oh, one, two, three, four, five, six, okay. I was on the first line.
BY MR. BULLOCK:
Q. If you would begin to read that sentence again?
A. Surely. This consent order authorizes and requires Respondent to continue to operate the WWTP in compliance with T.O.P. until such time as the new AWT WWTP is constructed and placed into service.
Q. And since environmental law is filled with an abundance of acronyms, WWTP means?
A. Wastewater Treatment Plant.
Q. And isn't it true TOP means the State Temporary Operating Permit?
A. Yes.
MR. BULLOCK: Your Honor, we would move 132 into evidence?
THE COURT: Be received.
MR. JACOBS: I'm sorry, Your Honor, again, this is an

unsigned document, it's -- the last two pages of the exhibit have numerous signature lines, there's not a signature. This could conceivably be a draft of a consent order that was negotiated between the parties, neither of which was the Federal Government.
MR. BULLOCK: We'll be glad to pull from the files a copy, the signed order and substitute it.
THE COURT: Okay.
Or you can show it to counsel and see that that satisfies him, either way.
MR. JACOBS: I have 132, I have just been handed another 132. The objection is that 132 is not signed, and again, it's a consent order presumably negotiated between two parties and neither of which is the Federal Government.
THE COURT: Well, we're talking about identification, authentication and I thought that the Magistrate Judge talked to you guys about that, at least I asked him to at the pre-trial conference.
MR. BULLOCK: Yes, Your Honor, he did.
MR. JACOBS: He did, and we objected, but with all candor, we objected on relevancy grounds and we did not object on authenticity grounds.
MR. BULLOCK: Your Honor, I have a copy of --
MR. JACOBS: It's not relevant because it's not signed, I suppose would be another way to look at it.

THE COURT: It's not relevant because it's not signed. Well, that's -- I'm not real impressed with that backdoor approach.

MR. JACOBS: I'm not sure I am anymore myself, Your Honor.

MR. BULLOCK: I'll be glad to hand this copy of the signed permit to Mr. Jacobs if he wants to review it.

THE COURT: All right.

MR. JACOBS: I'd be happy to accept counsel's representation this is an exact copy that he's just handed me of 132, except for the fact that it's been signed.

THE COURT: Well --

MR. JACOBS: But it doesn't appear to be --

THE COURT: I tell you what, I'm going to receive it subject to some later problem with that document and you can study it and compare it, but --

MR. JACOBS: Just on a short comparison, it's not the same document by any means.

THE COURT: Not the same?

MR. JACOBS: No, sir.

THE COURT: Well, okay, I'm going to reserve ruling on that. I'll sustain the objection at this point. If you want to try to move it later on after you have had a chance to look at it further, we'll see about it.

MR. BULLOCK: Thank you, Your Honor.

BY MR. BULLOCK:

Q. Mr. Klingenstein, let me refer you to Exhibit Number 135, and ask you if you have seen this document before?

A. Yes, I believe I have.

Q. And can you identify the document?

A. It's a letter dated March 1, 1991, on the Florida Cities Water Company letterhead, it's to Ms. Martha Hunter from Mr. Paul Bradtmiller and it is a revised draft of the Carrollwood Wastewater Treatment Plant.

MR. BULLOCK: Your Honor, we would move Defendants' 135.

THE COURT: Be received.

BY MR. BULLOCK:

Q. Isn't it true this letter is another request from Florida Cities to EPA to adopt the interim limits between establishing a consent order between FDEP and Florida Cities which would in a sense be secondary limits?

A. This letter does request that the interim limits established in the consent order between EPA and Florida Cities be included.

Q. Let me ask you to look at 137 and ask you if you have seen that?

A. I believe -- I'm sorry, I believe I've seen this.

MR. BULLOCK: Your Honor, we would move Defendants' 137 into evidence.

THE COURT: Be received.

BY MR. BULLOCK:

Q. Just to save some time, Mr. Klingenstein, isn't this letter also a request for EPA to continue secondary treatment levels at Carrollwood?

A. The letter again requests the interim limits be incorporated.

Q. Let me refer you to Defendants' 139. Have you seen this document before?

A. Yes, I believe I've seen this.

Q. All right.

Would you identify it, please?

A. This is a letter dated May 20th, 1991. It's on Florida Cities Water Company letterhead to John T. Marlar, it is from Mr. Paul Bradtmiller and it's re, Carrollwood Advanced Wastewater Treatment Plant, Administrative Order Number 90-100, and then gives the NPDES permit number.

MR. BULLOCK: Your Honor, we would move Defendants' 139.

THE COURT: Be received.

BY MR. BULLOCK:

Q. Isn't it true this letter informs EPA that in fact Florida Cities has completed an agreement with the Hillsborough County Public Utilities Department to connect Carrollwood to the Hillsborough County Facility?

A. Certainly, the letter indicates that negotiations had been completed and that the agreement was scheduled to be, I suppose, reviewed for approval by the County Commissioners.

MR. BULLOCK: Your Honor, I'm getting ready to move into a different area, just so the record is complete. If you want to address at this time, Mr. Baise and Mr. High have reviewed the document that we had the disagreement over earlier, the State Consent Order, and it is identical in fact to the exhibit that we proferred earlier save for the fact this one actually is signed. There are two exhibits attached to it which are State permits which are already into evidence.

MR. JACOBS: Well, that's what made them different as I quickly saw that 132 had eleven pages and they handed me something with roughly thirty or thirty-five. I was able to tell the Court it wasn't the same document. I didn't compare it, perhaps counsel, if I might suggest, would like to remove from the one he's saying is the signed version, the additional pages, then I would have no objection to 132 if it's identical. I'm not trying to belabor the issue, I'm trying to advance.

MR. BULLOCK: I'll be glad to submit pages one through eleven of this report.

THE COURT: All right.

Want to show it to counsel.

MR. JACOBS: I can't review all eleven pages, but I'll be happy to accept Mr. Baise's representation it's

identical, so if he makes that representation, I will.

MR. BAISE: I make that representation, Your Honor.

MR. JACOBS: I withdraw the objection.

THE COURT: Defendants' 132 will be received.

MR. BULLOCK: Your Honor, may we substitute the version of it at a later time so Mr. Jacobs can make a copy of this?

THE COURT: Yes, sir.

BY MR. BULLOCK:

Q. Let me ask you to look next at Defendants' 140, and ask you if you've seen this document before?

A. Yes, I have.

Q. And could you identify it?

A. It's dated, I'm sorry, May 28, 1991, it is on U. S. Environmental Protection Agency, Region IV letterhead to Mr. Paul Bradtmiller, Senior Vice President, Florida Cities Water Company, it is signed by Mr. W. Ray Cunningham, and it is re, final issuance of NPDES Permit Number FL0029319, Carrollwood WWTP, and it covers the NPDES permit.

Q. And the permit is attached to it, is it not?

A. Yes.

MR. BULLOCK: Your Honor, we would move Defendants' 140 into evidence.

THE COURT: It will be received.

BY MR. BULLOCK:

Q. Mr. Klingenstein, let me refer to what I believe is the tenth page of that exhibit. Isn't it true this is identified as the amendment to the statement of the basis at the time of issuance of this permit?

A. Yes, it is.

Q. Let me refer you to paragraph two and actually -- excuse me -- sub heading two and the two paragraphs which fall under public comment and ask you to read those two paragraphs?

A. And in April 1, 1991, letter was received from Florida Cities Water Company FCWC. In this letter, FCWC requested that the interim limits established in the consent order of February 4, 1991 entered into by FCWC with the Environmental Protection Commission of Hillsborough County and the State of Florida, Department of Environmental Regulation be incorporated into this permit. This request is a compliance matter. A copy of the letter was given to Thomas Pfaff and the compliance section. On April 8th, 1991, the compliance section will address the request after final issuance of this permit.

Would you like me to continue, sir?

Q. That's fine, thank you.

Let me refer you next to Defendants' 142.

Have you seen this document before?

A. Yes, I believe I have.

Q. Would you identify it for the record?

A. It is a letter on Florida Cities Water Company letterhead

dated June 24, 1991. It's addressed to Mr. Michael Ham, the Environmental Protection Agency. It's signed by Mr. Paul Bradtmiller, and the subject is NPDES Permit Number FL0029319, Administrative Order Number 90-100, Carrollwood Wastewater Treatment Facility.

Q. Isn't it true this is also a request from the company for relief from the AWT limits and a new permit?

A. Yes.

Q. All right.

And isn't it true that this letter states that it was written pursuant to discussions with Thomas Pfaff of the EPA Enforcement Staff?

A. That's the indication.

Q. All right.

MR. BULLOCK: Your Honor, the next series of exhibits are 147, 148, 150, 151 and 154. These are the discharge monitoring reports for the Carrollwood Facility. The DMR's are already in evidence. If you remember on Monday we objected, they did not have the cover letters attached. I don't know exactly how you want me to approach these. I'd like to move the DMR's with the cover letters into evidence.

THE COURT: Any objection?

MR. JACOBS: No, Your Honor. I said on Monday if you wanted to introduce the cover letters, I have no objection and I stand by that.

THE COURT: All right.

Do each one of them have a cover letter; is that what you're saying?

MR. BULLOCK: That's correct, each of those exhibit numbers that I read to you have cover letters attached to them.

THE COURT: So you're offering them individually?

MR. BULLOCK: Yes.

THE COURT: Are the numbers you just indicated?

MR. BULLOCK: That's correct.

THE COURT: Say again, please.

MR. BULLOCK: 147, 148, 150, 151, 154.

THE COURT: All right.

Then they'll be received.

BY MR. BULLOCK:

Q. Mr. Klingenstein, let me ask you to look very briefly at the first page of each of those exhibits and tell me if you've ever seen them before?

MR. BULLOCK: Your Honor, I would also include Exhibit 152 which is also a DMR with a cover letter attached.

THE COURT: All right, will be received.

THE WITNESS: I don't recall whether I've seen the cover letters.

BY MR. BULLOCK:

Q. All right.

Isn't it true these cover letters informed EPA that they

will be transferring the wastewater flow from the Carrollwood Plant to Hillsborough County in late December or early -- well, they will be transferring it and that they will request a cancellation of their NPDES permit or --

MR. JACOBS: Could I ask counsel to rephrase, I think that was vague.

THE COURT: Well --

MR. JACOBS: He started down one track and switched. I'm not sure the record will reflect --

THE COURT: Well, just restate the question, if you would.

BY MR. BULLOCK:

Q. Mr. Klingenstein, isn't it correct that each of these cover letters informed EPA that Hillsborough County -- that Carrollwood will connect with Hillsborough County and that Florida Cities will seek a revocation of its NPDES Permit?

A. Well, certainly Exhibit 147 does, 148 does --

Q. Isn't it true, Mr. Klingenstein --

THE COURT: Wait, he's not through.

THE WITNESS: And 150 does.

THE COURT: Okay.

THE WITNESS: As does 151.

THE COURT: You through?

THE WITNESS: I'm sorry, was 151 the last of those that you asked me to look at?

BY MR. BULLOCK:

Q. 152 and 154?

A. Yes, 152 as does 154.

Q. Mr. Klingenstein, isn't it true that the Administrative Order 90-100 remained in effect until March 3rd, 1992?

MR. JACOBS: Objection to the extent that the question calls for a legal conclusion.

THE COURT: Okay.

Well, if you know, I'll overrule the objection. Do you know?

THE WITNESS: No, I couldn't tell you.

BY MR. BULLOCK:

Q. Let me refer to Florida Cities Exhibit 156. Have you seen this document before?

A. Yes, I believe I have.

Q. I believe you testified earlier that the effluent limitations in 90-100 were in fact secondary treatment limits, is that correct?

A. I believe that was what we said, yes.

Q. And let me ask you to read the first paragraph of Exhibit 156?

A. This is the cover letter?

Q. That is correct?

A. Dear Mr. Bradtmiller, we are in receipt of your February 10, 1992 correspondence regarding the closure of the above

mentioned facility. This is to advise you Administrative Order Number 90-100 parentheses WKS issued on September 27, 1990, has been complied with and placed in an inactive status.

Q. Mr. Klingenstein, isn't it true that you have reviewed the enforcement history in EPA Region IV of the Carrollwood Facility?

A. I've reviewed documents from the enforcement file.

Q. Isn't it true that no enforcement action against Carrollwood was taken for the violations of the permit between July 1, '91, through January, 92, until this lawsuit was amended in April of '95?

A. I'm not aware of any.

Q. Thank you.

MR. BULLOCK: Let me move 156 in evidence, Your Honor.

THE COURT: It'll be received.

BY MR. BULLOCK:

Q. Mr. Klingenstein, let's turn now to Barefoot Bay. Did you interview anyone at EPA Region IV about the enforcement history of the Barefoot Bay Facility?

A. I believe I spoke to Mr. Kwan.

Q. Did you speak to anyone else?

A. Not that I recall.

Q. So you did not speak with Roy Herwig, is that correct?

A. Not with regard to Barefoot Bay.

Q. Do you know who Roy Herwig is ?

A. Yes, I know Roy Herwig.

Q. Who is Roy Herwig?

A. He's an employee of EPA Region IV.

Q. And to your knowledge, was Mr. Herwig involved in the enforcement actions at Barefoot Bay?

A. I've seen Mr. Herwig's name mentioned in the correspondence.

Q. Do you recall what documents you reviewed from the EPA Region IV enforcement files in preparation of your report?

A. Not specifically. I mean, there were quite a number.

Q. Let me refer you to Florida Cities' 202, and ask you if you've ever seen this document?

MR. JACOBS: Just for the record, Your Honor, forgive the interruption, but apparently we had a renumbered exhibit list yesterday, sorry, Monday, at the beginning of Court, and until now, it's matched up with the Government's objections that were submitted to the Court by exhibit by exhibit.

At this point, it no longer matches because the list was shortened, so I'm happy to try and keep up, but it might take me a moment longer to look at the exhibit because I no longer have the current list and the Court's list is no longer current because as I say, the Defendants gave us a new list Monday morning which was the time we submitted our list to the Court with our objections, not before.

MR. BULLOCK: Your Honor, I might respond by saying that this previously has been listed, we have identified that Exhibit 202 was formerly Florida Cities' 498 and that the Plaintiffs objected to this on the grounds of irrelevancy and offers to compromise.

MR. JACOBS: Well, Counsel did indicate that it was formerly 498 which will help us, but the objections aren't listed on the new list, so I think perhaps we've got to do a new list for the Court.

Now we have new numbers. I'm thinking both in terms of my own problem in keeping up as well as the Court's in making sure it has a current version of the Government's objections which it no longer does. I don't know how many these are, Mr. Bullock. If there's only a few, we perhaps can work through it.

MR. BULLOCK: I believe there are four; is that correct, four?

MR. JACOBS: I yield to the Court on that issue. We'll do a new list or --

THE COURT: Now, does this -- what effect, Mr. Bullock, does this new list have on it the list of objections that the United States has now?

MR. BULLOCK: Your Honor, the only difference between my list, I mean, the difference would be that we added at the end of the list Exhibits 199, 200, 201 and 202. Those were

previously identified to the Government as exhibits that we intended to use at trial. Those were previously identified with the trial exhibit number and the Government has filed objections as far as I'm able to tell to only one of those. As I say, it only involves four documents and we can easily give Mr. Jacobs the prior exhibit numbers right now.

MR. JACOBS: May I just inquire with respect to the additional exhibits, your list now goes up to 202. We objected up to 519. Have you, with the exception of those four, withdrawn all the remaining ones following 202?

MR. BULLOCK: Your Honor, we have provided, pursuant to the Court's order, a copy of our exhibit list with the exhibits that we intend to put in on our direct case. We reserve the right, I believe, as did all parties to put in documents for cross examination or rebuttal purposes, and so -- but in terms of the -- and I'll be glad to have Mr. High, who actually negotiated this with Mr. Quinn, discuss this matter if the Court sees fit. Again, we're talking about four documents that we can identify right now to counsel for the Plaintiff.

MR. JACOBS: Your Honor, we certainly endeavored to put on our list every single document we intended to use here for purposes of direct or cross examination so we wouldn't get into a situation like this again. If it's only four, we'll work with the Defendants. I would like to have a representation as to whether they have withdrawn everything after 202, and

then perhaps we can move on.

THE COURT: Take a fifteen minute recess, work it out, gentlemen.

(Thereupon, a brief recess was taken.)

Okay, we all set?

MR. BULLOCK: That's correct, Your Honor.

Your Honor, we have discussed this on the break, we have identified, in fact, there are only four exhibits that were added to the end of the list, two of them the Government has no objection to.

The third one is Exhibit 201 which you have already admitted into evidence over their objection and a fourth one is 202 which we're offering now and they filed the same objection. They were previously identified with other numbers on them.

The only reason we moved them in is the Court's order directed us to put them in sequential number and when we were removing exhibits, we changed the numbers so they would continue to be in sequential number and have identified that for Plaintiff's counsel.

MR. JACOBS: And Your Honor, we appreciate counsel for the Defendant working with us on this and indeed, I think he's accurately represented there's only one that remains now and that is the newly numbered 202 for clarification, though again, one matter that I had raised before we recessed briefly was what happened to the three hundred or so exhibits after 199

and I just want to make sure they're not going to resurface as cross examination exhibits.

MR. BULLOCK: Your Honor, in our submission in the joint pre-trial statement, we stated that we listed the documents which we would put forth in our direct case and we reserved the right to use other documents for rebuttal and cross examination and this is the first objection I've heard to that inclusion in the joint pre-trial order.

MR. JACOBS: Judge, we endeavored, on the other hand, we understood the arrangement to be that we list every conceivable document, both for everyone's own convenience as well as the Court in our exhibit list.

MR. BULLOCK: Your Honor.

MR. JACOBS: We understood that to be our obligation and that is what we've done and I'm just trying to make sure we're not going to have any surprises. We've begun at 200, are we going to go back up to 500? I didn't realize we were down to 200 until Monday and going back up to 500. I'd rather know now than again to take the time of the Court on an individual basis when they start popping up and with new numbers.

THE COURT: All right.

You had a list of five hundred and some odd exhibits?

MR. BULLOCK: That's correct, Your Honor. We had attempted to come up with a -- we came up with a list of five hundred exhibits that were submitted with a revised joint

pre-trial statement in January.

Subsequent to that list, we made an effort, because we knew the time was going to be precious in this trial, to get them down to as minimum number as possible and the documents that we were going to use on our direct case and so that is where the new 202 list came on Monday.

THE COURT: Are you saying that you have no obligation to list documents that you intend to use on cross examination, that you only have the obligation to list exhibits that you intend to introduce in your case in chief? That is not -- that is not proper.

MR. BULLOCK: May I beg the Court's indulgence just a second?

THE COURT: Yes.

MR. JACOBS: Judge, if I -- forgive me.

MR. BULLOCK: Your Honor, as for cross examination, we would agree that we would be bound by the 202 list. As for rebuttal, I believe that is a different issue. If there is surprise, we would have no way to identify those documents in advance.

THE COURT: Well, that is another issue, I think. Yes, sir.

MR. JACOBS: Judge, again, it's my understanding and I'm always the Plaintiff in these cases, that the Plaintiff gets rebuttal case, but not necessarily the Defendant, but in

any event, in the Court's February 27th, 1995 order setting out what the pre-trial -- the joint pre-trial statement to be filed with the Clerk of the Court shall contain, paragraph eight, item D as in dog, a list of all exhibits with notation of all objections thereto. There is no --

THE COURT: All exhibits what? Read it to me.

MR. JACOBS: Paragraph eight, no later than three work days prior to the date set for the pre-trial conference of which -- by the way, there were two before the Magistrate Judge, one in early --

THE COURT: I know that.

MR. JACOBS: Okay, sir. The parties file their joint pre-trial statement with the Clerk of the Court with a, quote, courtesy copy, unquote, so marked.

THE COURT: I know, just read to me that paragraph.

MR. JACOBS: Subparagraph d, lower case d as in dog, a list of all exhibits and Rule 5.04, exhibit substitutes to be offered at trial with notation of all objections thereto. That is verbatim.

THE COURT: All right.

MR. BULLOCK: That was the five hundred list, Your Honor.

THE COURT: That was the five hundred?

MR. BULLOCK: That we filed.

THE COURT: Yeah. Okay.

Well, and that was furnished to Plaintiff's counsel?

MR. BULLOCK: That's correct.

THE COURT: When?

MR. BULLOCK: That was furnished I believe January 14th or 15th.

THE COURT: And the new list that Mr. Jacobs is referring to?

That was a pared down list that was furnished on Monday morning?

MR. BULLOCK: That is correct.

MR. JACOBS: My interpretation would be that the requirements would still hold, they would need to list all exhibits that they intend to introduce at trial. We're happy to see fewer, but again --

THE COURT: All right. Well --

MR. BULLOCK: I don't mean to belabor this point, Your Honor, but in at least two different occasions in front of the Magistrate, Mr. Jacobs made extensive comments and arguments about the length of our exhibit list, so we have on a number of occasions attempted to cull through these documents to lower --

THE COURT: You had seventeen hundred and some odd at one point, didn't you?

MR. BULLOCK: That's correct, Your Honor, that was before you issued either of the Summary Judgment orders and so

after that, we have been -- we have been aggressively and in some instances frantically paring them down. We recognized that's too much as well and we got them down to --

THE COURT: Well, you're saying that it's possible that you want to reserve the right -- let's see, you're Defendants, so you've got -- you don't have rebuttal.

MR. BULLOCK: Well --

THE COURT: Go ahead.

MR. BULLOCK: Your Honor, this is one of those unusual cases where we bear the burden of mitigation.

THE COURT: Well, okay.

And so, if any of the exhibits, hopefully not, but if any of the exhibits among those other three hundred and some odd are offered, then I'll hear the objection at the time. They may not be. Hopefully not.

MR. BULLOCK: Thank you, Your Honor.

THE COURT: All right.

All right, let's proceed.

MR. BULLOCK: Your Honor, I believe that I had moved Defendants' 202 into evidence.

THE COURT: All right.

MR. JACOBS: We object. Again, this would be -- these are additional notes. Same objection as the other notes. I know the Court's already ruled on them.

THE COURT: 201, I think. All right. The Court

will, for the sake of consistency, at least, overrule the objection to 202, and the Court will base its ruling on the same ruling as 201. Be received.

BY MR. BULLOCK:

Q. Mr. Klingenstein, is there a reason why you didn't speak to Mr. Herwig about his investigation of Barefoot Bay?

A. Other than he did not speak to me, no, none that I can identify.

Q. Well, you were engaged to form an expert opinion about this case, isn't that correct?

A. Yes, that is correct.

Q. Mr. Herwig is the only EPA official who investigated this case during the time period at issue to your knowledge, isn't that correct?

A. As I said, I've seen his name in the records, so I certainly have knowledge that he had some involvement.

Q. Okay.

Is there a reason then why you didn't feel it was necessary in formulating an opinion to learn the facts from the actual investigating agent of EPA Region IV?

MR. JACOBS: Objection, assumes facts not in evidence. There's no indication Mr. Herwig was the investigating agent for this facility. At this point in time, he's written some notes?

THE COURT: Sustained.

Ask your next question.

BY MR. BULLOCK:

Q. All right.

Would you refer to page 3 of the notes on proposed planning assessment. Would you read that for the Court, please?

A. Surely. The entire page?

Q. Excuse me, would you read paragraph six for the Court, please?

A. Sure. The enforcement team considered the fact that Respondent has been working closely with the Florida Department of Environmental Regulation since 1985 to develop a solution to the problem. Since being contacted by EPA, Respondent has been very cooperative. Consideration was given to calculating liability on a daily basis beginning with the initial overflow in 1985.

However, since the Respondent has been working with DER and since the effluent being discharged would have met the limitations contained in the permit now being issued by EPA, it is believed that the true violation was limited to that of not applying for an NPDES permit.

Q. EPA Region IV issued an administrative order for Barefoot Bay, isn't that correct?

A. Yes, I believe that is correct.

Q. And in fact, you have testified about violation of the

effluent limitation in that administrative order, isn't that correct?

A. Yes, it is.

Q. EPA issued a final NPDES permit in November of 1991, isn't that correct?

A. I'm not sure the issuance was in November of 1991. I believe the effective date was 1991, November, 1991.

Q. All right.

And isn't it true that the effluent limitations in the final permit were different than those contained in the administrative order, isn't that correct?

A. Yes, as I recall.

Q. Let me refer you to Plaintiff's 145, and also at the same time, Defendants' Exhibit 192. Are you familiar with those two documents?

A. Yes, I am.

Q. And I believe you did testify that the limits in the final permit were different than in the administrative order, isn't that correct?

A. Yes.

Q. All right.

And have you performed any comparisons of the exceedences which occurred of the administrative order to determine whether or not they would have been exceedences of the final permit limits?

A. Not that I specifically recall, no.

Q. Do you know where the final permit limit numbers were derived from?

A. Since I was not involved in the development of the permit nor have I seen the files that related to the development of the permit, no, I couldn't speak to where specifically each of those numbers came from.

Q. If the evidence shows that in fact the effluent, the exceedence levels would not have been -- exceedences, excuse me. Let me start over again.

If the evidence shows that the effluent would have passed the limitations in the permit as opposed during the period of time covered by the administrative order, would that lessen the seriousness of the violation of the administrative order?

A. From a technical standpoint, it would depend on the bases of each of the relative numbers.

Q. Okay.

And again, the State of Florida is taking the lead in determining water quality standards; isn't that correct?

A. Yes.

Q. When we played the videotape that you shot of the Barefoot Bay Plant, isn't it true that it showed a number of citrus groves in the area?

A. Yes.

Q. Were there other agricultural activity in the area?

A. I would expect so.
Q. And isn't it true that these facilities would be using agricultural chemicals?
A. I would expect they would.
Q. And isn't it true that some of these chemicals would eventually make their way into the canal and into the Sebastian River?
A. Yes.
Q. And isn't it true nine point source pollution such as agricultural runoff is one of the greater dangers on the Sebastian River?
A. Yes.
Q. And in fact, on Monday, you referred to Plaintiff's Exhibit 249 which is the SWIM document, the Surface Water Improvement Management Plan?
A. Yes.
Q. Let me refer to that document and ask you to look again at page 11. Mr. Jacobs asked you to read the second bullet point on page 11 about domestic and industrial wastewater treatment plants on Monday, is that correct?
A. I don't recall whether he specifically requested that I read that bulleted item.
Q. Isn't it true the first bullet point discusses runoff from residential and commercial property, storm water discharges?

A. Yes, it does.
Q. All right.
And these are also serious problems for the Sebastian River and Indian River Lagoon?
THE COURT: You asking him or telling him?
BY MR. BULLOCK:
Q. Isn't it true these are also serious problems?
A. Yes.
Q. The third bullet point addresses the problem -- isn't it true the third bullet point addressed the operation of marinas and boatyards as serious problems for the Indian River Lagoon?
A. Yes, it does.
Q. And this includes discharges of heavy metals, hydrocarbons and raw sewage, isn't that correct?
A. Yes, that's what is characterized, that's right.
Q. And secondarily treated effluent does not include raw sewage, does it?
A. It should not if there are no by-passes.
Q. One of the NPDES permit violations you discussed was toxicity, is that correct?
A. Yes, correct.
Q. And isn't it true that toxicity involves subjecting certain test species to one hundred percent effluent in a laboratory?
A. Yes.

Q. All right.
Toxicity testing in and of itself, isn't it true, it is not a test of the effluent as it inter -- reacts with the receiving water?
A. It's intended to provide an indication of whether or not that effluent has the capacity to provide toxic -- to cause toxic effects in organisms in the receiving water.
Q. My question was, though, isn't it true it is not -- it does not address the actual way in which the effluent reacts with the receiving water?
A. Well, as I said, it's intended to provide a measure of what will happen to the organisms in the receiving water when it's discharged there.
Q. It's done in the laboratory, isn't it?
A. Yes, yes.
Q. One of the other violations involved total residual chlorine?
A. Yes.
Q. And I believe you testified yesterday that chlorine is used to disinfect effluent in one of the final stages of treatment?
A. Yes.
Q. Isn't it true during the period of time involving the TRC exceedences at issue, Florida Cities was using an EPA approved method to test for total residual chlorine?

A. My recollection was that there was an issue regarding which method was used versus which method should have been used.
Q. Are you aware that the Plaintiff has withdrawn that allegation in this case?
A. Yes, I am.
Q. All right.
Are you familiar with EPA Region IV's policy on how to report total residual chlorine levels in discharge monitoring reports for facilities in Florida depending upon the various test methods used?
MR. JACOBS: Objection, assumes facts not in evidence. That is to say that EPA Region IV reporting procedures are any different from the rest of the --
THE COURT: Read the question back.
(Thereupon, the record was read back.)
Overruled.
THE WITNESS: I'm aware there is language in the permit or at least I've seen language in permits to that effect.
BY MR. BULLOCK:
Q. Okay.
Let me ask you to refer to Defendant Florida Cities' Exhibit 158.
THE COURT: I've got it, I just need to purge my

bench here.

Okay.

BY MR. BULLOCK:

Q. Are you familiar with this document?

A. No, I'm not.

Q. Would you identify the document?

MR. JACOBS: Objection, how can he identify it if he's not familiar with it, Your Honor.

MR. BULLOCK: If I may, Your Honor.

THE COURT: Well, yeah. You know, technically the question is inappropriate. If he doesn't know what the document is, he can't identify it. If you're asking him truly for the purpose of identification, yeah, go ahead.

MR. BULLOCK: Your Honor, this is a document which was produced by EPA's files pursuant to a document production. It's on United States Environmental Protection Agency letterhead, and my purpose in asking him to identify it was merely to identify what the title of the document was on the records.

THE COURT: Well, all right.

You can ask him that question.

BY MR. BULLOCK:

Q. Can you identify or state for us what the title of the document is?

A. It's on United States Environmental Protection Agency,

apparently memo paper, dated April 11, 1986, and it appears to be entitled Region IV NPDES Permits, Chlorine Strategy.

MR. BULLOCK: Your Honor, I would move Defendants' 158 in evidence.

MR. JACOBS: Objection, Your Honor, hearsay and relevancy.

THE COURT: Hearsay and relevancy. Let me hear your relevancy.

MR. JACOBS: I'm seeing this for the first time as well as Mr. Klingenstein. Look at the date, it's April, 1986, the violation --

THE COURT: Now wait a minute, you're saying this document was not produced or rather was not disclosed to you? You're not --

MR. JACOBS: No, oh, no, that I'm not saying, Your Honor.

THE COURT: All right.

MR. JACOBS: I'm saying I've just scanned this, this very moment, which is not an excuse, because it has been produced earlier.

THE COURT: What's the relevance?

MR. JACOBS: The point is that it's dated April, '86. There is no foundation laid that it's in that. Then it refers to a policy or strategy, as I read the title, there's no evidence that it applies at the point in time that the

violations took place which is after November of 1991 which is over five and a half years later, and as I scanned the document, the bottom of page 4 speaks in terms of a July 1, 1988 deadline, so again, I'm drawing conclusions from a quick glance at the document, but it seems to relate to a policy or practice or strategy that might have been in effect between '86 and '88 and not after November, '91 which is when the violations in question took place.

MR. BULLOCK: Your Honor, the document again was found in EPA's own files.

THE COURT: All right.

Well, I'll assume that.

We're talking about relevancy.

MR. BULLOCK: The relevancy is, Your Honor, this is a document that demonstrates how or its guidance to permit riders on dealing with the issue in Florida which has a particularly sensitive issue regarding residual chlorine and EPA and Florida have contracted agreements about issues such as permitting and residual chlorine and this document is a guidance to permit riders on how to address the issue on permits in Florida, TRC testing under various test methods.

THE COURT: Okay.

Other objections?

MR. JACOBS: Yes, Your Honor. Again, if it was an instruction to a permit rider, I'm not sure that the foundation

has been laid. Again, the permit was written in 1991, five and a half years later there is no indication that this policy was in effect at that time and therefore, I would say it's irrelevant.

MR. BULLOCK: Well, Your Honor --

THE COURT: All right.

I'll overrule the objections and receive it for what it's worth.

MR. BULLOCK: Thank you, Your Honor.

THE COURT: Don't thank me, just move on.

MR. BULLOCK: That's -- all right.

BY MR. BULLOCK:

Q. Mr. Klingenstein, let me refer you to page four, the second paragraph which begins with the NPDES permit conditions. Have you read the paragraph?

A. Yes, I have.

THE COURT: Which paragraph?

MR. BULLOCK: I'm sorry, the second paragraph, Your Honor?

THE COURT: All right.

BY MR. BULLOCK:

Q. Referring also to Defendants' 192 which is the 1991 permit, isn't it true that the 1991 permit allowed Florida Cities to use the DPD colorimetric method to test for total residual color that's found on page I-2 of the permit?

A. Not in my interpretation of that paragraph.
Q. In fact, Mr. Klingenstein, the Government has withdrawn its claim that -- isn't it a fact that the Government has withdrawn its claim as to the propriety of which test method was used?
MR. JACOBS: I object, asked and answered.
THE COURT: Is that the same question you elicited from him before?
MR. BULLOCK: Well, Your Honor, he testified that in a fashion, Your Honor, but asked in a different context, he's --
THE COURT: All right, all right, I'll overrule the objection. Let's get going.
BY MR. BULLOCK:
Q. Well, assume with me, Mr. Klingenstein, that the DPD colorimetric test method was in fact permitted under the permit. In the next series of questions, I'll ask you to follow that assumption. What was the -- isn't it true that the NPDES permit required a TRC residual level of .01?
A. Yes.
Q. And this was in effect based on concerns from the State of Florida?
A. Yes.
Q. All right.
Isn't it true that the EPA guidance in the 1986 document

that you're looking at states that the EPA knew that the DPD colorimetric method was not sensitive enough to detect chlorine down to a .01 level?
A. Yes.
Q. And therefore in those cases, the permittee need only report non-detectable using one of those tests to be considered in compliance, isn't that correct?
THE COURT: That's not non-detectable, it's not detectable.
BY MR. BULLOCK:
Q. Not detectable?
A. That's the indication in Exhibit 158.
Q. And assume with me for purposes of hypothetical that Florida Cities was not informed of this requirement or this method of reporting. If they were using the DPD colorimetric method, wouldn't in fact some of the TRC violations be false reports, false positives and in fact should have been reported as non-detect?
A. That would depend on what detection limit Florida Cities was receiving in the DPD test.
Q. But in fact if they were not receiving down to .01, isn't it true that this EPA memo states that they should be told to check off non-detect -- not detect?
A. What the memo is indicating is that if in fact you're at or below your detection limit, then you would put non-detect --

not-detect.
Q. And under those assumptions, isn't it true that some of the TRC exceedences that were reported could in fact be false positives.
A. Again, that would depend on specifically what detection limit you were achieving.
Q. But it is possible those were false positives; yes or no?
A. It is possible.
Q. Let's look at some of the alternatives which you listed as possibilities at Barefoot Bay for alternative discharge.
Have you investigated what land was available to be purchased for percolation ponds in the Barefoot Bay area?
A. To the extent that I have seen documents in the file that indicated that various parcels of land were discussed as being potentially available for sale.
Q. Are you aware of the cost per acre of that property?
A. Some of those documents included costs.
Q. All right.
Have you yourself personally investigated the cost of the land?
A. Independent of those documents?
Q. Correct?
A. No.
Q. You have no independent opinion then as to reasonable cost of land in Brevard County for agricultural land which

could be purchased for percolation ponds?
A. No.
Q. You have no opinion as to what price the Florida Public Service Commission would have found to be prudent, isn't that correct?
A. No.
Q. All right.
You testified on Monday that the company built two test ponds on what's been referred to as the forty acre site, but those ponds lacked sufficient capacity to accept all the plant's effluent, isn't that correct?
A. Yes.
Q. Isn't it true that in fact the company determined that the hydrogeological conditions in the Barefoot Bay area were not suitable for percolation ponds?
A. I would characterize it that the company investigated the capacity of a limited number of sites and based on the inadequate capacity of those sites decided to abandon pursuit of percolation ponds.
Q. But you haven't done the research to determine in fact whether or not any sites in the area were suitable for percolation ponds?
A. It's my opinion want of sufficient size might have been.
Q. What do you base that opinion on?
A. The fact that the company was percolating a certain

amount of wastewater through an existing size pond. They did carry out tests on-site that demonstrated percolation capacity of some fixed capacity or a given size of a piece of property and therefore that a proportionately larger site would be expected to likely provide the necessary capacity.
Q. So that's based on your review of documents in this case?
A. Of actual tests carried out by Florida Cities' consultants.
Q. Those were documents in this case?
A. Yes.
Q. But isn't it true that Florida Cities determined that percolation ponds were not a viable option in Barefoot Bay?
A. It's my opinion that Florida Cities decided not to pursue percolation ponds. I can't speak as to what all of their motivations were.
Q. Do you know what requirements were necessary to permit the percolation ponds in Brevard County, Florida?
A. I'm not aware of all of the State of Florida's requirements, however, I assume that Florida Cities was since they had previously done so.
Q. So the answer to the question is, you're not aware of the permitting requirements for percolation ponds in Brevard County, correct?
A. I can't say I know all of them, no.
Q. Which requirements are you familiar with?

A. Well, certainly that the pond would have to have adequate capacity to accept the plant's flow and be concerned with protection of ground water quality.
Q. Which permitting agency requires that?
A. Well, that would probably be FDER, certainly.
Q. But you're not really familiar with FDER permitting requirements for perk ponds, are you?
A. Not in detail.
Q. All right.
You're not familiar in detail with the requirements for Brevard County, are you?
A. No.
Q. Isn't it true that the Florida Department of Environmental Regulation agreed with Florida Cities' analysis of the perk pond option and directed the company to look at other discharge options?
A. I recall from the correspondence that the Florida Department of Environmental Regulation agreed with the position to not pursue putting percolation ponds on the sites that had been previously put forth or had been looked at by Florida Cities. I can't say whether they would have not agreed to a percolation pond on another site.
Q. Let's turn to the spray field option. You testified that the company started looking at the option of spray fields in 1987, but did not purchase any land until recently, is that

correct?
A. Yes.
Q. Isn't it true that on a number of occasions, Florida Cities contacted grove owners in the area about providing effluent for various groves for spray irrigation?
A. Yes.
Q. Isn't it true that -- strike that. Let me back up.
Would AWT have been required for discharge into spray irrigation?
A. Depending on what land you were spraying on to.
Q. Okay.
What land would secondary effluent have been allowed to be sprayed on?
A. Wholly owned land, I believe, without any food crop on it?
Q. If it was owned by Florida Cities but had food crop on it, it would require AWT?
A. Yes.
Q. And isn't it true that if it was owned by other owners, and was growing food crops, it would be -- the effluent should be treated to AWT levels?
A. That's my understanding.
Q. Isn't it true that Florida Cities was unable to find other owners of groves who would accept the spray effluent?
A. Florida Cities, based on my review of the documents,

Florida Cities spoke to a number of grove owners, however, financial issues seemed to continue to stand in the way of them being able to reach an agreement.
Q. Isn't it true that they could not find other grove owners to take the spray effluent, Mr. Klingenstein?
MR. JACOBS: Objection, Your Honor, to the extent that he's asking again for a matter of fact, not a matter that he's gleaned from documents.
THE COURT: I'll overrule the objection.
THE WITNESS: Certainly, history bears out that they did not end up in an agreement with any other grove owners.
BY MR. BULLOCK:
Q. You reviewed a number of pieces of correspondence back and forth between Florida Cities and various grove owners, correct?
A. Yes.
Q. And Florida Cities was unable to -- that correspondence indicated that Florida Cities was unable to come to any agreement with these grove owners, correct?
A. With the grove owners they were in contact with, yes.
Q. What was the financial reasons you referred to a minute ago?
A. That I recall, issues regarding the cost of on-site development on the groves which would be improvements to the irrigation systems, to allow distribution of wastewater,

storage facilities on-site, cost of the wastewater itself that Florida Cities was interested in charging the grove owners for the actual wastewater. Those sort of issues.

Q. Isn't it a fact that the Public Service Commission mandated that Florida Cities charge for effluent?

MR. JACOBS: Objection, calls for speculation, facts not in evidence.

THE COURT: Well, I don't know whether he knows that or not.

BY; MR. BULLOCK:

Q. Do you know whether or not Florida Cities was mandated to charge for its effluent by the Public Service Commission?

A. I would say I don't know whether or not the Florida Cities Public Service Commission -- I'm not aware that there was something that would have prevented Florida Cities from providing the effluent to the grove owners at no cost, if they had been willing to assume that cost.

Q. Okay.

The answer to the question is, you don't know whether or not the EPA mandated that Florida Cities charge for its effluent; yes or no?

A. No, I'm not aware of anything that specifically required Florida Cities to charge.

Q. So, if they did require that, it would be news to you?

THE COURT: Well, go on to your next question.

Let's pause for change of Reporters.

(Thereupon, there was a change in Court Reporters.)

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CONTINUED CROSS-EXAMINATION
BY MR. BULLOCK:
Q. Isn't it true that Florida Cities actually initiated an eminent domain proceeding to obtain grove land for spray irrigation in the Barefoot Bay area?
A. Yes, I am aware that such an action was taken.
Q. Isn't it true that a group of adjacent landowners intervened in that proceedings and appealed the issue to the Florida Court of Appeals?
A. Yes, I am aware of that.
Q. And didn't that stay the eminent domain proceedings?
A. Yes, it did.
Q. Isn't it true that FDER continued to authorize the company to discharge surface water and directed that the company continue to look at other alternatives following the eminent domain proceeding, if you know?
A. I believe that's true.
Q. All right. Let's turn to the deep well injection option. You testified that Florida Cities did not look into deep well injection seriously until 1989; is that correct?
A. Yes.
Q. And, again, we've -- you've testified earlier that you don't have any particular experience with deep wells in the state of Florida, correct?
A. That's correct.

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Q. Are you familiar with the permitting process for deep wells vis-a-vis Brevard County?
A. Just to the extent that I am from this case.
Q. And what Brevard County requirements are you aware of?
A. Well, I am aware of the requirement specifically to go through the water district.
Q. All right. Would there be county-specific permits as opposed to the water district permits to your knowledge?
A. That I can't say.
Q. Have you researched the performance of other deep wells in the Brevard County area?
A. To the extent that I followed that issue through the documents that have been available.
Q. Have you performed any independent research yourself?
A. On?
Q. Deep well performance in Brevard County.
A. I had one conversation with a Florida Department of Environmental Regulation employee with regard to performance of wells.
Q. And who was that?
A. I cannot recall the name offhand. That was some time ago.
Q. Have you reviewed the operating data from any other deep well in Brevard County?
A. No, I've not.

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Q. Isn't it true that the St. Johns River Water Management District would govern permitting of deep wells in Brevard County?
A. They have an involvement in it.
Q. Okay. Did you interview anyone at the St. Johns River Water Management District about their policies on deep well injection?
A. No, I did not.
Q. All right. Didn't Florida Cities actually apply for permits for deep well?
A. Yes, they did.
Q. And isn't it true that Florida Cities could not have proceeded with the construction of deep wells without the permission of the St. Johns River Water Management District?
A. That's my understanding.
Q. The NPDES permit violations at issue, let me moye back to those just a second. Between the date of those violations -- excuse me. Let me start over again.
Were there any enforcement actions taken by EPA on those violations prior to the Barefoot Bay facility being added to this lawsuit in April of 1995?
A. Not that I can recall, not that I'm aware of.
Q. Mr. Klingenstein, I have a few brief questions back on Waterway Estates that I omitted, and I will move through those very briefly.

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One of the other options which you had identified was a connection to the North Fort Myers Utility?
A. Yes.
Q. All right. And in your report -- excuse me. Let me add -- North Fort Myers' capacity is based upon spray fields and deep well injection; is that correct?
A. Yes, that's correct.
Q. All right. Do you know how many deep wells North Fort Myers had?
A. No, I'm not aware of the exact number.
Q. Do you know the cost of connecting to North Fort Myers?
A. I've seen documents that have included various discussions of what the costs might be.
Q. Have you yourself performed any calculations about the cost of connection to the North Fort Myers compared to the actual construction of the AWT plant?
A. No, I've not.
Q. In the 1981 and 1990 studies -- let me refer you to the 1990 waste load allocation study, which is in evidence as Plaintiff's 422. Let me refer you specifically to page 17, the third paragraph. The last sentence of the third paragraph reads, "This is the same recommendation made in the 1981 model document (WQTS, Volume II, Number 52)."
Isn't it true that the recommendation that they were referring to is moving the point of discharge? Is that

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correct?
A. Yes.
Q. And the term used in this 1990 study is "recommendation" and not "requirement"; isn't that correct?
A. The document uses the word "recommendation."
MR. BULLOCK: Your Honor, that completes my cross.
There are about four or five documents which we would request to move into evidence which we've discussed: Florida Cities Number 23, which is the NPDES Permit Denial in '86.
No objection?
MR. JACOBS: No objection.
THE COURT: All right. It will be received.
(Florida Cities Exhibit Number 23 received in evidence.)
MR. BULLOCK: The next one, Your Honor, would be 33, which is the letter re: Lee County Waterway Estates temporary operating permit.
MR. JACOBS: (Indicates affirmatively.)
THE COURT: Okay. Be received.
(Florida Cities Exhibit Number 33 received in evidence.)
MR. BULLOCK: 52, which is the amendment to Section 309, I believe you ruled on that already, and the Government objected and then withdrew its objection.

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MR. JACOBS: I agree, Your Honor.
THE COURT: Okay. Be received.
(Florida Cities Exhibit Number 52 received in evidence.)
MR. BULLOCK: 142, which is a letter regarding the Carrollwood NPDES permits requesting relief in the permit, I believe you had already ruled on that as well.
MR. JACOBS: (Indicates affirmatively.)
MR. BULLOCK: Your Honor, I believe that the record will indicate that you already admitted these, although Ms. Cole indicated to us that she had not written them down or didn't have --
THE COURT: 142 was not actually offered. I don't know whether it was an oversight.
MR. BULLOCK: I'm sorry. It's my fault, then, Your Honor, and I would offer it at this time.
MR. JACOBS: (Indicates affirmatively.)
THE COURT: It will be received.
(Florida Cities Exhibit Number 142 received in evidence.)
MR. BULLOCK: And 192, the final issue of the NPDES permit for Barefoot Bay.
MR. JACOBS: (Indicates affirmatively.)
THE COURT: Okay. It will be received.
(Florida Cities Exhibit Number 192 received in

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evidence.)
MR. BULLOCK: The only other matter, Your Honor, we now have copies of Exhibit 132, which was the Hillsborough County consent order. Mr. Jacobs had raised the question that the copy he had seen earlier didn't have -- was not executed. We now have copies of all of it sufficient for everyone of the actual document. We'd just like to substitute that.
THE COURT: All right. That's 132.
Okay. Mr. Bullock, are you through?
MR. BULLOCK: I am, Your Honor.
THE COURT: Okay. Mr. Hird?
MR. HIRD: Thank you, Your Honor.
If we may, I'd like to retrieve my copy of the report.
THE COURT: Yes, sir.
MR. HIRD: But we have a substitute copy we will give to the law clerk.
THE COURT: All right. Thank you.
CROSS-EXAMINATION
BY MR. HIRD:
Q. Good afternoon, Mr. Klingenstein.
A. Good afternoon.
Q. You testified when questioned by Mr. Bullock that SAIC's annual billings to EPA and DOJ for enforcement matters was approximately $1 million in the last two years; is that

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correct?
A. Approximately a million dollars each year I believe was the testimony.
Q. I'd like you to look at the first page of your resume in the bottom paragraph. Do you see a reference there, sir, that billings were approximately $2 million per year?
A. Yes. That was for those two years.
Q. Thank you. Now, Mr. Klingenstein, if I -- on pages 4 and 7 -- or pages 4 and 5 of your resume you describe your experience with treatment system design and operation; is that correct?
A. Yes.
Q. And you describe being involved in the construction of three facilities on those two pages; is that correct?
A. Yes.
Q. And those include, one, metal finishing facility and, two, electroplating facilities; is that correct?
A. Yes.
Q. Now, the pollutants that come from metal finishing and electroplating facilities are different in nature and kind than those that come from domestic sewage facilities; isn't that correct?
A. Yes.
Q. And the treatment technology used to remove those pollutants from the waters is completely different from that

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that's used for domestic sewage; is that correct?
A. There are certainly significant differences.
Q. Well, you use principally ion exchange to remove metals from these facilities. Wouldn't that be correct?
A. You could. You --
Q. And you don't use ion exchange --
THE COURT: Wait. Wait. Wait.
MR. HIRD: I'm sorry.
THE COURT: Had you finished?
THE WITNESS: You could use ion exchange. You could use precipitation technologies. There are a variety of technologies that could be used.
BY MR. HIRD:
Q. And those technologies are not used with domestic wastewater sewage; is that correct?
A. Typically not.
Q. Now, Mr. Klingenstein, you identified yourself as an engineer when you began your examination; is that correct?
A. Yes.
Q. And you were qualified as an expert in wastewater treatment; is that correct?
A. Yes.
Q. You don't have any training as a psychiatrist or a psychologist, do you?
A. None whatsoever.

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Q. And you're not an expert here testifying here about human behavior or human motivation, are you?
A. That's not my understanding.
Q. Okay. I'd like you to turn to page 9 of your report, if you would.
A. I'm sorry. Which page?
Q. Page 9. Do you have that page, sir?
A. Yes, I do.
Q. Could you read the first full paragraph -- I'm sorry. It's the second full paragraph beginning "furthermore."
A. "Furthermore, FCWC failed to avail themselves of the opportunity to connect to the North Fort Myers Utility Company, NFMU, an available option which would have allowed cessation of discharge prior to August 1988. Correspondence after this date indicates that FCWC decided that the plant upgrade and relocation of the outfall were the best choice nominally for cost reasons.
"However, the assertion that cost prevented FCWC from connecting to NFMU is not consistent with the record. NFMU indicated that it would provide service to Waterway Estates for 3.6 million or less (competitive with FCWC's actual costs on the upgrade and outfall extension)."
THE COURT: What page are we on?
THE WITNESS: I'm sorry. Page 9 of the report, sir.
MR. HIRD: Page 9, Your Honor, of his report.

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THE COURT: And what paragraph?
MR. HIRD: The paragraph that begins "furthermore." I believe it's the second.
THE COURT: Okay. Okay. Go ahead.
THE WITNESS: "A November 27, 1991 FCWC memo from Gordon to Levy provides an indication of another possible motivation for FCWC's rejection of NFMU's offer. NFMU's financial health and need to sell capacity was discussed, and a recent balance sheet for the utility was attached. It appears that FCWC did not want to yield its customers to its competitor."
BY MR. HIRD:
Q. Now, here you're writing about Florida Cities' motivation, aren't you? Isn't that correct? You're writing about what you consider Florida Cities' motivation to be?
A. I would be offering an opinion there as to a potential reason for why such a connection was not made.
Q. And you've just testified previously that you're not trained to speak as an expert about motivation; is that correct?
MR. JACOBS: He said he wasn't a psychiatrist.
THE COURT: Well, all right. Let's move on. I've got that point.
MR. HIRD: All right.
BY MR. HIRD:

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Q. Well, let me explore this issue with you. I'd like to have you take a look at Government's Exhibit Number 466, if you would. And at the same time would you get a copy of Avatar Holdings' Exhibit Number 3, please?
THE COURT: I missed your last question, Mr. Hird. What was that?
MR. HIRD: I'm going to ask him questions, Your Honor, about Government Exhibit 466 and Avatar Holdings Exhibit 3.
BY MR. HIRD:
Q. Do you have those in front of you, sir?
A. I have one of them. I'm sorry. And the other one was your Exhibit 3?
Q. Do you have Exhibit 466 in front of you, sir?
A. I have 466 in front of me, and I have your Exhibit 3.
Q. Okay. First I'd like to ask you whether 466 is the November 27, 1991 memo that you're referring to on page 9.
A. Yes, it is.
Q. And then looking at Exhibit 3 I'd like to ask you whether the first three pages of Avatar Holdings Exhibit 3 correspond to Exhibit 466 from the Government.
THE COURT: You mean are identical?
MR. HIRD: Are identical.
THE WITNESS: They certainly appear to be.
MR. JACOBS: Just for the record, they have

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different Bates numbers, but I'll agree in substance they are. The Bates numbers may or may not --

BY MR. HIRD:

Q. Now --

MR. JACOBS: I'm sorry. Also on the top of Avatar 3 there's a handwritten notation "file."

THE COURT: All right. Go ahead.

BY MR. HIRD:

Q. Now, Mr. Klingenstein, this memo to which you refer to is written on November 27, 1991. That's correct?

A. Yes.

Q. I believe you testified that the negotiations between Florida Cities and North Fort Myers occurred in mid-1988; is that correct?

A. In the late 1980s.

Q. So this is written two to three years after those negotiations were over.

THE COURT: Is that correct?

THE WITNESS: Yes.

BY MR. HIRD:

Q. Now, you offer your opinion that because this document 466 includes references to North Fort Myers' financial health and the need to sell capacity and included a balance sheet that Florida Cities was concerned that it did not want to yield its customers to its competitors; is that right?

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A. Yes.

Q. I'd like you to look at the first page of 466 and the corresponding first page of Exhibit 3. Do you see a line that says "ref"?

A. Yes.

Q. And subpart B in that says, "B, memorandum dated 11/20/91, Sharp to Wilkov"?

A. Yes.

Q. Okay. Could you turn to the fourth page of Avatar Holdings Exhibit 3? Do you have that, sir?

A. Yes, I do.

Q. Does that appear to be a memorandum from Peter Sharp to Lawrence Wilkov dated November 20, 1991?

MR. JACOBS: Objection, lack of foundation. He hasn't established that the witness has seen this document yet.

MR. HIRD: Your Honor, this document -- I don't believe the witness has. However, this document comes from Mr. Levy's files and is a business record.

I am going to be using it for Mr. Klingenstein in the nature of impeachment, so therefore I think I can appropriately question Mr. Klingenstein about it. I will be offering it through Mr. Levy.

THE COURT: Well, how do you plan to impeach the witness on the basis of a document that he's not seen before?

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MR. HIRD: I am attempting to show him that there is another cause that would supplant his opinion as to why the Florida Cities -- why this memorandum was written and that this memorandum has nothing to do with the cause that he attributes to it.

THE COURT: Well, I don't know -- I think maybe you might be able to ask him questions of a hypothetical nature at this point.

MR. HIRD: All right, Your Honor.

THE COURT: But I'm going to sustain the objection to the document at this point.

MR. HIRD: Then I will move to a hypothetical.

BY MR. HIRD:

Q. Let me ask you to assume that sometime shortly before the November 27th, 1991 letter was written that North Fort Myers Utility had approached Avatar Holdings and expressed an interest in Avatar Holdings or one of its subsidiaries to purchase North Fort Myers Utility, either the whole thing or an interest.

Can you make that assumption with me?

A. If you ask me to, yes.

Q. Now, if you make that assumption, wouldn't it be reasonable for a memo to be prepared that discussed North Fort Myers Utility's financial health?

A. Yes.

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Q. And wouldn't it be reasonable to discuss the need to -- North Fort Myers Utility's need to sell capacity?

A. Yes.

Q. And wouldn't it be reasonable to include a balance sheet?

A. Yes.

Q. And wouldn't this provide another explanation different from the one in your report as for why the November 27th, 1991 memo was written?

A. Yes.

Q. All right. Turning back to the November 27th, 1991 memo -- or, rather, for a moment let's turn back to your report. I believe when Mr. Bullock questioned you, he asked you whether you compared the cost of connecting to North Fort Myers to the cost of building an upgrade and the outfall extension; is that correct?

A. Yes, I believe he asked me that.

Q. And you said that you didn't compare it.

A. I believe I said I had not carried out my own detailed independent analysis of that.

Q. I see. But in this paragraph you seem to indicate that you believe the two costs were comparable; is that correct?

A. I believe I was referring to a piece of correspondence that had specifically offered a summation of what the cost would have been.

Q. Do you know if that summation of the cost included tax

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gross-up?
A. No, I do not.
Q. Do you know what tax gross-up is?
A. No, I do not.
Q. Now, if you take a look at Exhibit 466, which has been referenced in your letter – in your report, rather, 466, do you see in the middle of the middle paragraph on the first page the phrase "the tax gross-up impact made the connection uneconomic compared to upgrading our existing plant"? Do you see that phrase?
A. Yes, I do.
Q. And you were unable to interpret that phrase because you didn't know what tax gross-up is; is that correct?
A. I interpreted it to the extent that it was an indication that there was some tax-related cost that was being identified as having had an impact on the cost.
Q. And further down in 466 is the statement "being unable to reach an agreement that made economic sense – the gross-up was the killer – Florida Cities turned its attention to upgrading its existing wastewater treatment facility." Do you see that?
A. Yes, I see that.
Q. So at least in the view of this letter the tax gross-up was something that made a difference in terms of Florida Cities' decision here; is that correct?

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A. Apparently in the view of the writer.
Q. But you don't know what difference it was and how it impacted the comparative costs?
A. Not at this point, no.
Q. I'd like you to turn to the second page of 466. That shows the balance sheet for National Fort Myers Utilities (sic) that you referred to in your report; is that correct?
A. Yes.
Q. And it shows a negative number for equity capital of $3,995,000 in the year 1990; is that correct?
A. It appears to, yes.
Q. And moving down the page, in the year 1990 it shows a net loss of 1,479,000; is that correct?
A. Yes, it does.
Q. And turning to the last page of 466, there is the statement – in the paragraph beginning "obviously," there is the statement, "Obviously without a bailout by the county, North Fort Myers Utilities' future appears bleak." Do you see that?
A. Yes, I do.
Q. Now, in considering whether to hook up to North Fort Myers in 1988, would it have been reasonable for Florida Cities to consider the financial condition of North Fort Myers?
A. Yes.

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Q. And it would not be a good solution for Florida Cities to hook up to a facility that was in danger of floundering because of financial reasons; is that correct?
A. Well, unless their hooking up made a difference in the condition of that entity.
Q. Now, you have talked about a Mr. Ken Kwan at several times during your examination. Mr. Kwan is the EPA enforcement lead for this case; is that correct?
A. Yes.
Q. And he is the – he's an engineer by training; isn't that correct?
A. Yes, I believe that's so.
Q. And he is the person who is responsible on behalf of EPA for making the technical decisions with respect to this case; is that correct?
A. I wouldn't want to characterize who makes the decisions for EPA.
Q. But he is the staff -- the front-line person, the first-line person with respect to technical issues in this case; is that correct?
A. He's been my primary point of contact in this case within EPA.
Q. Are you testifying under a contract with EPA or the justice department for this case?
MR. JACOBS: Objection, relevancy.

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THE COURT: Overruled.
THE WITNESS: EPA.
BY MR. HIRD:
Q. And do you have a contract officer in connection with that contract?
A. Within our company or within EPA?
Q. Within EPA.
A. Yes.
Q. And do you have a project officer within EPA with respect to this particular task order?
A. Yes.
Q. And is Mr. Kwan the project officer?
A. No.
Q. Now, I'd like to have you take a look at Exhibit 494, if you would.
MR. HIRD: This is Government Exhibit 494, Your Honor.
THE COURT: Yeah. I'm assuming that you don't have 494 exhibits.
MR. HIRD: We have only one book, Your Honor.
THE COURT: Yeah.
MR. HIRD: Do you have that in front of you, Your Honor?
THE COURT: I have 494.
THE WITNESS: Yes, I do too.

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BY MR. HIRD:
Q. This is one of the documents you relied on in your report, is it not?
A. I've seen this document, yes.
Q. Okay. This document refers to a meeting between EPA and the Department of Justice on one hand and representatives of Florida Cities and Avatar Utilities on the other, does it not?
A. Yes, it does refer to a meeting that took place.
Q. And this meeting took place on December 22nd, 1992; is that correct?
A. Well, I believe the meeting took place on December 16.
Q. I'm sorry. It took place on December 16th, and the memo is dated December 22nd; is that correct?
A. Yes, that appears to be correct.
Q. Okay. Now, at this meeting representing the Government was Mr. Jacobs; is that correct?
A. Representing the U.S. Department of Justice apparently, yes.
Q. And representing EPA was someone named Gwen Eason; is that correct?
A. Yes.
Q. Is that the same person as Gwen Fitz-Henley?
A. Yes.
Q. Also representing the Government at this meeting was Mr. Ken Kwan.

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A. Yes, that appears to have been correct.
Q. And this was a meeting about the Waterway Estates claims in this case; is that correct?
A. Yes.
Q. Okay. Now, at that meeting, if you go down to the first -- to the paragraph that has one line, about the middle of the first page, it says, "Ms. Eason stated the violations were as follows." Do you see that?
A. Yes.
Q. And those are essentially the Waterway Estates violations that are in this case; is that correct?
A. Without matching exact dates, yes.
Q. Well, it's actually a little broader because the alleged violations here start June 1988 and the complaint starts November 1, 1988; is that right?
A. I believe so.
Q. And then if you go down the next block, it says, "Ms. Eason stated the penalties are based on the following factors." Do you see that?
A. Yes.
Q. And the first factor is seriousness of violation; is that correct?
A. Yes.
Q. And, Mr. Klingenstein, you're here testifying about seriousness of violation; isn't that correct?

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A. That's correct.
Q. Now, on the next page you see a calculation of various dollar figures; is that correct?
A. Yes.
Q. And I'd like you to go down way towards the bottom of the calculation. You see a figure called gravity component seriousness.
A. Yes.
Q. Do you see that?
A. Yes.
Q. And what figure is that?
A. $407,000.
Q. And if you go back up to the heading of the paragraph, that states, "Mr. Kwan showed the calculations pertaining to the settlement model as follows"; is that right?
A. I'm sorry. Where is this exactly?
Q. Up at the --
A. Oh, I'm sorry. Just above that.
Q. Yeah.
A. Yes, I see that.
Q. So Mr. Kwan expressed at this meeting that the seriousness of the violations was worth to the agency $407,000; is that correct?
A. That's what this memo reflects.
Q. Now, you were here when Mr. Jacobs gave his opening

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argument on Monday?
A. Yes, I was.
Q. And Mr. Jacobs asked this Court for $1.9 million with respect to the claims of unpermitted discharge. Do you recall that?
A. Yes, I do.
Q. And that's almost five times the $407,000 figure in this letter.
THE COURT: Well, don't examine the witness on the basis of an opening statement by counsel. I won't permit that.
MR. HIRD: All right.
Your Honor, I have no further questions of the witness.
THE COURT: Redirect?
MR. JACOBS: Very briefly, Your Honor, with your permission.
THE COURT: Don't say "very briefly" unless you mean it now.
MR. JACOBS: I mean it, Your Honor.
THE COURT: Oh, good.
MR. JACOBS: First thing this morning we spoke of a stipulation. And we did submit it to Ms. Cole, but I understand that we have not technically moved into evidence all of the exhibits in the joint stipulation that has been

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signed by all three parties and submitted to the Court. And I'd like to do so at this time.

THE COURT: All right. Okay. I have the joint stipulation which I have reviewed, and the Court will permit over the objections which are reflected in the joint stipulation as Codes 1, 2, and 3 the exhibits that are set forth in Attachment A to that joint stipulation. I don't think that we will need to go through verbally all of those. I think you've got a record of that here in your joint stipulation.

And Ms. Cole can -- she's not here right now, but I'll instruct her to make note of that on the -- where she records the exhibits that are received.

All right.

REDIRECT EXAMINATION

BY MR. JACOBS:

Q. Mr. Klingenstein --

THE COURT: Now, that's of course with the exception of -- well, those exceptions are noted in the last paragraph of the joint stipulation which we've already addressed.

All right. Go ahead.

BY MR. JACOBS:

Q. Mr. Klingenstein, you spent some time with Mr. Bullock on the subject of when Florida Cities was on notice of the need to upgrade the plant and move the outfall, and you went

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through some documents with him. In your opinion, sir, when was Florida Cities Water Company first on notice of the need to upgrade the plant at Waterway Estates, that is, and move the outfall?

A. Well, in my opinion, Florida Cities' first indication that they would need to do something about that treatment plant was when in fact the 1981 waste load allocation study was completed and a zero waste load allocation was found for the plant based on the assumption that it was going to tie into the Cape Coral Regional Facility.

When that regional facility, the arrangement in effect fell apart, in my opinion Florida Cities should have been on notice that -- given that it was clear from the document that in fact no waste load allocation would be found to exist at the existing point of discharge for the existing level of treatment, some action would need to be taken. So back in that time frame, in the time frame when that fell apart, 1982, 1983.

Q. I see. Now, the waste load allocation study was what year?

A. 1981.

Q. And then continuing down the time line, so to speak, when did the concept of the regional plant fall through?

A. The documents that I've seen would seem to indicate that it was in the 1982-1983 time frame when that arrangement fell

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apart apparently due to cutbacks in federal funding.

Q. Now, assuming for whatever reason they were not on notice in 1981 or 1982 or 1983 of the need to upgrade the Waterway Estates plant and move the outfall, what milestone, if you will, would you next identify in terms of the notice that they received of the need to upgrade the plant and move the outfall?

A. Well, certainly a very formal notice would be the tentative denial of the permit.

Q. And would that be Florida Cities Exhibit 23?

A. If I could refer to it.

Yes, and that's dated June 30th, 1986.

Q. Very well. And was there any additional notice after that to Florida Cities that they needed to upgrade the plant and move the outfall?

A. Well, certainly they also received the formal denial at the end of the year that became effective in January of 1987.

Q. And would that be Florida Cities Exhibit 27?

A. Yes, which is dated December 8, 1986. Both of those documents indicate that there is no permit either going to be issued or issued for the discharge at that particular location for that particular discharge. The logical conclusion is that an additional -- rather, an alternative point and type of discharge is necessary or zero discharge is necessary.

Q. Now, Mr. Bullock also went through a series of

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administrative orders, known as AO's, with you at Waterway Estates, the first of which was Defendant's or Florida Cities' Exhibit 28. Would you take a look at that, please, sir?

A. Yes. That's dated May 11, 1987.

Q. Directing your attention to the second page of the administrative order itself, which is the third page of the exhibit, would you tell me what, if anything, the agency ordered Florida Cities to do with respect to its discharge?

A. Under item number 1, it specifically says that "Respondent shall cease discharging pollutants to waters of the United States at the earliest date practicable but not later than September 30, 1988. The Respondent shall report on progress toward meeting this compliance date as follows."

And then a two-column table of activities and due dates is provided that provides for a series of progress reports, the start of construction, completion of construction, and then the meeting of the final requirements to cease discharge.

Q. And that means cease discharge at the present location; is that correct?

A. Certainly there would not be anything that would preclude the application for the right to discharge at another location or with another type of discharge.

MR. BULLOCK: If the Court please, objection. The document speaks for itself as to what it means, and I would

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object to his interpretation which on the face of it appears to be outside of the scope of the meaning of the language of the document.

THE COURT: I'll overrule the objection.

BY MR. JACOBS:

Q. Had you finished your answer, Mr. Klingenstein?

A. Yes.

Q. Now, in your opinion, sir, was this order in schedule set forth in paragraph 1 of the administrative order, Florida Cities Exhibit 28, complied with?

A. No, it was not.

Q. Directing your attention to paragraph 2 of the same exhibit.

A. On page 3?

Q. Yes, sir. Does that paragraph give any indication with respect to whether this administrative order can be considered an NPDES permit?

A. Yes, it specifically reads, "This should in no way be considered a permit to discharge."

Q. Now, if the paragraph continues that "The Respondent does discharge to the waters of the United States in violation of the act," this administrative order provides that what needs to happen?

A. "The Respondent's discharge of treated wastewater shall at least comply with the effluent limitations, monitoring

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schedule and other requirements contained in its previous permit."

Q. Now, Mr. Bullock also directed your attention to a subsequent administrative order, Defendant's or Florida Cities' 195. Can I direct your attention to that administrative order, please?

THE COURT: Don't give me another one, please. I'll just do my best. Thank you very much, though.

THE WITNESS: Yes.

BY MR. JACOBS:

Q. First of all, is there an indication in Defendant's Exhibit 195, which is the September '89 administrative order, as to whether or not that administrative order constitutes an NPDES permit?

A. Yes, on page 4 there is the same language in paragraph 2 that this should in no way be considered a permit to discharge.

Q. And is there also a construction schedule set out in this administrative order?

A. Yes, on page 3 under paragraph number 1 there is a schedule listed at the bottom of the page, again a two-column table activities and due dates with start construction on May 1, 1990, complete construction and cease discharge at the current location August 1, 1991, and comply with NPDES requirements at permitted location by October 1, 1991.

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Q. And were any of these requirements violated?

A. Yes. Construction of the complete upgrade was not completed by the October 1, 1991 date.

Q. You mean the compliance with the NPDES permit requirements was not completed by October 1, 1991?

A. By October 1, 1991. The completion of all construction was not completed by August 1, 1991.

Q. Those are two separate requirements; is that correct?

A. Yes.

Q. And it's your testimony that both were violated?

A. Yes.

Q. Now, finally Mr. Bullock brought to your attention Defendant's or Florida Cities' Exhibit 52, the one-page, as it were, administrative order which substituted new dates for some of these milestones.

Again, is there a reference in this particular order as to whether this order excuses compliance with the Clean Water Act --

A. I --

Q. -- or an NPDES permit?

A. I'm sorry. I don't have it in front of me.

Q. I'm sorry. This is Defendant's 74. Oh, it has two -- I'm sorry. It's Defendant's 52 for trial purposes. It was Deposition 74.

A. Yes.

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Q. And what is the indication in that respect, sir?

A. There is again a construction schedule provided, again a two-column table showing activities and due dates, start construction February 1, 1989, complete construction May 1, 1990, and meet final requirements by ceasing discharge November 1, 1990.

Q. And these are new dates, are they, substituted dates for the previous order? Is that correct?

A. For the order that preceded this as opposed to the order that we just looked at.

Q. Is there one we haven't looked at to your knowledge that was in between?

A. Well, I'm sorry. Could we refer back to the previous one? What was the number of the previous one?

THE COURT: Is that 195?

MR. JACOBS: 195. Thank you, Judge.

BY MR. JACOBS:

Q. And before that we referred to 28 so perhaps I could rephrase the question and ask you to testify as to which previous administrative order this one-page administrative order amends.

A. Well, this one would amend 87-085.

Q. By setting out later dates; is that correct?

A. Setting out later dates, yes, as opposed to the dates that were in the --

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Q. Now, while it sets out later –
THE COURT: Wait. Wait. Wait.
Were you through?
THE WITNESS: Just as opposed to the dates that were in the one that we had previously reviewed.
MR. JACOBS: Sorry.
BY MR. JACOBS:
Q. Now, looking at the bottom of 52 again, you said the order sets out new dates. Does the order excuse compliance with the previous order with the NPDES permit or with the Clean Water Act?
A. Paragraph 6 notes that "Nothing in this order shall be construed to prevent further enforcement of the violation stated herein, nor shall it preclude institution of administrative penalties or civil litigation based on violations of the Clean Water Act."
Q. Thank you. Moving on to Carrollwood, Mr. Bullock called your attention to Exhibit 201, which were these notes written by an EPA staffer describing the history of compliance and/or lack thereof at Carrollwood. I'd like to direct your attention to the bottom of page 2 of the exhibit.
THE COURT: Now, you're talking about Defendant Florida Cities 201, correct?
MR. JACOBS: Yes, sir. Thank you.
BY MR. JACOBS:

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Q. The bottom of page 2, end of paragraph 6, of Defendant Florida Cities 201, "An application was submitted to DER for a construction of an Advanced Wastewater Treatment, AWT, upgrade in November 1989. In July 1990 DER issued Respondent a construction permit for the construction. On July 31st, 1991 Respondent submitted an application for an NPDES permit. EPA plans to issue an NPDES permit to the Respondent."
A. Yes, I see that.
THE COURT: Did he read that correctly?
THE WITNESS: Yes.
THE COURT: Okay.
BY MR. JACOBS:
Q. Now, Mr. Klingenstein, can you tell me whether you have an opinion as to whether one could draw an inference from that statement that the NPDES permit that EPA planned to issue was based on the construction of an AWT plant by Florida Cities Water Company?
A. Yes, that's the inference.
Q. Now, directing your attention to Florida Cities Exhibit 97, I believe Mr. Bullock directed your attention to page 2 of the exhibit to subparagraph A. I'd like you to look at subparagraph D, as in "dog," and E, as in "Ethel."
Would you read D, first of all, into the record?
A. "If an agreement with Hillsborough County is not made by the deadline in B, the permittee shall submit a construction

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application to provide an alternate effluent disposal method by July 1, 1984." Paragraph –
Q. Mr. – I'm sorry?
A. Paragraph E –
Q. Let me stop you at D, if I may. Now, do you know whether an agreement was reached between Florida Cities Water Company and Hillsborough County by July 1st, 1984?
A. Yes, I am aware that no agreement, such agreement was reached.
Q. In fact, when was the agreement reached?
A. The agreement was not reached until I believe mid-1991, the year prior to the disconnection, or, rather, the connection to Hillsborough County and the taking off line of the Carrollwood plant.
Q. So is it a fair inference from this state document that under the circumstances the permittee – that is, the state of Florida Cities Water Company – needed to submit a construction application to provide an alternate effluent disposal method by July 1, 1984?
A. That would appear to be the requirement of this modification of the permit.
Q. And now would you take a look at subparagraph E, as in "Ethel"?
A. Yes.
Q. And would you read that into the record, please?

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A. "The discharge to Sweetwater Creek shall cease no later than January 1, 1985."
Q. When did the discharge to the Sweetwater Creek cease?
A. When the connection was made to Hillsborough County in very early 1992.
Q. Seven years later?
A. Yes.
Q. Now, Mr. Bullock has brought to your attention a couple of documents reflecting correspondence between Florida Cities Water Company and the Hillsborough County with respect to a potential connection.
Based on your testimony yesterday, approximately how many pieces of such correspondence did you review in addition to the few that Mr. Bullock called to your attention?
A. I can't recall the exact number, but it's something between a half dozen and a dozen I would say.
MR. JACOBS: One moment, Your Honor.
THE COURT: Okay.
BY MR. JACOBS:
Q. Mr. Klingenstein, based on your review of the correspondence between Florida Cities and Hillsborough County over the span of the seven or eight years, can you tell me whether there was any commitment given by Hillsborough County to hooking up the Florida Cities Carrollwood system?
A. Based on my review of the correspondence, I didn't see

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what I would have considered to be anything approaching a commitment until 1991 when in fact an agreement was reached.
Q. Thank you. Did you see any documents that suggested that there could actually be a no guarantee of a connection?
A. Certainly there were a couple of documents, couple of letters that indicated concerns on Hillsborough County's part about being able to provide capacity certainly by a particular date.
Q. Did you see any indication that Hillsborough County encouraged Florida Cities Water Company to pursue alternative means of providing wastewater service given the deadline imposed on them by EPA?
A. No. Certainly there was at least one mention in a Hillsborough County letter that perhaps Florida Cities should pursue other options. And, frankly, I took the fact that Hillsborough County apparently lost one of Florida Cities' applications and that it had to be resubmitted some period of time later as an indication that they were not strongly encouraging such a connection.
Q. Directing your attention to Government Exhibit 263, would you look at the second full paragraph? I take it you've seen this document before, sir?
A. Yes, I have.
Q. Would you look at the second full paragraph, please, and read that into the record?

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A. "We understand that the Department of Environmental Regulation has requested that your facility be taken out of service and wastewater disposal service provided by Hillsborough County. However, we do not see this as a realistic possibility at this time or in the near future."
THE COURT: Was that not previously read?
MR. JACOBS: I don't think that paragraph was.
THE COURT: Okay. It just sounded kind of familiar.
MR. JACOBS: The document looked a little --
THE COURT: I don't want you to repeat anything. Okay.
Did you read that?
THE WITNESS: I don't know, Your Honor. I've read so much.
THE COURT: Okay. Go ahead. Move on.
BY MR. JACOBS:
Q. Directing your attention now to Government Exhibit 278 and in particular to page 2, have you previously examined this exhibit, sir?
A. Yes, I have.
Q. And in paragraph 2 of page 2 of Exhibit 278, does the indication or suggestion appear from Hillsborough County that Florida Cities pursue alternative means other than connecting to Hillsborough County?
A. There is a notation "the department would have no

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objection to Florida Cities pursuing alternative means of providing wastewater service for this development given the deadline" --
THE COURT: Wait. Wait. Wait.
THE WITNESS: Oh, I'm sorry.
THE COURT: A little fast for the Reporter.
THE WITNESS: Let me read that over.
"The department would have no objection to Florida Cities pursuing alternative means of providing wastewater service for this development given the deadline imposed on them by EPA."
BY MR. JACOBS:
Q. And what deadline was that, sir, if you know?
A. I'm sorry. What date?
Q. What deadline?
A. Oh, the deadline to cease discharge to the creek.
Q. Under an administrative order?
A. Yes.
Q. And do you recall what that deadline was?
A. I can't recall at this point which deadline.
Q. Now, Mr. Bullock also brought to your attention the permit application for the Carrollwood facility, did he not? I believe that was Defendant Florida Cities 126.
And I believe you said you've seen that previously; is that correct?

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A. Actually I don't -- I couldn't say whether I had seen that as I recall.
Q. I stand corrected. Are you familiar with reviewing these types of applications?
A. I'm familiar with these types of applications, yes.
Q. Okay.
A. I've not reviewed them for EPA in terms of submitted, but I'm familiar with reviewing them in the course of working with facilities.
Q. Very well. Directing your attention to the fifth page of the exhibit -- again, this is Defendant Florida Cities 126, and this would be the fourth page of the application itself. Is there an indication in the application -- is there an indication by the Florida Cities Water Company as to whether it intends to upgrade the Carrollwood plant?
A. Yes. Under --
Q. And what is that indication?
A. Under item 6, "treatment system," which requests the applicant to describe briefly any treatment systems used or to be used. "In general an Advanced Wastewater Treatment, AWT, System designed to comply with the Grizzle-Figg legislation by employing the following treatment technologies: screening, grit removal, flow equalization, biological treatment using the Orbal oxidation ditch process, clarification, tertiary filtration, chlorination, de-chlorination, and post-aeration."

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Q. Now, to your knowledge, sir, an EPA NPDES permit was issued based on this application; is that correct?
A. Yes, it was.
Q. And, in fact, that permit did require treatment of the effluent to AWT standards; is that correct?
A. Yes, it did.
Q. And is it a fair inference to be drawn that the permit was actually issued based on the representation in the application that the plant would be upgraded to AWT standards?
A. Yes, that is.
Q. Now, Mr. Bullock also asked you to look at Defendant Florida Cities Exhibit 156, and I wonder if you could take a look at that now, please.
A. Yes.
Q. And I believe he referred you to a paragraph that reflected that the administrative order had been placed in an inactive status; is that correct?
A. Yes.
Q. Now, by the time the administrative order had been placed in an inactive status, had the NPDES permit already been issued?
A. Yes, it had.
Q. In fact, when did that permit take effect?
A. I believe July 1991.
Q. And this deactivation, as it were, took place when?

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A. I believe it's dated March 3rd, 1992.
Q. In your professional opinion, sir, was the administrative order previously issued superseded by the NPDES permit that took effect in November 1991?
MR. BULLOCK: If the Court please –
THE COURT: Just a moment.
MR. BULLOCK: I don't believe this is a proper subject for his testimony if he's testifying about what an agency action does or doesn't do. He's not an agency employee. He doesn't know the purpose or the motivation behind sending that letter. He can look at the letter, but in terms of why it was done, the basis of doing it, is outside the scope of expert testimony.
MR. JACOBS: Your Honor, it's rebuttal, and I think they've well opened the door in terms of interpreting EPA documents.
MR. BULLOCK: Your Honor, there is an EPA official here who's sitting –
THE COURT: I'll sustain the objection.
MR. BULLOCK: Thank you.
BY MR. JACOBS:
Q. Finally, turning to Barefoot Bay, Mr. Klingenstein, Mr. Bullock also directed your attention to Government Exhibit 145, the administrative order for the Barefoot Bay facility, and I wonder if you could take a look at that again, please,

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sir.
A. Yes, I have that.
Q. Thank you. Could you tell me if there's language in this administrative order as to whether or not it constitutes a permit?
MR. BULLOCK: If the Court please, Your Honor, he went into this on direct, and he's asked the exact same whether or not –
THE COURT: Sounds familiar to me. I'll sustain the objection.
MR. JACOBS: Very well.
BY MR. JACOBS:
Q. Mr. Klingenstein, in your professional opinion, what is the purpose of these administrative orders at each of the three facilities?
MR. BULLOCK: If the Court please, Your Honor, same objection.
THE COURT: Sustained.
BY MR. JACOBS:
Q. Directing your attention now to Defendant Florida Cities Exhibit 192, I think you previously identified this as the Barefoot Bay permit issued in September of '91 effective November of '91; is that correct, sir?
A. Yes.
Q. Now, Mr. Bullock brought to your attention an internal

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EPA document as I recall dating back to '95 – or – sorry – '85 that related to permit requirements for the testing for total residual chlorine. Do you recall that?
A. Yes.
Q. Now, does the permit itself instruct the permittee on the methods that are to be used both to measure and to report total residual chlorine?
A. Yes.
Q. And where does the permit do that?
A. On page Roman numeral I-2 which is within part 1, and it's under item number 2.
MR. JACOBS: Thank you, sir. No further questions at this time.
MR. BULLOCK: If I promise to be brief, Your Honor, and live up to it?
THE COURT: Well, I – this is going to have to truly be legitimate recross. What are the areas that you want to –
MR. BULLOCK: Two questions, Your Honor. Excuse me. Two areas, Your Honor. I would like to address issues raised regarding the 1986 permit denial, the Administrative Order 87-085, and I want to ask him about – a question about a letter of correspondence with Hillsborough County regarding –
THE COURT: I'll permit limited recross, but let's be very brief.

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RECROSS-EXAMINATION

BY MR. BULLOCK:

Q. Mr. Klingenstein, Mr. Jacobs asked you about the tentative denial of the '86 permit application in Exhibit 23. There's nothing in either the tentative denial or -- isn't it true that there's nothing either in the tentative denial or the formal denial in Exhibit 27 which directs upgrade to AWT?

A. There's nothing that specifically directs upgrade to AWT, that's correct.

Q. Let me also ask you to look at 87-085, which is Exhibit 28. Mr. Jacobs asked you to read paragraph 1 on page 2. The language in paragraph 1, page 2, isn't it true that this language states that "the Respondent shall cease discharging pollutants to the waters of the United States at the earliest date practical but no later than September 30, 1988"? Is that correct?

A. Yes, that's the language.

Q. There is no requirement in this order to begin constructing an AWT facility, is there?

A. No, there's no specific requirement to construct an AWT.

Q. And, in fact, EPA for whatever reason did not believe that at this point in time Florida Cities had the authorization to discharge into the waters of the United States; is that correct?

A. My interpretation would be that they did not have

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authorization to discharge into the waters of the United States at a particular place.

Q. And where is that stated? Is that stated in the '86 -- excuse me. Let me withdraw that.

Can you point out where that is in the '86 tentative denial?

A. Well, a denial denies a permit application.

Q. Okay. Would --

A. I'm sorry. An applicant applies to discharge a particular wastewater flow with certain characteristics at a certain place.

Q. Well, the denial has to state a basis of a denial, does it not?

A. My experience, typically they do, yes, they do include a reason for denial.

Q. Is there a -- let me refer you to page 2 of Exhibit 23, page 2 of the actual -- of the fact sheet. Excuse me.

The basis for the final effluent limits and permit conditions do not say anything about -- isn't it true that that does not say anything about whether or not there was a waste load allocation developed for the canal in 1981?

A. Only to the extent that that same document on the previous page lists receiving water as Caloosahatchee River via a canal.

Q. Isn't it true that the first time there was any

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requirement, any formal official requirement from the Environmental Protection Agency to Florida Cities Water Company regarding AWT construction was in September 26, 1989?

A. Certainly based on our review of documents today, that's the first document that I recall seeing that's specifically from EPA that specifically required AWT in writing in the document.

Q. So the answer to my question is yes?

A. Yes.

Q. Let me turn with you to Carrollwood briefly. Exhibit 272, which would be Plaintiff's 272 --

A. I'm sorry. That was 272?

Q. Correct. That would be the letter from Hillsborough County to Florida Cities in 1986. Is that correct?

A. No, this is -- I'm sorry. This is Government 272?

Q. Yes.

A. I'm looking at Government 272, which is dated September 27, 1984. It's a U.S. EPA letter from Paul Traina.

Q. I'm sorry. I may have written the wrong number down.

Well, I can ask you this question because you just recently looked at the document. Mr. Jacobs showed you a document from Hillsborough County in 1986 stating that the county did not have the capacity to accept the effluent and the county would have no objections to the company looking at other options. Do you remember that?

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A. Yes.

Q. All right. In fact, that letter came from the Hillsborough County Department of Sanitary Services; isn't that correct?

A. I'd have to look at the document again.

MR. JACOBS: We can stipulate to that if it would help.

MR. BULLOCK: Thank you.

BY MR. BULLOCK:

Q. Isn't it true that the Department of Sanitary Services is not the governing body for discharge permits in Hillsborough County?

A. My understanding, it is the Hillsborough County EPC would be.

Q. So the Sanitary Services could not excuse any condition of a Hillsborough County Environmental Protection Commission permit or an FDER permit, could it?

A. I would expect not.

MR. BULLOCK: Thank you.

THE COURT: Okay. Thank you, sir. You may step down.

THE WITNESS: Thank you, Your Honor.

(Mr. Klingenstein was excused.)

THE COURT: I think we'll go till 5:30 this evening. And we've been here for over two hours, so let's take a

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ten-minute recess.
(Recess taken.)
THE COURT: Sorry. I had an emergency.
Okay. Call your next witness.
MR. JACOBS: Your Honor, the United States calls Jack Schenkman.
While he's taking the stand, Your Honor, my questions of Mr. Schenkman will be very brief, and I understand that to be the case with both of the defendants as well.
Mr. Schenkman was kind enough to fly up from Miami on Monday and again today, so we're going to I think mutually agree to finish him today. And we'll try to do that by 5:30 within the Court's specifications.
THE COURT: All right.
THE CLERK: Raise your right hand.
(Whereupon Jack Schenkman was duly sworn.)
THE CLERK: Take a seat in the witness box.
State your name and spell the last for the record, please.
THE WITNESS: Jack Schenkman, S-c-h-e-n-k-m-a-n.
THE CLERK: Thank you.
DIRECT EXAMINATION
BY MR. JACOBS:
Q. Good afternoon, sir. And thank you for coming, and I

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apologize for the inconvenience.
Would you tell me how you're employed, please.
A. I'm the chairman of the board of North Fort Myers Utility.
Q. And that's in Fort Myers, Florida?
A. Yes, it is.
Q. And how long have you been affiliated with North Fort Myers Utilities?
A. I started at North Fort Myers Utility from the beginning, and it was about I would say around ten, 11 years ago.
Q. And does North Fort Myers Utilities operate a wastewater treatment plant?
A. Yes, it does.
Q. When was this plant first placed in service?
A. Let's see. About 1985, '84, something like that.
Q. Mr. Schenkman, do you recall executing a declaration in this case back in November?
A. Yes, I do.
Q. Would it refresh your recollection to have that handy?
A. Surely.
MR. JACOBS: Your Honor, may I?
THE COURT: Yes, sir.
THE WITNESS: Thank you.
BY MR. JACOBS:
Q. Now, making reference to your declaration as you see fit,

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sir, could you tell me what the capacity of the North Fort Myers Utilities Wastewater Treatment Plant is?
A. Two million gallons per day.
Q. And when did the plant have that capacity?
A. We had it -- we really started to build it in beginning of '87. By '88 we had it resolved, finished.
Q. And so when was the plant first placed in service?
A. The plant was placed in service before that in -- North Fort Myers Utility was near Old Bridge Village, which is one of my communities, and then I moved it to a 40-acre site, which it is in today, and we built a two-million-gallon facility at that time.
Q. And, again, with reference to your declaration, if you need to, sir, at what point in time did you have the two-million-gallon capacity?
A. 1987.
Q. Take a look at paragraph 2. Does that refresh your recollection as to when the two-million --
A. Yes, yes.
Q. All right. Just for the record, when did the plant have the two-million-gallons-per-day capacity?
A. From 1987 on.
Q. All right. Paragraph 2 you say, "North Fort Myers Utilities Wastewater Treatment Plant, which has a capacity of two million gallons per day, was first placed in service on

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August 27th, 1988."
A. That's true. But in 1987 it was under construction.
Q. Okay. I understand. You began construction in '87, and it was complete and ready to go in August of '88; is that correct?
A. That is correct.
Q. Now, can you tell me, Mr. Schenkman, what method the plant uses to dispose of its treated effluent?
A. Well, we send treated effluent to golf courses, public grounds, and so forth. It's all reuse.
Q. It's all reuse?
A. Everything is for reuse.
Q. So you do or you don't have any discharge to a surface water?
A. No, we don't. We also have a two-million-gallon deep well into the boulder zone in case of unusual weather so that we don't flood the streets.
Q. Or the golf course?
A. Or golf courses that might not be able to take the excess water we have.
Q. So in wet weather your backup is the deep well; is that correct?
A. That's correct.
Q. Now, Mr. Schenkman, at any point in time did you have discussions with representatives of the Florida Cities Water

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Company relative to providing wastewater treatment service to wastewater from the Waterway Estates facility?
A. I think some discussions began about 1987, and we offered to service them if they wanted to come in to us.
Q. And did your attorney actually conduct those negotiations --
A. That is correct.
Q. -- at your instruction?
A. That is correct.
Q. And did he copy you on the correspondence?
A. Yes, he did.
Q. Directing your attention now to Government Exhibit 362, which will be brought to you, Mr. Schenkman, is this a piece of correspondence that your attorney wrote?
A. That is correct.
Q. At your instruction?
A. That's right.
Q. And in this letter, Exhibit 362, does your attorney on your behalf offer to provide bulk sewer service to Florida Cities Water Company for the Waterway Estates plant?
A. That is right.
Q. And the date on this letter, sir?
A. Let me see. February 2nd, 1987.
Q. Was an agreement reached in February of '87?
A. No, we never did reach agreement with them. We made the

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offer.
Q. And just focusing on this offer for the moment, I see there's a signature line on the bottom of page 2 I take it that was never signed, meaning an agreement was not reached; is that correct?
A. That is correct.
Q. And is that because the offer was not accepted?
A. That is right.
Q. Now, were there subsequent negotiations?
A. Yes. They talked about it after. And we gave them a figure at the time. And then there was further discussions, but they never accepted us.
MR. JACOBS: Okay. Before we move on to the next piece of correspondence, Your Honor, I'd like to move 362 into evidence.
THE COURT: Be received.
(Government Exhibit Number 362 received in evidence.)
BY MR. JACOBS:
Q. Now, Mr. Schenkman, I'd like to direct your attention to Government Exhibit 385. Do you recognize Government Exhibit 385, sir?
A. Yes, yes, I do.
Q. And would you identify it, please, for the record?
A. It was dated November the 17th, 1988.

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Q. And, again, is this a letter from your attorney written on your behalf with respect to the same subject?
A. That is correct.
MR. JACOBS: Move 385 into evidence, please.
THE COURT: Will be received.
(Government Exhibit Number 385 received in evidence.)
BY MR. JACOBS:
Q. Now, Mr. Schenkman, in this particular November '88 letter, are you essentially lowering your price for the connection?
A. Yes, we did at that time to help out as much as we could to Florida Cities.
Q. You wanted to help them out. Did you also want to make a deal, Mr. Schenkman?
MR. BULLOCK: If the Court please, Your Honor, I know he's trying to rush to get through, but he is kind of bordering on leading a little bit, and we would object to it.
THE COURT: Okay. Well, try not to lead too much.
BY MR. JACOBS:
Q. Mr. Schenkman, let me direct your attention to the second full paragraph on the first page of Exhibit 385. Do you see that?
A. Yes, I do.
Q. Could you read that first sentence of the second full

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paragraph, please?
A. "Jack recently indicated that he could provide capacity at the same point on Pondella Road for a total of three-million-two primarily because of his willingness to utilize tax losses for the benefit of the deal which losses he could otherwise utilize on consolidation and other operations."
Q. Okay. That was paragraph 3. I wonder if I could ask you to read the first sentence of paragraph 2.
A. "Although Jack fully appreciates your intent to go forward with the construction of the advanced wastewater treatment unit on your Waterway Estates plant, I am reminded of our earlier discussion wherein you indicated to me that the possible interconnection" --
MR. BULLOCK: Objection.
THE COURT: Just a moment.
Sir?
MR. BULLOCK: Objection, hearsay.
THE COURT: I received this in evidence.
MR. BULLOCK: All right. I'll withdraw that.
THE COURT: Go ahead.
BY MR. JACOBS:
Q. "I am reminded."
A. "I am reminded of our earlier discussion wherein you indicated to me the possible interconnection into North Fort

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Myers Utility is simply a matter of dollars. The last time we discussed this matter, North Fort Myers Utility offered you one million gallon per day of capacity for three-million-seven and estimated it would cost an additional 800,000 to extend its lines to a point of interconnection on Pondella Road for a total cost of 4.5 million.

"Mr. Schenkman agreed to reduce that price somewhat, but you calculated your internal cost at an additional approximately 1.8 or 1.9 million."

Q. Okay. Now, moving on to the top of page 2 of the same exhibit, could you read just the last sentence of that first paragraph beginning with "therefore"?

A. Wait a minute. I lost you.

Q. Just flip the page.

A. Okay.

Q. And start on the top, first full paragraph but the second full sentence beginning with "therefore."

A. I first got to find it.

Q. May I approach?

THE WITNESS: Would you show me where it is? Where is he talking about?

Oh. "Therefore we extended the offer" --

THE COURT: No. Wait. Wait. Wait.

THE WITNESS: "Therefore we extend" --

THE COURT: Wait. Wait. "Therefore he extends,"

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right?

THE WITNESS: You're right, sir. I'm sorry.

THE COURT: The court reporter is taking this down. I don't want an error.

THE WITNESS: "Therefore he extends an offer to build lines and provide one million gallons of capacity to the designated point under Pondella Road for 3.2 million subject of course to negotiation of the appropriate contract to us to do so."

BY MR. JACOBS:

Q. Okay. Now, looking down two paragraphs, there is a representation by the author of the letter, Mr. Sundstrom -- and he is your attorney; is that correct?

A. That is correct.

Q. -- that you, Mr. Schenkman -- I'm sorry. -- that "Mr. Reeves and Bob French have consistently told Jack Schenkman and me," meaning Mr. Sundstrom, "that you would prefer to come to North Fort Myers Utilities as a permanent and final solution, but that, as aforesaid, it is simply a 'matter of dollars.'"

Do you recollect, Mr. Schenkman, that that is what in fact got in the way of reaching an agreement? Was it a matter of dollars?

A. That is correct, sir.

MR. BULLOCK: Objection.

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THE COURT: Wait. Wait. Wait a minute.

MR. BULLOCK: He's now being asked -- my impression of the question was that Mr. Schenkman is being asked what Mr. Sundstrom's understanding was of what Mr. Reeves and Mr. French were saying. I think, while I understand that the letter is in evidence, the subsequent questions beyond that are calling for hearsay.

THE COURT: Well, I'll overrule the objection.

BY MR. JACOBS:

Q. Let me ask it again, Mr. Schenkman. Did you hear from both Mr. Reeves and Mr. French -- do you remember who Mr. Reeves is at the time?

A. Yes, yes, I do.

Q. Did he work for Florida Cities Water Company?

A. At that time he did.

Q. Okay. And Mr. French, did he work for Florida Cities Water Company at that time?

A. Yes, he did.

Q. And did you hear from them that they would come to North Fort Myers Utilities --

THE COURT: Well, now, this is your witness. Don't lead him.

MR. JACOBS: I'm sorry, sir.

BY MR. JACOBS:

Q. The representation in the letter that these gentlemen

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told you that they would prefer to come to North Fort Myers Utilities as a permanent and final solution but that it was simply a matter of dollars that prevented them from coming, is that an accurate statement, Mr. Schenkman?

A. That is correct.

Q. Now, do you recall how you came up with the $3.2 million figure?

A. Well, that's what our cost was to go up to Pondella Road.

Q. Can you recollect whether Florida Cities ever represented to you what it would cost them to upgrade their plant and move their outfall and thereby continue their discharge as opposed to hooking up to your facility?

A. I wasn't privy. I heard rumors, but I wasn't privy to them telling me what it cost.

Q. Let me direct your attention then now to Exhibit 397. Is this again, Mr. Schenkman -- well, let me ask you this.

Can you identify 397?

A. Yes, I can.

Q. Would you, please?

A. Yes, dated September 25th, 1989.

Q. And who's this letter written to and by whom?

A. It was written Bill Sundstrom, Rose, Sundstrom & Bentley, to Florida Cities Water Company, attention to Mr. Tony Reeves at the time.

Q. And you're a recipient of a cc of this letter, are you,

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sir?
A. Yes, yes, I was.
MR. JACOBS: Move --
THE COURT: *Just a moment.*
MR. BULLOCK: Objection, Your Honor, hearsay. The document contains representations of Mr. Sundstrom's conversations with the Department of Environmental Regulation employees and what the employees said, and it's Mr. Sundstrom's characterizations of those conversations.
THE COURT: Okay. Yes, sir?
MR. JACOBS: I'm sorry. Did you sustain?
THE COURT: No, no. Do you want to be heard on that?
MR. JACOBS: Well, first of all, Your Honor, there's no objection to the exhibit on the objection list, and I'll move it into evidence on that basis at this time.
MR. BULLOCK: I'll withdraw it.
THE COURT: Be received.
(Government Exhibit Number 397 received in evidence.)
BY MR. JACOBS:
Q. Now, Mr. Schenkman, directing your attention to the bottom of the first page of the exhibit beginning with "North Fort Myers Utilities has capacity now permitted and in service to provide raw sewage treatment and disposal sufficient for

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the Waterway Estates district of Florida Cities Water Company" -- or, to be precise, "FCWC" -- through the end of that paragraph which reads, "NFMU has offered to provide sewage treatment and disposal services to FCWC for the same capacity at approximately the same or slightly less than that cost," can you tell me whether in trying to make a deal, as you said you did, with Florida Cities Water Company you essentially tried to give them a price that was lower than the price or cost that they would expend as represented to you to upgrade the plant and move the outfall?
THE COURT: Just a moment.
MR. BULLOCK: Question is leading.
THE COURT: Sustained.
BY MR. JACOBS:
Q. Mr. Schenkman, do you recall receiving any information from Florida Cities that related to the cost of moving the outfall and upgrading the plant?
A. I don't know what that cost was, but we at that time offered them some tax advantages losses that we had that they -- that would be advantageous to them.
Q. Can you tell me whether Florida Cities Water Company *accepted your September 25th, 1989 offer?*
A. No, they didn't.
Q. And did you come to an understanding as to why?
A. They believed they felt that they can do it for less cost

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than what we offered.
THE COURT: Any further questions?
MR. JACOBS: Just one more document, Your Honor, if I could direct the witness's attention to Government 408.
BY MR. JACOBS:
Q. Do you have 408 in front of you, sir?
A. Yes, I do.
Q. Do you recognize that, and, if so, could you identify it, please?
A. Yes. It was written February the 5th, 1990 addressed to Mr. Reeves from Florida Cities Water Company.
Q. And it was written by whom, sir?
A. *It was written by -- let me see the back of it --* William Sundstrom.
Q. Is that your attorney?
A. Yes, he is.
Q. And did you receive a cc of this letter?
A. Yes, I did.
Q. At or about the time that it was written?
A. That's correct.
MR. JACOBS: I'd move 408 into evidence, sir.
THE COURT: Be received.
(Government Exhibit Number 408 received in evidence.)
BY MR. JACOBS:

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Q. Now, Mr. Schenkman, in Exhibit 408 do you again offer to make a deal with Florida Cities Water Company to connect the Waterway Estates plant?
A. Yes, we did.
Q. And was that offer accepted?
A. No.
Q. And did you in this February 5th, 1990 communication again drop the price?
A. I think we went down to three-million-two. I'm going to try to --
Q. Take your time, sir.
Let me direct your attention to paragraph 1 on the first page. Does that help, Mr. Schenkman, to refresh your recollection, first page of Exhibit 408?
A. Yes. "North Fort Myers Utility would commit to sell a million gallons of sewage treatment in an effluent disposal capacity to Florida Cities for a firm price of 2,470,000 or 2.47 -- $2.47 per gallon."
Q. Are you again dropping the price here, sir?
A. I think it was dropped a little bit at the time.
Q. And directing your attention to paragraph 3 to refresh your recollection, if you need to, did you also offer to construct the necessary sewage transference lines either at your own cost or at the county's cost to the point of connection?

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A. I think the way it reads -- and let me read it for you exactly because it's back to 1990. "Additionally, it is anticipated that the county would finance and construct all of the transference lines from the existing Waterway Estates plant to North Fort Myers Utility lines. Should you desire, North Fort Myers would commit to construct the remainder of the lines from interconnection of 41 and Pondella Road to the Waterway Estates plant as a recoverable investment as another option available to FCWC."
Q. And moving on, flipping the page now and starting with paragraph 4, did you also offer to finance the investment for Florida Cities Water Company?
A. That is correct. "North Fort Myers Utility would agree to finance the FCWC investment at its outstanding tax exempt rate of 8 percent with an amortization period not to exceed ten years."
Q. And now focusing your attention on the bottom of the page, same page, the second page of the exhibit, last paragraph, can you tell me, Mr. Schenkman, whether at this point in time you still had sufficient capacity to take the Waterway Estates effluent?
A. We did.
Q. Okay. And can you tell me, then, from the point in time of this first offer in February of '87 through February of 1990, over those three years did you at all times have the

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capacity to accommodate the Waterway Estates effluent?
A. Yes, we did.
Q. And was a deal ever reached?
A. No.
MR. JACOBS: Thank you. No further questions.
THE COURT: Mr. Bullock?
CROSS-EXAMINATION
BY MR. BULLOCK:
Q. Good afternoon, Mr. Schenkman.
A. Good afternoon.
Q. How are you? Nice to see you again.
Mr. Jacobs just asked you whether or not at all times between February of '87 and February of '90 did you have capacity to accept the Waterway Estates effluent. Isn't it true that you didn't have capacity until August of 1988 based on your own declaration?
A. Well, we had at that time capacity for 700 -- when we first started to construct, 700,000. By the time we would have hooked up we would have had capacity to take more than a million.
Q. But you didn't have completion of the two-million-dollar facility -- I mean two-million-gallon facility until August 27, 1988.
A. But we had the capacity to handle everything you had at the time which was -- we offered 700,000, and we had it at the

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time. And the time we would have connected the lines we would have had all the capacity you needed.
Q. Okay. The Waterway Estates plant was permitted for 1.08 million gallons a day, was it not? Isn't that true?
A. I don't know what they were permitted for at the time. I don't know what Waterway Estates had.
Q. All right. Isn't it true that they would have to find capacity for their -- the entire projected capacity of 1.08 MGD?
A. No, no. At the time when we made that offer we would have been completely finished at the time that lines were interconnected and hooked up.
Q. But my question was -- Mr. Jacobs' question to you was did you have the capacity in February of '87.
A. When we first discussed it --
THE COURT: Did you have the capacity in February of '87? That's his question.
THE WITNESS: February '87, no, I only had for 700,000.
BY MR. BULLOCK:
Q. How many deep wells does your facility have?
A. We have one deep well.
Q. Okay. How many -- what is the capacity of the spray field?
A. In the deep well?

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Q. No, the spray field.
A. The spray field?
Q. Yes.
A. Oh, we can send a million and a half, two million gallons in the spray field.
Q. All right. And then what is the capacity of the deep well?
A. Couple million gallons, two, three million gallons.
Q. Do you use the spray field and the deep well at the same time?
A. No. The only time we use the deep well, if there's heavy rain that the spray fields cannot take it, then we send it to a deep well. Otherwise we try to save as much as the water we can for the -- keep the aquifer intact.
Q. Mr. Jacobs asked you to look at what was Government's Exhibit 408, which is the February 5th, 1990 letter.
A. Okay. I'm looking at it. What did you want?
THE COURT: Just a moment.
BY MR. BULLOCK:
Q. Isn't it true that in February of 1990 Florida Cities was well on its way to constructing the AWT plant at Waterway Estates?
A. I don't know what Florida Cities had or didn't have. I didn't get into their affairs.
Q. Well, if you assume with me that they were well on their

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way to building an AWT plant -- excuse me -- to permitting and designing an AWT plant, let's assume that, would it have made sense to stop at that point in time and hook into your facility?

MR. JACOBS: Objection, calls for speculation.

MR. BULLOCK: I'll withdraw the question, Your Honor.

THE COURT: I'll overrule.

THE WITNESS: I can't speak for Florida Cities.

BY MR. BULLOCK:

Q. All right. Did you offer in your February 1990 letter to reimburse Florida Cities for any of the engineering or design costs that it would have already incurred in designing an AWT facility to Waterway Estates?

A. Not to my knowledge.

MR. BULLOCK: Thank you, Mr. Schenkman.

THE COURT: Give me just a moment, Mr. Hird. Go ahead, Mr. Hird.

MR. HIRD: Thank you, Your Honor.

CROSS-EXAMINATON

BY MR. HIRD:

Q. Good afternoon, Mr. Schenkman.

A. Afternoon.

Q. You I believe testified that the total capacity of North Fort Myers would be two million gallons per day; is that

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correct?

A. That's correct.

Q. And in the period that we're talking about, the late 1980s, when you first began operations, you only had commitments for about half of that; is that correct?

A. Less than half.

Q. Less than half. And in terms of getting a rate established from the Public Service Commission, isn't that rate based on the used capacity?

MR. JACOBS: Objection, beyond the scope.

THE WITNESS: I don't know.

THE COURT: Just a moment. I'll overrule the objection.

Do you know? Do you know, sir?

THE WITNESS: No, I don't know.

BY MR. HIRD:

Q. You don't?

A. No.

Q. You don't know whether the rate is based on the used capacity as opposed to the --

A. No, I don't.

Q. -- potential capacity? Okay.

Now, were you operating in the period of the late '80s in the red or in the black?

A. We haven't made a profit really, even today, that is, in

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the utility business. But we keep growing and growing and growing, and the assets keep growing with it.

Q. So you were operating in the red; is that correct?

A. Yes.

Q. Now, if you would turn to Exhibit 385, if you would.

THE COURT: Plaintiff's?

MR. HIRD: I'm sorry. Government Exhibit 385.

BY MR. HIRD:

Q. Do you have that in front of you, sir?

A. I don't know. The gentleman will tell me.

Q. Do you have that, sir?

A. I have it in front of me.

Q. Okay. If you'd look at the second paragraph -- and I believe you read this language with Mr. Jacobs -- it says, "The last time we discussed this matter, NFMU offered one million gallons per day of capacity for 3.7 million and estimated that it would cost an additional 800,000 to extend its lines to a point of interconnection for a total cost of 4.5 million." Do you see that?

A. Yes, I do.

Q. And then you see the next sentence, "Mr. Schenkman agreed to reduce the price somewhat, but you calculated that your internal costs at an additional approximately 1.8 or 1.9 million." Do you see that?

A. Yes, I do.

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Q. So if you add those together at that point in time, the cost to Florida Cities would be somewhere in the neighborhood of 6.3, 6.4 million; is that correct?

A. I don't know what the cost would be to Florida Cities.

Q. Well, you would have to add the 4.5 plus the 1.9, would you not, because of the internal cost that Florida Cities would bear?

A. Yeah, but, you see, we were using tax benefits that I would -- we wouldn't be spending any more than 4.5 on the job.

Q. But you see --

A. So what it would cost Florida Cities is really -- I wasn't aware of or --

Q. But your lawyer was aware that it would cost between 1.8 and 1.9 million additional, wasn't he? Didn't he say your internal costs would be an additional 1.8 or 1.9 million?

A. Yeah, that's correct.

Q. So if you add that to the 4.5, you get a total of approximately 6.4; is that correct?

A. Go ahead.

Q. Now, if you reduce the price here to 3.2 million --

A. That is correct.

Q. -- that would still mean the total cost to Florida Cities would be about 5.9 million; isn't that correct?

MR. JACOBS: Calls for speculation, Your Honor.

THE WITNESS: I'm not that --

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THE COURT: Overruled.
THE WITNESS: – familiar with the cost to Florida Cities because I don't run their books. I don't know.
BY MR. HIRD:
Q. But you recognize there's an internal cost to Florida Cities that's not reflected in your offer; is that correct?
A. I wouldn't have the internal cost of Florida Cities in my offer at any time. I wouldn't know what – how you run your company.
Q. You've indicated you don't know what the internal cost is, but if the internal cost was 1.8 or 1.9, that would be a factor in making this option, the option of connecting to North Fort Myers, more expensive, would it not?
A. That's a guesswork. I wouldn't know.
Q. But you recognize that there would be some internal cost to Florida Cities, but you don't know what –
A. Possibly.
Q. And do you have reason to disagree with your lawyer's estimate of 1.8, 1.9?
A. No. No, I don't.
Q. Okay. Now, in order to connect to North Fort Myers, Florida Cities would have to build a pipeline connection; is that correct?
A. That is correct.
Q. And Florida Cities would have to contribute that as

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property in kind to North Fort Myers; is that correct?
A. I believe so.
Q. And Florida Cities – and that would be taxable income to North Fort Myers, isn't that correct, that contribution?
A. I imagine so.
Q. And Florida Cities would have to pay the tax –
A. No.
Q. – on that contribution.
A. No, not really because we had a tax losses and benefits that we can pick up so it would save the money for Florida Cities.
Q. So you believe that that tax would not have to be –
A. That's correct.
Q. But you – Mr. Schenkman, you indicated that you were operating in the red at this time.
A. That's right.
Q. And if Florida Cities had made this deal, it would have helped you a good deal; is that correct?
A. To some degree.
Q. Did there come a time in 1991 that you made a proposal to Avatar Holdings or its subsidiaries to buy an interest in North Fort Myers?
A. Not to my knowledge.
Q. Did you ever – do you know a man named Arnold Sheven?
A. I heard of him, but I don't know him.

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Q. You don't know him?
A. (Indicates negatively.)
Q. You never contacted a lawyer with the law firm of Stroock, Stroock & Lavan?
A. I didn't.
MR. HIRD: Your Honor, I'd like to show the witness a portion of Exhibit -- of Avatar Holdings Exhibit 3 to see if it refreshes his recollection.
THE COURT: All right.
BY MR. HIRD:
Q. I'd like to show you the last page of Avatar Holdings Exhibit 3.
A. Sure.
Q. Would you read that to yourself, sir?
MR. JACOBS: Objection, no foundation.
THE WITNESS: Want me to read the whole thing?
THE COURT: Well, he showed him a document, and he's going to ask him to read it to himself to see if that refreshes his recollection regarding his last question, I guess.
MR. JACOBS: Which I would add, Your Honor, I think was beyond the scope of direct, well beyond the scope of direct.
MR. HIRD: Me?
THE COURT: Yeah.

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MR. HIRD: I think this is clearly within the scope of direct because we're talking about the connections between Florida Cities and North Fort Myers. And he's gone through the history, and there's another stage in the history that he hasn't gotten to.
MR. JACOBS: This is 1991. This is a November 1991 document, and the –
THE COURT: I'll sustain the objection, beyond the scope.
MR. HIRD: I have no more questions, Your Honor.
THE COURT: You don't have any redirect, do you?
MR. JACOBS: No, Your Honor, I do not.
THE COURT: All right. We'll reconvene at 8:45 tomorrow morning. We'll be in recess.
(Adjourned at 5:55 p.m.)

CERTIFICATE

I hereby certify that the foregoing is an accurate transcription of proceedings in the above-entitled matter.

_____ _____

Court Reporter Date

Florida Cities Water Company
Docket No._____
Rate Application for Recovery
of Legal Expenses
Exhibits____(GHB-76 thru GHB-85)
Gary H. Baise
Volume 6 of 7

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663-WU EXHIBIT NO. 6-Vol. 6
COMPANY/
WITNESS: Baise
DATE: 8-12-98

FLORIDA CITIES WATER COMPANY

RATE APPLICATION FOR RECOVERY OF LEGAL EXPENSES

EXHIBITS____(GHB-1 THRU GHB-110) OF

GARY H. BAISE

Exhibit List for Testimony of Gary H. Baise

Exhibit	Document
1	Player's List
2	TIME LINE, *U.S. v. Florida Cities Water Company*
3	Resume of Gary H. Baise
4	List of Gary H. Baise's reported cases
5	Court's Standard Interrogatories
6	United States' Answers to Court's Standard Interrogatories
7	Defendant Florida Cities Water Company's Answers to Court's Standard Interrogatories
8	Motion for Extension of Time in Which to File Motion to Strike Affirmative Defenses
9	United States' Motion to Strike Affirmative Defenses
10	Memorandum in Support of United States' Motion to Strike Affirmative Defenses
11	United States' First Request for Production of Documents
12	Deposition digest of Julie Karleskint Deposition
13	Defendant's Motion for a Protective Order
14	Order re: Florida Cities Water Company's Motion for Protective Order (dated April 18, 1994)
15	Letter to Mr. Jacobs from Mr. Scroggin (dated April 19, 1994)
16	Letter to Mr. Scroggin from Mr. Jacobs (dated April 20, 1994)
17	Memorandum in Support of United States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees
18	Memorandum in Opposition to Plaintiff's Motion for an Order Allowing

Ex Parte Contacts with Former Employees

19	Motion and Memorandum for Permission to File Reply Memorandum in Support of United States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees
20	Order re: Defendant's Emergency Motion for a Temporary Protective Order (dated Feb. 13, 1995)
21	Order re: Plaintiff's Motion for an order allowing ex parte contacts (dated March 16, 1995)
22	Deposition digest of John Marlar deposition
23	Deposition digest of Peter McGarry deposition
24	Defendant's Motion to Disqualify Counsel
25	Transcript of February 15, 1995 hearing before U.S. District Judge Swartz
26	Order re: Motion to Allow Ex-Parte Contacts and Motion to Disqualify Counsel
27	United States' Second Request for Production of Documents
28	Deposition digest of Connie Kagey deposition
29	Deposition digest of Bruce Barrett deposition
30	Defendant Florida Cities Water Company's Motion for Partial Summary Judgment and Request for Oral Argument
31	Deposition digest of Paul Bradtmiller deposition
32	Deposition digest of Johnnie Overton deposition
33	Deposition digest of Jack Tompkins deposition
34	Letter to Mr. Baise from Mr. Jacobs (dated Jan. 30, 1995)
35	United States' Reply to Defendant's Emergency Motion for a Temporary Protective Order and Defendant's Request for Oral Argument in Connection with Defendant's Motion to Disqualify Counsel

36	*United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994)
37	United States' First Set of Interrogatories to Defendant Florida Cities Water Company
38	Defendant's Second Request for Production of Documents to Plaintiff United States of America
39	Defendant's Offer of Judgment
40	Defendant's Notice of Intention to Oppose Constructive Motion by United States for Leave to File Amended Complaint
41	Defendant's Memorandum in Partial Opposition to Plaintiff's Motion for Leave to Amend Complaint
42	Order re: United States' Revised Amended Complaint (dated April 26, 1995)
43	Revised Amended Complaint
44	Defendant Florida Cities Water Company's Motion to Strike
45	United States' Motion for Reconsideration of Court's Order on Amendment of Complaint
46	Defendant Florida Cities Water Company's Answer to Revised Amended Complaint
47	United States' Opposition to Defendant Florida Cities Water Company's Motion to Strike
48	United States' Third Request for Production of Documents
49	Defendant's Motion for Partial Summary Judgment
50	United States' Opposition to Defendant Florida Cities Water Company's Motion for Partial Summary Judgment
51	Order Denying FCWC's Motion for Partial Summary Judgment
52	United States' Motion for Partial Summary Judgment (exhibits omitted)
53	United States' Second Set of Interrogatories and First Request for Admissions

54	Research Memos
55	FCWC Motion for Partial Summary Judgment and Request for Oral Argument
56	Deposition Summaries
57	Deposition Summaries
58	FCWC's Fourth Request for Production of Documents and Third Request for Interrogatories
59	United States' Fifth Request for Production of Documents
60	FCWC's Notice of Dispositive Authority
61	Order re: Summary Judgment Motions
62	FCWC Exhibit List and Stipulations
63	DOJ Exhibits
64	Joint Pretrial Statements
65	United States' Motion for an Order Permitting Discovery of Defendant's Late-Named Witnesses
66	FCWC Memorandum in Opposition to Plaintiff's Motion for an Order Admitting Discovery of Defendant's Late-Named Witnesses and for Expedited Consideration
67	Order re: Discovery of Late-Named Witnesses
68	United States' Motion for Expedited Reconsideration of the Court's Ruling on Res Judicata and in Reply to Avatar Holdings' Motion for Clarification of the Court's Order
69	Order re: Motion for Reconsideration on Res Judicata and Motion for Clarification
70	FCWC Proposed Findings of Fact and Conclusions of Law
71	FCWC's Pretrial Brief

72	Defendant's Joint Motion in Limine to Exclude the Testimony and Report of Mark J. Klingenstein.
73	United States' Motion in Limine
74	Defendant's Joint Motion in Limine to Exclude the Testimony and Report of Eileen Zimmer
75	Berz Settlement Proposal
76	Trial Transcript
77	United States' Offer of Proof in Lieu of the Testimony of Witnesses who Plead the Fifth Amendment
78	Defendants' Joint Memorandum of Law Addressing the Invocation of the Fifth Amendment
79	FCWC's Witness List
80	Plant Effluent Quality Report (Black & Veatch)
81	FCWC Motion to Strike the Deposition Testimony of Jack Williams Tompkins
82	Parties' Proposals for Post-Trial Submissions
83	Order Regarding Fifth Amendment and Request Court Draw Inferences from Refusal to Testify
84	United States' Post-Trial Memorandum
85	United States' Post-Trial Proposed Findings of Fact and Conclusions of Law
86	FCWC Post-Trial Brief
87	FCWC Proposed Findings of Fact and Conclusions of Law
88	United States' Motion for Reconsideration on Adverse Inferences and Extension of Page Limits
89	FCWC Memorandum in Opposition to Motion for Reconsideration
90	Order Granting in Part and Denying in Part Motion for Reconsideration

91	United States' Citation of Additional Authority
92	Defendants' Joint Response to Plaintiff's Citation of Additional Authority
93	Order Directing Parties to File Memorandums on Borough of Ridgeway
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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs.
FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS, INC.,
Defendants.

Case No. 93-281-CIV-FTM-21

Thursday, March 28, 1996
Tampa, Florida

TRANSCRIPT OF NON-JURY TRIAL
BEFORE THE HONORABLE RALPH W. NIMMONS, JR.,
UNITED STATES DISTRICT JUDGE

Appearances of Counsel:

For the Plaintiff: Mr. Daniel S. Jacobs
Mr. T. Anthony Quinn
Ms. Gwendolen Fitz-Henley

For Defendant Avatar: Mr. David B. Hird
Ms. Joanne Tantoso

For Defendant Florida Cities: Mr. Gary H. Baise
Mr. Alexander M. Bullock
Mr. Lance High
Mr. Don G. Scroggin

Reported by: Dennis Miracle
Official Court Reporter

PROCEEDINGS

THE COURT: Good morning.

All right. Mr. Jacobs, you may call your next witness.

MR. JACOBS: Thank you, Your Honor.

The United States calls William Schafer.

THE DEPUTY CLERK: Come forward and be sworn. Raise your right hand.

Do you solemnly swear that the testimony you shall give in this cause shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

THE DEPUTY CLERK: Take the witness stand.

State your name for the record and spell your last name.

THE WITNESS: My name is Bill Schafer, S-C-H-A-F-E-R.

- - -

Thereupon,

BILL SCHAFER,

a witness, having been duly sworn to speak the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JACOBS:

Q. Good morning, Mr. Schafer.
A. Good morning.
Q. I understand you have been under subpoena since Monday. And while you are here in Tampa, I apologize for the lack of certainty as to when you would be called precisely, and we appreciate your yielding to Mr. Schenkman yesterday so he could get back to Miami.
Would you state, please, how you are employed?
A. I'm Head of Planning for the Sanitary Sewer Department of the City of Tampa.
Q. And for how long have you been employed in that capacity, sir?
A. Fifteen years.
Q. And would you describe, please, your responsibilities as Head of Planning in the Department of Sanitary Sewers?
A. My primary responsibility is to deal with expansions over our system and our plant to make sure we have enough capacity to add new development.
Q. And did there come a time when the City of Tampa expanded its wastewater treatment plant?
A. Yeah. The plant was -- the last major expansion was in 1978; we went to 60 million gallons a day. We're now doing another one.
Q. In 1983, sir, approximately how much capacity remained of the 60 million gallons that you expanded to in '78?

A. About ten million gallons a day.
Q. Now, did there come a time when Florida Cities Water Company contacted the City of Tampa to inquire about the possibility of connecting its Carrollwood sewer system to the City of Tampa sewer system in order to eliminate the Carrollwood plant?
A. Yes.
Q. And do you recall, sir, when that was?
A. It was in 1983.
Q. Directing your attention to Government Exhibit 266, would you identify Exhibit 266, please?
A. It's a letter to Elton Smith, who was the director of our department at that time, from Larry Good, who was the regional manager for Florida Cities Water Company.
Q. And can you testify that this letter was, in fact, received by your department, sir?
A. Yes, it was.
Q. And to your recollection, does this letter represent the contact that you said took place in 1983 to inquire about the possibility of the connection from Carrollwood to the City of Tampa system?
A. Yes.
Q. To your recollection, sir, did Florida Cities representatives subsequently meet with representatives of the City of Tampa Department of Sanitary Sewers to actually

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discuss the possibility of the connection of Carrollwood to the City of Tampa system?
A. Yes, they did.
Q. And do you know, sir, when that took place, that meeting?
A. It was sometime in the fall of '83, I think. It was after this letter.
Q. Okay. You are welcome to refer to your declaration that's, I believe, been provided to you, if you would like to pinpoint the date.
MR. JACOBS: And for the record, the declaration has been filed with the Court and has been provided to opposing counsel.
THE WITNESS: I don't have it. It's back with that stuff you took when I sat down. It should be right on top.
BY MR. JACOBS:
Q. Handing the witness his declaration filed with the Court on December 28th, 1995, and directing his attention to Paragraph 3, does that refresh your recollection, sir, with respect to at what point in time the meeting took place between the representatives of your department and the representatives of Florida Cities Water Company on the matter of the connection of the Carrollwood plant to the Tampa plant?

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A. Yes. It was October of that month -- of that year.
Q. And that year is 1983, sir?
A. '83, that's right.
Q. Did you subsequently, sir, on behalf of the City of Tampa write a letter to the Florida Cities Water Company describing the options available for connection of the Carrollwood system to the City of Tampa system?
A. Yes, I did.
Q. Directing your attention to Government Exhibit 525 at this time, sir, are you able to identify Exhibit 525?
A. Yes.
Q. Would you do so, please?
A. It's a letter from me to Mr. Good outlining the points of connection and some other -- and requesting additional information from them in order to proceed.
Q. And is that your signature on the bottom of Page 2 of Exhibit 525?
A. Yes, it is.
Q. And did you write and sign this letter on or about December 29th, 1983?
A. Yes.
Q. And in this letter, sir, how many different connection points do you propose as possibilities for the connection?
A. Three.
Q. And is there one in particular that you favored at the

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time?
A. The third one at 131st Street and Rome Boulevard.
Q. Directing your attention to Paragraph 3 of the letter, doesn't it say 131st and North Boulevard?
A. I'm sorry. What did I say? That's what I meant.
Q. I thought you said Rome.
A. Oh, I'm sorry. No, it's North Boulevard.
Q. Okay. And why did the City of Tampa favor that connection point, sir?
A. At that time, that was the only connection point available that was ready to go without any additional improvements on our part.
The other two that we had discussed all required additional downstream improvements.
Q. I see.
When you say "ready to go," does that mean -- what do you mean by that, sir?
A. It was in the ground; all they needed to do was run a line and connect to it and they were connected.
Q. It was immediately available?
A. Correct. And there was capacity in it.
Q. And the distance of the line that would need to be run was how long, sir?
A. 15,000 feet.
Q. Approximately three miles?

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A. About.
Q. Mr. Schafer, did Florida Cities actually subsequently request a connection from its Carrollwood system to the City of Tampa system?
A. No. The response -- I got a response from them, but it did not really request the connection. It just wanted to know what we needed -- I had asked for additional information, and they wanted to know why we needed that.
Q. The additional information you asked for, is that the information that you referred to on Page 2 of Exhibit 525?
A. Yes.
Q. And to your recollection, they responded how?
A. They wanted to know why I needed it, but they didn't go beyond that.
Q. Any subsequent contacts, to your knowledge?
A. No.
Q. Again, any subsequent actual request to connect the Carrollwood system to the City of Tampa system?
A. Not until some years later when they contacted me again to see if those options were still available.
Q. Do you recall when that was, sir?
(Pause.)
A. It was '86; '85 or '86.
Q. Directing your attention to Paragraph 5 of your declaration, does that refresh your recollection as to which

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year it was exactly?
(Pause.)
A. No. I have it in my notes, but that doesn't -- that just tells me it was '86 that the capacity was available again, but I don't -- I thought it was '86 that they called me again, or that they contacted us again.
Q. To the best of your recollection, they contacted you in '86 --
A. Yes.
Q. -- again.
And at the point that they contacted you again, did you then have capacity?
A. No, we *did* not.
Q. Why not?
A. Two things: One was that during that period, we had an increase in growth of development, and a lot of new projects came on line that we had committed -- that we had to commit to.
And we also had increases in ground water because of heavy rain, and the two things combined, it brought us -- the actual connected plus the committed unconnected brought us close to the 60 million gallon a day capacity. And we were under -- we had received notification from the Environmental Protection Commission that any additional connections to our system at that time would not be

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permitted.
Q. And this was in 1986?
A. That was '86.
Q. Now, did there subsequently come a time when you did have additional capacity that became available --
A. Yes.
Q. -- at your system?
And when was that, sir?
A. Within about two years of that time.
Q. So, is it fair to say from '83 to '86, you had capacity; from '86 to '88, you did not but --
A. Yes.
Q. -- subsequent to '88 you did?
A. Yes.
Q. Thank you, Mr. Schafer.
MR. JACOBS: No further questions.
THE COURT: Okay. Mr. Bullock?
CROSS EXAMINATION
BY MR. BULLOCK:
Q. Mr. Schafer, good morning. I'm Alex Bullock.
A. Good morning.
Q. Mr. Schafer, have you ever been a Hillsborough County employee?
A. No, I have not.
Q. All right. Referring to the December 29, 1983,

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letter, which is Exhibit 525 --
THE COURT: That wasn't offered, was it?
MR. BULLOCK: Oh, I'm sorry.
MR. JACOBS: Your Honor, it's already in evidence.
THE DEPUTY CLERK: It is.
THE COURT: Oh, it is? Okay. Excuse me. Both of those are --
MR. JACOBS: Yes, Your Honor, that's my understanding.
THE COURT: All right.
BY MR. BULLOCK:
Q. Mr. Schafer, when you met with the folks from Florida Cities first in October, you didn't give them a firm figure on the cost to connect at that point in time, did you?
A. No.
Q. All right. You gave them at some point in time a ballpark figure of a connection fee, which would have been approximately $800 a customer?
A. We gave them that number as kind of the maximum fee, but nobody knew at that time if that's actually what it would be. It was just a "Here's the most you'll probably have to pay" kind of number.
Q. In fact, this would have been the largest connection that the City of Tampa -- one of the largest connections that the City of Tampa would have undertaken at that time,

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isn't that correct?
A. I don't know. I would have to go back and look at my records.
Q. Carrollwood is not in the City of Tampa, is it?
A. No.
Q. All right. You have testified earlier that the connection location was about 15,000 feet from the Carrollwood plant?
A. Right.
Q. All right. Florida Cities would have been responsible for constructing the forced main that connected the plant to your system, isn't that correct?
A. That's correct.
Q. All right. Do you know whether or not Carrollwood ever hooked up into another system?
A. I understand that they eventually hooked up into the County system.
Q. All right. And do you know who paid the bill -- the forced main to hook them up into the County system?
A. No, I do not.
Q. All right. The Carrollwood area is a residential subdivision?
A. Uh-huh.
Q. Okay. I need for you to say "yes" or "no" so the court reporter can take that down.

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A. Yes.
Q. Thank you.
Building the forced main to connect to Tampa would have required Florida Cities itself to construct a forced main through the residential area, isn't that correct?
A. It would not -- I'm sorry. It would not have required them to construct a forced main through their residential area. It would have been through parts of the City, some parts of which are residential.
Q. All right. That would have required them to develop some -- the cost of going through residential areas and paying for disturbing roads and trees and issues like that?
A. Yeah, the normal costs of construction.
Q. All right. Do you have any opinion as to the cost of the construction of that forced main?
A. At that time, my best guess would have been a -- roughly, if you take two and a half times the cost of the size of the pipe in dollars and, say, that's your per foot cost, that generally takes care of the excavation and the restoration and any other thing that goes along with it.
Q. Would they have had to obtain building permits and construction permits from Hillsborough County?
A. They would have had to get permits from us, from Hillsborough County, and any state or -- any state or Federal roads that they would go through, they would also

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have to get permits from them.
Q. All right. In your December 29 letter that we have referred to, Exhibit 525, you did not give -- isn't it true that you did not give them a hard final cost?
A. No, I did not.
Q. Okay. You referred to some correspondence between Larry -- between Florida Cities when they wrote back to -- wanting to know why you needed additional financial information about the company?
A. That's correct.
Q. Isn't it true that in that letter, they also asked you to provide a connection fee figure so that they could evaluate the option further?
A. That's correct.
Q. All right. And did you ever provide a firm connection fee?
A. No, because we -- we needed the financial information to come up with the connection fee number, and we never got it. It was kind of a Catch-22.
Q. Okay. Why did you need the financial information on the company to determine a connection fee?
A. The main reason that we requested that was that we wanted -- two things, really -- one, to find out if they were financially stable; and if we did connect them, would they still be around ten years from now, or would we have to

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take over that system.
The other was, did they have any assets which might be usable as a capacity fee.
Q. Even without that information, isn't it true that you could have given them a figure that would have allowed them to -- a firm figure that would have allowed them to compare and develop whether or not that was a viable option?
A. They could have had the $800 a unit figure at any time.
Q. Okay. As a regulated utility, at least in Hillsborough County, Florida Cities' rates are governed by Hillsborough County's version of the Public Service Commission?
A. That's my understanding, yes.
Q. And the Hillsborough County Public Service Commission, or whatever the technical name of it is, would have had to pass on the prudency of that decision, isn't that correct?
MR. JACOBS: Objection; beyond the scope, Your Honor.
THE COURT: I think it is. I'll sustain the objection.
BY MR. BULLOCK:
Q. Mr. Schafer, isn't it really true that in terms of this dispute, you don't really have a dog in this fight?
A. I'm sorry?

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Q. You don't really have a dog in this fight about -- between EPA and Florida Cities, isn't that correct?
A. No, I don't.
Q. All right. And when you negotiated with -- you've negotiated a number of contracts dealing with a tie-in or connections to Tampa's system, isn't that correct?
A. That's correct.
Q. And when you were negotiating with Florida Cities, isn't it true that you believed that Florida Cities was negotiating with Tampa in good faith?
A. I had no way of knowing. I presumed that they would. I wouldn't have wasted time with them if I thought otherwise.
Q. You have negotiated with other people enough to determine whether or not you can figure if somebody is negotiating in good faith?
A. I think so.
Q. All right. Do you know how large a forced main they would have had to build?
A. I think it was a ten-inch forced main. But just off the top of my head, I don't recall. I've got it in my notes; it's there.
Q. All right. So, your estimation on calculating the forced main would be two and a half times the cost of per foot of a ten-inch pipe; is that how you would have

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calculated it?
A. Yeah, at that time. Now it's a whole lot more, but...
Q. Okay. As a matter of fact, the cost of that had gone up in the mid '80's, isn't that correct?
A. The cost of construction?
Q. Yes.
A. I can't say that one way or the other. It's all -- usually it's a function of how much -- how busy the contractors are, and I would presume at that time they got -- they were busier, so probably it did.
Q. And by mid to late 1980's, the cost of any connection fee with Tampa would have gone up as well?
A. The cost did not increase until 1987.
Q. All right. And that's when the City -- you testified the City had additional capacity?
A. Yes.
Q. All right. Thank you.
THE COURT: I thought you said you didn't have additional capacity until '88. Was it '87 or '88?
THE WITNESS: It was '88. You're right, Your Honor.
MR. BULLOCK: Thank you, Your Honor.
THE COURT: Okay. Mr. Hird?
MR. HIRD: Very briefly, Your Honor.
CROSS EXAMINATION

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BY MR. HIRD:
Q. Mr. Schafer, you said that you got additional capacity in 1988, is that correct?
A. Yes.
Q. And you didn't have it earlier in '86?
A. Correct.
Q. Did you ever have any communication with Florida Cities about that additional capacity?
A. No.
Q. Thank you.
THE COURT: Any redirect?
MR. JACOBS: Only one very brief question.
THE COURT: Okay.
REDIRECT EXAMINATION
BY MR. JACOBS:
Q. Mr. Schafer, you said that you didn't have a dog in the fight. I wonder if I could ask you, was it in the interests of your department to make a deal with Florida Cities to connect when you had that ten million gallon capacity?
Do you understand the question?
A. Yeah, I understand the question.
My answer is probably no.
Q. It was not in the City of Tampa's interest to --
A. No -- mainly the problem is that Florida Cities'

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franchise is outside of our service area. And theoretically, our capacity is reserved for our service area.
We were really only interested in that connection because there was some environmental problems involved and it was a good thing to do if we could do it.
Q. Did you want to make the deal?
A. At the time, yes.
Q. Thank you.
MR. JACOBS: No further questions.
THE COURT: Thank you, sir. You may step down.
THE WITNESS: Thank you.
THE COURT: Call your next witness.
MR. JACOBS: The United States calls Leon Levy.
THE DEPUTY CLERK: Come forward and be sworn. Raise your right hand.
Do you solemnly swear that the testimony you shall give in this cause shall be the truth, the whole truth, and nothing but the truth, so help you God?
THE WITNESS: I do.
THE DEPUTY CLERK: Take the witness stand.
MR. HIRD: Your Honor, before Mr. Levy begins his testimony, I would like to bring a procedural matter to the Court's attention.
Mr. Levy is chairman of the board of Avatar

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Holdings. We intend to call him in our case in chief. I had proposed to the Government that we allow the Government to begin examination of Mr. Levy; and when my turn comes, for me both to include the cross examination and my direct so that Mr. Levy will only have to testify one time. I believe this will serve the interests of judicial economy.
This will also be beneficial for Mr. Levy who resides in New York. He came here on a special chartered plane from Eleuthera in the Bahamas.
He is under the care of a cardiologist who he expects to see in New York in the next few days. He's also undergoing a series of root canal operations in New York.
I think both for Mr. Levy's interests and the interests of judicial economy, this is the proper thing to do.
I was surprised yesterday to learn that the Government would not accede to this request.
MR. JACOBS: Your Honor, Mr. Levy has been designated as the representative of the party entitling him to be in court the entire time of trial, first of all.
Second of all, there was not just one but two motions for protective orders filed by Avatar Holdings in which they maintained that Mr. Levy had no relevant information whatsoever to the case.
So, to hear now that Mr. Hird wants to call him as

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a witness in the middle of our case in chief, which we had expected to complete yesterday, I think is a bit of a disruption to our case.

And with all due respect to the needs of Mr. Levy, we have had witnesses waiting for days now to testify, and we will have more witnesses that they have asked us to put on standby.

And while I sympathize with this particular witness' needs, there are many people's needs here that need to be met, and we really would like to stick with our direct and then Mr. Hird's cross. And if Mr. Hird feels the need to call Mr. Levy again in his case, which I understand follows Florida Cities' case, we would have no objection to him recalling Mr. Levy at that time.

THE COURT: Well, you wouldn't be in a position to object to calling him anyhow.

How long would you intend to be, Mr. Hird?

MR. HIRD: I imagine -- my straight direct, right now, I would imagine, will go between half an hour and 45 minutes. When I see Mr. Jacobs cover whatever he's going to cover, I imagine that would cut down substantially my direct.

THE COURT: Well, I'll take that under submission. We'll get through the direct examination and see where we are at that time.

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MR. HIRD: Thank you, Your Honor.

THE DEPUTY CLERK: State your name and spell your last for the record, please.

THE WITNESS: Leon Levy, L-E-V-Y.

- - -

Thereupon,

LEON LEVY,

a witness, having been duly sworn to speak the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JACOBS:

Q. Mr. Levy, first of all, there was a reference to a cardiology problem. I asked you at your deposition whether there was any medical reason why your deposition should not go forward. Do you recall mentioning this cardiology problem?

A. I don't remember whether I did or not, but I think at that particular time, being in New York and I didn't have any appointments with a cardiologist, I would have seen no reason why I shouldn't have gone forward.

It just so happened that I did have an appointment -- and I hate to discuss medical reasons in court; it's somehow like getting undressed -- but I did have an appointment with my cardiologist, which I have cancelled for today, but --

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Q. But not --

A. -- but I'm fine right now.

Q. Is there any urgent need for you to see your cardiologist this week, sir?

A. I don't think there's an urgent need.

Q. Now, how are you employed, sir?

A. I'm a partner of Odyssey Partners, which is the successor of Oppenheimer and Company, and is an investment partnership. And I'm also involved in a number of non-for-profit organizations which consume a great deal of time.

Q. Do you have any relationship to a company called Avatar Holdings?

A. I'm chairman of the board.

Q. And Mr. Hird represented that you reside in New York. From your deposition testimony, you reside in New York City at a place called Sutton Place, is that correct?

A. That is correct.

Q. And you also have a personal residence in Westchester County, New York, is that correct?

A. That is also correct.

Q. And you, in addition, have a residence, again, that Mr. Hird referred to in the Bahamas, is that correct, sir?

A. That is also correct.

Q. You do not reside nor have you ever resided in the

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State of Florida, is that correct?

A. That is also correct.

Q. And you have never maintained an office --

A. Only, I might add, with one exception: At the Government's suggestion, during the war, at Camp Blanding for a good while.

Q. And you have never maintained an office in the State of Florida, have you, sir?

A. No, I have not.

Q. But you do maintain an office in New York City, is that correct?

A. Yes, I do.

Q. And that office is at the offices of Odyssey Partners?

A. Right.

Q. And you don't have any other offices anywhere, is that correct?

A. That is also correct.

Q. So, when you conduct Avatar business, you conduct it from your Odyssey Partners office, is that correct, sir?

A. That is generally correct.

Q. Now, Mr. Levy, you have testified under oath on a number of occasions in a number of different matters, isn't that right?

A. Yes, I have.

Q. In fact, you have given your deposition some 25 to 30

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times, roughly, is that correct?
A. I really don't remember. That sounds as if it might be a fair estimate. I don't know.
Q. Do you recall whether that was exactly the estimate you gave at your deposition?
A. No, I don't recall.
Q. Okay. Let me direct your attention to Page 7 --
THE COURT: What does it matter? What does it matter?
MR. JACOBS: I'm sorry, sir?
THE COURT: Does it really matter?
MR. JACOBS: No. Okay. We'll move on.
THE COURT: Yes.
BY MR. JACOBS:
Q. You do, sir, recall giving your deposition in this particular matter on October 24th, 1995, and December 6th, 1995, both times in New York City, is that correct, sir?
A. Yes, I do.
Q. And would you tell the Court, please, whether you testified truthfully on both of those occasions?
A. I -- to the best of my ability.
Q. And prior to giving your deposition, on June 7th, 1995, you executed a declaration under penalty of perjury in this matter, isn't that correct?
A. I believe so.

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Q. And you do recall that the context in which you executed that declaration was a motion to -- motion for a protective order filed on behalf of Avatar Holdings to preclude your testimony on the grounds that you had nothing to do with Avatar Holdings, is that correct?
MR. HIRD: Objection; that's a mischaracterization.
MR. JACOBS: I'll rephrase.
BY MR. JACOBS:
Q. Do you recall, sir, that in that declaration you said, I reside and work in the State of New York. I am fully occupied with work that is unrelated to the affairs of Avatar Holdings?
A. Well, I think that is correct; but like everything else, there's a slight ambiguity there.
Q. I'm sorry. Let me make sure that the record is clear.
Have I correctly represented your statement in the declaration? And I'm happy to bring it up to you.
A. Well, if you tell me that that's what it says, I -- that's fine with me. But nevertheless, I mean, I am fully occupied with the work at Odyssey.
And I also should add that -- well, I don't know when work stops and ends and I spend a great deal more time than maybe a working day.
And, moreover, Avatar is an investment of ours at

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Odyssey, and so I work on that in New York.
Q. Well, let me ask you this, sir: Is it or is it not true that you are fully occupied with work that is unrelated to the affairs of Avatar Holdings?
A. Fully occupied? I guess it's not entirely true.
Q. In fact, at your deposition, did you not state that you spent 15 to 20 percent of your time on matters related to Avatar Holdings and its subsidiaries?
A. I might have. That's a pretty rough estimate because I don't keep time records.
Q. Would you agree that that's your testimony, sir?
A. Yes, I would.
Q. And didn't you at that time say that the statement in which you said, I am fully occupied with work that is unrelated to the affairs of Avatar Holdings, was a false statement?
A. It might have been not entirely correct.
MR. JACBOS: I'd like the witness to look at his deposition testimony, Pages 123 to 124.
THE COURT: Let me see what we're doing here procedurally, now. You're entitled, as I understand it, to offer the deposition testimony of an adverse party witness.
Now, if that's your purpose, and that is to offer during your case in chief the testimony -- deposition testimony of an adverse party witness, you just do that; you

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don't call the witness to the witness stand and confront him with the testimony that you want the Court to consider.
Now, if the witness testifies to something different -- if you call the witness and he testifies to something differently, then you can confront him with his deposition. I don't understand procedurally this approach here.
MR. JACOBS: Well, if the witness told me one thing at his deposition and he's telling you something else, Your Honor, I --
THE COURT: Well, you haven't even elicited any -- you know, you haven't asked him substantive questions as yet for -- and if his response is different from his affidavit or from his deposition, then you can confront him with his affidavit or his deposition or, as I say, alternatively, since he's a party in this case, he -- I believe he would qualify as a party where you could use his deposition as substantive evidence. But let's try to adhere to -- unless I have misstated what the proper procedure is on these matters...
MR. JACOBS: These are admittedly not substantive questions, or questions that don't go to substance. They really go to bias, Your Honor --
THE COURT: Well --
MR. JACOBS: -- and credibility.

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THE COURT: Yes. But, you see, he hasn't been offered –

MR. HIRD: Your Honor, Mr. Levy is obviously testifying as an adverse witness, and clearly his sympathies are with Avatar Holdings. I don't think Mr. Jacobs needs to labor this to demonstrate any sort of bias.

MR. JACOBS: Let me try and move on.

THE COURT: Yes, let's do that.

BY MR. JACOBS:

Q. Let me ask you, Mr. Levy, how much time did you spend on matters related to Avatar Holdings and its subsidiaries?

A. Again, I'd say – look, I come down every – eight times a year to board meetings at Avatar. Very occasionally I will come down, oh, I would say, once every several years when there's not a board meeting, and the annual meetings; and I get reports from Avatar in the mail. And occasionally I talk on the telephone to the chief executive about the real estate business.

It's hard to quantify and be particularly specific about something which, to me, is more amorphous.

Q. In fact, Mr. Levy, with the exception of your work with Odyssey Partners, Avatar Holdings takes up more of your time than any of your other business endeavors, isn't that correct, sir?

A. Well, business endeavors – I spend a great deal of

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time with the Institute for Advanced Studies where the chairman just became head of the World Bank and asked me to take over for him.

And I also spent a great deal of time at the Jerome Levy Institute, which is an economic research institute of which I'm president. Where the time is greater, I don't know. If I kept time sheets, I would be able to tell you, but I don't.

Q. Do you recall that at your deposition you testified that, quote, I spend the majority of my time on Odyssey Partner matters?

THE COURT: Do you all want a reference to the – if you're not interested in slowing down for the page and –

MR. HIRD: I'm trying to avoid slowing everything down; but if this continues this way, I guess we would need references to any deposition pages.

THE COURT: Okay. Well, at such time as you want to assert your rights in that respect – ordinarily, I require that counsel will – if they are impeaching a witness or attempting to with a deposition ask a witness – remind him of his deposition, Do you recall giving the following answer to the following question, page number, line number and so forth.

MR. JACOBS: Very well.

BY MR. JACOBS:

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Q. Mr. Levy, directing your attention to the deposition you gave on August 24th, 1995, in New York, and in particular to Page 73 – and a copy is being given to you and an original will be provided to the Court –

THE COURT: Well, I'm not requiring that. If you want to do that, that's fine but –

MR. JACOBS: I want you to be able to follow along if you –

THE COURT: Well, I know, but I'm not requiring that you do that with the witness either. That's not part of my requirements. But if you want to do that, that's all right.

BY MR. JACOBS:

Q. On Page 73, Line 4, Question: If we could go down the list of the organizations with which you're presently affiliated, Mr. Levy, would you tell me what percentage of your time you spend on matters relating to your affiliation with Odyssey Partners –

A. Right.

Q. – would you read your answer, sir, please?

A. Well, I might answer that by saying I spend a majority of my time on Odyssey Partner matters. And after that would come Avatar, and the others don't take up much time except that some of the non-for-profit organizations do. They truly take up most of the time, the Institute for Advanced

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Study and the Jerome Levy Institute.

Q. Thank you.

THE COURT: For future reference, Mr. Jacobs, you can ask him, Do you recall giving the following answer to the following question? And you read the question and you read the answer. And then you can ask him if he recalls giving that answer.

MR. JACOBS: Thank you, Your Honor.

THE COURT: All right.

BY MR. JACOBS:

Q. Mr. Levy, as chairman of the board of Avatar Holdings, do you consider yourself responsible for ensuring that Avatar Holdings and its subsidiaries comply with Federal laws and regulations?

A. Well, I certainly consider myself responsible for seeing that they are an ethically and morally run company.

I think the question you put to me is more of a legal question than a – so far as the ethics and the morals, I feel very strongly about that.

As far as how you answer a question like that or what its legal implications are, I just cannot answer it.

Q. Well, Mr. Levy, who at Avatar Holdings, if anyone, is the officer whose duties it would be to ensure that Avatar Holdings and its subsidiaries operate in compliance with Federal laws and regulations?

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A. Our chief legal officer and executive vice-president is Dennis Getman, who has been with the company for quite a number of years.
Q. Do you know how long, sir?
A. I would think about 15 years -- I may be mistaken -- but almost as long as I have.
Q. Now, Mr. Levy, in 1980, you and Peter Sharp acquired what was then known as GAC Corporation, isn't that right?
A. We acquired an interest in the bonds of GAC; and in a reorganization plan, the bondholders received a considerable amount of stock. But at that time we did not -- we -- and today -- we never had a majority of the stock.
Judge Britton, who is a Federal Judge in Miami, did something which I was told was unusual in a bankruptcy case, because the various parties of interest suggested directors, and Judge Britton discarded all of their suggestions and appointed a number of directors of his choosing.
I might say he did very well, I think, aside from myself or Peter Sharp, but that's for others to decide.
Q. You said you didn't have a majority of stock. Did you have a controlling interest, sir?
MR. HIRD: Object to the characterization of --
THE WITNESS: It became --
THE COURT: Wait, wait, wait.
THE WITNESS: Well, as it became --

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THE COURT: When an objection is made, Mr. Levy, you just wait until I rule on the objection.
THE WITNESS: I'm sorry.
MR. HIRD: I think this calls for a conclusion. If Mr. Jacobs wants to ask what percentage he controls, he can -- he owns, he can do that; but "controlling" is a subjective term.
MR. JACOBS: "Controlling," I think, is a term of art in Mr. Levy's profession.
THE COURT: All right. I'll overrule the objection, if he can answer it.
You can go ahead and answer the question, if you remember it. Do you remember the question?
THE WITNESS: Yes.
I think in a sense, Judge Britton appointed Peter Sharp -- I forget what appointment he gave Peter Sharp -- someone else was appointed chairman of the board at the time by the Judge. And after about a year, he retired and I became chairman of the board.
BY MR. JACOBS:
Q. And at that time Mr. Sharp became the chief executive officer, is that correct?
A. Yes, he was chairman of the executive committee at that time.
Q. And between you and Mr. Sharp, did you all have a

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controlling interest in Avatar Holdings?
A. Well, I guess in the -- I guess you might say we did.
Q. Now, you mentioned Peter Sharp. Who was Peter Sharp?
A. Peter Sharp was a fellow who was born here in Florida and his parents were in the hotel business, in the real estate business.
He subsequently became a good friend of mine. He went to Princeton where he studied medieval French.
THE COURT: Do you want to know all of this? Are you wanting to elicit this?
MR. JACOBS: I'm trying not to interrupt the witness in midstream.
I think some of it is relevant, actually.
THE COURT: All right. Go ahead.
THE WITNESS: And then he moved to New York, after having lived in different places, where he managed some family hotels, and finally he settled in New York.
BY MR. JACOBS:
Q. And did he become a successful real estate businessman in New York?
A. Yes, he was.
Q. And did you come to know him pretty well? You said he became a friend.
A. Yes, I knew him quite well.
Q. And in addition to being chief executive officer of

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Avatar Holdings, Mr. Sharp also served as the chief operating officer, is that correct?
A. I don't believe -- he was chairman -- well, he was chairman of the executive committee. I forget whether he was chief operating officer or not.
These titles are always rather fuzzy. In different companies they mean different things.
Q. What does it mean at your company, Avatar Holdings?
A. Well, the chief operating officer today, for example, would be Mr. Jacobson.
Q. Let me ask you this: Until Mr. Jacobson became the chief operating officer, was Mr. Sharp essentially the chief operating officer?
A. He may have been in title -- and I just don't remember -- I think -- he was chairman of the executive committee, but he was mostly concerned with very broad issues.
MR. JACOBS: Move to strike, Your Honor.
THE WITNESS: I'm sorry?
MR. JACOBS: Move to strike about the nature of the issues he was concerned with being broad; move to strike as non responsive.
THE COURT: I'll deny your motion. Let's move on.
BY MR. JACOBS:
Q. Directing your attention to Government Exhibit 518,

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Mr. Levy --
A. All right.
MR. BIRD: Could you give us a moment, Your Honor, to pull this?
THE COURT: Yes.
(Pause.)
BY MR. JACOBS:
Q. -- and in particular to Page 15 of the exhibit --
THE COURT: Just a moment.
(Pause.)
THE COURT: Okay. All right.
THE WITNESS: All right.
BY MR. JACOBS:
Q. Do you see the name "Peter Sharp" on Page 15?
A. Yes, I do.
Q. Could you tell me what position he held at this time with Avatar?
A. Chief executive officer and chief operating officer, director, chairman of the executive committee of the board.
Q. And what was the first title? I'm afraid, perhaps, that I overlapped with your answer.
A. Well, you didn't say in 1980. This is, I think, the original 10-K, or whatever, that the company filed. Subsequently, there were a number of other people who became president and perhaps chief operating officer and --

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THE COURT: He asked you what your --
THE WITNESS: I'm sorry?
THE COURT: He said chief executive officer.
MR. JACOBS: Right, and I'm afraid that -- the first item that's listed is president, and I can't tell whether he said that or --
THE COURT: Are you asking him to --
THE WITNESS: He was president --
THE COURT: Wait a minute.
Are you asking him to read what's on that exhibit?
MR. JACOBS: Yes, Your Honor.
THE COURT: Would you read what that says, please, sir?
THE WITNESS: Yes, sir. Thank you.
President and chief executive officer and chief operating officer, director, chairman of the executive committee of the board.
BY MR. JACOBS:
Q. And did he serve in all these capacities at the time that this 10-K form, as you have identified it, was filed with the Securities and Exchange Commission?
A. I assume he did, yes.
Q. Now, Mr. Sharp, after you and he acquired the controlling interest of Avatar Holdings, Mr. Sharp even moved to Florida -- he moved to Florida, did he not, when

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you first acquired the company?
A. Yes, he did.
Q. And he took an apartment in Coral Gables, right?
A. That is correct.
Q. So that he could work at the Avatar Holdings offices which are, in fact, in Coral Gables, is that correct?
A. That's so. I think he -- right. Whether his home was in Coral Gables or was near there is -- would be irrelevant, I guess.
Q. Okay. And, in fact, he stayed in Florida for the first two years after you and he acquired the controlling interest, isn't that correct?
A. Yeah. I seem to -- as best I remember.
Q. And after that time, he went back to New York City where he worked out of his offices at Peter Sharp and Company, is that correct?
A. That's correct.
Q. And the business he did which related to Avatar Holdings, to your knowledge, when he was in New York, he did out of those Peter Sharp and Company offices, is that correct?
A. That is correct.
Q. And New York City is where he resided after he returned from Florida after those first two years, is that right?

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A. That is also right.
Q. Now, although you said, Mr. Levy, that presidents -- other presidents were subsequently appointed, Mr. Sharp remained the chief executive officer of the company until 1990, isn't that true?
A. I believe that is true.
Q. And he remained the chairman of the executive committee of the board until 1991; is that not correct?
A. Yes, that is correct.
Q. Now, Mr. Sharp was a very wealthy man, wasn't he?
A. Yes, he was.
Q. In fact, he was on the Forbes list of the 500 richest men in the United States, is that correct?
A. Four hundred.
Q. And perhaps I should be more politically correct: Richest people.
A. Right.
Q. Now, Mr. Sharp was a micro manager, wasn't he, Mr. Levy?
A. He was a what?
Q. Micro manager.
A. No. He was very curious in that regard, by the way, because he had the ability --
THE COURT: Okay. He said "no." He answered your question.

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THE WITNESS: I'm sorry, I --
THE COURT: Ask your next question.
BY MR. JACOBS:
Q. Well, didn't he personally get involved in quite a variety of issues that related to Avatar Holdings and its subsidiaries?
A. His choices of what he got involved in was rather eccentric.
Q. Let me ask you this: When he got a memo or a letter about a given issue, didn't he go through it meticulously?
A. He often did.
Q. In fact, the example you gave me at your deposition was that if he got a legal brief from his lawyers, he would go through 80 pages and correct it for grammar and spelling and other less important details as much as for substance, is that correct?
A. He has been known to do that.
Q. And Mr. Sharp was very much in charge of any project he actually did -- I'm sorry, I'm going to start again.
Mr. Sharp was very much involved -- very much in charge of any project he got involved with at Avatar Holdings, wasn't he?
A. Yes. I would emphasize what he got involved with.
Q. That was the question.
A. Yes.

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Q. Now, knowing Mr. Sharp as well as you do, Mr. Levy, would you say that when Mr. Sharp said something, he meant what he said?
A. Yes. I would say he was an honorable man.
Q. Is that a "yes"? When he said something, he meant what he said?
A. Yes.
Q. And he was very used to giving orders, wasn't he?
A. Yes, he was.
Q. And when Mr. Sharp gave an order, he expected it to be carried out, didn't he?
A. He generally did.
Q. Did anyone at Avatar Holdings have the authority to countermand one of Mr. Sharp's orders?
A. I -- you know, that's a very complicated question. I would have to say not to my knowledge.
Q. And a man in Mr. Sharp's position, he wasn't really used to taking many orders, was he?
A. Well, I guess not, but...
Q. In fact, Mr. Sharp didn't really like to be told what to do, did he, Mr. Levy?
MR. HIRD: Objection. I have been letting some of these questions go forward, but this goes way beyond the scope, talking about general characterization of the individual. If Mr. Jacobs wants to talk about specific

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actions of Mr. Sharp, I think he needs to --
THE COURT: I think he covered this pretty well. Let's move on.
MR. JACOBS: Yes, sir.
BY MR. JACOBS:
Q. Now, at a point in time Mr. Sharp became ill, is that correct, Mr. Levy?
A. That is so.
Q. And he passed away in April of 1992, is that correct?
A. That is correct.
Q. With the exception of the time during which Mr. Sharp was ill, though, he was, in fact, for the entire period or entire course of his affiliation with Avatar Holdings in essence its chief executive officer, is that correct?
MR. HIRD: Objection, Your Honor; this was asked and answered. Mr. Jacobs has asked about when Mr. Sharp resigned as chief executive officer.
THE COURT: Sustained. Sustained. Let's move on.
BY MR. JACOBS:
Q. Moving on now, Mr. Levy, who was John Sladkus?
A. John Sladkus was a Czech who immigrated to the United States, became a citizen, and is an engineer.
Q. And did he have any relationship, business relationship with Mr. Sharp?
A. He worked with Peter Sharp fairly closely.

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Q. And he supervised engineering on Mr. Sharp's projects, including Avatar Holdings' projects, isn't that right?
A. Yes, he did.
Q. And do you happen to recall whether Mr. Sharp was an officer of Avatar Holdings?
THE COURT: Mr. Sladkus, you mean?
MR. JACOBS: Yes. Thank you, Your Honor.
THE WITNESS: I don't recall. He might well have been.
BY MR. JACOBS:
Q. Directing your attention to Government Exhibit 519, could you identify Government Exhibit 519, sir?
A. It is meetings of the -- minutes of the annual meeting of the board of directors of Avatar Holdings, held on May 14th, 1981, at 11:00 o'clock at the annual meeting of shareholders. I left out some -- the rest of...
MR. JACOBS: One moment, Your Honor.
THE WITNESS: I'm sorry?
MR. JACOBS: I was talking to the Judge, Mr. Levy.
(Pause.)
MR. JACOBS: Judge, with your indulgence, I want to move back and move 547 into evidence. I think that's one of the few we've referred to that had not yet been moved into evidence.
MR. HIRD: I'm sorry, Your Honor. I don't believe

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547 is one that has been discussed with this witness. If you can give me a moment so I can take a look at it...
(Pause.)
MR. HIRD: We have no objection.
MR. JACOBS: Likewise 551.
I'm sorry, Your Honor, I didn't give you a chance to rule.
THE COURT: 547 will be received.
MR. JACOBS: 551.
MR. HIRD: No objection.
THE COURT: It will be received.
BY MR. JACOBS:
Q. Now, Mr. Levy, redirecting your attention to Exhibit 519, Page 4, do these minutes refresh your recollection as to whether Mr. Sladkus had an official position with Avatar Holdings?
A. Yes, it does. He did at that time.
Q. And what was that position, sir?
A. He was executive vice-president, land and utility operations.
Q. To your knowledge, did Mr. Sladkus hold that position throughout his entire affiliation with Avatar Holdings?
A. I really don't know without having the records.
Q. Now, Mr. Sladkus had quite a lot of responsibility with Avatar Holdings, didn't he, sir?

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A. Yes, he did.
MR. HIRD: Objection, Your Honor. The witness has previously testified he didn't know what Mr. Sladkus' position was.
THE COURT: I'll overrule the objection.
You can answer the question.
THE WITNESS: When this company emerged from bankruptcy, there was $160 million of mandated work that the previous management had not completed and which the Court or the Federal Trade Commission ordered to be done. Mr. Sladkus was in charge of the completion of this mandated work.
BY MR. JACOBS:
Q. In fact, Mr. Sladkus was the only one, in addition to you and Mr. Sharp, who had the authority to sign checks over $100,000 on behalf of any Avatar entity, isn't that correct, sir?
A. I accept that. I don't remember that, but I accept it.
Q. Is that a "yes"?
A. I'm sorry?
Q. Is that – I need –
THE COURT: Do you know or not know?
THE WITNESS: I don't know.
BY MR. JACOBS:

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Q. Directing your attention, then, to Exhibit 526, can you identify Exhibit 526, sir?
A. It's the minutes of the board of directors of Avatar Holding held on Friday, January 27th, 1984.
MR. JACOBS: Move 526 into evidence.
THE WITNESS: I beg your pardon?
THE COURT: It will be received.
MR. JACOBS: I'm talking to the Judge, Mr. Levy.
THE WITNESS: I'm sorry.
BY MR. JACOBS:
Q. Now, directing your attention, please, to Page 10 of Exhibit 526 and in particular to the second full paragraph on Page 10, doesn't that paragraph say that only you, Mr. Sharp and Mr. Sladkus have the authority to sign checks in the amounts of $100,000 or more?
A. Yes, it does say that.
Q. And does that then refresh your recollection as to whether only the three of you had that authority?
A. Well, I accept it as it's written.
Q. Any reason to believe it's not true?
A. No, no reason not to believe it.
Q. Turning your attention now to Mr. Lawrence Wilkov, could you tell the Court who Lawrence Wilkov is?
A. Mr. Lawrence Wilkov eventually became the president, chief operating officer of Avatar.

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Q. Do you know when he became the president?
A. I can't tell the date without seeing some --
Q. Does 1984 sound correct?
A. Yeah, that sounds right.
Q. Will you accept that?
A. I would gladly accept that.
Q. Okay. And then he became the chief executive officer beginning in 1990; would you accept that?
A. I would completely accept that.
MR. JACOBS: Move 526 into evidence which documents 1984 as the date for Mr. Wilkov joining the company.
THE COURT: All right. What number?
MR. JACOBS: 526.
THE COURT: That's already been received.
MR. JACOBS: I'm sorry. 551, which references the 1990 date when he became chief executive officer.
THE COURT: That's already been received.
MR. JACOBS: I'm sorry, Your Honor. I've got my exhibits out of order.
BY MR. JACOBS:
Q. Now, Mr. Wilkov's offices were in Coral Gables, is that correct?
A. That is correct, at the headquarters of the company.
Q. And he remained with the company until he got into a

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major disagreement with Edwin Jacobson, is that correct?
A. Well, you can put it that way.
Q. Now, Mr. Jacobson came on board in 1992 as a member of the board of directors and chairman of the executive committee of the board, is that correct?
A. That is correct.
MR. HIRD: Objection. Mr. Jacobson may have come on -- assumed the two roles at different times, and I think the question is misleading.
MR. JACOBS: The question wasn't meant to be misleading. Let me try it again, for the record.
THE COURT: Okay.
BY MR. JACOBS:
Q. Mr. Jacobson came on board in 1992 as director and chairman of the executive committee of the board, correct?
A. I believe that is --
MR. HIRD: Objection again. Mr. Jacobson, I believe, came on as director and subsequently in that year became chairman of the board.
THE COURT: Are you going to testify, or are you going to let this witness testify? I mean --
MR. HIRD: I think the question is misleading.
THE COURT: I don't think it is.
You know, this is a grown man. If he knows, he knows. If he doesn't, he doesn't. And if he testifies to

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something that is not accurate, you'll have him on cross examination. Now let's move on.
BY MR. JACOBS:
Q. Mr. Levy, do you know the answer? Do you need the question repeated?
A. No, I understand the question.
I believe he became -- to the best of my memory, he became chairman of the executive committee.
Q. Of the board of directors in 1992, is that correct, sir?
A. Yes, in 1992.
Q. And then he became president of the company in what year?
A. I would have to refresh my recollection as to the times.
Q. But it was subsequent to 1992, is that correct?
A. Yes.
Q. Now, as a result of the disagreement, as we've described it, with Mr. Wilkov, Mr. -- I'm sorry -- with Mr. Jacobson, Mr. Wilkov subsequently left the company, correct?
A. That is correct.
Q. And then he sued Avatar Holdings, Odyssey Partners and Mr. Jacobson over this employment dispute, correct?
A. That is right.

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Q. And that suit was settled for $1 million, is that correct?
A. That is right.
Q. Let's turn back to your acquisition with Mr. Sharp of GAC which you renamed Avatar.
Is it fair to say you did rename it "Avatar," Mr. Levy?
A. It was renamed "Avatar," you might say.
Q. And was that your idea or Mr. Sharp's or --
A. No, it was neither of our ideas.
Q. Why did it get renamed "Avatar"?
A. Well, GAC seemed an inappropriate name at the time. It had all sorts of connotations about defaulted debt and all the other things that a company in bankruptcy has.
And it was also originally named after a finance company in Harrisburg, Pennsylvania, which had nothing to do with what the company was now doing.
Q. Why was the name "Avatar" picked? What does "Avatar" mean?
A. Actually, the then treasurer of the company came up with the name of "Avatar," and it means reborn, or from the ashes, like a phoenix. It was a literary allusion.
Q. Now, you and Mr. Sharp acquired GAC primarily for the land, is that correct?
A. Well, we acquired it as you would acquire any company:

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For all of the assets minus all of the liabilities. And you would give more weight to some than others. And the land was obviously a principal consideration.
Q. Were the utility holdings an additional consideration?
A. Relative to the entire assets of the company, they would not have been very important at that time.
Q. Now, the original owners of the company were the Rosen brothers, is that correct?
A. That is correct.
MR. JACOBS: Move 253 into evidence.
MR. HIRD: Your Honor, I object to 253. 253 is a memo prepared by a gentleman who joined Avatar Holdings in 1995. It was done with the -- his own musings as to what may have happened to Avatar -- to the preexisting company prior to 1980.
The memo has nothing -- is not based on personal experience, is not based on anything that anyone in the management post bankruptcy had done. It was simply language by a gentleman who joined the company 15 years after the bankruptcy speculating as to what happened before the bankruptcy.
MR. JACOBS: Your Honor, may I respond?
THE COURT: Yes, sir.
MR. JACOBS: First of all, it's a business record of Avatar Holdings.

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Secondly, it contains Mr. Levy's handwritten notation on the top, and that was his testimony at his deposition.

Third, it's a historical narrative point by point of the history of the company. And Mr. Hird can certainly use his time on cross examination to dispute this history; but, otherwise, Mr. Levy has already testified in deposition that the history is correct.

THE COURT: All right. What do your objections say that you --

MR. HIRD: My objection, Your Honor, is this is not a business record. It's --

THE COURT: Is this what your recorded objections say?

MR. HIRD: Number one, it's not a business record.

Number two, Your Honor, it's not an admission.

Number three, the individual who prepared it had no personal knowledge and was not even involved in the company at the time.

Moreover, the activities of General Acceptance Corporation prior to 1980, before the bankruptcy, has nothing to do with not only the Avatar Holdings post 1980 but the violations at issue in this case which date from 1990.

So, it's totally irrelevant. It's hearsay; it's

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irrelevant; it's not an admission by a party opponent.

MR. JACOBS: Judge, there's no objection on their list.

MR. HIRD: Yes, there is. 253: Irrelevant; hearsay within hearsay.

MR. JACOBS: I'm holding Avatar Holdings' objections to Government exhibits, unless it's a superseded company --

MR. HIRD: That's way old. That's because you renumbered the exhibits, and we had to redo our objections.

Here you go. 253, there are the objections.

MR. JACOBS: Thank you.

May I respond to the objections?

THE COURT: Yes, sir.

MR. JACOBS: Your Honor, do you have the exhibit in front of you?

THE COURT: No, I don't have the exhibit.

MR. JACOBS: Let's get the exhibit.

(Pause.)

MR. JACOBS: We think it's on the bench.

THE COURT: 253?

MR. JACOBS: Yes, Judge.

THE COURT: Yes.

MR. JACOBS: Your Honor, there's testimony by Mr. Levy --

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THE COURT: Well, give me just a moment.

MR. JACOBS: I'm sorry, sir.

(Pause.)

THE COURT: Yes, Mr. Jacobs?

MR. JACOBS: It's a business record. Mr. Levy testified at his deposition that the author --

THE COURT: Well, now, don't tell me about what he testified during his deposition.

MR. JACOBS: It's a business record. It's an admission --

THE COURT: How do we know it's a business record?

MR. JACOBS: It comes from Mr. Levy's files. That's his handwriting at the top. He testified that that's his file, the handwriting.

Milton Dresner is a director of Avatar Holdings. He's recounting a history of Avatar Holdings, which is very relevant to the issues in this case, particularly Paragraph 3: The owners were quick to install roads without sewer and water.

MR. HIRD: Your Honor, if I may respond for a moment?

THE COURT: Are you through, Mr. Jacobs?

MR. JACOBS: I'm sorry, sir?

THE COURT: Are you through?

MR. JACOBS: Yes.

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THE COURT: Yes, sir?

MR. HIRD: Your Honor, to be a business record, a document has to be prepared at or near the time of the events. This is Mr. Dresner's memo done on July 15th, 19-- July 7th, 1995. Mr. Dresner joined Avatar Holdings in 1995. He is writing about events that precede 1980.

THE COURT: I agree. I don't think it qualifies as a business record. I'll sustain the objection.

BY MR. JACOBS:

Q. Mr. Levy, the Rosen brothers were the original owners of the company, is that correct?

A. To the best of my knowledge, yes.

Q. And to the best of your knowledge, they were hustlers, is that correct?

MR. HIRD: Objection, Your Honor. I think this goes to relevance. Mr. Levy has testified that he acquired -- he and Mr. Sharp became involved in Avatar Holdings in 1980 when it emerged from bankruptcy. The violation was in 1991. This isn't even a history of violations. This goes back to a different set of owners that were removed by the Bankruptcy Court and has nothing to do with this case.

THE COURT: Yes, sir?

MR. JACOBS: This is the beginning of a story, 1980, and I'm attempting to establish, as I did at

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Mr. Levy's deposition, that when Mr. Levy and Mr. Sharp took over this company, they knew what they were getting into in terms of the previous owners being hustlers -- and that's the word that appears in the deposition transcript -- and that they, in fact, were known to install roads without sewer and water. And the inadequacy of sewer facilities at Barefoot Bay is a major part of this case. And there is direct knowledge of this testimony by Mr. Levy based on his direct knowledge of these facts at his deposition.

MR. HIRD: Your Honor, if I may briefly respond, Mr. Levy has just testified this morning that Judge Britton ordered Avatar Holdings install $160 million worth of improvements to the properties in the new company. This is ancient, ancient history.

What's happening here is an effort to tar the company that was reinvented in 1980 with its history of prior owners before the time, and it's totally irrelevant to violations that don't start until 1990 at the earliest with respect to --

THE COURT: I'll sustain the objection.

BY MR. JACOBS:

Q. Mr. Levy, do you have knowledge of whether the Rosen brothers made a practice of selling land which did not have sewer and water service?

MR. HIRD: Same objection, Your Honor.

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THE COURT: Sustained.

MR. JACOBS: Your Honor, may I address --

THE COURT: No, sir. Let's move on.

MR. JACOBS: Okay.

BY MR. JACOBS:

Q. Now, in addition to the land, when you acquired GAC, you acquired significant water and wastewater utility holdings as well, is that correct?

A. That is correct.

Q. And these utility holdings included valuable holdings both in the mid-west and Florida, is that correct?

A. That is right.

Q. And one of these properties was Barefoot Bay, is that correct?

A. I believe so, yes.

Q. And Avatar acquired both the Barefoot Bay development and the Barefoot Bay wastewater treatment plant, is that correct?

A. I believe so. We acquired so many properties at that time, including a very complicated title insurance company, CATV systems and whatever. So, on any of the specifics, my memory is not necessarily accurate.

Q. Let me ask you this, moving from the past to the relative present, Mr. Levy: In 1990, did Avatar Holdings' utility operations represent a significant portion of the

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company's total business?

A. What is the "significant portion"? Yes, I guess it did, depending on how you define "significant portion."

Q. Isn't that the way Avatar Holdings characterized the holdings in its 10-K statement for that year?

A. Yeah, I guess it was.

Q. And that included 15 wastewater treatment plants, is that correct, sir?

A. If that's the number, that's right.

I say, if that is the proper number, that is -- I'll -- if you tell me that, I will agree; I accept that.

Q. You don't quarrel --

A. No, I don't quarrel.

Q. And including Barefoot Bay, is that correct?

A. Correct.

Q. Now, the water and wastewater utilities continued to play a large role in Avatar Holdings' business until it sold off the mid-west utilities in 1993 for approximately $60 million, is that correct?

A. That is correct.

Q. When you acquired Avatar, it had significant land holdings in Florida, correct?

A. That is correct as well.

Q. And these included Barefoot Bay?

A. Yes.

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Q. And a number of other land holdings?

A. Right.

Q. Now, you visited a number of these land holdings, isn't that right, sir?

A. Yes, sir.

Q. And you visited a number of these wastewater treatment plants, isn't that correct, sir?

A. I visited mostly water utilities. The only ones I remember having visited were in the mid-west.

Q. You don't recall having visited wastewater treatment plants?

A. No, I don't.

Q. Mr. Levy, at your deposition, I asked you, So you have been to some wastewater treatment --

MR. HIRD: Excuse me, Your Honor. Could he refer to the page and volume?

THE COURT: Yes, sir.

MR. JACOBS: By all means. This is the August 24th, 1995, deposition, in New York City, Page 65, Line 17. Question --

THE COURT: Wait, wait, wait. Let him find it.

(Pause.)

THE COURT: Okay. Did you give the following answers to the following questions? Go ahead.

BY MR. JACOBS:

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Q. Mr. Levy, did you give the following answers to the following questions? Question, Line 17: So, you have been to some wastewater treatment plants?
Answer: Yes.
A. Yes, that is true. The only ones I remember, though, were in the mid-west.
Q. But they were not just water --
A. No, they were wastewater treatment plants.
Q. And you said you visited a number of land holdings, but you never visited Barefoot Bay, is that correct?
A. I don't recall having visited Barefoot Bay.
Q. And the reason you didn't visit Barefoot Bay is because as an investor, it was worth a lot less to you than these other land holdings, is that correct?
A. That's right. We had a great deal of scattered land in Florida and most of the --
THE COURT: He answered "yes." He answered "yes."
THE WITNESS: Yes.
MR. JACOBS: I'm happy to move on, but I don't want to be interrupting --
THE COURT: No, no, I understand, but he's answered your question, so you can go ahead and ask your next question. He said "yes."
BY MR. JACOBS:
Q. What kind of housing is there at Barefoot Bay,

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Mr. Levy?
A. I'm told it's manufactured housing.
Q. Drawing on a word we used -- or that was used yesterday, is that upscale housing, Mr. Levy?
MR. HIRD: Objection. The witness has testified that he's never been to Barefoot Bay. In answer to the last question, he said he was told it's manufactured. I don't know how he can answer that question based on personal knowledge.
THE COURT: Overruled.
THE WITNESS: No, it is not upscale.
BY MR. JACOBS:
Q. Now, you didn't visit the Barefoot Bay, Carrollwood or Waterway Estates treatment plants, is that correct?
A. That is correct.
Q. That's because they were small investments for you, correct?
A. Relatively small in relation to the company.
Q. That's why you didn't visit them, is that correct?
A. Well, that would certainly have been a major reason.
Q. Mr. Levy, do you recall that at the July 27th, 1984, Avatar Holdings board of directors meeting, Mr. Wilkov, the president at the time of the company, reminded the board that, quote, The Department of Environmental Regulation has been imposing stricter requirements and that in his opinion,

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developmental growth within certain areas will depend heavily upon the availability of water and sewer facilities?
A. I'm sure that's true.
Q. As a member of the Avatar Holdings board of directors, Mr. Levy, you did receive -- you did receive a briefing on wastewater treatment, did you not?
A. Yes, we did.
Q. In fact, by late 1985, you had received a briefing not only on wastewater treatment in general, but on a particular plant called Fiesta Village which at that point in time was in the planning stage, is that correct?
A. I believe it was around that time, yes.
Q. And at that particular same Avatar board of directors meeting, a brochure was distributed entitled Nature's Way: How Wastewater Treatment Works for You, is that correct?
A. I don't recall that, but I will accept that.
Q. Now, Mr. Levy, who is Robert Gordon?
A. Robert Gordon is president of Avatar Utilities.
Q. And how long has he been with Avatar?
A. He was with the company going all the way back, I believe, certainly before I became involved.
Q. So, before 1980?
A. Yes.
Q. But it wasn't Avatar Utilities back then, was it?
A. No. It couldn't have been Avatar Utilities. I guess

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it was Consolidated Water.
Q. Turning now to the Barefoot Bay facility, Mr. Levy, did there come some point in time when you became aware that there was a problem with the disposal of the wastewater at Barefoot Bay?
A. Yes, I believe there was.
Q. And do you recall when you became aware of that problem?
A. No, I do not.
MR. JACOBS: Move 21 into evidence at this time.
MR. HIRD: Your Honor, if you would give us a moment?
THE COURT: Yes, sir.
(Pause.)
MR. HIRD: No objection, Your Honor.
THE COURT: It will be received.
MR. JACOBS: Move 25 into evidence.
(Pause.)
MR. HIRD: No objection.
THE COURT: It will be received.
BY MR. JACOBS:
Q. Mr. Levy, directing your attention to Exhibit 25 --
A. Right.
Q. -- do you have that in front of you?
A. Yes, I do.

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Q. Would you identify it, please?
A. It's the minutes of the board of directors meeting on November 30, 1984.
Q. Directing your attention to Page 4 of Exhibit 25, do the minutes of this November 30th, 1984, board meeting refresh your recollection with respect to the date on which the Barefoot Bay effluent disposal problem came to your attention?
A. Well, it says what it says. I think the document speaks for itself.
THE COURT: Well, whether you think it speaks for itself or not, does it refresh your recollection? That's the question.
THE WITNESS: Let's see. We're on page -- this is Exhibit 25?
MR. JACOBS: Yes, sir, Page 4.
THE WITNESS: Page 4.
THE COURT: Why don't you ask him the question again. It's been a while.
BY MR. JACOBS:
Q. Looking at Page 4 of these November 30th, 1984, board meeting minutes, can you tell me whether the minutes refresh your recollection as to in what year you personally became aware of the problem with the disposal of the effluent from the Barefoot Bay wastewater treatment plant?

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A. Well, my honest answer has to be that, of course, I accept what it says here, but I cannot say that I remember at the time and it doesn't jog something in my memory that reminds --
THE COURT: Okay. He's answered your question.
BY MR. JACOBS:
Q. You have no reason to doubt -- let me ask you this --
A. No, I have no reason to doubt it.
Q. Okay. And you did sign these minutes, didn't you, on Page 9, Mr. Levy?
A. Right. No, I have no reason to doubt them.
Q. That you became aware in 1984 of these problems --
A. Correct.
Q. -- is that correct, sir?
A. Yes, sir.
MR. HIRD: Objection. I don't think that was his testimony. His testimony is that he signed this and that this says what it says; but he has no memory of the specific issue.
THE COURT: Well, I think that's a different matter. I'll overrule the objection.
BY MR. JACOBS:
Q. Now, Mr. Levy, can you tell me what, if anything, was done about these problems at the Barefoot Bay wastewater treatment plant, say, between 1984 and 1987?

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MR. HIRD: Objection. It's not clear what problems are being discussed. He just asked what he -- whether he has any recollection of this issue being raised. I'm not sure --
THE COURT: Well, if he has a difficult time understanding what problems there were, then he can say that and he won't be able to answer the question, but I'll overrule your objection.
THE WITNESS: Will you repeat your question, please?
THE COURT: Read the question back, Mr. Miracle.
(Record read back.)
THE WITNESS: I'm afraid I cannot.
BY MR. JACOBS:
Q. Okay. Now, at the January 30th, 1987, meeting of the Avatar Holdings board of directors, you received another report on this same problem, did you not, sir?
A. I would have to look at those minutes.
Q. Very well. Government Exhibit 53 will be directed to your attention.
MR. JACOBS: Your Honor, may I move 351 into evidence while he's looking at that, the minutes?
MR. HIRD: No objection.
THE COURT: 351?
MR. JACOBS: Yes, sir.

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THE COURT: All right. It will be received.
MR. JACOBS: And while he's looking, can I move 53 in, also minutes?
MR. HIRD: No objection.
THE COURT: It will be received.
THE WITNESS: Your question was -- excuse me.
THE COURT: I don't think he's asked -- you haven't asked a question yet, have you? You asked him to turn to Exhibit 53, correct?
MR. JACOBS: That was the last thing I did.
BY MR. JACOBS:
Q. The question was, before that, at this January 30th, 1987, meeting of the board of directors of Avatar Holdings, you received another report on the Barefoot Bay effluent disposal problem, is that correct, sir?
A. So it says in the minutes, yes. I believe the -- I'm sure they are correct.
Q. In fact, at that meeting, Mr. Wilkov, the president, reported that under consideration is extending the option to purchase property contiguous to the Barefoot Bay subdivision, the purpose being to determine if the soil tests positive for spray irrigation.
He advised that the 40 acres previously acquired by Avatar Utilities for such purpose had proven unsuitable for percolation ponds and a damage claim against the testing

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engineer is being considered.
He also advised that if the optioned property tests positive, we would construct a golf course on approximately 80 acres and develop the remaining 190 acres for home sites.
A. Right.
Q. Do you recall whether Mr. Wilkov gave that report at the meeting, sir?
A. My memory just doesn't work that I can remember him giving the report, but I'm sure he did if it says so.
Q. And you did sign these minutes on Page 8, sir?
A. And I certainly signed the minutes.
Q. Now, you personally continued to receive reports on this problem, did you not, sir?
A. I assume that if the reports were sent, I would receive them.
Q. All right. Let me direct your attention to Exhibit 61.
A. Right.
Q. Do you have that in front of you, sir?
A. Yes, I do.
Q. Do you see your name in the upper right-hand corner, handwritten; C.C.: Leon Levy? Can you make that out?
A. Oh, yeah.
Q. Okay. Now, this is a report -- the cover memo, anyway, is a report from John Sladkus to Peter Sharp, is

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that correct?
A. That is correct.
Q. And it attaches a memo from Robert Gordon to the file, is that correct?
A. It says: Enclosure: Robert -- Bob Gordon's memo of 2-10-88. The following page -- yes, it's Robert Gordon to the file.
Q. Now, Mr. Gordon's memo has to do with the meeting that he had with DER, is that correct?
A. Yes, the Orlando Department of Environmental Regulations. That's correct.
Q. In fact, this meeting Mr. Gordon represents as being held on February 9th, 1988, is that correct?
A. That's what he represents.
Q. And the purpose of the meeting which takes place in the Orlando Department of Environmental Regulation office is to discuss the proposed consent order recommended by the Orlando DER office in August 1987, is that correct?
A. That is apparently correct.
Q. And the consent order, according to Mr. Gordon, as originally drafted, basically required the company to eliminate the discharge from the Barefoot Bay wastewater treatment plant to a nearby canal and imposed a moratorium on additional connections to the system until there was a final resolve of the effluent disposal problem.

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The company countered with a recommended consent order whereby the company would request approval of the surface water discharge; would institute monitoring of the nearby canal to determine the level of treatment to meet water quality standards; would proceed to make any necessary changes to its treatment process to meet water quality criteria even if this meant converting the existing plant to advanced wastewater technology, is that correct?
A. That's what it says, and there's no reason not to believe it.
Q. And Mr. Gordon further represents that the meeting opened up with Mr. Alexander of the DER indicating that the discharge into the canal had gone on for over three years without an apparent resolve of the problem in the near future, and he wanted action now.
George Gioia, G-I-O-N-I-S, the Orlando DER enforcement officer, stated that it was their position that the consent order as proposed by the DER should be executed. And in order to discontinue the existing discharge to the canal, the company should proceed with construction of the percolation basins on the new 40-acre site.
Have I accurately represented that portion of the memo, sir?
A. Yes, you have.
Q. Continuing on, Mr. Landers, the Florida Cities Water

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Company attorney, proceeded to -- and I have added that in for the Court's benefit -- proceeded to explain that building the ponds did not solve any problem in that the ponds would not have sufficient capacity to eliminate the entire current discharge. If the surface water discharge was approved, building of the ponds would be a complete waste of time.
THE COURT: Of money.
MR. JACOBS: Thank you.
BY MR. JACOBS:
Q. Although the existing outfall was illegal, there was no reason why the DER could not approve a temporary discharge permit while the testing was going on.
Have I accurately represented that paragraph, as the Judge corrected me?
A. Yes, you have.
Q. After private discussion by the two parties -- I'm skipping down a little ways -- the company proposed the following: The company would enter into a consent order which would not contain a moratorium; would agree to immediately construct a spray irrigation system on the 40-acre site; and proceed to design and construct a deep well.
This proposal was generally accepted by Mr. Alexander, although expressing some reservation about the continued

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connection of additional customers to the system.
We also indicated that we needed our board approval before the consent order could be executed.
Did I accurately represent --
A. Yes, you accurately read it.
Q. Now, moving from Mr. Gordon's memo to the shorter memo which is the first page of Exhibit 61, Mr. Sladkus tells Mr. Sharp that he's -- first of all, in Paragraph 1 -- and I'll try and paraphrase this to save time -- that he's sending along a copy of Mr. Gordon's memo, is that correct?
A. That is correct.
Q. And he essentially paraphrases the memo in the following four paragraphs. Although he's numbered the paragraphs 2, 3, 3 and 4, there are a total of five paragraphs, is that correct?
A. Right.
Q. And he's outlined there the cost of the deep well system in Paragraph 3, is that correct?
A. This is on --
Q. In the first Paragraph 3, on that first page, Exhibit 61?
A. The deep well system -- oh, yes, $2 million. Right.
Q. Okay. And he also says, quote, We have confidence that it will be effective because there are a number of deep wells in the area. Correct?

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A. Right.
Q. And then he goes on to say, In addition, if successful, it will solve our Barefoot Bay problem once and for all?
A. That is correct.
Q. And I continue to quote, And finally, we really don't have any alternative. Did I accurately read that part --
A. Yes, you did.
Q. -- of Paragraph 3?
Now, backing up to Paragraph 2, the proposed resolution is as follows: We would immediately spray irrigate on the 40-acre Hearndon property.
Now, we haven't touched upon that yet, Mr. Levy. What is the 40-acre Hearndon property?
A. I really can't answer that without being --
Q. Refreshed?
A. -- refreshed.
Q. Okay. I can perhaps do that later.
We would also proceed with the design and subsequent construction of a deep well system. Correct?
A. That's what it says.
Q. The spray irrigation will pose no significant expense since we have spare traveling irrigators on Plant Number 2 in Poinciana, is that correct?
A. That's what it says.

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Q. What's Plant Number 2 in Poinciana, Mr. Levy?
A. I just don't know.
Q. What's Poinciana?
A. Poinciana is a large development outside of Orlando, or Kissimmee.
Q. I'm sorry?
A. Near Kissimmee.
Q. And do you know who owns that development?
A. We do.
Q. Meaning Avatar Holdings?
A. Avatar Holding, yes.
Q. So, is it fair to say that based on Mr. Sladkus' memo here that the irrigators are going to be moved from Poinciana's wastewater treatment plant over to the Barefoot Bay treatment plant?
THE COURT: Just a moment.
MR. HIRD: Objection; no personal knowledge.
THE COURT: I'll overrule the objection -- well, no, I'll sustain the objection to the form of the question, whether it's fair to say, particularly in the context of his previous responses. I'll sustain the objection.
BY MR. IACOBS:
Q. Is Mr. Sladkus here proposing that the irrigators be moved from another Avatar facility, Mr. Levy?
A. That apparently seems to be what he's saying, yes.

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Q. Now, moving down to what I'll call the second paragraph 3, which is actually the fourth paragraph, Mr. Sladkus says: As you will note in the memo, Bob made a tentative commitment subject to the board's approval.
Is "Bob" referring to Bob Gordon here?
A. I assume that's right, yes.
Q. And then he says, Meaning, of course, your consent to the above. Do you know what that means?
A. I assume that it -- Peter Sharp was the chief executive and that Sladkus wanted to be sure that Peter agreed with what Bob's commitment was.
Q. And Peter Sharp here is essentially the board as far as Mr. Sladkus is concerned, is that correct?
MR. HIRD: Your Honor, objection. It's not clear the board of which company. We have several companies that could be involved: Florida Cities, Avatar Utilities, Avatar Holdings.
THE COURT: Well, he can explain that if -- overruled.
You want the question read back, sir, or do you remember the question?
THE WITNESS: Well, yes. I guess that Peter was the chairman of the executive committee. And I believe at that time he was the chief executive officer of the company, and he would act for the -- as chief executive officer.

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(The witness' microphone fell on the floor.)
THE WITNESS: They never gave me any mechanical problems to work on with that company.
THE COURT: Why don't you let Mr. Doherty place the microphone where it needs to be, Mr. Levy. If you have problems with it, you call on Mr. Doherty here who is our mechanical engineer.
THE WITNESS: All right. Thank you.
Well, Peter -- first of all, normally, I guess in most companies, in between board meetings, the executive committee and the chairman of the executive committee acts for the board. I believe that it's that way with Avatar.
BY MR. JACOBS:
Q. Okay. I think you answered my previous question. Let me ask you another one, Mr. Levy. You referred to the company and Mr. Sharp's role, or roles, in the company. What company and what board were you referring to?
A. Well, I was referring -- there are so many different companies here, and each question would have to have its own answer.
Q. Right. Now, the question refers to actually your previous response: Peter Sharp, he was chairman of the executive committee of what company?
A. He was chairman of the executive committee of Avatar, but don't forget --

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Q. Avatar Holdings?
A. Avatar Holdings.
But you must be careful, because I am on the board of Avatar Holdings and have had very little to do with the utility companies, so my frame of reference would be Avatar Holdings whether --
MR. JACOBS: Move to strike, Your Honor.
THE COURT: Overruled; denied.
Go ahead. Ask your next question.
BY MR. JACOBS:
Q. In what I have called the second Paragraph 3, Bob made a tentative commitment subject to the board's approval. In this context, what board are we talking about, sir?
A. I can't tell.
Q. He says, Meaning, of course, your consent to the above, referring to Mr. Sharp. Do you know whether Mr. Sharp served on the board of any other Avatar entities?
A. No, I don't. I mean, he may have. I just don't know.
Q. Mr. Levy, directing your attention now to Government Exhibit 80, do you recognize this?
A. Yes, I do.
Q. Would you identify it, please?
A. It's the annual utility operations review meeting dated January 20, 1989. And there's an enclosure which seems to be the agenda for the meeting -- which is the

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agenda for the meeting.
MR. JACOBS: Move Exhibit 80 into evidence, if you will, Your Honor.
MR. HIRD: Your Honor, this witness -- this would still be subject to our objections for matters relating to barred claims and issues that preceded the statute of limitations, so I would like to preserve those objections for the record.
I would also like to state, with respect to any questioning on such documents, I wonder if we could have a standing objection with respect to those issues so we don't have to raise them with respect to specific questions.
THE COURT: Very well.
The Court will adhere to its previous rulings and will overrule your objections as to Government's Exhibit 80, and you will have the standing objection as you requested.
MR. JACOBS: Proceed, Your Honor?
THE COURT: Yes, sir.
BY MR. JACOBS:
Q. Mr. Levy, you did receive a copy of this, did you not?
A. Yes.
Q. In fact, that's your handwriting on it, correct?
A. I think it is. I'm sure, yes.
THE COURT: Let's take a ten-minute recess.
(A recess was taken.)

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THE COURT: Mr. Jacobs.
MR. JACOBS: Thank you, Your Honor.
BY MR. JACOBS:
Q. Mr. Levy, do you still have Trial Exhibit 80 in front of you?
A. Exhibit 80?
Q. Yes, sir?
A. Just let me check. Here it is, 80. Yes, Mr. Jacobs.
Q. And you did receive a copy of this memorandum at or about the time that it was written, correct?
A. Yes, I believe so.
Q. January 20, 1989?
A. Right.
Q. And it advises you of an upcoming utility meeting, did it not?
A. Yes, it does.
Q. And one of the items it advises you of is the agenda on a major construction project at Barefoot Bay, is that correct?
A. Yes, that's correct.
Q. Item number nine and the major construction project under item number nine for Barefoot Bay is deep well disposal system, is that correct?
A. That's correct.
Q. What is a deep well disposal system?
A. Well, it's a well that goes I guess below the surface

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water and you put effluent into the deep -- into the deep well.
Q. So you do understand that it's used for disposal of effluent?
A. Yes, I understand that.
Q. And the other major construction project listed is the Waterway Estates Wastewater Treatment Plant, is that correct?
A. Yes, that's correct.
Q. Now, do you recall whether at some later point in time the concept of a deep well for the Barefoot Bay effluent was rejected?
A. I don't recall that either way.
Q. Directing your attention then to Exhibit 96, do you have that in front of you, sir?
A. That is the one that begins with Ohio Suburban Water Company, Peter Sharp from Robert Gordon, August 16th?
Q. Yes. You're looking down into the text. If you could refer to the caption to identify it, sir.
A. Right.
Q. Is it from Gordon to Sharp and Wilkov?
A. It is, indeed.
Q. And subject, Avatar Utilities, general?
A. Correct.
Q. And the date is August 16, 1989?
A. That's correct.
Q. And you're the recipient of this memorandum, is that

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correct, sir?
A. Yes, I am.
Q. Directing your attention to page 3 of the exhibit. The first paragraph reads, the further the company gets into the deep well injection process, the more uncertain the whole process becomes. What company is this?
A. I assume that's Avatar Utilities. I don't know for a fact.
Q. All right, sir. The DER is demanding more and more testing and monitoring system design while at the same time expressing concern that the, quote, geology in Brevard County is properly understood and in at least one area of the county appears to be unsuitable for class one injection wells. The company's confidence level for success is expanding.
Did I accurately read that?
A. You accurately read that, Mr. Jacobs.
Q. And then he goes on to say, they're looking at spray irrigation at the time, is that correct?
A. That's correct.
Q. And he's advising the recipients of this memo that among other possibilities, he's looking at the possibility of acquiring orange groves on which to spray the effluent instead of constructing the deep well, is that correct?
A. That seems to be what he recommends or suggests we explore.

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Q. And he's even telling you he's thinking of going into the citrus business, isn't he? If you look at the second paragraph from the bottom of page 3.
A. Yes, well I think that would be not a recommendation to go into the citrus business, but if we go into the buying of the place to put the affluent, we would have to be in the citrus business and find out what it's about.
Q. Now I think you said "affluent," did you mean a effluent?
A. Right, right, excuse me.
Q. The other recipients of this memo, sir, are Mr. Allen, Mr. Getman, Mr. Kleinerman and Mr. Sladkus. Would you identify Mr. Allen, please?
A. Yes. Gerald Allen is the second person in Avatar Utilities.
Q. And Mr. Getman I believe you identified. What about Mr. Kleinerman?
A. Mr. Kleinerman was the chief financial officer of the company at that time.
Q. And for clarification, which company are we discussing?
A. He was chief financial officer of Avatar, but he may have also been chief financial officer of Avatar Utilities, GLU -
Q. Mr. Levy, do you mean Avatar Holdings?
A. Well, depends on context.
Q. What context did you mean the last answer?
A. My last answer, since I'm thinking in terms of Avatar

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since they're the people I work for, I would be most of the time thinking in terms of Avatar, but that is not a legal thought, that's merely a colloquial identification.
Q. When you identify Mr. Kleinerman as being an officer of Avatar, did you mean Mr. Kleinerman as an officer of Avatar Holdings?
A. He was an officer of Avatar Holdings.
Q. At the time of this memorandum, sir?
A. He also may have been an --
THE COURT: His question is at the time of this memorandum was he an officer of Avatar Holdings.
THE WITNESS: Yes, he was.
THE COURT: And you said he was also what?
THE WITNESS: He also may have been an officer of Avatar Utilities or whatever.
MR. JACOBS: Move to strike as speculation.
THE COURT: Overruled, denied.
BY MR. JACOBS:
Q. Now, if Mr. Gordon on behalf of Avatar Utilities wants to go ahead and build the deep well, whose approval does he need?
A. Well, the stock of Avatar Utilities was owned by Avatar Holdings, and which might have given him very, very broad discretion, but I think it's a matter of policy, you would notify the largest stockholder if you had a major expenditure in view.

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Q. Well, didn't we already establish that anything over a hundred thousand, you, Mr. Sharp or Mr. Sladkus had to personally approve?
A. We established that for signing checks at one particular time. I don't think it suggests anything more than that.
Q. Well, is it your testimony that Mr. Gordon did not require Mr. Wilkov and/or Mr. Sharp's approval in order to expend the funds that would be necessary either for the deep well or the spray irrigation?
A. I don't think I testified on that one way or another.
Q. Okay.
Do you have an understanding one way or another with respect to that?
A. I would think he would probably, as a matter of policy, discussed it with Mr. Sharp or --
Q. And sought Mr. Sharp's approval?
A. And sought that.
Q. Directing your attention now to Government Exhibit 97, sir, if you would. Do you have that in front of you, sir?
A. Yes, I do.
Q. And in this memorandum, Mr. Gordon -- or rather Mr. Gordon writes this memorandum five days after he wrote the previous one that we discussed, correct, which was Exhibit --
A. Why I'll take your word for it.
Q. I'm sorry, correction, Trial Exhibit 97?

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A. Uh-huh. (Indicating affirmatively.)
Q. So he's written 97 five days after 96, is that correct?
A. Well, is that date? Want me to check it or shall I take your word for it? I'd rather take your word for it, Mr. Jacobs.
Q. If you'll accept it, I'm sure the Court would.
MR. HIRD: We'll stipulate it was written five days later.
THE WITNESS: Right.
THE COURT: Thank you.
BY MR. JACOBS:
Q. And this second memorandum, Trial Exhibit 97, also relates to the possibility of an acquisition of an orange grove in the vicinity of the Barefoot Bay Plant to be used for effluent disposal, is that correct?
A. That's correct.
Q. And this memorandum is again written from Mr. Gordon to Mr. Sharp with copies to Mr. Allen, Mr. Getman, Mr. Kleinerman, Mr. Levy and Mr. Sladkus?
A. That is correct.
Q. Now, do you recall receiving on or about November 27th, 1989, a rather extensive report authored by Mr. Allen on the subject to alternatives to deep well injection?
A. I don't recall receiving it, but as I think you asked me in my pre-trial examination, I don't have a very good memory

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for all of those things.
Q. Directing your attention to Government Exhibit 115.
A. Right.
Q. Does 115 refresh your recollection with respect to whether or not you were the recipient of an extensive report from Mr. Allen on the subject of wastewater disposal alternatives to deep well injection at Barefoot Bay?
A. I accept it, I did receive it, Mr. Jacobs. I don't think you're misleading me by putting in.
Q. I'm sorry, I didn't hear you.
A. I don't think I would be misled by having somebody putting this in and ask me whether I received it if I hadn't received it.
Q. I'll stipulate to that, and can I ask you, sir, did you recall receiving it at or about the time that it was written and it's dated November 27, 1989?
A. Well, I would agree that I would have received it at that time.
Q. Directing your attention on the top of page 3, Mr. Allen represents that there are approximately three thousand --
THE COURT: Page 3 of what?
MR. JACOBS: I'm sorry, sir, same exhibit.
MR. HIRD: My exhibit of 115 is one page.
THE COURT: Yeah, there's only one page in Exhibit 115 in my notebook.

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MR. JACOBS: Uh, we might have consolidated 114 and 115. I suspect that 115 is the cover page for the report or cover memorandum for the report which is actually --

THE COURT: 114 in my book is Wastewater Disposal Alternatives to Deep Well Injection.

MR. JACOBS: Right, that would be the report that was transmitted by cover memorandum, Exhibit 115.

THE COURT: All right.

MR. JACOBS: I'm sorry for the confusion. Why don't we look at 114 since that appears to be the correct --

THE COURT: You want him to turn to --

MR. JACOBS: Page 3.

THE COURT: Three.

BY MR. JACOBS:

Q. And in the event we've not moved 114, I think we moved 114 already into evidence, yes, we have, so there is no problem there.

Now, Mr. Levy, directing your attention to the second full paragraph on page 3 of Exhibit 114, Mr. Allen represents that there are approximately three thousand acres of orange groves located within one point five miles of the Barefoot Bay Wastewater Treatment Plant.

A. Where on page 3 of exhibit?

Q. 114?

A. Right, yes, I'm with you.

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Q. Now, moving down to the third full paragraph on this same page of Exhibit 114, there is a discussion in that paragraph of consummating reuse agreements with the orange grove owner.

A. Right.

Q. Mr. Levy, do you know what reuse means in that context?

A. I can surmise, but that would be -- I don't know for a fact.

Q. Just give me your best understanding if you would then, sir?

MR. HIRD: Calls for speculation.

THE COURT: Well --

THE WITNESS: I would think --

THE COURT: Wait, wait, wait, wait.

THE WITNESS: I'm sorry.

THE COURT: Well, just a minute, just a minute. You said you would be surmising. Well, let's go ahead and give us that and I may strike it. It's how knowledgeable he appears to be. I'll overrule the objection.

THE WITNESS: I think it only means they would, after they were finished with whatever irrigation purposes or water purposes, that the orange groves would be returned to the original owner.

MR. JACOBS: I would stipulate to striking the response.

THE COURT: Well, they may withdraw the motion at this point.

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All right, do you adhere to your motion or your objection?

MR. HIRD: I adhere to my objection because the answer simply demonstrates that the --

THE COURT: You withdraw the objection?

MR. HIRD: I adhere to it.

THE COURT: Adhere to the objection, all right. It will be sustained, and I'll strike the witness' answer, his response.

BY MR. JACOBS:

Q. Now, Mr. Allen also kept you personally apprised of certain EPA regulations, did he not, sir?

A. Not particularly, no.

Q. May I direct your attention then to Exhibit 548. Do you recognize Exhibit 548, Mr. Levy?

A. Well, I can't say I recall having seen it, but I'm sure I did and I notice my handwriting on top of it.

Q. Is that handwriting that says file?

A. Yes.

Q. And you're on the distribution list on page 2, is that correct?

A. Yes, I am.

MR. JACOBS: Move 548 into evidence.

MR. HIRD: Your Honor, we object at this time, on

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grounds previously stated, also irrelevant. This deals with drinking water treatment standards, has nothing to do with wastewater treatment. Avatar Holdings ran drinking water -- I'm sorry -- Florida Cities and other Avatar Utilities subsidiaries ran water treatment systems to provide drinking water. Avatar Utilities and Florida Cities also ran water treatment plants providing drinking water and this rule deals with drinking water regulations.

MR. JACOBS: Your Honor, indeed it does, but the question was, did Mr. Allen keep you apprised of certain EPA regulations. It was more general, it was not specific.

THE COURT: I'll overrule the objection. Be received.

THE WITNESS: Apparently he did, and occasionally whether he did it systematically or frequently or rarely, I cannot tell you.

BY MR. JACOBS:

Q. Mr. Levy, now directing your attention to the Waterway Estates Wastewater Treatment Plant, do you recall being privy to the issue of Florida Cities' acquisition of the entire Lee County water and wastewater utilities system?

A. No, I don't recall it now.

Q. Directing your attention to Government Exhibit 384.

A. All right.

Q. Just to be sure, does this exhibit have three pages,

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Mr. Levy?
A. Yes, it does.
Q. And is the first page a memorandum from Mr. Sharp to Mr. Gordon?
A. Yes, it is.
Q. And does it attach a memorandum from Mr. Gordon to Mr. Sharp and Mr. Wilkov on which you're listed as a cc?
A. Yes, it does.
Q. Do either of these memorandums refresh your recollection to whether it was Florida Cities' goal to acquire the entire Lee County Water and Wastewater Utility System?
A. No more than merely the statement as it says here. That may have been a brainstorm of Peter's on that day or he may have been serious, I don't know.
MR. JACOBS: Non-responsive, move to strike. I asked him if it refreshed his recollection about the objective, I didn't ask him anything about whether it was serious or not.
THE COURT: Oh, I'll leave it in and I'll deny your request.
BY MR. JACOBS:
Q. Now, Mr. Sharp is saying that Florida Cities' long term objective should be to own the entire Lee County system, that is, the County's facilities as well as the City's, is that correct?
A. That's what he said.

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THE COURT: Just a moment.
MR. HIRD: Your Honor, although the second part of this Exhibit appears to be copied to Mr. Levy, there is no evidence that the first page has been -- ever came to Mr. Levy's attention, therefore I object to him being questioned without having personal knowledge.
THE COURT: Yes.
MR. JACOBS: It's hard to know exactly what he's seeing and what he hasn't seen because he testified that he throws a lot of documents away, and he's also testified that his recollection isn't very good, so I think it's fair to ask him about --
THE COURT: When did he testify he's thrown a lot of documents away? I may have missed that.
MR. JACOBS: No, I'm sorry, Your Honor, he did that in a deposition. I can --
THE COURT: Don't tell me what he said in a deposition.
MR. JACOBS: I can go through that. I'll voir dire him on this if that will assist the process.
THE COURT: I'll overrule the objection and receive it.
BY MR. JACOBS:
Q. Now Mr. Levy, Mr. Sharp says that the Florida Cities Water Company's long term objectives should be to own the

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entire Lee County system, that is the county's facilities as well as the city's, is that correct?
A. That's what it says.
Q. To your knowledge, did anyone ever countermand that objective?
A. No, not to my knowledge. I don't know. I'll leave it at that.
Q. Now, Mr. Levy, shutting down one of Florida Cities Lee County Wastewater Treatment Plants would not have been consistent with that objective, would it have been?
A. Well, he doesn't say it was an objective. It said it should have been an objective. I think he means that as a subject for discussion. I mean that's my interpretation, but he doesn't say it's an objective.
Q. He says Florida Cities' long term objective should be to own --
A. He doesn't say it's --
THE COURT: Wait, wait, wait, wait, wait, let him finish his question before you start answering.
BY MR. JACOBS:
Q. Mr. Sharp says, Florida Cities' long term objective should be to own the entire Lee County system, that is, the county's facility as well as the city's, is that correct?
A. That is correct.
Q. Now, to shut down one of the Florida Cities Wastewater

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Treatment Plants in Lee County is not consistent with that objective, is it?
A. Well, but there is -- I have a problem with the language because I don't know whether subjective should be there. You're talking about a -- well, look, I'm quibbling.
THE COURT: What did you say, sir?
THE WITNESS: I say, it would not be -- I'm not so sure that was an objective of Peter Sharp's, even from his language, which is all I have here, because when he said should be, that does not to me indicate an objective. That is like will be or is or it's something else.
BY MR. JACOBS:
Q. So, you're testimony is you're not sure whether this is -- strike that. I'll go back to my other question then.
Assuming that Mr. Sharp is stating that the objective should be and he is stating that the objective should be to own the entire Lee County system, isn't it true that shutting down one of Florida Cities' plants would not be consistent with that objective?
THE WITNESS: As far as the city's plants?
THE COURT: Just a moment.
MR. HIRD: Asked and answered, Your Honor.
THE COURT: Well, we got an answer of sorts. Let's try it again. Go ahead, see if you can answer it. Answer the question.

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THE WITNESS: Florida Cities –
THE COURT: Assuming that that is just an assumption.
THE WITNESS: No, no, Florida Cities is in Lee County.
BY MR. JACOBS:
Q. I think the Court can take judicial notice of the fact that the Waterway Estates Plant is in Lee County.
A. All right.
On that assumption, yes, you're right, it is inconsistent with acquiring all of the Lee County systems.
Q. Shutting down the Waterway Estates Plant would be inconsistent with the objective of owning the entire Lee County system, is that correct?
A. That is correct.
Q. In fact, the exact opposite is true, right? Rather than shutting down a plant, acquiring another plant would be consistent with that same objective, correct?
A. I think unless I were aware of all the circumstances surrounding it, I couldn't – I couldn't certify that -- agree with that necessarily.
Q. Well, assuming that the objective is to acquire the entire system, acquiring another plant would be consistent with that objective, correct?
A. Well, might have been duplication.
MR. BULLOCK: If the Court please, he's actually

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going – the basis of my objection is Mr. Levy's I believe testified that he doesn't have the factual background to understand what the Lee County system was and if we want to get into how many plants were in Lee County, how many customers they were going to treat, whether the plants they were going to buy or the plants they were going to shut done switched the same customers to other plants, that's a different story, but this hypothetical is getting way out of what the witness already testified he has any substantive knowledge or the ability to base an intelligent answer on the facts of that hypothetical.
THE COURT: Mr. Jacobs?
MR. JACOBS: Well, Your Honor, I think we finally got an answer to the question of what the objective was and I'm just taking it one step further and he's an intelligent man and he's the chairman of the board of the company and I think I'm establishing that.
THE COURT: I'll overrule the objection. I'll permit him to answer this question and let's move on.
THE WITNESS: Could you read that back to me, please?
(Record read back.)
And I suggest I cannot answer that because I don't know whether the other plant – closing down another plant wouldn't duplicate, might possibly expedite the acquiring of the system. Maybe one is duplicative of another. I just don't

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have enough information to be able to answer that.
MR. JACOBS: Your Honor, I respectively move to strike the answer as non-responsive. It is one thing to say he doesn't know, but he went on to speculate that shutting down might be –
THE COURT: Motion denied, ask your next question.
BY MR. JACOBS:
Q. Mr. Levy, are you aware that at the time Mr. Sharp and Mr. Gordon are exchanging these memoranda and the issue of acquiring all of the Lee County Waste – sorry, Wastewater and Wastewater Utilities is on the table that Florida Cities is discharging in the Caloosahatchee River without a permit?
A. No, I was not aware of that.
Q. Mr. Levy, isn't it true that over ten years ago, the Avatar Holdings' Board of Directors was concerned about potential liability for environmental violations?
A. That is certainly true.
Q. In fact, that issue came up at the January 30th, 1986 meeting of the audit committee of Avatar Holdings Board of Directors, isn't that correct?
A. That is correct.
MR. HIRD: Your Honor, I object. There's been no establishment that Mr. Levy served on the audit committee, so he cannot – this is going beyond his personal knowledge.
THE COURT: Well, I don't know whether it is or not.

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He may have personal knowledge.
MR. JACOBS: He already answer it.
THE COURT: What was his answer?
MR. JACOBS: Correct.
THE COURT: Well, ask your next question.
BY MR. JACOBS:
Q. In fact, isn't it true that the minutes of the March 20, 1986 audit committee meeting reflect that Mr. Getman, Mr. Gordon and Mr. Sladkus had met with Mr. David Berz, Esquire, an environmental attorney with Avatar general counsel Weil, Gotshal & Manges and that the purpose of that meeting was to discuss Mr. Berz' review and a settlement of the utility company's potential liability exposure and that Mr. Getman expressed Mr. Berz' opinion that the existing corporate structure and operating procedures provide adequate liability protection against an attempt to, quote, pierce the corporate veil, but that further assessments would be made?
MR. HIRD: If he's reading from an exhibit, can we have the exhibit number?
THE COURT: Yeah. I think the appropriate way to do that is let's get to the exhibit that you're reading from.
MR. JACOBS: By all means, Judge. I apologize. I'm trying to move things along. It's Government's Exhibit 353 and it is already in evidence.
May I inquire as to whether Ms. Cole has recorded

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this as being in evidence, 353?
THE CLERK: No, it's not.
MR. JACOBS: Move 353 into evidence.
MR. HIRD: Your Honor, we do not object.
THE COURT: Be received.
MR. JACOBS: Move 48 in evidence, if it's not in evidence.
MR. HIRD: What is 48?
MR. JACOBS: Also minutes. These are both minutes. Have they been accepted, Your Honor?
MR. HIRD: I'm trying to find 48. No objection to 48.
THE COURT: All right.
353 and 48 will be received.
BY MR. JACOBS:
Q. Let's look at 48 for a moment, Mr. Levy.
A. That's Exhibit 48. I don't think I have that here?
Q. We'll get it for you in just a moment.
A. I have it.
Q. Now, Mr. Levy, can you identify Exhibit 48?
A. Well, I see I have it in front of me, yes.
Q. Can you?
A. It's the minutes, oh, I'm sorry, it's the minutes of the meeting of the board held on Friday, March 21st, 1986.
Q. And is your signature on page 10? This is again Exhibit

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48, for the record.
A. Yes, that is my signature.
Q. And then is there an Exhibit A attached to these minutes, sir, following page 10?
A. Well, there's some minutes of the audit committee, yes, Exhibit A, something wrote in pen, yes, that's right.
Q. So the audit committee minutes are an exhibit to the minutes of the entire board of Avatar Holdings, is that correct?
A. They certainly were at this time if Exhibit A was written at this same time as the rest were when they were attached.
Q. Look at page 4 of the audit committee minutes.
MR. JACOBS: And while the witness is doing that, can I just ask for a stipulation, to speed things up, from Avatar Holdings, that in fact, and perhaps Ms. Tsotsos can speak to this, that the minutes of the Avatar Holdings Audit Committee or rather the Audit Committee of the Board of Directors of Avatar Holdings are in fact exhibits in the minutes --
THE COURT: Why don't you consult with -- if you're asking for a stipulation, my rule is to not request that in the present of the trier of the facts?
MR. JACOBS: Forgive me, sir.
THE COURT: Or within the trier of the facts' hearing.
MR. HIRD: Your Honor, we'll stipulate that the audit committee minutes are exhibits to the minutes of the board

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meeting. We'll not stipulate that Mr. Levy was in attendance at the audit committee meeting.
MR. JACOBS: I didn't go as far as that, all I wanted to be clear is --
THE COURT: Is the format?
MR. JACOBS: Yes, sir.
THE COURT: All right.
MR. JACOBS:
Q. Now, look at page 4 of the audit committee minutes, Mr. Levy?
A. Page 4 of the audit committee minutes?
Q. That would be three pages back from the end of the exhibit.
A. This is Exhibit 48?
Q. Yes, sir.
A. Right.
Q. Mr. Gordon indicated David Berz, Esquire, an environmental attorney with Avatar's general counsel --
THE COURT: You're reading now?
MR. JACOBS: YES.
THE COURT: Right.
MR. JACOBS: Yes, sir.
THE WITNESS: This is what page of that audit committee meeting?
THE COURT: Page 4.

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BY MR. JACOBS:
Q. Page 4, Mr. Levy, first full paragraph. I'm going to read it again to speed things along.
Mr. Gordon indicated that David Berz, Esquire, an environmental attorney with Avatar's general counsel, Weil, Gotshal & Manges, had been contacted requesting his assistance in assessing the utility company's environmental liability exposure with recommendation to limit said exposure, if any.
Did I accurately read that paragraph?
A. Yes, you did.
Q. Now, turning your attention to Exhibit 353, do you recognize that, sir?
A. That is minutes of a meeting of the Board of Directors held on May 29th, 1986.
Q. And you signed those minutes on page 8, did you not, sir?
A. Yes, I did.
Q. And attachment, it's an Exhibit A, which represents the minutes of the meeting of the audit committee of the Board of Directors of Avatar Holdings on March 20, 1986, correct?
A. Yes, they seem to be attached.
Q. And could I direct your attention, please, to page 4 of the audit committee notes, and again, that would be for your convenience, sir, four pages back from the end of the exhibit?
A. Right, I have it in front of me.
Q. And I'm going to read into the record the second full

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paragraph.
Mr. Getman reported that he, Mr. Gordon, and Mr. John K. Sladkus had met with David Berz, an environmental attorney with Weil, Gotshal & Manges, in Washington, DC, to discuss Mr. Berz' review and a settlement of the utility company's potential liability. Mr. Getman expressed Mr. Berz' opinion that the existing corporate structure and operating procedures provide adequate liability protection against an attempt to, quote, pierce the corporate veil, unquote. But that further assessments would be made.
Did I accurately read that paragraph, sir?
A. Yes, you did, Mr. Jacobs.
Q. Now, directing your attention to Government Exhibit 356, which I'll move into evidence at this time.
THE WITNESS: Is that the --
THE COURT: Will be received.
THE WITNESS: That is the minutes of the board meeting of Wednesday, July 30, 1986?
BY MR. JACOBS:
Q. And you signed those minutes, sir?
A. Yes, I did.
Q. Now, Mr. Levy, the majority of these minutes are devoted to environmental matters, is that correct?
A. I would have to read them in order to be able to answer that.

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Q. Fair enough.
THE COURT: What are you referring to? You're referring to --
MR. JACOBS: To 3 --
THE COURT: What exhibit?
MR. JACOBS: 356, sir.
THE COURT: 356. Well, we're not going to wait for him to read it. He can scan them if he wants to. We're not going to wait for him to read it.
MR. JACOBS: Fair enough.
BY MR. JACOBS:
Q. Let me see if I can put it a different way, Mr. Levy. Isn't it true that a majority of these meetings related to environmental issues, including --
A. Oh, this meeting, I would agree with, yes, I thought you were asking me in general if the minutes of the board refer to environmental matters.
Q. No, I'm just asking you about this meeting, sir?
A. Yes.
Q. Mr. Levy, were you personally concerned at any time that Avatar Holdings might be called to account for the environmental violations of Florida Cities?
A. I was concerned about everything that Avatar Utilities did, but I felt the people in the water companies were very conscientious and that they would, as you have to rely on other

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people, I felt comfortable relying on them.
Q. Mr. Levy, Avatar is a public trade corporation, isn't that right?
A. That's correct.
Q. And you have a large stake in Avatar Holdings, do you not?
A. That is also correct.
Q. In fact, no one has a larger stake, isn't that right?
A. That is true.
Q. In fact, you beneficially own over twenty-five percent of the stock, isn't that true?
A. No, that's not true.
Q. Directing your attention to Exhibit 591.
A. I'm afraid, Mr. Jacobs, you're probably including all of the stock the Odyssey partners own of which I'm merely one partner.
Q. 591 is already in evidence. It's a 1994 10-Q statement filed with the Securities and Exchange Commission?
A. Which page would you like me to turn to, Mr. Jacobs?
Q. I'd like you to turn to the schedule 14-A information towards the back of the document which lists the principal stockholders.
MR. HIRD: Are you talking about page 14, Exhibit A?
MR. JACOBS: No, it's a computer printout. That's why I'm struggling.

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BY MR. JACOBS:
Q. Let me refer you to Avatar Holdings Exhibit 1, which is the annual report.
MR. HIRD: This contains the same information.
THE COURT: Okay.
Let's move along.
MR. JACOBS: I'm sorry, Your Honor, I'm trying to convert a computer printout into a hard copy of the SEC statement. With the Court's permission, I'll read the footnote that I have in mind. I'll just ask the witness if he agrees. Is that permissible?
MR. HIRD: Which page does the footnote appear on the printout?
MR. JACOBS: I can show it to counsel in the computer version.
THE COURT: All right.
It's all right, fellas, just get on with it.
BY MR. JACOBS:
Q. Mr. Levy, footnote one under principal stockholders and security ownership of management represents that Mr. Levy, Mr. Nash -- let me read it. Mr. Levy, Jack Nash, Steve in Bussen-Mayer, Joshua Nash, by virtue of being general partners of Odyssey, share voting and dispositive power with respect to the common stock owned by Odyssey, and accordingly, may each be deemed to own beneficially the common stock owned by Odyssey.

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Do you agree with that statement?
A. Well, I am sure it's legally correct, but in layman's language, obviously all four of us did not own the same block of stock.
Q. The question was whether you beneficially own over twenty-five percent of the stock of Avatar Holdings?
A. Well --
Q. Using the definition, if you will, which is the definition or footnote from the SEC statement?
A. It's the SEC statement, I guess I have to accept that, but --
Q. Thank you.
And the next largest owner is an investment group which owns less than twenty percent, is that correct?
A. That's correct.
Q. Would you tell me, sir, as such a large stockholder in this company, would a multi-million dollar penalty against Avatar Holdings have an economic impact on you?
MR. HIRD: Objection. Are you talking about on Mr. Levy, personally, or on the company, or on Odyssey Partners. I need to know before the question is answered. I think it's vague. It should be clarified.
THE COURT: You need to clarify your question.
THE WITNESS: The question related to?
THE COURT: Wait, wait, wait.

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MR. JACOBS: Whether a penalty, a multi-million dollar penalty against Avatar Holdings would have an economic impact on the witness.
THE WITNESS: Yes, it would have an economic impact.
MR. JACOBS: Why?
THE WITNESS: Well, obviously --
THE COURT: Wait, wait, wait, wait, you have an objection?
MR. HIRD: I object to relevance, Your Honor, why the impact on the individual witness would -- what relevance does it have?
THE COURT: Yes, the issue is economic impact on the Defendant. I'll sustain the objection.
THE WITNESS: I mean, if it lost a dollar --
THE COURT: Wait, wait, wait, wait. I'll sustain the objection.
MR. JACOBS: No further questions.
THE COURT: Mr. Hird, you have -- I've taken under submission your request to be permitted to, at the conclusion of your cross examination, to present testimony that you would present over and above any testimony that you would elicit on cross examination of this witness.
MR. HIRD: Your Honor, actually, I think much of what Mr. Jacobs has questioned the witness about covers topics in my direct examination. I think there may be one or two areas in

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which we might get an objection as to scope and what I would suggest is to go through, because I think Mr. Jacobs has shortened my examination tremendously and I think if I could go --
THE COURT: I hope so, I hope so.
MR. JACOBS: I was trying to, Your Honor.
MR. HIRD: And do that, I think we would make it simpler. If Mr. Jacobs has an objection as to scope at that time, we can deal with it.
THE COURT: All right, All right.

CROSS EXAMINATION

BY MR. HIRD:
Q. Mr. Levy, Mr. Jacobs questioned you about the organization that you worked for, Odyssey Partners. Does Odyssey Partners have any relationship with Oppenheimer and Company?
A. Oppenheimer and Company was started by, among others, the partners of --
THE COURT: Well, is the answer to that yes or no and then you can explain.
THE WITNESS: The answer is no, okay.
BY MR. HIRD:
Q. What is Oppenheimer? Is Odyssey a successor in any way to Oppenheimer?
A. It is a successor. It has a historical relationship, but

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no current relationship?
Q. Could you explain that historical relationship?
A. Yes. Some of the partners of Oppenheimer -- of Odyssey started Oppenheimer and Company or were there at the very beginning. And many years later, the partners of Oppenheimer decided to sell Oppenheimer and Company, the partnership, and retain the proceeds and other assets of Oppenheimer and became an investment partnership and we called ourselves Odyssey because the buyers of Oppenheimer felt they were entitled, quite properly, to the name of the brokerage and the investment firm.
Q. And were you one of the original partners of Oppenheimer, sir?
A. I became a partner about a year after -- less than a year after the firm started?
Q. About when was that?
A. 1951.
Q. And when you worked for Oppenheimer, did you have any involvement in the Oppenheimer Fund?
A. Yes, I started the Oppenheimer Fund, Inc.
Q. And could you tell us what the Oppenheimer Fund was, please, sir?
A. The Oppenheimer Fund was a mutual fund. It was more of a hitch fund, actually, but it was a fund.
Q. Do you still have relationship with the Oppenheimer Fund?

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A. Yes, I'm chairman of the board.
Q. And when the Oppenheimer Fund started, about how much money did the fund have in terms of assets?
A. About two million dollars.
Q. And how much does it have today, sir?
A. Oh, the group – it's now a group of several different funds. It has about forty billion.
Q. Was the Oppenheimer Fund the first such mutual fund in America?
A. It had many distinct qualities about it which may have made it certainly among the first, but I don't –
Q. Now, when Mr. Jacobs asked you about how you spent your time, you mentioned that you worked for many not for profit organizations. Can you identify those organizations, please?
A. Yes. I work for the Institute for Advanced Studies down in Princeton.
Q. And what does that do?
A. It has four divisions. I'll make it very brief. That's where Einstein worked, that's where the people who interpret the Hubble Telescope photographs work. They work in abstract math and abstract physics and also in history.
Q. What position do you have with the organization, sir?
A. I'm vice chairman of the board when the chairman of the board is on leave.
Q. So you're acting chairman at this point?

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A. I'm active chairman.
Q. What other not-for-profit organizations do you work for, sir?
MR. JACOBS: I object, beyond the scope, relevance.
THE COURT: Wait, wait, I will overrule the objection.
THE WITNESS: I'm treasurer of the Institute for Advanced Studies as well as I work for the Guggenheim Foundation and the Guggenheim Awards and I'm chairman of that finance commission, I work for the Jerome Levy Institute, I'm president, and that's an economic research institute.
BY MR. HIRD:
Q. Any others, sir?
A. I'm sure there are, but, yes, the Rockefeller Institute in New York. I'm on the finance committee and board of directors of trustees.
Q. Do you have any training in the operation of wastewater treatment plants?
A. No, I do not.
Q. Do you own any -- have you ever operated wastewater treatment plants?
A. No, I certainly haven't.
Q. Do you have any background or training in the utility business?
A. None, except as looking in the financial statements of

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utilities.
Q. Now, in your position as chairman of the board of Avatar Holdings, what is the nature of your responsibilities?
A. I would say overall strategy and I would also think for certain times of financial decisions.
Q. What is your role with respect to the business of Avatar Holdings' subsidiaries?
A. I'm not really involved in the operating decision in the businesses.
Q. What is your involvement with the operation of Florida Cities Water Company?
A. Virtually nothing.
Q. Does the Avatar Holdings Board of Directors ever handle the day-to-day operations of the Florida Cities Water Company?
A. No, they do not.
Q. Now, you've seen a number of board minutes in this Court in Mr. Jacobs's examination. How often does the Avatar Holdings Board of Directors meet?
A. About eight times a year.
Q. And you preside at those meetings?
A. Yes, I do.
Q. Are you a member of the audit committee of Avatar Holdings' Board of Directors?
A. No, I'm not.
Q. Is anyone associated with the management of Avatar

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Holdings a member of the audit committee?
A. No, they are not.
Q. Who comprises the audit committee?
A. Oh, gee, I have to refresh my memory on that. I think it's Martin Myerson and –
MR. HIRD: Your Honor, I withdraw the question at the time. I'll show him the exhibit later that will help him refresh his recollection.
BY MR. HIRD:
Q. Have you ever been an officer, director or employee of Florida Cities Water Company?
A. No, I have not.
Q. Have you ever attended a Florida Cities board meeting?
A. No, I have not.
Q. Now, Mr. Jacobs showed you some correspondence which came to your attention – I'm sorry -- correspondence which you acknowledged that you received. Can you describe your practice in receiving correspondence? How do you treat correspondence when it comes into your office?
A. Yes. Depending upon its nature, I read it carefully or glance at it or other kinds of material that comes from Avatar, I might even discard without looking at it if there would be --
Q. So, how you treat a piece of correspondence depends on the nature of the subject matter?
A. Exactly.

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Q. Do you get more in a week than you could read?
A. Yes, I do.
Q. And what would your -- how would you treat a document that came to your office with respect to Avatar Holdings Utility business?
A. I think it would depend on the nature of the document.
Q. Well, what document would you read seriously and perhaps keep?
A. Well, I would be very interested in documents that suggested serious regulatory problems or suggested serious investment possibilities or commitments or you just have to make a subjective judgment as to the import on the entire operation on both the utilities and on the company itself as to how much time you would spend on the document. It's like allocating time for anything else.
Q. And how would you treat documents that dealt with technical aspects of utility operation at a particular plant?
A. I would have felt I could add very little to that. I would have difficulty understanding most of it, so I would probably not read any technical discussions of the water Utilities.
Q. Now, Mr. Jacobs asked you a number of questions about Peter Sharp. Did Mr. Sharp have any background experience in the utility industry before becoming --
A. Not to my knowledge, he had none.

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Q. Now, when you and Mr. Sharp acquired Avatar Holdings or required a significant interest in Avatar Holdings back in 1980, did you acquire it in order to obtain interest in real estate or to obtain a utility business?
A. We were interested in real estate.
Q. Why were you interested in real estate at that time?
A. Because prior to the whole exercise, Peter Sharp and I had a long conversation one day where Peter figured he owned enough real estate in New York and would like to own more real estate in the sun belt, and we looked at a number of companies that operated in the sun belt and owned land and finally we came across GAC.
Q. Now, when you and Mr. Sharp acquired an interest in GAC, you were appointed to the Board of Directors by Judge Britton?
A. That is correct?
Q. And who selected the original directors?
A. Oh, Jeff Hazard and Bill Porter recently resigned of the original directors appointed by the Judge.
Q. That was my question, Mr. Levy. Were the original directors appointed by the Judge?
A. A number of original directors were appointed by the Judge, yes.
Q. And was Mr. Jeffrey Hazard one of those?
A. He was among those, yes.
Q. Who is Mr. Hazard?

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A. He is a Professor at Yale Law School who was in charge of -- whose fame, and that I think is fair, is in the field of legal ethics.
Q. And did Mr. hazard serve as a director?
A. He did, for many years.
Q. Did he serve on the audit committee of the board?
A. I believe he did, yes.
Q. Was a Henry King Stanford appointed?
A. Yes, he was also appointed by Judge Britton.
Q. Who was Mr. Stanford?
A. He was president of the University of Miami for a great many years. Very distinguished gentleman.
Q. Was an Edward Houston appointed?
A. Yes, he was.
Q. Who is Mr. Houston?
A. Mr. Houston, I think, I believe was a Federal Judge in Fort Lauderdale.
Q. And did Mr. Houston serve on the Board of Directors?
A. Yes, he did, for quite a number of years?
Q. Did he serve on the audit committee?
A. I believe he did, yes. I think he was chairman of the audit committee.
Q. Was a William Porter appointed?
A. Yes, he was appointed also by Judge Britton, as was Mr. Houston.

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Q. And did Mr. Porter serve on the audit committee?
A. Yes, he did.
Q. Did a Martin Myerson become a director of Avatar Holdings?
A. That was sometime later, yes, he did.
Q. What was Mr. Myers background?
A. President of the University of Pennsylvania. He was Provost out in California.
Q. And did Mr. Myerson serve on the audit committee?
A. Yes, he did, still does.
Q. Did a Leon Kendall join the Board of Directors?
A. Yes, Lee Kendall did, indeed.
Q. And what was his background?
A. He was chairman of Magic which was the first mortgage insurance company, the earliest mortgage insurance company before that or after that. He was chairman of the SIA, the Security Industry Association, which represented all of the interest in the security business, and he's now a Professor at the University -- North Western University.
Q. Did Mr. Kendall serve on the audit committee?
A. He still does.
Q. And now, you had testified that Mr. Sharp came down to Florida the first couple years after Avatar Holdings emerged from bankruptcy, is that correct?
A. That is correct.

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Q. But he moved back to New York, is that correct?
A. That is also correct.
Q. Would that be in approximately 1982?
A. I think around that time.
Q. And from that time forward, Mr. Sharp never lived in Florida, is that correct?
A. That is correct, he visited Florida, but he didn't live in Florida.
Q. And you testified that Mr. Sharp is dead, is that correct?
A. Yes.
Q. And that he died in April of 1992?
A. Yes, that's right.
Q. What was the cause of his death, sir?
A. Cancer, lymph cancer.
Q. Do you know whether if he was ill for a long period of time?
A. Well, he was visibly ill, as much as he would go to the hospital over a few years. If I may, it was my instinct, every year he went out to the Mayo Clinic. He was a very quiet and private person. I think he had instincts that he was ill for much longer than he would let on.
Q. Now, sometime before his death, Mr. Sharp resigned as chief executive officer, is that correct?
A. That is correct.

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Q. And I think Mr. Jacobs asked you whether that occurred about 1990?
A. I think about then.
Q. Now, there were some questions concerning Mr. Sladkus?
A. Right.
Q. And you identified Mr. Sladkus when Mr. Jacobs showed you an exhibit that refreshed your recollection that Mr. Sladkus was an executive vice president of Avatar Holdings?
A. Right.
Q. Do you know whether Mr. Sladkus ever resigned that position?
A. Whether he did? I believe he did, yes.
Q. Do you recall when?
A. No, I don't.
Q. I'd like to show the witness Avatar Holdings' Exhibit 17.
Mr. Levy, do these appear to be board minutes of Avatar Holdings, Incorporated?
A. Yes, they do.
Q. And were these board minutes at the time that you were chairman of the board?
A. If you tell me what period this covers, to save time. What period?
THE COURT: It's a meeting?
MR. HIRD: it's Exhibit 17.
MR. JACOBS: Judge, to save time, we'd stipulate

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Mr. Sladkus resigned from the position of executive vice president of the land and utility operations as effective January 1st, 1991, if that's helpful.
MR. HIRD: That's what I was attempting to elicit.
THE COURT: Okay, very good.
MR. JACOBS: But not from his affiliation -- any other affiliation he might have held with the company subsequent to that time.
BY MR. HIRD:
Q. Now, you mentioned -- now what was Mr. Sladkus' background?
A. He was an engineer.
Q. Do you know whether -- excuse me.
Do you know whether his engineering expertise was in the nature of wastewater treatment or some other specialty?
A. I think he was a civil engineer. He built things, he supervised the building when Peter would build an office building or what-have-you, among other things.
Q. Was his experience in the construction industry?
A. I think so because we used to refer to the mandated work that we talked about before as horizontal engineering, when you had them put in the roads and whatever that was ordered by the Corp and the Federal Trade Commission and Sladkus spent a great deal of time working on that.
Q. All right.

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Where did Mr. Sladkus maintain his office?
A. I believe he maintained his office in the same building as Peter Sharp maintained his office, in New York.
Q. Did Mr. Sladkus apprise Sharp on projects that were unrelated to Avatar Holdings?
A. He certainly did, yes.
Q. To your knowledge, did Mr. Sladkus ever have an office in Florida?
A. Not to my knowledge.
Q. Was Mr. Sladkus a director of Avatar Holdings?
A. No, he is not, nor was he.
Q. Now, you had been questioned a little bit about Mr. Wilkov?
A. Correct.
Q. Was Mr. Wilkov a member of the audit committee of Avatar Holdings?
A. No, he was not.
Q. Was Mr. Sharp?
A. No.
Q. What was Mr. Wilkov's background?
A. I believe he was in the real estate business up in New York and then he moved to Florida and he acted as an independent and then he joined Avatar.
Q. And did he have any experience in the utility business?
A. Not to my knowledge.

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Q. You also discussed Mr. Getman who was identified as general counsel of Avatar Holdings, is that correct?
A. That is correct.
Q. What are Mr. Getman's responsibilities?
A. Well, Mr. Getman is responsible for overlooking, overseeing all of the legal aspects of the family of companies in the Avatar family.
Q. Do you know whether Mr. Getman also holds the title of executive vice president of Avatar Holdings?
A. Yes, he does.
Q. Does that title involve any duties in addition to his role as general counsel?
A. Yes, I believe it does.
Q. Do you know what those duties are?
A. I couldn't enumerate them.
Q. Does he have business responsibilities?
A. Yes, he does.
Q. Does he have business responsibility with respect to the utility operations?
A. Well, I don't know -- I really don't know since I couldn't enumerate and outline exactly what his responsibilities are.
Q. Would Jacobson know what Mr. Getman's business responsibilities would be?
MR. JACOBS: Objection.

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THE COURT: You can ask him if he knows, whether he would be in a position to know. I think that question would be legitimate, so rephrase your question. Overrule the objection.
BY MR. HIRD:
Q. Would Mr. Jacobson be in a position to know what those business responsibilities would be?
A. I can't see how.
Q. Now, you were asked some questions about Barefoot Bay and I believe you indicated that Barefoot Bay was one of the properties that was acquired when Avatar Holdings --
A. Yes, that was among the properties in Avatar Holdings from the GAC.
Q. Was this considered one of the major real estate properties?
A. No, it was not.
Q. Why not?
A. 'Cause its size possibility, potential, all of the other measures that you would use to measure one property as against another and the impact it would have on the company as a whole was not as great by a long shot as a Hoover Island, Poinciana, King Cal.
Q. Did you visit the major properties of Avatar Holdings?
A. Several times?
Q. Did you ever visit Barefoot Bay?
A. No, I never did.

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Q. Now Mr. Jacobs asked you whether you ever visited wastewater utilities. How often have you visited wastewater utilities owned by Avatar Holdings or its subsidiaries?
A. Oh, gosh, aside from when we first acquired the company and I went out in the midwest and visited most of the utilities that we had in the midwest, I would say almost never. The only familiarity I had was in a presentation to which Bob Gordon made at Fiesta which was an advanced wastewater plant that we built in Lee County, I believe.
Q. But you never visited Fiesta Village?
A. No, I never visited Fiesta Village.
Q. So you only visited some utilities in the midwest at the time that you first became involved with Avatar Holdings?
A. That's correct.
Q. You never visited Barefoot Bay Treatment Plant?
A. No.
Q. And you never visited the Carrollwood Treatment Plant?
A. No.
Q. And you never visited the Waterway Estates Treatment Plant?
A. No.
Q. Now, you were asked some questions about Robert Gordon. Does Mr. Gordon have any position with Avatar Holdings?
A. No.
Q. How many times a year do you speak with Mr. Gordon?

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A. Maybe two or three, at the most. Perhaps maybe we run into each other by accident. We'll be very friendly as we are, but I don't see him.
Q. You were also asked some questions about Gerald Allen. Does Mr. Allen have any positions with Avatar Holdings?
A. No, he does not.
Q. How many times a year do you speak with Mr. Allen?
A. Maybe I see him two or three times a year, at the most.
THE COURT: I assume you have some more?
MR. HIRD: I have some more, and Your Honor, actually it would be -- I can be in a better position after the break.
THE COURT: All right.
This would be a good time to recess for lunch. We'll reconvene at 1:15.
(Thereupon, a luncheon recess was taken.)
All right, Mr. Hird.
MR. JACOBS: Pardon me, may I be heard on one procedural matter with respect to tomorrow's schedule, with the Court's permission? Mr. Quinn and I have 5:00 p.m. flights which are apparently the last non-stop flights to Washington, and I just don't know if that's acceptable to the Court. I wanted to find out.
THE COURT: How are you going to be here and there at the same time?
MR. JACOBS: That's the point. If I'm going to be

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here, I'm not going to be on the 5:00 p.m. flight.
THE COURT: Well, let me see just a minute. Well, I have two sentencings tomorrow afternoon that were originally scheduled for 4:00 o'clock that I had moved back to 4:45, and those will be probably fairly lengthy sentencings, and I don't plan to be here Friday night, so we may be able to accommodate you.
MR. JACOBS: That would be great. Thank you, so much, Your Honor, and we'll cut it very close. If you want to go to 3:30 or 3:45, we'll take our chances getting out there by 5:00.
THE COURT: Probably will want to go till at least 3:45.
MR. JACOBS: All right, sir. but I've got a 5:00 o'clock flight.
THE COURT: Okay.
MR. JACOBS: It's 3:45.
THE COURT: You want to be heard?
MR. HIRD: Your Honor, defense counsel I believe is going to be here for the duration.
MR. BAISE: We're here for the duration, Your Honor, and we hadn't planned on returning over the weekend.
MR. HIRD: And we're prepared to go to however late Your Honor wishes.
THE COURT: Well, I'll tell you what, you know, I got

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some other balls in the air, too, and as a matter of fact, some things that have kept me awfully busy, and I'm here for the duration, not just this case, but if I want to continue in this position, Judges have to pace themselves, too, but which brings up the subject of where are we in this case? I have an estimate from the Government of several days, whatever it was, and the Defendants estimated eight days.
MR. BAISE: That is correct, Your Honor.
THE COURT: Where are we in that estimate?
MR. JACOBS: Judge, we estimated a maximum of five Court days. As you recall, we actually set out a potential scheme on how to split those five days up. The last penalty trial that we had was finished in three days, that includes both sides. We had anticipated completing our case in chief yesterday. We now anticipate, based on the length of the cross examination of Mr. Klingenstein, we'll complete our case in chief this afternoon.
MR. BAISE: With respect to Florida Cities, Your Honor, we have approximately seventeen witnesses that we need to call in light of the evidence that's been brought forth. We're going to do our very best to push that group into next week and it's going to be very difficult to do and we understand that.
MR. HIRD: On behalf of Avatar Holdings, assuming that Mr. Levy does not have to come back, which at this point I

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think is probably the case, we have, I think, two witnesses, I imagine would be completed in about two hours.
MR. JACOBS: Judge, those are reductions from the list. If counsel could share with us their revised list, we'd sure appreciate it. This is nineteen instead of twenty-six.
MR. BAISE: I may have mispoken, counsel, it's either seventeen or nineteen. I have to look at the list, Your Honor.
THE COURT: Well, why don't we – why don't you cooperate with each other to the extent of keeping each other abreast of the witnesses that you intend to call so we can try and move this thing along as expeditiously as possible.
MR. BAISE: We have been doing that, Your Honor. I find no difficulty in terms of working with Government counsel in terms of them keeping us apprised of their witnesses. In fact, we were just talking here a few moments ago about how to fill in the rest of today, assuming under the best of circumstances that they finish their case and we finish our cross, we have an hour or so left this afternoon, how can we fill that in productively. We're making arrangements, one of my colleagues has been attempting to make arrangements to pull in a gentleman that will talk about the Carrollwood situation for maybe the last hour, hour and a half this afternoon, if we have that amount of time.
MR. JACOBS: The agreement was, though, we exchange a day ahead of time not only who was going to be expected to be

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called the next day, but the order, and so far, it seems like the Defendants are not sticking with the order which is making our job a little bit tougher and we really did endeavor to get our precise number down way ahead of time as well as our order.
MR. BAISE: One of the reasons, Your Honor, that it has been somewhat difficult to keep that order is the length of time that direct and cross examination has been taking. Obviously, we have an order in which we would like to present our case, so what I'm, at the present time trying to do is fill in, if there's any time left this afternoon, with the gentleman who can deal with our Carrollwood situation so we can start with on direct cleanly tomorrow.
THE COURT: All right.
Well, we're going to move on now.
MR. BAISE: Thank you.
THE COURT: I think that Ms. Cole, I'm sure she told you that Tuesday I have to be in Jacksonville, that's not going to be a Court day.
MR. BAISE: Yes, she did.
THE COURT: I also have a two week trial calendar commencing a week from Monday in Jacksonville which I've committed to, so we'll move on now, okay.
MR. JACOBS: Can we plan on our flights for tomorrow? Will you be able to terminate by 3:45?
THE COURT: We'll do that.

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MR. JACOBS: Thank you, sir.
MR. HIRD: Your Honor, just to correct something, I said I mentioned two witnesses, in reality it's three, but one witness will be called during Florida Cities' examination, I will question him with respect to my case in chief.
MR. JACOBS: So we understand, who?
MR. HIRD: Gerald Allen. I've already told Mr. Quinn.
THE COURT: All right, proceed.
BY MR. HIRD:
Q. All right.
Mr. Levy, could you take a look at Government Exhibit 80, please?
A. Thank you.
Q. Mr. Levy, I believe Mr. Jacobs questioned you about Government Exhibit 80 and you identified it as a cover memo and the agenda?
A. Yes, that's correct.
Q. I'm sorry, I hadn't finished, I was waiting for Judge Nimmons to get the document.
THE COURT: Okay.
BY MR. HIRD:
Q. I believe when Mr. Jacobs questioned you about Exhibit 80, you identified this as a cover letter and agenda for an annual utilities operation meeting, is that correct?

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A. That is correct.
Q. And these annual meetings, they occur once a year?
A. If that often.
Q. Did you ever attend any of these annual utility operation meetings?
A. I think I attended one.
Q. But did you miss most of them?
A. Yes, sir.
Q. Why did you decide not to go to those meetings?
A. Well actually, if the meetings followed a regular board meeting, I would probably have attended it unless I had to be somewhere else.
Q. But you wouldn't go specially?
A. I wouldn't have gone specially.
Q. Okay.
If you could turn for a moment to Government Exhibit 61, please.
A. Yes, sir.
Q. Mr. Jacobs asked you a number of questions about Government Exhibit 61. I'd like to ask you a more basic question. Do you ever remember reading this exhibit, this document at the time it was dated?
A. Well, as I mentioned before, I don't remember reading it, but I wouldn't say that I didn't read it either.
Q. You were asked questions about disposal of effluent at

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Barefoot Bay. Is that an area about which you felt specially qualified?
A. No, it was not.
Q. Would it be your practice to deal with that issue directly or to leave it to others within Avatar Holdings or its subsidiaries to deal with such an issue?
A. I would normally always leave it to others in the subsidiary to deal with.
Q. Now, with respect to the attachment, the attachment refers to a meeting between Florida Cities Water Company and the Florida Department of Environmental Regulation, is that correct?
A. Yes, sir.
Q. Based on your review of the attachment, does it appear anyone attended that meeting on behalf of Avatar Holdings?
A. I'm sorry?
Q. Did anyone attend that meeting on behalf of Avatar Holdings?
A. Not to my knowledge.
Q. Did Avatar Holdings ever direct Florida Cities what to do with the effluent at Barefoot Bay?
A. Not as far as I know, sir.
Q. I'd like to have you look at Exhibit 384, please, government Exhibit 384.
A. Yes.

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Q. This is a document about which Mr. Jacobs questioned you. In particular, he asked you about the first paragraph 384. Can you read the second one, please, for the record?
A. What?
Q. Second paragraph of the first page.
A. Right.
Q. Could you read it aloud, please.
A. We should be trying to work out an agreement either to purchase now or to operate or lease the facilities with the right to purchase sometime in the future, preferably at a price fixed now.
Q. So, to the extent Mr. Sharp was suggesting that Florida Cities acquire Lee County's utility systems, he was talking about purchasing or leasing other systems, is that correct?
A. That seems to be the case.
Q. So, the control of Lee County Utility Systems could have been obtained by simply leasing or buying other utilities regardless of whether Waterway Estates continued to operate?
A. That is correct.
Q. I'd like to have you take a look at Government Exhibits 96 and 97, if you would, sir.
A. Yes, Mr. Hird.
Q. Now, Government Exhibit 96 is a memo entitled Avatar Utilities, general, is that not true?
A. That is correct.

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Q. And this memo refers to various different aspects of Avatar Utilities' operation, not just Barefoot Bay?
A. that is so.
Q. And that includes Avatar Utilities operations in the midwest, is that correct?
A. That's right.
Q. Did Avatar Utilities -- I think you alluded to this briefly, but was there a sale of Avatar Utilities' midwest operations?
A. Yes, there was.
Q. And does Avatar Utilities have any operations now outside the State of Florida?
A. It has a small operation in Arizona, very small.
Q. But previously, it was in what states?
A. It was in Ohio, Indiana, Michigan.
Q. Would Missouri be one?
A. Missouri, yes.
Q. And all of those operations were sold?
A. Right.
Q. And did that result in reduction in the number of employees that Avatar Utilities had?
A. Well, it certainly would have, certainly in the field.
Q. About when did that sale occur?
A. I think it occurred in '92 or '93, but I want to refresh my memory before I --

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Q. Now, exhibit -- the portion of Exhibit 96 that deals with Barefoot Bay, and Exhibit 97, both mention the possible purchase of orange groves; do you see that, sir?
A. Yes, I saw that.
Q. Would this have been a different business for Avatar Holdings?
A. Well, I don't think we owned any orange groves, but it would not have, in a sense, I guess the technical answer would be, yes, but it wasn't was so widely different from what we were doing. We had sod farms and other agricultural interests incident to whatever else we were doing.
Q. Now if a subsidiary was thinking of a new business venture, is that the kind of thing that would be brought to the attention of you or either Mr. Sharp?
A. Yes, if it was major, going into a new direction, that would have been brought to our attention.
Q. I'd like you to take a look at Government Exhibit 114 and 115, if you would, sir.
A. 114.
Q. 114 and 115.
A. Yes, sir.
Q. Are those in that book?
THE COURT: You have them?
THE WITNESS: I have the Exhibit. Did you ask me a question, I'm sorry?

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BY MR. HIRD:
Q. No, I didn't know if you had it yet.
A. I'm sorry.
Q. Exhibit 115 is a cover letter and Exhibit 114 is the memo from Mr. Allen about wastewater disposal alternatives, deep well injection at Barefoot Bay. Do you see those documents?
A. Yes, I do.
Q. All right.
Is this memo, 114 -- first of all, do you have a recollection of actually reading 114 at the time it was sent to you?
A. No, I don't have a recollection, no.
Q. Is the topic that 114 is discussing in the area of your responsibility and expertise?
A. No, it is not.
Q. And you testified I believe that you get a lot of things during the course of your affairs that you don't have time to read, is that correct?
A. That is correct.
Q. Mr. Levy, does Avatar Holdings control Florida Cities' operations on a daily basis?
A. No, it does not.
Q. Does it control the operations of any of its individual plants on a daily basis?
A. No, it does not.

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MR. HIRD: Your Honor, at this time, I'd like to move into evidence certain exhibits that have been designated as annual reports or board minutes of Avatar Holdings. I have discussed it with counsel during the break and I believe there are no objections.
MR. JACOBS: Well, what you said during the break was that some of them were incomplete. I said as long as they were complete, I have no objections.
MR. HIRD: I will give you the complete ones, Your Honor, and then to the extent any of these exhibits are incomplete, we have complete copies that can be substituted.
Exhibit 1 Avatar Holdings' 1994 annual report.
THE COURT: Wait a minute. All right.
Exhibit 1.
MR. HIRD: Avatar Holdings' Exhibit 1.
MR. JACOBS: Can counsel represent whether it's complete?
MR. HIRD: Yes, it is.
MR. JACOBS: No objection.
THE COURT: Be received.
MR. HIRD: Exhibit 10, Avatar Holdings' minutes of a board of directors meeting dated September 24, 1980 is complete.
THE COURT: It'll be received.
MR. HIRD: Exhibit 11, Avatar Holdings' minutes of a

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board of directors, dated 10-23-1980.
MR. JACOBS: Complete.
MR. HIRD: Complete.
THE COURT: Be received.
MR. HIRD: Exhibit 15, Avatar Holdings' minutes of a board of directors dated January 1 -- 25, 1990.
MR. JACOBS: Complete?
MR. HIRD: Complete.
THE COURT: Be received.
MR. HIRD: 17, Avatar Holdings' board meeting, date, January 1, 1931 -- January 31, 1991, complete.
THE COURT: Be received.
MR. HIRD: Exhibit 18, Avatar Holdings' board minutes dated 6-15-92, this is complete.
THE COURT: Be received.
MR. HIRD: Your Honor, the following exhibits we have in excerpted form. We do have complete copies to the Government if he wishes to see them. The Government had the full opportunity to review all of Avatar Holdings' board minutes, so we are offering them in their excerpted form. If that is not acceptable to the Government, we can replace the completed form. Exhibit 21.
THE COURT: This is among those now that you're talking about?
MR. HIRD: Pardon?

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THE COURT: This 21 is among those you're talking about?
MR. HIRD: Yes, the ones that I'm going to read are all of this variety.
MR. JACOBS: 21, in at least the version that was provided to us by Avatar Holdings, are not minutes of board meetings, they purport to be minutes of the audit committee meeting.
MR. HIRD: As Mr. Jacobs already established, the audit committee meetings are an exhibit to the board meeting. We do have the board minutes to which they were attached that can be provided as well to the Government if it's unacceptable for that reason.
MR. JACOBS: It is unacceptable if it's incomplete. If it's complete without the minutes of the board meeting, I think we established it is not complete.
MR. HIRD: We have the board minutes with us, we can attach that. The substance of what we wish to have it for is the audit committee minutes so we can have it admitted, either in its excerpted form or its whole form.
THE COURT: Well, do I already have the minutes; do we already have the minutes of the board meeting in evidence?
MR. HIRD: No, we do not, Your Honor. I can produce them, they can be authenticated through Mr. Levy or some other means. We simply -- and Mr. Jacobs personally was able to see

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the entire board minutes.
THE COURT: Well --
MR. JACOBS: It's true, I'm sorry, Your Honor.
THE COURT: All right.
We have documents here. The documents are -- these are exhibits that objections have been made to them. Now, what objections have been made by the Government with respect to this excerpted Exhibit 21?
MR. JACOBS: Incomplete under rule of evidence Rule 106.
THE COURT: Incomplete, well --
MR. HIRD: Federal Rule 106 is not an absolute bar. It simply provides the other party has the right to introduce the rest of the document. We can have the document entered as the audit committee minutes only or we have here that can be substituted the exhibit with the board minutes attached. In order not to clutter up the Court's record, I did not want to put in a longer document simply to get what was relevant which was the smaller portion.
THE COURT: How many of these do we have like this?
MR. HIRD: There's only four that we particularly wish to see added on. That's 21, 23, 24 and 25.
THE COURT: All right.
Well, let's go ahead and put the -- make it complete, satisfy the Government and can we do that sometime during the

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recess?
MR. HIRD: I can do that during the break, Your Honor, if we don't need Mr. Levy to authenticate the documents.
THE COURT: Okay.
MR. HIRD: There's only one other exhibit that I'd like Mr. Levy to authenticate, it's probably the only examination I think that is beyond the scope of what we have, if I may do that, it would --
THE COURT: Go ahead, ask your question.
BY MR. HIRD:
Q. Okay.
Mr. Levy, can you look at Avatar Holdings' Exhibit 3? Do you have that in front of you?
A. Yes, I do.
Q. Is that your marking file in the corner?
A. Yes, that's my marking, Mr. Hird.
Q. And if you could turn to the fourth page of the exhibit, see the words "call Bob Gordon" written in handwriting?
A. Yes.
Q. Is that your handwriting?
A. That is indeed my handwriting.
Q. Do these documents comprising Exhibit 3 come from your office?
A. Yes, I believe they do.
Q. Are these records that you keep in the ordinary course of

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your business as chairman of the board of Avatar Holdings?
A. Yes, although they would be probably filed in a warehouse sometime after about two years.
MR. HIRD: Your Honor, I move that Exhibit 3 be admitted in evidence.
MR. JACOBS: Your Honor?
THE COURT: Yes.
MR. JACOBS: May I be heard? Mr. Hird represented in open Court these were Mr. Levy's personal records and were not the documents, the business records of Avatar Holdings. I've just heard him say the opposite. He told the Magistrate that these were not produced to us as Avatar Holdings' records because they were Mr. Levy's personal records, at which point in time we had to go subpoena Mr. Levy. So to hear him now say these are Avatar Holdings' business records is somewhat inconsistent. We object. It's got to go one way or the other.
MR. HIRD: May I reply, Your Honor?
THE COURT: Yes.
MR. HIRD: I indicated that these were not records of Avatar Holding Company per se. What I've asked Mr. Levy today is whether these are business records that he keeps in the course of his duties as chairman of the board of Avatar Holdings. These are not from the official files of Avatar Holdings, but they were from the files that Mr. Levy keeps personally in connection with his responsibilities as Avatar

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Holdings Board of Directors, so I think the statements were consistent, but this is not from an official Avatar Holdings' file, but it is from the business files that he keeps for himself.
MR. JACOBS: Can't have it both ways, Your Honor. If he keeps them as Avatar Holdings' files, then they're Avatar Holdings' records. He's the chairman of the board of Avatar Holdings. Mr. Hird has argued repeatedly in pleadings and in open Court that these particular records were Mr. Levy's personal records.
Exhibit 3 also seems to contain three separate documents and would appear to be hearsay and hearsay within hearsay, certainly with respect to the second two.
MR. HIRD: Your Honor, I believe with respect to the second document, Mr. Levy identified that it was his handwriting on the documents, with respect to the third, it is clearly the document that is referred to and incorporated in the second.
THE COURT: I'm going to overrule and receive it.
MR. HIRD: Thank you, Your Honor.
Mr. Levy, thank you very much, I have no more questions.
And, Your Honor, with this inquiry, I don't believe I will need to bring Mr. Levy back.
THE COURT: All right.

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Okay.
Redirect.
MR. JACOBS: No redirect, Your Honor.
THE COURT: All right.
You have no redirect?
MR. BULLOCK: No.
THE COURT: Thank you very much, you may step down.
THE WITNESS: Thank you very much, sir.
THE COURT: Call your next witness.
MR. JACOBS: Your Honor, at this point in time, the United States would call James Elder, Dennis Gotman, Robert B. Gordon, Anton A. Reeves, III, John K. Sladkus and Lawrence Wilkov. All of these six individuals have refused to answer any substantive questions in this matter at deposition on the grounds that their responses would incriminate them and have asserted their Fifth Amendment Right not the respond. The depositions themselves are, I would proffer, the deposition testimony of these witnesses at this time as recorded on page 34 of the revised joint pre-trial statement. In addition, I would like to make an offer of proof.
THE COURT: What page?
MR. JACOBS: Page 34, Your Honor, joint pre-trial statement.
THE COURT: Yes.
MR. JACOBS: And in addition, I would make an offer

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of proof in lieu of the testimony of the witnesses who pled the Fifth Amendment because it's a bench trial. I've put it in writing and would like to submit it to the Court with the Court's permission.
MR. HIRD: Your Honor, I don't think we have seen this offer of proof.
THE COURT: Well, show it to counsel before you show it to me.
MR. JACOBS: I've got copies for counsel, sir, and the original.
THE COURT: Before you show it -- well, just hand it to the Clerk. Now, you're offering -- you're offering these portions of the depositions of the six witnesses that you named?
MR. JACOBS: Yes.
THE COURT: Which is set forth on page 34 of the joint pre-trial statement?
MR. JACOBS: Yes, Your Honor.
THE COURT: All right.
First of all, is there any objection to those portions of the depositions?
MR. BULLOCK: Your Honor, I would note, first of all, the Government has never attempted to list these people as witnesses in the joint pre-trial statement or anything filed or delivered to us subsequent to the joint pre-trial statement.

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MR. JACOBS: Your Honor – sorry.
THE COURT: Wait a minute.
MR. BULLOCK: We would also object under relevance of offering these portions of the depositions.
THE COURT: Now, let's take one thing at a time. If this is a list of depositions that the Government as indicated intends to introduce at trial, correct, depositions to be offered in evidence at trial?
MR. JACOBS: Yes, Your Honor.
THE COURT: I don't understand your first objection, counsel.
MR. BULLOCK: In the context of, if he is at the present time going to argue that he would call these people in his case in chief had he not – had they not pled the Fifth Amendment, we've never had any notice of the fact he would have called these people in his case in chief. He didn't list those as potential witnesses in the pre-trial statement.
THE COURT: Well, wait a minute. He's listed their depositions and certain pages and lines. I don't follow you.
MR. JACOBS: I might add, if I may.
MR. BULLOCK: Some of these people, in fact –
MR. JACOBS: I've also listed on page 15, I specifically stated in the same pre-trial statement that I would have called those witnesses but for the fact that they asserted the Fifth Amendment at deposition.

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MR. BULLOCK: I withdraw that.
MR. HIRD: I would like to make a specific – with respect to one of the individuals, John Sladkus, who we had initially indicated might be one of our witnesses, the Government objected to John Sladkus being on our witness list, so therefore I don't think the Government can thereby offer information concerning Mr. Sladkus' potential testimony.
THE COURT: Well, the Government objected to Mr. Sladkus being on your witness list?
MR. HIRD: That's correct, Your Honor.
MR. JACOBS: Only –
THE COURT: And was that ruled upon?
MR. HIRD: Ultimately, Mr. Sladkus' name was withdrawn. Actually, Your Honor, I think you probably did rule upon it in your order last Monday because it was briefed. We indicated –
THE COURT: You indicated in your response what?
MR. HIRD: Mr. Sladkus had been withdrawn.
MR. JACOBS: I believe the Court therefore ruled that issue is moot because Mr. Hird had withdrawn him as a witness.
THE COURT: Yeah. What was the issue?
MR. JACOBS: The issue was Mr. Hird listed Mr. Sladkus as a witness when we had deposed Mr. Sladkus. He asserted the Fifth Amendment Right, and therefore didn't testify. The Government's position was, well, if he's going to

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testify at trial, he has to be deposed first, and discovery had already closed, so we said that Mr. Hird couldn't call him as a witness. And therefore, Mr. Hird withdrew him from the witness list and the Court, as I recall Monday's order, said the issue was moot.
THE COURT: I did, I said the issue was moot because they had removed him from the witness list. That's what I said.
MR. HIRD: Yes, but we had no indication Mr. Sladkus would be treated as a witness by the Government.
THE COURT: He's been listed.
MR. HIRD: Not by the Government.
THE COURT: Yes, he has. Oh, okay, maybe – well, he is on page 34, his deposition.
MR. HIRD: I mean as a live witness.
MR. JACOBS: On Plaintiff's page 15, I said I would have listed all the witnesses, but for the fact they asserted their Fifth Amendment Rights at deposition. Especially notes the United States would call the witnesses who have asserted the Fifth Amendment at deposition, see section H, infra, which is indeed page 34. I believe I preserved the right in two places.
THE COURT: Okay, Mr. Bullock.
MR. BULLOCK: Your Honor, I have another separate objection, but I didn't want to interrupt.

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THE COURT: Yeah.
MR. BULLOCK: Your Honor, we had – this is the first time that the – at least Florida Cities has seen the offer of proof. I'm a little confused because as I understand –
THE COURT: Well now, wait just a minute. As I understand it, the Government has asked to introduce these depositions, that is not a separate issue.
MR. BULLOCK: Well, Your Honor, the offer of proof includes putting the depositions in. It's not clear whether just the depositions are going in. Mr. Jacobs also attached a number of exhibits to these depositions. It's not clear, I have not had the opportunity to figure out whether or not he's trying to include the exhibits which were attached to these depositions to bring them in as well.
THE COURT: Let me see the – well, have you – this is a thirty-five page document here. Have you tendered this to counsel before?
MR. JACOBS: Not before today, Your Honor. This is part of our case in chief, and as far as we're concerned, they're entitled to rebut it in their cases and we've offered it in in fairness to allow them to.
MR. HIRD: Your Honor, we have substantial objections to the offer of proof. I don't know whether you want to deal with that now or whether you want to deal just specifically with the depositions, but and we're prepared to deal with it,

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whichever sequence you want.
THE COURT: Well, I don't understand what this -- what is this document?
MR. JACOBS: This is my -- the Government's proffer, Your Honor, of what we would be able to show were these witnesses to testify.
THE COURT: They have not?
MR. JACOBS: They have refused to testify in response to any substantive questions.
THE COURT: Well, how do you determine what they would testify to?
MR. JACOBS: Based on the documentation. We asked the Court to draw adverse inferences in this civil matter through the documents. As I said in any opening statement, these witnesses did not testify, they have that right, but the Government has the right to ask the Court to draw adverse inferences from the failure to testify, and as I said in my opening statement, they've left a long paper trail and essentially what I've done for the Court here is taken the Court through the paper trail and suggested the adverse inferences that should be drawn.
MR. HIRD: Your Honor, two points --
THE COURT: Well now, just a minute.
MR. HIRD: Sorry, Your Honor.
THE COURT: Is this not more in the form of you're

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asking the Court, number one, assuming the Court receives in evidence those portions of the depositions wherein these witnesses take the Fifth Amendment and, of course, this is predicated, this offer or this document here is predicated on that, that is -- you're arguing what inferences the Court may draw from these various witnesses taking the Fifth Amendment during their depositions.
Now, is this not more in the form of arguments regarding reasonable inferences based upon the evidence that comes before the Court, including the claims of the Fifth Amendment than it is any separate items? This is not -- this is not evidence here, these are your arguments regarding the inferences the Court may legitimately draw based upon the evidence that is before the Court, including the claims of the Fifth Amendment.
MR. JACOBS: Yes, and based on the evidence that there are another perhaps twelve to fifteen documents that I would move into evidence at this time. The point is that at this point in the case, I would be calling six adverse witnesses, and I would be showing -- essentially, I would be showing the Court essentially through the testimony of those witnesses, as you saw me run Mr. Levy through certain documents, I would be introducing certain evidence. Because these individuals have refused to testify in a civil case, adverse inferences may be drawn. I'm simply setting forth here

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in this document and at this point in my case in chief what I would expect to be able to prove through the testimony of those witnesses, particularly the testimony of the Avatar witnesses, Mr. Getman, Mr. Gordon, Mr. Sladkus, Mr. Wilkov.
MR. HIRD: Your Honor, Mr. Bullock will go first.
THE COURT: Mr. Bullock.
MR. BULLOCK: Your Honor, a couple of issues. First of all, we're actually double checking the transcripts right now. I do not believe that at least in some of these depositions, Mr. Jacobs actually propounded questions to the witnesses, the answers of which he's now trying to infer negative because they took the Fifth Amendment.
Secondly, for example, I refer you to page 2 of this document where he starts out a listing of Avatar Holdings' key players, including Peter Sharp, a New York City real estate tycoon who took a close personal interest in his investment. Obviously, Mr. Sharp's deceased. I don't know if Mr. Jacobs' trying to put evidence in because he can't get hold of Mr. Sharp, but at this point in the case, basically to turn in a brief where he's basically writing the testimony these people I think is highly improper and not a legitimate offer of proof.
MR. JACOBS: If it's just --
MR. HIRD: May --
THE COURT: Sir?
MR. HIRD: Following the points of Mr. Bullock, in

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none of these instances were there any specific questions asked in the ten or fifteen minutes, these deposition ended on page 10 or 12, so there were no specific questions asked.
With respect to the documents, as the Court has seen, the substantial number of documents that were admitted into evidence, Mr. Jacobs can argue whatever inferences he can for those documents, but specific questions were not propounded to these witnesses.
Mr. Sharp, as Mr. Bullock said, was dead, so he shouldn't be included in this, and is the first person mentioned in this list, and beyond the -- with respect to Avatar Holdings, in particular, two of the individuals who are recited were former employees. Mr. Wilkov has not only left the company at the time he was deposed, but he had filed suit against the company in connection with his termination. Moreover, he was deposed before Avatar Holdings was even in the case.
Mr. Sladkus, as you have just seen, left the company in 1991 and was deposed over the summer of 1995. Mr. Getman who was the third individual was deposed both for Florida Cities and Avatar Holdings, but is an attorney, and many of the specific questions would have been objected to on the grounds of the attorney/client privilege.
What we have here is an effort to embellish on inferences that he would have the Court draw from the

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documents. We have here a post trial brief that is rephrased as an offer of proof and we think this document is wholly illegitimate under the circumstances. We also don't think that any adverse inference should be drawn against Avatar Holdings because as you heard, we had the chairman of the board testify. He's been able to depose the president, the vice president of financial operations, he would have been able to depose the secretary, Ms. Kerrigan, if he called her in time. We have substantial officers of Avatar Holdings to testify.

Thank you, Your Honor.

MR. JACOBS: Your Honor, on the point of depositions, I forgive Mr. Hird. I believe he was only present at one of these six. I forgive him for saying that I didn't ask substantive questions because I did. And in fact, there were stipulations made that these witnesses would refuse to answer any substantive questions and the pattern that I followed was I went through each facility and I asked questions about each facility, I handed over literally dozens if not in some cases over a hundred documents and asked them if they recognized them and I went through a series of questions, a litany, if you will, and to each question the witness asserted his Fifth Amendment Rights. In fact, in each instance, you'll recall yesterday we saw a sample of a cue card, if you will, that said I respectfully decline to answer. In fact, each of these witnesses would state their name and their address and I think

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that was about it. When I got to how are you employed, that is when they started asserting the Fifth Amendment Right.

And then I went through my litany relating to each facility. I proffered the documents that I would have asked them about. Those documents are attached to the depositions. The depositions have already been filed with the exhibits.

So I think I've got my record here that I would have had the opportunity to elicit substantial testimony from these witnesses. And all I'm doing now in my case in chief is making an offer of proof of what I could prove at this point in my case in chief if these witnesses took the stand and testified. And in a civil matter, I believe I'm entitled to make that offer.

THE COURT: Now, you've cited Jacksonville Electric versus Bermooth. Where is the body of law that deals with the inferences that may be drawn in a civil case from the Defendant -- a witness invoking the Fifth Amendment privilege?

MR. JACOBS: A moment, Your Honor, I think I have it.

In the United States trial memorandum, page 16. First of all, footnote seventeen, we set out again the --

THE COURT: Just a moment.

MR. JACOBS: Sorry.

THE COURT: What page?

MR. JACOBS: Page 16 of the Government's trial memorandum. We set out in footnote seventeen the record of the

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deposition testimony.

THE COURT: Right.

MR. JACOBS: Those individuals who pled the Fifth Amendment.

THE COURT: Right.

MR. JACOBS: And then at the bottom of the same page, we suggest the adverse inference.

THE COURT: Right.

MR. JACOBS: And the body of law following.

THE COURT: Okay.

MR. JACOBS: Your Honor, this is not an attempt at surprise. To the contrary, we're right to argue this later on, perhaps in post trial briefs. It might be said the Defendants had not had an opportunity to respond. By offering this at this point in time, I think the Defendants are in fact advantaged by being able to rebut to the extent that they're capable of my offer in the context of their cases.

And in particular, this document, as I said, relates mostly to the inferences to be drawn from the failure of the Avatar witnesses to testify, and based on Mr. Hird's request that the Avatar Holdings part of the case follow the Florida Cities part of the case which is expected, based on what we heard just after the recess to be much more lengthy, seventeen or nineteen witnesses as opposed to two, I think that will give Avatar Holdings sufficient time to address these adverse

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inferences that we've suggested. There is no surprise intended and there is no unfairness intended.

THE COURT: Okay.

MR. SCROGGIN: May Florida Cities be heard?

THE COURT: Sir?

MR. SCROGGIN: May Florida Cities address the issues raised by --

THE COURT: I thought you had? Who is doing that; both of you now?

MR. BULLOCK: Your Honor, the only difference would be is in case the Court had any question about the actual deposition, Mr. Scroggin was at the deposition, also has copies of --

THE COURT: All right.

MR. SCROGGIN: Thank you, Your Honor. I was present I believe at each one of the depositions at which the Fifth Amendment was asserted. I can state personally that the procedures for these was essentially in an assembly line process wherein on some occasions hundreds of documents were introduced without being identified other than by number. No questions were propounded regarding each of the exhibits that were produced, and indeed, several of these Fifth Amendment depositions took an hour, sometimes less, at two or three times were scheduled for a single morning. In one instance, counsel for the United States asked that we simply accept a boxful of

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documents without seeing what was in the box as though those would appear later as exhibits for the deposition.

We insisted they be taken out of the box and at least numbered, but they were neither reviewed, identified or discussed. And in most instances, specific questions other than the broadest of questions regarding the names of facilities were propounded, sometimes a dozen questions and the deposition was over.

Florida Cities' position would be that the inferences were not set up in a manner because the questions were not propounded in a manner that would allow any inference to be draw.

MR. HIRD: Your Honor, may I speak for Avatar?

THE COURT: Wait a minute, wait a minute.

MR. SCROGGIN: And finally, Your Honor, I would point out both the president, Mr. Gerald Allen and vice president, Mr. Paul Bradtmiller of Florida Cities have indeed agreed to testify and have waived their Fifth Amendment Rights.

MR. JACOBS: Your Honor, may I be heard on the matter of depositions?

THE COURT: Yes.

MR. JACOBS: Your Honor, these exhibits were actually pre-marked at the request of Florida Cities to expedite the process. They wanted their witnesses not to be humiliated, they wanted to be able to come in quickly, assert their rights

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and leave. We accommodated their request in that respect. In each deposition, I suggest that you will see that I've asked questions about each facility, substantive questions about each facility. When I handed the documents over, they were identified by exhibit number and the first question was, do you recognize any of the documents and the response was, I refuse to respond on the grounds of the Fifth Amendment, what you saw on that cue card yesterday, and at that point, I entertained a stipulation by Florida Cities' counsel that the witness would take the Fifth Amendment in response to any substantive question.

And at that point, I think I've set my record clear. There is nothing more to be done. I don't think I need to spend two days with each witness on each exhibit. I think the record shows clearly that the witness refused to testify beyond, as I say, his name and address.

THE COURT: All right, Mr. Hird.

MR. HIRD: Your Honor, looking quickly at this offer of proof which is, as we said, we've just seen, Mr. Jacobs wishes to draw adverse witness inference from five individuals, the first is Peter Sharp. Peter Sharp is dead. I don't think there is any adverse inference that can be drawn from a man being unable to testify because he's dead. The second is John Sladkus as the Court has heard, recently --

THE COURT: Well now, just a minute. What's the name

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of the first?

MR. HIRD: Peter Sharp.

THE COURT: Sharp. He could have been called as an adverse witness?

MR. JACOBS: Except he's deceased.

THE COURT: I understand that.

MR. JACOBS: He's unavailable.

MR. HIRD: He died in 1992. So there's no --

THE COURT: Now, the Government sought to take his deposition?

MR. HIRD: no, Your Honor, no.

MR. JACOBS: He was already deceased.

THE COURT: He was already deceased.

MR. JACOBS: Which I think makes him unavailable.

MR. HIRD: I don't think leads to an adverse witness inference.

MR. JACOBS: Perhaps not an adverse inference, certainly an inference from the paper trail, again the documentation.

THE COURT: Go ahead.

MR. HIRD: Okay.

I'm going to skip to Mr. Wilkov and go back to Sladkus. Mr. Wilkov was deposed at a time when he was no longer employed by Avatar Holdings. He had filed a lawsuit against Avatar Holdings and he was deposed before Avatar

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Holdings was a party in this case.

THE COURT: His name is what?

MR. HIRD: Lawrence Wilkov.

THE COURT: All right.

MR. HIRD: W-I-L-K-O-V. Fifth Circuit recognized the problem in the case of FDIC versus Fidelity and Deposit Company of Maryland, 45 F 3rd, 969, it's a 1995 decision, indicating that a problem in drawing inferences where you have a disgruntled ex-employee who may invoke the privilege to hurt his former employer. Here, we have a situation where an employee who obviously left under bad circumstances that caused him to sue his employer. The deposition itself was not taken a at time Avatar Holdings is in the case. It's inappropriate to draw an inference from that.

Mr. Sladkus, John Sladkus was deposed in the summer of 1995. Mr. Sladkus resigned from his connection with Avatar Holdings in 1991. He is therefore a former employee, although he -- I would not characterize him as a disgruntled former employee. I think this period of separation is so long that it's inappropriate to draw the inference with respect Mr. Sladkus.

There are two more individuals, one is Robert Gordon. You've heard the testimony today that Robert Gordon has never been an employee, officer or director of Avatar Holdings. He is president of Avatar Utilities. But he has no employment

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relationship with Avatar Holdings, therefore it is wholly inappropriate to draw the inference.

The last individual is Dennis Getman who holds the position of being general counsel to both Avatar Holdings and Florida Cities and was originally called, I believe, his deposition was noticed I believe at the time when Florida Cities was the only Defendant in the case. Had there been full questioning of Mr. Getman, there may have been numerous legitimate invocations of the attorney/client privilege since Mr. Getman's role is as general counsel, the two entities.

In this situation, Your Honor, Avatar Holdings' chairman of the board has just been – has just testified. The president, Edward Jacobson was deposed and will testify. Charles McNairy, the vice president for financial matters, was deposed and will testify. Juanita Kerrigan, the secretary of the corporation signed interrogatory responses, was originally on our witness list, been dropped, we don't believe she's necessary, but she would have been able to testify.

To draw these inferences we think is illegitimate and I would point out that the reason why these witnesses invoked the Fifth Amendment had to do with the scope of the Weisenoff case which it has been brought to your attention earlier which indicated that very broad criminal liability rule in connection with the criminal enforcement of the Clean Water Act. Prior to that case, there was a general perception that a knowing

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violation of the Clean Water Act required you to know that what you were doing was a violation of the Act itself. That case said no, in order to be criminally liable, all the Government has to prove is that you know what you did.

And certain individuals in the wake of that case made their personal decision to take the Fifth Amendment, including Mr. Sladkus and Mr. Wilkov, at that point and with no assertion of Avatar Holdings, and therefore, had ever reason to put personal considerations ahead of company considerations, so under the circumstances, we think it's highly I believe appropriate to draw these inferences.

If the Government believes that there is such a clear document trail, he has those documents in evidence, he can ask this Court to draw what inferences he wants, but to make up this inference just out of documents I think is illegitimate under the facts of this case where so many Avatar Holdings' employees have testified and the few – and the two or three that haven't were not employees at the time they were deposed, one employee is dead and the last one is a special case and general counsel and could have invoked the attorney/client privilege.

MR. JACOBS: May I, Your Honor, briefly?

THE COURT: Yes.

MR. JACOBS: With respect to Mr. Getman who is executive vice president according to Mr. Levy's own testimony

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this morning, the other point of Mr. Levy's testimony was Mr. Getman has been with Avatar Holdings back almost as far as Mr. Levy has been. Likewise, Mr. Gordon preceded Mr. Levy in terms of his affiliation with Avatar Utilities or whatever it was known before it became Avatar.

And finally, Mr. Sladkus, as you heard Mr. Levy, was one of three individuals in addition to Mr. Levy and Mr. Sharp that had the authority to expend funds over one hundred thousand dollars. It is true that Mr. Jacobson, the present president of Avatar Holdings, has testified. It is also true based on Mr. Levy's testimony that Mr. Jacobson did not become affiliated with the company until 1992.

Essentially, the people who are being offered by Avatar Holdings as willing witnesses here are the people who either came in after the fact or, as Mr. Levy is maintaining, has no recollection or knowledge of the violation.

We would be able to establish through this offer of proof and the documents that it references that the three individuals, Mr. Getman, Mr. Gordon and Mr. Sladkus were highly knowledgeable of the violation, highly involved on behalf of Avatar Holdings in decision-making directly relating to these violations.

THE COURT: All right.

Yes, sir.

MR. BULLOCK: Would Your Honor consider a request to

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take this under advisement till we can at least provide some kind of legal memorandum on the validity of this?

THE COURT: Did you address this in your trial memorandum?

MR. BULLOCK: No, Your Honor. We addressed the overall Fifth Amendment issue in the Summary Judgment. We have not addressed the propriety of the offer of proof in this context nor has either side actually submitted the actual testimony, copies of the depositions.

MR. JACOBS: We filed them, Your Honor.

THE COURT: All right.

Well, I don't think it would be appropriate for the Court to draw any inferences from the deposition of Lawrence Wilkov who is no longer with Avatar and indeed demonstrated some – certainly had no – well, demonstrated hostility by the fact he himself filed suit against Avatar.

As far as Sharp is concerned, I don't know, I don't understand how the Government is entitled, if I understand correctly, he was never deposed, he died before he was ever deposed. I don't know how you can assert the same rationale for drawing inferences against Avatar by reason of his unavailability at trial. Talk to me a little bit about that.

MR. JACOBS: Well, by all means, I don't think we have the same right under the line of cases that I cited to in my trial memorandum because he did not assert the Fifth

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Amendment. He is unavailable by definition. And therefore, we can suggest inferences from the documents that he's left behind. But I don't think we –

THE COURT: Yeah, yeah, that's argument. I mean, that's – you'd be able to do that or at least argue it.

MR. JACOBS: The reason for the introduction to Mr. Sharp actually at the beginning of the document is just to put in prospective some of the other exhibits that are cited in the offer of proof because so many of them went from Sharp to Sladkus, as you have seen this morning, through Wilkov or Sharp to Wilkov and Sladkus, and/or to Levy or Gordon to Sharp. And if it was just that particular portion of the document, I'd be happy to have the Court accept the document with excising the section on Peter Sharp. That again is on the bottom of page 2 and ends on the top of page 4, because I think I've elicited that information through Mr. Levy, so I'd be happy to have that stricken from the document if the concern is that he does not fall into the same category as the witnesses who plead the Fifth Amendment which I would concede in terms of adverse inferences.

THE COURT: Well, okay, I'm going to permit counsel for the Defendants to brief this issue and I'll take this under advisement, and I need to know, the Government is offering the depositions of which of these persons again; they're listed on page 34?

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MR. JACOBS: Yes, sir. James Elder, Dennis Getman, Robert Gordon, Anton A. Reeves, III, John K. Sladkus and Lawrence Wilkov.

THE COURT: I've already ruled on Lawrence Wilkov. I'm not going to -- I'm not going to allow that deposition, sir.

MR. HIRD: That was the clarification that I was standing to ask you about because I thought you had. I wasn't certain.

THE COURT: Now, now you were going to offer into evidence documents?

MR. JACOBS: Yes, Your Honor. Government's 16.

THE COURT: Well, how many of these are we talking about?

MR. JACOBS: It's a very short list.

THE COURT: You said very briefly yesterday afternoon, too, so you better -- they will be. How many are there?

MR. JACOBS: Yes, Judge.

(Brief Pause.)

Thirty-three, Your Honor.

THE COURT: Thirty-three?

MR. JACOBS: And I can't tell you how many --

THE COURT: Brief is relative -- short is relative, isn't it?

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MR. JACOBS: I'm not sure there will be objections to that many, although I can't speak to that.

Is 16 in already?

THE CLERK: Yes.

THE COURT: See, there are only thirty-two now.

MR. JACOBS: Briefer than I thought.

Is 26 and 30, are they in also? I think they might be?

THE CLERK: 26 and 30, yes.

MR. JACOBS: And 34 is as well, is it not?

THE CLERK: Yes.

MR. JACOBS: I'm sorry, I didn't do my homework. 38 is as well?

THE CLERK: No.

MR. JACOBS: Move 38 in.

MR. HIRD: Your Honor, once again, 38 is subject to, I guess, code one and code two objections.

THE COURT: All right.

Overruled, it will be received.

MR. JACOBS: 51 I believe is already in.

THE CLERK: No.

MR. JACOBS: Forgive me. Then I'll move 51.

MR. HIRD: We have no objection to 51.

THE COURT: Be received.

MR. JACOBS: 52.

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MR. HIRD: I believe 52 is in.

THE CLERK: No.

MR. HIRD: This also is a code one and code two objection, Your Honor.

THE COURT: All right.

It'll be received.

MR. JACOBS: 58.

MR. HIRD: This is Avatar Holdings, we have no objection.

THE COURT: Be received.

MR. JACOBS: 65.

MR. HIRD: We have no objection.

THE COURT: Be received.

MR. JACOBS: 81.

MR. HIRD: This has a code one and code two objection, Your Honor.

THE COURT: All right. It will be received.

MR. JACOBS: 82.

MR. HIRD: Code one and code two objection, Your Honor.

THE COURT: It'll be received.

MR. JACOBS: 83.

MR. HIRD: Code one and code two objection, Your Honor.

THE COURT: Will be received.

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MR. JACOBS: I believe 99 is in.
THE CLERK: Yes.
MR. JACOBS: I believe 156 is in.
THE CLERK: Yes.
MR. JACOBS: Is 156 in?
THE CLERK: Yes.
THE COURT: All right.
MR. JACOBS: 196.
MR. HIRD: We have no objection.
THE COURT: Be received.
MR. JACOBS: 201.
THE COURT: I thought that was in.
THE CLERK: No, it's not.
MR. HIRD: No objection.
THE COURT: Be received.
MR. JACOBS: 203.
MR. HIRD: No objection.
THE COURT: Be received.
MR. JACOBS: 273, these are minutes.
MR. HIRD: No objection.
THE COURT: Be received.
MR. JACOBS: 383.
MR. HIRD: Your Honor, this is a code two objection.
THE COURT: All right. Overruled, it will be received.

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MR. JACOBS: 386.
MR. HIRD: No objection.
THE COURT: Be received.
MR. JACOBS: 403.
MR. HIRD: This is a code two objection, Your Honor.
THE COURT: Overruled, be received.
MR. JACOBS: 462.
MR. HIRD: We have no objection to that one.
THE COURT: Received.
MR. JACOBS: 496.
MR. HIRD: We have no objection to that one.
THE COURT: Be received.
MR. JACOBS: 497.
MR. HIRD: No objection to that one.
THE COURT: Received.
MR. JACOBS: 513.
MR. HIRD: Your Honor, this is Mr. Sladkus' statement invoking the Fifth Amendment. I believe that is what you just took under advisement.
MR. JACOBS: I believe that is the cue sheet.
THE COURT: Cue sheet, oh yeah.
MR. JACOBS: If the Court wants to consider that with the offer of proof.
THE COURT: Yeah, that's going to be within the parameter of what I'm inviting counsel to brief. Okay, so I'll take that under advisement.

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MR. JACOBS: Likewise, 515, it's another cue sheet.
MR. HIRD: I believe that's on Wilkov. I think you already ruled on Mr. Wilkov.
THE COURT: Yes, I have. That is Wilkov's?
MR. HIRD: Yes.
THE COURT: Okay, well – is that Wilkov?
MR. QUINN: 515 is Lawrence Wilkov.
THE COURT: Yes, I'll sustain it.
MR. JACOBS: 515, it's a cue sheet for Mr. Elder.
MR. BULLOCK: Your Honor, wouldn't that also be the scope of the – wouldn't that also be within the scope of what you are holding in abeyance?
THE COURT: Yes.
MR. BULLOCK: Thank you.
THE COURT: Reserve on that.
MR. JACOBS: 522, these are minutes.
MR. HIRD: No objection.
THE COURT: Be received.
MR. JACOBS: 521, also minutes, I believe.
MR. HIRD: No objection.
THE COURT: Be, received.
MR. JACOBS: 546, this is an annual report, 1990, of Avatar Holdings.
MR. HIRD: No objection.

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THE COURT: Be received.
MR. JACOBS: 560.
MR. HIRD: No objection.
THE COURT: Be received.
MR. JACOBS: 568.
MR. HIRD: No objection.
THE COURT: Received.
MR. JACOBS: 579.
MR. HIRD: No objection.
THE COURT: Received.
Isn't that thirty-three?
MR. JACOBS: I'm sorry, sir?
THE COURT: Haven't we gotten past thirty-three in the exhibits?
MR. JACOBS: I'm on my last one.
THE COURT: Good.
MR. JACOBS: I'll count them and let you know if I was wrong again.
THE COURT: No. You got one more?
MR. JACOBS: 593 should be the last one, sir.
MR. HIRD: I'm sorry, 593?
THE COURT: 593.
MR. JACOBS: Yes.
MR. HIRD: We have no objection.
THE COURT: Be received.

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Okay.
I need to give counsel a time within which you'll be expected to address these issues here. I guess it comes -- it'll probably come as no surprise to you I'm probably not going to announce my ruling at the end of this case. I don't anticipate doing that. Frankly, the only reason why I would suggest that the Court has to have your response right away would be for the Court to rule on a motion made at the close of the Plaintiff's case which may be coming shortly, but when can you have your responses ready?
MR. HIRD: May we confer, Your Honor?
THE COURT: Yes, sir.
(Brief pause.)
MR. BULLOCK: Your Honor, would the Court consider Wednesday?
THE COURT: You want to be heard?
MR. JACOBS: Will we have the opportunity after Wednesday to respond? I don't mind if the Court wants to take the matter under submission. You don't expect to rule before the end of the case as I understand what the Court just said.
THE COURT: Yeah.
MR. JACOBS: We can do it in the context of --
THE COURT: Really, what we're talking about here --
MR. JACOBS: Do you want to do this in the context of post trial briefs? I have no problem with that, Your Honor.

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THE COURT: Well, that might be the best way to handle it.
MR. HIRD: Your Honor, Avatar Holdings was contemplating a Rule 52-C motion at the time that the Government finishes its case and if it's inconvenient for the Court, obviously we'll deal with it, but it had been our hope to put that motion forward in that way, hopefully.
Avatar Holdings had been planning a Rule 52-C motion when the Government finishes its case. We don't believe the Government has proven liability against Avatar Holdings. Obviously this is an issue that needs to be resolved before, that if the Court is more comfortable with doing it in the scope of post trial briefs, we obviously exceed to the Court, however, we don't intend to pursue a motion that the Court does not feel it's prepared to deal with, but if there's any matter which we can schedule so our 52-C motion can be considered and perhaps avoids us to unnecessarily produce witnesses, we would appreciate it.
MR. JACOBS: I'm not sure what he just proposed. If this is helpful, we probably have in evidence roughly five hundred documents already, many of which we would argue will establish Avatar Holdings' liability. If that relates to his upcoming motion, we just haven't had a chance to argue it. We argue some of these obviously in the offer of proof and again, in fairness, we really did intend the other side to rebut this

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in their case through evidence that they can present. They're sort of in control of the cards here because they have been able to pick which witnesses testify and which don't. It's a luxury we haven't had in terms of calling their witnesses.
THE COURT: Well, let me consider that and let you know by the end of the day how I think we ought to best handle this issue. When we first started talking about this and when I heard Mr. Jacobs talking about the number of exhibits, the exhibits are coming in and there is no uncertainty with respect to the exhibits themselves, I'm not talking about the cue cards here, and so, there is no uncertainty anymore regarding those exhibits. The only issue is as to which if any of these witnesses who have pled the Fifth Amendment is the Court going to permit the Government to rely upon adverse -- that is adverse to the Defendant's inferences.
MR. HIRD: And also what inferences can be drawn, Your Honor.
THE COURT: And what inferences can be drawn.
MR. JACOBS: Your Honor, again, there was no unfairness intended and if they want to rebut the offer during their cases or even in their post trial brief, I have no problem with that. In a sense, I've shown my hand as opposed to waiting till that point in time.
THE COURT: All right.
Well, Mr. Hird, frankly what the Court may wind up

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doing and likely will be doing is reserving ruling on your motion that you'll be making at the close of the Government's case and so I don't think that you're going to be prejudiced by the Court's providing for post trial motions or memoranda addressing this particular issue, but I'll hear you on your motion at the close of the Plaintiff's case and I haven't set that in concrete as yet.
MR. HIRD: Yes, Your Honor.
MR. BULLOCK: Your Honor, just one other point, two other points, just briefly. As you know, we have not had a chance to read this document. It's unclear from this document, at least a cursory review, as to how many of these documents are offered as proof inferences against which specific proposed witnesses or these individuals that the Plaintiff is trying to claim the Court should draw an adverse inference from. And I don't know if that's something you want to -- if you wanted to look at the documents this afternoon and see if that addressed any of the issues or not. And the other question is whether or not this is a brief of some sort and we could be excused from the Court's page limit as well since this is thirty-five pages as I assume it's either ten or fifteen pages over the Court's page limit for a brief.
MR. JACOBS: Your Honor, we stopped at thirty-five based on the precedent that you set earlier in this case when we submitted something in excess of thirty-five and you

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departed back to thirty-five and that is why we stopped at thirty-five here. There was, as I said before, fifteen years history to cover.

THE COURT: Well now, let me – let me make sure I understand. The Court is being asked to draw certain inferences from the invocation of the Fifth Amendment by these various witnesses. And are the – is the Government -- well, let me see.

MR. BULLOCK: Your Honor, I may be able to point you to --

THE COURT: Yes.

MR. BULLOCK: You look, for example, at page 34, there is a footnote which lists the whole slew of documents that the Government's claiming. These are other trial exhibits which support further the inferences suggested, but it's not identified which documents against which individuals to draw what inferences against which companies.

MR. JACOBS: Judge, this document relates almost exclusively to the liability of Avatar Holdings. I'm not sure we – only peripherally do we have adverse inferences with respect to Florida Cities for what that is worth.

THE COURT: Is that clear from your written submission?

MR. JACOBS: I think it should be, Your Honor. I perhaps can enlighten upon that.

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THE COURT: All right, I tell you what, Counsel, you'll have a greater opportunity to absorb this document. We have spent a considerable amount of time on this this afternoon, and I think that you know I don't have to necessarily put it in concrete this afternoon as to how we're going to deal with this. I think after you have had an opportunity to assimilate this, we can perhaps address procedurally how we best ought to approach this.

This is a fairly unusual situation here and frankly, I'm groping a little bit at this point and I don't doubt that in a civil case that certain inferences may be drawn by reason of a witness who is associated with a party in the case invoking the Fifth Amendment. But, just how far that can go, and I don't know at this point, so, I'll let you know when – I'll not require a response sooner than Wednesday, and may extend that further. So, perhaps we'll discuss it further in the morning. Okay.

Call your next witness.

MR. QUINN: Yes, Your Honor. The United States calls Ms. Eileen Zimmer.

Thereupon,

EILEEN ZIMMER,

having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

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THE CLERK: Take a seat in the witness stand. State your name and spell your last name for the record, please.

THE WITNESS: My name is Eileen Zimmer, Z-I-M-M-E-R.

DIRECT EXAMINATION

BY MR. QUINN:

Q. Thank you. Good afternoon, Ms. Zimmer.

A. Good afternoon.

MR. QUINN: Your Honor, we would like to make an offer of proof in light of the Court's ruling, it will not be long.

Were Ms. Zimmer allowed to testify as to the wrongful profits analysis, she would testify to those areas as set forth in parts one and three of United States Exhibit for identification 598.

BY MR. QUINN:

Q. Ms. Zimmer, where do you work?

A. I work for the Antitrust Division of the Department of Justice?

Q. What is your title at the United States Department of Justice, Antitrust Division?

A. I'm a senior financial analyst with the Corporate Finance Department.

Q. As senior financial analyst with the Corporate Finance Department, which unit did you work for?

A. Corporate Finance Unit.

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Q. As senior financial analyst with that unit, did you analyze wrongful profits and ability to pay in this case?

A. Yes, I did.

Q. Have you prepared an expert report in this action?

A. Yes, I have.

Q. And I'd like the witness to be shown Exhibit 598, please. My question is going to be is that your report when you get to it.

A. Yes, it looks like it is.

Q. Have you formed an opinion as to the ability of Florida Cities Water Company to pay a civil penalty in this case?

A. Yes, I have.

Q. Have you formed an opinion as to the economic impact of payment of a civil penalty on Florida Cities Water Company?

A. Yes, I have.

Q. Have you formed an opinion as to the ability of Avatar Holdings, Incorporated to pay a civil penalty in this case?

A. Yes, I have.

Q. And have you formed an opinion as to the economic impact of payment of a civil penalty on Avatar Holdings, Incorporated?

A. Yes, I have.

Q. Can I ask you some questions about your background as a financial analyst, Ms. Zimmer?

Where did you earn your undergraduate degree?

A. I earned it at Penn State University.

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Q. Which year?
A. 1976.
Q. Do you also have a Masters degree in business administration?
A. Yes, I do.
Q. And where did you get that?
A. From the George Washington University.
Q. And when did you get that?
A. In 1978.
Q. Have you taken any other graduate courses?
A. No, I haven't.
Q. And are you a certified financial analyst?
A. I'm a chartered financial analyst.
Q. Excuse me. Can you tell me what the requirements are to become a chartered financial analyst?
A. The chartered financial analyst program or CFA program is a program, is a three year course of study that covers a range of business disciplines including accounting, economic quantitative analysis, fixed incomes securities, equities, security analysis, and there's an ethics portion, and in addition, there is a three year experience requirement.
Q. Is this a self-study program, Ms. Zimmer?
A. It can be a self-study program. There's also courses, there is a national professional agency that runs the CFA program and each regional area such as for instance Washington,

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DC, has a regional chapter and they run review courses.
Q. Did you complete the required course work, Ms. Zimmer?
A. Yes, I did.
Q. When did you do that?
A. 1991?
Q. Did you complete the experience requirements?
A. Yes, I did.
Q. About how many chartered financial analysts are there in the United States?
A. I'm not sure of the exact number, but it's somewhere in the range of about thirty-five thousand.
Q. Can you tell be how does a chartered financial analyst differ from a certified public accountant?
A. A certified public accountant or a CPA is a professional accreditation in the acting field. The CFA program is a professional accreditation in, as I said, it covers a broader range of business disciplines.
Q. Have you taught any seminars in the field of financial analysis?
A. Within the Department of Justice, I have taught a few seminars for the various divisions within the Department and the AUSA's.
Q. And what areas were those seminars?
A. It was in understanding financial statements, bankruptcy and evaluating a company's ability to pay.

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Q. Ms. Zimmer, could you please briefly describe your employment history?
A. Yes. After I graduated, from Penn State, I worked as a statistician at the Census Bureau, U. S. Bureau of the Census, and then I went and obtained my MBA from the George Washington University. After I graduated, I worked for about a year for Washington Gas Light Company which is a public utility in the DC area. And after that, I worked for the Federal Energy Regulatory Commission for about five years. And after that, I started my job with the Department of Justice. I've been at Justice for twelve years.
Q. And has all that time been in the Antitrust Division?
A. Yes.
Q. Thank you. Can you please briefly describe your experience in determining a company's ability to pay a civil penalty in separate cases?
A. Well, I have twelve years of experience at Justice in doing that type of analysis, over twelve years.
Q. About how many cases or companies have you analyzed to determine their ability to pay a civil penalty?
A. I don't have an exact count, but it's hundreds of cases.
Q. And other than corporations, have you also analyzed other entities' ability to pay civil penalties?
A. Yes.
Q. That would still be within the same hundreds of cases?

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A. Right.
Q. Thank you. Can you please tell me a little bit about the work that you did in the U. S. versus Heater Boil Company and Sonny Wayne Mash? What was the work for?
A. That was in an ability to pay, that was for a sentencing hearing.
Q. And when was that?
A. I'm not -- I think it was in 1993, but I'm not sure. It's listed on my CV. It was antitrust price fixing sentencing hearing.
Q. About how many cases have you analyzed ability to pay in antitrust cases?
A. I really don't know. The number I gave previously included ability to pay cases in all of the divisions.
Q. And which of those divisions, please.
A. The Antitrust Division, the Civil Division and what is now known as the Environment and Natural Resources Division.
Q. Do you sometimes do analysis when the United States is a Defendant in a case?
A. Yes. Do you mean for ability to pay?
Q. Yes?
A. No.
Q. Do you sometimes testify when the United States is a Defendant, though?
THE COURT: You mean for the United States?

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BY MR. QUINN:
Q. For the United States. Withdrawn.
Do you ever do work in cases in which the United States is a Defendant?
A. Yes, I do.
Q. Thank you. And have you ever determined a company's economic benefit from non-compliance with a law or regulation?
A. Yes, I have.
Q. About how many times over the course of your twelve years?
A. The cases that I've worked on determining economic benefit were environmental cases and I have testified at my deposition that I had three cases that I worked on, three cases with regards to that.
Q. Have you ever analyzed wrongful profits which inured as a result of a violation of law or regulation?
MR. HIRD: Your Honor, I do believe we're getting to the point where it has been ruled on on our motion in limine.
THE COURT: Appears so.
MR. QUINN: I withdraw the question.
Your Honor, at this time, I'd proffer Ms. Eileen Zimmer as an expert witness in the area of financial analysis.
THE COURT: Okay, proceed.
BY MR. QUINN:
Q. Ms. Zimmer, could you please tell me what economic

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benefit means?
A. Economic benefit –
MR. HIRD: Your Honor, what I'm concerned about, we've set forth in our brief what we understood the law to be in economic benefits. You accepted our view, Magistrate Swartz endorsed it. That's fine. if this is another argument as to why wrongful profits should be used, I would object.
MR. QUINN: Your Honor, this is not another argument about wrongful profits. I'm merely getting into some definitions about what economic benefit is.
THE COURT: All right.
MR. HIRD: Also, I would like to point out there is nothing in her expert witness report about economic benefit other than wrongful profits analysis and therefore if they're going to substitute some additional numbers about economic benefit, we would most intensely object.
MR. QUINN: Ms. Zimmer is not going to talk about any numbers, Your Honor.
THE COURT: All right.
BY MR. QUINN:
Q. My question was, can you tell me what does economic benefits mean in your opinion, Ms. Zimmer?
MR. HIRD: Objection, Your Honor, are we talking under the Clean Water Act or talking generally?
MR. QUINN: I withdraw the gentleman.

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BY MR. QUINN:
Q. Under the Clean Water Act, what does the term economic benefit mean to you?
MR. HIRD: Objection, calls for a legal conclusion.
THE COURT: I'll overrule the objection. I'm not sure where we are going with this right now, but go ahead and answer the question.
THE WITNESS: In my opinion, economic benefit is the gain derived by an entity as a result of not being in compliance with a law. I guess in your example, it's the Clean Water Act.
BY MR. QUINN:
Q. Have you ever heard of the United States EPA's Ben Model?
A. Yes, I have.
Q. What is it, please?
A. The Ben Model is a computer model or program that was designed to be – I'll use the term, "user friendly," simple, easy to use. It's a computer program which calculates the economic benefit from delayed costs of compliance.
THE COURT: Wait just a minute. I'm trying to recall now, but my recollection of reviewing her report in dealing with pre-trial motions was that her opinions regarding economic benefits is centered on wrongful profits.
MR. QUINN: That is correct, just wrongful profits.
THE COURT: All right, now. I believe that what is

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carved out or what is left legitimately for her to testify to has to do with Defendants' ability to pay.
MR. QUINN: Yes, Your Honor. I'm trying to lay a foundation for a subsequent witness as to the Ben Model.
MR. HIRD: Your Honor, I would object because I think what they're attempting to do is put in evidence of economic benefit through the Ben Model which is a more traditional method of doing it which they did not produce in their expert testimony, did not give us before trial. The only calculations of economic benefit that they gave us was wrongful profit. Apparently what they're trying to do is Mr. Pfaff is their only witness left and now to do an economic Ben Model calculation is something that's never been disclosed to us in this case.
THE COURT: Where has she included in her report reference on the Ben Model?
MR. QUINN: Does not have any anything in her report with regard to the Ben Model. However, she did discuss it upon inquiry during her deposition.
THE WITNESS: In my report.
MR. HIRD: In her deposition, we asked her, Mr. High particularly, about the Ben Model, pointed out she hadn't used the accepted method for calculating the economic benefit and at that point, she had only produced wrongful profits analysis and forgone what is the traditional technique.
THE COURT: She's not going to be permitted to

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testify concerning anything that is not in her report.
MR. QUINN: Thank Your, Honor. I'll move on.
BY MR. QUINN:
Q. Moving to the area of about to pay, Ms. Zimmer; Ms. Zimmer, did you analyze the financial condition of Florida Cities Water Company with respect to its ability to pay a civil penalty in this case?
A. Yes, I did.
Q. How did you analyze the financial condition of Florida Cities?
A. I reviewed the documents produced by the Defendants here, the which include the financial statements from 1981 for my reports. I had the financial statements from 1981 through 1993. In addition, I attended the deposition of Mr. Murphy, the CFO of Florida Cities. But that deposition was after my report.
Q. Did you – you said you reviewed documents. I'd like to show you three exhibits, please, United States Exhibit 583, 584, 585. Could you please tell me whether you reviewed Exhibit 583 in preparation of your expert opinion?
A. Yes, I did.
MR. QUINN: Your Honor, I would –
THE WITNESS: Uh, can I clarify my answer?
BY MR. QUINN:
Q. Please?

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A. Are we talking about Florida Cities Water Company?
Q. I'm talking -- I'll withdraw the question.
In review, in preparing your expert opinion as to Florida Cities' and Avatar Holdings' ability to pay, did you review United States Exhibit 583 for identification?
A. Yes, I did.
MR. QUINN: Your Honor, I would move United States Exhibit 583 into evidence.
MR. HIRD: Your Honor, Exhibit 583 seems to be excerpts from Avatar Holdings' Exhibit 1 which is already in evidence and on that basis, we have no objection.
THE COURT: Be received.
BY MR. QUINN:
Q. Ms. Zimmer, did you review again portions of the Avatar Holdings Exhibit 584 for identification?
MR. HIRD: Mr. Quinn, I appear not to have a copy of Exhibit 584 in the notebook that you gave me.
MR. QUINN: I apologize.
MR. HIRD: Is that your annual report?
MR. QUINN: Portions of it.
MR. JACOBS: You want to see portions?
MR. HIRD: It might be easier to just use Exhibit 1.
MR. QUINN: I'm not going to refer to these documents at all, Your Honor. I wanted to identify them for the record and move them in evidence. Ms. Zimmer, if she needs to, will

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have them at her disposal.
MR. HIRD: You're representing that's another excerpt of Avatar Holdings' Exhibit 1?
MR. QUINN: My representation is that Exhibit 584 is a different excerpt of the same annual report, Your Honor.
THE COURT: Okay. Be received.
BY MR. QUINN:
Q. Thank you. Turn to page, hopefully there will be an exhibit there to United States Exhibit 585 for identification. Can did you review that exhibit, Ms. Zimmer?
A. Yes.
Q. Could you please tell me what it is?
A. It's the audited financial statements for Florida Cities Water Company for December 31st, 1993.
MR. QUINN: We're going to move the next book -- like you to take a look at Exhibits 591, 594, 595 and 596, and I'm going to ask you the same questions. With regard to United States Exhibit for identification 591, have you seen -- did you rely upon that exhibit?
A. Yes, I have.
Q. With regard to United States Exhibit 594 for identification, did you rely upon that exhibit, Ms. Zimmer?
A. 594?
Q. Yes.
A. For my report, are you talking about for my report?

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Q. For your ability to pay analysis only.
A. For my ability to pay analysis, yes, I did rely on 594.
MR. QUINN: Your Honor, I would move United States Exhibit 594 for identification into evidence, please.
MR. HIGH: no objection.
THE COURT: It'll be received.
BY MR. QUINN:
Q. Did you rely upon 595 for your financial analysis?
A. Yes, I did.
MR. QUINN: Your Honor, I would move United States Exhibit 595 into evidence at this time, please.
THE COURT: Be received.
BY MR. QUINN:
Q. Ms. Zimmer, would you please look at one last exhibit, Exhibit 596 for identification. Did you rely upon 596?
A. Yes.
Q. What is 596, please?
A. It's a SEC 10-Q quarterly report for the three month period ending September 30, 1995.
MR. QUINN: Your Honor, at this time, I'd like to move United States Exhibit 596 for identification into evidence.
THE COURT: It'll be received.
BY MR. QUINN:
Q. Ms. Zimmer, do you have an expert opinion as to Florida

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Cities Water Company's ability to pay a penalty in this case?
A. Yes, I do.
Q. What is your expert opinion on that?
A. My opinion is that Florida Cities Water Company has the ability to pay an amount up to seven and a half million dollars.
Q. And do you have an expert opinion as to the economic impact that payment of a civil penalty of up to seven and a half million dollars would have on Florida Cities Water Company?
A. Yes, I do.
Q. And what is that opinion, please?
A. My opinion is that a seven and a half million dollar amount would not have a material adverse affect on the company.
Q. Ms. Zimmer, you also stated earlier that you analyzed the financial condition of Avatar Holdings with respect to its *ability to pay a civil penalty in this case, is that correct?*
A. Yes, I did.
Q. Could you please tell me what you did do to go about analyzing the financial condition of Avatar Holdings?
A. Avatar is a public company, so I reviewed the filings that the company made with the SEC, and I also had a financial data base with printout information on public companies that is based on the SEC filing.
Q. What is the data base you had?

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A. The Standards and Poors Compustat Data Base.
Q. Ms. Zimmer, you did you attend any deposition of any chief financial officers?
A. Yes, I did.
Q. And?
A. The CFO of Avatar Holdings, Mr. McNairy.
Q. Ms. Zimmer, in your experience, do balance sheets of companies always accurately reflect the true value of a company?
A. A balance sheets reflect the accounting amount for the assets, the liabilities and the net worth of the company in terms of market value or the value, the total net worth or the total equity that's listed on a balance sheet. That number may or may not be reflective of a company's true market value.
Q. Ms. Zimmer, do you have an expert opinion as to Avatar Holdings ability to pay a civil penalty in this action?
A. Yes, I do.
Q. And *what is that opinion, please?*
A. My opinion is that Avatar can afford to pay a penalty up to fifteen million dollars.
Q. Ms. Zimmer, do you have an expert opinion as to the economic impact that payment of a penalty of up to fifteen million dollars would have on Avatar Holdings?
A. Yes, I do.
Q. And what is that opinion?

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A. My opinion is that a payment of fifteen million dollars would not have a material adverse affect to the company.
MR. QUINN: Thank you, Your Honor. I have no more questions.
THE COURT: Okay.
MR. HIGH:. Your Honor, may name is Lance High, I represent the Defendant Florida Cities.
THE COURT: Yes, you may proceed.
CROSS EXAMINATION
BY MR. HIGH:
Q. Good afternoon, Ms. Zimmer.
A. Good afternoon.
Q. Ms. Zimmer, you testified that you've always worked for the U. S. Government from 1978, 1979; is that correct?
A. Yes.
Q. Have you ever given any expert testimony for any entity other than the U. S. Government?
A. No.
Q. Ms. Zimmer, what percentage of time do you spend performing ability to pay analyses for the privately owned, publicly regulated utilities in your position with the Department of Justice?
A. Very little.
Q. Would that be less than ten percent of your time?
A. Yes, sir, certainly.

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Q. Have you ever performed an ability to pay analysis for a company that is regulated by the Florida Public Service Commission?
A. No, I have not.
Q. Ms. Zimmer, would you turn to page 8 of your report, please?
A. Could you tell me what the exhibit number is?
Q. I believe it's Plaintiff's 597 – 598.
THE COURT: What page?
MR. HIGH: Page 8, please, Your Honor.
THE WITNESS: 585?
BY MR. HIGH:
Q. 598, Ms. Zimmer.
A. Okay.
Q. Ms. Zimmer, you conclude on page 8 in the second paragraph that liquidity as represented by its current ratio and working capital is poor; is that for Florida Cities?
A. Yes, Florida Cities Water Company.
Q. And current ratio is the ratio of current assets to current liabilities, correct?
A. Yes, it is.
Q. And it's meant to be somewhat of a Litmus test for short term obligations, is that correct?
A. Typically, yes.
Q. And the results of that current ratio tell you that the

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working capital is poor, correct?
A. Yes.
Q. That means there's no free, access money just floating around in some bank account, correct?
A. That's one portion of liquidity.
Q. And then you go on to state, Ms. Zimmer, equity has been established since 1991, correct?
A. Yes, I do.
Q. And that long term debt has increased over that period of time, correct?
A. Yes.
Q. So for that period of time that you analyzed since 1991 through 1993, at least the equity to debt ratio, that has fallen, hasn't it?
A. I don't have those amounts specifically on this page. I think they're in a later exhibit.
Q. Well, in reaching that conclusion, Ms. Zimmer, didn't you analyze Florida Cities' financial statement?
A. Yes, I did.
Q. For the years 1989 through 1993?
A. Yes, I did. I'm just looking for the exhibit that has that balance sheet which is in Exhibit 4, just to check my answer before I give it. And the answer is that it has been declining somewhat, but it is basically stable.
Q. And the equity to debt ratio is another Litmus test,

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isn't it, about the financial situation?
A. It's another financial indicator.
Q. And over this period of time, it's been somewhat diluted, the equity has been stable and debt has increased, correct?
A. I'm not exactly sure what the question is. Could you repeat the question?
Q. The question is, Ms. Zimmer, over the period of time that you analyzed, the equity to debt ratio has been somewhat diluted, isn't that correct?
A. Well, actually when you're looking at the long term debt for the company, it went down in 1993,, in 1990 it was, just to use numbers, it's twenty-three and a half, I'm looking at the long term debt, long term debt as twenty-three and a half million, it went down in '91, it went up in '92, and went down again in '93. In terms of comparing a long term debt to total capitalization ratio, that ratio has actually improved somewhat in '93, but it's basically stable over the period.
Q. But you conclude, don't you, Ms. Zimmer, that equity has been stable, but long term debt has increased somewhat?
A. Over the years that I compared, it has increased, it went down in '93, it's changed in '94.
Q. Ms. Zimmer, would you turn to page 2, Plaintiff's Exhibit I believe it's 594, please?
A. Okay.
Q. And that indicates and would you – I'm sorry, would you

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turn to page 2 of that exhibit, please. I believe it would be the third page of the document, page 2.
A. Okay.
Q. And that's the page titled capitalization liability, isn't that correct?
A. I have it.
Q. And you say, Ms. Zimmer, long term debt has decreased between 1993 and 1994, is that correct?
A. No, I didn't. This financial statement indicates that the long term debt in '94 has gone down.
Q. That's right. It's gone down. Would you look a little bit below that under current liabilities, Ms. Zimmer?
A. Okay.
Q. What has happened to notes payable between 1993 and 1994?
A. Notes payable went up in '94 as compared to '93.
Q. And by how much did it go up?
A. About one point six million dollars.
Q. And accounts payable, how much did that go up between 1993 and 1994?
A. Oh, about a million dollars.
Q. And how much did the amount due to parent company affiliates go up between 1993 and 1994?
A. That went up about one point six million.
Q. So even though long term debt has been decreased by about one point five million dollars, short term liabilities have

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gone up by about six million, isn't that correct?
A. Actually, the number's more like four point three. I'm looking at the total current liability number.
Q. But the fact of the matter is liabilities have gone up by about four point three million?
A. Yes.
Q. Liabilities are debts, are they not?
A. They're obligations of the company.
Q. And the company must pay those obligations?
A. Well, you see, it depends. Mr. Murphy in his deposition specifically addressed the two million dollars that Florida Cities Water Company obtained in a loan from an affiliate. I think it was Consolidated Water Company, and he stated during his deposition he does not expect that Florida Cities would have to pay that back.
Q. Did you interview anybody from Consolidated Water Company?
A. No, I didn't.
Q. Did you investigate any of the loan terms between Consolidated Water company and Florida Cities Water Company?
A. We deposed Mr. Murphy in terms of seeing the actual loan document. No, I have not seen the loan document if there is a loan document.
Q. So other than Mr. Murphy's testimony, you have no independent basis?

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A. No, but Mr. Murphy is the CFO of the company of Florida Cities.
Q. But you yourself have no independent basis for saying Florida Cities Water Company will not have to pay the two million dollars?
A. The significance is Mr. Murphy is CFO of Florida Cities Water Company and the statement in his deposition.
Q. But you have no independent basis other than that statement?
MR. QUINN: Objection, Your Honor, asked and answered.
THE WITNESS: Right.
THE COURT: Sustained.
BY MR. HIGH:
Q. Ms. Zimmer, let's go back to your report, page 8, please. The next paragraph where we --
A. I forgot the number of the exhibit.
Q. 597.
A. Okay.
Q. Plaintiff's 597?
A. I think it's 598.
Q. 598, I'm sorry.
A. What page, please?
Q. Page 8.
A. Okay.
Q. Ms. Zimmer, you go on to state in the next paragraph, the

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third paragraph down, that earnings have declined over the period analyzed for Florida Cities Water Company, is that correct?
A. Yes, in the period covered in my report, yes.
Q. And then you state that revenues are increasing, but at a lower rate than costs, correct?
A. Yes.
Q. So costs are outpacing revenues?
A. During the period that is contained in my report, yes.
Q. You state then, Ms. Zimmer, capital expenditures have decreased over the period, correct?
A. Yes.
Q. Do you know what the capital expenditures for Florida Cities Water Company will be in the next five years?
A. That is another area that we deposed Mr. Murphy on, and he explained that during 1995, 1994 and 1995, Florida Cities Water had implemented a large capital expansion, capital expenditure program, but that he expected capital expenditures from 1996 forward for the next few years to be at light levels was the term he used.
Q. Do you know how much or what light levels means or is that the only basis for your opinion?
A. During his deposition, we deposed him and asked him what the capital expenditures in the five year plan were budgeted for, and he addressed that they had gone through this major

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capital expenditure program and they did not expect that their cash needs nor capital expenditures would be very -- would be significant in the next few years.
Q. But you don't know what significant is, do you, Ms. Zimmer?
A. He could not remember the actual numbers in the budget, and he was in -- the company was in the process of developing the next set of projections.
Q. You haven't seen those projections, have you?
A. No, I haven't.
Q. Those projections are not a part of your opinion, is that correct?
A. Right.
Q. And so if those projections are higher than what Mr. Murphy recalled, then that would affect your conclusions in this ability to pay analysis, is that correct?
A. It would depend on what those typically -- typically that's done during an interview and I can ask Mr. Murphy what the capital expenditures are for and whether or not there's any possibility or the likelihood that any of the capital expenditures could be delayed for a few years.
Q. But the fact of the matter is you don't know what the capital expenditures and capital budgets are for the next five years?
A. No, I do not.

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Q. Ms. Zimmer, you go on to state that their eighteen thousand shares of preferred stock will be retired annually between 1997 and 2001?
A. I see that.
Q. Do you know what the liquidation of those shares is?
A. Could I refer to the footnote in the financial statements?
Q. Yes, ma'am.
A. The liquidation value is stated at a hundred dollars per share.
Q. One hundred dollars liquidation value, is that what you said?
A. One hundred dollars per share.
Q. And is that an annual obligation of one point eight million dollars per share between 1997 and 2001, is that correct?
A. That's stated in the footnotes to the financial statements.
Q. And that is an obligation that Florida Cities Water Company will have to pay, correct?
A. It's an obligation that the company has; depends on the terms of the preferred stock.
Q. And it says in the financial statement that 18 thousand shares per year will be liquidated at a hundred dollars per share?

A. That's a liquidation schedule disclosed in the financial statement.
Q. So their one point eight million dollars obligation enters into your analysis?
A. The preferred stock liquidation and preferred stock dividend did enter into my analysis, yes, sir.
Q. You assume, Ms. Zimmer, don't you, that the preferred stock dividends will not be paid during this period of time that Florida Cities might be paying a penalty, is that correct?
A. What I assumed is that preferred stock dividend payments could be deferred?
THE COURT: We need to change Reporters. We'll take just a couple minutes. We'll be at ease.
(Thereupon, a ten minute recess was taken.)

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CONTINUED CROSS-EXAMINATION
BY MR. HIGH:
Q. Ms. Zimmer, I believe when we left off you stated that the preferred dividends would not be made during this five-year period for Florida Cities would be paying 1 to 1.5 million a year; is that correct?
A. What I assumed is that the preferred dividend payments would not be made. When we deposed Mr. Murphy, who, again, is the CFO of Florida Cities Water Company, we asked him who owned those preferred shares, and he mentioned that Florida Cities' immediate parent, FCWC Holdings, Inc., held the preferred shares.
In the footnote to the Florida Cities financial statements, it explains that in 1991 a certain amount of common stock shares were converted to preferred shares.
Q. And, Ms. Zimmer, aren't you assuming that the preferred shares of Florida Cities Water Company Holdings are owned by an Avatar-related entity? Isn't that correct?
A. I'm not making that assumption. What I'm making the assumption – the assumption I'm making is that the preferred stock of Florida Cities Water Company is owned by its immediate parent, FCWC Holdings, Inc., and that assumption is based on Mr. Murphy's deposition testimony.
Q. And have you investigated the preferred stock shares, the agreement, or the terms of the preferred stock? Strike that.

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Let me start over.
Have you investigated – in your analysis of this ability to pay, have you investigated the terms of the preferred stock?
A. During Mr. Murphy's deposition, we asked him what the specific terms of the preferred stock were, and he could not remember. They are – some of the terms are disclosed in a footnote to the financial statements, but other terms such as – for instance, some types of preferred stock when dividends are not paid, they just accumulate.
Q. Have –
A. Those details Mr. Murphy did not know.
Q. Ms. Zimmer, have you independently investigated the terms of the preferred stock?
THE COURT: You mean other than what she just testified?
BY MR. HIGH:
Q. Other than what you just testified to, Ms. Zimmer.
A. No.
Q. Ms. Zimmer, what would happen if Florida Cities Water Company defaulted on its preferred stock obligations?
A. It depends on the terms of the preferred. If it's owned by its immediate parent, it's very unlikely that an immediate parent would exercise whatever the default provisions are. There may be no default provisions. Also, as I said

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previously, the unpaid dividends may just accrue.
Q. Ms. Zimmer, isn't it also equally as likely that the credit rating of Florida Cities Water Company would be affected by a default on its preferred stock?
A. It depends. It's possible. It may or may not be affected.
Q. Assume for me that Florida Cities Water Company cannot opt out of this obligation to pay preferred stock dividends. Wouldn't that affect Florida Cities Water Company's ability to go to the market and borrow money?
A. It may or – it depends on how Florida Cities goes to the – when you say "go to the market," you're not talking about a public debt issuance, I assume. I assume you're talking about going to a bank or some private placement or something like that.
Q. Yes, ma'am.
A. It depends on the term of the debt. If there's security offered, depending on whatever security is offered, it may – what I'm saying is it may or may not affect it.
Q. Ms. Zimmer, do you know whether there are any assets free to be offered as security?
A. May I refer to the financial statement for a moment?
THE COURT: Yes.
THE WITNESS: The problem with answering that question is when you look on the financial statements, they do

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have first mortgage bonds which indicate that those are secured. But during our deposition with Mr. Murphy, he indicated that the company was in the process of refinancing and obtaining an additional long-term debt financing of $18 million. Some of that would be used to pay the 1995 capital expenditures, which I was previously discussing, and some of it would be used to pay back existing debt.
So at that time it had not yet been entered into, so that would certainly have an effect on the current security or unencumbered assets, depending upon whatever that – whatever happened.
BY MR. HIGH:
Q. Ms. Zimmer, I believe the question was do you know whether there are any plant assets free to be offered as security.
A. At this time, no.
Could I also offer a clarification?
THE COURT: Yes.
THE WITNESS: We're talking about obtaining additional borrowing. One of the other areas that Mr. Murphy mentioned in his deposition was the existence of a line of credit that Avatar Utilities, Inc. had, and he mentioned that Florida Cities Water Company was able to borrow from Avatar Utilities on that line. He mentioned that they never had, but that they were able to.

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And the 1994 10-K for Avatar indicates that the -- and also the deposition of Mr. McNairy, who at that time at least was the CFO of Avatar Holdings, indicated that the $15 million unsecured line of credit that Avatar -- that is listed in Avatar Holdings' 1994 10-K was a 15 million line of credit that Avatar Utilities had. And in that 10-K they cite that the unused portion was 8.2 million.

MR. HIGH: One moment, please, Your Honor.

THE COURT: Yes.

BY MR. HIGH:

Q. Ms. Zimmer, do you know whether Avatar Utilities is a defendant in this case?

A. I don't know for sure. I don't think it is.

Q. And you don't know whether Avatar Utilities or Avatar Holdings would be able to loan 1 to $1.5 million per year to Florida Cities Water Company; isn't that correct?

A. What I was referring to, I actually made a reference to it in my report, the possibility that Florida Cities could borrow the full amount from Avatar, and then they would -- they wouldn't have to borrow 1 and a half, 1 million to 1 and a half per year. They could borrow the entire amount up front. So it wouldn't be an annual borrowing.

Q. And I'll leave the issue of whether Avatar Holdings would be willing to offer that to Mr. Hird.

Ms. Zimmer, you concluded that it's unlikely that

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Florida Cities Water Company would be able to borrow money from a bank to pay this penalty; isn't that correct?

A. Typically that's often the case with companies. And in this instance it's probably likely that they could not borrow.

Q. And that's because banks like to lend money to income-generating activities; isn't that correct?

A. Right.

Q. So really the only instance or the only availability of $7 and a half million would have to come from Avatar Holdings; isn't that correct?

A. Well, actually when we're talking about Florida Cities Water Company's ability to pay, looking at their ability to generate income and a cash flow and using the guidance that Mr. Murphy gave in his deposition with regard to the fact that he expected future earnings for the company for the next few years out into the future to be in the one-and-a-half- to two-million-dollar range, plus he expected capital expenditures to be light, what I took from that was if you make the assumption that capital expenditures equal depreciation, which for Florida Cities is about let's say -- is about $3 million, the excess of cash flow, just looking at cash flow being depreciation plus earnings, the earnings would be available to fund a payment to the government.

If there were any other cash needs that the company may have, they had other options available, such as borrowing

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on this Avatar -- against this Avatar -- going to Avatar Utilities to borrow against their working capital line.

Q. And you don't know what the capital expenditures are in the future; you don't know whether they will equal the depreciation expense, do you?

A. No. But I made that assumption, and it's -- typically or generally speaking, it's an often-made assumption in analysis like this.

Mr. Murphy himself said that capital expenditures would be light, and that's in comparison -- I took that to be as in comparison to historical levels. And historical levels -- you can look in my report -- range from somewhere like 2 million to 7 -- I think 7 million was the 1994 or 5 amount, which, as Mr. Murphy explained, was due to an unusual capital expenditure program at Florida Cities.

Q. And isn't it a fact, Ms. Zimmer, that capital expenditures for the period of time you analyzed have always been greater than net income?

A. I didn't look at that specifically.

Q. Well, doesn't that mean, Ms. Zimmer, that Florida Cities Water Company has not been funding capital expenditures merely from operating activities?

A. Right, that's what that would mean.

Q. That means they've been borrowing the money for capital expenditures; isn't that correct?

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A. No, not necessarily. Depreciation is -- when you're looking at net income, that's after depreciation. And depreciation is a non-cash expense, so you add that back.

Q. But you don't know, Ms. Zimmer, whether the capital expenditures have been greater or less than depreciation over this period of time; isn't that correct?

A. If you look at page 8 of my report, you can see the bottom line on the earnings indicator chart lists the capital expenditures over those years compared, and there's a -- the third line is the net income line.

Depreciation you can find in Exhibit 1 to my report. The fourth line down, for the period 1981 through 1993, you can see that it -- it's in the $2 million range for '93. It was 2 and a half million for '94. It was somewhere in the range of around $3 million.

I did have nine-month statements for '95, which are produced in late 1995, and that had nine-month figures for the year 1995 ending September 30th. And it indicated that depreciation levels were somewhat higher than that in '94, which I previously stated were listed on the financial statements at about 3 million. It also indicated that net earnings for the company for the first nine months of '95 were a little bit higher than net earnings for the first nine months of '94.

And when you look at the 1994 statements, you'll see

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that net earnings included an accounting charge for expenses related to this case. They took a $1.3 million charge for the litigation costs relating to this case.

In addition, and as Mr. Murphy testified in his deposition, there were expenses actually incurred in 1994 for litigation costs relating to this case. The reason I mention that is that those are non-recurring costs. And when you add those non-recurring costs back to the earnings of the company, since Mr. Murphy said that the operating earnings of the company would be somewhat -- would be stable but somewhat increasing due to inflation and minor rate increases that they would probably likely apply for in the future, you can see that actually the company is generating increasing earnings.

Q. And the fact of the matter is, Ms. Zimmer, isn't it, that in the future the company also has recurring one-time costs such as preferred dividend liquidation obligations? Isn't that correct?

A. Well, we already talked about the preferred dividend obligations. The way I factored that in was that Mr. Murphy told or testified that the preferred stock was owned by its immediate parent, FCWC Holdings, so that it was -- my assumption was that those deferred dividend payments and redemption rights could be extended.

Q. And that's an assumption that you make --

A. Yes.

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Q. -- isn't that correct?

A. Yes.

Q. Ms. Zimmer, did you know whether a penalty in this case is tax deductible?

A. I don't -- typically we don't take a position with regard to the tax deductibility of a civil penalty payment.

Q. Isn't it a fact, Ms. Zimmer, that the tax deductibility does not exist for a penalty?

MR. QUINN: Objection, Your Honor. This goes beyond the scope and also conflicts with the statement of the witness that the United States doesn't take the position.

MR. HIRD: Your Honor, that may be the statement of the witness, but in any dealing that I've had with the United States in this and other cases, they take the position.

If the United States is taking a different position now, it would be interesting to know that.

THE WITNESS: Can I --

THE COURT: Well, I'm going to overrule the objection and permit the question.

Do you remember the question?

THE WITNESS: No, I don't.

BY MR. HIGH:

Q. Isn't it a fact, Ms. Zimmer, that a penalty in this case is not tax deductible?

A. Typically in my analysis I assume that it is

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nondeductible.

Q. And so in order to pay a $1.5 million penalty per year, Florida Cities would have to increase its revenues by about $2.2 million per year; isn't that correct?

A. Well, the -- you're assuming a 40 percent tax rate?

Q. Assuming 40 percent, yes, ma'am.

A. That's one way to look at it. The way I did it was I looked at the earnings history of the company, looked at what the future earnings would likely be, primarily basing my opinion on that. Nobody has a crystal ball, but I used Mr. Murphy's judgment that he expressed during his deposition. He is the CFO of the company, and I used his guidance, because he is the CFO of the company, and looked at what future cash needs would be. He expressed that they would be light in the next few years, so I kept capital expenditures to depreciation levels.

They could fund capital expenditures through depreciation, and then any excess would be used to pay a civil penalty. And that's on a net income basis after taxes.

And, for instance, looking at 1994, their ability to generate earnings -- I think their net income was 1.3 million, but as I mentioned earlier, that includes a $1.3 million charge for litigation expenses relating to this case. And then in addition, there were other -- there was at least $284,000 of litigation costs relating to this case, and

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Mr. Murphy testified that the 1994 amount was higher than the 284,000. So that is also a non-recurring expense which should be added back.

And I'm assuming that future earnings are at least equal to those of '94 and probably higher because, as I indicated when I was looking at the 1995 first nine months' unaudited statements that were provided in late '95 and they have a comparison for the first nine months of '95 to the first nine months of '94, it indicated for '95 that net earnings were higher than '94.

Q. Do you recall exactly how much higher?

A. It wasn't a large increase, but it was higher.

Q. So just a little --

A. A few percentage points, yes.

Q. Just a little bit higher?

A. Yes.

Q. And in this analysis you're assuming that net income or the -- strike that.

You're assuming the capital expenditures can be funded through depreciation; isn't that correct?

A. Basically, yes.

Q. And that if capital expenditures happen to go up in the future, then Florida Cities would have to borrow the money; isn't that correct?

A. When you look at the -- keeping with 1994 net earnings,

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those net earnings --
THE COURT: Can you answer that yes or no and then explain your answer, or can you do that?
THE WITNESS: Could you ask the question again? I'm sorry. I forgot what the question was.
BY MR. HIGH:
Q. If you assume -- your assumption is that capital expenditures will be funded through depreciation, correct?
A. Yes.
Q. And that if capital expenditures then go up, Florida Cities would have to borrow the money, correct?
A. It depends by how much capital expenditures go, how much they increase by.
THE WITNESS: Should I explain that?
THE COURT: If you need to.
THE WITNESS: Okay.
THE COURT: Briefly.
THE WITNESS: Looking at '94 net income, it's 1.3 million. They had a 1.3 million charge for these litigation expenses. You add that back, that's 2.6. Plus they had some pretax expenses for litigation expenses relating to this case. I'm not exactly sure how much that is, but it's at least 284,000. But those have to be put on an after-tax basis.
So let's just stick with the 2.6. That's the net income that's reflected on the '94 income statement, plus the

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1.3 charge, which is a non-cash order, a non-recurring expense. That's 2.6. If you pay a million or a million and a half to the government, there's a little bit left over. So if capital -- it allows capital expenditures to go up by the difference. Anything in excess would have to be borrowed.
BY MR. HIGH:
Q. Ms. Zimmer, you've referred a lot to Mr. Murphy's deposition. Did that deposition in any way affect your conclusions in this report?
A. No. That deposition occurred after the report. But this report is also based on information up through 1993, and Mr. Murphy had the use of the 1994 statement.
Q. And in this report you conclude that Florida Cities, if it were to pay the penalty, would have to borrow it from an Avatar-related entity, correct, pay the penalty up front?
A. No, I presented that as an option. The conclusion of my report listed on page 9 indicates that based on that information that Florida Cities could pay a million to a million and a half per year. However, if they were able to borrow from an Avatar-related entity, the -- and I'm assuming if they were able to borrow the full amount, they could pay the full amount up front.
Q. And the 7 and a half million up front would have to come from an Avatar-related entity, correct?
A. That's expressed in this report, yes.

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Q. So the answer is yes, Ms. Zimmer?
A. Could you ask the question again just so I get the exact wording?
Q. Sure.
THE COURT: You want it read back, or do you want to restate it?
MR. HIGH: I'll restate it, Your Honor.
BY MR. HIGH:
Q. Ms. Zimmer, your conclusion is that if Florida Cities were to pay a $7 and a half million penalty, it would have to come from an Avatar-related entity, correct?
A. If they were to be -- if they could -- if they had to pay it up front immediately.
Q. So your answer is yes?
A. Yes.
MR. HIGH: Thank you. No further questions, Your Honor.
THE COURT: Mr. Hird?
CROSS-EXAMINATION
BY MR. HIRD:
Q. Good afternoon, Ms. Zimmer.
A. Good afternoon.
Q. You indicated that you are a chartered financial analyst; is that correct?
A. Yes.

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Q. And you try to make a distinction between that and a CPA, a certified public accountant; is that right?
A. Yes.
Q. One of the distinctions that you didn't make between them is the nature of the body that certifies or charters them; is that correct?
A. Yes, they're chartered or certified by different bodies.
Q. And aren't certified public accountants certified by state agencies?
A. Yes.
Q. Governmental bodies; is that correct?
A. Actually I'm not a CPA, so I -- I do know they have to be state certified. I don't know which body does it.
Q. And chartered financial analysts are not certified by state agencies; is that correct?
A. Correct.
Q. Or by federal agencies?
A. Correct.
Q. Isn't it true that to be a chartered financial analyst you simply get a charter from a trade organization of chartered financial analysts?
A. It's the Association for Investment Management Research. I don't know if that's a trade organization. It's a --
Q. But that's not a governmental or regulatory agency?
A. No, it is not.

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Q. Okay. Thank you. Mr. High asked you a couple of questions about the preferred dividend on Florida Cities -- I'm sorry. Excuse me.

Mr. High asked you some questions about the preferred stock that's owned in Florida Cities by FCC Holdings, and you said that you assumed that the dividend on that preferred stock wouldn't have had to be paid because the parent corporation owned that -- owned Florida Cities; is that correct?

A. What I assumed is that those payments could be deferred or extended because it is owned by its immediate parent.

Q. Well, do you know that there is preferred stock in Florida -- in FCC Holdings? Do you know that preferred stock exists in FCC Holdings?

A. I assume --

Q. FCWC Holdings.

MR. HIRD: I'm sorry, Your Honor.

BY MR. HIRD:

Q. Let me ask the question again. Are you aware that the immediate parent of Florida Cities Water Company, FCC -- FCWC Holdings, has its own preferred stock?

A. No, I'm not aware of that. I assume they have the preferred stock of Florida Cities Water Company, but you're talking about a different --

Q. That there is preferred stock in FCWC Holdings; that it

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has itself issued preferred stock.

A. No, I'm not aware.

Q. And you're not aware that that preferred stock is owned by Allstate Insurance; is that correct?

A. No, I'm not aware.

Q. And you're not aware that the payment that Florida Cities will make on its preferred stock to its parent, FCC Holdings, will then be repaid by FCWC Holdings to its preferred shareholder, Allstate Insurance; is that correct?

A. Could you say that one more time?

MR. HIRD: Your Honor, may it help if I could illustrate it on the blackboard?

THE COURT: Yeah, you can write your question on there graphically.

MR. HIRD: Do we have any chalk?

THE COURT: Well, now, that's asking a little much. We're supposed to.

You've got all colors except white it looks like.

BY MR. HIRD:

Q. Okay. You have said that Florida Cities has preferred stock. And assume -- and you understand that Florida Cities' preferred stock is owned by FCWC Holdings; is that right?

A. Right.

Q. That's the immediate parent of Florida Cities.

A. Right.

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Q. Now, you are unaware that FCC Holdings has its own preferred stock.

A. Right.

Q. And you are unaware that that preferred stock is owned by Allstate Insurance; is that correct?

A. Right.

Q. And you're unaware that when Florida Cities will pay its dividend on its preferred stock that FCWC Holdings will then turn around and pay its dividend on its preferred stock to Allstate Insurance; is that correct?

A. That's correct.

Q. Thank you. I'd like you to turn to Avatar Holdings Exhibit 1, if you would.

MR. HIRD: Bob?

THE WITNESS: He said Exhibit 1.

Okay.

BY MR. HIRD:

Q. Ms. Zimmer, this is the 1994 annual report of Avatar Holdings. You indicated in your testimony that you viewed at least excerpts of the report. Did you view the whole annual report?

A. Yes, I had.

Q. Okay. I'd like you to turn to page 39, if you would.

A. Okay.

Q. I'm waiting till both you and the Court have that.

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THE COURT: My page numbers are partially --

MR. HIRD: It's the second to last page in the exhibit.

THE COURT: I've got it now.

MR. HIRD: It's headed "Five-Year Comparison of Selective Financial Data."

BY MR. HIRD:

Q. Can you see line 2 of this chart, "loss (income from continuing operations before extraordinary item and changes in method of accounting)"? Do you see that?

A. Yes, I do.

Q. This is the five-year comparison of losses and gains in Avatar Holdings, is it not?

A. Yes.

Q. Okay. Let's start with the year 1990. That shows an $11,132,000 gain; is that correct?

A. It shows an $11,132,000 income.

Q. Income. I'm sorry. You testified that you attended the deposition of Charles McNairy, chief financial officer of Avatar Holdings; is that right?

A. Yes.

Q. Didn't he testify in that deposition that this gain was due to a one-time sale of land assets owned by Avatar Holdings in California?

A. I remember the one time. I don't remember where they

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were located.
Q. But that this gain was due to a one-time sale of certain assets?
A. Yes.
Q. And that absent this gain there would have been a loss in that year; is that correct?
A. Yes.
Q. All right. 1991 we have it shows a loss of 8,635,000; is that correct?
A. That's what this indicates, yes.
Q. 1992 there was a loss of 4,342,000 before extraordinary items; is that correct?
A. That's correct.
Q. And there was an extraordinary item loss of 2,402,000; is that correct?
A. Yes.
Q. Now, in 1993 we have -- there's a gain of 5,474,000; is that right?
A. That's right.
Q. And in Mr. McNairy's deposition, didn't he testify that that was the year of the sale of the Midwest Utilities?
A. Yes, he did.
Q. And that without that sale there would have been a loss?
A. Yes, he testified to that.
Q. Okay. 1994 we have a loss of $14,621,000; is that

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correct?
A. That's correct.
Q. All right. Keep that in front of you, and if you could also -- keep a finger in that point and, if you could, also turn to Exhibit Number 9, Avatar Holdings Exhibit Number 9.
Do you have that in front of you, ma'am?
A. Yes, I do.
Q. This is the Avatar Holdings 10-Q for the third quarter of calendar year 1995?
A. Yes, it is.
Q. And that's through at least the beginning of October of 1995; is that correct?
A. It's through September 30th.
Q. Through September 30th. I'm sorry. I apologize. This is a document that you reviewed as well in preparation to testify; is that correct?
A. Yes.
MR. HIRD: Your Honor, I move in evidence Avatar Holdings Exhibit 9.
MR. QUINN: No objection, Your Honor.
THE COURT: Will be received.
(Avatar Holdings Exhibit Number 9 received in evidence.)
BY MR. HIRD:
Q. Turn to page 4, if you would, in Avatar Holdings Exhibit

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9.
THE COURT: What page?
MR. HIRD: Page 4.
BY MR. HIRD:
Q. Do you have that in front of you, ma'am?
A. Yes, I do.
Q. And if you look down on the list, nine months for 1975, loss before income -- I'm sorry -- net loss, do you see that?
A. Yes, I do.
THE COURT: 1995.
BY MR. HIRD:
Q. 1995 net loss. So for the first three quarters of 1995 Avatar Holdings had a net loss of 5,444,000; is that correct?
A. That's correct.
Q. And in the corresponding five months in nine months in 1994 its loss was 6,077,000; is that correct?
A. Yes.
Q. But its ultimate loss for the year in 1994 was 14,621,000, is that right, if you go back to Exhibit 1, page 39?
A. You're talking about '94?
Q. '94.
A. Yes.
Q. So you would expect, would you not, that the loss for the final year of 1994 -- 1995 would be significantly greater than

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5,444,000? Is that right?
A. No, that is not correct.
Q. You don't know of any particular event that would have shown a short-term gain in the last three months of 1995 --
MR. QUINN: Objection.
BY MR. HIRD:
Q. -- for Avatar Holdings?
MR. QUINN: Objection, Your Honor. This calls for information that was requested during the course of discovery and had not been provided. I object to any questions that deal with information that was accumulated after Ms. Zimmer wrote her report and that has not been produced by the defendants, if there's any change, material change, in economic circumstances.
MR. HIRD: I'm not asking -- I'm not offering evidence. I'm asking for an opinion whether she expects the sudden upturn in the company based on what she's seen.
MR. QUINN: Your Honor, she hasn't seen anything because they haven't given her anything.
MR. HIRD: She's seen over five years of history of the company.
THE COURT: Well, I'll sustain the objection.
MR. HIRD: Okay.
BY MR. HIRD:
Q. All right. Is it fair to say that the history of Avatar

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Holdings absent the two extraordinary asset sales in '90 and '93, the economic history from 1990 to the end of the third quarter in 1995, has been one of continuous losses?
A. They've had net losses on their financial statements.
Q. Continuously throughout that period essentially?
A. Except for those two years.
Q. And those two years the gains were only due to extraordinary asset sales.
A. Yes.
Q. And not to usual operations.
THE COURT: Is that right?
BY MR. HIRD:
Q. Is that right?
A. Yes.
Q. Okay. Ms. Zimmer, you've indicated that Avatar Holdings can pay $15 million --
A. Yes, sir.
Q. -- in penalties?
From what assets can Avatar Holdings make that payment?
A. Avatar has an investment portfolio listed on their balance sheet, and it's comprised of -- you mentioned the 1993 sale of the Midwest Utilities. In 1993 they sold the Midwest Utilities for about $60 million, and they took a $20 million gain on that on their books. The $60 million, it's reflected

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in their 1994 annual statement or its 10-K that those proceeds were put into an investment account that is used in part to secure certain lines of credit that Mr. McNairy testified were for the Avatar Properties, the real estate operations.
Q. So that the --
A. And --
Q. That investment portfolio is securing lines of credit against which Avatar Properties has already invested -- borrowed; is that right?
A. The 1994 --
Q. Excuse me, Ms. Zimmer. Can you answer yes or no before you go into your explanation?
A. Yes. And the explanation is is that part of those securities are securing the Avatar Property lines of credit. The foot -- the annual report in the SEC 10-K annual report as of '94 stated that approximately 45 million of the -- it was somewhere in the range of $50 million of assets in the investment portfolio were providing security to about 31, $32 million of Avatar Property lines of credit.
Q. And that's the 1994 report which is already over a year old; is that correct?
A. Correct.
MR. QUINN: Objection. Move to strike the last question; move to strike the last response. Again, this is information about being over a year old.

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Your Honor, she would have done more work if she had the information.
MR. HIRD: Your Honor, this witness has information that is current through the third quarter of the past calendar year. And to indicate that that was a year old at this point given the time period when that would have come out is not anything in any way restrictive on information that she would have had after that point. She's testifying about information she's seen since then.
THE COURT: I'll overrule the objection.
THE WITNESS: I'm sorry. Was there a question?
THE COURT: No, you answered it.
BY MR. HIRD:
Q. You answered the question.
Have you analyzed in any way Avatar Holdings -- or strike that.
Of this investment portfolio that we're discussing, is it held by Avatar Holdings or Avatar Properties?
A. At this point I'm not sure who owns it. It's listed in the consolidated Avatar Holdings financial statements. And Mr. McNairy, who's the CFO of Avatar Holdings, mentioned that that investment portfolio is used as in part, as I explained earlier, you know, security for Avatar Properties lines of credit.
Q. Didn't he also testify that it was in fact a portfolio

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held by Avatar Properties?
A. I don't remember that. He may have. I don't remember.
Q. So you just don't remember. But you have no information to say that that's untrue; you just don't remember?
A. I just don't remember.
Q. Assume with me that it is held by Avatar Properties. Avatar Properties is not a defendant in this case; is that correct?
A. What I understand is that Avatar Holdings is a defendant and Florida Cities Water Company is a defendant.
Q. And so your understanding is that Avatar Properties is not a defendant; is that correct?
A. Yes.
Q. And is it also your understanding that Avatar Properties is in the real estate business and not the utility business?
A. Yes.
Q. And that Avatar Properties has no direct connection with Florida Cities except that they're both subsidiaries of Avatar Holdings?
A. It's my understanding that they're both subsidiaries of Avatar Holdings. I don't have any other information to --
Q. But you have no other information about any connection between Avatar Properties --
MR. QUINN: Objection.
BY MR. HIRD:

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Q. – and Florida Cities?
THE COURT: Just a moment.
MR. QUINN: Objection. We've covered this. This has been asked and answered, Your Honor.
THE COURT: Sustained.
BY MR. HIRD:
Q. Would you reasonably expect this investment portfolio to be subject to management fees?
A. I think Mr. McNairy testified that there are two third-party managers of the investment portfolio, and so yes.
Q. And so they would pay management fees, and those would be expected in the ordinary course; is that correct?
A. Yes.
Q. And that would reduce the amount of money available in those portfolios; is that correct?
A. It depends on how the accounting is done. For instance, if you – just using – if you have a million-dollar portfolio and you have fees of let's say 100,000 and yet you earn 200,000, you have a net hundred-thousand-dollar gain.
Q. But that would reduce it beyond getting the – realizing the full 200,000 gain in your example; is that right?
A. Yes.
Q. Okay. Now, assuming that Avatar Holdings holds this portfolio, as a property company would it reasonably – would you reasonably expect it to have property taxes to pay?

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A. I'm not sure if your question -- I thought you said if Avatar Holdings holds the --
Q. I'm sorry. Let me strike that. I made an error.
Assuming that this portfolio is held by Avatar Properties as a property company, a real estate company, wouldn't real estate taxes be a recurring cost?
A. It doesn't matter if they hold a portfolio or not. I would normally expect a real estate company to have to pay property -- that owns real estate to have to pay property taxes.
Q. And wouldn't it use available assets to it to pay property taxes?
A. I would expect it would.
Q. And if it paid property taxes from that portfolio, wouldn't that reduce the amount in the portfolio?
A. Again, it depends on what the earnings from the portfolio are or were.
Q. In your report, Ms. Zimmer, you say that Florida Cities can pay 1.5 million without borrowing, but it can pay up to 7 million, 7 and a half million if it borrows from Avatar Holdings; is that correct?
MR. QUINN: Objection, Your Honor. Again, we've covered this a number of times.
MR. HIRD: I'm sorry. I think this was asked on Mr. High's questioning, and I'm asking some further -- I'm

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introducing a new topic.
THE COURT: I'm going to allow him to get into it, but only for the purpose of bringing out anything additional.
Of course, don't repeat anything unless it's --
MR. HIRD: I'm not repeating.
THE COURT: – necessary to get into some aspect of it.
MR. HIRD: I'm not repeating, Your Honor. I'm asking about a different issue.
THE COURT: All right.
MR. HIRD: I'm asking – Mr. High explored this question from a Florida Cities perspective, and I'm exploring it from an Avatar Holdings.
THE COURT: Go ahead.
BY MR. HIRD:
Q. If Avatar Holdings were to lend Florida Cities the additional money, how would it get paid back?
A. It depends on whatever the terms were that Avatar Holdings agreed – you know, they would have an agreement between Florida Cities and Avatar. They could spread payments over – you know, there would be an amortization.
Q. But wouldn't it be paid back out of money that would have otherwise gone from Florida Cities to Avatar Holdings as dividends?
A. I think – well, I think Florida Cities pays its parent

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dividends, Florida Cities Holdings. Are you talking about eventually it goes up to Avatar Holdings?
Q. Yes.
A. Well, any excess, it would be paid in interest and principal repayment rather than it would take away from dividend.
Q. It would take away --
A. The ability to pay dividends, yes.
Q. It would take away from the dividends. So ultimately the money would come out of Avatar Holdings' pocket, and it would not be repaid because the dividend income it would otherwise get would be lost; is that right?
A. They would not – it would prohibit Florida Cities from paying that amount in dividends. I'm not sure I'm following --
Q. And that would have been money that Avatar Holdings might otherwise get in dividends; is that right?
A. Yes, that's an option, that the company could pay it in dividends instead.
Q. So functionally if Florida Cities is assessed a penalty of more than 1.5 million and it borrows the excess from Avatar Holdings, that extra money really comes from Avatar Holdings' pocket, right?
A. Well, it's financed through Avatar. I assumed in my report Avatar Utilities. If you want to assume Avatar

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Holdings, that's fine.
Q. So it would in fact come from Avatar?
A. It would be financed by its parent or its ultimate parent. But Florida Cities would be paying it back through earnings over however many years out the loan went.
Q. And if this Court -- let's assume for the moment that this Court found Avatar Holdings not liable. If a payment was assessed against Florida Cities for an amount above 1.5 million that required Avatar Holdings to lend the money to Florida Cities, wouldn't Avatar Holdings essentially be paying a penalty for liability it didn't have?
MR. QUINN: Objection. This calls for a legal conclusion and speculation.
THE COURT: Sustained. Sustained.
BY MR. HIRD:
Q. Let me ask another question, then. You've said that in addition to the seven -- to Florida Cities paying this penalty that Avatar Holdings can pay its own penalty of up to 15 million; is that right?
A. Are you talking about in addition?
Q. Well, you said that Avatar Holdings can pay a penalty of up to 15 million.
A. Right.
Q. If this Court were to assess $7 and a half million penalties against Avatar Holdings and Florida Cities,

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wouldn't -- strike that.
You just testified that anything above 1.5 million that would be assessed against Florida Cities would come from Avatar Holdings or some other Avatar-related entity; is that right?
A. No, I don't think I testified to that. I testified that if payments were to be made up front, it could be made if its parent, some parent above Florida Cities Water, were willing to loan the money or finance the payment to Florida Cities.
Q. If those payments were being made in that manner and that parent was Avatar Holdings and Avatar Holdings would be assessed its own penalty, wouldn't Avatar Holdings functionally be paying twice for the same violation?
MR. QUINN: Objection. Again, it calls for speculation and a legal conclusion.
THE COURT: Sustained.
MR. HIRD: I have no more questions, Your Honor.
THE COURT: Redirect?
MR. QUINN: Your Honor, two items, and we can move on.
Your Honor, at this time I move United States Exhibit 585 into evidence. I neglected to earlier.
And also with regard to Ms. --
THE COURT: Wait. Wait. Wait.
MR. QUINN: I'm sorry.

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THE COURT: That's 585?
MR. QUINN: Yes, sir.
THE COURT: All right. Do we know which one we're talking about here?
MR. QUINN: It was one of the documents Ms. Zimmer reviewed.
THE COURT: All right. It will be received.
(United States Exhibit Number 585 received in evidence.)
MR. QUINN: Your Honor, with regard to Exhibit 598 -- that is the expert report of Ms. Zimmer -- in light of the Court's ruling, I would only like to move portions of it in and mark for identification the remaining portions that deal with wrongful profits.
Your Honor, I would like to move into evidence Exhibit 598 only Part 2.
THE COURT: Okay. That will be received.
MR. QUINN: I would also like to move into evidence Exhibit 598-A.
THE COURT: 598-A?
MR. QUINN: Yes, which is an --
MR. HIRD: Excuse me, Your Honor.
THE COURT: Just a moment.
MR. QUINN: 598-A is an attachment to Ms. Zimmer's report. It was just broken out. It's Attachment 1 or Exhibit

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1.
MR. HIRD: What does it have on its attachment?
THE COURT: You mean exhibit or -- no.
MR. HIRD: No objection.
THE COURT: Wait a minute. I haven't found it. 598-A?
MR. QUINN: Yes, sir.
THE COURT: Oh, is that a separately -- or is that an attachment?
MR. QUINN: It was an attachment to the original report, Your Honor.
THE COURT: Oh, I see. I see. Well, that's --
MR. QUINN: But it's a separately-marked exhibit. There are certain other ones --
THE COURT: All right. It's not indexed with a tab, but it is -- it's on a page which it has typewritten "Exhibit 1," and then the tab is Government Exhibit 598-A. And that's what you're talking about?
MR. QUINN: Yes, Your Honor.
THE COURT: Okay.
MR. QUINN: I would like 598-B and C to be marked only for identification. I will not move those.
I will move, however, Exhibit 598-D, 598-E, and 598-F into evidence, please.
MR. HIRD: We don't object, Your Honor.

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THE COURT: Sir?
MR. HIRD: We don't object.
THE COURT: Okay. Well, let me find them here and make sure we know what we're talking about.
You're offering D?
MR. QUINN: E and F, Your Honor.
THE COURT: D, E, and F?
MR. QUINN: Yes, sir.
THE COURT: All right. They'll be received.
MR. QUINN: Thank you.
Your Honor, we have no more questions of Ms. Zimmer.
THE COURT: All right. Thank you, ma'am. You may step down.
THE WITNESS: Thank you.
(Ms. Zimmer was excused.)
MR. QUINN: Your Honor, for purposes of the remainder of the day, United States has one remaining witness, which I believe will take ten minutes on direct examination, after which we have two ministerial items moving some depositions in and some interrogatories in. I don't know how long the cross-examination is going to go.
After we've done that we rest, so what would you prefer, Your Honor?
THE COURT: Well, I have a sentencing that's -- is the defendant here? Is he incarcerated?

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THE CLERK: Yes.
THE COURT: Okay. Are the lawyers here?
THE BAILIFF: Everybody's here, Your Honor.
THE COURT: Okay.
THE BAILIFF: I don't see the Government, Your Honor, but the defendant is here and his attorney is here.
THE COURT: What is the urgency, if any, with respect to the witness? Is there any urgency?
MR. QUINN: Oh, no, none. We just want instead of leaving him hanging overnight --
THE COURT: Sure.
MR. QUINN: We can move the ministerial stuff now if you're waiting for the other. Or we can come back after.
Your Honor, there's no urgency with regard to the witness.
THE COURT: Okay. Let's --
THE BAILIFF: Everybody's present.
THE COURT: Let's take the ministerial stuff.
MR. QUINN: Yes, Your Honor.
THE COURT: And then I think we're going to have to recess for the evening.
MR. QUINN: Your Honor, ministerial item number 1 deals with answers to interrogatories. United States would move the following exhibits in. And Mr. Moore will pass them on to the defendant. These are answers by the defendants.

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The first item is the March 30th, 1995 document Florida Cities' Answers to the United States' First Set of Interrogatories and the Correction to Florida Cities' Answers to the United States' First Set of Interrogatories. We'd like to move those into evidence, Your Honor.
THE CLERK: What number?
MR. QUINN: Should I continue on down the list, or would you like to take these one by one?
THE COURT: Take them one by one.
MR. QUINN: Okay.
THE COURT: Are these marked?
THE CLERK: What exhibit --
MR. QUINN: I'm sorry?
THE COURT: Are these marked?
MR. QUINN: As exhibits?
THE COURT: Yes.
MR. QUINN: They are not marked as exhibits, Your Honor.
THE COURT: All right. They'll be received.
MR. QUINN: Thank you. The next item is the November 22nd, 1995 Florida Cities' Amended Revised Responses to Plaintiff's First and Second Interrogatories.
THE COURT: Okay. They'll be received.
MR. QUINN: Your Honor, the next item is the June 8th, 1995 Defendant Florida City Water Company Answer to

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Plaintiff's Second Set of Interrogatories.
THE COURT: They will be received.
MR. QUINN: The next item is the June 9th, 1995 Defendant Florida Cities Water Company Answer to Plaintiff's First Request for Admissions.
THE COURT: Received.
MR. QUINN: The next item is the June 9th, 1995 Defendant Avatar Holding, Incorporated Objections and Answers to United States' First Request for Admissions.
THE COURT: Received.
MR. QUINN: The next item is the June 15th, 1995 Defendant Florida City Water Company's Answers to Plaintiff's Second Request for Admissions.
THE COURT: Received.
MR. QUINN: And the final discovery item is the July 14th, 1995 Defendant Florida City Water Company's Answers to Plaintiff's Third Set of Interrogatories.
THE COURT: Be received.
MR. QUINN: The final ministerial item, Your Honor, deals with the movement of -- I'd like to move in certain deposition transcript portions. These have been set out in our pretrial memorandum located at page 32, 33, 34 -- the joint pretrial statement. Excuse me. The revised joint pretrial statement, Your Honor, pages 32, 33, and 34.
THE COURT: Well, now, 34 is the one we were talking

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about earlier.
MR. QUINN: I'm sorry. The top of 34, Your Honor. It continues over for Ms. Karleskint.
THE COURT: Karleskint?
MR. QUINN: Yes, sir. And then --
THE COURT: Well, now, wait a minute.
MR. BAISE: Your Honor, a point of clarification, is the Government moving in the deposition of Gerald Allen?
THE COURT: Of who?
MR. BAISE: Gerald Allen.
MR. QUINN: Yes, we are, Your Honor.
MR. BAISE: Gerald Allen's going to be testifying, though. He's available.
MR. QUINN: Your Honor, we can use depositions for a -- deposition of a party for any purpose.
MR. BAISE: You can use it to impeach, but he's going to be here to testify. That's best evidence.
MR. QUINN: Your Honor, we can use it for any purpose according to the Federal Rules of Civil Procedure.
THE COURT: All right. Now, is this a party?
MR. JACOBS: Party officer.
THE COURT: Party officer?
MR. QUINN: Yes, sir.
THE COURT: Yeah, that can be used.
Now, what you're proposing to do is to introduce

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these and have me read them at some time during my leisure, or are you going to read them?
MR. JACOBS: May I address that, Your Honor?
THE COURT: Yes, sir.
MR. JACOBS: The intention was to put them into evidence and then, as with the 500 documents, it's not our concept that you would read all of them at your leisure but that perhaps we would call your attention to particular documents and particular portions of testimony in post-trial proceedings.
THE COURT: Well, let me tell you, I've been burned on this sort of thing before where during non-jury trials counsel have dumped depositions on the Court instead of reading them during the trial of the case, and it becomes quite burdensome.
MR. JACOBS: We -- I think it's our intention to cover, as we have with Mr. Levy, for example, most of the material that took place in the deposition with the witness, if he is being called in fact by the defendant or one of the defendants.
Although they propose to call 26 witnesses, by my present count anyway, in the next five days, I'm not sure they're going to get to all of them. I don't want to risk, of course, their not getting to some of them and my not moving into evidence deposition portions. And as the rules provide

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for parties, officer, or managing agent, we are entitled to use their statements in their deposition for any purpose.
So I can certainly represent to the Court that there's no intention to in any way mislead the Court here. We want to preserve our right to have this material in evidence for the record.
MR. BULLOCK: Your Honor, let me address a couple of different issues. First of all, as to page 32 of the March 27, 1995 deposition of Gerald Allen -- as you will recall, Mr. Allen is here as the corporate representative of Florida Cities -- which is a deposition in which Mr. Allen took the Fifth Amendment, Mr. Allen subsequently changed his mind and testified for two full days and will be one of our witnesses.
I'm not sure whether this falls under the offer of proof from earlier this afternoon. I'm not really sure that it's relevant if the witness in fact is -- has been deposed and will testify.
THE COURT: Well, this deposition of March 27, 1995, this is the one in which he did not testify?
MR. BULLOCK: Chose not to testify, Your Honor.
THE COURT: Now, you're addressing right now only that deposition?
MR. BULLOCK: That is correct, on this point.
THE COURT: Well, it seems to me that -- seems to me that that particular deposition would fall under the Court's

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reserved ruling, wouldn't it, Mr. Jacobs?
MR. JACOBS: Well, perhaps the inferences to be drawn from the deposition, but under Rule 32(a)(2), the deposition of a party or of anyone who at the time of the taking the deposition was an officer, director, or managing agent --
THE COURT: Well, I understand that. I don't think there's any issue as far as I'm concerned as far as the Court -- or your entitlement to present the deposition of a party and any officer and so forth.
What we're talking about now is whether that particular deposition doesn't fall within the Court's reserved ruling with respect to that grouping on page 34 of the revised joint pretrial statement.
MR. JACOBS: Perhaps I misunderstood the Court's ruling in that respect. Mr. Wilkov, there was a distinction made because he was a former officer. And I understood the Court to be taking under advisement the issue of the effect of the pleading of the Fifth Amendment by these witnesses. I did not understand -- and perhaps that was my mistake -- that we had -- I didn't understand that we had at that point in time in the discussion actually moved these depositions into evidence, which is what --
THE COURT: Well, you were offering the ones on page 34 into evidence, and the Court has reserved ruling on that.

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Now, I announced that I was sustaining the objection to Mr. Wilkov for the reasons that I mentioned.

But it seems to me that at this point at least I'm going to put the deposition of Mr. Allen dated March 27, 1995 in the same category and reserve on that.

MR. BULLOCK: Your Honor, I would add as a supplemental point to that, it's my understanding of Mr. Jacobs' argument is that because he was unable to depose the individuals we discussed early this afternoon he ought to be able to draw the inference. In fact, he's been able to depose Mr. Allen for two days, and so I'm not sure -- that to me is another and a separate argument on our behalf that this particular deposition shouldn't be included.

MR. JACOBS: I'm not asking that adverse inferences be drawn from Mr. Allen's prior failure to testify or his prior assertion of the right to testify. As you can see, he went on to testify. I've got --

THE COURT: Well, then why do you want the March 27, '95 deposition in evidence, then?

MR. JACOBS: I think I'm entitled to have it in evidence, and I'm interested in why there was a change, frankly, Your Honor. And I don't want to get into that too much, but there was obviously a change of heart of some sort, which I'd like to discuss with Mr. Allen when he takes the stand.

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MR. BULLOCK: Your Honor, he actually asked Mr. Allen that question in his deposition, and Mr. Allen answered it.

MR. JACOBS: Well, I still think I can ask him when he gets to the stand.

THE COURT: Well, all right. I'm inclined to believe that notwithstanding the fact that a witness originally may take the Fifth Amendment and not submit to deposition, if you're able -- if he changes his mind and does take -- you do take his deposition later on, although I think that you may very well be entitled to inquire as to why the change of heart, I'm not sure that the deposition, the original deposition, is admissible.

I will -- I'll reserve ruling on that, that issue.

MR. JACOBS: Very well. And --

THE COURT: Which when you do brief this subject that we've been talking about, which was precipitated by our discussion regarding page 34, you can treat that as well.

MR. BULLOCK: Your Honor, as on page 33 -- Your Honor, he is offering the deposition of Julie Karleskint. I don't believe and don't know exactly how the Court would define an officer or director. I don't believe Ms. Karleskint has ever been an officer or director of Florida Cities Water Company.

MR. JACOBS: If I may, Your Honor, he's left out

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"managing agent." And her title is operations manager, so we think she falls under the rule.

MR. BULLOCK: Your Honor, Florida Cities would contend that she is a staff person, not someone that rises to that level.

THE COURT: Well --

MR. BULLOCK: Your Honor, we'll withdraw that.

THE COURT: Okay. All right.

MR. HIRD: Your Honor, on page 34 I don't know which ones are being admitted. Are you stopping with Ms. Karleskint?

THE COURT: Yes.

MR. HIRD: Okay.

MR. JACOBS: For clarification, then, is the Court accepting --

THE COURT: Yeah, I guess so.

MR. JACOBS: -- Mr. Tompkins, Mr. --

THE COURT: Who, Tompkins?

MR. JACOBS: Is the first one, Jack W. Tompkins.

THE COURT: Yes.

MR. JACOBS: Gerald Allen on November 13th, '95 --

THE COURT: Yes.

MR. JACOBS: -- and December 15th, '95?

THE COURT: Yes.

MR. JACOBS: Paul Bradtmiller, November 18th, '94

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and November 21st, '94?

THE COURT: Yes.

MR. JACOBS: Julie Karleskint on April 21st, '94 and October 2nd, '95 as well as --

THE COURT: Yes.

MR. JACOBS: -- October 16th, '95?

THE COURT: Yes.

MR. JACOBS: Thank you, Your Honor.

MR. BULLOCK: Your Honor, as a procedural matter -- and I almost hate to bring this up --

THE COURT: Then don't.

MR. BULLOCK: But unfortunately I think I have to.

In terms of objections to the questions that were in the depositions --

THE COURT: Okay. If there are objections, then you can read them just as if the witness is testifying.

MR. BULLOCK: Okay.

THE COURT: You see, that's the thing that I do not want to get saddled with later on.

MR. JACOBS: I think I took all of these that you've accepted without exception. And I believe that Mr. Scroggin was present at all of them, and I think that -- and Mr. Scroggin can correct me if I'm out of turn -- I think there were relatively few objections. I believe Mr. Baise was present for one day of Mr. Bradtmiller, but otherwise

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Mr. Scroggin was present. So, again, I don't --
THE COURT: They're going to go on the record here in this courtroom. You can read them, and I'll hear the objections as they --
MR. JACOBS: You --
THE COURT: I don't know when we'll finish this trial.
MR. JACOBS: Judge, you want us to read the lines that there are objections to?
MR. BULLOCK: Your Honor, my understanding of the Federal Rules is that all objections save as to the form of the question are reserved until the time the deposition will be used.
MR. JACOBS: There was no stipulation to that effect, Your Honor.
MR. BULLOCK: That's the operating basis of the Federal Rules.
THE COURT: Okay. We're through for the day, gentlemen. I'll see you at 8:45 tomorrow morning.
MR. JACOBS: Judge, what was your ruling with respect to these --
THE COURT: Those depositions?
MR. JACOBS: Yes, sir.
THE COURT: Yeah. You're going to be permitted to have them read. That's my ruling. And I'll hear the

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objections as they're read.
MR. JACOBS: And if there are -- I'm trying to get to expedite matters. If there are -- as I say, most of these questions and answers were not objected to. Can they be accepted, then, as such and we'll just read the lines that are objected to with the objections, or we'll just waive those and take them right out if we don't think they're that important? Again, I'm trying to move things along.
THE COURT: Well --
MR. JACOBS: Because if the Court accepts that proposal, I think we could probably get through this in, at most, an hour, all of them.
MR. BULLOCK: Your Honor, these depositions were taken under the understanding they were pursuant to the Federal Rules, and our position is that that's the Federal Rules that all the objections save as to the form are preserved. I don't believe that requires --
THE COURT: Now, wait a minute. Sit down. Sit down.
Did not the order, the pretrial order or the scheduling order, or the local rule require that any objections to any depositions that are listed be set forth in the joint pretrial statement?
MR. JACOBS: I have it handy if it would help the Court, Your Honor.

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THE COURT: The scheduling order provides that the joint pretrial -- or the pretrial statement shall -- let's see. This is subparagraph -- well, paragraph 8-H. A list of all depositions to be offered into evidence at trial, as distinguished from possible use for impeachment, including a designation of the pages and lines to be offered from each deposition.
Well, I was under the impression that the order required all objections to any portions of the deposition designated be set forth in the pretrial statement. Not so.
MR. JACOBS: Judge, again, if I can be helpful, there were very few objections. I don't think this is going to be a problem.
I would be willing to meet with counsel and either remove from our proposal the questions that were objected to, excise them and offer the rest, or just read the few lines where there are objections and ask the Court to rule.
And, again, my best estimate would be that would take no longer than an hour.
MR. BULLOCK: Your Honor, the point is, the Federal Rules allow us to preserve all objections. That is the underlying assumption that we've used in these depositions and --
THE COURT: Well, and that's -- I was telling you that I was under the impression that I descended further than

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that, and I know now to amend my scheduling order.
Go ahead.
MR. BULLOCK: I was just going to make a point that there was no understanding that the defendant, this defendant, was waiving that. I believe Mr. Hird can speak that there was no understanding that Avatar Holdings was waiving that.
As a matter of fact, Ms. Tsosos just handed me a copy of Mr. Levy's deposition, which clearly says it was taken pursuant to Federal Rules and they're not waiving objections.
MR. JACOBS: We didn't offer Mr. Levy, sir.
THE COURT: Sir?
MR. JACOBS: We didn't offer Mr. Levy. He's here.
MR. BULLOCK: There has to be agreement of all counsel that you would waive that.
THE COURT: Okay. Well, Mr. Bullock has posited that objections, unless they are as to form, are not waived.
MR. BULLOCK: That's correct.
THE COURT: And that sounds right to me. I think that's correct. And I'll be traveling on that assumption.
Mr. Jacobs, is that not your understanding of the Federal Rule?
MR. JACOBS: It wasn't my understanding, Your Honor, unless there's a stipulation, which there was never at any of these depositions.
THE COURT: A stipulation of what?

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MR. JACOBS: By the parties that objections would be preserved. It was my understanding --

THE COURT: Well, now, you know, it's historically always been the case, as far as I recall, that while you must object as to the form of the question at a deposition, else run the risk of waiving those kinds of objections, that you don't waive the right to object to questions other than as to form.

Now, historically that's always been the case, I think. I mean that's -- as I get older, I know that when I -- the more dogmatic I am, the more I step on my own toes.

But, now, if you can disabuse me of that with some authority, then so be it. But I'm afraid that counsel for the defendants have a legitimate point here when they say that they will be entitled to raise objections to these depositions that are being offered on bases other than as to form unless they have raised the objections as to form during the deposition.

So that's what it appears at this point, so we'll proceed to hear your depositions in the morning. And we can have them read, and if somehow or other you can avoid the scenario that I think all of us see might occur, more power to you. But I will be here to hear these depositions tomorrow, however long it may take to read these excerpts.

So anything else?

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We'll reconvene at 8:45 tomorrow morning, and we'll plan to recess at 3:45 tomorrow afternoon.

MR. JACOBS: Thank you, sir.

(Adjourned at 5:10 p.m.)

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CERTIFICATE

I hereby certify that the foregoing is an accurate transcription of proceedings in the above-entitled matter.

_____ _____

Court Reporter Date

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs.
FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS, INC.,
Defendants.

Case No. 93-281-CIV-FTM-21

Friday, March 29, 1996
Tampa, Florida

TRANSCRIPT OF NON-JURY TRIAL
BEFORE THE HONORABLE RALPH W. NIMMONS, JR.,
UNITED STATES DISTRICT JUDGE

Appearances of Counsel:

For the Plaintiff: Mr. Daniel S. Jacobs
Mr. T. Anthony Quinn
Ms. Gwendolen Pitz-Henley

For Defendant Avatar: Mr. David B. Hird
Ms. Joanne Tsotsos

For Defendant Florida Cities: Mr. Gary H. Baise
Mr. Alexander M. Bullock
Mr. Lance High
Mr. Don G. Scroggin

Reported by: Dennis Miracle
Official Court Reporter

PROCEEDINGS

THE COURT: Good morning.

Okay. Are we ready to proceed?

MR. JACOBS: Your Honor, with your permission, I would like to address the issue that we left off with yesterday which had to do with reading in portions of depositions that the Government listed in its part of the joint pretrial statement.

I recall the Judge mentioning that he anticipated taking under advisement any Rule 52 motion. With that in mind, what I would propose -- and I'm cautiously optimistic that this will at least alleviate a great number of these depositions; and if not, certainly a great number of the lines of the depositions that we would need to have read into the record -- I would like to withdraw our proposal that we read those into the record now and reserve the right to do so in our case on rebuttal, if need be.

I suspect that most of the information that we seek to have entered into evidence through the depositions we will be able to elicit through the witnesses that Defendants advised us that they will be calling.

THE COURT: Well, you can do that, of course, if it's proper rebuttal. I mean, you don't have to reserve your right to do that.

MR. JACOBS: The only one exception is one

witness, Mr. Tompkins, is unavailable beyond the subpoena power of the Court since he resides in Nashville, Tennessee, so that -- but he's the only witness of the ones we've listed who did not take the Fifth Amendment who the Defendants are not also anticipating calling.

And I will personally commit to going through that particular deposition before our case on rebuttal and excising out any information that we could really do without by that point in our case so that, again, I'm cautiously optimistic that we could get through this all in an hour at the end of the case, if need be.

THE COURT: Mr. Bullock?

MR. BULLOCK: If the Court please. Good morning, Your Honor.

THE COURT: Good morning.

MR. BULLOCK: A couple of points on that issue. First of all, I looked at some case law in the library last night. There is authority within the Court's discretion for you to exclude depositions which are being offered to be read in if you find that the evidence would be cumulative or duplicative. And I would be delighted to hand the Court the authority and give a copy of that to counsel as well.

That even though the Plaintiff may have a right to read that in, you in your discretion may exclude that if you find it, I believe, duplicative, cumbersome or if it would

interfere with the time in which the case would be tried.

I would also note that Mr. Tompkins, the witness who Mr. Jacobs just spoke about, at the time of the taking of the deposition was not an officer, director or manager of Florida Cities Water Company.

Rule 32(a)(2) says that the deposition must be of an officer, director, managing agent at the time of the taking of the deposition. So, we would object to Mr. Tompkins' deposition being offered in that manner.

MR. JACOBS: Are you through?

MR. BULLOCK: I would note that the authority that I have cited is also found in Wright and Miller, in Volume 8-A, Section 2145. And if the Court pleases, I'll be glad to hand that up and to serve copies to counsel.

THE COURT: Okay.

MR. JACOBS: While he's doing that, may I respond just briefly --

THE COURT: Yes, sir.

MR. JACOBS: -- on Mr. Tompkins?

We do not seek to have the deposition testimony of Mr. Tompkins read pursuant to 32(a)(2). We seek to have the deposition testimony of Mr. Tompkins read pursuant to Rule 32(a)(3) which provides, under Subsection B, that the witness is at a greater distance than one hundred miles from the place of trial or hearing.

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Like I said, he's in Nashville, and I would ask the Court to take judicial recognition that Nashville is more than a hundred miles from here.

THE COURT: Okay. Mr. Bullock, what about that? He's not offering it under 32(a)(2).

MR. BULLOCK: Your Honor, if that -- my impression was as of last night, Your Honor, it was under 32(a)(2). If that's what he represents, that's -- in my mind it's a totally different ball game.

And, Your Honor, if he submits the deposition, we, of course, would reserve the right to offer other sections of the deposition as well.

Let me also, Your Honor, suggest an additional alternative in the event that the Court does not want to exclude under the authority...

THE COURT: All right. Well, right now, we're only talking about Tompkins. As I see the scenario that has been painted by Mr. Jacobs, he's not going to be offering any of this deposition testimony during his case in chief with the possible exception of Mr. Tompkins.

MR. JACOBS: I'd even hold off on that, Your Honor. I'm going to offer nothing now.

THE COURT: I know, I know, but what -- my understanding is that with respect to all depositions except Tompkins, Mr. Jacobs is proposing to be willing to only

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offer those depositions that he would seek to offer on rebuttal, if any. They would, of course, need to properly be rebuttal.

With respect to Tompkins, I suppose he's asking the Court -- if I'm misreading you, Mr. Jacobs, let me know -- I suppose you were asking the Court for leave to permit you to evaluate the Tompkins deposition and augment your direct case with so much of his deposition testimony as you wish to do after the conclusion of the Defendants' cases. Is that what you're asking?

MR. JACOBS: I'm not sure I'm going to need to do that, no. Actually, I -- I'm sorry I didn't make myself clear.

We've already designated certain lines --

THE COURT: Yes.

MR. JACOBS: -- and what I said I would commit to do is try and cut back on those lines.

THE COURT: On rebuttal?

MR. JACOBS: Yes, sir.

THE COURT: But only on rebuttal?

MR. JACOBS: Yes, sir.

MR. BULLOCK: And, Your Honor, subject to his establishing that this is, in fact, proper rebuttal...

THE COURT: Well, that's what I'm saying: He'll have to -- he's not going to be able to reopen his case, as

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it were, with these depositions. He's going to step back and be willing to take the chance that he'll be able to cover what he can by cross examination. And then if there are some minimal matters -- hopefully minimal, if any -- that he feels that he needs to present on rebuttal, proper rebuttal, through these depositions, then he'll seek to do so.

MR. BULLOCK: This is just as to Mr. Tompkins' deposition?

THE COURT: No. I --

MR. JACOBS: The only qualification that I mentioned earlier is if there's a 52 -- my understanding is, the Court is going to take any 52 motion under advisement until the close of all of the evidence.

THE COURT: Well, I said I probably would be doing that, but what has that got to do with this?

MR. JACOBS: That's the one reservation that I have about making this proposal to move things along. There are some lines that will relate to Avatar Holdings' liability. And I'm happy to read those in, again, at the end of the evidence, but I don't want my case thrown out when I rest my case in chief because I haven't read those lines in.

THE COURT: Well, you're presenting your case as to both Florida Cities Water and Avatar, and you will be

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closing pretty soon --

MR. JACOBS: Within an hour, I hope.

THE COURT: -- so I don't understand where the Tompkins deposition has any -- what that has to do with the Rule 52 motion and whether the Court reserves on that or rules on it.

MR. JACOBS: No, that would have to do only with two of the three witnesses that come under 32(a)(2) and these are witnesses -- the Company's own employees.

THE COURT: Well, yes, but if you present either, you know, depositions under (a)(2) or (3)(b), they are going to need to come in in your case in chief unless they are proper rebuttal.

MR. JACOBS: I understand.

MR. HIRD: Your Honor, may I speak to this issue for a moment? The two witnesses that he's referring to, I believe, are Mr. Allen and Ms. Karleskint. While they may be officers or managing agents of Florida Cities, they are not of Avatar Holdings, so I don't think they come in against Avatar Holdings under that rubric.

We do intend -- Your Honor may defer ruling on the Rule 52(c) motion, but we do intend to make one on behalf of Avatar Holdings at the close of Plaintiff's case in chief.

THE COURT: Yes. That's not surprising.

All right.

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Which, incidentally, that last quote or that last statement could be misconstrued. I didn't mean anything by that; I'm meaning that that's almost always done. I'm not commenting on anybody's case here.

Okay. Whether you all are clear or not, I think I'm clear, and so we'll just move on at this point.

MR. JACOBS: Thank you, Your Honor.

THE COURT: Call your next witness.

MR. QUINN: Your Honor, the United States calls Roger Pfaff.

THE DEPUTY CLERK: Come forward and be sworn. Raise your right hand, please.

Do you solemnly swear that the testimony you are about to give in this cause will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: Yes.

MR. HIGH: Your Honor, I have one issue to raise before Mr. Pfaff begins his testimony.

Yesterday, counsel tried to lay a foundation through expert witness Eileen Zimmer about the economic benefit model. I expect that counsel will try and do that today through Mr. Pfaff.

I would call the Court's attention to United States' supplemental responses to Defendant's first interrogatories served on November 17th where the

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interrogatory was, Identify all persons who you intend to call as fact witnesses at any hearing or trial or other proceeding; state the subject matter on which the witness is expected to testify and summarize the facts to which each witness is expected to testify.

They identified Mr. Pfaff, and they identified Mr. Pfaff to testify to the nature and number of Defendant's violations at Barefoot Bay and Carrollwood and Waterway Estates and to the enforcement history at each of those facilities.

So, to the extent that Mr. Pfaff is going to testify about economic benefit, I would ask that his testimony be limited.

In addition, Defendants served 30(b)(6) notices of deposition on the Plaintiff, and one of the paragraphs, Paragraph 38, stated: Any economic analyses performed by EPA to assess the economic benefit the company gained for alleged instances of non compliance of Barefoot Bay, Carrollwood and Waterway Estates, and the United States designated Mr. Kenneth Kwan to speak to that.

So, again, to the extent that Mr. Pfaff is going to talk about economic benefit, I would ask that his testimony be limited.

MR. HIRD: Your Honor, we join in the objection.

We would also like to point out that Ms. Zimmer

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was the only expert designated with respect to economic benefit. The only economic benefit analysis that was provided to the Defendants was Ms. Zimmer's report which this Court has struck in appropriate part.

THE COURT: All right. Mr. Quinn?

MR. QUINN: Yes, Your Honor. If I may, I'd like to address the 30(b)(6) issue first.

The United States -- counsel correctly states the United States did not designate Roger Pfaff as the United States' designee for that purpose.

Under Rule 30(b)(6), we are entitled to designate any person who consents to testify on that behalf. The fact that we didn't designate Roger Pfaff for purposes of testifying about economic benefit at that time does not prohibit him from testifying at a later point in time.

The mere fact that his deposition was noticed and we put him up -- or the agency's deposition was noticed and we put up Mr. Pfaff to testify about an area doesn't mean he can't testify about another area.

THE COURT: All right. Well, what about the other argument?

MR. QUINN: The answers to interrogatories, counsel correctly read the response. Mr. Pfaff will not be putting up anything new today. He'll be testifying about -- the portion that he'll be testifying about comes within that

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area of enforcement history. There will be one document that we will use with Mr. Pfaff, and that document was done during the course of enforcement history.

And then as to the expert issue, the United States will present -- the testimony of Mr. Pfaff is not expert testimony at this point. What we're trying to elicit from him will not require expert opinions, because we are limited; he didn't write a report and we didn't list him as an expert.

THE COURT: Well, you'll be precluded from eliciting any expert testimony on economic benefit from this witness.

MR. QUINN: Yes, sir.

THE COURT: All right. To that extent, I will sustain any anticipated objection; but, of course, Mr. High, if you perceive that that's being violated, you, of course, have the right to object at the appropriate time.

All right. You may proceed.

MR. QUINN: Thank you, Your Honor.

- - -

Thereupon,

ROGER PFAFF,

a witness, having been duly sworn to speak the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. QUINN:

Q. Mr. Pfaff, where do you work?

A. At the U.S. Environmental Protection Agency in Atlanta.

Q. What is your title with the United States Environmental Protection Agency in Atlanta?

A. I'm chief of the Enforcement Section and the Water Management Division.

Q. When you say "Atlanta," do you mean Region 4?

A. Yes. That's the Region 4 office.

Q. How long have you been chief of the Enforcement Section, Water Management Division, at Region 4?

A. Six years.

Q. Sir, what is the BEN model?

A. It's a mathematical model used to compute the economic benefit of delayed or avoided costs of compliance with environmental laws.

Q. Can you tell me briefly what are delayed costs of --

MR. HIGH: Your Honor, I would object.

MR. HIRD: Objection, Your Honor.

MR. HIGH: This is getting into what the benefit model is.

MR. QUINN: This is a fact, Your Honor; this is not expert testimony.

MR. HIRD: Your Honor, the Plaintiff proffered testimony on economic benefit using one methodology. He is now -- they are now presenting economic benefit testimony using a completely different methodology.

THE COURT: What's the purpose of his testimony if it's not to attempt to elicit from him testimony regarding economic benefit?

MR. QUINN: Your Honor, an exhibit has been entered and he is going to explain that exhibit.

THE COURT: What is the exhibit?

MR. QUINN: 494, Your Honor.

THE COURT: What is that exhibit?

MR. QUINN: It is an exhibit which has -- it's a memorandum with some attachments.

And, Your Honor, I also add that in your order of Monday, the Court agreed that in the instant case economic benefit should be analyzed as the present day value of costs avoided by non compliance rather than profits earned during the period of non compliance, from Page 3 of that order; and also on Page 4 of that order, the Court notes that Kenneth Kwan --

THE COURT: Would you sit down?

Gentlemen, I asked my -- I'm getting a little crotchety, I guess -- and I apologize for that -- but my rule in this courtroom is only one of you standing at one

time. It's distracting to me when somebody else gets up while somebody is speaking.

As you know, I probably give attorneys more leeway in speaking than I should, but please don't get up until the other person has finished.

Go ahead.

MR. QUINN: Yes, Your Honor. I was reading from Page 4. Mr. Kwan testified at deposition that the method for calculating economic benefit involved analysis of the capital cost that is required to meet the permit or the Clean Water Act requirements as well as additional operations and maintenance expenses that are required to come in compliance.

On Exhibit 494, on the bottom -- it's numbered 733 and 734 -- are numbers which do that. And I am merely asking -- going to ask Mr. Pfaff to elucidate on those two pages.

And it does not -- my opinion is, and the United States' position is, this does not require a rocket scientist or expert testimony.

THE COURT: Okay, Mr. Hird.

MR. HIRD: Your Honor, this is an economic analysis. And although there is a model that's being used, it's a model that has been devised by EPA based on economic assumptions and economic analysis.

I agree that the analysis of avoided costs is the accurate way to measure economic benefit, but there are a lot of assumptions that go into this model that affect the ultimate result, assumptions as to what the costs were, assumptions as to what the delay factor is, all sorts of things that one would cross-examine an expert witness about.

We don't have a designated expert witness whose deposition we could take because the witness that was designated used a different methodology. We deposed that individual. We explained how the methodology was wrong, and there was a motion to limit it.

So, what they are doing now is saying Mr. Pfaff is a fact witness because he, you know, may have turned the dials in the BEN model. In fact, he did not do it.

So, I don't think it's within his personal knowledge as to this particular calculation, these particular results. And they are using him as a pseudo expert.

THE COURT: Is 494 in evidence?

THE DEPUTY CLERK: Yes, sir.

MR. HIRD: 494 is in evidence; that is correct, Your Honor.

THE COURT: What are you going to offer in evidence through him?

MR. QUINN: Just 494, Your Honor. That's it.

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THE COURT: Which is already in evidence?
MR. QUINN: Yes. I'm just going to have him talk about those two pages, sir.
If I may add, Your Honor, these types of numbers are run for every case that EPA handles in the Clean Water Act.
THE COURT: Well, I'll hear his testimony and take under submission the objections, and you can renew your objections after I have heard his testimony.
MR. HIRD: Your Honor, may we also object at certain points as we go through on lack of personal knowledge?
THE COURT: Yes, sir.
MR. HIRD: Thank you.
THE COURT: You may proceed.
BY MR. QUINN:
Q. Mr. Pfaff, could you please turn to United States Exhibit 494, and I'd like to direct your attention to Page 733 and 734 as Bates stamped on the bottom. That's about the fourth and fifth pages in.
A. All right.
Q. Mr. Pfaff, what do these pages show?
MR. HIRD: Objection, Your Honor. Counsel has not shown that Mr. Pfaff prepared these pages or how he is otherwise familiar with them.

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THE COURT: Okay. Overruled.
THE WITNESS: They are two outputs of -- an output of two BEN runs for the Waterway Estates facility, one showing the economic benefit of not employing the wastewater treatment plant, and the other one for not moving the outfall in a timely manner.
THE COURT: Tell me what a BEN run is. I have read about it, but you need to elicit from him what a BEN run is.
MR. QUINN: Yes, Your Honor.
BY MR. QUINN:
Q. What's the BEN model used for at EPA?
THE COURT: Or BEN model.
THE WITNESS: The BEN model is used to calculate the economic benefit of the avoided or delayed costs of compliance with environmental laws, and these are computer outputs from runs made using that model.
THE COURT: You know, somewhere along the line this model that somebody has devised to determine economic benefit and to establish economic benefit -- you're saying that this can be established without anyone testifying as an expert.
MR. QUINN: Yes, Your Honor, we are at this point.
THE COURT: Ordinarily, you have somebody give testimony of economic benefit, come in and talk about the

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BEN model and what it means and how it was devised and why it has credibility.
MR. QUINN: Your Honor, I can't tell you what we've done before because I'm not aware that we get this far in a whole lot of cases, so I can't tell you that, sir. But I'll be happy to look it up and get back to you.
THE COURT: I'm concerned about -- you know, the Court has precluded you, rightly or wrongly, from bringing in the expert that you have designated to testify regarding economic benefit who has used a wrongful profits analysis, and then you bring somebody else in to testify regarding economic benefit and tell me that there is no expert testimony that is needed, that he can just look at an exhibit, which is a so-called "BEN run," and breathe credibility and life into that exhibit. It sounds like an end run to me.
MR. QUINN: Your Honor, I apologize if it appears to be an end run. The United States' position is that this document is in evidence, and there is nobody to say what it is.
THE COURT: Well, you know, there are documents that come into evidence in massive document cases that may be meaningless if there is not someone who can properly interpret those documents; and it seems to me that the person to properly interpret a BEN run is going to have to

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be an expert.
MR. QUINN: Your Honor, I respectfully disagree that an expert is required to do this, particularly because of the fact that at EPA and under Mr. Pfaff's supervision, runs like these are calculated all the time. They are --
THE COURT: All right. Go ahead.
MR. QUINN: I'm sorry. They are periodically done by engineers. It is correct that certain assumptions are made. The assumptions that are made are not being proffered at this point in time, just merely what that document says, and that's all I'm trying to do through this witness, Your Honor.
THE COURT: The purpose for this is to establish economic benefit?
MR. QUINN: Yes, Your Honor. We're trying to put a number on the table.
THE COURT: Yes, I know you are.
Well, go ahead and we'll see where we go.
MR. QUINN: Thank you, sir.
BY MR. QUINN:
Q. I think my last question was, can you tell me what Page 733 shows with regard to whether it was pollution control equipment or the relocation of the outfall? Can you tell me which one 733 is?
A. 733 is the pollution control equipment.

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Q. What is 734?
A. The relocation of the outfall.
Q. What does Page 733 of United States Exhibit494 conclude about the economic benefit of delayed compliance for the failure to upgrade pollution control equipment as calculated by the BEN model?
MR. HIGH: Your Honor, I would object to lack of personal knowledge.
MR. HIRD: I join in the objection.
MR. QUINN: I will withdraw that question.
BY MR. QUINN:
Q. Do you know what Page 733 of U.S. 494 concludes about the economic benefit of delayed compliance?
MR. HIRD: Same objection, Your Honor, as well as our continuing one.
THE COURT: Well, I'll overrule the specific objection at this point.
Go ahead.
THE WITNESS: Yes.
BY MR. QUINN:
Q. What does Page 733 of United States Exhibit494 conclude about the economic benefit of delayed compliance regarding the pollution control equipment as calculated by the BEN model?
A. It shows that as of March of 1993, it would be

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$3,089,000.
Q. Sir, do you know what Page 734 of United States Exhibit 494 concludes about the economic benefit of delayed compliance for relocation of the outfall as calculated by the BEN model?
A. Yes.
Q. And what does 734 of United States Exhibit 494 conclude about the economic benefit of delayed compliance as calculated by the BEN model?
A. That as of March of 1993, it is $226,018.
Q. Thank you.
MR. QUINN: No more questions, Your Honor.
MR. HIGH: Your Honor, I move to strike Mr. Pfaff's testimony.
THE COURT: I'm going to grant the motion. I think it would be necessary for the Government to come in and have someone testify as to what the BEN model is, why it has credibility; and of necessity I think that would have to be a person who would qualify as an expert witness, Mr. Quinn.
MR. QUINN: Yes, Your Honor.
THE COURT: All right. I'll grant the motion to strike for those reasons.
MR. QUINN: And we have no more questions for Mr. Pfaff.

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THE COURT: Thank you, sir. You may step down.
MR. QUINN: Your Honor, the United States rests.
MR. HIRD: Your Honor, just before the United States rests, if I may, there were four exhibits that were tendered yesterday that were tendered in incomplete form, and the Court instructed that if we had complete versions of them, they would be admitted.
We have provided them to counsel for the Government. I have copies for the Court and personal copies for Your Honor.
THE COURT: All right. Have you shown them to counsel?
MR. HIRD: Yes, sir. I believe Ms. Tsotsos, my colleague, has shown them.
We would like to have them --
MR. JACOBS: If you will just identify them for the record, I don't think we'll have --
THE COURT: Right. What are the numbers?
MR. HIRD: These were Avatar Holdings' Exhibits 21, 23, 24 and 25.
MR. QUINN: We have no objection, Your Honor.
THE COURT: All right. Those are being tendered by Mr. Hird. And as I understand it, those will replace the originals.
Do we have the first ones that were --

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MR. HIRD: Yes, Your Honor.
THE COURT: The originals?
MR. HIRD: Yes, or the incomplete versions.
THE COURT: Incomplete versions.
And so you have got hard copies of those, and those will be returned to, I guess, Mr. Hird.
THE DEPUTY CLERK: Yes, sir.
THE COURT: All right.
MR. HIRD: Your Honor, are those documents received?
THE COURT: Yes.
MR. HIRD: Thank you, Your Honor.
MR. QUINN: Now we rest, Your Honor.
THE COURT: Okay. These are just copies here that you handed to me?
MR. HIRD: Yes, Your Honor. Those are personal courtesy copies.
MR. BAISE: Your Honor, before the Defendant Florida Cities starts its case, I would like to defer to Mr. Hird for a motion, Your Honor.
THE COURT: All right, sir. Mr. Hird?
MR. HIRD: Thank you, Your Honor.
Your Honor, at this time Defendant Avatar Holdings would like to move the Court for a judgment on partial findings under Rule 52(c) of the Federal Rules of Civil

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Procedure.

In the Court's decision on summary judgment, it established the standard for holding a parent company liable for the Clean Water Act violations of its subsidiary, and that is that there had to be evidence showing that the parent corporation caused or directed violations or exercised actual and pervasive control of the subsidiaries to the extent of actually being involved in Florida Cities' daily -- Florida Cities' operations on a daily basis. So, in other words, we had to either actually control or direct the violation or be integrally involved everyday in the subsidiary. There has been no evidence that shows an every-day involvement of the parent corporation in the subsidiary.

THE COURT: Well, now, wait a minute. Are you saying that the Plaintiff -- the Government has to show evidence of some activity each day?

MR. HIRD: I'm reading your opinion -- from your opinion, Your Honor. You stated --

THE COURT: I think you read too much into that opinion.

Now, read back to me the portion that you're talking about.

MR. HIRD: Exercising actual and pervasive control of Florida Cities to the extent of being actually involved

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in Florida Cities' operations on a daily basis.

THE COURT: Well, you're not saying that the Government has to come in and put on evidence that the Defendant did something each day?

MR. HIRD: Not that the Defendant caused violations each day, but we're talking about -- what I understood you were saying about daily operations was that the companies would be so integrally involved that every day -- that even the most routine decisions would be made at the senior corporate management of the parent corporation.

THE COURT: Okay. Go ahead.

MR. HIRD: That level of control has not been shown by any of the evidence presented to date. There has not been the evidence of control on the everyday, the routine basis, the ordinary activity level.

Now, the other possibility that Your Honor left open, and the possibility which is consistent with the Lambert case decided by this Court, is the -- is a finding that the parent company caused or directed the underlying violations.

And let's look at what's left truly of the Government's case against Avatar Holdings. What's left at -- we'll start with Carrollwood. At Carrollwood, what's left is the Government's allegations that in this narrow window of time, the last six months of 1991, there were

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violations of the permit for the Carrollwood plant, the advanced wastewater treatment permit that was issued to a secondary treatment plant.

The Government basically alleges that if Florida Cities had done things faster or had tied in to the City of Tampa, those violations wouldn't have occurred.

You heard Mr. Schafer testify yesterday. He didn't testify in any way of any communications with Avatar Holdings. There's no indication that Avatar Holdings had anything to do with any activity relating to those violations within that narrow six-month window.

Indeed, the Court found in its earlier decision that there was very little evidence concerning Avatar Holdings' involvement at Carrollwood in any period later than 1984, and there is very little even at the 1984 level. Nothing else has come in to make a difference.

With respect to Waterway Estates, what we have left at Waterway Estates is the Court granted our motion on statute of limitations. We have the tail end of the Government's claims of discharge in the wrong location and we have a few alleged permit violations afterwards.

The Government's case against Avatar Holdings with respect to Waterway Estates is that somehow Avatar Holdings had a grand conspiracy to buy -- to acquire all of the wastewater treatment facilities in Lee County and,

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therefore, stubbornly made its subsidiary continue to violate rather than shut down and tie in to North Fort Myers. Yet, you have seen that Avatar Holdings had an opportunity to buy North Fort Myers in 1991 and didn't act on it. So, there's really no evidence that Avatar Holdings somehow caused those violations.

With respect to Barefoot Bay, the Government has been able because -- to get into evidence some 255 documents going back approximately ten years before the alleged violation at Barefoot Bay.

But what do we have at Barefoot Bay? We have violations of reporting biological oxygen demand as carbonaceous biological oxygen demand, which is simply a question of which test was used and which reports were done. There's nothing that Avatar Holdings could have done to cause that.

We have total residual chlorine violations, and I think Mr. Klingenstein testified that what happened was chlorine was added at the end of the process to disinfect the wastewater stream, and an allegation is made that not enough chlorine was taken out, again, before it was discharged. And we have these three toxicity test violations which essentially are species in the laboratory reacting to whole effluent, reacting in such a way that is adverse to health.

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There is this ten-year history that is being offered to say that somehow the ten-year -- the activities of Avatar Holdings caused these very, very technical violations. But when you look at the ten-year history, all that's going on there is there is discussions of long-term alternatives by the subsidiary as to how they are going to deal with long-term discharge situations.

And since these discussions necessarily involve major issues and major expenses, they are brought to the attention of the parent corporation. And the parent corporation people ask questions and get involved. But there's no indication that Florida Cities came and said, We're going to violate our toxicity tests unless you, Avatar Holdings, do "X". And Avatar Holdings did not do "X."

There's no indication of anybody at Avatar Holdings coming into any of these plants and fiddling with the valves and somehow changing the discharge.

This is a stretch. What you're dealing with is very, very technical violations of permit, and yet you're claiming that long-term planning activities that go back ten years somehow result in very technical violations of the permit ten years later. It is pushing the Clean Water Act way beyond its scope.

Your Honor, we, of course, will respond to the Government's offer of proof with respect to the Fifth

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Amendment, but I'd like to just discuss the five individuals who are mentioned there.

One is Mr. Sharp who, as you know, died in April 1992. I don't think the Government is entitled to any adverse inference from a witness who died before they filed the complaint. Mr. Sharp was dying of cancer during the last years of his life and resigned as chief executive officer in 1990. That's before the violations alleged against Avatar Holdings occurred.

Mr. Wilkov you have already struck, Your Honor, for this.

Robert Gordon was identified yesterday by Leon Levy as the president of Avatar Utilities. He's not an officer, director, employee of Avatar Holdings, and there's absolutely no reason why his taking the Fifth Amendment should in any way be imputed to another company.

You're left with John Sladkus and Dennis Getman. Mr. Sladkus retired the beginning of 1991. That was testified to yesterday. The violations here alleged against Avatar Holdings begin at the earliest May 4th, 1990, so the overlap is minuscule. In fact, at Barefoot Bay and Carrollwood, the alleged violations do not begin before Mr. Sladkus was gone.

Mr. Sladkus was deposed five -- four-and-a-half years after he had resigned from Avatar Holdings. This is

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not someone who we control; this is someone who made a personal decision. It's inappropriate, we believe, under the circumstances to read anything into that inference.

Finally, there's Mr. Getman. Mr. Getman is general counsel both of Avatar Holdings and Florida Cities. He was noticed at the time before Avatar Holdings was in the case, and he could have responded to -- and had he not taken the Fifth Amendment, many of the questions would have been objected to under the attorney/client privilege.

In contrast, we have witnesses who have testified -- you have heard Mr. Levy. There are many, many documents that the Government has put into place. The Government cannot make up for the lack of evidence by these adverse inferences.

The Government wants to argue from these -- from the documents that are in place -- it obviously has the right to do so -- but these documents cannot be augmented or reinterpreted or reinvented through the specter of witnesses who have taken the Fifth Amendment.

Your Honor, what we have here is a lot of smoke that is disguising the fact that there really is not a case against the parent company. In fact, the only reason why the parent company is here was brought out yesterday in the questioning of Ms. Zimmer. Florida Cities does not have the ability to pay the penalty that the Government would ask

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from this court. And that's the sole reason why Avatar Holdings is in this case.

Your Honor, I request respectfully that you grant Avatar Holdings' judgment on -- partial -- on partial findings in our favor.

THE COURT: Okay. Let me hear argument from the Government in response, Mr. Jacobs, and then I'll hear from Florida Cities Water Company.

MR. JACOBS: Your Honor, the Court ruled in its November 22nd, 1995, order that in order for Avatar Holdings to be held liable, it must have acted in such a way that it should be a person who violates, quote, unquote, under Section 309(d) of the Clean Water Act.

The Court noted in the same decision that there was both probative evidence in at least two, if not three, of the facilities indicating that decisions were made by the parent company relating to the violations in the complaint.

As I noted in my opening statement, far more additional evidence has surfaced since that motion was adjudicated. In fact, much of the evidence that is now in evidence was not even available to the Government until the close of discovery.

You heard some references yesterday, I believe, to the documents that came from Mr. Levy's files not being Avatar Holdings' records; they were Mr. Levy's personal

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files. So, they were not produced in a timely fashion.
Likewise with Mr. Sharp, there was an argument made that the documents that Mr. Sharp generated and maintained were his personal records and not those of the Company's and so much of these -- much of this evidence wasn't even available to the Government until the close of discovery.
The evidence -- and there are now approximately 500 documents in evidence -- and that evidence establishes that through its officers, Avatar Holdings was actually involved in critical decisions relating to the proven violations.
I'm not talking about the past unpermitted discharge violations at Barefoot Bay and Carrollwood; I'm talking about all of the violations that the Court has already found took place.
Under the Bernuth case, such involvement is, quote, a sufficient condition, unquote, for the imposition of liability.
Moreover, Avatar Holdings caused or directed the violations -- that's the standard that the Court put in its November 22nd, 1995, order -- by failing to direct and authorize actions that would have resulted either in the cessation of the discharge or the timely construction of advanced wastewater treatment facilities at each of the

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three plants.
We have introduced expert testimony to the effect that the alternatives that would have prevented the violations were either a number of cease discharge alternatives or the construction of advanced wastewater treatment facilities.
Avatar Holdings' officers were involved in all of these decisions. Avatar Holdings' officers and directors exercised actual and pervasive control over Florida Cities' environmental practices.
I was struck by Mr. Hird's opening statement when he said -- and I remember the Court interrupted him -- the Government has never come in and sued a parent company before. And that's absolutely false. We sue the parent company under the Clean Water Act when the parent company is liable. This is not a case of new impression whatsoever. And, in fact, in open court before the Magistrate, we gave a citation to Mr. Hird of another case in which that was done, a published case, United States versus Menominee Paper Company. And then we also gave Mr. Hird a list of 750 or so Clean Water Act cases on file in Federal Courts throughout the country in all of the EPA regions, a number of which included cases in which we named the parent company.
It's not the least bit unusual; we only do it when we think the parent company is liable.

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THE COURT: Is there a reported case in which you have successfully sued a parent company?
MR. JACOBS: There is a reported case in which we successfully sued the parent company, United States versus Menominee Paper Company and Bell Packaging, and the public -- I'll get the citation. I believe it's in one of my pretrial submissions.
That was a summary judgment decision, and essentially the subsidiary conceded liability both by the subsidiary and the parent. So, I'm not sure to what extent in that particular decision the Court analyzes the standard to be applied. In any event, the case is 727 F.Supp. 1110, Western District of Michigan, 1989.
As I say, because the point was conceded, I'm not sure how much discussion of that particular issue there is in that particular reported decision; but that was a case where we did sue the parent company and successfully so.
THE COURT: All right.
MR. JACOBS: Moving on to the individual facilities. As I've said before and as we established through the testimony of Leon Levy, the story here starts in 1980. And Mr. Levy's testimony was simply an introduction to what we would have established through these witnesses who took the Fifth Amendment.
And I do not suggest that we -- there need to be

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an adverse inference drawn from Mr. Sharp's unavailability. I'm not legally entitled to an adverse inference obviously from his unavailability. But we are entitled to draw -- or ask the Court to draw inferences from the documents that he wrote or that he received and from the instructions that he gave. And Mr. Levy testified that when Mr. Sharp gave an instruction, he expected it to be followed. And Mr. Levy testified that as far as he knew, nobody countermanded Mr. Sharp's orders.
And the documents will demonstrate -- and as I've outlined in the offer of proof and as we heard from Mr. Levy yesterday in conjunction with one particular exhibit, Mr. Sharp's objective was to take over the entire Lee County system. There was no way when he stated that objective in that memorandum that his subordinates, whether they be an Avatar Holdings subordinate who worked directly with him up in New York at his real estate company, who also held an Avatar Holdings vice-president position -- John Sladkus -- there was no way they are going to go back and tell Mr. Sharp that they are going to sell the Waterway Estate franchise, or that they are going to connect the Waterway Estates franchise to Mr. Schenkman's facility when Mr. Sharp said, We want to take over all the private franchises in the area and all the municipal and county systems as well; we want to own the whole system.

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Now, that was way back in the mid '80's. The fact that much, much later in 1991 there was a decision made that they didn't want to buy Mr. Schenkman's facility because Mr. Schenkman, as they pointed out, was in the red, that doesn't mean that they have changed their objective any.

Now, at Barefoot Bay, which I point out -- and I know this has come out repeatedly in evidence -- this was an Avatar development entirely. And the board itself was repeatedly involved, repeatedly involved. And Mr. Sharp was repeatedly involved, and Mr. Sladkus oversaw the project as Mr. Sharp's engineer, what to do about the disposal of the effluent.

The evidence yesterday was that in 1984, it was clear that the board of directors of Avatar Holdings knew they had a problem with the disposal of that effluent, a problem that they had not even solved as we sit here today, as far as I know. While the plant is under construction, it's still not completed. A decade later, still not completed.

And had they built the plant that they are now building way back when, none of those violations -- none of the violations that the Court has already held took place would have taken place, and that's true at all three of these facilities.

If the plant -- this company, or these companies,

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don't have the right to pollute. But if they go through the proper permitting procedures and they are permitted to discharge into a water body, then they may discharge into a water body.

It's not as if we're not allowing them to conduct their business. Nobody said, You can't discharge into any of these water bodies, which they could conceivably have said as regulatory bodies. They said, Either you're going to have to stop discharging; or if you're going to continue to discharge, you're going to have to meet -- you're going to have to apply for the permit and you're going to have to meet the permit limits.

And to do that, they had to build three advanced wastewater treatment plants, technology that was available as far back as 1970. Long before this case started, advanced wastewater treatment plants existed.

And those judgment calls were not being made by the subsidiary; those judgment calls were being made by the parent company.

And the fact that I cannot put Mr. Getman on the stand -- every time they mention Mr. Getman, they call him general counsel. Every time I mention Mr. Getman, I call him vice-president of the company. He served as vice-president, senior vice-president, and now he serves as executive vice-president.

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And he's made many, many, many business decisions that have nothing to do with the legal counsel that he may or may not have given to Avatar Holdings or any of the subsidiaries.

And there was no assertion of attorney/client privilege or attorney work product at his deposition. He just took the Fifth Amendment.

There was no motion before the Magistrate to preclude him from testifying on the grounds that he was an attorney. And the Magistrate has expressly held, in conjunction with requiring the production of documents from Mr. Getman's files, that just because he happened to have a law degree and a title as general counsel didn't mean that the documents weren't subject to discovery.

Now, we are handicapped by virtue of the fact that the Defendants can select which witnesses they put on the stand and testify and which are going to assert the Fifth Amendment. We have no control over that.

And it just happens to be that the ones who testify -- the only person who testified who goes back to 1980, who has knowledge -- had only slight knowledge, admittedly -- and that was Mr. Levy.

The other people in the know, Mr. Gordon, who predated Mr. Levy, took the Fifth Amendment. Mr. Getman, who started in the early '80's, took the Fifth Amendment.

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Mr. Sladkus, who started in the early '80's, took the Fifth Amendment.

And there's a reference to other Avatar Holdings' officers testifying -- and that's true -- Mr. Jacobson, who didn't come along until '92; and the financial officers who presumably were not involved in the technical engineering decisions.

Now, Mr. Sladkus was an engineer. He was the one who was calling the shots directly under Mr. Sharp's direction up in New York.

And I dare say there are over a hundred documents that have Sharp and Sladkus' name on them directly relating to what to do about the effluent at Barefoot Bay. This was a problem they knew about in the early '80's and continued to be a problem, I dare say, through Mr. Sharp's death and Mr. Sladkus' resignation, which took place at approximately the same time.

So, I dare suggest that there is far enough -- far more than enough evidence to establish already at this point in time Avatar Holdings' liability for the violations.

Thank you, sir.

THE COURT: All right. Mr. Baise?

MR. BAISE: Your Honor, may I address the Court?

THE COURT: Yes, sir.

MR. BAISE: Two points, Your Honor, I would like

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to bring to your attention. Government counsel has made a great deal with regard to witnesses of Florida Cities not testifying and some of them taking the Fifth Amendment.

Mr. Allen, of course, is one that you have been told about that did take the Fifth Amendment and will be testifying.

The reason I think it's important to bring to the Court's attention the fact that this whole issue arose has been alluded to on one occasion, and that is something called the Weitzenhoff case. When the Supreme Court refused certiorari with respect to that case coming out of the Ninth Circuit, I brought that case to all of the individuals' attention and asked them to take that case into consideration, consult with their own counsel with respect to what that case indicated. They did, and did so. Some chose to testify; some chose not to testify.

It all arose because the Weitzenhoff decision -- which a number of individuals commented on the area -- I believe it's an incorrect decision -- but the fact is, people have to draw their own conclusions with respect to what Weitzenhoff said. Weitzenhoff is very broad with regard to its potential liability.

So, we would suggest to the Court that, one, it review the Weitzenhoff case and take that into account.

Number two, counsel continues to suggest from the

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Government that these facilities did not have permits. They did not have the Federal permit; that is correct. But at all times they were discharging with State permits. That's number one.

Number two, these facilities were meeting the very high levels of secondary treatment, and I do not want to leave in the Court's mind that there was any discharge of raw or untreated waste during this particular period of time. And that obviously will come out in our direct case. Those are the only points I would like to make, Your Honor.

Thank you.

THE COURT: All right.

MR. HIRD: Your Honor, if I can have just one minute -- I literally mean just one minute.

THE COURT: Okay. You can have brief rebuttal.

MR. HIRD: First of all, Your Honor, the U.S. v. Menominee Paper decision had no discussion of corporate parent liability. We looked at that case when Mr. Jacobs brought it to our attention.

Secondly, Your Honor, Mr. Getman's deposition lasted for, I believe, a total of eight pages. No specific questions were asked to which the attorney/client privilege could have been raised.

But finally, I want to say, the most important thing I heard in Mr. Jacobs' statements was he's accusing

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Avatar Holdings of failing to take action to sufficiently direct the violations. And here's where I think Mr. Jacobs has confused the standards.

What he's asking the Court to do is assume that Avatar Holdings had a duty to act because certain information came up the chain and then our -- find Avatar Holdings liable because it didn't act. That's not the way it works.

Subsidiaries tell parent corporations about what they do. What has to be found to hold a parent corporation liable is the parent corporation reaching down and directing the subsidiary to do or not do something which the subsidiary would otherwise do or not do. That is not shown.

What Mr. Jacobs is saying is Avatar Holdings is liable for its inaction because it didn't do this, that or the other thing; putting aside the merits of what we did or what we didn't do or what Florida Cities did or didn't do, which Mr. Baise will get to. You can't prove pervasive control by inadequate supervision, and that's essentially what Mr. Jacobs is arguing.

Thank you, Your Honor.

THE COURT: All right. The Court is going to reserve ruling on the Rule 52 motions.

Florida Cities Water will go first, correct?

MR. BAISE: Yes, Your Honor.

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THE COURT: All right. Mr. Baise, you may call your first witness.

MR. BAISE: Your Honor, we are going to have to take a couple of our witnesses out of order because some of them have travel plans, particularly Mr. McWeeny, who will be the first individual to testify.

He will be testifying with regard to the Carrollwood facility and dealing with some of the points that have been raised with the Government. So, we would ask the Court's indulgence to allow us to take him out of order that we had suggested to the Government that we would follow.

THE COURT: All right, sir.

MR. BAISE: Thank you.

MR. BULLOCK: If the Court please, Your Honor, we would call Michael McWeeny.

THE DEPUTY CLERK: Come forward and be sworn. Raise your right hand, please.

Do you solemnly swear that the testimony you are about to give in this cause will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

THE DEPUTY CLERK: Take a seat in the witness stand.

State your name and spell your last for the

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record, please.
THE WITNESS: Michael W. McWeeny; M-C capital W-E-E-N-Y.
- - -
Thereupon,
MICHAEL W. McWEENY,
a witness, having been duly sworn to speak the truth, the whole truth and nothing but the truth, was examined and testified as follows:
DIRECT EXAMINATION
BY MR. BULLOCK:
Q. Mr. McWeeny, good morning.
Would you state your position, please?
A. I'm the director of the Hillsborough County Department of Public Utilities.
Q. All right. What is your responsibility in that position?
A. To manage that portion of County Government providing the water and wastewater service to about 95,000 customers in unincorporated Hillsborough County.
Q. And how long have you been in this position?
A. Approximately ten years.
Q. All right. When did you join Hillsborough County?
A. I became an employee of Hillsborough County in June 1985.

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Q. All right. Who was your predecessor?
A. Prior to me coming to the Hillsborough County Utilities Department, we had an interim director, Bruce Olvin. Prior to him, the last permanent director was Bruce Kennedy.
Q. All right. Do you know how long Mr. Kennedy was in his position?
A. I believe Mr. Kennedy was the director for about three-and-a-half years.
Q. All right. Let me refer you, first of all, Mr. McWeeny, to Florida Cities' Trial Exhibit 96. Have you seen this document before?
A. Yes, I have.
Q. Can you identify it for the record?
A. Yes. It is a letter dated June 28th, 1983, from Bruce Kennedy to Mr. A.A. Reeves, III, at Florida Cities Water Company.
MR. BULLOCK: Your Honor, we would move Defendant's 96 into evidence.
THE DEPUTY CLERK: It's in.
MR. BULLOCK: I'm sorry. Thank you.
THE COURT: It will be received.
THE DEPUTY CLERK: It's already in.
THE COURT: Beg your pardon?
THE DEPUTY CLERK: It's already in.

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THE COURT: Already in. Okay.
Go ahead.
BY MR. BULLOCK:
Q. Mr. McWeeny, let me refer you to the first paragraph, the sentence that begins with, We anticipate.
A. Yes.
Q. Would you read that sentence, please?
A. We anticipate a time frame of late 1985 at the earliest before we could consider providing service.
Q. All right. When you joined Hillsborough County in 1985, did the system have capacity to accept the effluent from the Carrollwood plant?
A. We did not have capacity in the system at that time, no.
Q. All right. Let me ask you to flip a couple of exhibits to Defendant's Exhibit 99. Have you seen this document before?
A. Yes, I have.
Q. Would you identify it for the record?
A. It is a letter dated September 6, 1984, from Bruce Kennedy to Mr. L.L. Good of Florida Cities Water Company.
MR. BULLOCK: Your Honor, we would move Defendant Florida Cities' 99.
THE COURT: It will be received.
MR. BULLOCK: Thank you.

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BY MR. BULLOCK:
Q. Let me refer you to the second paragraph of that letter; and about the fourth line down, the sentence begins, The latest projected date.
A. Yes, sir.
Q. Would you read that, please?
A. The latest projected date for having the expanded plant in service is June 1987.
Q. All right. Let me ask you to also read the following sentence.
A. In addition, the identification of the point of connection to the County's system is dependent upon the completion of a master wastewater transmission plan for northwest Hillsborough County, tentatively anticipated to be completed by mid 1985.
Q. Okay. Was the plan completed by mid 1985?
A. There were numerous plans that were developed for the Hillsborough County wastewater system. I believe the master plan was actually presented in early 1986.
Q. All right. Do you know approximately how many plans there were for Hillsborough County?
A. I believe there were probably three or four iterations of master plans within the 1985 to 1990 time frame.
Q. Was there capacity available to accept the Carrollwood effluent in 1987?

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A. There was not.
Q. All right. And can you tell us why the date for the capacity was continuing to be pushed back?
A. Yes. Hillsborough County, in 1985, when I became the director, August of '85 when I became the director, was in a situation where our wastewater treatment plants were pushing their permitted capacities. We did not have capacity for new development, and we were not meeting our permit criteria.
We initiated a significant capital improvement program in 1986 wherein we borrowed approximately $367 million to expand and upgrade our utilities system. That was a significant capital improvement program, far larger than anything the County had ever done before.
As we began to undertake those capital improvements, we experienced our earliest -- our earliest scheduling as being a little optimistic, and we were not able to complete those projects as we initially scheduled them.
Q. When you indicated a minute ago that you were not meeting your permit criteria, what regulatory body permitted your facilities?
A. Our permits were through the Florida Department of Environmental Regulation and EPA.
Q. All right. Let me ask you to turn to Florida Cities' Exhibit 103. Are you familiar with this document?

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A. Yes, I am.
Q. Would you identify it for the record?
A. Yes. It is a letter that I signed addressed to Mr. A.A. Reeves, III, vice-president of Florida Cities, dated June 3, 1986.
MR. BULLOCK: Your Honor, we would move Florida Cities' 103.
THE COURT: It will be received.
MR. BULLOCK: Thank you.
BY MR. BULLOCK:
Q. You wrote this letter, Mr. McWeeny, is that correct?
A. My staff wrote it and then I signed it.
Q. What was the purpose of this letter?
A. The purpose of this letter was to establish the parameters for connection of the wastewater service from the Carrollwood subdivision, Florida Cities Water Company, to Hillsborough County.
Q. And did you identify whether or not a connection fee would be necessary? And I'll refer you to Page 3.
A. Yes. On Page 3, in Section B, we do have a statement regarding fees and charges saying that all of the fees and charges be calculated and collected pursuant to County ordinance.
Q. Did you require Florida Cities to submit an application?

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A. An application was required, yes, sir.
Q. All right. Did you identify a specific plant that the County was building which would allow the system to have capacity?
A. Yes. In Page 1, the last paragraph, I identified that we anticipated capacity would be available when we brought the Sheldon Road wastewater treatment plant on line. That's the plant we currently call the Northwest Plant.
Q. Okay. In 1986, when did you anticipate that the Northwest Plant, or the Sheldon Road plant, would be on line?
(Pause.)
A. I don't believe that in this letter we identified the specific date that that particular plant would be on line.
Q. Okay. Did you identify a date in which you believed that there would be sufficient capacity anywhere in the system?
(Pause.)
A. We did identify that we thought the River Oaks Plant would be expanded by spring of 1988 and that we -- that would make capacity available.
Q. Okay. Was the River Oaks Plant expanded by 1988?
A. The River Oaks Plant was undergoing expansion from about 1985 through about 1988.
Q. Did those expansions, in fact, provide sufficient

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capacity to accept the Carrollwood effluent?
A. While the River Oaks Plant would have had capacity to accept the flow, the River Oaks Plant is a significant distance from the Carrollwood area, service area; and there was not infrastructure to take the wastewater from that area to the River Oaks Plant.
Q. Let me refer you next to Exhibit 106. Are you familiar with this document?
A. Yes, sir.
Q. And would you identify it for the record?
A. It is a letter dated March 8, 1988, addressed to Mr. Dale Ernsburger, P.E., of Reynolds, Smith and Hill signed by myself.
MR. BULLOCK: Your Honor, I believe 106 is already in evidence.
THE DEPUTY CLERK: Yes, it is.
BY MR. BULLOCK:
Q. What was the purpose of writing this letter, Mr. McWeeny?
A. The purpose of this letter is to provide a preliminary review of the plans for the connection of the service area to the County system and to identify the fees that would be required.
Q. Is this the first time that the County was able to identify any fee specifically?

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A. I believe this is the first time that we communicated in writing what we had calculated the fees to be.
Q. All right. What did you calculate the connection fee to be?
A. $5.5 million.
Q. All right. And what made up the connection fee?
A. The connection fee is the fee that the County charges to recover the capital cost of the facilities needed to provide the service, including the transmission facilities to bring the wastewater to the plant for treatment, the treatment plant itself, and the effluent disposal and sludge disposal facilities.
Q. Did this $5.5 million figure include any costs that Florida Cities would have to undertake to connect to the plant?
A. It did not include the cost of the connection itself. This was just to pay for the existing facilities that would be utilized.
Q. All right. Were you able to identify a time in which capacity would be available?
(Pause.)
A. In this letter, we indicated that the application for service would be put on a priority list and the capacity would be -- correction -- the applicant would be notified when the capacity was available. We did not in this letter

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indicate when that would be.
Q. Did Florida Cities question the $5.5 million connection fee?
A. As I recall, they did have considerable objection to the five-and-a-half million dollar fee.
Q. Your office -- let me start over again.
Does your office permit privately-owned wastewater treatment facilities in Hillsborough County?
A. We do not.
Q. All right. Do you have any control over the permitted -- the terms of the permits that these facilities would receive?
A. We do not.
Q. Did you continue to negotiate with Florida Cities regarding the connection fee?
A. As I recall, we had several conversations, but it essentially dropped because we could not reach resolution.
The capacity fees are not a negotiable item in our normal administrative activity.
Q. Did the negotiations pick up at a subsequent time?
A. Subsequently, the negotiations did pick up.
Q. And do you know why they picked up?
A. It is -- I have no personal knowledge other than we were --
MR. QUINN: Objection.

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THE COURT: Sustained.
BY MR. BULLOCK:
Q. Was the County contacted by Florida Cities to continue negotiations?
A. It is my understanding that we were.
Q. All right. And do you know when these negotiations picked up again?
A. I believe that would have been in 1990.
Q. Were any other parties involved in the negotiations?
A. I believe only the County staff and one of the County Commissioners and representatives of Florida Cities were involved.
Q. All right. Let me refer you to Defendant's 125. Are you familiar with this document?
A. Yes, I am.
Q. And would you identify it for the record?
A. It is a letter dated July 27, 1990, to Mr. A.A. Reeves of Florida Cities Water Company signed by myself.
Q. All right.
MR. BULLOCK: Your Honor, 125 is already in evidence.
THE COURT: Okay.
BY MR. BULLOCK:
Q. What was the purpose of this letter, Mr. McWeeny?
A. This was a response to a question posed by Mr. Reeves

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regarding the scheduling of the completion of County capacity that could provide service to Florida Cities.
Q. All right. When did the County anticipate that capacity would be available?
A. We identified in this letter that capacity would be available -- anticipated to be available in the first quarter of '91, 1991.
Q. And, in fact, did capacity become available during that time?
A. Capacity did become available, yes.
Q. Let me ask you to refer to Defendant's 141, which is in the next volume. Mr. McWeeny, are you familiar with this document?
A. Yes, I am.
Q. And would you identify it for the record, please?
A. This document is the transmittal letter and an agreement between Hillsborough County and Florida Cities to provide wastewater service.
MR. BULLOCK: Your Honor, I would move Defendant's 141 into evidence.
THE COURT: It will be received.
BY MR. BULLOCK:
Q. Mr. McWeeny, could you identify the day this agreement was entered into?
A. The date of the agreement is June 5, 1991.

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Q. Okay. Does this agreement reflect whether or not the capacity fee would actually be levied by the County?
(Pause.)
A. The agreement does not require the payment of a capacity fee.
Q. All right. Under the terms of this agreement, who is to bear the cost of construction of the forced main which would have been needed to connect Carrollwood to Hillsborough County?
A. A point of connection was identified, and the County bore the costs up to the point of connection, essentially west of the point of connection, between there and our wastewater plant; and Florida Cities picked up the cost of the infrastructure up to the point of connection.
Q. Whose forced main was longer, Florida Cities' or the one the County would construct?
A. I don't recall the answer to that.
Q. All right. Does the agreement address any penalties for construction delays?
A. Yes, it did.
Q. Okay. And what does the agreement reflect regarding the payment of any penalties for construction delays?
A. If the County were responsible for construction delays and not making the connection by the date certain, the County would be responsible for those penalties.

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Q. All right. And what was the date certain in this agreement?
A. I believe the date certain was, from memory, December 31st, 1991.
Q. Okay. Are you aware of when the connection actually occurred?
A. I believe it was five or six days later than that.
Q. All right. Are you aware of the distance between the connection point and the Carrollwood facility?
A. Generally, but I do not know the specific number of feet or miles.
Q. All right. Mr. McWeeny, did the County, in fact, pay any penalties for construction delays?
A. Yes, we did.
Q. Thank you, Mr. McWeeny.
MS. TSOTSOS: Your Honor, Avatar Holdings has no questions of this witness.
THE COURT: All right. Mr. Quinn?
MR. QUINN: Yes, Your Honor. I will be brief, and I do mean brief.

CROSS EXAMINATION

BY MR. QUINN:
Q. Good morning, Mr. McWeeny. My name is Tony Quinn. I'm counsel for the United States.
Mr. McWeeny, your understanding is that Florida

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Cities -- is it your understanding that Florida Cities Water Company was under an order to cease discharge to the Sweetwater Creek?
A. It was my understanding they were under an order to either cease discharge or to upgrade their effluent to meet the advanced waste treatment standards.
Q. But during your course of dealings since 1985 with Florida Cities Water Company, you didn't detect any sense of urgency to their dealings, did you?
A. I don't know how to measure a sense of urgency. Certainly I think they were anxious or interested in compliance, but I don't know how to define a sense of urgency.
Q. Sir, do you remember giving a deposition in this case?
A. Yes.
Q. I'll refer to Page 33, Lines 12 through 18.
Sir, do you remember the question being asked, In your dealings with Florida City with respect to connecting to Carrollwood, to the County, did you get the idea that the Company had a sense of urgency to the connection?
And your answer to that question was: I don't recall one way or the other any sense of that urgency.
Do you remember that?
A. Yes, generally.
Q. Okay. Well, does that -- I mean, you just stated now

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you don't know how to --
THE COURT: Well, he's answered your question and I have his previous answer and I've got this answer. Let's move on.
MR. QUINN: Thank you.
BY MR. QUINN:
Q. Sir, during your course of dealings with Florida Cities Water Company, did Hillsborough County ever lead Florida Cities down the path that a connection would be forthcoming immediately?
A. I don't believe that in any of our communication with them we indicated that capacity would be immediately available.
I believe that we did indicate that capacity was anticipated to be available when certain plant construction was completed, but we did not guarantee a date or an immediacy.
Q. So, you just told them the truth as to what the circumstances were and how those circumstances changed, didn't you?
A. Yes, sir.
Q. Prior to June of 1985 when you joined Hillsborough County, there was capacity at the Dale Mabry Plant, wasn't there?
A. I think that the amount of capacity that was available

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at any of the facilities in that time frame was under some question. And, in fact, one of the first things that I did as the Utilities Director was to determine that I could not sign off on the certifications that capacity was available at our treatment facilities. And shortly thereafter, the regulatory agencies placed us under a moratorium until we could clarify the amount of commitments and flow at our facilities.

Q. How about prior to you coming on in June of '85, do you know whether adequate capacity existed at the Hillsborough County plants?

A. I do not know.

Q. Okay. Sir, you have mentioned during direct testimony that a County Commissioner was involved in negotiations in 1990. Why was a County Commissioner involved in the negotiations with Florida Cities?

A. Hillsborough County is organized under a system of commissioners where we have four district commissioners and three at-large commissioners.

The commissioner that was involved, I believe, was Commissioner Iorio, and that was her district and I believe that she was representing her constituents.

Q. In the course of your dealings with privately-owned wastewater treatment plants, is it unusual for -- withdrawn.

How many times has a commissioner been involved in

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negotiations?

A. This is the only agreement that we have of this type, but generally commissioners are not involved in the administration.

Q. So, is it safe to say that this is, to your recollection, one of the only times that a commissioner was involved in negotiations with Hillsborough County and a privately-owned wastewater treatment plant?

A. Yes.

Q. Sir, at any time subsequent to you coming on in 1985, June, did Florida Cities make a commitment to tie in to the Dale Mabry Plant? Did they make a written commitment?

A. I don't recall any commitment to make a connection until we entered into the June 5, 1990, agreement.

Q. Okay. Subsequent to June of '85 and prior to the agreement, did Florida Cities ever agree to pay for the construction of necessary transmission piping or pumping equipment?

A. The only commitment or agreement we have is the June 5 agreement.

Q. Sir, do you know if Florida Cities had made a commitment to tie in to the Dale Mabry Plant in June of1985 and had agreed to construct the necessary transmission piping and pump stations, whether they would have been put on that priority list you mentioned during direct testimony?

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A. If they had made the application after August of 1985 when I became the director, I would not have been able to sign off that there was capacity. Whether my predecessors would have signed off, I cannot say.

Q. So, do you know whether if they had done -- withdrawn.

Do you know whether if they had made those commitments prior to you becoming director, whether or not a connection would have been allowed?

A. I don't know the answer to that.

Q. Do you know whether it's possible?

A. I think that it would depend on whether the regulatory agencies at that time would have considered us having been over-committed in our capacity, and I don't know how they would have evaluated that.

Q. Sir, during the time you have been with Hillsborough County, have you ever not had an NPDES permit for any of your plants?

A. We have currently, I believe, nine major wastewater plants, several of which do not have NPDES permits.

Q. Is that because of the delegation to the State of Florida?

A. No. That's because they don't have discharges.

Q. Okay. Let me rephrase my question. Since June of 1985, did any of the plants under your direction which had discharges ever not have NPDES permits?

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A. The only one that comes to mind as not having a discharge -- an NPDES permit is the South County Treatment Plant which had an NPDES permit which was rescinded to a zero discharge NPDES permit.

Although we had NPDES permits at several of our facilities, we did have consent orders and consent decrees with both EPA and DER regarding restrictions to some of those discharges.

Q. And Hillsborough County considers administrative orders and permits to be important documents, don't they?

A. Absolutely.

Q. And you wouldn't not apply for one, would you?

A. I'm sorry, I didn't hear the question.

Q. You would not fail to apply to renew a permit, would you?

A. Not knowingly. We might by accident miss a date, but we would not knowingly fail to permit a plant.

Q. During the time that you were on board since 1985 to present, have you ever accidentally failed to reapply for a permit when necessary?

A. I don't recall that we have.

Q. Sir, with regard to the plants that don't have surface water discharges, what do they do with the effluent?

A. The effluent is reused for irrigation or some other type of reuse.

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Q. Are there holding ponds?
A. Many of our plants have holding ponds.
Q. Sir, are there also deep well injection places?
A. Hillsborough County has no deep well injection for effluent disposal.
Q. About how many ponds do you currently have?
(Pause.)
A. I believe that we only use percolation ponds for effluent disposal – I take that back. We have one plant currently in operation that uses percolation ponds for effluent disposal. We have lined ponds at several facilities that are used for holding reclaimed water for future reuse.
Q. Sir, prior to Exhibit 106, which was the agreement we were talking about a little bit further on, did Florida Cities Water Company ever ask Hillsborough County for a cost to tie in to the plant?
A. They did ask us through the application process what would be the conditions for the connection. Our preliminary plan review, which was one of the exhibits previously discussed, identified the capacity fees and a point of connection.
The normal approach is that the applicant is responsible for the infrastructure up to the point of connection.

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Q. Is that what happened in this case?
A. That was not what happened in this case. In this case, we entered into a separate specific agreement that identified a point of connection. And based on that point of connection, the infrastructure up to the point of connection was provided by Florida Cities and beyond the point of connection by the County.
Q. Would you say that was unusual in this circumstance for the County?
A. It was only unusual in that we had a separate agreement rather than just using the preliminary plant approval letter.
Q. Thank you, sir.
MR. QUINN: I have no more questions. Thank you.
MR. BULLOCK: Nothing, Your Honor. Thank you.
THE COURT: Thank you, sir. You may step down. Call your next witness.
MR. BAISE: Your Honor, Mr. Don Scroggin will call our next witness.
THE COURT: Okay.
MR. SCROGGIN: Florida Cities calls Mr. Douglas Smith.
THE DEPUTY CLERK: Come forward and be sworn. Raise your right hand, please.
Do you solemnly swear that the testimony you are about to give in this cause will be the truth, the whole truth and nothing but the truth, so help you God?
THE WITNESS: I do.
THE DEPUTY CLERK: Take a seat in the witness stand.
State your name and spell your last for the record, please.
THE WITNESS: My name is Douglas G. Smith, S-M-I-T-H.

* * *

Thereupon,

DOUGLAS G. SMITH,

a witness, having been duly sworn to speak the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCROGGIN:
Q. Good morning, Mr. Smith.
A. Good morning.
Q. Would you please state your name and current position?
A. Douglas G. Smith, senior partner and regional environmental manager for Black & Veatch.
Q. How long have you been employed at Black & Veatch?
A. Just over 16 years.
Q. Can you tell us what Black & Veatch is?

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A. Black and Veatch is a large engineering construction partnership founded some 81 years ago headquartered in Kansas City, Missouri, engaged in providing engineering and construction management and related services in the energy, environment and facilities business around the world. We have about 6,600 employees and do about $1.2 billion worth of business each year.
Q. Would you please tell me what college degree you hold?
A. I have an undergraduate degree, a bachelor of science, in civil engineering with an emphasis in sanitary engineering. I received that in 1971 from Kansas State University in Manhattan, Kansas.
And after that, I received a masters of science in civil engineering, essentially sanitary engineering, from the University of Colorado in Boulder; finished my work there in 1974 and the degree was conferred, I think, in 1975.
Then I have a juris doctor degree from the University of Denver College of Law, received that in 1989.
Q. Can you tell me what training you have relevant to the construction of wastewater treatment facilities?
A. Most of the training I have received has been pretty much on-the-job training. I began in the construction business in 1967 right out of high school and continued it essentially in some regard or another to the present time.

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I'm currently vice-president of our construction company, Black and Veatch Construction, Incorporated, where we engage in the construction of municipal water and wastewater treatment plants.

And during the 29 years since I first engaged in construction business, I have seen all kinds of construction activities regarding water and wastewater treatment plants for mostly what we would call municipal owners.

Q. Can you tell me if you have any other professional training?

A. We, in the engineering practices, have a number of informal and more formal training seminars and conferences and educational activities we take part of during the years.

I have attended or taken part in terms of either giving papers or participating in those educational activities essentially before even my undergraduate degree was completed, probably, say, beginning 1970 through the present time. And I probably averaged four or five of those kind of conferences or seminars each year, so probably in excess of a hundred such training sessions, generally focused in the sanitary engineering field, which has been the main focus of my vocation for the 25 years.

Q. Has this professional training related to the operation of wastewater treatment facilities?

A. Some of that has. As part of my early career, I was

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engaged directly in the operation of wastewater treatment facilities, and so I attended a great number of those. During the 1970's, that was a big focus.

After the 1970's, when I went to Black and Veatch in the consulting engineering business, I probably put less emphasis on just construction -- excuse me -- on operation-related activities; but that was always a part of these technical conferences and seminars that we attend -- that I attended.

Q. What was your first full-time job after college?

A. I began as chief of the sanitation branch for the Department of Army at Fort Riley, Kansas. I had responsibility for four wastewater treatment plants and three water systems, a couple of swimming pools and a landfill. Essentially I was the responsible operator for those plants; make sure they had to meet certain discharge requirements in the State of Kansas. And we then had operational -- I had operational responsibility, maintenance, those kind of things. And I did that until I returned to graduate school.

Q. What was your next full-time employment?

A. After completion of my graduate work at the University of Colorado, I began work for the City of Boulder, Colorado, and there I was first hired as assistant sewer division director and quickly moved to the sewer division director

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and then as public utilities director for the City of Boulder and at each of those levels had responsibility for the sewer division, which was all the sewer collection system, sanitary sewers, two sewage treatment plants, the largest of which was about 16 MGD; and then as public utilities director had responsibility for drinking water treatment, two surface water treatment plants which was -- one was about 50 MGD and the other was about 12 MGD, and then wastewater treatment, and then as well the storm water utility, which Boulder had one of the first storm water utilities in the U.S., and that was until I left there in 1979.

Q. You used the term "MGD." Can you tell us what "MGD" means?

A. That's a term representing the flow or capacity of one of these treatments plants. It stands for million gallons per day.

Q. Can you tell us what your next employment and responsibilities were?

A. I left the City in 1979 and for a few months worked for another consulting engineering firm, Hennings, Durman, Richardson in Phoenix, Arizona, and then was employed by Black and Veatch in late 1979 until the current time.

And during that period both with HDR and subsequently with Black and Veatch, I was first senior project manager in

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charge of large water and wastewater treatment plant construction - design and construction projects, related feasibility studies, water quality studies, management studies in terms of financing improvements and implementing them. And then on into the late '80's -- excuse me.

With Black and Veatch, I was hired in Denver and was part of the Denver office there until 1989 when I moved to Florida and had responsibility for the Florida operations of Black and Veatch.

Q. Can you tell me how many years' experience and training you have relating to the construction and design of wastewater treatment facilities in total?

A. Essentially, I'd certainly represent more than 25 years, since my undergraduate degree, and through that entire time the focus has been on wastewater treatment.

Q. How many years' experience do you have regarding the operations of wastewater treatment facilities?

A. Certainly the focus of my ten years in the 1970's, from early '72 when I was employed by the Department of Army until I left the City of Boulder in '79, operations was a big focus of mine.

However, even in the early '80's, through the mid 1980's, one of my principal projects I was involved with was the upgrading of the Denver Metropolitan Wastewater Reclamation District's central plant. It's a 185 MGD plant.

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And I was very involved with looking at operations through that time, so I'd say probably on the order of 15 years.
Q. What experience do you have relating to the assessment of the impacts of the operations of such wastewater treatment facilities?
A. I assume you mean impacts on receiving waters?
Q. Yes, sir, the environmental impacts on receiving waters from the operation of wastewater treatment facilities.
A. While I was in Boulder, specifically we had two wastewater treatment plants discharging to Boulder Creek, which was a high-quality, front-range stream, trout stream, in the upper reaches, and so there's a great deal of concern about the impacts of wastewater treatment flows on that water body. And I was involved directly in sampling and assessing the impacts of those discharges on that creek and in trying to figure out what ways we could improve the quality of effluent and diminish the impacts on the creek. That was through the '70's and the improvements were -- some improvements were built during the '70's and some later.
Then in the '80's, my focus was on Segment 15 of the South Platte River, which is the receiving waters of the Metropolitan Denver Disposal District's Plant, and we looked a great deal at flora and fauna in that reach of the stream and assessed impacts of water quality, particularly looking

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at dissolved oxygen conditions and ammonia discharges, impacts on ammonia on the fish species in the creek -- in the river.
Q. Have your experiences included the analysis and review of water quality data from receiving waters?
A. Right. Certainly in my graduate program, I actually did the sampling and testing and had to work those hours in the laboratory to actually know how to do the tests. After that point, essentially people worked for me that did it. We had laboratories in Boulder that performed those water quality analyses, and we did a great deal of working -- compilation of data and analyzing data and trying to determine what that data meant as to what kind of impacts were on the stream or what we could do to mitigate those impacts.
Q. What experience specifically in the State of Florida do you have regarding the construction of wastewater treatment facilities and the operations of wastewater treatment facilities in the State of Florida?
A. As I mentioned, I came to Florida in 1989 and during that time --
THE COURT: Let's stop there a moment. Let's take a ten-minute recess.
(A recess was taken.)

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THE COURT: Okay, Mr. Scroggin.
MR. SCROGGIN: Yes, Your Honor.
BY MR. SCROGGIN:
Q. Mr. Smith, can you tell me what national recognitions if any you've received for your experience in the areas of operations and construction of wastewater treatment facilities?
A. Well, probably the most important national recognition I've had is that of being accepted as a diplomate of the Academy of Environmental Engineers.
This Academy has been formed to recognize achievements and qualifications of those engaged in the practice of water, wastewater and air pollution engineering and it's a fairly vigorous examination and admittance procedure, and I was examined and admitted in 1989 and 1990.
Initially, I think it was '89 when I completed my application process and 1990 when I was interviewed and subsequently elected into the Academy and it's a fairly select group of a small number of what would be known as sanitary engineers with considerable experience in the field and recognized by their peers as such.
Q. You've testified you have experience relating to construction and operation of wastewater treatment facilities in the State of Florida.
I'm going to ask you now what experience if any do you have regarding the assessment of the environmental impacts in

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the State of Florida of wastewater treatment facilities?
A. You asked me that question, I didn't get to answer it, though, earlier. I don't know if you want me to answer that now regarding experience in the State.
Q. Yes, sir.
A. Particularly with wastewater treatment plants operation and construction, I've been involved with treatment plants in Pensacola, the Main Street Plant, which is about 20 MGD and the Avondale Plant which is now going to eight million gallons per day, the City of Tallahassee Treatment Plants, both of which have a combined capacity of about 25 MGD, City of Tampa, Hooker's Point, Howard F. Curen Plant, which is I think about 65 MGD, being expanded to 88 MGD, on down to the City of Manatee County Southwest Plant, Waterway Estates Plant, Caloosahatchee River, Fiesta Village, over to Fort Myers over to the Reedy Creek Plant for Disney World which is about an 8 MGD Plant, City of Daytona Beach, Western Regional Plant there which is 10 MGD. I might have missed a couple.
That's most of them I have been involved with regarding assessment of capacity, performance operations and recommendation for constructed improvements to change their treatment systems into the future.
Then your next question was which ones –
THE COURT: Wait a minute.
MR. JACOBS: I object. I let it go the first time,

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but I think it's a little improper for the witness –
THE COURT: Sustained, sustained.
BY MR. SCOGGIN:
Q. Mr. Smith, approximately how many such projects in the State of Florida have you been involved with?
A. I'd say at least fifteen to twenty treatment plants in individual projects, would probably be more than that 'cause there's multiple projects associated with individual plants, so –
Q. And how many such projects nationally have you been involved with?
A. Goodness, certainly more than a hundred, with probably fifty to a hundred treatment plants as individual plants that I've had projects associated with them.
Q. Have you published articles in professional journals?
A. Yes, published probably thirty to forty professional articles in journals and have presented those articles in addition to or presentations, probably another seventy-five presentations at conferences, technical symposiums.
Q. Can you tell me if you hold a professional license in the State of Florida?
A. Yes. I'm a registered engineer, professional engineer in the State of Florida, I think it's license number 43134, and licensed engineer in the State of Colorado. And since I left there, I essentially put it on inactive status, but I would

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become licensed again by just paying my dues back there.
MR. SCROGGIN: Your Honor, I could continue asking questions of this witness regarding his qualifications, but in order to save time and move forward, I would proffer this witness as an expert witness to this Court at this time in the areas of the construction and design of wastewater treatment facilities; second, in the area of operations of those wastewater treatment facilities; third, the environmental impacts of the operations of such facilities on the receiving waters and the associated environs; and finally, in the areas of analysis and review of water quality data.
THE COURT: Yes, sir.
MR. JACOBS: Opportunity to voir dire the witness, please?
THE COURT: All right.
You may voir dire.
You think he may not be qualified? Well, go ahead.
MR. JACOBS: I think he's not properly before the Court as an expert in this case, so, yes, the voir dire relates exactly to that subject sir.
THE COURT: All right.
VOIR DIRE EXAMINATION
BY MR. JACOBS:
Q. Mr. Smith, you signed three expert reports relating to three wastewater treatment plants at issue in this case,

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correct?
A. That's correct.
Q. But you didn't actually write any one of these three reports, did you?
A. I don't know what you mean by actually "write."
Q. Mr. Smith, do you recall that you were deposed in this matter on October 30, 1995, at the United States Attorney's Office here in Tampa?
A. Yes, sir, I do.
Q. Reading from page 7, line twenty-three of the deposition – transcript of that deposition; Mr. Smith, who wrote these reports. That's the question I'm reading, sir, and your answer was, they're prepared by our firm and there were two principal authors, Dr. Barcus Jernigan and Andy Westfall.
I ask you again, sir, isn't it correct that you did not write –
THE COURT: No, ask him – ask him if he gave those answers to those questions.
MR. JACOBS: I'm sorry, sir, forgive me.
BY MR. JACOBS:
Q. Did you give those answers?
A. Yes, I did.
THE COURT: Go ahead.
BY MR. JACOBS:
Q. Now, referring to page 8, line seven, but you didn't

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write them – question, but you didn't write them, is that correct. Answer, line eight, no, I did not.
Sir, did you give that answer?
A. Testimony at deposition says yes, I believe I did.
Q. Page 8, line fifteen, question, and did you rely on the work of Dr. Jernigan and Mr. Westfall in terms of the preparation of these reports, line eighteen, answer, yes I did.
Do you recall giving that answer, sir?
MR. SCROGGIN: Your Honor?
THE WITNESS: Yes.
THE COURT: Just a moment, sir.
MR. SCROGGIN: Your Honor, I would object to this line of questioning which may be appropriate for cross examination of the witness or indeed weight to be given the evidence that he will present.
I would suggest, however, that it's not related to his qualifications as an expert and I proferred him as an expert in this case based on his qualifications to render an expert opinion, not the merits of that opinion and not the weight that this Court would give it. I would suggest counsel seeks to argue a cross examination issue more than a qualification.
THE COURT: Overruled, go ahead.
BY MR. JACOBS:
Q. Now, in terms of what information you personally

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reviewed, Mr. Smith, prior to giving your deposition in October, isn't it true that aside from reviewing the Government's complaint, you never personally reviewed any documents whatsoever except for a few compilations compiled by your staff?
A. I reviewed drawings and data that we had taken from the files from Florida Cities Water Company. I looked at, I think, I believe I said miscellaneous DMR's and MOR's, that's discharge monitoring reports and monthly operating reports.
I did not look at them in great detail or try to correlate at that point, and yes, those documents were then transcribed or the results from those documents were transcribed to graph compilations and presented in a report. I looked at some, I don't know if I said maps, and certainly some memoranda, schedules, things like that, construction documents; reviewed those, yes.
Q. I'm referring now to your deposition, sir, again page 12, line twelve, and during the course of the preparation of –
THE COURT: Ask him if he made the following answers to the following questions.
BY MR. JACOBS:
Q. And, sir, I'm asking if you made the following answers to the follow questions at the time of your deposition. And during the course of the preparation of any of the drafts of the final versions of these three reports, Exhibits 875 and 876

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and 877, and those for the Court's reference were the deposition exhibit numbers; did you have the occasion to review any documents. That is the question.
Now, sir, my question to you is, did you give the following answer, I believe that I reviewed just compilations of information that was compiled by my staff as part of the reports. I did review the complaint. I'm trying to think if there's any other documents. Nothing sticks out in my mind, any particular documents I reviewed.
Did you give that answer, sir?
A. Yes, I did.
Q. Do you recall that I then asked you the following question, are you sure, though, and I'm referring to page 12, line twenty-two, you're sure, though, that you reviewed what you have characterized as compilations of information compiled by your staff, is that correct, and the answer. I'm asking you whether you gave that answer, is that correct?
A. Yes, compilations included such things as excerpts and copies, that's right.
MR. JACOBS: Move to strike his last answer, sir, as non-responsive.
THE COURT: Denied.
BY MR. JACOBS:
Q. Then, do you recall, sir, that I asked you, and I'm referring to page 13, line five of the deposition, and about

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how voluminous were these compilations for each plant. Do you recall, sir, giving the following answer, and I'm referring to page 13, line seven, these are like tables or a series of tables and graphs or of data points, sequence of dates, that kind of information. Do you recall giving that answer, sir?
A. Yes, I do.
Q. I see you looking down, are you looking at the transcript?
A. No, I'm just concentrating. Thank you.
Q. Okay, fine.
A. And those questions are asked in the narrow context of formal documents, we're talking about MOR's and DMR's and NPDES permits. We actual have books of three or four inches thick of information that is backup to the reports.
Q. Right. And I didn't ask you that, sir.
A. Okay.
Q. You said "we," you mean Black and Beach has all that information?
A. That's right.
Q. Let me be very clear. I'm asking you what you personally reviewed?
A. That's what I was saying.
Q. You're not saying you personally reviewed all those notebooks before your deposition?
A. We had a project notebook, that's essentially that, yes.

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THE COURT: Proceed counsel, let's move on.
MR. JACOBS: I need to be able to distinguish and for the witness to understand that I'm inquiring not into what –
THE COURT: Just ask the question.
BY MR. JACOBS:
Q. Okay, sir.
Now, the next question relates again to the compilations. Question on page –
THE COURT: No, no, no, I tell you what, just ask him a question and if you have got something there that is in conflict with what he testifies here before me, then you can ask him the question as to what he testified to earlier. But ask him a question now, don't be asking – don't be reading from the deposition until he says something that you think is inconsistent with what he is testifying to here?
BY MR. JACOBS:
Q. Okay.
The compilations, Mr. Smith, how voluminous were they?
A. The compilations that you asked me about in the deposition were compilations of data points from MOR's to DMR's. We have compilations of data from the project file that is in a notebook that was –
Q. I'm just asking you about the compilation?
MR. BAISE: Objection, Mr. Jacobs continues to interrupt the witness while he is answering.

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THE COURT: Sustained. Finish your answer.
THE WITNESS: I don't want to mislead anybody. We have a projects file that is part of a backup of a written report which includes data, memos, historical information. It's about a three or four inch notebook. I reviewed that.
And then you had asked me during the deposition very specifically as I recall about administrative orders, NPDES permits, MOR's, DMR's, and those I had not reviewed very closely, and that is the compilation of data points I spoke of that we had reduced to graphs which were included in the report, so I wanted to distinguish what we're talking about here.
THE COURT: All right, go ahead.
BY MR. JACOBS:
Q. I'm asking you whether you reviewed all those voluminous notebooks. My question to you now, sir, is it your testimony today, prior to your deposition you reviewed all those voluminous notebooks containing all that information you just referenced; you personally, sir?
A. There is one notebook, and I briefed through it prior to the testimony, obviously not enough, 'cause I didn't have all the facts in my mind.
Q. Now, let me go back to the earlier question, the compilations of data that you reviewed and you testified to at your deposition.

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How voluminous was that information, the compilations?
A. The compilations of data are essentially data points off MOR's, DMR's relating to specific effluent limit or effluent quality standards. They appear on OMR's, MOR's, DMR's at multiple places, so it's taking a point off of one month and putting it on a graph. So what I saw were graphs with those data points, and so talking about a few pages of graphs, that kind of thing. That's the compilations.
Q. Okay.
Now, aside from compilations that you've mentioned that were a few pages each that you've said were compilations of DMR and MOR information, and aside from the complaint, and aside from drafts of these reports that were prepared by others, isn't it true that prior to your deposition, you did not review any other data relating to this case?
A. Drafts of the reports, there are also some maps and diagrams, layouts of facilities, those kind of things that's in the backup, we didn't end up putting them in the final report. I think other than that, that's generally correct. I had not reviewed – as I recall, the question was aimed at had I reviewed the NPDES permits. I had not at that time.
Q. Okay.
So you think there might have been in addition to what I just outlined, the DMR's, MOR's, the drafts that were prepared by your staff and the compilations of a few pages, you think

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you might have also reviewed a couple maps?
A. Yes, we had maps in the file.
Q. I understand. You didn't -- you don't recall mentioning that at the deposition, but you do think you reviewed those prior to the deposition, is that correct?
A. I believe it is. I know it's part of the notebook. I know I looked at the notebook a lot more since then.
Q. So you're not sure whether you reviewed the maps before the deposition or since the deposition?
A. I believe I did look at them before. I know I've studied them since.
Q. Okay.
Aside from the information we've just gone over, the maps, the DMR's, MOR's, the draft reports and complaint, you did not review any other data related to this case prior to your deposition, is that correct, sir?
A. That wasn't in the reports, that's correct.
Q. Right, I included the reports in the question?
A. Yeah, I think that is right.
Q. Okay, thank you.
THE COURT: You through?
MR. JACOBS: Just a moment, Your Honor, if I may.
BY MR. JACOBS.
Q. And isn't it true that prior to your deposition, these compilations were not provided to the Government?

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A. As I say, the compilations came right off the documents you had in your possession, so they were -- they were just data points off of the MOR's, DMR's.
Q. Sir, I'm not asking you about the DMR's or MOR's, I'm asking you about compilations that were put together by your staff. Isn't it true they were not provided to the Government prior to your deposition?
A. They were on the graphs that were in the reports, so it was data put from a column kind of thing to the graph.
Q. Are you testifying that the compilations are in the reports just as they were as you reviewed them or they're exactly the same as in the reports?
A. They changed form from the numerical statistics, if you will, to that of being on a graph, so I don't think we -- well, we didn't publish the compilations as part of the report, we published the graphs, so -- and that's what we used to prepare the graphs.
Q. Okay.
So you did not give the Government the compilations?
MR. BAISE: Objection, this has been asked and answered about three times, now the fourth time.
THE COURT: Well, I don't know, I'll overrule the objection. Let's go ahead.
THE WITNESS: The columns of data were not given to, as far as I know, they weren't in the report, thus, you did not

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have them before our deposition -- before my deposition.
BY MR. JACOBS:
Q. I'm not sure I heard you; they were not in the report and you did not provide them prior to the deposition, is that your answer is, sir?
A. That is what I said, yes.
Q. And prior to your deposition, sir, you had never visited in the context of your services as an expert witness in this case any of the three plants, is that correct?
A. In the context of expert witness, that is correct.
Q. And the only preparation you did for your deposition, for the deposition itself, was to review the three reports written by your staff and highlight them in preparation for your testimony, isn't that correct?
A. That's correct.
MR. JACOBS: Your Honor, in your Monday, March 25th, 1996 order at the bottom of page 4, you ruled, quote, so that there would be no misunderstanding, Mr. Smith will not be permitted to give testimony based upon documents or information not relied upon to generate his report, nor will he be permitted to give testimony based on his subsequent visits to the facility sites.
The testimony elicited from this witness establishes that he did not write the reports, that he did not review or rely on any documents or information in preparation of the

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reports with the exception of the DMR's and MOR's, and with the exception of data compilations, and by the way, those were not provided either, to your knowledge, Mr. Smith, were the particular DMR's and MOR's that you reviewed, were those particular ones provided to the Government prior to your deposition?
THE WITNESS: We just had copies of them, so I don't know if they were.
MR. JACOBS: Okay.
And he's testified that the data compilations were not provided to the Government prior to his deposition as required by Rule 26(a)2, and that the only documents he personally reviewed prior to his deposition to prepare were the reports themselves.
The United States, therefore, moves on the basis of the Court's rulings on the bottom of page 4 of its March 25th, 1996 order, to exclude the testimony of Mr. Smith.
MR. SCOGGIN: May I respond, Your Honor?
THE COURT: Let me find the order. What page?
MR. JACOBS: Page 4, sir.
THE COURT: Just a moment.
MR. JACOBS: And we'd be relying in part, of course, on 26(a)2(b) which relates to the disclosure of expert testimony which I see the Court also refers to on page 4.
THE COURT: Just a moment.

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(Brief pause.)
All right.
MR. SCROGGIN: May I respond?
THE COURT: Yes. Go to the microphone, please.
MR. SCROGGIN: Referring to your order, Your Honor, on page 4, the order reads, Mr. Smith will not be permitted to give testimony based upon documents or information not relied upon to generate his report, nor will he be permitted to give testimony based on his subsequent visits to the facility sites.
We will not ask Mr. Smith to give testimony regarding any information not relied upon to generate his report, nor will he be asked any questions regarding the facility site visits that he subsequently made after his deposition.
The purpose of an expert witness is to assist the trier of fact in understanding technical complexities in a case such as this. We believe that this expert witness satisfies that requirement. I would, if I might, clarify with the witness, I had a line of questions that I was going to ask him regarding the preparation of the report, if that would help.
THE COURT: Go ahead, go ahead.
MR. SCOGGIN: I will not read from the deposition, I will simply ask the witness the same questions that were asked at the closure of the deposition, but were not read by Mr. Jacobs.
MR. JACOBS: Can we have a clarification, who asked

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the questions?
MR. SCROGGIN: I asked the questions at the end of the deposition. If I may, I will ask the witness unless you want to hear the deposition.
THE COURT: Go ahead.
BY MR. SCROGGIN:
Q. Mr. Smith, you worked with others in the preparation of your report?
A. That's correct.
Q. Did you work with others in the preparation of your report?
A. Yes, we did, I did.
Q. Were you personally involved in every phase of the analysis and preparation of these expert reports?
A. Yes, I was, from the moment we were engaged until the reports were actually published.
Q. Did you personally supervise and oversee the work of any staff member who was working under you?
A. Yes, I did.
Q. There has been much talk of the compilation of data. What exactly were these compilations of data; did they contain any new information not already in your report or already produced to the United States?
A. Not that I'm aware. The information was simply presented in a different form in the report than it was in our --

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essentially our data extractions that are compilations we had before then.
Q. Can you explain what you mean by "different form"?
A. For instance, on the information regarding the discharge monitoring reports and monthly operating reports, we would have a month and then a corresponding column, the actual effluent quality associated with that, so for like for May of 1991, you'd have BOD, 4.8 and TSS 3.2 and right on across the form, so that would be -- that would be like a compilation we had of a series of those. Those were then -- that's what we had in 'cause that's what we took it off, the MOR's, DMR's, we took those and put them in the report then, and on a graph, and so we've got graphs that have the exact same information, it just has on one ordinate of the graph it has date and time, on the other ordinate of the graph it has the relative magnitude of what that parameter was.
The other thing was that of dates and schedules, and so we had listed dates and schedules. We ended up putting in bar charts and that kind of thing in the charts.
Q. Do these compilations contain data or analyses of data?
A. It's simply data.
Q. Were they anything more than rearrangement of data that appeared in the charts that are part of your report?
A. No.
Q. Can you tell me if you received drafts of your expert

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report as they were in preparation?
A. Yes. We worked through them in kind of a stage at a time trying to establish first data and make sure we had a picture of things correct, and so Barcus Jernigan and Andy Westfall were working directly with me, they would write them and they would send them to me and I would mark them up and get on the phone, we'd be in conference or conference calls and go over the things it said and say -- I'd tell them, oh, I believe that something was different or changed or a different opinion of what they had written and we would modify that based on my direction. And we worked out each stage through the preparation of the report until the final report was completed.
Q. Can you tell me approximately how many contacts, personally, you had with your staff members during the preparation of these reports?
A. Oh, dozens. I mean, we began -- I think we were engaged in May of 1995, the report was completed in October, so five months. Certainly dozens of meetings and a couple dozen, twenty meetings. I don't know, something like that perhaps.
Q. Can you tell me what questions you asked of your staff in response to the drafts you received?
A. I might ask clarifying questions on the data, the text that was written, where did they get it or did we know about something else that made that raise a question on it, so I wanted to know more about that.

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I may have asked based on my own background I would have thought something different, could they defend where we were going with this thought interaction, just like that, just collegial development, pretty normal practice for us. I mean, I'm a large firm, we're always working as teams and nobody ever just writes a report by themselves.

MR. JACOBS: Objection, move to strike.

THE COURT: Denied.

MR. SCROGGIN:

Q. What changes did you make in the draft reports that you received from your team members?

A. Generally, I would get the reports and blueline them, things that, you know, I thought was the wrong conclusion or maybe a conclusion that should have a different approach to it.

Obviously, the facts -- I relied on my team for the facts and examination of those facts in the files is very tedious and time consuming which is not appropriate for me to be involved with, and so I just asked them where they got that stuff, that kind of thing.

Q. Is this team approach that you've described different from the approach you use in servicing other clients on similar projects?

A. No. I mean, that's the way we do business. We are -- we have project teams, that's the essence of every project is a project team to balance the views of different people.

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THE COURT: Okay.

You've answered his question.

BY MR. SCROGGIN:

Q. What steps did you take to assure that errors were not made in the transcription of data by your team members?

A. We had checks within the team and then we had clerical checking as for transcription purposes so we didn't make mistakes. We did make some and I think Mr. Jacobs pointed it out, our bibliography had a couple errors. Certainly, that's what we try to do. It's a little difficult because of the confidential nature of the work. We didn't make it available to very many within the firm.

Q. Do you take personal responsibility for all of the conclusions and analyses in your expert reports?

A. Yes, I do.

Q. And has your opinion expressed from those reports changed since the time of your deposition in any way?

A. No, they have not.

MR. SCROGGIN: Your Honor, I would renew my motion for proffering Mr. Smith as an expert witness and in the areas I've already enumerated in this case.

THE COURT: Okay.

Mr. Jacobs, you want to be heard any further?

MR. JACOBS: Very briefly, Your Honor.

BY MR. JACOBS:

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Q. Mr. Smith, Mr. Scroggin asked you about these drafts you reviewed.

THE COURT: No, no, I'm not talking about testimony, I'm talking about argument.

MR. JACOBS: Oh. I don't have anything further, Your Honor. No argument, Your Honor. Thanks.

THE COURT: All right.

Well, your testimony -- well, I guess I should ask counsel this.

Mr. Scroggin, this Court in its order provided that Mr. Smith would not be permitted to give testimony based upon documents or information not relied upon to generate his report.

MR. SCROGGIN: That is correct, Your Honor. We have no expectation of asking him any question regarding the compilation or other documents that --

THE COURT: Mr. Smith, will you be rendering any opinions or testimony based upon any documents or information not relied upon to generate your report or reports?

THE WITNESS: No, sir, I won't.

THE COURT: Will your testimony be based even in part on subsequent visits to the facility sites?

THE WITNESS: No, sir.

THE COURT: Okay.

I'll overrule the objection, I'll permit him to

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testify over objection.

BY MR. SCROGGIN:

Q. Mr. Smith, when were you retained as an expert witness in this case and by whom?

A. May of 1995, by Gabeler, Baise and Miller.

Q. Can you tell me the scope of inquiry that was given to you for your expert work?

A. In general, it was the three treatment plants. First emphasis was Waterway Estates. We were asked to look at the improvements that were made at the plant and had they taken a reasonable amount of time, and we looked at the effluent discharges, both during the time that the complaint was made and whether those discharges had any impacts or what the impacts might be on the receiving waters.

And then we looked at Barefoot Bay and asked similar kinds of questions about the treatment plant and what would be expected from the treatment plant and looked at the discharge and its impact on the receiving waters, what those impacts might be.

And then finally at Carrollwood Village, similar questions.

Q. Who personally was your contact for your retention as an expert witness?

A. I spoke with you, Mr. Scroggin, and we developed really our scope and idea of what we were going to perform.

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Q. What instructions were you given regarding the conclusions that you should reach in performing your analysis?
A. Well, we talked about wanting to maintain our objectivity and it was very important that our firm report what we saw and what we opined of our own basis of fact and that, you know, we were to render our judgment as an independent engineer and that was what we were to write.
Q. Did you in fact prepare expert reports for the three facilities; Barefoot Bay, Carrollwood and Waterway Estates, that are in issue in this litigation?
A. Yes, we did, a report for each one of the plants.
Q. Mr. Smith, are you familiar through your twenty-five years of experience with the design and operation of a general secondary treatment wastewater treatment facility?
A. Yes, I am.
MR. SCROGGIN: Your Honor, I would ask the indulgence of the Court in allowing Mr. Smith to go to the drawing board and to assist his testimony to speed the process, if we might, by his drawing --
THE COURT: Sure.
BY MR. SCROGGIN:
Q. I will ask you, sir, would you please draw and describe the operations of a general generic secondary treatment wastewater treatment facility?
A. Yes.

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Q. I'll ask you to do that, sir.
MR. JACOBS: Your Honor, may I move a little closer?
THE COURT: Sure.
THE WITNESS: Your Honor, we have domestic sewerage coming in from a sewage collection system. We generally look at this sewerage in regards to about three parameters; one is BOD, the other is TSS.
BOD is biochemical oxygen demand, and TSS. These are kind of the measures of how strong this sewerage is coming into the plant. For domestic sewerage, these typically are about two hundred parts per million of BOD and about a hundred and fifty parts per million to take suspended solids into a plant.
Sewerage comes in through a sewer line, gravity or pumped, and may first receive some general screening to take out any large items, rags and debris, wood, things like that. And that is scraped off on a screen, that is usually manually removed or with a machine, and then it goes into what we call a complete mixed activated --
THE COURT: Why don't you pivot that whole thing, that way you can move back. You can see how --
THE WITNESS: Now, that is --
THE COURT: Move back a little bit.
MR. JACOBS: Do you mind if I get a little closer to see?
THE COURT: Uh, I don't mind. I tell you what, just

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--
MR. JACOBS: We can look at it during the break, perhaps if you want to keep it there, Your Honor.
THE COURT: All right, go ahead.
THE WITNESS: This next stage of treatment is really where the work is done and you have the sewerage that comes in about two hundred parts per million, that's essentially raw sewerage that comes into the plant, comes into the activated sludge basin.
And in this basin, essentially all we're doing is adding air and that's added in various means, but essentially mixed with the sewerage and residents of the sewerage, micro-organisms, and begin growing and create what we call mixed liquor, which is eventually a biomass that consumes this BOD. It's the food for these micro-organisms.
They start growing with the help of air and changes this stuff that comes in as raw effluent from essentially sanitary waste from our houses, from restaurants, those kinds of places, is mixed, these bugs consume it, and then we take the bugs, this whole mixed volume now completely mixed and biogenous into a settling tank which we then separate the liquid from these bugs, essentially dead bugs and some that are still living, and this is separated out, the liquid then goes out and that becomes essentially the effluent which is discharged.

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The most important thing in a treatment plant is this return stream of what we call return activated sludge which is this microbial population that we're going to take back in to help start up the process. And we take off what we call waste activated sludge, the removal of those, and that right there is probably the single most important part of operating a wastewater plant is the waste activated sludge, how was that taken off and how is the age of that taken off.
The other aspect --
THE COURT: How is the what taken off?
THE WITNESS: The age of those bugs, how long they have been in the system.
THE COURT: Okay.
THE WITNESS: The other aspect that is very important is that of air, how much air you add to the process. If you can control these two things, that is essentially how you control the stream of the plant, the wasting of the sludge, the return of it, and thus, the air, so those are very important.
And this effluent which comes off the weir of this settling basin, then we usually add chlorine to and then in some cases, we take the chlorine -- the chlorine is added to disinfect the effluent, to kill disease-forming bacteria that might be in there.
Those bacteria may come in, they're called fecal-coliform, and they come in in the millions and by the

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time they go through the treatment plant, they're down here after chlorination to maybe, I think the standards are generally two hundred or four hundred, two hundred on an average basis, four hundred on a particular basis by the time it goes through the process.

So you've seen, we've taken out millions down to a very small number. That's a measure of how safe it is for public health purposes. This whole idea is for public health. Now, after the chlorine is added because chlorine is also a -- not only does it kill these kind of bugs, it has negative impact on other living things in the environment.

We add things such as sulphur dioxide to remove the chlorine. It's done its work, it's killed the bugs, now we have to, before it goes into the receiving waters over here, let's make it safe, and so then it's discharged. And that is generally a secondary treatment plant in general form.

So, air wasting, and the effluent from this plant, the BOD and TSS that comes in is usually removed at about 85 percent, yielding an effluent that is like thirty parts per million of BOD, and on the order of twenty to thirty parts per million of total suspended solids.

Now again, just to characterize this for you, Your Honor, total suspended solids are essentially if you took this effluent and put it through a coffee filter, the stuff remaining on the coffee filter is twenty to thirty parts per

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million, so one part of -- out of a liter would be what that is.

In the BOD, the test that's done for this is essentially, it's a measurement of how much oxygen like this air with this stuff, this food in this effluent consumed if were put in the stream, and it's very important because back when we were first discovering about these things in the stream, we looked at when sewerage was added to a stream, we saw that down the stream aways, we'd see a depression in the dissolved oxygen. The stream would use up it's dissolved oxygen to essentially do the same thing we now do in this tank.

That became of great concern and we figured it's about a five day period this happened and, thus, the test is called the BOD-5. That's what we're concerned about.

So, we put this sample in a bottle, we put it in an incubator, a certain time, and measure how much oxygen is consumed within that bottle and that's the measurement and that is something that has been around since early in the Twentieth Century. That's become now our standard of measurement. Really just measures the amount of organic matter to oxygen inducing impact. That's a general secondary treatment.

THE COURT: Okay.

MR. SCROGGIN: Your Honor, may the witness remain at the board as I ask my next question?

THE COURT: Yes.

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BY MR. SCROGGIN:

Q. Mr. Smith, what is raw sewerage?

A. Raw sewerage is that which is untreated and collected in the residential or commercial collection system, so it includes sanitary waste from households and residences and commercial establishments, includes gray water from like washing machines and floor drains, and that's generally it.

Q. Can you tell me the breakdown of raw sewerage between water and pollutants?

A. Well, two hundred parts per million means that two hundred parts of stuff in this million parts of water, so it's like ninety-nine point eight percent water and point two percent, or yeah, point two percent stuff.

Q. What is a part per million? Can you give us an example of a part per million?

A. Well, it's -- we're trying to figure this out. What would be a good way? It's actually equal to about one drop, like an eyedropper in thirteen gallons, and just calculate that out, and roughly to -- so you think of it as one drop in your gas tank which is like thirteen or fifteen gallons, that's the idea, that's the concentration of if one part per million is this, so twenty parts would be twenty drops in a gas tank or that kind of thing.

Q. What is BOD?

A. Well, that's what I was discussing a little bit earlier.

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BOD is biochemical oxygen demand. It's the amount of oxygen consumed by these micro-organisms from -- in a confined space where they can't get any other oxygen over a five day period.

Q. Your chart shows BOD two hundred parts per million after treatment. What is the BOD?

A. It comes in at about two hundred, exits under secondary treatment at about thirty.

Q. What is TSS?

A. That is the filterable fines that you can take out on a filter that is like a coffee filter, and that which is remaining, evaporated and weighed, and that is the TSS, total suspended solids.

Q. Your chart shows TSS and raw sewerage. It's approximately --

A. One hundred fifty parts per million coming in and it goes out at somewhere, twenty to thirty parts per million.

Q. Therefore, can you tell me, secondary treatment removes approximately what percentage of the BOD from the raw sewerage that comes into the treatment facility?

A. It's generally accepted about 85 percent. In fact, we used to define it that way, 85 percent removal with secondary treatment.

Q. Is there a higher level of treatment than secondary treatment?

A. Yes. Actually a couple different levels, but the next

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level would be tertiary treatment. And tertiary treatment is essentially taking this flow to the next level, removal of BOD and TSS, trying to get it down to much lower levels of BOD and TSS. And that would be by using other methods.

A couple of methods may be to add additional tankage on here or actually a separate tank where you would have had more aerated micro-organisms or you could add a filter where you would actually – a seine filter much like is used in drinking water treatment to remove the fines and with those fines you would take out some associated BOD, and so you might see with the tertiary treatment BOD and TSS removal up to 95 percent, so down to less than ten, ten, or something less than that.

Q. And is there a higher level of purification of sewerage than the tertiary treatment you just described?

A. Right. The next level from tertiary, again this is secondary –

MR. SCROGGIN: I don't mean to interrupt the witness, may I ask Your Honor that his chart be marked for identification only as Florida Cities' 203?

THE COURT: Mark anything you want to for identification.

THE WITNESS: The third one would be what we called advanced waste treatment, AWT, and the focus of advanced waste treatment is now is a shift. It's something that is developed as we've advanced our treatment technologies and advanced waste

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treatment is focused now on removal of nutrients. Nutrients are carbon, nitrogen and phosphorus.

Carbon we mostly remove because carbon is what is associated with BOD, biochemical oxygen demands, is mostly in carbonaceous form, that's carbon which is found everywhere in the atmosphere. Nitrogen now is of concern. Nitrogen comes in in domestic sewerage, mostly in the form of urea. It's converted from urea, organic nitrogen into usually ammonia, it's hydrolized into ammonia in the treatment process, and some of it actually may be changed to nitrate, another form of nitrogen. The key here is –

THE COURT: The first, is that what they call ammonical nitrogen?

THE WITNESS: Yes, ammonia, yes, that's correct, sir.

THE COURT: Contrasted with that, I got into this fertilizer case I had one time, contrasting nitrate nitrogen with ammonical.

THE WITNESS: That's correct, sir.

THE COURT: Okay.

THE WITNESS: These three are of concern, because these are the basic –

THE COURT: Nitrate nitrogen breaks down more readily, does it not.

THE WITNESS: Well, ammonia nitrogen requires oxygen to break it down. Nitrate nitrogen already has oxygen with it

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so it facilitates its breakdown because the breakdown then takes nitrogen to nitrate gas and right out into the atmosphere.

THE COURT: Okay.

THE WITNESS: The last one is phosphorus and it is of concern because each one of these are basic building blocks of essentially all life forms, certainly plant life. And of concern quite directly is we're concerned about growing algae in receiving waters.

So if we can limit these elements, the algae won't grow, we won't get algae falling out into the receiving waters which then is called putrification and can actually affect the water quality.

So the idea is if you control this advanced waste treatment, you can control the quality of the receiving water. So that's the focus of advanced waste treatment.

Now, what actually happens may be again carbon and nitrogen is treated in this basin here, again, by micro-organisms, and essentially it requires more air, the sludge age has to be older, takes longer because that which removes the nitrogen takes longer, the micro-organisms are slower to act, they're not as fast and not as relatively strong within the environment.

The phosphorus is usually removed by chemical precipitation and you add chemicals here in the solids liquid

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separation and that chemical ties up the phosphorus, it settles out with the sludge and is removed and so then we take the phosphorus out.

So that is generally advanced waste treatment and it may have standards. Generally accepted standards in Florida are five parts of BOD, five parts of suspended solids, three parts of nitrogen and one part of phosphorus. Again these are parts per million, one drop to thirteen gallons.

BY MR. SCROGGIN:

Q. Mr. Smith, you first described secondary treatment and your testimony was that secondary treatment removes 85 percent of CBOD and TSS. Can you tell me what does the effluent from a secondary treatment facility look like?

A. Well, the effluent from a secondary plant would have on the order of thirty parts of BOD and twenty to thirty parts of suspended solids. The total nitrogen is probably on the order of fifteen to twenty parts per million and the total phosphorus is six to eight parts per million.

Q. What color is the effluent from a secondary treatment plant, the first one that you described?

A. It's generally colorless, unless there's color in the drinking water that you use, which we have in Florida some places, but generally it's colorless, fairly clear, when you look at it, it's fairly clear to look at, probably doesn't sparkle, doesn't have that sparkling look you see in real clean

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water.
Q. What is, in your experience, the level of treatment that most sewerage treatment facilities in the United States have?
A. By far, most of them are secondary treatment plants.
Q. Approximately what percentage of the facilities in the country based on your experience would have either tertiary or advanced wastewater treatment?
A. It's a very small percent. I'd hate to put a number on it. Certainly, on the order of maybe less than ten percent of the plants in the U. S.
Q. And with advanced wastewater treatment, can you tell me the color and characteristics of the effluent from the facility you've just finally described, the most advanced wastewater treatment facility?
A. It would be very sparkling, actually look very clear. If we have used filters to remove some of the solids, it would be very clear, sparkling. It may still have color with it because there's really nothing in the treatment plant to remove color, but essentially looking at it, it looks like a fresh stream.
Q. Why are nitrogen and phosphorus of environmental concern in a secondary treatment facility's effluent?
A. Why are they or aren't they?
Q. Why are nitrogen and phosphorus of potential environmental concern in the effluent from a secondary treatment facility?

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A. Well, generally, they haven't been a concern in secondary treatment and they're not regulated or concerned of – the effluent isn't an issue. When it becomes an issue, the issue is that of being this building block and affecting the receiving waters for the purpose of growing algae, and the algae being an indicator of water quality and impact.
But there is another reason for nitrogen, and particularly the ammonia part of nitrogen. Actually, in many more plants than are receiving this kind of treatment, this 5,5,3,1, which this is total nitrogen, there's many more plants concerned with ammonia, because ammonia has an impact on fish in the River.
And so we're often asked to remove just the ammonia part or convert it to nitrate rather than leave it in the ammonia form because the ammonia in its unionized state is harmful to fish, can be harmful to some fish.
Q. Does that mean that effluent from a secondary effluent facility in Florida is harmful to fish?
MR. JACOBS: Objection, leading.
THE COURT: Overruled.
THE WITNESS: It can have an impact on fish, yes, but generally it's mitigated by the amount of water diluted with or the type of receiving water that is going into that kind of thing.
BY MR. SCROGGIN:

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Q. Can you tell me the role if any that chlorine plays in the effluents from secondary and advanced wastewater treatment facilities?
A. Well, I mentioned chlorine is introduced as a bactericide to kill the bacteria that are there in the effluent and that's very important from a public health standpoint. In fact, that's how we got started into sewerage treatment early in the century was to remove the disease-causing bacteria, that was the big issue.
So chlorine has been with us for sometime and it's an effective bactericide. It's been used in our drinking water, our swimming pools, very important. In fact, the levels that we added here are about the same that we add to our drinking water that we drink.
Now, what we've discovered is that we add this chlorine, is very effective, but now you've discharged that before it's mixed and has a chance to interact with the environs in the creek or whatever that receiving water is. It may actually – there's some species that actually find that as a toxic is the word, but really what it is, they find it unfriendly. They came up, the fish was swimming up to this area which has chlorine in it, they'd get like a buzz and turn around and go the other way, so it creates an area which they would not like to inhabit.
Based on that, we started in the '80's, started looking

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at trying to remove that chlorine and towards the end of the '80's, it became a standard to remove the chlorine with the addition of sulphur dioxide. It's essentially just another chemical to add in, it's essentially an anti-chlorine chemical. And we add that to remove the chlorine, happens instantaneously upon mixing.
THE COURT: What do you get when you mix chlorine with sulphur dioxide?
THE WITNESS: You get a chlorioxide, it's essentially harmless. And sulphur dissolves, and so this just –
THE COURT: Is that SO-2, is that a very odorous –
THE WITNESS: It's a gas that you add.
THE COURT: Very odorous?
THE WITNESS: That's hydrogen sulfide is what you're thinking of, that stinks like rotten eggs.
THE COURT: Yes, that's it.
THE WITNESS: This is SO-2, is really, and so, we add that, it undos what the chlorine did, is discharged, then it has no harm, and those fish then that might not want to get into the zone now can swim through freely.
BY MR. SCROGGIN:
Q. I'd like to turn now, Mr. Smith, and you may take the witness chair with the Court's permission, to the three facilities that are at issue in this case, and I will ask you first, the flows of raw sewerage into these three facilities

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which are Barefoot Bay, Carrollwood and Waterway Estates, and ask you, I will then ask you to compare, but I'll first ask you the flows?

A. The flow at Barefoot Bay, I think the period in question is about point five million gallons per day or half of a million gallons per day.

Q. How does that compare, sir, with the other facilities that you have had personal responsibility for with respect to the magnitude of flow?

A. Well, it's a very small plant, it's a pea-shooter plant we'd call it. It's compared to like the City of Tampa has sixty-five million gallons per day or a hundred thirty times as much, just finishing a project in Nevada that's eighty-eight million gallons a day, Denver was a hundred and eighty-five million gallons, so it's very small, not atypical in Florida to have small plants like that.

Q. What was the flow at Waterway Estates?

A. Waterway Estates is just under one million gallons per day.

Q. And at Carrollwood, sir?

A. I believe it's right around a half million gallons per day.

Q. In your experience, is the flow parameter of interest in evaluating environmental impacts of an operating wastewater treatment facility?

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A. Oh certainly, flow is very important because it's related to how much of an impact it has on receiving water because of the affects of dilution.

Q. Did you analyze the operations and environmental impacts of the Barefoot Bay Facility as part of your expert analysis?

A. I didn't analyze the operations. What I looked at is the results which indicate how it was operated and then, yes, we looked at that and we looked at the impacts in terms of the receiving water at Barefoot Bay which is the Satia Canal.

Q. And did you prepare an expert report for this litigation reviewing plant treatment capability of effluent quality at the Barefoot Bay Facility?

A. Yes, we did.

Q. And I would ask that the witness be shown Florida Cities' Exhibit Number 183. And I will ask you, sir, is this the expert report that you prepared pursuant to the instructions and retention you described for this litigation analyzing the Barefoot Bay Facility?

A. Yes, it is.

MR. SCROGGIN: Your Honor, I would move Florida Cities' 183 in evidence.

MR. JACOBS: Objection, Your Honor. This is hearsay. He didn't prepare the report. I've established that already on voir dire and the report is not automatically admissible under Rule 702. It is hearsay under 801(3), and I have additional

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authority. Engebretsen versus Fairchild Aircraft, E-N-G-R-B-R-E-T-S-E-N, 21 F 3rd, 721.

The witness has testified that the reports were not prepared by him, that the underlying data was not prepared by him. And I therefore think that under the authority of the case as stated and in particular, at 21 F 3rd, 728, the reports are inadmissible as evidence.

MR. SCROGGIN: May I respond, Your Honor?

THE COURT: Yes.

MR. SCROGGIN: Your Honor, the witness has testified that he personally supervised every phase of the preparation of these reports, including the analysis that underlies them. He says in his testimony, which we'll be happy to read back, but the Court has heard it today, that he takes personal responsibility for every word in these reports. And that he personally oversaw their preparation and the analysis upon which they relied.

We would ask the Court to accept them into evidence.

THE COURT: I'll overrule the objection. 183 will be received.

BY MR. SCROGGIN:

Q. Mr. Smith, would you please describe the Barefoot Bay Facility.

MR. SCROGGIN: And I might again ask the indulgence of the Court, if we could, Your Honor. I trust there would be no

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objection from the United States if we would use their own exhibit of the Barefoot Bay area as a map. I would ask that that which is --

THE COURT: You can use anything that is in evidence. Is that in evidence?

MR. SCROGGIN: It is already in evidence, Your Honor. It is attachment number one, Mark Klingenstein's expert report, and it is a geographic map of the Barefoot Bay area.

MR. BULLOCK: I have an extra copy of the report. I don't know if I should refer it to the Court.

THE COURT: All right.

THE WITNESS: I'm sorry, is there a question, Mr. Scroggin?

MR. SCROGGIN:. May I please ask that the written chart be removed so we can see the map more clearly, just tear off the page, it's been marked already as our exhibit number 203. It can be flipped over so the map is clearer.

THE COURT: You want to hand him the pointer from over in the corner there. He's got it.

BY MR. SCROGGIN:

Q. Mr. Smith, would you please describe the location of the Barefoot Bay Facility and its environs, and you may feel free to use the map at this time.

A. The facility is located adjacent to the Barefoot Bay development which is in southern Brevard County, southeast

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Brevard County.
THE COURT: Why don't you have a seat over there in the jury box, take those things out of chair there, Mr. Jacobs, and you can have a seat right there.
MR. JACOBS: I always get excluded from the Jury, normally.
THE COURT: Well, this will be a rare privilege for you. You can pretend like you're trying the facts, okay.
THE WITNESS: Okay.
I'm not exactly familiar with this map, but I think it's – I get somewhere, it's right along Micco Road which is right here. And I think – I don't know what version this, I believe the plant and development is right along in here, general area, maybe over here. I'm not sure if this is the development or the orange groves. It's in an area of citrus groves, southern Brevard County. I'm not sure that is the exact place or I'll be honest, I can't tell from this map.
BY MR. SCROGGIN:
Q. Have you reviewed your own map of this area?
A. Right, and I'm not sure which version this is. Seems like the one I have has a little different demarcation of the development actually, so –
Q. Based upon your previous review of maps of the Barefoot Bay area in preparation of your expert report, would you describe the location of the Barefoot Bay Facility and the

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route of the discharge from that facility?
A. Right. The plant discharges into this drainage canal which is essentially across the road from the plant and the site goes down –
MR. JACOBS: Objection, he's relying on his visit at this point in time. That is how he knows exactly where that drainage ditch is because he previously testified he hadn't visited the plant.
MR. SCROGGIN: Your Honor, he just testified he relied upon a map and schematic diagram of the plant in determining its location and environs, not his visit, I'm not asking him about his visit.
THE COURT: You relying on your visit?
THE WITNESS: I don't want to kid anybody, obviously the visit –
THE COURT: Don't, don't, I don't want him testifying concerning anything that he observed with respect to that visit after his deposition. I already ruled on that.
MR. SCROGGIN: Yes, Your Honor.
MR. JACOBS: Forgive me, I am going to move to strike some of the earlier testimony. It's now apparent to me that he couldn't have pinpointed the location as precisely as he did until after his deposition because in the deposition, he testified it was somewhere in Brevard County. That was all he could say, so I'm going to move to strike all of his testimony

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about the location of the plant.
BY MR. SCROGGIN:
Q. Mr. Smith, did you review a map of the area of the Barefoot Bay Facility?
THE COURT: All right.
Let me reserve on that. Go ahead and ask him.
BY MR. SCROGGIN:
Q. Sorry. Did you review a map of the Barefoot Bay area in preparing your expert report?
A. Yes, I did, and I think I, in the deposition, testified to that fact.
Q. May I ask you please, to remove the Government exhibit of that map and draw your own map based upon information that you had reviewed prior to your deposition in preparing your expert report.
A. The general forms of areas of interest are the Indian River Lagoon, Sebastian River, the north prong of the Sebastian River, and then this – the Barefoot Bay Plant and Barefoot Bay development.
And essentially, the plant discharges to a drainage canal which drains in general areas which is indicated on the map as citrus groves and flows down to this north prong of the Sebastian River.
And I think if you look at the map, it's on the order of – this distance is on the order of three to four miles from

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the point in which the plant discharges to the point which goes –
MR. JACOBS: Objection, there is no map in this report, there was no map provided to the Government prior to the deposition. Again, he's out of bounds, Your Honor.
THE COURT: Out of bounds?
MR. JACOBS: Out of bounds of the terms of your order. He's relying on information clearly reviewed subsequent to the deposition and/or his visit to the plant.
MR. SCROGGIN: Your Honor, he's testified that his – the map he's drawing is based upon information, maps that he reviewed prior to his deposition, any and all such maps.
THE COURT: Ask him that.
BY MR. SCROGGIN:
Q. I will, Your Honor.
Mr. Smith, is the map you're drawing based upon information and documents that you reviewed prior to your deposition and relied upon in preparing your expert report for the Barefoot Bay Facility?
A. Yes. We had had copies of USGA maps, USGA quad maps like this, similiar fashion.
Q. Is your testimony based upon your personal recollection of that review of those maps?
THE COURT: Just a moment, please.
BY MR. SCROGGIN:

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Q. How far, Mr. Smith, is the distance from the discharge of the Barefoot Bay Facility to the north prong of the Sebastian River.

THE COURT: I'm going to overrule the objection, the last objection that was made and the motion to strike and the immediately preceding one as well. Go ahead.

THE WITNESS: As I said, I think it's about three to four miles. If you look on the map, again, look at our report, the description I just gave orally is essentially the same description that I gave that is given in the report on page 6 of the Barefoot Bay report.

BY MR. SCROGGIN:

Q. Go ahead.

A. And so the drainage canal, there's a drainage canal, goes down, that's about three or four miles, then the River is, north prong of the Sebastian River is not very long, I don't believe, and then again into the Indian River Lagoon, this is a shorter distance than that, this distance here.

Q. The three to four miles along the canal, can you describe that canal?

A. It's a drainage canal which it has been -- the purpose of it is to drain the citrus area there, that's it use and purpose, so that it has upland characteristics for use for citrus groves.

So it drains the storm water from those groves, and thus,

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that's what is the receiving water for this sewerage treatment plant. I don't want to get into the particulars of the canal because I'm afraid I'd step over the line there, so I'd rather not.

Q. Yes, sir, I was only asking you the length of the canal based on your review.

A. Right, it's a man-made canal. Trapezoidal section kind of thing.

Q. Can you tell me, sir, what happens to pollutants such as chlorine residuals and ammonia that you said are present in secondarily treated effluent as they travel down such a canal?

A. Well, first with chlorine, as I said, it's a bactericide and an occident, so once it gets -- it wants to be consumed and wants to oxidize, so when it gets into the receiving water, it does its thing, and as soon as it does that, it's used up. It becomes essentially harmless.

So once it is in the mixing zone and it touches things that it can oxidize, then it essentially is used up and neutral.

So beyond a fairly short distance within the receiving water, depending on the flow, I would expect that you would find very little evidence of any chlorine that might have been in there.

Q. What is a short distance compared to three or four miles?

A. You know, fifty, hundred, two hundred yards, something

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like that. Depending on flows. Obviously with more flow, the distance would be shorter. And you're talking about a flow of either -- the effluent from the plant is a half mgd or it's like point seven five cubic feet per second, and I don't know what the flow in the canal is, but -- well, enough said there.

Then you asked about ammonia. Ammonia undergoes then the biological processes that may have occurred within the treatment plant and again it is a function of dilution, and the information we had received that was actually water quality monitoring done in this canal showed that total nitrogen concentrations in the canal were very low, on the order of one part per million, very low concentration, so we should say ammonia is even lower than that because its -- total nitrogen is all the different forms of nitrogen in the stream.

Q. Would you be able to give a more precise answer about the distance over which a pollutant such as residual chlorine would have an impact if you were to see a video of the Barefoot Bay Facilities outfall?

A. If it showed the channel and, you know, I could estimate the flow of the channel, it probably would help, yes.

MR. SCROGGIN: Your Honor, I would bear the Court's indulgence, I would ask the Court's permission, would ask perhaps after the lunch break the witness be allowed to view the United States' video, only the very brief section that relates to the outfall at Barefoot Bay.

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This is an expert witness who can evaluate it in front of the Court, and we would suggest that would assist the trier of fact in understanding the impact that is in question. That is with the Court's permission, I would ask the cooperation of the United States in being able to use their exhibit this afternoon for no more than a two or three minute excerpt from the video at which he could answer the question with more precision since it is this question that relates directly to the environmental harm or potential for harm that might have been caused by the outfall effluent at Barefoot Bay.

MR. JACOBS: Judge, we're happy to make the video available. My understanding is it's in evidence and he's allowed to rely upon it if he wants.

I might point out they've had the video which was made in December of '94 and they've certainly had a chance to show it to Mr. Smith, but I can't object to them showing it to him again if he hadn't seen it.

THE COURT: Okay.

All right, I think we're going to go ahead and take a recess till five minutes after 1:00 o'clock.

(Thereupon, a luncheon recess was taken.)

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THE COURT: Mr. Scroggin.
MR. SCROGGIN: Your Honor, during the lunch break, we procured a copy of the Government's exhibit videotape. And with the Court's permission, I would like to play us a portion of the videotape that, according to the testimony of the United States' expert, shows the outfall at the Barefoot Bay facility, which is one of the facilities located here.
THE COURT: All right.
MR. SCROGGIN: I have turned, Your Honor, the video so that it faces the witness, since he has not seen this video before. And I will --
THE COURT: Okay. Does that video have a number, exhibit number?
MR. IACOBS: I went to say 505, Your Honor.
THE COURT: Okay. That's all right.
MR. SCROGGIN: This is the road in front of the Barefoot Bay facility and the outfall, according to the testimony of the Government's expert. For the record, it is the Government's Exhibit 505, the videotape we are watching. And the counter on the tape begins at, approximately, 11 -- excuse me, approximately, 10:50. I believe it was set to zero when we started the tape in the beginning, just for reference, on this particular tape counter.
It's, approximately, one or two more minutes, Your

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Honor.
THE COURT: Okay.
MR. SCROGGIN: That's the end of the section, Your Honor, dealing with the outfall.
CONTINUED DIRECT EXAMINATION
BY MR. SCROGGIN:
Q. Mr. Smith, after viewing that brief videotape of the outfall and the receiving water, Satilli Canal, at the Barefoot Bay facility as identified by the Government's expert, do you have any opinion based on your experience regarding the flow of the canal or its size?
A. Just looking at it, the flow looked to be coming out of -- it's on the order of a half MGD, depending on what time of day it was. It could vary a little bit. It appeared to be probably 16-inch pipe -- 12- to 16-inch diameter pipe. It's free falling into the stream there, although it's apparent that the water level has been up near the outfall at times, because the vegetation is stripped around there, around the outfall where the pipe is actually coming out.
It's hard to tell how wide it was, but looking at it just trying to get a sense of it, it's obviously more than 10 feet, less than 20, something like that. I didn't get any sense of depth at all. If you assumed it was a foot deep -- which I'd guess at least it's a foot deep based on the plunge pool that was exhibited by the flow from the sewage plant.

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A foot deep, 15 feet deep across, even a triangular section, would probably yield seven and a half feet in flow. And we're talking about flow that's about a tenth of that, so -- but that's a rough approximation based on a limited view of that. So, something on the order of ten-to-one flow dilution.
Q. Based on a ten-to-one flow dilution of the outfall in the Satilli Canal, do you have any opinion regarding the impact of Barefoot Bay's discharges on the Satilli Canal?
MR. IACOBS: Objection, Your Honor. He's going beyond the scope of this report. This data that he's just speculated or roughly estimated is not on the report, and I don't think he can now rely upon it to answer the question.
THE COURT: Okay. Sustained.
BY MR. SCROGGIN:
Q. Would you anticipate -- have you reviewed, Mr. Smith, the characteristics of the effluent at Barefoot Bay?
A. Yes, we have.
Q. And in your judgment, can you tell me what impacts, if any, might be expected from those discharges into the receiving water canal?
A. Well, in the period in question, the plant is discharging very well-treated secondary sewage, which I'd expect very little impact, if any discernible impact. Looking at the water quality data that was provided, some sampling in the canal,

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looks that the water quality is reasonably good. It's not a real high water quality receiving stream, and there's not much impact from the plant.
Q. What do you mean by very highly-treated secondary effluent?
A. Well, as I mentioned earlier, the secondary treatment would expect treatment to something like 30 milligrams per liter of BOD in that order. And we're seeing effluent here of half that amount, on the order of 15 milligrams per liter BOD, so -- something over 90 percent removal of BOD in suspended solids. So, it's doing a very good job of secondary treatment.
Q. In preparing your expert report, did you review the exceedances noted for failure to report BOD in the discharge monitoring reports turned into EPA for this facility during the period of November 1991 through November 1993?
A. Yes, we did.
Q. And did you reach any conclusion regarding the environmental impact, if any, of those failures to report BOD on the discharge monitoring reports?
MR. IACOBS: Objection, Your Honor. This has been a pattern. The question has been "have you," and the response has been "we." And I'm going to object on the grounds of vagueness, because we can't tell from the question whether Mr. Scroggin is asking Mr. Smith whether he personally did this

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type of review or analysis or whether his firm did. And I think that distinction is important for the purposes as I announciated earlier.

MR. SCROGGIN: May I respond, Your Honor?

THE COURT: I'll overrule the objection. You'll have him on cross.

THE WITNESS: Yes. We looked at it. Generally, as I recall, the tests that were being performed were actually carbonaceous BOD tests, and they were reporting what we call a CBOD. Indeed the permit was asking for BOD, and the exceedances then were being based on the fact that it was CBOD rather than BOD.

BY MR. SCROGGIN:

Q. In preparing your analysis, did you prepare a chart summarizing the trends of BOD or CBOD at Barefoot Bay during this period of time and the effluent from this treatment facility?

A. Yes, we did.

Q. I would ask, please -- we have an enlargement of one of the charts that are contained in the expert report -- the expert's report for Barefoot Bay. It's simply an enlargement for Florida Cities Exhibit 183.

Mr. Smith, can you describe what this chart presents?

A. Yes, sir. This top line is -- first, just as I mentioned earlier, this represents typical raw sewage, the strength of

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raw sewage, the BOD strength. Then it goes on to show the actual BOD strength. So, it's fairly what we call weak sewage coming into the plant. It looks like an average of maybe 125 to 150 milligrams per liter.

This diamond here is what's shown as the -- was in the order -- administrative order or the permit conditions as to effluent limits, 20 or 30 parts per million. And then the diamonds are the actual plant effluent reported, and I think that's where they were actually reporting numbers that were samples taken as CBOD and reporting them as BOD.

Q. Can you explain the difference that would be expected between the measured values for CBOD and BOD from this effluent during this period of time?

A. Well, it's interesting. This is a question that really was never an issue in years past in the sanitary engineering business, because CBOD was kind of all of BOD. You put this stuff -- diluted it into a bottle. You measured the amount of oxygen that was used up, and all the oxygen made the BOD.

Well, as we started going to higher and higher levels of treatment, it turns out that these -- as I showed you on that earlier chart -- the bugs that take up the nitrogen are not as strong as those that take up the carbon, and so it takes longer for them to do their thing.

And so, what's happened is, we've cleaned up the effluent more and more. There's not as much carbon for these

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bugs to consume. So, they consume all the carbon, and then they start consuming nitrogen. They convert ammonia to nitrate, and that exerts oxygen demand.

Well, what's happened is that in these very high quality effluents, such as we're seeing down here with discharges in the teens or ten, or somewhere in that range, at parts per million, it uses up all the carbon, exerts that demand. And then it starts using up the ammonia and exerts another demand, which we then call nitrogenous oxygen demand.

So, a plant operator is interested for his own treatment purposes in the carbonaceous demand, what's this plant doing, because that's what he's most interested in. But it does impact what the reported value is. But as I said, the work is first done by the carbonaceous microorganisms and then the nitrogenous.

So, what we see here in this graph is actually the reported CBOD values, because there's been an inhibitor added to the sample that doesn't let the nitrogenous microorganisms actually do their work. On the lower values, the impact of not having added that inhibitor could be greater, could be maybe as much as 25 percent more. So, if you had ten parts per million of CBOD, if you looked at total BOD, that may be as high as 12 or 13 parts.

If you were up higher than that, then the impact would be less, because it had to consume more carbon. It

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didn't have as much time for the nitrogen to be consumed. But from -- during the entire period up -- we've reported here through 6 of '93. Through this period here, this would never have exceeded effluent limitations, thus from that standpoint would not have impacted the environment any more than what was permitted by the permit.

Q. Mr. Smith, the Court has found that Florida Cities did incorrectly report CBOD values when the permit required reporting BOD values.

My question to you, sir, is can you tell from your analysis whether or not Florida Cities' effluent would have complied with the permit's limits during the time in question?

A. Well, that's what I was saying. In these areas here, the effluent reported as CBOD is very, very low. So, even that influence of NOD, Nitrogenous Oxygen Demand, would be, you know, relatively small, some on the order of 25 percent greater than what was reported.

If you added 25 percent to every one of those values, you're still well below the permit limits. Again, it's a very good effluent for that plant.

Q. During this period of time, sir, how many exceedances based on your analysis would Florida Cities had reported if they had been measuring and reporting correctly BOD instead of CBOD?

A. The only one we saw was early in the period, very early in

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the period, and I -- and that's this one spike here. Could you --

Q. But the period of time to which I'm referring you is November of '91 through November of '93. Let me phrase my question again, if I might, sir.

A. Okay.

Q. And that is, during the period of time of relevance to this litigation, November '91 through November '93, how many exceedances would Florida Cities have reported on the DMRs to EPA if they had been correctly measuring CBOD instead of BOD based upon your analysis?

MR. JACOBS: Objection. Asked and answered.

THE COURT: Overruled.

THE WITNESS: There would be no exceedances.

BY MR. SCROGGIN:

Q. No exceedances at all, sir?

A. No.

Q. I'd like to turn to the exceedances that are reported in the violations that have been found for total residual chlorine at the Barefoot Bay facility. I'm going to ask you, sir, can you tell me what levels of total residual chlorine the water quality standards of the state of Florida require in the final outfall from a sewage treatment facility?

MR. JACOBS: Objection. Relevancy. We're talking about a federal permit. There's no allegations of violations

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of the state permit.

THE COURT: Overruled.

THE WITNESS: It varies to application. Sometimes as high as .5 parts per million and as low as 003 for total residual chlorine. No detectable limit.

BY MR. SCROGGIN:

Q. Do you know, sir, what the specific permit limit was in the federal NPDES permit for total residual chlorine for this facility during the time of September 1992 through March of 1993?

A. I believe it was no detectable -- what do they call it -- no detectable trace or no detectable measurement.

Q. Do you know if the total -- do you know, in fact, what the -- what total residual chlorine values were reported by Florida Cities during this period of time?

A. I think we have that in the report. I'd have to look at that to be able to identify them. In looking again at the report, essentially .01 was the standard, which is essentially not below detectable levels. I don't recall what the actual limit -- what they were actually -- the numbers were.

Q. Well, the Court has already found that they reported numbers higher than .01 and, therefore, that there were exceedances reported on the DMRs. And the DMRs are -- have already been introduced into evidence.

Can you tell me, sir, what the -- what environmental

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impact, if any, you would anticipate from levels of chlorine residual between .01 parts per million and one part per million?

A. Well, again, chlorine is a biocide of an oxidant, and so when it's introduced into the receiving water, it's going to want to oxidize things. And it will be quickly diluted from the flow of the stream depending on the relative flow. That dilution, along with its active oxidizing strength, would dissipate within fairly short order, again based on the mixing zone of that stream.

Q. Would there be any impact, based upon your analysis of total residual chlorine, by the time the flow of the Satilli Canal reached the north prong of the Sebastian River, which you testified is, approximately, three or four miles away?

A. I would expect it to be dissipated well before it got to the Sebastian Creek.

Q. And can you tell me what you mean by "dissipated"? Does that mean with respect to the magnitude of environmental impact?

A. Right. Dissipated is that it's used up, and it has no oxidizing. It's the HCL -- HOCL. The hydrochloride ion is what is active, and that will essentially be used up, hydrochloride ion, and that this would be gone. And there may be chlorides left in the water, but -- and the impact would essentially, again, be in the mixing zone. It would be one of

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discouraging certain species that may be sensitive to this level of chlorine from entering that mixing zone.

Q. And would the impact downstream of the discharge from the Barefoot Bay facility, before it reached the north prong of the Sebastian River, be detectable?

A. Would the impact be detectable?

Q. The impact of total residual chlorine.

A. No.

Q. You stated that the permit limit is 0.1 parts per million. Your previous testimony was that one part per million is one drop in the 13 gallons. Can you tell us what one tenth of a part per million is?

A. It would be one tenth of a drop in 13 gallons. It's a very small amount.

Q. Do you have experience in evaluating the impacts of total residual chlorine on receiving water environments?

A. Yes, I do.

Q. Can you tell me what impacts, if any, you would anticipate from the discharge from the Barefoot Bay facility at levels of .1 to one part per million?

A. Again, it would be a very minor confined impact to the mixing zone area until it's dissipated. That could be confirmed by field measurement. But from what we've seen, the impacts would be fairly minor compared to -- this is a drainage canal. Depending on what species are there -- they've already

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become accustomed to not swimming into this zone, and essentially it just – it would be a barrier to some movement in the stream in that area.
Q. You testified earlier that the outfall you viewed in the videotape was above the surface water of the receiving water, the surface of the receiving water. Does that have any impact on the level of total residual chlorine that the outfall would realize in the receiving water?
A. Well, there would be some – just some off gases from any of the chlorine, just vaporization of it, stripping. The biggest impact is that the water is free falling, and there's some aeration going on. And so, it's making an aerobic environment and, you know, mixed well.
Q. And does that mean that the impact in the receiving water would be higher or lower than if the outfall were under the surface water?
A. I would expect it – the mixing – it promotes mixing, and mixing is important to dissipate the chlorine to diminish the amount of impact it would have.
Q. Can you compare the levels of total residual chlorine in the Barefoot Bay effluent with normal drinking water in the state of Florida?
A. Well, drinking water would normally be – have a chlorine residual of anywhere from one to two parts per million when it leaves the water plant and always has to have a residual in the

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distribution system. So, if you turn on the tap at your house, you would have chlorine in the tap so that it would oxidize the bacteria in the pipes.
MR. JACOBS: Objection. Goes beyond the scope of the report. Move to strike. He's not been qualified as an expert in water or water treatment or water distribution, and I don't believe any of this was in the report.
MR. SCROGGIN: May I respond, Your Honor?
THE COURT: Yes.
MR. SCROGGIN: He has testified that he has experience in water and wastewater treatment. And certainly with respect to the seriousness of the violation, the comparison to other environmental waters such as drinking water is relevant.
THE COURT: Overruled.
BY MR. SCROGGIN:
Q. I would ask you, sir, can you compare the levels of total residual chlorine, that is, how many times the total residual chlorine is there in drinking water compared to the levels in the effluent from the Barefoot Bay water treatment facility during this period of time?
A. Well, anywhere from ten times to – or two times to ten times or 20 times, as much in drinking water as there would be in the effluent going into this canal.
Q. And did you reach any expert opinion about the expected

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environmental impacts on the Satilli Canal from these TRC exceedances?
A. Yes, we did.
Q. And what was that?
A. We found it to be no measurable impact on the canal.
Q. And did you reach that conclusion with a reasonable degree of scientific certainty to state that there were no impacts on the canal?
A. Yes, we did – I did.
MR. JACOBS: Misstated the witness's prior testimony that – the prior testimony was measurable impact, and Mr. Scroggin asked him to confirm that there was no impact. And I think there's a difference between measurable and no impact.
THE COURT: You'll have him on cross. Overruled.
BY MR. SCROGGIN:
Q. I'd like to turn, sir, to the toxicity exceedances at the Barefoot Bay facility and ask you if – first of all, do you have any experience in – with respect to the use of toxicity tests to measure effluent?
A. Yes, I do.
Q. And what is that experience?
A. Well, the whole effluent toxicity test is a fairly new measurement of effluent strength and effluent conditions, quality if you will. The idea is that you take effluent in its – the whole effluent, if you will, a hundred percent

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effluent, and you subject some fairly fragile organisms to living in this whole effluent.
And the idea is to see if these very fragile organisms can live in the whole effluent, such that if it can, then that's good effluent. And if can't, then there may be some reason to look further into the effluent itself. It was an idea, a test that came about, to pick up the impacts of some difficult-to-measure compounds in wastewater treatment plants and effluent.
One of the offshoots of it, however, was that – what we found was that all of the species, which are generally fat head minnows or silver side minnows or fleas – or water fleas and shrimp, are also very susceptible to ammonia, which is ubiquitous in wastewater that has not been treated to advanced treatment methods.
And so, when it first came out in the late '80s as a test, then everybody that didn't remove ammonia failed the whole effluent toxicity test. So, we've been struggling with how to use it. It's a difficult test to use and now has become a standard for those with advanced waste treatment, that you need to pass that test.
Q. Is it more common in your experience to have whole effluent toxicity tests for advanced wastewater treatment, AWT facilities, than it is for secondary facilities?
A. Yes.

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Q. Is whole effluent toxicity testing designed to measure actual toxic impacts in the environment?
A. No. The idea is that you take these very fragile organisms, which may or may not live in the receiving waters that you're discharging to, and see can these very fragile organisms live in this effluent all by itself. And if they can, then good. That means that most everything in the stream will live there, too. If it can't, then again you move upstream and see if there's some things you need to remove.
Q. Where are the whole effluent toxicity tests performed if they're not based upon actual observations of the environment?
A. It's a laboratory test under controlled environment and conditions and with repeatable methods and procedures so that you can do them over and be assured of not introducing any other error into the test.
Q. What are those controlled conditions in the laboratory for a whole effluent toxicity test?
A. I couldn't recite them all, Mr. Scroggin.
Q. Do you know, for example, what concentration of effluent is used for the testing done at the Barefoot Bay facility?
A. Well, generally whole effluent -- the idea is that it's a hundred percent effluent that this organism needs to live in.
Q. Is any consideration taken of dilution in the environment that actually occurs in doing whole effluent toxicity testing in the laboratory?

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A. Generally not. Although, there's some that are actually -- there's some testing done to see what the dilution is in allowing it to live in that condition. But for the testing purposes, it's a hundred percent effluent.
Q. Do you know or have any opinion what caused the toxicity test -- whole effluent toxicity test failures of the Barefoot Bay facility during this period of time?
A. Most assuredly I'd say it was ammonia.
Q. And on what do you base that opinion?
A. Well, a couple things. One is, that's what we have found historically in the municipal treatment plants, is ammonia is the thing that causes us to fail. But more specifically on this plant, we've got a period in which it failed the test. We put in some advanced waste treatment, which removed ammonia, and then it passed the test. And the treatment that took place really wouldn't have removed anything else that might have been there, other than some solids or -- because they filtered it, and they took out the nitrogen.
And so, there isn't any -- you know, still microbial treatment, still bugs doing the same thing. It's just giving them a little longer to do it. So, generally I'd say ammonia is the key thing. I mean, you took out the ammonia, and it passed the test.
Q. Based upon your experience, would you anticipate that the effluent from a well-run secondary treatment facility would

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have sufficient ammonia to fail these new whole effluent toxicity tests that you've described?
A. Yes.
Q. Are you aware of the quality of the effluent during the time of interest for this litigation at Barefoot Bay? Was it, in fact, secondarily-treated effluent?
A. Yes, it was.
Q. And did you conclude with a reasonable degree of scientific certainty that the most likely cause of the failures of the whole effluent toxicity testing at Barefoot Bay was the presence of ammonia in the effluent?
A. That's correct. We did.
Q. Did your analysis reach any conclusions regarding the environmental impact with respect to the whole effluent toxicity test failures?
A. The plant had been discharging this effluent for some time, and whatever was occurring in the canal was pretty much their status quo. So, there's no impact from that -- continued during this period from November of '90 through '93, no additional impact at all from not passing those tests.
Q. The record in this case, sir, will -- according to EPA is that there has been continuous discharge from this facility since 1983. My question to you is, would you have anticipated, based on your judgment, to have seen some measurable impact after that length of time of operation of this facility?

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MR. JACOBS: Objection to the extent the question mischaracterizes the Government's position. He said continuous discharges since 1983. The testimony was that they began in 1980.
MR. SCROGGIN: I will be glad to amend my question to 1980.
THE COURT: All right.
BY MR. SCROGGIN:
Q. Assuming that there had been continuous discharge of this facility, as the Government has stated, since 1980, would you anticipate finding environmental impacts pursuant to your analysis?
A. Well, again, the water quality monitoring that we saw from '88 to '93, I think it was, by Bionomics indicated the total nitrogen in the canal was quite low, on the order of one or two parts per million. So, I would suspect that the ammonia fraction of that is quite low. And generally we're concerned with the -- actually the unionized portion of ammonia that affects fish and these organisms. So, I would expect very, very little impact and probably not measurable, probably not -- probably not there.
Q. I'd like now to move to the Carrollwood facility. But before I move to the Carrollwood facility, I will ask you, can you state the conclusion that you've just given with a reasonable degree of scientific certainty?

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A. Yes.
Q. I'd like now to move to the Carrollwood facility and the exceedances which the Court has already found are violations for CBOD: fecal coliform, nitrogen, phosphorous, TRC, Total Residual Chlorine, and Total Suspended Solids, TSS.
Are you familiar with the Carrollwood facility, Mr. Smith?
A. Only by historical reference. It's gone, and I didn't visit it before it was gone.
Q. Do you know the flow from the Carrollwood facility?
A. Yes. It's on the order of .5 MGD.
Q. And based upon your experience, how does that rank among sewage treatment facilities? Is it large or small, or can you describe its flow in terms of magnitude?
A. Again, it's a very small residential plant serving an area of old Carrollwood there, essentially residential and some commercial connections, fairly small.
Q. Do you know for over what period of time the Carrollwood facility had the violations that are alleged in this case, for how long a period of time?
A. I don't remember exactly the number of months, but until they achieved their connection. It's from the period in which they got a permit – because it was very low permit values based on AWT – until the time which they ceased discharging. So, during that period they had exceedances.

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Q. You said that it was a very low permit. Can you describe the – based upon the review you did for your expert report, what kind of permit did Carrollwood have during the period from July 1991 through December 1991?
MR. JACOBS: Objection. He said he hadn't reviewed the permit in preparation of his expert report.
BY MR. SCROGGIN:
Q. Do you know, sir, if –
MR. SCROGGIN: May I ask him the question, Your Honor, does he know what kind of permit?
THE COURT: All right. Yes.
THE WITNESS: Okay. I would characterize it as an AWT – the effluent limits are like AWT permit limits because they're very low and generally conform with what we know as the Grizzle-Figg Standards on the west coast. All of Tampa Bay is – anything that discharges into it generally is 5531. I think the actual number was 4.8 per BOD at Carrollwood: three of solids and three of total nitrogen and one of total phosphorous.
BY MR. SCROGGIN:
Q. The discharge monitor reports of the Carrollwood facility, do they contain both the measured values and the permit limits for any particular parameter?
A. Right. That's the way the columns are set up on the reports.

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Q. And you did review the information from the DMRs with respect to the Carrollwood facility?
A. Right. And we plotted those on the graphs, as well.
Q. Can you tell me if you reached any opinion regarding why there were these exceedances at the Carrollwood facility?
A. It was a permit – the standards are for a plant that is an advanced waste treatment plant, and the Carrollwood plant was essentially a good secondary plant.
Q. You said that Carrollwood is a good secondary plant. Would you anticipate that any good secondary plant would have violations such as those that occurred at Carrollwood if it had the permit limits that were imposed on Carrollwood during this six-month period?
A. Oh, absolutely. I mean, the Carrollwood plant actually did remarkably well, in terms of almost meeting some of the permit limits. Despite it being simply a secondary plant, it had an extraordinary performance record based on those standards.
Q. For some months the Court has found there was not a violation from the Carrollwood plant during this six-month period for TSS. You've testified that the permit limits were for an AWT facility. Would that include the permit limit for TSS?
MR. JACOBS: Objection to the extent that counsel is mischaracterizing the Court's ruling.

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THE COURT: What was your question? That the Court had found that there were not –
MR. SCROGGIN: During the six-month period, Your Honor, from July 1991 through December 1991, for Total Suspended Solids, TSS, and CBOD, Carbonaceous Biochemical Oxygen Demands, there are no violations. And my question to him is –
THE COURT: Wait a minute. There are no violations. Now, was this – you need to refresh my recollection. Was this based – what was this finding of the Court based on?
MR. SCROGGIN: The Court's summary judgment order in this case found violations for the Carrollwood facility during the period July 1991 through December 1991 for the parameters that I discussed: CBOD, fecal coliform, nitrogen, phosphorous, TRC, and TSS, but not for every month. Some months there are no violations for TSS and CBOD.
And my question to the witness is whether he would have expected a normal secondary plant to have violated every month.
THE COURT: Well, you can ask him that, but don't characterize my order.
MR. SCROGGIN: Yes, sir.
BY MR. SCROGGIN:
Q. Would you anticipate a well-run, good secondary plant to have violated these parameters every month if it had the

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permit limits that were given to the Carrollwood facility?
A. Yes, I would.
Q. And did you reach any conclusion as to how the Carrollwood plant was able to achieve the higher advanced wastewater treatment limits, the more stringent advanced wastewater treatment limits for TSS and CBOD, at least for some months during this six-month period?
A. Well, yes. I looked at it, and there's a couple of things they could do to optimize the operation in terms of the aeration and how that works. And the more you aerated, the more you treat this sewage within controlled periods, you can actually get better solids/liquids separation. And then they also had a holding pond at the end of it.
And assuming they didn't have any algal growth in the holding pond, they could actually get some additional clarification there to where there are very good treatment. And so, assuming they – obviously they must have had sufficient aeration capacity and clarification to get down to very low numbers.
Q. Based upon your experience with operations of sewage treatment facilities, can you tell whether – how would you rate the operation it was able to achieve, at least for some months on at least two parameters the more stringent limits of AWT, when the facility is a secondary facility?
A. Again, really it was extraordinary treatment that was

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being provided by that plant, because it was not intended for that kind of limit.
Q. Extraordinary in which way, sir? Is it extraordinarily good –
A. Extraordinarily good.
Q. –or extraordinarily bad?
A. Extraordinarily good.
Q. Did you reach any conclusion regarding the seriousness of environmental impacts during this six-month period when the Carrollwood facility operated as a secondary facility with an AWT permit? Did you reach any conclusion regarding the environmental impacts of these exceedances?
A. Of the BOD and TSS?
Q. Yes, sir.
A. Our conclusion was it would be essentially not measurable, very little impact on the receiving waters.
Q. And on what do you base that conclusion?
A. Well, the permit limits are written, again, to essentially minimize impact, really on the receiving waters of Tampa Bay. And in this area, this is very high quality treatment, and we would suspect background levels of BOD from just surface runoff to be in the order of what we're seeing from the treatment plant.
Q. And did you reach this conclusion with a reasonable degree of scientific certainty?

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A. Yes.
Q. You've addressed CBOD and TSS. Can you tell me what your assessment of the seriousness of the environmental impact was from the violations of fecal coliform?
A. Well, as I remember, the standards here were essentially zero on fecal coliform. So, if they had any fecal – which the only way you can get down to zero or 2.2 part – or 2.2 colonies under the most probable number test is essentially through filtration, and they were not providing filtration. And so, I would not be surprised at all that they would exceed it greater than that for fecal coliform.
Q. And I'll ask you the same question, sir. Did you reach any conclusion regarding the seriousness of the environmental impact regarding the nitrogen and phosphorous exceedances for the Carrollwood facility during this six-month period?
A. Nitrogen – it seems that there weren't many tests available of nitrogen and phosphorous. But those we had, again ammonia was – nitrogen is much lower than we would have expected from a secondary plant, that they're obviously achieving some level of nitrification. Nitrification is changing ammonia to nitrate with additional oxidation.
And so, obviously they were getting some of that, and that's what I would expect given the high quality of effluent they were achieving from the treatment process. So, it's much less than what we would expect from a secondary plant

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obviously, but it still exceeded the permit, because it was written from AWT plant.
Q. I'm sorry, sir. You said much less. You mean the environmental impact was much less than you would anticipate from a secondary –
A. The amount of ammonia or amount of nitrogen in the effluent was much less than I would have expected from a typical secondary plant. The amount of environmental impact – again without looking at direct water quality information, I would suspect that it would be a very minor amount of impact from ammonia in that stream.
Q. And did you reach that conclusion with a reasonable degree of scientific certainty?
A. Yes.
Q. I'd like to move on to the Waterway Estates facility, which has exceedances for toxicity and nitrogen and violations for discharge to the wrong location and discharge without a permit.
Are you familiar, sir, with the Waterway Estates facility?
A. Yes.
Q. Did you visit the Waterway Estates facility before your deposition?
A. Yes. Not inside the fence, though.
THE COURT: What did you say?

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THE WITNESS: I visited, but not inside the fence.
THE COURT: Oh.
THE WITNESS: I told Mr. Jacobs that I viewed through the windshield.
BY MR. SCROGGIN:
Q. Are you familiar with the environs of the Waterway Estates facility on land?
A. Generally, yes.
Q. Are you familiar with the hydrological area around the Waterway Estates facility? And by that I mean are you familiar with the water area, as opposed to the land area, around the Waterway Estates facility?
A. Yes. I mean, it's on a drainage canal adjacent to the Caloosahatchee River. You know, there's marine – some kind of marine facilities on each side of it, boat docks and whatnot, boat – boat barns, that kind of thing.
Q. Do you know the flow from the Waterway Estates facility?
A. As I recall, it's just under one million gallons per day during the period of interest.
Q. And do you know the flow of the Caloosahatchee River, the receiving water for which this facility was permitted?
A. I think we reported values in our report of greater than a thousand million gallons per day at the upstream gauging station, upstream of the discharge.
MR. SCROGGIN: With the Court's permission, I would

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like to ask the witness, please, based upon the work that he's done for his expert report, to draw the Waterway Estates facility, which has an unusual location. I would ask, if I might, please, to have the diagram that the witness has already done with respect to the Barefoot Bay facility marked for identification only as Florida Cities 204. And --
THE COURT: Well, you're going to need to make sure it's marked, if you want to do that. It's counsel's responsibility to premark all exhibits.
MR. SCROGGIN: Okay. We can mark it right now, Your Honor, if that's agreeable to the Court.
THE COURT: But my clerk's not doing that.
MR. SCROGGIN: Okay.
THE COURT: You need to do the leg work or have it done by one of your people.
MR. SCROGGIN: I'd like to mark for identification the witness's diagram of the Barefoot Bay facility as Florida Cities 204 for identification.
THE COURT: Put "For ID" on there, if you would. All right.
MR. SCROGGIN: With the Court's permission, I would like to ask the witness to step down and --
THE COURT: You can step down.
MR. SCROGGIN: – draw the layout of the Waterway Estates facility and its nearby environs.

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MR. JACOBS: Objection to the extent that it goes beyond the report and relies on his visit to the facility itself as opposed to the drive-by windshield view.
THE COURT: Well, let's only have the drive-by windshield view without relying upon your subsequent visit, and I'll overrule the objection otherwise.
THE WITNESS: I'll limit it to outside the plant itself. The Caloosahatchee River flows – it's kind of – north is going this way. The plant is located on a little drainage canal that I would guess was built to allow this area to be developed for residential purposes and to allow boat access up and down.
The plant is located right on the canal. There's, as I recall, some other kind of canal and kind of an island that's built out there. There's a restaurant here and a boat barn, and it seems like there's a boat – something else – a boat yard over here, and this is "boat barn," "restaurant." Canals kind of go various ways, and the plant is kind of sandwiched in.
I essentially drove up to that point and stopped and looked through the windshield at the plant. That was my windshield tour, and I went back out. So, I think that's a fair collection of what it was. This is the plant here.
BY MR. SCROGGIN:
Q. Can you tell me, sir, how does the size, the land

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area size of the Waterway Estates facility, compare to other facilities with which you are familiar?
A. It's a very tight site, very small, probably less than an acre.
Q. And are there any implications regarding the difficulty or ease of operation of a facility located on a small site?
A. Well, operationally it's not too hard. I mean, actually things are very close together, nice and compact. But it is a very tight site to try to put all the pieces of a treatment plant on it.
Q. In a moment we'll discuss your analysis of the steps described in your report for constructing – undertaking a construction project on such a site.
And I'll ask you now, are there implications for constructing a new facility on a site of this size that are – that distinguish it from other sewage treatment facility sites?
A. Well, the plant improvements, as I recall, were something in excess of $2 million. And if you can imagine trying to build a house on less than a one-acre site and spending more than a million dollars or $2 million on the house and yet staying in the existing house that's also on the site – that's kind of a sense of it. It's very compact, very difficult logistically to try to build something on that site, so – it's a very difficult site to try to do anything with.
Q. Do you know where the discharge from the Waterway Estates

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facility occurred from the time it was built until July 1991?
A. I believe it just went straight up from the plant into the canal, right here.
Q. Do you know the size of that canal?
A. It's probably 30 – I don't know. 40 feet across, something like that, just a typical boat canal, drainage canal kind of thing, access up into residential areas.
Q. Have you seen similar boat canals elsewhere in Florida?
A. Right. We have them down in South Tampa, all along the Tampa Bay, lots of them, kind of finger canals that go up and allow boat access to slip docks right up by the house. That's the kind of facilities that were built here, as well. So, you know, 30, 40 feet across, probably enough depth so that the boats can get in and out of there.
Q. Do you know whether this canal is tidally influenced or has its own independent flow of water?
A. I think we reported in our report that it is tidally influenced.
Q. Do you know how far the discharge point was from the edge of the Caloosahatchee River?
A. Well, as I mentioned, it goes from – here's the discharge – or was the discharge. The river goes down past the boat barn, and there's another kind of canal that comes in here, and I don't know really where that goes. There's a little island barrier out here, and then the main river is out

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here. I don't know. It's probably a good five iron, at least. I'd say a couple hundred yards, maybe, 180 yards.
Q. Do you know the level of treatment that the Waterway Estates facility achieved during the period of time of relevance to this litigation, which would be from July – I'm sorry – from November 1989 through April 1992?
A. Again, it's a secondary plant actually providing something a little greater than secondary treatment. They were actually providing some nitrogen removal in the plant through its operation.
Q. Does that mean that the effluent – or can you tell me, sir, how you would compare the effluent from the Waterway Estates facility with other secondary-treated facilities with which you have experience?
A. Well, it would be better effluent. As I recall, it also had filters on it at different times, and so the filters would provide even less in the way of solids and BOD. That wouldn't affect nitrogen and phosphorous generally, but it was a well-operated secondary plant achieving some nitrogen removal and excellent BOD and SS removal – TSS.
Q. Do you know of any limitations on the area of the Caloosahatchee River into which this facility was discharging regarding nitrogen and phosphorous?
A. Well, the concern at Caloosahatchee was that you would not discharge too much nutrients, again, to cause the provocation

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of algae. And so, there were measurements taken and work done by the Department of Environmental Regulation at the time to try to determine how much they could put in and develop those amounts. And so, there was concerns about nitrogen and phosphorous going in, because, again, the idea – the basic building blocks of algae – you don't want to formal algae in the river.

MR. SCROGGIN: With the Court's permission, I would like to have the witness refer to a blowup of – which is Exhibit No. 92 from the expert report that has been prepared.

BY MR. SCROGGIN:

Q. I'll ask you, sir, did you prepare this chart as part of the expert report that you – perhaps I should preface that by saying did you prepare a report for the Waterway Estates facility regarding these exceedances and their environmental impacts?
A. Yes, we did.
Q. And is this chart one of the charts that you prepared in your analysis for this facility?
A. Yes, it is.
Q. I would refer you to Florida Cities Exhibit No. 92, which I would like to show the witness at this time. I'll ask you, sir, is this the expert report that you prepared for the Waterway Estates facility?
A. Yes, it is.

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MR. SCROGGIN: I would ask that Florida Cities Exhibit No. 92 be moved into evidence.

MR. JACOBS: Same objection, Your Honor.

THE COURT: Okay. Overruled. It will be received.

(Florida Exhibit No. 92 was received into evidence.)

BY MR. SCROGGIN:

Q. Sir, can you explain this chart, which is from page 24 of your expert report and marked as Exhibit 92 – can you read the title and explain this chart to us, please, for the Waterway Estates facility?
A. The title of the chart is "Nitrogen Discharge To The River," and that's the Caloosahatchee River.

THE WITNESS: If I could, Your Honor.

THE COURT: Yes.

THE WITNESS: The chart is just to indicate the impact in terms of the amount of nitrogen being discharged from this plant into the Caloosahatchee River. There have been some work done to develop how much nitrogen could the river accept and not grow too much algae so as to create an environmental harm. And that number was up here in excess of 1200 pounds of nitrogen per year. Then it –

THE COURT: That's the threshold –

THE WITNESS: Pounds per day.

THE COURT: That's the threshold at which algae would develop?

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THE WITNESS: That's the threshold at which the amount of algae would be an impact. So, they wanted to keep it below that. So, they actually set a limit and said, "Okay. We'll allocate the amount of waste that can be put into the stream to be something on the order of a thousand fifty pounds of nitrogen per day." And so, they allowed the -- they divided this up and gave it to the various treatment plants to say, "You can discharge so much, the total of which can't be more than that," because once it gets more than that -- this is just a safety factor, if you will. And there could be other future things. They want to reserve it for a number of reasons they want to do.

The standard which was given to Florida Cities was actually 25 pounds per day, and that's essentially equal to one million gallons of flow and three parts per million of the nitrogen, total nitrogen in effluent. So, if you multiply it out, it's about 25 pounds per day of this total of over a thousand.

As you can see, these diamonds then are essentially the actual amount of discharge of nitrogen by the plant: less than 200, a hundred. And this goes from 90 through 92, a high of over 200 and clear down here, essentially zero, and again generally around a hundred pounds, which indicates that they were probably discharging about 12 parts of nitrogen rather than three.

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Again, putting it in perspective, it's this much of a total allocation of this much. And so, there's a great deal more capacity in the river than what was being used up by Florida Cities.

Q. Can you tell me from your chart whether or not Waterway Estates was meeting its permit limits for nitrogen during this period from August 1, 1992 on?

A. Generally it wasn't. There may have been one or two times that -- it looks like there's one or two times that it was meeting the limit.

Q. And can you compare the magnitude of the actual nitrogen in the effluent from Waterway Estates with respect to the total potential loading that you described for the river itself?

A. Well, again, the -- on the order of a hundred pounds per day is what Florida Cities -- again, about 12 parts per million over a capacity of a thousand seventy-five. So, they were about a tenth, perhaps, of the capacity of the river in terms of their discharge.

Q. You talked about the capacity of the river and dividing up the capacity of the river. Is that a wasteload allocation?

A. Yes. That's what -- essentially what's the capacity of this river to accept discharges, and then we allocate that capacity to various treatment plants based on relative size and other configurations. And that's allocating waste load, if you will, how much waste you each can contribute to the stream.

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And their allocation was quite small, only 25 pounds. They were in excess of their allocation. But compared to the whole, it's a very small amount.

Q. Does a wasteload allocation already consider the other discharges on the river?

A. Yes. That's part of the -- generally what they would do -- because this is -- you know, this is forever essential. I mean, a stream isn't going to change much. So, I would suspect that the existing -- this is allowing for future capacity in these plants. And so, in the ultimate kind of build-out, it could not exceed that number, but under current situations, it's much less than that.

Q. You testified that one of the consequences of an effluent containing more nitrogen might be producing algae. Is algae a serious environmental problem?

A. Well, it's an undesirable, if you will. It's not a threat to public health. It's not a threat to, you know, welfare or anything like that, but it's an undesirable. It could discolor the water. If there's too much of it, it actually can accumulate and affect other organisms which depend on clean bottomed rivers and so forth or -- not be covered up by the algae, that kind of thing.

Q. Do you know if there ever were observed any such discoloration of the water or algae problems in the Caloosahatchee River based upon your analysis?

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THE COURT: Just a minute.

MR. JACOBS: Objection. Hearsay.

THE COURT: I'll overrule the objection.

THE WITNESS: It's my understanding from work that was done by DER in about 1990, as I recall, they measure essentially chlorophyll-A from the algae. And they're fairly low concentrations, on the order of 15 or 16 micrograms per liter, with as high of about 19 micrograms per liter near the discharge.

BY MR. SCROGGIN:

Q. Were any of these measured values of chlorophyll-A in your judgment attributable to the Waterway Estates discharge?

A. Yes. I believe the spike from 15 to 19 is probably the result of the plant. It was taken near the -- up near the plant in the boundary of the Caloosahatchee River.

Q. Do you know if, in fact, there's any data that you considered in preparing your report that demonstrate any actual environmental harm attributable to the operation of the Waterway Estates facility?

A. Well, the work that was done at that time indicated they actually expected something on the order of 25 micrograms per liter and that this was much less than expected, that they had overestimated the impact by as much as a third, so that the plant had very little impact and certainly not that which was intolerable.

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Q. Did your report analyze the impacts regarding the relocation of the outfall from the canal to the six-foot contraline of the Caloosahatchee River?
A. Yes, we did.
Q. And what conclusions did you reach about the environmental impacts of that change in the outfall's location?
A. We said that it would – I would say that it would have an improved – it would improve the water quality generally, because it introduced the flow at a point which was getting very good mixing and dilution at the deepest point and probably the fastest point in the river and – yes.
Q. Are you aware of any data that actually demonstrated an improvement in the water quality of the Caloosahatchee River during – before and after the relocation of the outfall?
A. No.
Q. Do you know if there were any impact at all on the Caloosahatchee River attributable to the relocation of the outfall?
A. I'm sorry. Did you say any data or any impact?
Q. Any data of any impacts attributable to the relocation of the outfall at Waterway Estates.
A. I don't recall any right off, no. I mean, our judgment was one more of intuitive engineering judgment, to move it out to the mixing zone, that you're going to get better mixing and less of an impact on the river.

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Q. But did you analyze any data showing a lessening of impact on the river?
MR. JACOBS: Objection. Asked and answered. That's the third time.
THE COURT: Sustained.
BY MR. SCROGGIN:
Q. I'd like to move on to the exceedances for toxicity and nitrogen at the Waterway Estates facility and ask you, sir, if you have any opinion regarding the seriousness of these exceedances for toxicity of the Waterway Estates facility?
A. Much the same testimony as I made on the Barefoot Bay plant. Again, this is toxicity related generally ammonia in the effluent, that this plant did not remove all of the ammonia until it was upgraded. And after it was upgraded, it met the whole effluent toxicity test after it was up and running and in good shape.
So, it was our judgment and my judgment that indeed it was related to the ammonia, the toxicity was, and its failure to meet those tests.
Q. What kind of effluent was the Waterway Estates putting out during the period time of the toxicity failures? That would be from – the toxicity failures are reported in February through June of 1992.
A. Generally it was very good secondary treatment. Again, it was secondary treatment with some filtration, but not complete

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nitrification. Now, as I recall, the plant was put on line in about April, and it took them a little while to get the nitrification up and running and everything clicking. I don't recall when the last violation was, if it was June. And then after that, they begin meeting the whole effluent toxicity standard, after they got the plant fine-tuned and running properly.
Q. Based on your experience, would you anticipate that a facility upgrading from secondary to AWT such as the Waterway Estates would be able to achieve passage of the toxicity test after the completion of that upgrade?
A. Yes, I do.
Q. And can you tell me regarding the nitrogen exceedances if you have – if you reached any conclusion regarding the cause of the nitrogen exceedances of the Waterway Estates facility during the period of time of this litigation, which is July '91 through April – March of '92?
A. Again, the plant was generally not designed for complete nitrogen removal. They had levels of three parts per million, which is very, very low. And so, then they put in additional treatment methods, and they were able to get down below three. And so, they couldn't meet the standard because they didn't have the right treatment methods in place.
Q. Did the effluent coming from the Waterway Estates facility change during the period of time in question, to your

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knowledge?
Let me rephrase the question. Was there any change other than the improvement of the effluent during this period of time, to your knowledge, and based on your analysis?
MR. JACOBS: Objection. Assumes fact not in evidence, that is, to say the improvement of the effluent.
MR. SCROGGIN: Your Honor, he's testified that the effluent improved during this period of time.
THE COURT: Overrule the objection. Answer the question.
THE WITNESS: There would be no other reason for the improvement of the effluent quality except for the upgraded plant. There was no change in the influent, and the treatment processes were essentially the same that had been in place for some time. And so, the effluent quality changed when the new improvements were put in place.
BY MR. SCROGGIN:
Q. Did you reach any conclusion regarding the environmental impact of the toxicity and nitrogen exceedances from the Waterway Estates facility?
A. Very little impact on the Caloosahatchee River. I mean, obviously whether it's measurable or not in terms of – you could maybe measure it in a water quality fashion, but in terms of environmental impact or other fish or other living organisms impacted, I don't think you can measure it.

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Q. Did you reach that conclusion with a reasonable degree of scientific certainty?
A. Yes.
Q. One of the issues in this litigation is the length of time it took the Waterway Estates facility to upgrade from better-than-secondary effluent, as you testified, to the still cleaner advanced wastewater treatment. And I will ask you did you review the steps that a facility such as the Waterway Estates facility owned by Florida Cities took in order to achieve that upgrade from better than secondary to the still cleaner advanced wastewater treatment?
MR. JACOBS: Objection. Twice he's characterized the effluent as still cleaner, and that's a value judgment that's not in evidence.
MR. SCROGGIN: I believe, Your Honor, that he testified that the AWT effluent was still cleaner, but I'd be happy to ask him that question, if that would clarify it.
THE COURT: All right. Ask him that question.
BY MR. SCROGGIN:
Q. Is the advanced wastewater treatment that the Waterway Estates facility achieved still cleaner than the better than secondary with which they began?
A. Yes. The upgrade allowed them to take out the nutrients of nitrogen and phosphorous. It continued to lower the BOD and suspended solids. And so, yes. It was very high quality

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advanced waste treatments and able to meet the whole effluent toxicity test, as well.
Q. I will try to rephrase my question that I started with. And, that is, did you review the steps that a facility such as the Waterway Estates facility owned by Florida Cities Water Company would undertake in order to achieve this upgrade from better than secondary to the still cleaner advanced wastewater treatment facility?
A. Yes, I did.
Q. In your experience of the last 25 years, can you tell us how long such an upgrade might take for a facility such as this?
A. Well, it varies by wide margins. It varies largely because of the kind of permits that may be required. It's fairly predictable to estimate how much time goes from kind of figuring out the original idea and what options you have and preparing the engineering drawings and all that. That's fairly straightaway. But then once you get into the permitting realm, it becomes very difficult and unpredictable. There's other forces over which you as an engineer designer or an owner have no control.
MR. SCROGGIN: With the Court's permission, I would like to ask the witness if he would please go to the drawing board and describe those steps that are required for a facility such as Florida Cities Waterway Estates facility to upgrade

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from better than secondary to the still cleaner advanced wastewater treatment that they achieved.
THE COURT: Yes, sir.
THE WITNESS: Well, the owner was given essentially a new target. This is the new level of treatment that you're required to meet, essentially a new mission. So, there are a number of steps it has to do to get there. So, first of all, you have the mission defined, and that's the AWT. So, we begin through the process.
First of all, you have to figure out how am I going to do this. So, the first thing you do is evaluate alternatives and -- alternative ways of how I could do that, which would be -- generally what we've come to know what's the most economical, what's the most efficient way of getting there. In order to do that, the water company or an owner like that -- whether it's a municipality or water company -- would have to try to gain the expertise of outside firms to help them to do that evaluation.
So, they have to find and contract and engage this outside firm to develop this alternative evaluation. And from that, they would then interact and come to some agreement. And out of that would come then what is selected option. So, now we have a mission, and now we have an option of how we're going to actually accomplish our mission.
The next step then is, okay, this is kind of a

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concept. Now we have to take this concept and put it into bricks and mortar, concrete and steel. How do we actually put this project in place? So, the next step is some kind of preliminary design document that's going to start putting this together. Again, this requires outside expertise generally from a municipality or water company to do.
They would, again, go out and find and contract and engage some firm, engineering firm, to perform these tasks, and they would complete this preliminary design document. This allows the company or utility to then start planning from a capital point of view costs and so forth, how they're going to accommodate this and timing and so forth.
The next step would be then the detailed design and contract documents. These are the actual plans and specifications from which a contractor would erect and build these facilities. Now, in this case, they may continue to use the same engineer that was doing this part, if they performed satisfactorily. They may have to go out and get a new one. That's at the option of the owner. Generally we'd like to think if we were doing it we'd do a good job and we'd keep on going through.
The fourth step then begins where things start getting sticky, because this begins the permitting phase. During these steps, you have pretty much control of what's going on as the engineer, the owner, what's on the drawings and

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what's being prepared. Now at the permitting phase we start going out to others, to third parties, to see what indeed is being done.

The first permit that is very important is the FDEP or FDER – depending what time – what the department's called – permit to construct. And that allows the state to look at these drawings and see is it really – is what you've designed going to accomplish your mission. That's really the essence of it. And they'll take their judgment and their experience and look at it and see how you got there.

And generally that permitting process takes a fair amount of time. You fill out the permit. You do your job. You send it in. They have about 30 days, I believe, by regulation to reply, and generally that reply is in the form of some kind of question, clarification. You have 30 days to reply to that. They have another 30 days. So, you're kind of out about three months to even – to have a chance. And when there's other issues involved, it often creates other problems, and that may take quite a long time.

In this case, the other permit that was of difficulty was what we called the Corps of Engineers 404 Permit. This is a permit associated with building a pipeline in the Caloosahatchee River. Generally when we're doing a project like this, we get what's called a Nationwide 404 permit. The Corps of Engineers have said, "If you're going in general

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places, we can review your application. We'll give you a permit, not a problem, 30, 60 days."

In this case, we're going to a major drainage way, a major river, the Caloosahatchee River, and we're going out in the middle of it. So, now we've got navigation issues and all the other kind of problems. The Corps of Engineers are notorious for getting bogged into their bureaucracy and taking a very long time for this permit.

MR. JACOBS: Objection. Move to strike. No foundation and way beyond the report, the notoriousness of a U.S. Government agency, Army of Corps Engineers.

THE COURT: I'll deny your motion. Go ahead.

THE WITNESS: Other permits that we may have to get include the – what we call the SWFWMD permit, Southwest Florida Water Management District. That relates to storm water drainage on the site and changes, increases of impervious area, where that's to be drained. We have the local permits for development and meeting concurrency requirements, those kind of things.

All that's done before you even have done anything about engaging a contract. You don't have a contractor yet. This is just preliminaries to that. So, this is very difficult to guestimate in terms of planning. We've seen it from 30, 60, 90 days to take well over a year. And this is a – this is part of Florida's – developing projects in Florida. It's very

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typical of Florida.

From that point, assuming you have been granted those permits, then you'd move ahead to step five, which is actually the bidding of the project. And that's where we take these drawings and specifications. We send it out to the world of general contractors, and we ask them to bid the project: How much will it cost to meet what is going to be done here, and how long will it take you?

Those bids take on the order of 90 days to advertise the bids, to accept the responses, to check out the credibility of those, and then to move ahead. So, it's a minimum – kind of a 90-day period for that bid, unless there's some problems with it: Exceptions taken, they can't meet the contract documents, something like that.

Once that is done and the contract is awarded, the next permit is one that's obtained by the contractor, and that's generally the local building permit. And that's a permit that will go to the local agency, whether it's the county or the city in which the plant is located. And because most cities or counties don't look at sewage plants very often, they often have to engage in outside parties to help them review these plans and specifications.

It's not unusual then for that to take an extra bit of time and have that review done, check to make sure everything meets the codes and requirements. And then a

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building permit would be issued, and that permit would be going to the contractor, the general contractor who is going to build this plant. Now, he can actually begin construction and start building this project according to plans and specifications that has a construction period during which time he's actually putting in the concrete and steel that was described in the drawings.

And then at the end of that time would be a turnover period, a commissioning period, in which the owner would begin operating the plant with the new facilities and trying to get it up to speed to make sure it's meeting those requirements. There would be final permit sign-offs based on the completion of those activities. Essentially all of the permits would have to be certified by either the engineer on the site or the contractor or the owner to say that indeed those things that were promised to be done had been done and those certifications would be complete in this process.

BY MR. SCROGGIN:

Q. Mr. Smith, in describing the permits that are required in Southwest Florida, did you mean that Southwest Florida to include the permits that are required in Lee County?

A. Yes, yes. The area generally from Tampa, Sarasota, Manatee, Lee County.

Q. And can you tell me on, approximately, how many projects in Florida you have been associated with that have had to go

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through such steps for facilities like the – such as the Waterway Estates facility?
A. Actual treatment plant upgrades, we've probably done a dozen or so in Florida, in this general area, all the way up the coast.
Q. And did you review the length of time that it took the Florida Cities Water Company to go through these steps in performing your analysis?
A. Yes, we did.
Q. Did you reach any conclusion regarding whether or not Florida Cities completed the project in a timely fashion or not?
A. Yes, I did. I looked at the times and determined there was a fairly large amount of time that it took when the project was really out of the control of Florida Cities, and that was an exceeding long time. The actual work that was done was done in a reasonable amount of time for the work that was in the scope of that job, both in the design and construction phases and that, you know, it was a reasonable amount of time for the project.
Q. Mr. Smith, I'd like to turn your attention, please, to the Government's – United States Exhibit No. 597, which is the expert report from Mr. Mark Klingenstein, the United States Government – the United States' expert witness in this case.
MR. SCROGGIN: And I'll ask if the witness could

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please be shown that exhibit.
MR. JACOBS: Your Honor, it's my recollection on Monday that we sort of had an agreement that they weren't going to ask – we weren't going to ask Mr. Klingenstein about Mr. Smith's report, and they weren't going to ask Mr. Smith about Mr. Klingenstein's report.
THE COURT: That's my recollection.
MR. HIRD: Your Honor –
THE COURT: There's been a lot of water over the dam. I guess that's – no pun intended.
MR. BULLOCK: May I have just a second?
THE COURT: Yes, sir.
MR. BULLOCK: Thank you.
MR. SCROGGIN: Thank you, Your Honor, for your indulgence. We will be happy not to have him refer to the report, but simply to ask him a brief series of questions regarding these facilities, if that is consistent with the agreement that was reached.
THE COURT: You'd be happy to ask him questions regarding these facilities?
MR. SCROGGIN: I would like to – I have probably four questions, Your Honor, that I would like to ask him to determine whether or not he agrees with certain conclusions without reference to where those conclusions come from.
MR. JACOBS: It sounds like a back door to me, Your

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Honor.
THE COURT: It sounds like a back door.
MR. SCROGGIN: Then I'll withdraw the request, Your Honor, and –
THE COURT: No. I agree – I agree with the United States on that. My recollection is that this was discussed at the inception of the case. And I think that you would be accomplishing the same way – the same thing by doing it in this fashion as you would otherwise. So, I'll sustain the objection.
MR. SCROGGIN: That ends my direct examination of this witness.
Excuse me, Your Honor. There is one of the – Mr. Smith's expert reports which I would ask to move into evidence and have him view, if I might, before I end my direct examination, and that is the Florida Cities Exhibit No. 157, which while we discussed it I failed to have him identify and move into evidence. And if I might have him look at Florida Cities Exhibit No. 157, which is the Florida Cities –
THE COURT: Has he got it in front of him?
MR. SCROGGIN: He will in one second, Your Honor.
THE COURT: Okay.
BY MR. SCROGGIN:
Q. I'm going to ask you, sir, is this the expert report that you prepared for Florida Cities regarding the Carrollwood

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facility?
A. Yes, it is.
MR. SCROGGIN: And I would ask that it be moved into evidence, Your Honor.
MR. JACOBS: Same objection, Your Honor.
THE COURT: Same ruling. I'll overrule the objection. It will be received as Defendant's 157, Defendant Florida Cities 157.
(Florida Cities Exhibit No. 157 was received into evidence.)
MR. SCROGGIN: May I also ask, Your Honor, that the last two pages that the witness has drawn on the chart be marked for identification, No. 205 and 206 for the second page.
THE COURT: All right. Go ahead and mark it.
What we'll need to do is use the exhibit identification tags that you apparently – your associate has there.
MR. HIRD: We're preparing, Your Honor.
THE COURT: Yeah. Okay.
All right. Mr. Jacobs.
MR. SCROGGIN: Your Honor –
THE COURT: Just a moment.
THE WITNESS: Could we take a short break for restroom?
THE COURT: I think we need a – yes, sir.

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MR. HIRD: I have a few questions for this witness. I don't know whether you want the Co-Defendant to go before Mr. Jacobs or after. I have, approximately, five minutes.

THE COURT: You have five minutes. Okay. Well, we'll take Mr. Hird first, and then we'll take you, Mr. Jacobs. And we need to take a -- what time is it? Well, we'll go ahead and take a ten-minute recess.

(Brief recess taken.)

THE COURT: Okay. Mr. Hird.

MR. HIRD: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. HIRD:

Q. Mr. Smith, I believe you testified when you were describing the operations of the sewage treatment plant that in certain plants chlorine is added as a disinfectant toward the end of the process. Do I remember correctly?

A. Yes. That's correct.

Q. Is that the case at the Barefoot Bay treatment plant?

A. Yes.

Q. Now, turning to the exceedances of total residual chlorine at Barefoot Bay, is the chlorine in those exceedances -- was that due to the chlorine added after the process, or was that due to anything in the sewage from the homes of the residents of the Barefoot Bay development?

A. It would be from the chlorine added after the process.

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MR. HIRD: Thank you, Mr. Smith.

Thank you, Your Honor.

THE COURT: Mr. Jacobs.

CROSS-EXAMINATION

BY MR. JACOBS:

Q. Good afternoon, Mr. Smith.

A. Good afternoon, sir.

Q. Isn't it true that the Barefoot Bay plant was designed with the intention of disposing of the total effluent through percolation ponds and a spray irrigation system?

A. Yes, it is.

Q. And when was the plant designed?

A. Somewhere early -- late '70s, early '80s, I believe. Put into operation around 1980, I think, something like that. Let me think.

Q. That's your best recollection?

A. It may have been earlier. I'd have to look at a report to make sure of the actual dates was the dates we started looking at that kind of thing.

Q. Without looking at the Black & Veach report, you don't know when the plant was designed?

A. Beyond -- prior to that time, no. I can't remember if it was -- it may have been put in operation late '60s. What I remember is the operation of the percolation basins in the early '80s and not functioning in about '83 or so. So, that's

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the time frame I'm remembering.

Q. And the plant, again, to the best of your recollection, was designed when?

A. I don't remember exactly what time it was. As I say, it could have been late '60s, early '70s. That's where I'm not sure if it started operation then or if I'm thinking when it actually -- in the early '80s when the perc ponds ceased working very well.

Q. Okay. And by "perc ponds," you do mean percolation ponds, correct?

A. I mean percolation basins that are located on the plant site, yes.

Q. And as far as the Black & Veach investigation is concerned, in the Black & Veach report, you've concluded that there were two percolation ponds; is that correct?

A. That's correct.

Q. And isn't it true that these two percolation ponds at peak performance could only handle a hundred thousand gallons per day?

A. I think on the order of a hundred. I think it may have been something more than that, up to maybe 150 or a hundred, but in that range. That's correct.

Q. Are you speculating?

A. No. I think that it's not real clear what they did handle, because the water level varies in the ponds. So, the

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actual through-put of the ponds is a hard thing to quantify.

Q. Might it equally -- is it equally true that they might have been able to accommodate less than a hundred thousand?

A. Well, that's what I was saying, yes. The water level rises and falls in there. That's correct.

Q. Now, you just testified that the plant was designed to have percolation ponds and a spray irrigation system, correct?

A. Yes. That's what you asked me.

Q. Okay. And now, isn't it true, though, that a spray irrigation system was not ever put in place at that plant until March of 1990?

A. That may be true. I know that the spray irrigation has been used at the plant, and it's a fairly small site. Whether it was in the original design or not I'm not sure.

Q. Well, you said it was in the original design. What I'm asking you is whether the -- to the best of your knowledge, sir, when was that design actually first implemented?

A. Well, first, I didn't ever use the term "original design" until just now, and the plant as originally designed only had two perc ponds. The spray irrigation system was added because of the perc ponds not being sufficient. When was that put in place -- I'll take your word that it was 1990.

Q. You have no understanding of any spray irrigation system ever being installed at Barefoot Bay prior to March of 1990; is that correct?

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A. No. I don't have any understanding of that.
Q. And isn't it true that the spray irrigation system that was put in place in March of 1990 was a 40-acre site, which at, again, peak performance could accommodate 90,000 gallons of effluent a day in dry weather conditions?
A. It's a 40-acre site, and yes, I believe that's generally the amount of flow. It would largely depend on the way it was operated.
Q. And it would also depend, wouldn't it, on weather conditions?
A. Yes.
Q. In fact, it could not be operated at all if it was wet weather conditions, isn't that right, sir?
A. It would be unfavorable to operate it, right.
Q. Now, isn't it also true that in 1990, the same year when the spray irrigation system was first put in place, that the effluent flow from the plant was in the 421,000-gallons-per-day range?
A. It was certainly in the range greater than 400,000, yes.
Q. So, the spray irrigation system that was installed was not sufficient to eliminate the discharge to the Sebastian River; isn't that correct, in 1990?
A. That's correct.
Q. And isn't it also correct that there was no NPDES permit at that facility until 1991?

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A. Yes. I believe that's true.
Q. Now, isn't it also true that because the Barefoot Bay plant was a secondary treatment plant it was incapable of removing sufficient ammonia to regularly pass toxicity tests?
A. Yes. That's correct.
Q. So, since at least 1980 the discharge from the Barefoot Bay plant was bound to fail a sizable number of toxicity tests; is that correct?
MR. SCROGGIN: Objection, Your Honor, with respect to the time of these toxicity tests to which counsel referred.
MR. JACOBS: His report goes back actually to pre-1980, to the design days.
THE COURT: I'll overrule the objection.
BY MR. JACOBS:
Q. Do you recall the question, sir?
THE COURT: Do you remember the question?
THE WITNESS: Yes. Actually whole effluent toxicity tests didn't really come in to play until late in the '80s. So, it wouldn't mean much to have them back in the early '80s. It was a developing technology.
BY MR. JACOBS:
Q. Well, starting from the time that toxicity tests were put in permits, would you say that the Barefoot Bay plant was bound to fail such tests because it was a secondary treatment plant?
MR. SCROGGIN: Objection, Your Honor. Calls for speculation.
MR. JACOBS: Professional opinion.
THE COURT: Well, I'll allow him to answer it for whatever it's worth, if you can.
Can you answer that?
THE WITNESS: Yes. I mean, the issue is that this plant doesn't treat -- doesn't remove ammonia, doesn't change ammonia to nitrate. And as such, as long as it discharges ammonia, it's going to fail whole effluent toxicity tests. That's correct.
BY MR. JACOBS:
Q. Now, to have prevented the toxicity violation, isn't it true the company either needed to upgrade the plant to AWT standards or find an alternative source of discharge other than surface water?
A. To prevent the failure of those tests? Is that what you said at the beginning?
Q. Yes, sir.
A. Yes.
Q. Now, AWT plants existed as far back as the 1970s; isn't that right, sir?
A. The earliest plants were built in Lake Tahoe in the late -- middle '60s, late '60s. And then in terms of really being in place at any large use was kind of mid '70s to late '70s.

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Q. All right. So, there was no technological reason, was there, sir, why the company could not have built an AWT plant at Barefoot Bay before November 1991, correct?
A. That's correct.
Q. And with respect to finding an alternative source of discharge other than surface water, alternatives that could have been pursued were building additional percolation ponds, building a deep well, or using spray irrigation, correct?
A. Those are all alternative disposal methods. That's correct.
Q. But you did not examine any such alternative that the company had available to it in the 1980s, correct?
MR. SCROGGIN: Your Honor, this goes beyond the scope of the direct and also the scope of his report, which does not discuss alternatives.
THE COURT: Which did not discuss alternatives?
MR. SCROGGIN: Yes, sir.
THE COURT: The objection is that examination of the witness regarding alternatives is outside the scope of the report and the direct examination; is that correct?
MR. SCROGGIN: Yes, sir.
MR. JACOBS: Your Honor, what I'm seeking to establish is, in fact, he didn't look at any of the alternatives. So, I'm not sure there's any inconsistency here. I'm confirming that neither he, nor his staff, nor the

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report even looked at any of these other alternatives.
THE COURT: Well, I'll overrule the objection. Go ahead.
THE WITNESS: That's correct. We didn't look at alternatives. It wasn't part of our charge.
BY MR. JACOBS:
Q. You said it wasn't part of your charge.
A. Right. Like mission, your scope.
THE COURT: What he was hired to do.
THE WITNESS: Right.
THE COURT: Isn't that what you meant?
THE WITNESS: Yes, sir.
BY MR. JACOBS:
Q. Hired by the lawyers?
A. That's correct. We were retained by the law firm of Gabeler, Baise & Miller.
Q. And the scope that they gave you was -- did not include looking at the cease discharge alternatives in the 1980s; is that correct?
A. They asked us to look at the effluent quality and its potential impacts on the receiving waters and then the exceedances that occurred.
Q. I'm not quite sure I got an answer. Let me ask you again. Your charge, as you put it, or your scope did not include in the scope -- or the charge given to you by the

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lawyers that hired you in this case, did not include examining any of the potential cease discharge alternatives at Barefoot Bay in the 1980s, correct?
A. I believe that's true. We did not look at alternatives.
Q. Now, Mr. --
THE COURT: So, don't examine him any further on that. That would be beyond the scope.
MR. JACOBS: No. That was it.
BY MR. JACOBS:
Q. Now, Mr. Smith, you state that ammonia is known to be toxic to certain species of aquatic life, correct?
A. That's correct.
Q. And in the Black & Veach report on Barefoot Bay, you essentially conclude, do you not, that the apparent toxicity of the effluent would not have had an effect on the organisms in the receiving stream because the effluent had the same toxic characteristics for years; is that correct?
A. That same ammonia for years, yes.
Q. Well, are we saying the same thing, toxic characteristics? I thought you said on direct that the toxic characteristics are attributable to the ammonia?
A. In the whole effluent toxicity test. I mean, really confined to that very specific test on very fragile species, it's toxic. To characterize ammonia as toxic is just not correct.

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Q. I didn't say it was toxic. I'm using the phrase "toxic characteristics." Isn't that what a toxicity test tests for, toxic characteristics of effluent? Isn't that fair?
A. It's a very narrow test meant to look at its toxicity on very fragile species that could be indicators of some compound in the effluent that may need additional treatment, so -- but ammonia itself, to say it's a toxic compound -- that's what I'm disagreeing with. I don't think I've said that and certainly don't intend to say that.
Q. I didn't use the word ammonia in the --
THE COURT: All right. Just ask your next question.
MR. JACOBS: All right, sir.
BY MR. JACOBS:
Q. In essence, isn't it true that you're saying that any aquatic life that would have been affected by the toxic characteristics of the effluent would have been affected not by these particular violations but by earlier unpermitted discharges?
A. Yes.
Q. Now, moving on to the total residual chlorine violations. Isn't it true that neither you, nor your Black & Veach staff, nor your report expressed an opinion on the possibility of endangered species being affected by the total residual chlorine violations at Barefoot Bay?
A. No. We did not express an opinion as to endangered

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species.
Q. Moving now to the BOD versus the CBOD violations, the monitoring violations. Mr. Smith, these are both tests that -- both of these tests, rather, test the biochemical oxygen demand, correct?
A. That's correct.
Q. But they are two different tests which at any given time would likely result in different values; is that correct?
A. Two different tests, the CBOD test and a BOD test?
Q. BOD and CBOD, what you discussed on direct.
A. Right. I mean, they're different tests, and they measure different things.
Q. And would result in different values, correct?
A. Perhaps, if they're different. I mean, there may not be an NOD. There may not be any difference between CBOD and BOD. It may be exactly the same thing.
Q. In your professional opinion, what's the most likely scenario, that they're going to come out the same or not?
A. It depends on the concentration of BOD in the water and the microorganisms in the water. A very high quality effluent -- below 30, below 20 parts per liter of BOD -- you'll see the influence of nitrogenous oxygen demand.
At higher concentrations, certainly in raw influent, you'd not see any impact of NOD, because it's much stronger, and you wouldn't have any population to incur that NOD. So,

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it's only in the highly-treated flow that you're even going to see an impact like that.
Q. I see. And tell me, is the Barefoot Bay highly-treated flow?
A. Yes.
Q. Okay. So then in the -- narrowing my question to the Barefoot Bay context, these are two different tests which at any given time would likely result in different values; is that correct, sir?
A. Yes.
Q. Now, moving on to your findings with respect to water quality. Isn't it true that in the Black & Veach report on Barefoot Bay you say that the water quality of the drainage canal into the Barefoot Bay -- into which the Barefoot Bay plant discharges is only "fair"?
A. I think that's the term we used, is fair.
MR. SCROGGIN: Your Honor, is there a page reference to the page in which counsel is reading?
THE COURT: Is this from his report that you're talking about?
MR. JACOBS: Do you want me to look it up, or should I move on?
THE COURT: Well --
MR. JACOBS: I'm trying to finish. I don't think --
THE COURT: Yeah. I don't think --

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MR. JACOBS: *It's page 6, if that's helpful.*
THE WITNESS: The first quality is talking about DO and whatnot in there. It says "fair." That's what it says.
THE COURT: If you're going to read from the report, if you would inform counsel what page.
MR. JACOBS: Fair enough, Your Honor.
BY MR. SCROGGIN:
Q. Now, Mr. Smith, is it fair to say that you have no opinion as to whether the water in the canal met water quality standards during the period 1988 to 1993?
A. Well, we have some of the data that was taken by Bionomics on that canal. I'm not sure as I know what the water quality standards would be on that canal. I recall that the data we had was water of pretty good quality. The reason we said "fair," I think, was related to the dissolved oxygen levels, which seemed to be depressed at different times. We weren't sure of why. The data didn't look real good in that regard, reliable good.
Q. Mr. Smith, I'm going to ask you a question that I asked -- I'm going to read a question that I asked you in your deposition, and then I'm going to ask you -- then I'm going to read the answer and ask you if that is the answer you gave. The question appears on page 85, line 1 of your deposition and reads as follows: "So, you have no opinion as we sit here today as to whether the quality of the water in the Sebastian

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Creek and the drainage canal leading to the creek meets water quality standards or met water quality standards during this five-year period?"
Answer, line 6: "That's correct."
Is that the answer you recall giving, sir?
A. Oh, absolutely. It was Sebastian Creek.
Q. Moving on to the Carrollwood facility, you are aware, are you not, sir, that in 1979 the state of Florida determined that there should be no discharge from the Carrollwood plant into the Sweetwater Creek, correct?
A. I am aware of that. Yes.
Q. And you're aware that at that point in time the state of Florida was interested in reducing the amount of pollution going into the Tampa Bay, correct?
A. Yes.
Q. In particular the nutrient load, correct?
A. Yes.
Q. Which means nitrogen and phosphorous; is that also correct?
A. That's correct.
Q. And those are some of the pollutants that come from wastewater treatment plants, correct?
A. Yes. That is correct.
Q. And, in fact, the discharge from the Carrollwood plant was having an impact on the nutrient load in Tampa Bay, was it not?

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A. Yes. *It had an impact.*
Q. Now, you are aware, sir, that in 1984 EPA denied Florida Cities NPDES permit renewal application to discharge into the Sweetwater Creek?
A. Yes.
Q. And that the Carrollwood plant continued to discharge in the Sweetwater Creek without an NPDES permit until 1991, correct?
A. That's correct.
Q. And you are also aware, sir, that when in 1991 EPA issued another NPDES permit for the Carrollwood plant effective July 1991, it required that the effluent being discharged from the plant into the Sweetwater Creek be treated at advanced wastewater treatment levels, correct?
A. That's correct.
Q. Now, requiring advanced wastewater treatment, or as we've said, AWT treatment, is a way of minimizing nutrient load, is it not?
A. That's correct.
Q. And in so doing, protecting the Tampa Bay, correct?
A. That's correct.
Q. Now, it's also true, isn't it, sir, that the violations that took place at the Carrollwood plant took place because the effluent was not being treated at AWT levels, correct?
A. The plant was not an AWT plant. In fact, the treatment

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that it was performing was actually comparable to AWT for a number of parameters, even though the plant was not intended to be an AWT plant. It did -- I think the exceedances were in nitrogen and phosphorous and fecal coliform.

MR. JACOBS: Move to strike as nonresponsive, Your Honor. I asked him about the violations, and he's focusing on the nonviolations?

THE COURT: Denied.

BY MR. JACOBS:

Q. Let me ask you this, sir. The violations that took place at the Carrollwood plant took place because the effluent was not being treated at AWT levels, correct?

A. That's correct.

Q. And these violations resulted in a nutrient load to the Tampa Bay above the levels that had been permitted; isn't that correct, sir?

A. Yes. That's correct.

Q. Now, let's talk about the Sweetwater Creek for a moment. This is a relatively small body of water, is it not?

A. Right. I think six and a half MGD is the average annual flow.

Q. That's the average annual flow, but isn't it true, in fact, that during the time that the Carrollwood plant operated, the only flow in the Sweetwater Creek at the point of the discharge was the discharge itself?

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A. No. That's not correct.

Q. Would that statement be correct during dry weather conditions?

A. It could be in dry weather conditions. It's a drainage canal, and so there are times obviously when it rains it's not going to be the only thing. And it heads waters in Island Lipsey Lake. So, it overflows from the lake into the canal, and that depends a large part on rainfall and other run-off conditions. So, when it's dry, it well could be that there's no flow upstream of the plant.

Q. And no flow downstream except for the effluent itself?

A. For a period. I mean, it's in an urban area, so there's all kinds of run-off that impacts this. This is a drainage canal, and it drains all of urban Carrollwood. So, when someone is watering their lawn in a dry period, the run-off would end up in the creek.

Q. Again, I'm going to read from your deposition testimony, sir. The question which appears on page 114, line 18 is, "When you have a stream with essentially zero flow during dry weather, what does that tell you about what's in the stream when the plant is discharging to it in dry weather?"

Answer, line 22: "It's pretty much effluent. I would say 100 percent at the point where it goes in."

Is that the answer you gave at your deposition?

A. Yeah. That was not particularly the Sweetwater Creek.

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But you said if there's a creek with no flow in it.

Q. And is Sweetwater Creek different?

A. Yes. I mean, the -- it's a drainage canal, and there's essentially always a certain amount of water in that canal. It drains a lake and the surrounding urban area.

Q. Are you saying that Sweetwater Creek is not typical of a small creek?

A. There are small creeks in urban areas. Yes. It's typical of a small creek in an urban area, which drains groundwater and which drains surface water.

Q. And on page 5 of your report or the Black & Veatch report, don't you say the flow is essentially zero?

A. There are times of the year when it's essentially zero. That's what we said.

Q. And at those times isn't the flow essentially just the effluent from the plant?

A. At the point of introduction.

Q. Yes. At the point of introduction it is essentially just the flow from the plant; is that correct?

A. At the point of introduction it's essentially the flow from the plant. Correct.

Q. Now, the permit limit at Carrollwood for total residual chlorine was .01 milligrams per liter, correct?

A. I believe that's true.

Q. And the TRC levels during the latter half of 1991 were in

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the 1.6 to 2.8 milligrams per liter range, correct?

A. I don't recall those numbers exactly. I'd have to --

Q. Would you like to look at the DMRs?

A. That would be fine, or a report.

MR. SCROGGIN: Your Honor, if I may suggest, Florida Cities would have no objection to the Government using its own summary tables from the -- that have a list of these values, only in the interest of speeding up this process, rather than using the actual DMRs, which are hard to read.

THE COURT: Okay. You want to do that, Mr. Jacobs?

MR. JACOBS: I appreciate the suggestion. I think that we do have these handy tables that are on file with the Court. They were filed at the time of the summary judgment proceedings. And I've asked Mr. Moore to look to see if we have an extra set for the Court to refer to, as well.

THE COURT: Well, okay. Don't hold up on that. If you find one, fine. Don't worry about it.

MR. SCROGGIN: May I ask, Your Honor, if he does decide to use these tables that they be marked as an exhibit.

THE COURT: Well, no. They're not an exhibit. They were a part of the summary judgment process, but they're not a trial exhibit.

MR. JACOBS: I think we did put them in, because Mr. Klingenstein relied upon them, so --

THE COURT: Oh, you did put them in as trial

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exhibits?
MR. JACOBS: Yes, sir.
MR. SCROGGIN: Then I would ask that he use the one that's already been put in as the exhibit.
MR. JACOBS: That would not expedite things, but we could just look for it, or you could just stipulate those were the values, 1.6 to 2.8, Mr. Scroggin.
Would you like to just take a quick look?
THE CLERK: What was the exhibit number, and I can get it out of the box over here?
MR. SCROGGIN: Your Honor, I have no objection to using our DMRs which have been submitted in as exhibits, their tables or their DMRs. We'd just ask they use something that's been submitted.
THE COURT: Okay. Whatever you all want to do let's work it out. I'm not -- whatever will be most expeditious. If there is an exhibit in evidence that can be utilized for that purpose, then find it.
MR. JACOBS: The summary that Mr. Scroggin kindly suggested that we use is, in fact, the Government 255, which has been moved into evidence and accepted. And I would direct the witness's attention to Government Exhibit 255.
THE WITNESS: Yes, sir, I have it.
BY MR. JACOBS:
Q. And the question, sir, is isn't it true that the TRC

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levels during the latter half of 1991 at Carrollwood were in the 1.6 to 2.8 milligrams per liter range?
A. Well, the one that's shown here is 2.5 and 2.0, 1.6, 1.8.
Q. Did you see the 2.8 November '91?
MR. SCROGGIN: Objection, Your Honor. November '91 is not -- no. I'm sorry. I withdraw the objection.
THE WITNESS: Yes, sir, I did. 2.8, there it is.
BY MR. JACOBS:
Q. Okay. Is it fair to say that's the high end of the range and 1.6 is the low end?
A. That looks to be the case.
Q. So, the TRC levels were anywhere from 160 times the permit limit to 280 times the permit limit, correct?
A. That's correct.
Q. And these violations occurred literally every day; isn't that right, sir?
A. These are reported as daily maximums, yes. So, it's hard to tell what was within it. That was the daily max.
Q. These were daily violations, correct?
A. Right.
Q. But you essentially conclude that these violations would not have caused any serious effect on organisms in the Sweetwater Creek because the chlorine levels of the effluent had always been that high; isn't that right?
A. The impact on the stream, as I've discussed earlier, is

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going to be fairly closely tied to the mixing zone and the oxidation of this chlorine. Certainly if there's no water upstream of the plant, there's nothing to impact in terms of the aquatic organisms there.
Q. Well, what about when there is water in the stream and there are aquatic organisms, then they'll be impacted by the higher chlorine?
A. I would say that it would create a barrier for them. They would probably not penetrate this zone of high chlorine.
Q. Okay. So, when you say there would be a barrier, that means the aquatic life would stay away from that area of the stream; is that correct?
A. That's correct.
Q. Now, isn't it true that the effluent at Carrollwood, rather, was not being treated at AWT levels during this point in time because an AWT plant had not been built?
A. Again, I'd say some parts of it was receiving treatment equal to AWT, but again to -- you're correct as to nitrogen, phosphorous, and chlorine, because --
Q. Now --
A. Because it was not built -- the rest of your question. It was not a plant built to treat that. Yes.
Q. So, in a couple of areas, it was providing the equivalent of AWT treatment, but in all the rest of the areas it was not; is that correct?

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A. That's correct. Yes.
Q. Okay. Now, Mr. Smith, there was no technological reason why an AWT plant could not have been built by July 1991, was there?
A. No.
Q. And these violations could have been avoided either by building an AWT plant or by ceasing the discharge; isn't that also correct?
A. Yes. That's correct.
Q. Now, if the city of Tampa had the capacity to accommodate the Carrollwood plant's effluent in 1984, that would have been a good alternative to discharging to the Sweetwater Creek; isn't that right, sir?
MR. SCROGGIN: Your Honor, I object. This is clearly beyond the scope of the direct examination. It is nowhere contained in his report.
THE COURT: Sustained.
BY MR. JACOBS:
Q. Is it true, Mr. Smith, then that you didn't look at the possibility of connecting to the city of Tampa in your report?
MR. SCROGGIN: Same objection, Your Honor.
THE COURT: Sustained.
MR. JACOBS: I'm asking him if he covered that in his report, which is in evidence.
THE COURT: Well -- all right. You didn't cover that

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in your report?
THE WITNESS: No. We didn't get to that.
THE COURT: All right.
BY MR. JACOBS:
Q. You didn't personally cover it, but somebody else at Black & Veach did cover that in the report; isn't that correct, sir?
A. I don't recall that, Mr. Jacobs. But if it's in there, if it's in black and white, then obviously I'm in error.
Q. In your deposition, I asked you on page 125, line 14, "Did somebody else at Black & Veach do that" -- and I should back up a question, obviously, to put that question into context. The question on at line 6 is -- and I'm paraphrasing for the moment -- "did you look at the alternatives that existed during the period 1984 to 1991 that the company could have employed to cease the discharge?"
THE COURT: Could have what?
MR. JACOBS: "Could have employed to cease the discharge."
MR. SCROGGIN: Objection, Your Honor. Outside the scope of direct.
MR. JACOBS: It's in the report, Your Honor. The report is in evidence.
THE COURT: The report is in evidence, so -- and you presented the -- put the report into evidence. And I think, yeah, that's obviously something that the Court can consider.

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So, it's fair game for cross-examination. Overruled.
BY MR. JACOBS:
Q. Your answer at line 10 was "Okay." Do you recall that?
A. I'm sorry. You're asking with regard -- alternatives or to the city of Tampa in particular? I'm sorry.
Q. Well, starting with alternatives in general.
A. Right.
Q. And you answered "Okay" at line 10. Do you recall that?
A. Right. I do.
Q. And then I -- the next question was, "You personally, Mr. Smith?"
Answer: "Did I personally look at those alternatives? No."
Did you recall giving that answer?
A. I do recall that. Yes.
Q. "Did somebody else at Black & Veach do that" -- question.
Answer: "Yes."
Do you recall saying "Yes" to that question?
A. Yes, I do.
Q. Next page, 126, question on line 1: "Now, what were these alternatives, Mr. Smith?"
Answer: "We list them on page 27 of the report."
Do you recall giving that answer, sir?
A. I don't recall it, but if you're reading my deposition, I

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must have said it.
Q. And continuing with the same answer: "It includes underground injections, deep well, land application to spray fields, percolation ponds, urban irrigation, discharge to an adjoining utility."
Do you recall giving that answer, sir?
A. Something like that, right.
Q. Which -- and the next question is, "Which adjoining utilities were examined with respect to this last option, Mr. Smith?"
And your next answer was, "The city of Tampa and Hillsborough County."
Do you recall giving that answer, sir?
A. Again, I don't recall it, but I believe that's true.
Q. Now, Mr. Smith, if the city of Tampa had the capacity to accommodate the Carrollwood plant's effluent in 1984, that would have been a good alternative to discharging to the Sweetwater Creek; isn't that right?
A. It certainly would have been one to examine and see what the conditions for a connection would be.
Q. Would you agree with me that it would have been a good alternative?
A. Good in what respect, sir?
MR. SCROGGIN: Objection, Your Honor, to the characterization of good.

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THE COURT: Well, I'll overrule the objection to that.
THE WITNESS: It was good in terms of it would -- it would be good in that it would meet the discharge permits, yes. Good as to whether it was economical, I don't know.
BY MR. JACOBS:
Q. Now, back in 1983, Florida Cities also retained a contractor to study other possible alternatives, such as percolation ponds, spray irrigation, and deep well injection, correct?
A. I'm sorry. What was the date again?
Q. 1983.
A. Okay.
Q. Is that correct?
A. We reported those dates, yes, in the report. I'm not -- I don't have them right at the tip of my tongue.
Q. And that was the Jamal Study; is that correct?
A. Yes. I believe that's true.
Q. Now, there was no technological reason why one of these alternatives could not have been implemented; isn't that correct, sir?
A. Technology -- can it be done physically? Yes. Some of this could physically have been done.
Q. Turning your attention now to the Waterway Estates plant. Mr. Smith, in your 25 years working in the field of wastewater

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treatment, you've either studied or reviewed dozens of wastewater treatment plants; isn't that correct, sir?
A. That's correct.
Q. But in all of your 25 years of experience in this field, aside from Florida Cities, you have never had a client that operated a wastewater treatment plant and discharged into surface waters without an NPDES permit, have you?
A. Not without a permit. I've had clients that have had permits that have been in dispute, but they've had permits.
Q. But you never had a client –
A. That flat didn't have a permit, no.
Q. Aside from Florida Cities; is that correct?
A. That's correct.
Q. Now, the Waterway Estates plant discharges into the Caloosahatchee River; is that correct, sir?
A. It does today, yes.
Q. And you are aware, sir, that a 1990 study conducted by Florida Department of Environmental Regulation which looked at actual measurements of water quality in the vicinity of the Waterway Estates discharge point, revealed that with the treatment levels provided at the time the concentration of algae was about 10 percent higher than target values considered to be satisfactory, correct?
A. No. I think it was actually lower than the values that were predicted under the model, as I recall. It seems that the

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actual measurements were like 15 to 19 micrograms per liter. And they had targeted numbers of like 24 or 25. Again, that's my recollection.
Q. Directing your attention to the Black & Veach report, which has been marked and entered into evidence as Defendant's 92, sir, page 5, last paragraph about two-thirds of the way down.
A. I'm sorry. Page 5?
Q. Yes, sir. Last paragraph, starting with the word "however." Could you read that sentence aloud, please, sir?
A. "However" – let me just go ahead and read the paragraph to myself so I can understand the context.
THE COURT: Sure.
MR. JACOBS: Judge, while he's doing that, I've consulted with my co-counsel – and I'm not sure what your schedule is, but we'll both volunteer to miss our flights to get done with this witness. I've got maybe another half an hour. And I feel badly making that offer since you were kind enough to indulge my previous request.
THE COURT: Well, you know, I have built my schedule around what – I've got two sentencings starting at four o'clock.
MR. JACOBS: It's your pleasure, Your Honor. I'll pick it up Monday morning. I mean that. It's your pleasure.
MR. SCROGGIN: Your Honor, I will have some

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redirect. I would try to keep it brief, but I'll have some redirect based upon his cross-examination.
MR. JACOBS: Maybe we should pick it up Monday morning then.
THE COURT: Yeah, I think so. I wish had I known that.
MR. JACOBS: I'm sorry. We had hoped to be –
THE COURT: Well, we can go until four o'clock, but at four o'clock I'm going to have to –
MR. JACOBS: We'll probably miss the plane.
THE COURT: Oh, all right. Now, I set this schedule in part to accommodate my sentencings, but also you had – if you haven't canceled your flight – we're going to have to carry this over until Monday anyhow.
MR. JACOBS: Yes. That's the point.
THE COURT: I had planned on recessing at 3:45 preparatory to my four o'clock sentencings and also in line with your flight schedule.
MR. JACOBS: And I appreciate that. I thought perhaps we'd finish and –
THE COURT: Well, apparently we're not going to be able to.
MR. JACOBS: I agree, sir. I'm sorry.
THE WITNESS: Should I go ahead and answer your question, Mr. Jacobs?

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THE COURT: Why don't you do that?
THE WITNESS: I've got it in my mind, and I want to get it out.
THE COURT: Grab that thought.
THE WITNESS: Let me just – I'll read your sentence, and I'll tell you where the discrepancy is. "However, actual measurements of water quality in the vicinity of the Waterway Estates discharge points revealed that the treatment levels provided at that time, the concentration of algae, was about 10 percent higher than target values considered to be satisfactory."
Now, what I'm reporting to you, Mr. Jacobs, is that they had also looked at predicting what the impacts of secondary treatment would be, and they had predicted actually that the impact would be much greater than it was. So, you're correct in that it was higher than what they wanted in the stream based on AWT treatments, but it was lower than what they expected from what would have been a secondary plant.
BY MR. JACOBS:
Q. Could you just read the last sentence – I'm sorry – the following sentence, and then I'll be through for the moment?
A. Sure. "It was concluded by FDER that moving the point of discharge would improve the quality of the river" – "of the water in the Waterway Estates canals and in the Caloosahatchee River in the vicinity of the canals and the discharge."

MR. JACOBS: Thank you.
MR. SCROGGIN: Your Honor, may I ask if he's going to finish that sentence that he read the one sentence that follows?
MR. JACOBS: Maybe on his redirect.
THE COURT: Beg your pardon?
MR. JACOBS: I would suggest he could redirect on that issue.
THE COURT: Read that what?
MR. JACOBS: He's asking – he's now asking that the witness read other portions of the report, and I'm suggesting that that take place during the redirect.
THE COURT: Well, in fairness, it ought to be read now. And, of course, that's a fact issue that I would have to determine, and I don't frankly want to have to pause to do that. So, would you kindly read that, Mr. Jacobs?
MR. JACOBS: The following sentence?
THE COURT: What is it, the following sentence?
MR. SCROGGIN: The sentence begins with the word – it follows the sentence that was just read – "Improvements."
THE COURT: Or the witness can read that.
Would you read that?
THE WITNESS: "Improvements of this magnitude would be imperceptible and would be expected to take place gradually over many months."

BY MR. JACOBS:
Q. When you say "imperceptible," you mean to the naked eye?
A. In terms of trying to measure it. Obviously they were measured at 10 percent, so – would not be seen. That's correct.
Q. But it would be expected to take place over a number of months?
A. That's correct.
MR. JACOBS: Thank you.
THE COURT: Okay. Then we will be in recess until 8:45 Monday morning.
(Court adjourned at 3:47 p.m.)

CERTIFICATE

I hereby certify that the foregoing is an accurate transcription of proceedings in the above-entitled matter.

_____ _____
Official Court Reporter Date

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs.
FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS, INC.,
Defendants.

Case No. 93-281-CIV-FTM-21

Monday, April 1, 1996
Tampa, Florida

TRANSCRIPT OF NON-JURY TRIAL
BEFORE THE HONORABLE RALPH W. NIMMONS, JR.,
UNITED STATES DISTRICT JUDGE

Appearances of Counsel:

For the Plaintiff: Mr. Daniel S. Jacobs
Mr. T. Anthony Quinn
Ms. Gwendolen Fitz-Henley

For Defendant Avatar: Mr. David B. Hird
Ms. Joanne Tautges

For Defendant Florida Cities: Mr. Gary H. Baise
Mr. Alexander M. Bullock
Mr. Lance High
Mr. Don G. Scruggin

Reported by: Dennis Miracle
Official Court Reporter

PROCEEDINGS

April 1, 1996

******

THE COURT: Morning.

Okay.

Let's see, we had Mr. Smith on the witness stand. Mr. Smith, you can resume. Where is he?

MR. BULLOCK: He's outside, Your Honor.

MR. JACOBS: Your Honor, I just want to thank you on behalf of Mr. Quinn and I. We made our flights and due to the deluge of springbreakers, had we missed those, we never would have gotten home, without exaggeration. I do appreciate it.

THE COURT: Yes, indeed.

All right.

We're on cross examination, you may proceed, Mr. Jacobs.

MR. JACOBS: Thank you, Your Honor.

CROSS EXAMINATION CONTINUING

BY MR. JACOBS:

Q. Good morning, Mr. Smith?

A. Morning, Mr. Jacobs.

Q. Mr. Smith, you're relying on your reports for your testimony, are you not, sir?

A. Yes.

Q. Now, in preparing these reports, Dr. Jernigan and Mr. Westfall reviewed dozens of documents which they relied upon in turn in preparing the reports, is that correct?

A. That's correct.

Q. With the exception of documents that you mentioned on Friday that you personally reviewed prior to your deposition and prior to the preparation of the report, you personally reviewed no other documents prior to your deposition and prior to preparation of the report, is that correct, sir?

A. It's hard to be exclusive on that, Mr. Jacobs. I'm not sure -- no other documents, in particular reference to the case or this matter? I mean, you know, it's a very broad kind of question.

Q. Well, implicit at least from my prospective in the question was, documents related to the case, sir?

A. What I reviewed in particular were our project notebooks and, in particular, our report, various DMR's and OMR's and some various memoranda that had been prepared by the company, those kind of documents. This is the business of sanitary engineering. I'm always reviewing documents that have information, technical matters, that certainly have interest to this case, that are always, you know, a part of my daily routine. And I don't want to mislead you to think I don't read things that might impact my thinking on the case just because it wasn't listed or something.

Q. Right. Let me try again.

With the exception of those few documents that you've again just named, DMR's, OMR's, these compilations, the Government's complaint, before your deposition and before the preparation of the report, you personally prepared no -- you personally reviewed no other documents, correct, sir?

A. Mr. Klingenstein's report I think was in that group. I don't know if that counts as being one of the things, but I did review his report.

Q. That's fine. Anything else that comes to your mind now, sir?

A. Did I say there were some drawings and whatnot of existing plants? Right, I think that is it.

Q. Okay, thank you.

Now, you were retained to serve as an expert witness in this case in May of 1995, is that correct, sir?

A. Yes.

Q. And your firm is being paid how much to serve in that capacity?

A. We are retained on an hourly rate basis, so there's no set amount. It's based on how much work we do.

Q. Well, let me cut to the grist. Roughly how much has your firm made so far from serving as an expert witness in this case. Let me clarify. I mean for your services, Dr. Jernigan and Mr. Westfall and anybody else, for that matter, on your staff.

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A. I think we've billed –
THE COURT: You mean accrued, accrued or actually been paid as yet?
BY MR. JACOBS:
Q. Fair enough. Accrued. I assume they're getting paid timely. Accrued is a better question. Thank you, sir.
A. What I can tell you, Mr. Jacobs, how much we have been billed – how much we billed the law firm, I think it's on the order of forty thousand dollars.
Q. Okay.
Now, you and your firm have worked for Florida Cities for years, haven't you, sir?
A. We've worked for them I think for four years, maybe five.
Q. And they're a good client, aren't they?
A. They are a client. They are not – I don't know what you mean by "good." You know, that's a – they're – we have a good relationship with this client, yes.
Q. You do recall at your deposition I asked you the same question and you responded, yes, they're a good client?
A. Right. I'm not sure what your inferring, so I don't know what the good modifier – we have a good relationship with this client, Mr. Jacobs.
Q. Well, they paid you nearly half a million dollars in the last four or five years, isn't that correct, sir?
A. We have billed them for services in that amount. Of

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course, in prospective, we bill other clients probably thirty million dollars in that same period.
Q. I didn't ask you that, I asked you this client. Roughly half a million dollars in the last four or five years?
A. That's correct.
Q. Now, turning your attention back to Waterway Estates, where we left off on Friday. In terms of a water body's ability to assimilate a pollutant discharge, the greater the dispersion and dissipation, the greater the ability of the water body assimilate the pollutant discharge, correct, sir?
A. It would certainly happen much more quickly and with less immediate impacts. I don't know that it affects its overall capacity.
Q. Let me ask you this. Conditions in most parts of the Caloosahatchee River are unfavorable for the dispersion and dissipation of effluent, isn't that right, sir?
A. No, I wouldn't agree with that.
Q. Do you have your report in front of you?
A. No, sir, I don't.
Q. Directing your attention to the Black and Beach Report, Defendant's 92, in that case, please, in particular, page 28.
A. I'm sorry; page 28?
Q. Yes, sir. Of the Black and Beach Report, third paragraph, last sentence. Would you read that into the record, please, and just as a preamble to the first two paragraphs,

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describe the Caloosahatchee River.
A. Says these conditions are unfavorable for the – speaking of the conditions in the Caloosahatchee – are unfavorable for the dispersion and dissipation of the effluent from the Waterway Estates –
THE COURT: A little bit slower for the Court Reporter.
THE WITNESS: I'm sorry.
THE COURT: Would you read that again, a little slower.
THE WITNESS: Certainly. Speaking of the conditions in the Caloosahatchee River, these conditions are unfavorable for the dispersion and dissipation of the effluent from the Waterway Estates Plant.
BY MR. JACOBS:
Q. Thank you.
Now, conditions at the shoreline are particularly poor, are they not, sir?
A. I believe that is what that paragraph was about, actually.
Q. But would agree?
A. Yes.
Q. Okay.
Now, the flow in this river is slow or non-existent at the shoreline, isn't that right, sir?

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A. It's slow and it's tightly influenced, actually goes up and down at times.
Q. Correct or not correct; it's slow or non-existent, the flow, at the shoreline?
A. Correct.
Q. Now, when you have slow or non-existent velocity or flow, you have got unfavorable conditions for the dispersion and dissipation of effluent, isn't that correct, sir?
A. That is what we're reporting, yes.
Q. Okay.
And you agree with your own report, right?
A. Yes, sir, I do.
Q. Okay.
And the conditions in the canal, the boat canal where the previous outfall was, are even more unfavorable than the shoreline for the dispersion and dissipation of the effluent, isn't that right, sir?
A. As a relative matter, yes.
Q. The conditions, to summarize, for such dispersion and dissipation are least favorable in the canal, a little bit better right along the shoreline and best out in the middle of the river, using your term, "relatively speak," isn't that right, sir?
A. That's correct, Mr. Jacobs.
Q. In fact, Mr. Smith, didn't modeling by FDER show the best

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environmental protection of the river was afforded by a discharge to the six foot contour line of the river as opposed to a discharge to the canal?
A. There is absolutely no question about that, Mr. Jacobs. That is the best place for dispersion and dissipation of the effluent.
Q. And you do not debate, sir, as a matter of sound engineering principles, that a discharge to the six foot contour line of the river would therefore afford better environmental protection than a discharge to the canal?
A. There is no question about that.
Q. And would you therefore say as a matter of sound engineering principles that when FDER decided the discharge location should be moved to afford maximum environmental protection, it was making a correct decision?
A. Correct is a value-laden term, sir. I don't know correct -- what you're trying to say.
Q. Well, you're an engineer, you have been qualified as an engineer, from an engineering and environmental engineering standpoint?
A. Correct would be discharging into the canal, Mr. Jacobs. You could correct -- what we're saying is -- what you have described is the most environmentally protective manner would be the six foot contour line, but there's many things involved in that; permitting a pipeline, putting a pipeline in the

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middle of the river, across the river, building the pipe.
Q. The question -- let me read you back the question again.
It related to affording maximum environmental protection. That is the hypothetical, sir, that's the objective. If that is what FDER had in mind when it decided that the discharge location should be moved to afford maximum environmental protection, then it made the correct decision, is that right?
A. That's right.
Q. Now, Mr. Smith, the purpose of mixing, which you discussed in your eloquent, I almost want to say seminar, Friday morning with the illustrations that I was trying to following, the purpose of mixing is to maximize the water quality, isn't that right, sir?
A. Yes, that's correct.
Q. So then the requirement that the discharge point be the six foot contour line maximized water quality?
A. Yes, for those conditions, that's right.
Q. And while you might not be able to see an improvement in water quality with the naked I on a day-to-day basis, it was virtually certain that water quality would improve over time as a result of the relocation of the outfall, correct?
A. Absolutely right. In fact, probably improved the moment it was mixed out there in terms of the local water quality.
Q. In terms of what he call or the FDER report calls localized impacts?

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A. That's correct.
Q. Now, until April, 1992, the effluent discharged from the Waterway Estates Plant was only secondarily treated, correct?
A. Actually it was an advanced secondary plant, removing much more than a normal secondary plant, but not yet AWT.
Q. Okay, fair enough. Let me ask just make sure I understand your answer to my question, it was still secondary treatment, even if it was slightly more?
A. It was not AWT, it was greater than secondary.
Q. It was greater than secondary?
A. Oh yes. It was filter. There was much of the nitrogen removed. It was much better than secondary effluent.
Q. So would you call it sophisticated secondary?
A. I'd call it advanced secondary; something of that effect.
Q. But certainly not AWT?
A. Not AWT.
Q. Okay.
Now, isn't it even more important to discharge at the optimal point in terms of water quality when you have got effluent which is only secondarily treated?
A. If that is your goal, sir, to minimize the impacts on the receiving waters, it would -- that would be a better -- that would be a better environmental choice to do that, yes.
Q. Okay.
Now in 1981, the State determined the Waterway Estates

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Plant would have no wasteload allocation, isn't that correct?
A. I'm sorry, who determined that?
Q. The State of Florida.
MR. SCROGGIN: Objection, Your Honor, this is assuming a fact not in evidence?
THE COURT: Well, if he knows. Do you know that to be a fact?
THE WITNESS: We reported some of those things, Your Honor, but --
THE COURT: I'll overrule the objection.
BY MR. JACOBS:
Q. Do you need to hear the question again, sir?
A. Yes, please.
Q. In 1981, the State of Florida determine the Waterway Estates Plant would have no wasteload allocation, correct?
A. There's some dispute about that, but there's -- there was some issues about that. I think we reported that there was -- the work was going on about the wasteload allocation, it was unclear about whether Florida Cities had or had not one.
Q. But your report said there was none, isn't that correct?
A. That is what I've just said. I said we reported there wasn't one, but there was some dispute about that.
Q. Okay.
But -- I'll move on.
Now, between the time in 1981 that the State, according

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to your own report determined the Waterway Estates would have no wasteload allocation and December 1 of 1987, as far as you know, there was no request for a wasteload allocation, isn't that correct?
A. Not to my knowledge, sir.
Q. Directing your attention to your deposition testimony page 174, question line fifteen, I'm going to read the question and ask you if you gave the following answer, sir. Question, now between the time -- that time, referring back to 1981, and 1987, did you and your staff, for that matter, find any evidence of a request for a wasteload allocation.
Mr. Smith, did you give the following answer, not that we've made note of here and not that I know of here today?
A. I think that is just what I said wasn't it? Same thing. Same question; or did I miss something.
THE COURT: Yeah, did I miss something? What was his answer that you're seeking to impeach him from this prior?
MR. JACOBS: The previous question was essentially the same and I don't think he gave the correct answer. I don't think the answer was consistent with the deposition answer.
THE WITNESS: I thought I said I didn't know of any just right now and I thought that is what that you read?
THE COURT: Well, go ahead.
MR. JACOBS As long as that is what he said, I'll just move on.

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BY MR. JACOBS:
Q. On December 1st, 1987, Florida Cities Water Company requested a wasteload allocation, correct?
A. Right. That was -- yeah, they were also looking permits and all that, too, yeah. Okay.
Q. And you attribute the fact that Florida Cities Water Company waited until December 1, 1987, to apply for a wasteload allocation to their evaluation of various alternatives, correct?
A. Right. And I think there was some misunderstandings I mentioned earlier about whether they had one or didn't have one or whether the plant was to be joined to another regional plant, all those other things you'll get into later, I'm sure.
Q. Now, after Florida Cities evaluated these alternatives, they chose to continue their discharge, upgrade the plant and relocate the outfall, is that correct, Mr. Smith?
A. That's correct.
Q. Now this alternative they chose was not the fastest compliance alternative, was it, Mr. Smith?
A. There appeared to be a faster opportunity, yes.
Q. Now, couldn't the violations at Waterway Estates all have been avoid simply by connecting the Waterway Estates effluent to another system?
A. If it could have been worked out?
Q. Is that a yes?

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A. Yes, if it could have been worked out, yes.
Q. From a technical prospective?
A. Yes.
Q. You did not personally examine the possibility that the Waterway Estates Plant could have connected to the North Fort Myers Utility Wastewater System before any of these violations alleged in the second amended complaint took place, did you, Mr. Smith?
A. No, all we've done is review memoranda.
Q. And in fact, you don't have an opinion as to whether the Waterway Estates Plant should have connected to the North Fort Myers Wastewater System before any of these violations took place, correct?
A. I think we reported in our report that the cost was excessive and I believe that is we talked about in my deposition that we reported it was an excessive cost, but at the time, I did not know exactly what the cost was.
Q. You reported that the company considered it an excessive cost, isn't that right, sir?
A. Yes, sir.
Q. You didn't personally in your report say that the cost was excessive, correct?
A. I thought that was the term we used, but I'd have to look.
Q. Well, make reference to your report, if you'd like, but

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my understanding was in your report and in your deposition testimony, you did not express an opinion as to whether they should have connected, you might have expressed a historical narrative about how the company considered the cost to be excessive, am I right?
A. I think that is a fair judgment on it.
Q. All right.
Now, you don't have an opinion as to how much it would have cost to connect to the North Fort Myers system, do you, Mr. Smith, you personally?
A. I do.
Q. You do?
A. Yes. I didn't in my deposition, Mr. Jacobs, you're right.
Q. All right.
So you didn't at the time of your deposition, but you do now?
A. Right.
MR. JACOBS: In that case, sir, I move that he not be allowed to express that opinion.
THE COURT: Well, he hasn't given it yet, you haven't asked him for it, nobody's asking for it, so you don't need a motion?
BY MR. JACOBS:
Q. Now, when you say in your report that the North Fort

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Myers option, quote, proved to be infeasible due to high costs, page 38, you really mean to say, and I think we covered this already, the company decided that the cost was too high, correct?
A. The company did decide and in our review, we thought the same.
Q. Now, you don't say that in your report or your deposition though, do you, sir?
A. As I told you, I didn't say it in my deposition. I thought we used the term "excessive," and that's what I'm recalling, Mr. Jacobs.
Q. Directing your attention to your deposition testimony, page 227, line twenty, I asked you the question, on page 38 up at the top, Mr. Smith, you draw the conclusion that the connection to North Fort Myers Utilities proved to be infeasible due to high cost.
Let me ask you first, is this a question of your repeating the company's opinion that the cost was too high to the company or are you drawing your own conclusion here as an expert that the cost was too high. Answer, do you recall, sir, giving this answer, no, this was our review of the BSE report and the company's review of that. So it be – we weren't expressing what our thoughts were as to what was too high or not too high. Correct, is that your answer?
A. I believe that is true.

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Q. Mr. Smith, are you aware that the North Fort Myers System uses spray irrigation and deep well injection with no surface water discharge?
A. I think I'm aware of that. Certainly the deep well I was aware.
Q. And you're aware they have no surface water discharge?
A. Yes, sir, I was aware of that.
Q. Now, your report or the Black and Beach Report evaluates how much time it took Florida Cities to upgrade the Waterway Estates Treatment Plant, correct?
A. That's right.
Q. And the report suggests how much time was anticipated for each task and how much time each task actually took, correct?
A. That's right.
Q. And you do that in table one on page 35, correct, sir?
A. Yes, that's right.
Q. And some of the tasks took longer than Black and Beach thought was normal under the circumstances, correct?
A. That's right.
Q. Now, what you mean by quote "anticipated" duration in table one on page 35 of your report is Black and Beach's opinion of what you thought it would take, correct?
A. We thought it was a reasonable amount of time without undue interruptions.
Q. And some of the delays that took place are attributable

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to Florida Cities and/or its contractors it hired for the project, isn't that correct?
A. Some were, yes.
Q. In fact, sir, all of the delays under preliminary engineering in your table one are attributable either to Florida Cities and/or its contractors, correct?
A. You're using the term "delay," I don't know what you have in mind about delay.
Q. Okay, let me see if I can help you there. Your table as I'm sure you will recall and you can refer to it as you see fit, sir, sets up two columns; anticipated duration and actual duration. So, I'm referring to delay and we can use a more scientific word such as deviation if you're more comfortable with it to represent the difference between the time for each task or series of tasks?
A. How about the difference between anticipated and actual?
Q. You'd like me to use the word "difference"?
A. Delay is kind of a majority word, Mr. Jacobs, and I guess what I'm saying, we set out an anticipated time and then we had an actual time.
Q. Can we compromise and just use deviation?
A. That would be great.
Q. Okay.
More scientific perhaps.
A. Less majority.

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Q. All of these deviations under preliminary engineering in your table one are attributable either to Florida Cities and or its contractors, correct?
A. That is correct.
Q. Now, moving down to the detailed design, quote, unquote, section of your table one, these deviations in the preparation and issuance of the RFP are in fact attributable to Florida Cities, correct?
A. That's correct.
Q. And the, quote, consultant designs facility, quote, unquote, line item, do you see that?
A. I certainly do.
Q. Most of those delays were attributable to either Florida Cities or its consultants, correct?
A. Yes, it's part of their control.
Q. Okay.
Now, most of the contractor delays are attributable to Source Engineering which did the design, correct?
A. No, I don't think I'd agreed with that. Say that again. I heard you to say most of the contractor delays.
Q. Well, okay, maybe I should be more specific.
Source Engineering did the design, right?
A. Yes.
Q. And I'm sorry, 'cause I've -- my outline keeps saying delays and I've agreed to use deviations and I'm not trying to

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slip you up here, I'm going to try to hold true to my bargain.
The deviations between the anticipated time and actual time under design are attributable to Source Engineering, is that correct.
A. Well, actually, no I don't think they're all attributable to Source, there are some disputes between the company and Source about their scope and amending their scope and those kind of things, so, no, I think it's jointly held.
Q. Okay, between the company and Source, not all Source's fault?
A. No, it's just normal business transactions.
Q. I think my question was poorly phrased. I think that what I'm trying to establish is that Source did the preliminary design and to the extent there was a contractor deviation or a deviation for which this contractor was responsible as opposed to the company, that contractor was Source, is that correct?
A. And consultant is the word we use, that's why you through me. Contractor implies to me general contractor, so --
Q. I've been with the Government too long. We always use contractor. Okay.
Mr. Smith, moving right along, based on your twenty-five years experience in this field, and particularly your familiarity with engineering firms in the Tampa area, Mr. Smith, you would not have selected source to do this job, would you?

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A. I probably wouldn't have, no.
Q. In fact, you would have recommended someone else?
A. Probably would have.
Q. And there are many firms in this area that could have done this kind of project, aren't there?
A. Yes, including Source. I mean they were capable. I didn't say they weren't capable just because I wouldn't have chosen them?
Q. Fair enough. But there were firms with greater capabilities in wastewater treatment design in this area than Source?
A. Yes, I would agree with that.
Q. Okay.
Now continuing on down your table to your construction section. The line item that reads, quote, contractors prepare stroke submit bids, unquote. The delay there is attributable to the contractor, correct?
A. No.
Q. No. To the consultant?
A. Usually, what happens there, there are some questions regarding the bid raised by the contractors or issues that have raised during the bidding period, and so the owner or the engineer has to extend the bidding period and that is more than likely what happened during this period. The contractors is actually bound by contract to bid whatever period the owner and

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engineering allow him to bid, so the contractor really has no control over that time, it's the engineer or the owner that control that time.
Q. So that delays either the contractor or consultant or the company, correct?
A. The consultant or the company.
Q. Okay.
Finally, your line item that reads, quote, the contractor achieves substantial compliance, unquote. Here again, the delay is a attributable in part at least to the contractor, correct?
MR. SCOGGIN: Your Honor, Counsel keep using the term "delay," I think we agreed to use the term "deviation".
MR. JACOBS: I stand corrected for what it's worth.
BY MR. JACOBS:
Q. If I slip, Mr. Smith, and say delay because it's Monday morning and I'm looking at my outline, I do mean deviation.
A. Thank you, I understand that, it's clear. The contractor achieves substantial completion is the term, Mr. Jacobs, and there are a number of things that impinged upon his schedule there, and certainly he had charge of it. As I tried to describe, this is a very difficult construction site.
Q. I understand that, and that had to do with the size, if I followed your talk on Friday?
A. That's correct?

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Q. Right. Now when he starts out the contractor knows that's a problem 'cause presumably he goes to the site and takes a look, right?
A. Yes.
Q. Just like we did in the video and Mr. Klingenstein said that's a pretty lot of stuff on just a little site, right?
A. Great deal.
Q. Okay, so then that's something perhaps he can anticipate if he just takes a look in advance; is that fair?
A. Usually, unfortunately, you're giving a contract -- given a contract that has a firm completion date such as this one which is given by an order, and the contractor really has no opportunity to negotiate it or disagree with it before he bids the job. He takes the bid, often knowing he's unable to meet that deadline and is going to need to work it out during the period of the contract. Not at all unusual.
Q. Would you agree that before he signs the contract with the completion date that he would normally go take a look at the site?
A. Oh, probably required, in fact.
Q. Okay.
Now, Mr. Smith, if a client came to your firm in Tampa with the project such as the Waterway Estates upgrade and considered the project urgent and was willing to pay a premium to have the project expedited, would you in fact attempt to

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accommodate the client?
A. Yes, we would.
Q. And your timetable would be adjusted accordingly?
A. On those things over which we had control, yes.
Q. In fact, at your deposition, I gave you the same hypothetical question, didn't I?
A. Right.
Q. And what I called and I think we agreed to call the expedited or fast track, quote, unquote, timetable and you then proceeded to elaborate on table one by essentially in your deposition testimony suggesting how long each task would have taken under the expedited or fast track timetable, correct?
A. Right, I remember it well, Mr. Jacobs.
THE COURT: Are you seeking to impeach him based upon his deposition testimony?
MR. JACOBS: Not at all, I'm setting up --
THE COURT: All right. Well, let's -- there's no other purpose for harkening back to the deposition testimony. I got enough here in open Court without having to deal with -- unless it's impeachment.
MR. JACOBS: No, sir, it was really just to -- a lead into the next exhibit.
THE COURT: All right, go ahead.
MR. JACOBS: And the next question, more than anything else. That was not an attempt at impeachment.

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THE COURT: All right.
BY MR. JACOBS:
Q. Directing your attention now to Exhibit 508, Mr. Smith, and does --
MR. JACOBS: Just for the record, this is Government Exhibit 508. I've got terrible eyesight, can I get a little closer?
MR. SCOGGIN: Your Honor, we have objected to the use of this exhibit, it was only made available to us last week. We've never seen it before, was not part of the exhibits presented by the United States as part of this --
MR. JACOBS: Judge, actually it was a couple of weeks ago. What we did as we were preparing for trial, and in particular, preparing to examine Mr. Smith and trying to understand his own table, was what we've done here is illustrate his own table, table one from his report, and the deposition testimony which is why I used that as the lead into this questioning. So, I don't think there's anything unfair here. We're not submitting that exhibit for our own expert to testify to, all we've done is illustrate Mr. Smith's own report and his own table and his own testimony and --
THE COURT: You're not offering that in evidence then?
MR. JACOBS: Well, if he confirms that each of --
THE COURT: Well, it was not timely produced, was it,

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the exhibit?
MR. JACOBS: Well, normally for an expert, you'd product the exhibit at the time you produce his report, but again, this is the adverse expert's testimony and report we're seeking to illustrate after his report and testimony. I don't think there's anything unfair. If he testifies that it's inaccurate, that it doesn't accurately illustrate his own report and his own testimony, then I would --
THE COURT: I'll permit you to use it in a demonstrative manner, but whether I'm going to allow that in as an exhibit is problematic to be received as an exhibit as such.
MR. JACOBS: Very well, sir.
BY MR. JACOBS:
Q. Mr. Smith, would you take a look at what has been marked for identification so far as Exhibit 508?
A. Yes, I am.
Q. And feel free to refer to your table one which I see you have in front of you. Have we -- starting from the bottom --
THE COURT: Just a moment. Do we have that microphone that goes around the neck, because he needs both of his hands, I think. There we go. Just put that around your neck. I think everybody can hear you. Assuming it's working.
MR. JACOBS: I could speak up if need be.
THE COURT: Never mind, never mind. Can't get it

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working. Okay, go ahead.
MR. JACOBS: You keep the pointer.
MR. SCOGGIN: Your Honor, may we move to see the chart?
THE COURT: Yes, sir.
BY MR. JACOBS:
Q. Now, we both have a pointer.
Now, starting from the -- let's start with the middle line, the anticipated construction schedule and for no other reason than it is the first column in your table one, is that correct?
A. That's correct.
Q. Have we accurately represented your time line for anticipated construction?
A. It looks to be generally in conformance. Obviously, I'm not going to check every detail of it, but generally, it represents our table, but we would have said anticipated would be, yes, that's correct.
Q. Now moving down to your next column, is in fact actual construction schedule, is that correct?
A. Correct.
Q. And have we there again accurately illustrated your own second column of table one.
A. Looks pretty much in conformance, Mr. Jacobs?
Q. Okay. Now this next one might be a little bit tougher.

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What we have done on the top row is we've tried to illustrate your deposition testimony about the expedited or fast track schedule. Can you recall whether we've accurately done so?
A. I wouldn't know without going back and adding up all the days that we talked about in my deposition. Of course, as you recall from that time, this was a very unlikely scenario, but I'm kind of at your mercy.
THE COURT: Mr. Jacobs, you have a habit of smiling in a manner that indicates incredulity when a witness responds in certain ways. That's very distracting to me. And it's unbecoming and you may not even realize you're doing it, but you do it, and I don't want it anymore.
MR. JACOBS: Yes, sir, and I apologize, it's not intended in any disrespectful manner.
THE COURT: Well, what it is, it's a comment, unstated comment by the advocate on the witness' testimony.
MR. JACOBS: Fair enough.
THE COURT: Go ahead.
MR. JACOBS: I apologize.
BY MR. JACOBS:
Q. Well, let's go item by item then perhaps.
It's my recollection that you said in terms of in preparing the RFP had to be done under fast track in seven days, is that correct?
A. Mr. Jacobs, I mean, unless I wanted to look at my

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deposition testimony, I'm kind of at your mercy on this. I don't recall all the dates, I do recall our exchange that on that October 31st day, but that's all, or 30th, whatever date it was.
Q. And on the second item, consultant prepares and submits proposals, do you recall saying that could be done in fourteen to twenty days?
A. Yes.
Q. And insofar as SCWC, evaluating, selecting, negotiating and awarding the contract, you recall that you said that could be done in thirty days?
THE COURT: Well now, you're asking him to recall what he said on his deposition, sir, is that correct?
MR. JACOBS: Yes.
THE COURT: Mr. Jacobs?
MR. JACOBS: Yes.
THE COURT: How is that -- as I told you a few moments ago, I will permit you to impeach his testimony with his prior deposition. But, from a standpoint of substantive evidence, I'm not going to permit that, and frankly, I think that is one of the things that is wrong with that exhibit there. Go ahead.
BY MR. JACOBS:
Q. Let me take the point and rework the question, if I may. Under FCWC prepares, issues RFP, under a fast track scenario,

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sir, could that be done in seven days?
A. Yes.
Q. Consultants prepare stroke submit proposals. Under your own fast track scenario, could that be done in fourteen to twenty days?
A. Yes.
Q. FCWC evaluates, selects, negotiates, awards contract. Under your own fast track scenario, could that be done in thirty days?
A. Yes.
Q. Consultant performs study, submits report. Under your own fast track scenario, could that be done in ninety days?
A. Is that possible, yes.
Q. FCWC evaluates report, selects alternative. Under your own fast track scenario, could that be done in thirty days?
A. Thirty days would be certainly expedited, right.
Q. But within reason under --
A. It's possible.
Q. Moving down to the next line item and section. FCWC prepares, issues RFP for design services. Could that be done under a fast track in ten days?
A. That would be a real stretch, but assuming they had prepared for it ahead of time, yes.
Q. Consultant prepares stroke submits proposal. Could that be done in twenty-one days?

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A. Yes.
Q. FCWC evaluates, selects, negotiates, awards contract. Could that be done in forty-five days?
A. Yes.
Q. Consultant designs facility, submits permit aps -- that's applications?
A. That's correct.
Q. To FDER. Could that be done under your fast track scenario in a hundred and eighty days.
A. That would be a real push, but yes.
Q. Under permitting, could you go any faster than your anticipated duration?
A. As it turns out, you can't go that fast, Mr. Jacobs. I just did this under fast track and it took us two hundred and seventy-three days instead of two hundred and eighty-nine.
Q. So your anticipated duration is equivalent to a fast track in your own table here?
A. It's probably unrealistic optimism as it turns out.
Q. 'Cause you just did another one subsequent.
A. Just did one like this plant that took two hundred and seventy-three days. We were hammered on it all the way.
Q. After you did this report?
A. After I did the same kind of workup. Oh, after this report?
Q. Yes.

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A. Right.
Q. So you're relating an experience that took place after this report?
A. Oh, no, no, the work was done prior to the report being submitted, yes. You mean, we're talking about this report right here, the expert report for Waterway Estates?
Q. Yes, sir?
A. Yes, it was done prior to that.
Q. Okay.
But you agree at your deposition that the anticipated duration time 30/30/30/90?
A. Right.
Q. Was the fast track?
A. That was the best you could do, that's right, assuming everything hit. All I'm saying, even that is optimistic.
Q. Now finally, under construction, PCWC reproduces, advertises under the fast track, that could be done in thirty-seven days in conjunction with the contractors prepare and submit bids, correct?
A. That is possible.
Q. PCWC evaluates, bids, awards contracts or contract. That could be done in sixty days under the fast track?
A. Right.
Q. PCWC issues notice to proceed. That could be done in fourteen days under the fast track, correct?

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A. Right.
Q. And finally, contractor achieves substantial completion that could be done even under a fast track in four hundred and eighty days that you anticipated it would take, correct?
A. We thought that was a very aggressive schedule.
Q. So, you didn't change that?
A. Didn't change that.
Q. Right, okay.
Now, having gone through the schedule from table one in association with your deposition testimony, is it fair to say that we have accurately illustrated the fast track scenario or the expedited construction schedule from your own testimony?
MR. SCROGGIN: Objection, Your Honor, the term "expedited" is not the term that was used in questioning the witness. Fast track and expedited are not necessarily the same.
MR. JACOBS: I think they're both used. We could look into that matter.
THE COURT: I'll overrule the objection. Overruled.
THE WITNESS: Mr. Jacobs, it appears that you have accurately squished together all those dates, put them end to end, and as you recall in our deposition, I said that's pretty much impossible. There may be segments of this that you can do and sustain that kind of effort, but to do it all at once is really a misrepresentation. You cannot achieve that schedule

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without -- just under normal circumstances, and this takes no account for permitting agency interruptions or interventions, but those -- that chart that you have accurately adds up all those dates.
BY MR. JACOBS:
Q. In your own --
A. I believe what you have done in that way is correct.
Q. Okay.
MR. JACOBS: Your Honor, now I move 508 into evidence, please.
MR. SCROGGIN: Objection, Your Honor. We've stated for the record already our objection as to the use of this exhibit.
THE COURT: Sustained.
BY MR. JACOBS:
Q. Mr. Smith, are you aware that Florida Cities actually received a notice of intent to deny the permit renewal back in June of 1986.
A. Yes, I believe that is right. Seems like they applied, they were noticed in April, so that makes sense. I'm not sure of the exact dates. But that sounds correct.
Q. Now, using 508 for illustrative purposes only, your table starts, table one, with EPA denying the permit in 1986, correct?
A. That's correct.

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Q. So, if they new in June of '86 that EPA intended to deny the permit, hypothetically, they could have gotten started under any of these time lines back in June of '86, is that correct, sir?
A. Hypothetically, that's correct, sir.
Q. Now, whether you got started in June of '86 or December of '86, under expedited schedule, you finished before July '91, isn't that correct?
A. Yes, again with the caveats we discussed already.
Q. And now, which is the bigger project, upgrading the plant or relocating the outfall?
A. Construction project, Mr. Jacobs?
Q. Yes.
A. The construction activity associated with the plant would be more difficult. Permitting we thought would be more difficult for the line.
THE COURT: Say that again. I'm not sure I understand you.
THE WITNESS: The physical construction activity we think is more -- would take longer with the plant than the line, but the line required a 404 permit from the Corps of Engineers. That's a very long lead time. We thought it would be less to get a permit for the plant which is an FDER permit.
THE COURT: Okay.
BY MR. JACOBS:

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Q. In point of fact, the contract with Source to design the relocation of the outfall was awarded in February of 1988 at the same time as the contract with Source to design the AWT plant, correct?
A. I believe that is right, as part of the same contract, but I'd have to exhume that again to confirm it.
Q. February '87, both contracts?
A. February '88.
Q. '88, February '88.
A. February 29th, yeah.
Q. Both contracts for the –
A. I believe that is right. Right.
Q. And the outfall had been relocated by July of '91, correct?
A. Yes, physically in place.
Q. But not before?
A. It was right – July – just ahead of July 1, it seems or June 30th, or something like that it was completed. Maybe it was an August deadline that was done in July. That may be what it was, Mr. Jacobs. I'm looking for those exact dates. I didn't find the exact date. Was done that summer in July, yes.
Q. Okay.
A. Pipeline was complete.
Q. Now, under expedited schedule, could the outfall have been relocated by March of 1990, as well?

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A. Well, the big problem with that schedule, Mr. Jacobs, it took a year to get a 404 permit. There is no inclusion of that here in that schedule.
Q. The 404 permit, that is what kind of permit?
A. That is a fill – you asking me – fill and dredge permit within the waters of the United States covered by Public Law 92500, Section 404, administered by the Corps of Engineers, yes.
Q. This is the same Corps of Engineers that you referred to on Friday as a notoriously slow agency?
A. It is one and the same.
Q. Okay.
If it's notoriously slow, does that suggest, and you know it's notoriously slow, does that suggest you put the permit application in at the first possible instance?
A. You can't apply for the permit until you have your design completed.
Q. And, does that suggest that you do your design at the first possible instance so you can get this permit into the infamously notoriously slow agency?
A. Notorious is my word, Mr. Jacobs, infamous is yours. And you would apply for it as soon as you had the design complete and knew that that was your selected alternative. You have to work through your selected alternatives to make sure you're going to discharge to the six foot contour point in the river.

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Once you have that, you proceed with the design, complete your design and, yes, then you would submit your application for permit.
Q. But if you know you have to do all these other things in order to get the 404 permit from the notoriously slow Army Corps of Engineers –
THE COURT: forget the "notoriously slow." I have heard that enough. Just – I understand what he's testified to on slowness of that agency. Just refer to the Corps of Engineers?
MR. JACOBS: Okay. Let me just move on, skip the Corps of Engineers.
THE COURT: Good.
BY MR. JACOBS:
Q. Since we heard enough about it.
If you know in June of '86 that EPA intends to deny the permit, then you could start all those design and other mechanisms that you need to complete before you applied for the Army Corps of Engineers permit six months earlier, is that correct?
A. If the company chose to move ahead, based on the preliminary intent, you could have moved to schedule ahead, that's right. Again, you still have to go through the steps of choosing alternatives, on and on.
Q. Well, assuming we start six months earlier, under the

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expedited construction schedule, is it fair to say you could ended six months earlier?
A. You could have ended six months earlier than whatever your schedule was. I wouldn't want to imply you could end six months earlier than March of 1990. 'Cause again, I think that's unrealistic in that it doesn't have time for permitting.
Q. Well, your expedited schedule did have time for permitting if you look back at table one as you elaborated upon again.
A. It had one hundred eighty days for the DER permit, doesn't have a year for the Corps of Engineers' permit, nor as we have found out, much longer time for DER?
Q. And the DER permit took a little extra time because DER wasn't satisfied with some of the information that the company had given it, is that correct?
A. There was a dispute and they had to understand exactly what the company was proposing.
Q. They asked – DER asked for additional information, isn't that correct?
A. They certainly did.
Q. And it took some time for the company to get the additional information to FDER; isn't that right?
A. That's typically interchange with that agency.
Q. In fact, the company had a dispute with its contractor over whether – or consultant over who was going to provide

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that information and whether the company had to pay the consultant to provide that information, isn't that correct?
A. That is part of scoping the job and understanding whether that in the scope or not.
THE COURT: Yeah, but his question is whether that's correct or not.
THE WITNESS: Yes, that's correct.
BY MR. JACOBS:
Q. Now, I posed a hypothetical that the company knows in June of '86 that they're going to get this permit renewal denied. If the company knows in 1981 that it doesn't have a wasteload allocation to discharge to the canal and it's going to have to relocate the outfall and upgrade the AWT standards to 1981, is it possible to complete these projects under any scenario by 1986?
A. If you start --
MR. SCOGGIN: Objection, Your Honor, question assumes a fact not in evidence.
MR. JACOBS: It's a hypothetical.
THE COURT: I'll overrule the objection.
THE WITNESS: I'm sorry, Mr. Jacobs, you said if you know in 1981 that you don't have wasteload allocation?
BY MR. JACOBS:
Q. If you know in '81 that you're going to have to upgrade your plant and relocate your outfall to get your NPDES permit

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renewed when it comes up for renewal in '86, you have got five years, isn't that right?
A. Right.
Q. And under any of these scenarios, expedited, anticipated or actual, you could complete the project, correct?
A. I think that is a reasonable time, although the only caution I'd give you is this -- the technology is changing, the technology that was proposed and caused part of the delays here with DER actually was because technology was changing. You're at the very front-end of when the kind of treatment technology was being put in place in Florida, and you'd actually have been kind of ahead of your time. Might have taken longer just to get it through. That's the only caveat I'd give you there, but it's kind of a raw time line, you'd think five years would be about the right time.
Q. It's just coming in Florida in the early '80's, but it had been out in -- out in Reno in that -- by 1970, is that right?
A. It was in -- Lake Tahoe was kind of a test demonstration site in the early '70's's. Again, not taking -- these are very stringent standards and unusually applied here in Florida and not widely applied throughout taught the U. S. and we're on the cutting edge in the early 1980's?
Q. Any reason you know of that Florida has these more stringent standards?

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A. Legislative fiat.
Q. Now, same hypothetical, if you know in 1982 that the possibility of a regional wastewater treatment plant for that Waterway Estates Plant had considered tying into -- if you knew that plant had fallen through in '82, could you complete the process under any scenario by '86?
A. That would be very difficult, I think.
Q. Four years?
A. Four years. Again, with new technology, selecting alternatives that really could buy off on, you're seven or eight years ahead of what actually happened and when it happened the DER had a great deal of difficulty with the technology questions.
Q. Under your anticipated schedule, it took about four years, isn't that right?
A. Right, but now you've moved it up in time, in history, so now we've got issues that have not yet been addressed by the regulators, and we've got to struggle with those more in terms. That's all I'm saying.
Q. It might have taken four years, might have taken a little bit more because there were new issues, is that what you're saying?
A. Right, exactly.
Q. Now, there were two types of NPDES permit violations at the Waterway Estates Plant; nitrogen and toxicity, correct?

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A. That is correct.
Q. And you do agree do you not that these violations would not have taken place had the plant been upgraded by the time the new NPDES permit took effect, correct?
A. That is correct.
Q. And you do agree do you not that the toxicity violations had an impact on water quality, isn't that right?
A. No, I don't believe that is true. Toxicity test violations had an impact; I don't think so, there's no connection there.
Q. Directing your attention to your deposition testimony, again I'll read you a question, and I'll ask you if you gave the following answer. Page ten, sorry, page 210, line thirteen, question, and from that you concluded that toxicity was not a serious problem with the Waterway Estates Plant. Answer, right. Question, when you say it's not a serious problem, would you say that -- would you say it was a problem but it just wasn't serious, or are you saying it wasn't a problem at all? Did you give the following answer, sir? In terms of water quality impacts, it has some water quality impact, obviously. Its nutrients in the water, and the ammonia is also nutrient contributing to the nitrogen load, so it has some impact. Do you remember giving that answer, sir?
A. Yes, I do.
Q. Next page I asked you, line one --

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THE COURT: Let me ask the witness, just for clarification so I understand. How does that answer differ from the one that you gave a moment ago?

THE WITNESS: If you remember, Your Honor, the toxicity test is this business with this fragile organism in the water, so it's ammonia that impacts that organism. The question was, does the toxicity test connect to impaired water quality. That is what Mr. Jacobs was asking me. Toxicity test really goes to this fragile species, not to the water quality. That is what I was trying to ascertain.

THE COURT: All right.

MR. SCROGGIN: Your Honor, I would object to the extracting of the answer of the witness out of context and ask that the remainder of his answer be read into the record as well.

THE COURT: Any objection to doing that as well, Mr. Jacobs?

MR. JACOBS: If you prefer, Your Honor, as opposed to on cross examination.

THE COURT: I think it would be more helpful to me to have it done now.

MR. JACOBS: Fine, fine. If I might elaborate, the theme is, from what I understand Mr. Smith's testimony, he's saying you can't necessarily extrapolate from the laboratory test?

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THE COURT: You're not testifying, don't characterize his testimony. That can be done in argument or if you want to clarify it, you can ask further questions.

BY MR. JACOBS:

Q. Let he ask you this for clarification sake, Mr. Smith. You're saying that the federally mandated toxicity test because they're done in a laboratory aren't necessarily an indicator of toxicity in a given water body, is that what you're saying?

A. That was part of it. Again, it's toxicity as to this given species which may or may not inhabit the Caloosahatchee River. What you asked me is a water quality question. I see those as separate questions.

THE COURT: Go ahead and ask -- read the balance of that.

BY MR. JACOBS:

Q. The balance of the answer to the question, when you say it's not a serious problem, would you say it was a problem, but it just wasn't serious, or are you saying it wasn't a problem at all. I'll read your full answer without extraction and ask you if that's the answer you recall giving.

In terms of water quality impacts, it has some water quality impact, obviously its nutrients in the water and the ammonia is also a nutient contributing to the nitrogen loading, so it has some impact, how great an impact, again it's a very small amount of nutrients, a few pounds, in a river that is one

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thousand times larger than its flow; is that your complete answer?

A. That sounds correct, yes, sir.

Q. Now, starting again at the top of page 211, question one, so you're saying it had some impact, but a small impact; do you recall saying right?

A. Yes.

Q. And line four, question, and so it might have been a problem, but not a serious one. *Is that a fair way to* characterize your testimony. Answer, do you recall saying, pretty close. I'm not going to say it's a problem. That's what I'm weaseling on is the problem issue. It has some impact. Whether it's a problem now, and then I am embarrassed to say I interrupt you, and I say, question, I see. You're not willing to say whether it was a problem, you, and then you interrupt me and you give the answer, that is kind of a judgment for regulators to make, not for me. Do you recall giving that answer, sir?

A. I don't actually recall all that exchange, I remember parts of it, but it's in the deposition and it must have been said.

Q. Just a few more questions. Mr. Smith, starting with another one on toxicity, do you know the difference between a major municipal and a domestic wastewater treatment plant and a minor?

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A. Is that a Federal designation or something you're asking me, or you asking me to determine what's a major and a minor? I'm not sure I understand you.

Q. Are you aware of the way those terms are used in -- for Federal permitting process?

A. No, I don't know the cutoff between major and minor for Federal permitting purposes, I do not know that, Mr. Jacobs.

Q. Okay.

Are you aware that seventy-six percent of major municipal and domestic wastewater treatment permits in the State of Florida have whole effluent toxicity limit. Seventy-six percent of -- I'm sorry?

THE COURT: Read that -- sir?

MR. SCROGGIN: I'm just objecting to the time period the question refers to?

THE COURT: Would you state the question again or I can have it read back.

MR. JACOBS: I'll try to state it again.

BY MR. JACOBS:

Q. Are you aware, sir, that in the State of Florida, seventy-six percent of NPDES permits covering major municipal and domestic wastewater treatment plants have whole effluent toxicity limits?

THE COURT: What period are we talking about?

MR. JACOBS: The present?

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THE COURT: Present.
THE WITNESS: Could be, Mr. Jacobs, I don't know surface water discharges. I assume.
BY MR. JACOBS:
Q. Sure.
A. (Witness indicating affirmatively.)
Q. And are you aware that these whole effluent toxicity limits that are put in NPDES permits are put in when there is a reasonable potential that a water quality standard will be violated without such a limit?
THE COURT: Now just a moment.
MR. SCROGGIN: Objection, Your Honor, this witness is not purported to be an expert on permitting reasons for inclusion in the permits of certain limitations?
MR. JACOBS: He was put forth in four different categories. I dare say this would fall under at least one of them.
THE COURT: Well, I'll stretch the point and overrule the objection, receive it for what it's worth.
You remember the question?
Read it back.
(Record read back.)
THE WITNESS: Yes, I'm aware of that, although it's in dispute by several dischargers.
MR. JACOBS: No further questions, thank you, sir.

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THE COURT: Okay.
Redirect, Mr. Scroggin.
MR. SCROGGIN:: Yes, Your Honor.
REDIRECT EXAMINATION
BY MR. SCROGGIN:
Q. Mr. Smith, during your cross examination on Friday, you were asked whether or not you had investigated the alternatives for the Barefoot Bay Facility discharge. And I would ask you, sir, you were asked specifically whether you had looked at building percolation ponds, deep wells, spray irrigation and other alternatives, to the surface water discharge at Barefoot Bay. Do you recall that exchange?
A. Yes.
Q. And I ask you, sir, your response was, no, that was not included in your mission. I would ask you, sir, do you have experience as a real estate appraiser, and are you experienced in such matters appraising property for potential acquisition?
MR. JACOBS: Objection, that is clearly outside the scope of his expert testimony?
THE COURT: You're not going to be eliciting testimony from him as to values?
MR. SCROGGIN: No, sir, I'm not. I'm simply establishing this is clearly outside the scope of his expertise for which he was offered.
THE COURT: I'll overrule the objection. You may

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answer the question.
THE WITNESS: No, I'm not experienced in that.
BY MR. SCROGGIN?
Q. Do you have any personal knowledge regarding the availability of property near the Barefoot Bay Wastewater Treatment Facility that might be suitable for spray irrigation fields or other alternatives?
A. No, I'm not personally aware of it.
Q. You were also asked a question regarding the impact of the Barefoot Bay effluent potentially on endangered species such as the endangered Wood Stork. And this question related to the impact of residual chlorine in the outfall. Do you recall that?
A. Yes.
Q. You also testified on Friday that the residual chlorine in drinking water was several times higher than that of the Barefoot Bay effluent, is that correct?
A. Yes, I believe that is right.
Q. Do you have any opinion, sir, regarding what impact if any there would be on endangered species if the Barefoot Bay Facility were discharging drinking water instead of treated secondary effluent?
MR. JACOBS: Objection.
THE COURT: Overruled.
THE WITNESS: Well, if -- regarding chlorine, I mean

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whether it's drinking water or sewerage, the chlorine still has the same affect on the receiving waters, so it would be worse to discharge drinking water with the high chlorine residual than it would sewerage.
BY MR. SCROGGIN:
Q. And would you anticipate that there would in fact be any impact on endangered species near Barefoot Bay for the discharge of drinking water?
MR. JACOBS: Objection, goes beyond the scope of his testimony and his report.
MR. SCROGGIN: I would suggest, Your Honor, it does not go beyond the scope of the cross examination which specifically suggested there would be an impact on the endangered Wood Stork and from the residual chlorine in the effluent. I'm simply asking him to compare that testimony and response to the cross examination question with his earlier direct testimony comparing the effluent to drinking water.
MR. JACOBS: Judge, he said had no opinion. He's not trying to elicit an opinion.
THE COURT: I'll overrule the objection. You can answer that.
THE WITNESS: Well, again, as to the chlorine, the chlorine residual would be higher I would suspect from drinking water in the stream, and would have the same kind of impact on the stream in terms of the barrier for certain aquatic species.

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Some species will swim through the zone, there's others that are more fragile that won't actually impact it. The more residual just takes longer before it would dissipate as it would move down the stream. As I say, the level that was given in the effluent actually reported as discharge is pretty small and as I think I testified Friday, would probably be dissipated in a matter of a few hundred yards downstream, so I mean, you're talking about a canal that goes three or four miles before it gets to the north prong of the Sebastian River, so there's a lot of room for Wood Storks to go in, but I'm not an expert on Wood Storks, so I don't know.

Q. Are you aware of whether or not the Setilic Island to which the Barefoot Bay discharges, is itself listed as an endangered or protected water body?

A. I'm not aware. I think the Indian River Lagoon is the only one of that group that is.

Q. By the time effluent reached the protected Indian River Lagoon, would you anticipate any impact at all from the chlorine residual in the Barefoot Bay's discharge?

A. No.

Q. Would you have the same answer even if that -- the chlorine residual in the Barefoot Bay discharge were several times higher, even as high as that in drinking water?

A. Yes, same opinion.

Q. I'd like to turn if I could to the Carrollwood Facility.

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You were questioned on Friday about the sources of pollution into Tampa Bay. And I would ask you, sir, if you know what pollutants are of concern to Tampa Bay that gives rise to it being a protected water body?

A. Well, certainly carbon, nitrogen and phosphorus are all of concern.

Q. And what are the sources of those pollutants; carbon, nitrogen and phosphorus, into Tampa Bay?

A. Any number of sources. Regulated sources include several sewerage treatment plants, principally the Howard F. Curen Plant which is operated by the City of Tampa, which has permitted discharge of some sixty-five or sixty-six MGD, and probably -- well, I'd have to calculate the number, hundred thousand pounds of nitrogen permitted from that facility.

But there is also a great deal in our case, unusually we handle a lot of fertilizer on the docks at the Port, that's another source of concern for nutrient loading into the Bay, and it's carefully monitored and try to keep clean.

Q. I'm sorry.

A. And then also, typical storm water runoff from urban areas from irrigated lawns that have been fertilized and wash nutrients into the receiving waters, eventually into Tampa Bay.

Q. Can you compare the magnitude between the regulated point sources of such discharges and the other non-point sources in the -- that would be resulting in pollution in the Tampa Bay

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area?

A. I don't have firsthand knowledge, Mr. Scroggin, of that. It would be a generalization.

Q. Do you know if -- do you have any estimate at all or any relative comparison of discharges from wastewater treatment facilities versus all of the other sources of pollutants in Tampa Bay?

A. I don't. I do know that we've taken out -- we've controlled the point sources from the wastewater treatment plants and we've seen that noticeable impact of improvement in the Bay over the last ten years, and so generally we consider that the non-point source pollution coming from runoff is greater than point sources, but in this case, because of the concentrated discharges that we have, I'm not sure that generalization holds true.

Q. Among the regulated point sources, the wastewater treatment facilities in the bay area, can you rank the Carrollwood Facility among the others?

A. It has to be near the bottom.

MR. JACOBS: Objection.

THE COURT: Just a moment, sir.

MR. JACOBS: I'm sorry, this goes beyond the scope of his report and deposition testimony.

THE COURT: Sustained.

BY MR. SCROGGIN:

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Q. With respect to the three facilities at Barefoot Bay, Mr. Smith, Carrollwood and Waterway Estates, you were asked on Friday for each of these facilities whether or not the pollution from each would have been lessened had they upgraded to an advanced wastewater treatment and your response, I believe, was yes, the pollution would have been reduced had they been upgraded to AWT. And I would simply ask you, first, with respect to the Barefoot Bay Facility, is it correct that the Barefoot Bay Facility began before its current upgrade, that the effluent from the Barefoot Bay Facility was cleaner than secondary and that it was eventually upgraded to the still cleaner advanced wastewater treatment?

A. Yes. It was cleaner than secondary, it had generally very high removals of BOD and suspended solids and achieved some nitrogen removal. So, yes, it was a very well treated secondary effluent.

MR. JACOBS: Your Honor, this sounds very familiar from his Friday direct testimony for what that is worth.

THE COURT: Well, it sounds familiar to me, and please don't have him restate what he's already stated.

MR. SCROGGIN: Yes, Your Honor.

BY MR. SCROGGIN:

Q. There's been a lot of discussion in your testimony regarding discharges into small water bodies such as the canal at Barefoot Bay, Sweetwater Creek and Carrollwood and the canal

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at Waterway Estates. And I would ask you, sir, are there certain conditions under which the health of the water in the small receiving water bodies is actually improved by the discharge of secondary treatment, at least with respect to some measures of the health on receiving water?

MR. JACOBS: Objection, goes beyond the scope of his report, his deposition testimony and the examination that I examined him on.

MR. SCROGGIN: Your Honor, the cross examination specifically directed the witness' attention to the impact on the small receiving water bodies of the pollution with the implication that it was always a negative impact. I'm simply asking the witness if that impact is in fact always negative.

THE COURT: I'll overrule the objection. You can answer that.

THE WITNESS: With respect to Barefoot Bay, that canal has probably got water in it all the time and, you know, even at the worst condition, I'd suspect there's quite a bit of dilution in whatever impact it's going to have, it's going to have. There's always water there. I don't think there's – increment of additional water is probably inconsequential from the Barefoot Bay Plant.

At Carrollwood on the Sweetwater Creek, there are periods during the year in which the creek water is regulated upstream, and so there is very little if any water in the creek

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upstream. In that case, putting water in that is of relatively high quality is actually going to assist some of the vegetation and aquatic life in the stream downstream. It's not a deterrent to all he aquatic life, just some that are more fragile. Under most conditions, though, that is again a fifteen to one dilution under average conditions in that creek.

In the case of Waterways Estates, it's just imperceptible. That canal, the mass of water in that canal versus what is coming out of the plant is pretty small. I mean, it's certainly not doing anything to enhance the water quality there because there's lots of water there.

Q. A significant portion of the questioning on Friday and today has dealt with what can be done technologically or physically, and I'll ask you, sir, have you ever in your years of experience dealing with the construction and operations of wastewater treatment facilities, had clients who had no cost constraints, who simply asked you the question of what was physically possible as opposed to what was practical or feasible?

A. I have had some that thought they had no cost constraints until they encountered what the real costs were and there's always constraints of some kind on cost.

Q. Do you in your work as a consultant assisting municipalities and companies in constructing and building wastewater treatment facilities, ever plan a project without

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any consideration of the cost?

A. No, that is usually the most important consideration, along with meeting your mission.

Q. Are you – do you have any familiarity with EPA's funding of certain wastewater treatment facilities in the United States and in Florida?

A. Yes, I do.

MR. JACOBS: Objection, this is beyond the scope.

THE COURT: Sustained.

BY MR. SCROGGIN:

Q. You stated today, sir, that environmental protection would be maximized at the six foot contour line with respect to the Waterway Estates Facility. Is that based on data or on modeling?

A. Based generally on intuition largely, Mr. Scroggin, in that you're going to get the best mixing and deepest segmented and highest velocity of the stream, and so, that is more of an engineering judgment, engineering intuition on my part. I think in modeling, that was done, was unable to show a real increase in water quality.

Q. You made a similar statement today regarding the six foot contour line being the spot in the river that would maximize the water quality. I would ask you the same question with respect to that answer, was that answer based upon data you reviewed or upon your intuition or modeling.

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A. It's again, based on my general understanding of effluent dispersion and dissipation. I've done a fair amount of work in that area and modeling, those things, so I have a good sense of what makes it work and in that case, I think that would be the optimal place of discharge.

Q. You were asked several questions today regarding wasteload allocations, whether or not the Waterway Estates Facility had a wasteload allocation, what its role was in the permitting process. I'll ask you, sir, do you have expertise in the development and use of wasteload allocations for permitting purposes in Florida?

A. I have done a fair amount of work in wasteload allocations. I've not been involved in wasteload allocations in Florida.

Q. Have you any expertise regarding the legal requirements of wasteload allocations to be used in effluent limitations in the State permits?

A. Not in Florida, no.

Q. And were you asked to perform any such analysis in preparing your expert report for this case?

A. No.

Q. You were asked several questions today regarding the deviation from the anticipated schedule for the construction projects, the construction of moving the outfall and the upgrade to AWT at the Waterway Estates Facility. You were

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asked in particular whether or not you had ever in your experience had a client tell you that the matter was urgent and offered to pay a premium. And I ask you, sir, do you have any knowledge or experience regarding how the Florida Public Service's Commission would view the prudency of paying premiums for urgent projects?

MR. JACOBS: Objection, goes beyond the scope. Also calls for speculation.

THE COURT: I'll overrule the objection.

Do you know? What is -- do you know?

MR. SCROGGIN: Do you have -- you want me to ask the question be read back?

THE COURT: Read the question back -- well, let me hear it 'cause I'm not sure I remember all of it.

(Record read back.)

Do you have a view, yes or no?

THE WITNESS: Yes or no? Yes, I would have a view.

THE COURT: Okay.

BY MR. SCROGGIN:

Q. Do you know whether or not the premiums paid for urgent projects are routinely approved by the Public Service Commission?

MR. JACOBS: Same objection, goes beyond the scope and calls for speculation.

THE COURT: I'll overrule the objection.

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THE WITNESS: I don't know about premiums, per se. What I know is that the Public Service Commission looks with excruciating detail at all the costs the company incurs and wants to include in the rate base. That is what I have personal experience with this company.

THE COURT: I'm recede from my previous ruling and sustain the objection and the answer will be stricken.

BY MR. SCROGGIN:

Q. Finally, Mr. Smith, you were asked several questions regarding the table in your expert report for -- regarding Waterway Estates which is Florida Cities' Exhibit Number 92, which has been entered into evidence, and on page 35 of that report, you have listed anticipated duration of days, actual duration of days, and date completed. You were asked several questions about a new column that does not appear on this table. That was characterized as the fast track. And for each one of the entries, you had a shorter period of time than that that is either the anticipated or the actual duration. And I'd ask you, sir, have you ever, in fact, in your experience seen one of those entries in the fast track achieved in practice?

A. One of the entries, you mean one line?

Q. A single one, such as the --

A. Yes.

Q. Very first one, a single entry in one of the rows; have you ever seen that small number of days actually achieved in practice for one of the items of the many on the list?

A. I would say it's true for every item by itself.

Q. And have you ever seen a project that requires all of these steps in fact achieve such a small number of days for each one of the many steps?

A. No, I haven't.

Q. Have you ever used the term "expedited schedule" for any of the projects that you have yourself been involved with?

A. Yes.

Q. You think it's fair to call an idealized small number of days for each one of these steps expedited; is that a fair characterization for the smallest number of days added together end to end that you have ever seen for each one of these many steps?

A. Well, what we would -- to look at a fast track or expedited schedule, we would look at the schedule in whole and some things are going to be short and others are going to be long, but we look at the schedule in the continuum and certainly we have dealt with fast track schedules.

Q. Have you ever achieved a schedule in fact for a project such that each one of the entries of these many steps was at its absolute minimum value in the column that you characterize as fast track?

A. No.

Q. Have you ever in your many years of experience known any other engineer who has ever been able to achieve an end to end minimization of each of the time required for each one of these steps for a complex project such as this?

MR. JACOBS: Objection, hearsay, calls for speculation.

THE COURT: Overruled.

THE WITNESS: Not that comes to mind right now, no.

BY MR. SCROGGIN:

Q. Do you think that such an idealized minimum time schedule is realistic in any sense?

A. No.

Q. Finally, the construction schedule was discussed in some detail today. I'll ask you, sir, do you know when in fact the -- or let me ask you a preliminary question first, if I might.

The date -- does the construction schedule depend in part on the date that the company knows that it in fact has no choice but to begin construction and move the outfall and by that, sir, I mean, does the beginning date for all of these many steps depend in part on a decision by the company that it must initiate the first step and begin the construction process?

A. Well, not only construction, but the entire investigation process. I mean, that was what Mr. Jacobs was going to. At some point, the company has to decide to go or not -- or to wait.

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Q. And you were asked the question regarding how long would it have taken the company had they made that initial decision to upgrade the outfall, upgrade the plant and move the outfall in 1981, actually, sir, do know the date on which in fact Waterway Estates was formally for the first time required to upgrade to AWT and move its outfall as opposed to pursuing any other alternative?

MR. JACOBS: Objection to the extent that the question calls for a legal conclusion.

THE COURT: Overruled.

THE WITNESS: Well, we had official denial listed as 8 December, '86.

BY MR. SCROGGIN:

Q. But that official denial, are you – do you know the language that is used in the official denial; does the official denial require an upgrade to AWT in moving the outfall or does it require ceasing discharge?

A. I don't recall right now, Mr. Scroggin.

Q. Assuming for purposes of my question that the 1986 denial only requires ceasing discharge without naming the alternative to be chosen to achieve that cessation of discharge in the canal. Do you know the date on which the company was formally required to move the outfall and upgrade?

A. I don't other than obviously they had agreements with the regulators based on the schedules that were negotiated, had

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that agreement with the regulators, so other than those dates which are embodied in the actual orders.

Q. Assuming for purposes of my last question that the first date on which Florida Cities was formally required to upgrade the plant and move the outfall was in late 1988 in the State permit, would that potentially shift from 1986 to 1988, the beginning date for the gaining of permits and construction processes?

MR. JACOBS: Object, beyond the scope. He didn't review those documents prior to his deposition, the State permits or administrative orders. I think that has been established.

MR. SCROGGIN: May I address that Your Honor?

THE COURT: Yes.

MR. SCROGGIN: We talked a lot about time lines and I'm not asking him to interpret, I'm asking him to assume for purposes of my hypothetical that these are the operative dates, and he has reviewed dates and length of time of construction.

THE COURT: I'll overrule the objection.

THE WITNESS: You said spring of '88, Mr. Scroggin?

BY MR. SCROGGIN:

Q. Late 1988.

A. Late 1988. Appears then that their actions were prudent in that they took care of preliminary matters before they had the actual notice, so they were – they were moving ahead of

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that time. I would hate to think you'd wait right until the time you got the final notice.

MR. SCROGGIN: I have no further questions.

THE COURT: Okay.

Thank you, sir, you may step down.

THE WITNESS: Thank you, sir.

THE COURT: Call your next witness.

MR. SCROGGIN: Florida Cities calls Randy -- Randall Armstrong.

THE COURT: Let's go ahead and take a fifteen minute recess.

(Thereupon, a brief recess was taken.)

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THE COURT: All right. Call your next witness.
THE DEPUTY CLERK: Raise your right hand.
Do you solemnly swear that the testimony you are about to give in this cause will be the truth, the whole truth and nothing but the truth, so help you God?
THE WITNESS: I do.
THE DEPUTY CLERK: Take a seat in the witness stand.
State your name and spell your last for the record, please.
THE WITNESS: My name is Randall Lavoid, L-A-V-O-I-D; Armstrong, A-R-M-S-T-R-O-N-G.

- - -

Thereupon,

RANDALL LAVOID ARMSTRONG,

a witness, having been duly sworn to speak the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCROGGIN:

Q. Good morning, Mr. Armstrong.
Would you please state your current position?
A. I'm executive vice-president of the Phoenix Environmental Group, Incorporated.
Q. And how long have you served in that position?

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A. Essentially for the last six years.
Q. How long have you been with Phoenix Environmental?
A. Well, the first year -- I actually set up my own company in 1990, which was Phoenix Environmental Associates. Later that year, my partner and I merged and formed the Phoenix Environmental Group.
So, for a brief time that first year, I was a company of one. But since that time, in 1991, I have held a position with the Phoenix Environmental Group.
Q. What is your educational training in college?
A. I have a bachelor of science degree in biology and education from the Florida State University, received that in 1971.
Q. Okay. And what was the first full-time employment you had after college?
A. For a brief time, in the summer of 1971, I did some research for the National Science Foundation. I was actually under contract with the Orange County School System in Florida to develop curriculum for aquatic studies for Orange County high school students.
Q. Can you tell me your next full-time employment?
A. Yes. For a very brief time, I taught high school in Orange County, Florida.
MR. QUINN: Your Honor, if it will expedite matters, the United States will stipulate to the credentials of Mr. Armstrong. As long as we know what we may be able to stipulate to that, too, sir.
MR. SCROGGIN: Your Honor, if I might n areas in which I will proffer this witness as an e witness.
THE COURT: All right.
MR. SCROGGIN: I will proffer him in the areas of the technical development of waste load allocations and their use in Florida; second, the use of waste load allocations in the development of effluent limitations in State permits in Florida; third, the sampling and analysis of surface waters and the analysis of water quality data; fourth, computer modeling of water quality impacts on surface waters in Florida.
THE COURT: Computer modeling of what?
MR. SCROGGIN: Computer modeling of water quality impacts on surface waters of Florida.
And fifth, comparisons of water quality data and water quality modeling to the water quality standards of Florida.
THE COURT: Comparisons of water quality data what?
MR. SCROGGIN: Comparisons of water quality data and water quality modeling to the water quality standards of the State of Florida.

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MR. QUINN: Your Honor, those five areas are further than we thought Mr. Armstrong was going to be designated to testify about. In fact, most of those go beyond the scope of his expert report and were not listed in his expert report or in his deposition at the time we took it. The five areas that Florida Cities seeks to have him certified in are beyond it.
My understanding of his report dealt solely with comparisons of water quality data in and around the Caloosahatchee River.
And for that reason, sir, we would object to the qualification of the witness for any of the other four or five other areas. I can't tell...
MR. SCROGGIN: Your Honor, may I suggest one -- I will try to expedite the process as much as I can, but I do believe that we should be allowed the opportunity to qualify him in these areas. He --
THE COURT: Well, you may be able to qualify him in these areas, but the question is whether he's going to be permitted to testify, notwithstanding the fact that he's got qualifications.
The Government has said that he's not entitled to testify in four of the five areas because he has not been proffered for that purpose appropriately under the rules.
MR. SCROGGIN: If I might, Your Honor, I'm

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referring to the joint pretrial statement in which Mr. Armstrong's testimony is characterized, and those areas include the historical water quality of the Caloosahatchee River --

THE COURT: All right. Where is that in the five categories that you have just gone through?

MR. SCROGGIN: That would be in number three, Your Honor, the sampling and analysis of surface waters and analysis of water quality data.

THE COURT: Sampling of surface water --

MR. SCROGGIN: -- and analysis of water quality data.

THE COURT: -- and analysis of water quality data.

MR. SCROGGIN: That was the third category I read.

THE COURT: All right. Just a moment.

(Pause.)

THE COURT: And that's as to the Caloosahatchee River?

MR. SCROGGIN: Yes, sir. That will be the scope of our questions to him.

THE COURT: All right.

MR. SCROGGIN: We're only going to talk about Waterway Estates with this expert, Your Honor. His analysis will deal only with the lower Caloosahatchee River and the impacts on that water body of the Waterway Estates facility.

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THE COURT: All right. Just a moment.

(Pause.)

MR. SCROGGIN: Reading again, Your Honor, from our -- the joint pretrial statement, he is also being offered for the existence of water quality data, and that would fall within the fifth category which is -- I'm sorry -- to continue reading, the existence or lack thereof of water quality data indicating any impact of any discharges to surface waters from the Waterway Estates wastewater treatment plant.

THE COURT: Yes, and I think the Government recognizes that that falls within his proffer, correct?

MR. QUINN: Yes, Your Honor.

The proffer is set forth on Page 30 of the joint pretrial statement.

THE COURT: I'm looking at it. Go ahead.

MR. QUINN: Okay. It sets forth those two areas. These five areas -- first, I couldn't write them down quick enough, but they sound like they are well beyond anything that is listed on Page 30 or in his expert report.

And for those reasons, we would request that the Court not permit any questioning into those areas.

THE COURT: All right. Go ahead, sir.

MR. SCROGGIN: Your Honor, we've addressed, I believe, the five categories that I listed. Number four --

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and the second quote that I just read I believe falls -- is the fifth category: The existence or lack thereof of water quality data indicating any impact. That would involve the comparisons of the water quality data and the modeling, which is how the data are, in fact, developed with the water quality standards of Florida, which is the fifth category I have given you. So, I believe, sir, we've done four and five so far. Also --

THE COURT: You know, it sure would help on matters that are so technical as this if you could dovetail your statement of what the witness is going to be offered -- the categories that he's going to be offered in to what you're now saying that you intend to offer.

I was writing as fast as I could. I didn't get all these categories down. And I may have to take a recess and get Mr. Miracle to give me a statement of these various categories and make sure that you're not going beyond what you have proffered, legitimately offered previously.

Yes, sir?

MR. QUINN: Your Honor, two points: First, in Mr. Armstrong's expert report, there are two parameters that are listed: One is to review the data for key parameters that are indicative of the overall health of the estuarial system to determine the overall quality of the Caloosahatchee River estuary and to assess whether water

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quality appeared to be changing over time and, two, to attempt to locate water quality data from the area near a previous discharge point from the Waterway Estates domestic wastewater treatment facility to determine if that previous discharge was impacting water quality. That's it. That's all that's in there.

And, sir, this is further complicated by the fact that the Defendants want Mr. Armstrong to be both a fact and an expert witness, and they are expanding the scope of what he's going to testify about as an expert.

MR. SCROGGIN: Your Honor, Mr. Armstrong was questioned at his deposition at great length about the first two areas that I have just mentioned: The waste load allocation technical developments and their use in permitting.

If the Court wishes for him to be a fact witness in those areas and not an expert witness, that might be a way to cut through this potential problem, and we would be willing to accept that.

MR. QUINN: Your Honor, by the Florida Cities stipulation to try to qualify him as an expert witness, they concede that he has to be an expert to talk about it. And if he's going to testify as a fact witness, then they shouldn't be allowed to be mixing like this, sir.

MR. SCROGGIN: Your Honor, he has, in fact, been a

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fact witness in this case and an expert witness in this case. His deposition was consumed almost totally with issues relating to his factual experience rather than the areas in which we had noticed the Department of Justice he would serve as an expert.

The area that -- the last three areas dealing with the sampling, computer modeling and analysis of water quality data clearly falls within the description that we have offered in the joint pretrial statement.

This witness participated personally in the studies and supervised personally the studies that are at issue for water quality sampling, and in that regard he may be regarded as a fact witness by the Court.

THE COURT: Anything else?

MR. QUINN: One more point, Your Honor. He was deposed as an expert witness on the basis of his report. The fact that we may have asked questions about his background and his experience dealt with that experience as it relates to his expertise and doesn't relate to what he was going to testify about in this case.

And I'm advised he wasn't deposed as a fact witness.

THE COURT: Okay. Mr. Miracle, I want this transcribed as quickly as possible.

Where is the report?

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MR. SCROGGIN: I have his report with me.

THE COURT: Is it an exhibit?

MR. SCROGGIN: It is an exhibit. Yes, sir, it is. And I would move it into evidence.

THE COURT: What exhibit is it?

MR. SCROGGIN: Mr. Armstrong's report is Florida Cities Exhibit Number 91.

THE COURT: Okay. Well, we're going to take a recess for a little while. I don't know how long it's going to take for the Court to attempt to parse through this and to determine this issue.

We'll be in recess.

(A recess was taken.)

THE COURT: All right. The witness has been proffered in five categories as an expert, and the Court is of the view that he should be allowed to testify as an expert in the areas which are numbered three, four and five a few moments ago before I recessed.

The third area was the sampling and analysis of surface waters and the analysis of water quality data, and the fourth area was computer modeling of water quality impacts on surface waters in Florida; and fifth, comparisons of water quality data and water quality modeling to the water quality standards of Florida.

It appears to the Court that there has not been a

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sufficient predicate laid procedurally to permit the Defendant to testify regarding the first two areas on which he has been proffered; that is, the technical development of waste load allocations and their use in Florida and, second, the use of waste load allocations in the development of effluent limitations in the state permits in Florida.

Proceed.

MR. SCROGGIN: Thank you, Your Honor.

BY MR. SCROGGIN:

Q. Mr. Armstrong, one of the facilities that is at issue in this case is the Waterway Estates facility, and I will ask you, sir, when you were contacted to undertake work as an expert witness on behalf of Florida Cities with respect to that facility.

A. I was contacted by you, I believe, in late 1992 or probably early 1993 at that time primarily to assist you with gathering information related to this case, if I recall correctly.

Q. And what particular information were you asked to collect?

A. I was asked to gather information primarily from the files of the Department of Environmental Regulation, files related to water quality studies that had been done of the Caloosahatchee River and also files relating to permitting actions that had been taken by the Department or the

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Department was involved with that were being undertaken by the Environmental Protection Agency.

Q. And were you later asked to act as an expert witness in this case?

A. Yes, I was.

Q. And did you prepare a report as part of your work as an expert witness?

A. Yes, I did.

Q. I would ask that the witness be shown Florida Cities' Trial Exhibit Number 91, and I will ask you, Mr. Armstrong, is this the expert report that you prepared for this litigation?

A. Yes, it is.

MR. SCROGGIN: Your Honor, I would ask to move Florida Cities' Exhibit 91 into evidence.

THE COURT: It will be received.

BY MR. SCROGGIN:

Q. Mr. Armstrong, can you tell me what period of time your expert report covers?

A. I looked at all the historical data that I could find on the lower Caloosahatchee River. I focused on the period from 1982 to 1984 primarily because that's where the vast majority of -- the time period during which the vast majority of the water quality information had been collected.

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Q. Were any restrictions placed upon what data you were to review for purposes of your report?
A. No.
Q. Specifically, what instructions were you given with respect to analyzing all available data for the lower Caloosahatchee River?
A. I was asked to attempt to locate any data that I felt would help me evaluate the water quality of the Caloosahatchee River without restriction, basically.
Q. Can you tell me what instructions, if any, you were given with respect to analyzing data regarding impacts of the discharges of the Waterway Estates facility?
A. Yes. Again, I was asked to attempt to locate any data that I could that would help me reach conclusions regarding the impact of the Waterway Estates discharge, essentially again without restrictions on the type or nature of the data that I could pursue.
Q. Were you given any instructions at all regarding what conclusions you should reach in your analysis?
A. No, sir.
Q. Can you tell us specifically what data sources you reviewed in preparation of your report?
A. I researched the files primarily of the Department of Environmental Regulation. That agency has been designated as the repository for water quality data in the State of

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Florida.

And I looked in a number of their files and talked to some individuals there focusing in on three major sources of data: One was the water quality data that is contained in what is called the Storage and Retrieval System. STORET, S-T-O-R-E-T, is the acronym.

The STORET system is the computerized data base that is operated by the Department into which, by far, the majority of their data is stored or placed.

I also focused on the intensive survey documents that had been prepared by the Department documenting water quality data that had been collected by the Department during intensive surveys of the lower Caloosahatchee River both in 1980 and again in 1987, I believe.

Q. Can you describe the 1980 intensive survey to which you referred?
A. Yes, I can. The survey was designed to evaluate water quality data in roughly a 12-to-15-mile stretch, I believe, of the lower Caloosahatchee River. It was conducted by Department staff members, including myself.
Q. What was your own participation in that study?
A. At the time of the study, I was the administrator of the water quality analysis section of the department. That section was responsible for designing and actually implementing the water quality study and then analyzing the

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data.

Upon completion of that study -- the project manager for the study was a Mr. Bruce DeGrove who reported directly to me in my capacity as administrator of the section. I was involved in discussions with Mr. DeGrove relating to the design of the study, how the study was to be executed, and then I actually participated in the fieldwork that was necessary to collect the water quality information.

Q. Did you use the information from the intensive survey in 1980 for any modeling purposes?
A. Yes, we did.
Q. Can you tell me what those purposes were?
A. Yes. We had been asked by our district office in Fort Myers, which at the time was called the Southeast Florida District Office -- excuse me -- South Florida District Office -- the district had asked us to undertake the study in question and supply the results to them in support of both permitting decisions that they were going to be facing in the coming years and also --

THE COURT: Just a moment.

Yes, sir?

MR. QUINN: Your Honor, I'm going to object at this time. It appears that this testimony, although couched as fact, is going into the area of waste load allocations and the use of waste load allocations and the development of

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waste load allocations. For those reasons, I would object.

MR. SCROGGIN: May I be heard, Your Honor?

This witness has been proffered and accepted by the Court as an expert in computer modeling of water quality impacts on surface waters of Florida, which is category number four. It may be helpful to ask the witness the question. The waste load allocation is, itself, one of the products of such computer modeling and is a subcategory of computer modeling. I do, indeed, anticipate asking --

THE COURT: You can be heard in just a minute when he gets through.

MR. SCROGGIN: I would, indeed, Your Honor, expect to ask him some questions of the particular kind of computer modeling in which he has been proffered and accepted as an expert. One kind of computer modeling is waste load allocation.

I could perhaps ask him those questions if there's any question about that technical characterization of a waste load --

THE COURT: Well, let me hear from Mr. Quinn first.

MR. QUINN: I apologize when I stood up earlier, Your Honor. I thought Mr. Scroggin was asking a question about waste load allocation. I was just going to object. I have nothing further on this point, sir.

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THE COURT: Well, ask your questions which you say will support your legal argument here.
BY MR. SCROGGIN:
Q. I ask you, sir, if the information from the intensive survey was used for any modeling purposes?
A. Yes, it was.
Q. And was one of those modeling purposes the development of a model to be used in the development of waste load allocations for the Caloosahatchee River?
MR. QUINN: Objection.
THE COURT: Is this something that he testified to in the deposition?
MR. SCROGGIN: Yes, Your Honor. Virtually his entire deposition was devoted to his personal role in the development of the computer models used in waste load allocations and in the history of the use of those computer models in waste load allocations for the lower Caloosahatchee River.
The deposition lasted approximately three-and-a-half hours. Of that period of time, I would estimate no more than 15 minutes deviated from that single topic.
THE COURT: Mr. Quinn?
MR. QUINN: Yes, Your Honor.
We're getting into his fact testimony; that is,

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what he was a percipient witness on, as opposed to what his expert report relies upon.
To the extent that the two are inextricably linked, it is difficult for us to make objections on this basis, but I would object that all of this information is of a fact nature, and he should not be allowed to testify in his expert capacity to what he did as a fact witness unless it's within his expert report, sir. And this information that is seeking to be elicited is not in his expert report, sir.
THE COURT: Okay. Well, I'm going to overrule your objection, Mr. Quinn.
MR. QUINN: May I add one more point, sir?
THE COURT: Yes, sir.
MR. QUINN: As an additional note, Mr. Armstrong was not disclosed to the United States as a fact witness until after the conclusion of discovery.
In fact, in response to interrogatories filed after the close of discovery, that was the first time that in writing he was notified -- we were notified of his fact witness position. At his deposition was, in fact, the first time we knew that he had any role as a fact witness in any development of waste load allocations.
THE COURT: Mr. Scroggin, you want to be heard on that point?

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MR. SCROGGIN: Yes, I would, Your Honor.
I would ask that my colleague Mr. Alex Bullock speak to this since he was the person personally involved in these interactions.
I will say that it was certainly no secret that Mr. Armstrong was, indeed, the supervisor of the entire waste load allocation process. We assumed that was the reason the Department of Justice devoted virtually the entire deposition to that, much somewhat to our surprise.
We did disclose Mr. Armstrong's dual role as an expert and a fact witness in Florida Cities' amended revised responses to Plaintiff's first and second interrogatories.
A very short paragraph simply reads:
Mr. Armstrong is also listed as an expert witness. Additionally, he was employed by the Florida Department of Environmental Regulation from the early '70's to the late '80's. Mr. Armstrong is a co-author of the 1981 planning document which Connie Kagey used improperly in rejecting Florida Cities' 1986 renewal application for Waterway Estates. Mr. Armstrong has also participated in at least two extensive surveys of the Caloosahatchee River and has personal knowledge of the river in the vicinity of Waterway Estates. That ends our disclosure of his role as an expert in the three areas the Court has designated, also his factual history of involvement which intertwines that

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expertise.
THE COURT: Mr. Bullock?
MR. BULLOCK: Your Honor, Mr. Scroggin has covered most of the material that I was going to speak other than the fact that Your Honor had provided a scheduling order I believe in January of '95 which listed dates in which witness lists would be projected -- I mean when witnesses would have to be served on the opposing sides.
It's my understanding that the Government filed interrogatories seeking who -- exactly who our witnesses would be sometime in May of '95. We objected to having to provide the witnesses at that time.
The Government filed a motion to compel. Judge Swartz did not rule on that motion to compel until November 3rd, shortly before the close of discovery.
I might also point out that the Government did not provide a witness list themselves until the close of discovery as well.
THE COURT: Okay.
MR. BULLOCK: If Your Honor will remember, the case was originally set for trial in October of '95 and then extended until January and now March.
THE COURT: Mr. Quinn?
MR. QUINN: Yes, Your Honor. Just one point: The document that Mr. Scroggin read from the answers to

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interrogatories, that is the document to which I referred, and that was filed after the close of discovery and after a possibility to take any depositions.

MR. SCROGGIN: May I respond, Your Honor?

THE COURT: No, no. I've heard enough.

Well, all right. Go ahead. It may be that the Eleventh Circuit would perhaps be wondering what I cut off, so go ahead.

MR. SCROGGIN: Yes, Your Honor.

BY MR. SCROGGIN:

Q. Returning to the question I believe I was asking you --

THE COURT: No, no. I thought you had something else regarding argument.

MR. SCROGGIN: No -- oh, I'm sorry.

THE COURT: I misunderstood.

MR. SCROGGIN: Yes, I did, Your Honor, and that was --

THE COURT: Sir?

MR. SCROGGIN: I'm sorry, I mistook what you had said. I apologize. I do have one final point with respect to the current issue --

THE COURT: And that's what I said: Go ahead.

MR. SCROGGIN: -- and that is, Your Honor, that the last point Mr. Quinn made was that they didn't have

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notice before the deposition. I would simply remind the Court, as I did earlier, the entire deposition was consumed with nothing but this single subject.

THE COURT: Okay. Well --

MR. SCROGGIN: Indeed, Your Honor, the document at issue was presented to this witness at his deposition and he was questioned on it at his deposition.

THE COURT: Well, I'm going to overrule the objections that have been made to this line of testimony, and I'll permit you to proceed.

Go ahead.

MR. SCROGGIN: Yes, Your Honor.

BY MR. SCROGGIN:

Q. Mr. Armstrong, I was questioning you about the data gathered from the intensive survey of 1980 in which you participated.

Did you also participate in the analysis of that data that was gathered as well as in the physical sampling of the data?

A. Yes, I did.

Q. And what did that analysis of the data involve?

A. We analyzed the data just visually to get a feel for what we're dealing with, but the primary tool used in the analysis of that data was a computer model.

Q. And was that computer model subsequently used in the

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1981 waste load allocation for the lower Caloosahatchee River?

A. Yes, it was.

Q. I would ask that the witness be shown the Government's Exhibit Number 349, which is the 1981 Caloosahatchee River waste load allocation documentation, Lee County.

MR. SCROGGIN: Your Honor, this was also one of our exhibits; but in the interest of avoiding any duplication of exhibits, I'm using the Government's exhibit which I believe --

THE COURT: It doesn't matter whose exhibit it is. It's admissible, usable for all purposes.

BY MR. SCROGGIN:

Q. Would you identify this document, sir?

A. Yes. It's entitled Caloosahatchee River Waste Load Allocation Documentation, Lee County, Water Quality Technical Series, Volume 2, Number 52.

Q. Can you tell me what role, if any, you had in this particular document, in its development and publication?

A. Yes. I was involved in the discussions with our district office over the need and scope of the study. I was involved with Mr. DeGrove and others in the design of the study, and I was involved in the actual analysis of the data, including development of the computer model that's contained -- or on which this waste load allocation

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documentation is based.

Q. Did Mr. DeGrove, the listed author of this document, work for you?

A. Yes, he did.

Q. Did he report to you?

A. Yes, he did.

Q. Did you personally --

THE COURT: Just a moment.

MR. QUINN: Objection, Your Honor. I believe we're going into fact testimony, and I lodge my objection on that basis.

THE COURT: Overruled.

BY MR. SCROGGIN:

Q. Did you personally supervise the various stages of development of this document?

A. Yes, I did.

Q. And did you approve the final draft before it was published?

A. Yes.

Q. Did you make any changes to intermediate drafts that may have been developed in -- before the final was published?

A. Yes.

Q. Can you tell me for what purpose this waste load allocation was developed?

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MR. QUINN: Objection; calls for a legal conclusion, I believe, Your Honor.
THE COURT: Overruled.
THE WITNESS: Yes. The district office -- as I mentioned, the South Florida District Office had asked us to undertake this study for their possible use in the future in making permitting decisions and also as a reanalysis of waste load allocations that would be needed for the development of what's called a 201 facilities plan for this part of the state.
BY MR. SCROGGIN:
Q. What is a 201 facilities plan?
A. The 201 process is a process that was set up to allow counties and cities within the State of Florida to seek federal funding to assist them with the design and construction of municipal wastewater treatment plants for their particular communities.
Part of that process involved the need to develop waste load allocations so that the cities and counties could know what type of facilities they would need to build in the future.
Q. Do you know what happened to this waste load allocation after it was published? And by that I mean, do you know for what purposes it was, in fact, used?
A. Not specifically, no.

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Q. Was it your understanding in developing this document that this document would prescribe requirements against -- to be enforced against dischargers along the Caloosahatchee River?
MR. QUINN: Objection; leading, Your Honor.
THE COURT: Yes, it is leading. Sustained.
BY MR. SCROGGIN:
Q. What was your understanding regarding the uses to which this waste load allocation could be used, if any, for purposes of controlling discharges to the Caloosahatchee?
A. We supplied this document and other similar documents to our district offices around the state for their use as they saw fit. It was not a requirement on our district offices; they could use this in conjunction with any other information that they had available in making their decisions for permitting purposes.
Q. Who makes the decisions for permitting purposes, in your experience, in Florida?
A. The permits for facilities such as these were issued by our district managers in the five different district offices around the state.
Q. Was it your understanding that this document would be a requirement for the district --
THE COURT: Well, don't lead the witness.
BY MR. SCROGGIN:

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Q. What understanding, if any, did you have regarding how this document might be used in the development of permits for dischargers to the Caloosahatchee River?
MR. QUINN: Objection; calls for speculation.
THE COURT: Overruled. You can answer the question.
THE WITNESS: These documents were provided as guidance for the district managers and their staff to make regulatory decisions. They were not requirements.
BY MR. SCROGGIN:
Q. What is your understanding of the difference between guidance and a requirement for the district managers?
A. Well, in my opinion, a requirement would be something that the district managers would turn around and place on the dischargers who were seeking permits; and as such, then those requirements would become binding through the permitting process.
Q. Do you know whether or not this waste load allocation was ever submitted to EPA?
A. I believe it was.
Q. Do you know if there was a response from EPA to this waste load allocation?
A. Not an official response, to my recollection.
Q. Do you know whether or not the development of this waste load allocation was premised upon concern about

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current or imminent water quality violations in the lower Caloosahatchee River?
THE COURT: Do you know? Yes or no.
THE WITNESS: Yes.
BY MR. SCROGGIN:
Q. And was it premised upon concerns about then current or imminent water quality violations in the lower Caloosahatchee River?
MR. QUINN: Objection; leading.
THE COURT: Overruled.
THE WITNESS: The concern, I think, that was expressed to us was that the district office would like assistance in evaluating the health of the river and any trends that might need to be addressed through their permitting process.
To my knowledge, there were not any significant current problems that they felt needed to be addressed.
BY MR. SCROGGIN:
Q. If there were no current problems that they felt needed to be addressed -- by that, sir, do you mean that there might have been future problems that might need to be addressed?
MR. QUINN: Objection, Your Honor. This is a hypothetical question posed to this witness in his fact capacity, and it's improper. Objection.

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THE COURT: Well, I think the question is vulnerable. I'm not sure on that basis, but I'll overrule the objection.
THE WITNESS: Could you repeat the question, please?
THE COURT: Read the question back.
MR. SCROGGIN: I'll rephrase the question, Your Honor.
THE COURT: All right.
BY MR. SCROGGIN:
Q. What does the 1981 waste load allocation, the Government's Exhibit 349, predict, if anything, about future problems in the lower Caloosahatchee River?
A. The study revealed that there were -- there should be concerns over future water quality, and there may be some particular things that would need to be done to protect water quality under future scenarios of design and treatment and discharge.
Q. I would direct your attention, sir, to Page 17 of Government's Exhibit 349 and in particular to the section 3.6 entitled Waste Load Allocation, the two paragraphs that are contained there.
THE COURT: Just a moment.
(Pause.)
THE COURT: Go ahead.

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BY MR. SCROGGIN:
Q. And I would ask you, sir, what does this document say regarding waste load allocations for the Waterway Estates facility?
A. It says in the first paragraph, The allocations for the present design flows and present locations are for Waterway Estates no discharge.
Q. Was it your understanding that that statement required Waterway Estates to cease discharge?
A. No.
Q. And why not?
A. During the study, it was determined that there may need to be some changes made to both the treatment and the location of the outfall for Waterway Estates as well as other facilities. Based on information we had received from our district office, it was felt that Waterway Estates would likely tie in to another facility, as opposed to undergoing those upgrades and possibly relocating the outfall. And the facility was dropped from future -- dropped from the study basically at that point in time. It was not considered further in completing the study.
Q. I would direct your attention to Page 12 of the same document, the last paragraph on the page, the second sentence, beginning, The Waterway Estates treatment plant. Would you mind reading that, sir?
A. The Waterway Estates treatment pl from further modeling due to the assum Coral facility and the assumed impracti to AWT and relocating the outfall for sa
Q. Is that statement consistent with the have just given for why the no discharge allocation did not require the Waterway cease discharge?
A. Yes, it is.
Q. If this 1981 document is not containing requirements, for what purposes has it been used, if any?
MR. QUINN: Objection. It's a leading question, Your Honor.
THE COURT: Overruled.
THE WITNESS: I'm not sure if I know all the purposes for which it's been used. It was offered to our district offices as a planning and guidance document for whatever their needs might be or might have been.
BY MR. SCROGGIN:
Q. In supervising such projects, did you ever have an occasion to have discussions with your staff about when, if ever, dischargers could challenge such waste load allocations developed under your supervision?
A. Yes.
Q. What were those discussions?

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A. There were concerns on the part of our legal staff within the department and concerns expressed by my supervisor and my staff about the nature of the waste load allocations.
MR. QUINN: Objection; hearsay, Your Honor; move to strike that response.
THE COURT: Sustained.
MR. SCROGGIN: May I rephrase the question, Your Honor?
THE COURT: You can try.
BY MR. SCROGGIN:
Q. Did you develop any understanding regarding when, if ever, dischargers could challenge waste load allocations during your tenure at the Florida Department of Environmental Protection?
A. Yes, I did.
Q. And can you tell us what that understanding was?
A. I took the position as the administrator of the section and conveyed that position to our staff and our district offices that the waste load allocations were guidance documents; and since they were not binding and they were not requirements, they were not subject to challenge through the legal process within our agency.
If the documents were used in the permitting process and then as such became binding, the permits themselves, or

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proposed permits, were certainly subject to challenge.
Q. And who, if anyone, would incorporate waste load allocation requirements into a permit?
A. Within the agency, only our district offices.
Q. In such an instance, would a provision of a waste load allocation then become required and binding as opposed to merely planning and guidance?
A. Yes.
Q. Are there other factors that a district engineer would consider other than existing waste load allocations in determining state permit limits?
A. Yes, there are.
Q. What are those other factors?
A. The district offices, in deciding -- in making their permitting decisions, took the information that we had developed into play -- or under review for making their decisions, but they also looked at any existing water quality data. They frequently looked at the incidence of complaints, if any had been filed with the agency, regarding a particular discharger; history of other problems, such as fish kills or odor or color complaints, algae blooms; any other information that they might have on the water body and the discharger in question that might give them an indication of whether or not there were any problems out there that need to be addressed in the permitting process.

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Q. Can you point to anything in this document, sir, that requires Waterway Estates to cease discharging into the canal to which it was discharging at the time this study was conducted?
A. No, sir.
Q. Can you point to anything in this study that requires the Waterway Estates facility to move its outfall from the canal to the six-foot contour line?
A. No.
Q. Can you point to anything in this 1981 waste load allocation study that requires the Waterway Estates facility to upgrade its treatment facility from better than secondary to the still cleaner advanced wastewater treatment?
A. No.
Q. In preparing your expert report, did you reach any findings and conclusions regarding the health and trends in the health of the lower Caloosahatchee River?
A. Yes, I did.
Q. Can you tell me what those conclusions were?
A. Based on primarily the 12 years of data that I described earlier and the intensive surveys and other documents that I reviewed, it is my opinion that the overall health of the Caloosahatchee River I considered to be good.
Furthermore, with respect to trends, I could not determine that there were any trends to indicate that the

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water quality was either improving or declining in the river. It seemed to be pretty much steady throughout the study period.
Q. Did you reach any conclusions regarding whether or not the Waterway Estates facility had any measurable impact on the health of the Caloosahatchee River?
A. Yes, I did.
Q. And what was that conclusion?
A. I could not locate any data that would indicate that there was an impact -- a measurable impact or discernible impact from the Waterway Estates discharge.
Q. Did you reach any conclusion regarding whether or not moving Waterway Estates' outfall from the canal to the six-foot contour line had any beneficial impact on the health of the Caloosahatchee River?
A. Again, I found no data that would indicate that there was any difference in the water quality after moving the outfall. I simply could not find it.
Q. And what is the health of the Caloosahatchee River before and after the events that are at issue in this litigation; namely, the upgrade to AWT at Waterway Estates and moving the outfall of the six-foot contour line?
MR. QUINN: Objection; compound question, Your Honor.
THE COURT: Do you understand the question?

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THE WITNESS: I thought I did.
MR. SCROGGIN: I will rephrase the question if it would be more helpful.
BY MR. SCROGGIN:
Q. What is the health of the Caloosahatchee River which you have testified is unchanged during the period of time of your study from 1982 to 1994?
A. I would consider it good.
Q. And can you tell me what "good" means in terms of apprising the health of a river?
A. Well, I looked at various water quality parameters that I consider indicative of the health of a water body. In the period of record, there were occasions when for some of those parameters values would rise and fall. This is a very dynamic system, as most water bodies in Florida are, so water quality does fluctuate over time.
But in general, those parameters fell within what I would consider to be generally accepted ranges for water bodies such as this. It would indicate basically good water quality, good health.
Q. Can you tell me if you reached any conclusion regarding problems or potential problems with respect to nutrient loadings of the lower Caloosahatchee River during the period of your study?
A. With respect to nutrient loadings, both the nutrient

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concentrations, that is, nitrogen and phosphorus concentrations, and as well the clorophyll concentrations, which are sort of a measure of the productivity of the river, fell generally within good or acceptable ranges. Again, there were sporadic occasions where the values would fluctuate; but overall, I would consider those generally good.

Q. I'll show you, sir, behind you on the easel the enlarged chart that has been previously marked as Florida Cities' Exhibit 92 entitled Nitrogen Discharged to River. This is a table from the expert witness that we -- has previously testified in this case, Mr. Douglas Smith.

I will ask you, sir, do you recognize this table? Have you seen it before?

A. Yes, I have.

Q. And can you tell us the relationship, if any, of this table to the answer you have just given regarding nutrient loadings for the lower Caloosahatchee River during the time of your study?

THE COURT: Just a moment.

MR. QUINN: Your Honor, this chart was not within the expert report of this witness. It was in the expert report of Mr. Smith and at the time -- therefore, at the time he wrote his report was locked into his testimony. He couldn't have --

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MR. SCROGGIN: It's in evidence, Your Honor.

Might I ask him if it's consistent with the conclusions of his report?

THE COURT: I'll sustain the objection.

THE WITNESS: Would you mind repeating the question?

THE COURT: No, you don't have to answer it.

THE WITNESS: Oh, I'm sorry, Your Honor. I misunderstood.

BY MR. SCROGGIN:

Q. Can you tell me what data, if any, you found regarding the health of the canal to which Waterway Estates was discharging until it moved its outfall to the current *six-foot contour line*?

A. I did not locate any data from the canal system that would indicate that there were any problems. No data existed in the canal.

Q. Based upon your experience in planning, overseeing and taking such data in the past, do you have any opinion as to why certain areas are chosen for data collection and other areas are omitted from data collection?

A. Well, indeed, in this study, we discussed the scope of our study with our district office and within our staff in Tallahassee. It was felt that we would focus on the open water body of the Caloosahatchee River and not focus as much

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on the tributaries with respect to dischargers, such as Waterway Estates. The facility and the discharger were located very close to the river system, and we did not undertake a study of the specific area in the vicinity of the outfall. It just wasn't decided that it was something that we needed to, frankly, worry about in this study.

Q. What criteria would you use -- did you use in determining whether or not to sample the waters of the canal as opposed to the waters of the river?

A. Well, there really were two things that we were taking into consideration: One, of course, as I have already mentioned, was the distance from the facility and the discharge point to the river; that it was such a short distance that given the nature of the study and the size of the study area, we didn't feel that we should focus on such a small distance.

But more importantly, I think, if our district office had had any history of complaints or problems or violations in that canal, we would have included the study and -- that area in the study area. We had, you know, the resources and the expertise to look at the canal; it just simply wasn't an issue with our district office or with us at the time.

Q. Can you tell me what events might have triggered your sampling of the canal for this particular intensive survey?

MR. QUINN: Objection to speculation, conjecture.

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THE COURT: Sustained.

BY MR. SCROGGIN:

Q. What was the closest sampling station in the data you reviewed to the Waterway Estates facility?

A. If I recall, I believe the closest station that I could locate was in, I believe it was, a 1987 intensive survey and it was over a half a mile away.

Q. Would such a station be able to measure the *impact of* the Waterway Estates discharge?

A. Not in my opinion.

Q. And what's the basis of that opinion?

A. Well, the Caloosahatchee River is a very, very large estuary in this area. The Waterway Estates discharge was a relatively very, very small discharge.

Given the distance and travel time out to that station, I don't believe there would be any measurable impact discernible from the data that I could find.

Q. Did your study look at the risk of environmental harm caused by the Waterway Estates discharge into the Caloosahatchee River or into the canal?

A. Not really; only in a sense that we didn't --

THE COURT: Just a moment.

MR. QUINN: Objection; move to strike everything after "not really."

THE COURT: Sustained. It will be stricken.

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BY MR. SCROGGIN:
Q. Mr. Armstrong, have you reviewed the expert reports submitted by Mr. Mark Klingenstein in this litigation?
MR. QUINN: Objection. This goes beyond the scope of the items as set forth in the report.
MR. SCROGGIN: Your Honor, may we address that, please?
THE COURT: Yes.
BY MR. SCROGGIN:
Q. I will ask you, sir, did you hear his --
THE COURT: Wait a minute. Wait a minute. Can you address that? I thought you wanted to be heard.
MR. SCROGGIN: My understanding, Your Honor, was that the limitation on discussions of expert reports of other -- by each side was limited only to Mr. Smith and did not apply to any of the other experts.
THE COURT: Well, you assumed wrong.
MR. SCROGGIN: Yes, Your Honor.
THE COURT: Sustained.
MR. SCROGGIN: I would like to ask, Your Honor, several questions regarding what he heard in Mr. Klingenstein's testimony, if I might.
MR. QUINN: I'll object to that line of questioning, Your Honor. It's irrelevant. He's here as an expert in certain areas; and if it's not in his report, he

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can't testify to it, so why are we going to ask him what he heard here?
MR. SCROGGIN: I will limit my questions, Your Honor, to those areas in which he has been offered and accepted by the Court as an expert.
MR. QUINN: I will object, Your Honor, on the basis that those opinions will not be within his report.
MR. SCROGGIN: Can I respond, Your Honor?
THE COURT: Yes, sir.
MR. SCROGGIN: They are within the areas of expertise that he has been accepted by -- offered, proffered and accepted by this Court; and they are questions relating to and underlying the conclusions he reached in his own expert report.
THE COURT: Well, I guess we're getting to an issue as to whether an expert should be permitted to sit in the courtroom and listen to the testimony of another expert and then engage in a critique of the other expert's testimony, and I don't believe that's permitted.
Now, if you want to challenge that assumption --
MR. SCROGGIN: No, Your Honor.
THE COURT: -- I'd be glad to hear from you on that.
I'm not sure I'd be glad, but I would be willing to hear you on that.

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MR. SCROGGIN: No, I will not challenge that, Your Honor.
THE COURT: All right.
MR. SCROGGIN: I have no further direct questions of this witness.
THE COURT: Okay. We're going to recess for lunch until 1:35.
(The luncheon recess was taken.)

THE COURT: All right Mr. Quinn.

MR. QUINN: Yes, Your Honor. I don't believe Avatar Holdings has any questions.

MR. HIRD: That's correct.

THE COURT: Very well.

CROSS EXAMINATION

BY MR. QUINN:

Q. Good afternoon, Mr. Armstrong.

Sir, with regard to exhibit United States 349 the, wasteload allocation documentation, Lee County, isn't it true that the allocations in that document were prepared at the request of Fort Myers District Office due to pending requests for permit renewals?

A. I believe that was part of it.

Q. Okay.

And, sir, also, isn't I true that with regard to that same document, it was decided to re-evaluate prior allocations in this 1991 wasteload allocation document, is that correct?

A. That is correct.

Q. Okay.

Sir, isn't it true that in the 349, the wasteload allocation document, the Waterway Estates Treatment Plant was eliminated from further modeling through an assumption it would tie into the Cape Coral facility?

A. That's correct.

Q. And it was also assumed that it would be impractical to upgrade the plant to AWT and to relocate the outfall, isn't that correct?

A. That's my understanding.

Q. But in fact, the plant did relocate its outfall, isn't that correct?

A. That's correct.

Q. And the plant has upgraded to AWT, isn't that correct?

A. Yes, I believe so.

Q. Sir, the relocation of outfall to the middle of the Caloosahatchee River has improved the dissipation of pollutants, isn't that correct?

A. I would assume so. I don't know if that's been proven, but I would assume it has.

Q. Common sense would indicate there's better dispersion in the middle of the river, isn't that right?

A. That's correct.

Q. Mr. Armstrong, isn't it true there are no water quality data supporting any conclusion about the historical quality of water at the Waterway Estates outfall?

A. At the previous outfall?

Q. At the previous outfall, sir?

A. I could find no data that I could point to that said that there was any impact.

Q. You could find no data at all, isn't that true?

A. I found data, but not in the vicinity of the outfall. The closest data I found were too far away.

Q. My question, sir, is, there is no -- there are no water quality data supporting any conclusion about the impact at the prior Waterway Estates outfall, isn't that true?

A. I agree with that.

Q. Mr. Armstrong, there are no water quality data supporting any conclusion about the historical quality of the water for the canal into which the Waterway Estates Plant used to discharge, are there?

A. That is correct.

Q. And, sir, there are no water quality data supporting, in fact, any conclusion about the historical quality of water for the area at the intersection between the canal and the Caloosahatchee River, isn't that correct?

A. Again, there were no data collected at that point and the closest data I felt were too far away to draw any conclusions.

Q. It is -- there's no data?

A. There is data, there's not data at the receiving points. There's data in the area, but not at that point.

Q. Excuse me, there's no data upon which you can base a conclusion as to either degradation or improvement of the water quality, can you?

A. That's correct.

Q. Sir, the data that you examined in your report had no

bearing whatsoever on localized impacts or effects due to the -- on pollutant discharge, is that correct?

A. I'm not sure if I understand what you mean by "had no bearing on." Could you maybe explain that?

Q. Sure. Let me ask the question, withdraw the question, I'll ask it a different way.

Sir, there was no data that addressed localized impact at either the prior outfall or at the current outfall in the middle of the river, is that correct?

A. That's correct.

Q. And, sir, the data which you did examine, the closest of which you said was about a half mile away, showed no trends in water quality either, improvement or degradation, isn't that correct?

A. That's correct.

MR. QUINN: Thank you.

No more questions, Your Honor.

THE COURT: Any redirect?

MR. SCROGGIN: I have only one question on redirect.

REDIRECT EXAMINATION

BY MR. SCROGGIN:

Q. You were asked regarding data on localized impacts in the cross examination, Mr. Armstrong. Does that mean that there were localized buildups of pollutants in the canal?

A. Not based on the information that I reviewed.

Q. Is there a likelihood there was a localized buildup in the canal if there's no data --

MR. QUINN Objection, calls for speculation. He is beyond the scope of my cross examination.

THE COURT: I'll sustain the objection.

MR. SCOGGIN: I have no further questions.

THE COURT: Thank you, sir. You may step down.

Call your next witness.

MR. BAISE: Your Honor, the Defendant Florida Cities Water Company calls Roger Hartung.

Thereupon,

ROGER HARTUNG,

having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Take a seat in the witness stand, please.

MR. QUINN: Your Honor, if I may be heard.

On Monday last, the Court reserved ruling on the United States' motion to exclude Mr. Hartung's testimony. At this point in time, we'd like to renew the motion.

THE COURT: All right, sir.

MR. QUINN: May I be heard on that?

THE COURT: Yes, sir.

MR. QUINN: If it's okay, I'll speak from here.

THE COURT: I think we can probably hear you.

MR. QUINN: For Mr. Hartung's testimony to be admissible under Rule 702, it must assist the Court to understand the evidence and to determine a fact in issue or to determine a fact in issue you. Mr. Hartung's report does neither. There's no evidence that Mr. Hartung can help this Court to understand the evidence in this case.

Simple and straightforward, Florida Cities has violated the Clean Water Act. It has discharged without permits, it has discharged pollutants in excess of permitted levels and the United States commenced an enforcement action to recover civil penalties.

The Defendants presented their case on mitigation and you may hear testimony that certain discharges didn't really exceed permitted levels or that certain exceedances were unavoidable or there was not any environmental harm or significant environmental impact. Those are the Defendants -- what the Defendants will allege, but Mr. Hartung can't testify to any of these.

In fact, Mr. Hartung's report doesn't even attempt to apply the facts of this case to the EPA policies and procedures that he is going to be preferred as an expert upon.

In addition, his testimony will not assist in the determination of a fact in issue. The only fact in issue is what is an appropriate penalty against Florida Cities in this instance.

My understanding is that Mr. Hartung will not address any issues as to Avetar. In addition, in reaching a decision on the issue of the appropriateness -- appropriate amount of penalty, the Court must apply the statutory factor as set forth in the Clean Water Act. The only factor Mr. Hartung can opine on is the catchall quote, such other factors as justice may require, unlike factors such as economic benefit or environmental harm or seriousness of violation or ability to pay.

That factor goes to the equities of this case which is something that this Court and this Court is totally equipped to decide without resorting to outside experts.

Again, Mr. Hartung doesn't allege that the -- in his report, Mr. Hartung does not allege EPA violated any law or any regulation in bringing this case, nor does he point to any alleged violations of EPA's own policies or any regulations, nor does he attempt to put the facts of this case into any kind of prospective upon which the Court can make a mitigation of penalty.

Your Honor, the United States submits that Mr. Hartung is no more qualified to render an opinion in this case about what the appropriate penalty is than I am, and that for those reasons, we move to exclude Mr. Hartung's -- we renew our motion to exclude Mr. Hartung's expert testimony.

THE COURT: Mr. Hartung, let me -- I may have some

dialogue with the attorneys here. It would probably be best not to have your presence. Would you mind please stepping out into the corridor and we'll be with you in just a moment.

Go ahead, Mr. Baise.

That's all right, you can go ahead.

MR. BAISE: Thank you, Your Honor.

Mr. Hartung has been designated as an expert witness by the Defendant Florida Cities. The Defendant has been on notice for some period of time with regard to Mr. Hartung. In fact, the Defendant even missed the opportunity to take Mr. Hartung's deposition which they were given the opportunity to do, so it strikes me somewhat disingenuous for the Government to indicate they want to strike his testimony when they really do not know exactly what his testimony is going to be, number one.

Number tow, with regard to Mr. Hartung, here's an individual who has worked for the EPA, has supervised over fifty thousand permits in their enforcement in the agency, and can, we believe, assist the trier of fact with regard to such other factors as justice may require, and also, the seriousness criterion, Your Honor, because Mr. Hartung will point out the rules, the policies, the procedures with respect to EPA and how it abused those particular procedures in taking this permit away from Florida Cities. Obviously, list he's not going to testify to the facts with regard to Waterway Estates, but he

will lay out what the agency's policies and procedures were with regard to approving wasteload allocations.

This Court has heard a great deal about a 1981 wasteload allocation. Mr. Hartung helped develop the wasteload allocation program in part at EPA. He will point out to Your Honor that wasteload allocations are very important documents, they must go through a very careful screening and a approval process and if they do not go through that careful approval and screening process, they are unusable with an NPDES permit. That would mean that the wasteload allocation used in this permit was improper, unlawful. Therefore, we think it's very important, very helpful to the Court in terms of looking at the seriousness of the violation here.

The Government is accusing Florida Cities of having over a thousand days of discharges without a permit or discharge into the wrong location at the Waterway Estates into the Caloosahatchee River. Well, if the Government does not come in here with clean hands, Your Honor, whether or not it has made a mistake, and granted, our client did not appeal at the time they should have appealed, the engineers were looking at the situation, not lawyers, but the fact is, the Government has an obligation to abide by the rules, its own policies and procedures.

Mr. Hartung can lay this out because he's been through these experiences, he's worked on national committees,

Your Honor, looked at issues such as this and I think can be very helpful. The testimony is, I believe, very helpful in putting the six criteria into context for this Court, one, seriousness, two, such other our factors as justice may require. Thank you.

THE COURT: Mr. Quinn.

MR. QUINN: Yes, Your Honor. Counsel said we don't know what Mr. Hartung is going to testify to and that is patently wrong. Federal Rule of Civil Procedure 26 regarding the disclosure of experts states as follows: The report shall contain a complete statement of all opinions to be expressed and the bases and reasons therefor. And, Your Honor, there are no opinions as to any application of what EPA generally does in Region VI and what actually happened here, therefore, none of those opinions are helpful.

Second, the appropriate manner for these issues to be raised is through argument of counsel as is evident from the arguments here, not through the testimony of a purported expert witness on what EPA could have done without any application to the facts in evidence.

Your Honor, the Court is entirely capable of applying argument to the facts of this case and we don't need the witness here to do it, sir.

MR. BAISE: Your Honor, the Defendant finds it most interesting that EPA or the Defendant Department of Justice and

EPA have not brought forward their witnesses that they could have brought forward to assess to, one, what the policies and procedures of the agency were, even those individuals who were involved in the enforcement action with respect to the three facilities here, so, we felt it incumbent upon to us bring to the Court's attention what EPA's policies and procedures are with regard to how it handles NPDES Permits, how it handles wasteload allocations in those permits, and then, enforcements that can be taken upon those permits.

What Mr. Hartung has done in his report and what I was referring to a moment ago, Counsel, is that the Government had not taken Mr. Hartung's deposition, clearly it has the report. We prepared the report as required by the Court.

THE COURT: I'm going to cut this short and I'm going to overrule the objection. I'm going to permit the testimony. If the Court, as we get into this further and/or even subsequent to his testimony, determines that it is not probative of any of the issues in the case or is otherwise inappropriate for the Court to consider, we don't have a jury and I can recede from that if I find it necessary. I'm a little bit concerned about it. We're not here -- well, enough said. All right.

Ask Mr. Hartung to step back in, please.

THE CLERK: State your name and spell your last for the record.

THE WITNESS: Roger C. Hartung, H-A-R-T-U-N-G.

DIRECT EXAMINATION

BY MR. BAISE:

Q. Good afternoon, Mr. Hartung.

A. Afternoon.

Q. What is your occupation?

A. I'm an environmental consultant.

Q. How long have you worked in the environmental field, Mr. Hartung?

A. About twenty-four years.

Q. What professional degrees do you hold?

A. I have a degree, a Master of Science Degree from the University of Wisconsin in water resource management, and a Bachelor of Science Degree in civil engineering from University of Texas.

Q. When were you first employed by EPA?

A. December, 1971.

Q. So, you worked for EPA approximately twenty-five years?

A. I worked for them for twenty-three years until my retirement on September 30, 1994.

THE COURT: When were you at the University of Texas?

THE WITNESS: University of Texas, I graduated in 1961, January, 1961.

THE COURT: Thank you.

BY MR. BAISE:

Q. Do you have any professional degrees beyond what you received from the University of Texas, Mr. Hartung?
A. No, sir. Well, just the Master of Science at the University of Wisconsin that I mentioned.
Q. Where were you located when you were working for the U. S. Environmental Protection Agency, sir?
A. My career with EPA was spent in the Dallas Regional Office, Region VI?
Q. Did there come a time when you became aware of litigation between the United States and Florida Cities?
A. Yes, I think it was in September of last year.
Q. Were you asked to prepare a report regarding EPA's policies and procedures relating to the Clean Water Act relating to this litigation, Mr. Hartung?
A. Yes, I was.
Q. Did you prepare such a report?
A. Yes, I did.
Q. Did you write the report, Mr. Hartung?
A. Yes.
Q. Did you have any assistance in writing the report, Mr. Hartung?
A. No, I did not.
MR. BAISE: Your Honor, I would like to have identified as Florida Cities' Trial Exhibit Number 1, Mr. Hartung's report entitled, report on procedures used in the

implementation of the national pollutants discharge elimination systems authorized by the Federal Clean Water Act dated November 10, 1995, marked as Defendant's Number 1 and I ask this be moved into evidence, Your Honor.
MR. QUINN: Your Honor, I object on the same basis that I stated earlier.
THE COURT: All right. It will be overruled, it will be received.
BY MR. BAISE:
Q. Mr. Hartung, on page 1, you note that you were employed by Roy F. Weston, Incorporated. Is that still correct?
A. No, I'm no longer employed by them.
Q. Why not?
A. I was a manager there at the Fort Worth office. They no longer have a Fort Worth office. I'm self employed now.
Q. Mr. Hartung, would you briefly describe the position you held at EPA over your tenure with that agency?
A. Yes. From 1971 to about 1974, I was a staff environmental engineer in the water quality planning branch in the water division in EPA Region VI.
In 1974, I was promoted to section chief in that branch. In 1977, I was promoted to the position of branch chief of that same water quality planning branch. I held that position until November of 1981, when I became the chief of the NPDES enforcement branch in the water division. I held that position

for thirteen years until my retirement in 1994. And also, I was on detail at one time, in '87 and '88, a few months in the office of the water enforcement permits at NPDES national office in Washington, DC. I also held a position I think for three or four months at a time, two different occasions, as the deputy water division director of EPA, EPA Region VI.
Q. What experiences have you had in working with EPA Region IV, Mr. Hartung?
A. Uh, I have had experience and worked with them on occasions related to issues that involved both the regions, both in meetings and also conference calls, dealing with water quality issues, enforcement matters, and also I would meet with my counterparts in Region IV twice a year, what was called branch national branch chief meetings were headquarters of EPA and all the regions would attend for about a three day session.
I would meet with them including the other regions, about six days a year, and on occasion, I had the occasion to visit or I was invited over on one occasion to put on a seminar when I was in EPA headquarters down in Destin, Florida. I think it was Destin, and had visited the EPA Region IV offices in Atlanta on two occasions to exchange information about the NPDES program.
Q. What experience have you had serving on the national EPA committees, Mr. Hartung?
A. Quite a bit. I served on national committees that came

up which essentially produced and developed water quality, wrote guidelines for wastewater allocations, water management quality, present guidelines and regulations.
I was also involved in a committee that produced the national oversight NPDES program, oversight guidance. I was on a committee that produced the national enforcement management system that is used by all the regions and States for the NPDES program.
I was co-chair of a national committee once to expedite the processing of civil judicial cases. That was with EPA and Department of Justice.
I was chairman of a national committee dealing with storm water, industrial storm water guidelines. I was on a national committee for several years that worked on the definitions of significant non-compliance that would define what a significant violation of a NPDES permit was.
I was on a national committee, I was chairman of a national committee to come up with national sanitary overflow policies for the agency. I was on a committee on municipal water push prevention that came up with a national policy on that.
I was on a committee to come up with guidance and guidelines for implementing the national municipal policy which was a policy directed at getting most major cities in compliance by July 1st of '88.

And I was on the standing committee, I was chair of that committee for sometime, on the Agency's permit compliance system, computerized data system to track permit compliance and contains all the information about NPDES permits for the United States. I was on some others, but I can't think of them right now.

Q. And has EPA recognized any of your efforts in working in the environmental field over the last twenty some odd years?

A. Yes, I think they did.

Q. How have they recognized your efforts?

A. I received numerous awards including some five bronze medals. I think three of them were at the regional level and two at the national level, for such things as working on the committees that I mentioned.

Q. What are bronze medals so the Court will understand the hierarchy, Mr. Hartung?

A. It's the -- I think it's the highest medal that can be awarded an EPA employee at the regional level. And it's for some accomplishment. I was on a committee which I failed to mention a minute ago that worked on the guidelines for the administrative penalty policy back in '87. I got a bronze medal for that.

I also was working on one committee for municipal water push prevention, and I can't remember the other particular ones, but I also received a regional counsel award in about '88

or '89 and received several, I can't remember how many, what was called regional administrator awards.

Q. Mr. Hartung, in your report, you indicate and you already stated that in '77 you became chief of the water quality management branch and later in '81, the head of the newly created enforcement branch and Region VI was the enforcement branch responsible for overseeing NPDES permit programs?

A. Yes, we were responsible for overseeing the enforcement arena of the permit program.

Q. How many permits were within your oversight, Mr. Hartung?

A. Fifty thousand at the time of my retirement. That includes some Gulf of Mexico oil and gas platforms and some general permits for confined animal feeding operations as well as industrial storm water permits as well as normal discharge permits for industries and cities.

Q. Mr. Hartung, there's been a good deal of testimony in this case about water quality standards. What is your experience in working with the Clean Water Act water quality standards?

A. My initial job when I first joined the agency as a staff environmental engineer as well as section chief and branch chief, I worked for about ten years in the area of water quality standards. My job was to assist the State in implementing the many mandates that came out of the Clean Water Act of 1972 and establishment of the interstate water quality

standards was one of those mandates.

THE COURT: Could I stop you just a second, please? I've got a matter I've got to take up, but I can do it at sidebar independent of this case. Mr. Kunz.

MR. BAISE: You wish us to be excused?

THE COURT: No. Ms., Savage step up to sidebar. I don't need if Reporter.

(Brief pause.)

All right.

Pardon me. Go ahead, Mr. Baise.

BY MR. BAISE:

Q. Mr. Hartung, I'm not sure you were finished with your answer. What is your experience in working with the Clean Water act of water quality standards?

A. I think I was. I worked with the State for ten years and from about '72 through '81 in establishing and revising, upgrading those water quality standards.

Q. What is your experience in working with the Clean Water Act's NPDES permit program, Mr. Hartung?

A. As I mentioned, for the first ten years, '72 through about '81, my experience was in working with the State agency to establish effluent limitations that go into those permits and beginning in '81 through '84, my jobs switched to interpreting those permits and enforcement of them.

Q. What is your experience in working on water quality based

effluent limitations, Mr. Hartung?

A. Almost all of my experience in working with the State is to establish permit limits. We're dealing with water quality based effluent limits, those that had to be more stringent than secondary treatment for cities. Most of my experience dealing with municipals of domestic waste discharges?

Q. What is your experience in working with wasteload allocations in NPDES permits, Mr. Hartung?

A. I wrote the first set of guidelines to the State agencies back in the early '70's to perform those wastewater allocations. This included laying out scopes of services, approving contracts and subcontracts, also approving the final product and also furnishing that information in the permit required for inclusion in the NPDES permits in.

Q. What is your experience in working with the wasteload allocation approval process?

A. Essentially, it was my job for the first ten years of my career with EPA to make sure that these wastewater allocations were done, that they were submitted by the Governors of each of the five States in Region VI to our original administrator for our approval.

I recommended, concurred and reviewed all of these wastewater allocations and recommended approval by the regional administrator, and then it was my job also to make sure they were wastewater allocations which is essentially a water

quality base set of effluent limits were available to be written into the next round of NPDES permits.

Q. What is your experience in working with States in the administration of the NPDES permit program, Mr. Hartung?

A. Quite extensive. None of our States in Region VI until about the late '80's were ever approved or authorized to administer the NPDES program, mostly because of legal reasons. So when I was involved with the program, in those States, it was in a direct enforcement mode, direct implementation mode. That is, our region had to directly track and enforce the NPDES permits, the States had their own State permitting system, and we had to coordinate with the States quite extensively on running two parallel programs.

Q. What is your experience in working with major and minor NPDES dischargers, Mr. Hartung?

A. Most of my experience, I would say about eighty percent was with working with the major dischargers. By major, I mean, for cities and for domestic waste discharges, anyone that has a discharge greater or equal to a million gallons per day is classified as a major, the other dischargers are classified as minor. It's a little bit different system for industrials, it's a rating system, but the majors were the ones we concentrated on because the agency had made a decision to.

THE COURT: Now, this is not responsive to any question, Mr. Baise. He's answered your question.

BY MR. BAISE:

Q. Yes.

What is your experience in working with EPA discharge monitoring reports, Mr. Hartung?

A. Our enforcement program used those almost exclusively to determine -- to detect violation or non-compliance. We used them over compliance inspections. In addition, when I was at the national office of EPA, I was responsible for distribution of all the discharge monitoring reports to all the NPDES authorities, both the States and regions, and for having them pre-printed as far as what the conditions were that the permittee had to meet, either permit conditions or administrator order conditions.

Q. What is your experience with EPA in enforcement responses to violations of NPDES permits, Mr. Hartung?

A. I have had experience with all types of EPA enforcement responses. Most of the responses were informal, either phone calls or meetings, warning letters. That was about eighty percent of our responses. And then we had the formal responses and those consisted of administrative orders. I probably concurred on ten thousand of those in the thirteen years I was in that job.

We initiated some fifty civil -- excuse me -- criminal judicial cases and about two hundred civil judicial cases. I also concurred in and issued, actually had the authority to

issue some three hundred and fifty administrative penalty orders, another form of formal enforcement action.

Q. Mr. Hartung, have you written documents for EPA use and guidelines on water quality standards?

A. Yes, I have.

Q. And what were those documents?

A. Primarily -- you did say water quality standards?

Q. Yes, sir.

A. Primarily guidelines to staff and also to the States on how to paraphrasing the requirements of the laws back when we didn't have regulations and also interpreting EPA regulations.

Q. Would any of these guideline documents go into Region IV?

A. I don't know about the water quality standard documents. No, I don't know.

Q. Have you written documents, guidelines on the NPDES program?

A. Yes, I have.

Q. And what were those?

A. I was a co-author as I mentioned to the administrative penalty policy. And guidance -- actually wrote portions of the national policy and that was distributed to all regions and States that were administering the program.

I've co-authored overflow policy on a national committee which was distributed to all the regions. I've co-authored a municipal water push prevention regional policy which was

distributed nationally prior to the issuance of national policy. I have written all types of boiler plate and things related to administrative orders; how to issue administrative orders, how to issue administrative penalty orders, civil judicial packages that went through the system over at the Department of Justice that were distributed to -- I believe were distributed to all the regions, including Region IV.

Q. Have you written documents, uses, guidelines on wasteload allocations?

A. Yes, I believe I mentioned that I was writing some back in the early days, early '70's, and later on.

Q. What experience do you have in training EPA personnel, Mr. Hartung?

A. Quite a bit.

Q. What are those training items that you have implemented at EPA, Mr. Hartung?

A. In my capacity in the national job that I mentioned earlier, I traveled all over the United States and including Region IV, at their invitation, and trained them on use of the permit compliance system. I have given all types of seminars permittees as well as to States.

I remember specifically we had a round of seminars back in 1987 after one of the amendments to the Clean Water Act where we had a thousand permittees there. I have trained the staff internally in the region, I've trained branch chiefs at

national branch chief meetings, I have trained State legislators at their request, things of that nature.

Q. Branch chiefs you just mentioned in your last answer. Did it include branch chiefs in Region IV, Mr. Hartung?

A. Yes, it did.

MR. BAISE: Your Honor, Mr. Hartung's testimony was -- we laid out in his or in the pre-trial statement was -- Mr. Hartung's testimony will address EPA's general practices and procedures, and internal agency guidance regarding permitting and enforcement matters under the Clean Water Act.

His testimony will address the relationship and interactions between the environmental regulatory authorities of non-delegated States in EPA. It'll also address wasteload allocation approvals, TMDL total maximum daily load development and approval permitting requirements and permit writing, enforcement administrative records, enforcement of NPDES permits, and interpretations of EPA's permitting and enforcement guidance documents and memoranda.

Your Honor, on the basis and by virtue of his specialized knowledge and skill, and with regard to his experience on behalf of Florida Cities, we proffer Mr. Hartung as an expert?

MR. QUINN: We object, Your Honor. First, this is not an area in which expert testimony is normally accepted nor required. And second, on the basis of the reasons set forth in

Dalbar versus Mertel Pharmaceuticals, 113 Supreme Court, 2786, we object. In addition, we object on the further basis that Mr. Hartung's expert report which has been entered in evidence as Defendant's Exhibit -- Florida Cities' Exhibit Number 1 contains no opinions regarding any of the facilities at issue in this action.

THE COURT: All right. The objection will be overruled. He'll be permitted to testify.

BY MR. BAISE:

Q. Mr. Hartung, what is your understanding of what the objectives are of the Clean Water Act?

A. Their main objective is, one, is to clean up the waters of the United States to a point where they can be usable for propagation of fish or wildlife and allow for recreation in and on the waters by humans. That is often referred to as the "fishable/swimable goals" of the Act.

Q. How are those objectives implemented?

A. There's a couple more.

Q. Excuse me, I'm sorry.

A. The second main objective is to prevent the discharge of toxic and toxic amounts, that is, to treat it below the toxic level, and the third objective was to set up a national wastewater management planning program that would help to achieve the other two objectives.

Q. How are those objectives implemented, Mr. Hartung?

A. Three different ways. The first way that is achieved is to establish water quality standards as a kind of a base of the pyramid upon which everything is based. Then, to establish what permit limits by the States would establish what permit limits were needed to protect those water quality standards and to issue and enforce those permits.

Q. As noted earlier, we heard a great deal about water quality standards. What is a water quality standard?

A. A water quality standard is a goal set by the State, approved by EPA, but it's a State water quality standard for a particular body of water. The State was required under the Clean Water Act to establish State water quality standards to protect its waters, such as there was a standard on each sub-river or subsection of the streams in the State. It consists of two parts; one is a designated use such as suitable for warm water fishing or contact recreation or things of that nature, and then there is a second part of the water quality standard that is to establish the amount of criteria that would protect that particular designated use, such as establishment of dissolved oxygen levels to protect the propagation of fish.

Q. Why is a water quality standard important?

A. It's important because in the Clean Water Act, it is the legal basis for all the permits that are issued which are -- which can cause cities and industries to build facilities that are wastewater treatment facilities that cost millions and

hundreds of millions of dollars.

Q. How is a water quality standard developed?

A. Well, there was a guidance put out and has been put out for years by the National EPA that was required by the Act that EPA publish some sort of guidance to help the States establish water quality standards. I think there were criteria put out by the national Academy of Sciences on three or four different occasions.

The standards are usually done and the designated uses were a lot of times established by what historically the particular stream segment had been used for, let's say for drinking water supply. For instance, they would put out designated use, drinking water supply, and then this criteria I mentioned had been published by EPA, helped established what numbers, let's say, for fishing, for instance, to what levels dissolved oxygen would be necessary to protect a fishery if that was designated.

Q. All right.

A. So, you establish the water quality standards, then would submit them to the EPA for review and approval.

Q. Why does EPA have to submit water quality standards to EPA for it's approval?

A. You mean the State?

Q. Yes.

A. Well, it's statutory requirements.

Q. How are water quality standards implemented by EPA or the States to protect surface waters, Mr. Hartung?
A. The question was how they implemented?
Q. Yes.
A. Generally through establishment of point source controls, that is, issuance of permits dischargers, industrial and municipal or domestic dischargers, and also through non-point source controls.
Q. Is that what is known as the NPDES Permit Program?
A. The one for dischargers, yes.
MR. BAISE: Your Honor, I would like to have marked as Florida Cities Defendant Trial Exhibit Number 7, training manual for NPDES permit writers.
THE COURT: Well now, they're all marked.
MR. BAISE: You have that in front of you, Your Honor?
THE COURT: Yes.
BY MR. BAISE:
Q. Mr. Hartung, I ask you to turn to Defendant's Exhibit or what has been marked for identification as Defendant's Exhibit Number 7. Do you have that in front of you?
A. Yes.
Q. What is this document, Mr. Hartung?
A. It's the training manual for NPDES permit writers published in May of 1987.

Q. What is the purpose of this document, Mr. Hartung?
A. It was used as a guide to the regional EPA people for actually writing a permit and NPDES permit where the authority rested in the -- at the EPA regional level.
Q. Was there a prior training manual for NPDES required, Mr. Hartung?
A. Yes. As I recall, there was something of this nature, only earlier in the process back in the '70's and early '80's.
Q. Have you used this document in your own work at EPA, Mr. Hartung?
A. Yes, I have.
Q. I direct your attention too page 15 of the training manual. Are NPDES permit writers, Mr. Hartung --
MR. QUINN: Your Honor, objection, if the witness is going to be reading from the exhibit. It's not in evidence. It ought to be.
THE COURT: If he's going to be reading from it, certainly.
Is that what --
BY MR. BAISE:
Q. Is this document published by EPA as far as you know?
A. Yes.
Q. This is an EPA document?
A. Yes. It was written by the office of water enforcement permits in Washington.

MR. BAISE: I move this document in evidence, Your Honor.
MR. QUINN: United States objects on two bases. First, this document is published in May of 1987. The only permit for which is at dispute in this case was denied in 1986, therefore, this document postdates and has little or no effect on that permit. On that basis, we object on the basis of relevance. And that's the only basis, sir.
THE COURT: All right.
Mr. Baise.
BY MR. BAISE:
Q. Mr. Hartung, is it your understanding the document includes any guidance or information for permit writers that was in existence before 1987?
A. Yes.
Q. Any reason to believe this is not a trustworthy document, Mr. Hartung?
A. No.
THE COURT: Well, Okay.
The denial of the NPDES permit was in 1986?
MR. QUINN: January, 1996, Your Honor.
THE COURT: All right.
This is a manual that is dated May, 1987?
MR. BAISE: That is correct.
THE COURT: I have no testimony before me, I don't

believe, that indicates this manual was in effect at the time that the NPDES permit was denied.
BY MR. BAISE:
Q. Mr. Hartung, do you have any reason to believe that the policies set forth in this document were not in effect in January of 19 -- or December of 1986?
A. No, I do not.
THE COURT: Well, still, that doesn't get it. If he has any reason to believe that it wasn't, I don't have any affirmative testimony that, you know, what existed prior to May 1987 in terms of the training manual for permit writers. You want to try to --
MR. BAISE: Your Honor, this was a document provided to us by EPA from its files from Ms. Kadey's files as I recall as the permit training manual. That was the manual that EPA officials used and it was an update of prior manuals and they did not produce prior manuals to us and as Mr. Jacobs notes on the side here, he produced everything that was available to them at the time, so this is the best evidence we have of the training manuals for permit writers during the 1980's.
MR. QUINN: I still object on the basis of relevance, Your Honor. What was available after the permit denial is irrelevant for purposes of analyzing whether EPA did anything wrong or whether there should by any mitigation based on the permit.

THE COURT: Let me ask you this. What did you designate in your objections as to the bases for the objections in the pre-trial submission, Mr. Quinn?

MR. QUINN: May I have a moment, sir?

THE COURT: Yes, sir.

MR. QUINN: Thank you.

Your Honor, I have three bases; irrelevant under 402, hearsay under 802 and hearsay within hearsay under 805.

MR. BAISE: Your Honor, all the Defendant can do is request information from the agency, get it produced in discovery as we asked for and did. This is the permit manual they produced to us as representing the permit training manual that the permit writers used from the agency and it was presumably an update.

THE COURT: Do you have -- what do you have that you're asking the Court to allow you to use this document; on the basis that this -- that you were informed that this is the manual that was used to deny the NPDES permit?

MR. BAISE: Yes or its predecessor. Not this particular one because that would have been impossible, the one as Mr. Quinn pointed out dated May, 1987. But as Mr. Hartung who has already given his experience with regard to dealing with such matters has reviewed this document, it is listed in the documents, he reviewed and he indicated to us that this basically or entirely was the document or type of document that

EPA used for permit writers training in the 1980s.

THE COURT: Well --

MR. BAISE: In fact, may I pose a question to Mr. Hartung?

THE COURT: Yes, sir.

BY MR. BAISE:

Q. Mr. Hartung, you have reviewed this training manual for NPDES permit writers dated May, 1987?

A. Yes, sir.

Q. Have you reviewed prior training manuals for NPDES permit writers?

A. Yes.

Q. In your review of this 1987 document, did you see any changes from any prior manual that you had reviewed relating to training manuals for NPDES permit writers?

A. I didn't note any differences, no.

THE COURT: I'll overrule the objection and I'll receive it.

BY MR. BAISE:

Q. Mr. Hartung, I direct your attention to page 15 of the document in question, the NPDES permit writer' guide. And I direct your attention to page 15, general consideration contents of a permit. Would you summarize your understanding of that particular paragraph, Mr. Hartung?

A. It talks about the particular sections, major section of

a draft permit.

Q. And what are those particular sections that should be in a draft permit, Mr. Hartung?

A. Section concerning effluent limitation of the permit, section about monitoring requirements, other standard conditions and special conditions if there were such things.

Q. So a NPDES permit must have included in them effluent limitations, Mr. Hartung, included in everyone of them?

A. Yes.

Q. I direct your attention to page 16 of the training manual for NPDES permit writers. I direct your attention to the paragraph entitled overview. Would you please summarize your understanding of that particular paragraph, Mr. Hartung?

A. It talks about three methods for determining effluent limitations and they're through effluent limitation guidelines, the establishment of effluent limitations by water quality considerations and another one called best professional judgment.

Q. What is an effluent limitation guideline, Mr. Hartung?

A. Effluent limitation guidelines is what the name implies. These are guidelines that were produced out of our Washington office of EPA that told the permit writer how to put together a technology based permit, that is, this is a set of information about how to write a permit without regard to the receiving waters' water quality.

Q. What is a technology based permit?

A. It's a permit that is written based on a particular -- you apply a certain technology, you get a particular predictable result as far as effluent. As an example, secondary treatment is a technology based set of permit limits.

Q. So all NPDES permits would have to have a technology based limit included in the NPDES permit?

A. As a minimum, the law requires the technology base is the minimum and then processed in was to test to see if the application of technology based permits was enough to protect the water quality standards in a particular water body and then if that was not the case, then water quality considerations came in to bear and the effluent limitations had to be tightened down from the technology based permit.

Q. That is what is known as quality water limited NPDES permit.

A. Yes, the latter that I talked about, yes.

Q. What is the best professional judgment permit, Mr. Hartung?

A. Well, that was used a lot in the early days, back in the early '70's when in lieu of an effluent limitation guideline, the permit writer was left to use his best professional judgment.

Q. So, if you have a technology based permit or a water quality limited permit, you would not be able to write a best

professional judgment permit, Mr. Hartung?
A. That is correct, you would not need to.
Q. I direct your attention to page 28 of this document, Mr. Hartung, section entitled water quality considerations overview. What is your understanding of the purpose of this paragraph, Mr. Hartung?
A. Just a second. (Brief Pause.)
It says that water quality based limitations are necessary to be used in a permit when it's necessary to protect the receiving waters. So water quality standard of receiving waters --
MR. QUINN: Objection, move to strike the answer as non-responsive to the question that was asked.
THE COURT: What was the question that was asked?
MR. QUINN: What was the purpose of the --
MR. BAISE: Your understanding of the purpose of this paragraph, Mr. Hartung.
THE COURT: I'll grant the motion, it's stricken.
What was the -- what was your understanding of the purpose?
MR. BAISE: Yes.
THE WITNESS: The purpose was to instruct the permit writer that in some cases water quality based limitations were required to protect the water quality standards.
BY MR. BAISE;

Q. I direct your attention to page 31 of this training manual, Mr. Hartung, to the paragraph, determination of water quality base limits. What is your understanding of the purpose of this paragraph as it relates to the permit writer, Mr. Hartung?
A. It was to instruct, again, to instruct the permit writer on how to determine water quality based limits.
Q. I direct your attention to the top of page 32, Mr. Hartung, in terms of the water quality based limits, and what is your understanding of the purpose of that paragraph, beginning at the top of page 32?
A. It was to instruct the permit writer on how the process works as far as the establishment of maximum daily loads and how they fit in the permit writing process.
Q. Does it also discuss allocating waste loads, Mr. Hartung?
A. Yes, it does.
Q. What is the purpose of a wasteload?
A. Well, the State has the responsibility of determining how much waste or wasteload a particular body of water can take without violating the State's standards.
So in some cases where the application of the technology based permit limits is not enough to do that, then there has to be an allocation, if you will, a cutback to each of the dischargers and that is what they mean by wasteload allocation. It's actually an allocation, if you want to think of it, of the

cutback or the amount necessary to be taken out of each of the dischargers wasteloads that they're discharging in the stream in order for it to meet the water quality standards.
Q. Mr. Hartung, I direct your attention to page 39 of this training manual to the section captioned, wasteload allocation. You find that, Mr. Hartung?
A. Yes, I have it.
Q. And I direct your attention to the second paragraph or the last paragraph -- second paragraph under wasteload allocation, but the last paragraph on the page. Would you read the first two sentences, Mr. Hartung?
A. A regulatory agency's first step in establishing a wasteload allocation scheme for a water segment is to determine the total maximum daily load, TMDL, of discharges a segment can receive without exceeding the applicable water quality standard. The TMDL established by the State must be submitted to EPA for its approval before incorporated into the State's water quality management plan.
Q. Does this comport with your understanding of EPA's policies and procedures, Mr. Hartung?
A. Yes.
Q. I direct you to the top of page 40. Would you read the first two sentences of the first paragraph at the top of page ;40 in the permit writer's manual.
A. Excuse me, did you say the first two sentences?

Q. Yes.
A. Once the State has determined the amount of discharge that a segment can assimilate without violating water quality standards, that amount less the amount of capacity reserved by the State if any is allocated among dischargers, the States are responsible for establishment and implementation allowable schemes?
Q. Would you like to go to the board there, Mr. Hartung, and draw out the wasteload allocation process and approval process, please?
A. Yes.
Q. And mark that for identification Defendant Florida Cities' 207.
THE COURT: Well, you can if you want it marked, you can put a label up there.
MR. BAISE: Yes, sir, we'll do that during the break, Your Honor.
THE WITNESS: it's going to be a very simply applied, overly simplified explanation here, but let's say for instance this is a stream segment and the water quality standard is the designated use for warm water fisheries. Not a very good looking fish. And the criteria to support the use, the second part of the water quality standard let's say was five parts per million dissolved oxygen, not allowed any discharge or any other thing going, oxygen-demanding material going into that

segment would allow the water quality standard to go below five. The total maximum daily load is comprised of a load allocation plus a wasteload allocation and let's say we had three cities discharging into this, say city A, city B and city C, less some type of non-point source, source of waste or oxygen-demanding material, the load allocation is the sum of the background material, amount of wasteload that comes in upstream, background loading, but any non-point source loading coming off farms or fields, plus a growth reserve. The statement, when you talk about non-point source, you're just talking about non-specified source of discharge.

BY MR. BAISE:

Q. Describe non-point force for His Honor, Mr. Hartung. Is that the term of art under the Clean Water Act?

A. Examples of non-point source would be storm water that contained street runoff. You have certain metals and all that accumulates on the streets, that would go in a culvert, storm water culvert. Another source of non-point sources would be off a field, let's say an insecticide sprayed on a field might wash off when it rained. Non-point source generally only get into the stream when it's raining. It's runoff, street runoff, any type of water that reaches the stream by sheet flow or not coming out of a pipe, let's say.

And we talk about dischargers, normally talk about coming out of a pipe, either a pipe coming out of an industry or pipe

coming out of a waste treatment plant. But this growth reserve is for really reserved for someone else that the State might want to allow to discharge into a stream.

A wasteload allocation, excuse me just a second, is the sum --

THE COURT: Just a moment.

(Brief pause.)

All right, go ahead.

THE WITNESS: The wasteload allocation would be the sum of the point dischargers, that is the A, B and C. Let's say the total maximum daily load for this segment had been determined by the State to be a hundred and thirty thousand pounds per day of BOD or oxygen-demanding material. And let's say the State had reserved for the load allocation of thirty thousand pounds per day. That means that the sum of the point dischargers cannot exceed thirty from a hundred and thirty cannot exceed a hundred thousand pounds per day of BOD.

The first test that is applied for these dischargers when analyzing what you need if you needed a waste-water allocation is to apply technology based permit limits. That is secondary treatment for these three cities. So let's say apply secondary treatment A, B and C, and you get secondary equals, let's say A had sixty thousand pounds per day, B consisted of thirty thousand pounds per day and C another thirty thousand. K stands for thirty.

THE COURT: Stands for thirty?

THE WITNESS: Yeah, in engineer jargon. You can say sixty K, that means sixty thousand. Secondary equals a hundred and twenty thousand pounds per day. Well, as you can see, a hundred and twenty thousand pounds per day exceeds the sum of what is allowed for wasteload allocation or for the dischargers. It exceeds it a hundred -- it's a hundred thousand compared to a hundred and twenty thousand, so that tells you that you must go beyond the technology based permit limits, and the wasteload allocation must equal no more than a hundred thousand pounds per day.

So what you have to do is go in there and say water quality based limits must equal -- the wasteload allocation must not exceed a hundred thousand pounds per day, so you add up, you cutback A, let's say, to fifty thousand pounds, B, twenty-five thousand pounds, and C, to twenty-five thousand pounds. The reason of this previous example of secondary treatment, this was sixty, thirty, thirty, so fifty percent of the available is fifty thousand pounds. This one would be twenty-five percent, this one would be twenty-five percent. Comes out to a hundred thousand pounds per day, so the two match and then you go ahead and apply the water quality based limits and issue your permits. The permits would be issued for these figures here, fifty thousand, not to exceed fifty thousand pounds per day, that comes out to be a certain

concentration, you have flow and concentration and you had loading and the most important is the pounds per day.

BY MR. BAISE:

Q. Who recommends those wasteload calculations in the first instance, Mr. Hartung?

A. I didn't understand the question.

Q. Who generates those wasteload allocations in the first instance that you have just described here, Mr. Hartung?

A. The State is required to generate those by the law. Wasteload allocations is just another way of describing water quality limited effluent limitation permits.

Q. Based on your experience, what is EPA's policy after receiving a State generated wasteload allocation and approving that wasteload allocation before it incorporates the wasteload allocation into an NPDES permit?

A. What is their policy?

Q. Yes, what is the policy, what is EPA's policy with regard to approving wasteload allocations before they go into an NPDES permit?

A. It's required by the statute as well as policy procedures, regulations that the EPA approve or disapprove the wasteload allocations within thirty days of receipt.

MR. QUINN: Objection, Your Honor, move to strike. That calls for legal conclusion. The witnesses has not been qualified as an expert in legal matters.

MR. BAISE: I didn't ask him a legal question. I asked him what EPA's policy was regarding --

THE COURT: I'll overrule the objection except that I'm concerned about the period of time we're talking about here. If you want to limit your question to when the policy he's talking about was applicable, I'll overrule the objection.

BY MR. BAISE:

Q. Mr. Hartung, in 1986, was it EPA's policy to require the approval of wasteload allocations before the wasteload allocation was incorporated into a NPDES permit?

A. Yes, it was. The law established that in 1972 as a requirement.

Q. Was it also EPA's policy in 1981 to require the approval of wasteload allocations before incorporating such wasteload allocation into a NPDES permit?

A. Yes.

Q. In your opinion, Mr. Hartung, why is it important to have an approval process where wasteload allocation --

MR. QUINN: Objection, that's not within Mr. Hartung's expert report.

MR. BAISE: It is within his expert report in terms of his describing policies and procedures relating to approvals of wasteload allocations.

MR. QUINN: Your Honor, if I may, the specific question asked is for his opinion on the importance of an issue

that is not within his expert report and I object to eliciting a response on that basis.

THE COURT: I'll overrule the objection.

THE WITNESS:: In my opinion, it's important that this -- excuse me, could you repeat the question?

BY MR. BAISE:

Q. Yes. In your opinion, why is it important to have an approval process for the wasteload allocation you have just described up here this afternoon?

A. It's important because in some States there are several different agencies that are generating these wasteload allocations, and in order to have an orderly process to make sure it was the official submission by the State designated agency that was designated by EPA to submit, and lastly, it's important because those do, once they're approved, are used in issuance of permits that generate wastewater treatment plants, that cost millions and hundreds of millions of dollars.

Q. Mr. Hartung, with respect to the questions I have just been asking you with respect to this manual, was this the same guidance that was given to permit writers before January of 1987?

A. Yes.

Q. This was the same guidance that was in effect when the permit was denied in December of 1986?

MR. QUINN: Objection, Your Honor, this is assuming a

fact not in evidence and asking this witness to testify about something which was not in his report. We've already established -- well, that's it, Your Honor.

THE COURT: Overruled.

THE WITNESS: Would you restate the question, please?

BY MR. BAISE:

Q. Is this the same guidance to NPDES permit writers that was in existence in December of 1986 when the permit was denied?

A. I don't know anything about permits being denied by --

THE COURT: All right, then just eliminate that part of question. How about the --

THE WITNESS: it was the guidance that was in effect at that time, yes. This guidance or something like this guidance which contained all the basic components which was based on the laws and regulations that was passed back in the '70's.

MR. BAISE: Thank you, Mr. Hartung.

Your Honor, I would like to have marked for identification Defendant's Trial Exhibit Number 4, EPA's review and approval.

THE COURT: All of these are premarked, correct?

MR. BAISE: Correct. Just my standard line, Your Honor.

THE COURT: Which one?

BY MR. BAISE:

Q. FOWC Trial Exhibit Number four, do you have it in front of you?

A. Yes.

Q. Are you familiar with this document, Mr. Hartung?

A. Yes.

Q. Would you describe this document for the record, Mr. Hartung?

A. It's a memorandum from EPA, Washington, D.C., from the monitoring and data support division, dated March 25, 1986, which lays out Epa's review and approval procedures for State submitted total maximum daily loads and wasteload allocations.

Q. Did you use this document in your work, Mr. Hartung?

A. I used previous documents like this. By this time in 1986, I was in the enforcement program.

MR. BAISE: Your Honor, I'd like to move in.

This is an EPA document, Mr. Hartung.

THE WITNESS: Yes.

BY MR. BAISE:

Q. Published by EPA?

A. Yes. We were briefed on it. At the time, there was a national meeting, I think it was in San Francisco, wherein permits, all the national permit branch chiefs from the region as well as enforcement branch chiefs and water quality planning branch chiefs were briefed about this document.

Q. Any reason to doubt the trustworthiness of this document, Mr. Hartung?
A. None.
MR. BAISE: I would move this into evidence, Your Honor.
MR. QUINN: Objection, Your Honor, on two bases. First is relevance as we stated in our papers before the Court. Second, this witness has no personal knowledge of anything within this document. He said he's seen documents like it. For those two bases, we object to the introduction of this document.
MR. BAISE: He said he was briefed, too.
THE COURT: Objection be overruled. What did you say, Mr. Baise, what did you --
MR. BAISE: He was briefed on the document. His testimony --
THE COURT: Were you talking to me?
MR. BAISE: Talking to counsel.
THE COURT: Don't address your remarks to counsel.
MR. BAISE: I know.
THE COURT: I thought that what you said.
MR. BAISE: Yes.
THE WITNESS: I actually had a copy of the document, read the document at the time it came out.
MR. BAISE: And I move this document be entered into

evidence, Your Honor?
THE COURT: Already received it.
MR. BAISE: Thank you.
BY MR. BAISE:
Q. Mr. Hartung, I direct your attention to the fourth page of this document, dated March 25, 1986. Are you familiar with this memorandum dated March 25, 1986, Mr. Hartung?
A. Yes.
Q. Would you please summarize the purpose of this particular memorandum, Mr. Hartung?
A. I believe it was to remind the States as well as EPA regions about the procedures that had been in existence for years and it provided some additional ways to expedite procedures for getting total maximum daily loads and wasteload allocations approved by the regions because there was a national push to get a lot of people under compliance schedules and the wasteload allocation process was slowing things down, if you will.
Q. I direct your attention to the bottom paragraph of page 1, Mr. Hartung, under the subsection entitled purpose.
A. We were on page 4, is that right?
Q. Yes. I'm taking you back to page 1.
A. Can I have page 1?
Q. Last paragraph, first sentence, would you read that into the record, Mr. Hartung?

A. This guidance describes a step by step procedure for the review of State submitted total maximum daily loads and wasteload allocations that are required by the water quality management regulation and in Clean Water Act CWA including a list of questions and answers to focus on the key issues.
THE COURT: Where are you reading from?
MR. BAISE: Page -- this was actually marked page 1, Your Honor. Where the confusion comes, the first three pages are unnumbered. I apologize --
THE COURT: Okay.
MR. BAISE: -- in not giving you the direction on that, that's why the witness was confused.
Page 1, last paragraph, first sentence in that last paragraph on page 1 marked 1. Do you need him to go through it again.
THE COURT: No, no, I see it.
MR. BAISE: Thank you.
BY MR. BAISE:
Q. Does this correctly reflect what you believe this document discusses, Mr. Hartung?
A. Yes, it does.
Q. Mr. Hartung, I direct your attention now to page 2 which has the number 2 on it. Page is entitled overview of the process.
MR. BAISE: You see that, Your Honor?

THE COURT: Yes.
BY MR. BAISE:
Q. Paragraph B, Mr. Hartung, I direct your attention towards, and would you read the first two sentences in that paragraph for the record?
A. As a foundation for all total maximum daily loads slash wasteload allocations prepared by the State, EPA and the State should agree to the process that the States will used to develop the wasteload allocation and prepare a written agreement which describes these procedures.
Such an agreement promotes consistency between projects and between States, i.e., how background data is applied, which models are to be used, how total maximum daily loads are determined, how loads will be allocated, et cetera. See appendix C for sample technical agreements.
Q. Is that your understanding as well, Mr. Hartung?
A. My understanding of what?
Q. Of this paragraph. Does this paragraph correctly reflect your understanding of agreements that have to be prepared between the State and the regions?
A. Yes, sir, it had been in existence since 1972.
Q. Mr. Hartung, I direct your attention to page 3 of the document entitled EPA review and approval procedure for State submitted TMDL's and WLA's. And I direct your attention to the bottom of page 3, EPA reviews the State's TMDL's, WLA's.

A. Okay, I have it.
Q. Would you read the first two sentences from that paragraph, Mr. Hartung?
A. To meet the requirements of section 303(d) of the Clean Water Act and the water quality management regulation, EPA must review and approve all total maximum daily loads. EPA may taylor its review to what is reasonable and appropriate, that is, where a State is clearly described as process in its CPP, that's continuing planning process. EPA may conduct an indepth review of a sample of the State's total maximum daily loads slash wasteload allocations to determine how well the State is implementing its approval process and give a less detailed review of the remaining total maximum daily loads and wasteload allocations.
Q. Do those two sentences reflect your understanding of this particular process, Mr. Hartung?
A. Yes. This was the part that was added, if you will, as far as policy in making this document. The rest of this document was just a reiteration of requirements that had been around forever.
Q. Mr. Hartung, I direct your attention to page 4, subparagraph H, subsection, EPA approves or disapproves State's submission. Would you read the first full paragraph, Mr. Hartung?
A. Yes. EPA either approves or disapproves the State's TMDL

slash WLA within thirty days after submission by the State. And approved TMDL slash WLA is certified, quote, unquote, by the EPA as having been developed in accordance with section 303(d) of the Clean Water Act and a letter of such approval is transmitted to the State.
Q. Does this reflect your understanding of what is required by EPA's policies and procedures relating to wasteload allocation, Mr. Hartung?
A. Yes, and also it's a statutory requirement.
Q. Mr. Hartung, would you read the first sentence of the second paragraph under H on page 4?
A. First sentence?
Q. First sentence only.
A. If EPA approves the State's total maximum daily load slash wastewater -- if EPA disapproves the Stat's TMDL slash WLA, the State -- excuse me, the EPA regional office not later than thirty days after the date of disapproval must develop the total maximum daily load slash wasteload allocation in accordance with section 303(d) and issue a public notice requesting comment on the revision.
Q. Does this paragraph reflect your understanding of EPA's policies and procedures in terms of disapproving State TMDL as wasteload allocations, Mr. Hartung?
A. Yes.
Q. Mr. Hartung, I direct your attention finally to page 6 of

this document. Are you on page 6, Mr. Hartung?
A. Yes. Sorry.
Q. Do you see where it indicates question and answer and then a second question and answer, second Q, where it begins the sentence after a TMDL?
A. Yes, sir.
Q. Would you read both that question and answer into the record, Mr. Hartung?
A. Question, after a TMDL slash WLA is submitted to EPA, what is the time period in which a decision for approval or disapproval is to be made. Answer, the regional administrator shall not later than thirty days after date of submission approve or disapprove the total maximum daily load slash wasteload allocation. This length --
Q. Thank you.
I'm sorry, I told you to read the entire answer. I thought I mentioned only one sentence. Please, go ahead, my fault.
A. This length of time also applies to EPA's review of the listing of the priority ranked segments still requiring total maximum daily loads slash wasteload allocations.
Q. And does this reflect your understanding of EPA's policies and procedures with respect to the approving wasteload allocation examples?
A. Yes, it does.

Q. Mr. Hartung, you testified earlier from this document that agreements were to be developed between the States and EPA on the approval of wasteload allocations?
A. Yes, sir, they were generally called continuing planning processes.
MR. BAISE: Your Honor, I'd like to identify the next exhibit as Florida Cities' Trial Exhibit Number 2.
BY MR. BAISE;
Q. Would you please turn to 2, Mr. Hartung?
A. I have it.
Q. Are you familiar with this document, Mr. Hartung?
A. Yes, I'm familiar with documents like it, plus I believe John Marlar briefed us at a national branch chief meeting when this first came out.
Q. Who is John Marlar, Mr. Hartung?
A. John Marlar was my counterpart as a branch chief in Region IV for years. He was chief of the water quality branch. And then also became like I did, the chief for the enforcement and permitting branch in 1981, so --
Q. Do you know Mr. Charles Jeeter who is addressed at the top of this letter?
A. Yes, I met him.
Q. Who is Mr. Jeeter?
A. He was the regional administrator of EPA Region IV at the time this document was issued in July, 1982.

MR. BAISE: Your Honor, I move this into evidence.

MR. QUINN: We object, Your Honor. As the basis of that, it's irrelevant, also improper, insufficient foundation has been laid and the cover memo is hearsay and was listed as one of our objections as well, and no foundation to that has been satisfied, sir.

THE COURT: Mr. Baise?

MR. BAISE: Your Honor, this again is a document provided to us in discovery by EPA as representing the agreement between Region IV and the State of Florida with regard to procedures relating to the approval or disapproval of wasteload allocations.

Initially, the agency was unable to produce the signed document between the State of Florida and EPA and in the second day or third day of depositions, they brought this to us as representing the official document between the two entities, so it's an official document from the agency. The two cover letters discuss the document. I can certainly go in and ask Mr. Hartung more foundation questions with regard to the agreement itself in order to authenticate it. However, I thought in light of fact the Government had produced this and the fact it is signed by a regional administrator, former regional administrator at EPA and also signed by the secretary of environment for the State of Florida, it's on U. S. Environmental Protection Agency letterhead, it's on State of

Florida letterhead, if that would be sufficient to make an official document.

THE COURT: I'll overrule the objection, be received.

BY MR. BAISE:

Q. Mr. Hartung, I believe you testified that you're familiar with such documents. How are you familiar with such documents as attached to the letter of July 9, 1982?

A. I was personally involved in developing the documents like this for each of the five States in Region VI; Texas, Oklahoma, Arkansas, Louisiana and New Mexico.

Q. Mr. Hartung, I would direct your attention and these pages are not numbered, Your Honor, so, the first two pages are the letter, the third page is the title page, fourth and fifth pages are signature pages, the page identified as general, Roman Numeral I, and it is unnumbered, but obviously is one because the page behind it is two.

MR. BAISE; Did you find it?

THE COURT: Yes.

BY MR. BAISE:

Q. Now, Mr. Hartung, I direct your attention to Roman I, sub

A. Do you see that, sir?

A. Yes, sir.

Q. Would you review the second paragraph and summarize your understanding of that particular paragraph?

A. If you'll give me a moment.

Q. Yes, sir.

A. It goes into the things that that previous document we discussed reiterated.

Q. Would you identify the previous document for the record?

A. Previous document was the headquarters document, I think it was dated 1986, which proscribed the procedures for approving the total maximum daily loads and wasteload allocations. And this paragraph spells out that, again, the mandates and requirements by the States under the Clean Water Act and section 303 of that Act, for developing wasteload allocations that protect the States' water quality standards. And also, that the EPA must approve or disapprove them.

The last part of the paragraph goes into the fact that this procedure has been unnecessarily time consuming, I think is the term used here, and needs to be sped up or expedited or changed to expedite the process.

Q. Mr. Hartung, was this an agreement executed between the State of Florida and EPA Region IV as far as you can tell from your review of the document?

MR. QUINN: Totally beyond the scope of this witness' knowledge.

MR. BAISE: It is before the Court, Your Honor, two letters, which again, as I pointed out, are on what appear to be official stationery. Number two was presented to us in discovery by EPA.

THE COURT: Well, it's in evidence. But, I don't know that this witness knows the answer to your question.

Sustained.

MR. BAISE: May I proceed?

THE COURT: Sustained. Yes.

BY MR. BAISE:

Q. Mr. Hartung, I direct your attention to page 9 of the document entitled State EPA Region IV agreement on the development of wasteload allocation and wasteload water permit limitations.

A. Roman Numeral IV?

Q. Roman numeral IV, page 9. Would you read that paragraph into the record Mr. Hartung?

A. Which paragraph?

Q. First paragraph, page 9, under Roman numeral IV entitled approval of wasteload allocations?

A. The EPA's required by 303(d) of the Clean Water Act to review and approve slash disapprove the allowable wasteloads established by the States within thirty days after submission. And additional thirty days is allowed to make necessary revisions to disapprove the identifications and loads. All final approvals of wasteload allocations are to be incorporated by the States into their water quality management plans through the continuing planning process required under 303(e) of the Act.

Q. And further, Mr. Hartung, I would direct your attention to page 10 of this document, the next page under Roman Numeral V, entitled incorporation of wasteload allocations into permit limitation. You see paragraph A on page 10, Mr. Hartung?

A. Yes.

Q. Would you read that into the record, please?

A. General. The wasteload allocations developed in accordance with this procedure and subsequently approved by EPA are to be directly incorporated into permit limitations unless there are overriding environmental concerns. The current NPDES permit will remain in effect until its specified expiration date. At that time, the approved allocation would be the basis for the permit limitations.

Q. Do those paragraphs you have just read reflect your understanding of EPA's policies and procedures relating to the approval or disapproval of wasteload allocations?

A. Yes, they do.

Q. Thank you.

MR. BAISE: You want to take a break, Your Honor?

THE COURT: Sir?

MR. BAISE: May we take a break?

THE COURT: Yes, we've been here for almost two hours, and we'll take fifteen.

(Thereupon, a brief recess was taken.)

THE COURT: Mr. Baise.

MR. BAISE: Thank you, Your Honor.

BY MR. BAISE:

Q. Now, Mr. Hartung, you have testified earlier about permit programs being run by both EPA and the States. What is a non-delegated State under the Clean Water Act?

A. What is it or —

Q. What is a non-delegated State under the Clean Water Act?

A. Well, the original intent of the Clean Water Act was to have each the States assume the administration of the NPDES Program and the State and the EPA was envisioned as kind of — am I being responsive?

Q. Yes.

A. — as an oversight — overseeing agency, as well as an enforcement backup, but as it turned out, as the State — I think there are still 10 States that never assumed the program, usually for legal reasons, so the law was written in terms of, well, the State would be running the program.

Q. Could you identify the program, please?

A. The program being the NPDES Permits and Enforcement Program.

Q. In such situations does both the State and EPA issue permits to a discharger?

A. Yes, they do.

Q. Why is that?

A. Well, the States have statutes and requirements that they have to abide by and the EPA Regional Office, then, in that situation, would have to carry out the mandates of the Clean Water Act or the Federal requirements.

In my region, it was our job to run the NPDES Program in parallel with five States that ran State programs under State Laws and Regulations.

Q. Do those permits have to assure that water — that water quality stands set for the State are maintained?

A. When you say those permits, which permits?

Q. The NPDES Permits.

A. Yes, they do.

Q. Do the State permits have to assure water quality standards are maintained?

A. Yes, they do.

Q. What is your understanding of whether EPA must give deference to a State-issued water discharge permit?

A. It's my understanding that —

THE COURT: Just a moment.

MR. QUINN: Objection that this is beyond the scope of the expert report, as well, sir.

MR. BAISE: In his expert report he indicates he's going to testify with regard to policies and procedures relating to delegated and non-delegated States, Your Honor.

THE COURT: I'll overrule the objection.

MR. BAISE: You may continue.

THE WITNESS: In my opinion, unless the results have been born out by some papers and policies written by EPA Headquarters, that unless there's some kind of clear error committed by the State in interpreting its water quality standards and issuing its own permit, then the EPA has to give deference to the State permit.

Q. What is your opinion, Mr. Hartung, as to whether EPA could require a no discharge effluent limit in an NPDES permit if such a limit was not in the State Permit for the same facility?

MR. QUINN: Objection. That opinion is not within the report, sir.

MR. BAISE: I would disagree, Your Honor, that this witness can testify — he is an expert, and it talks about the fact that he's going to discuss the policies and procedures with regard to delegated versus non-delegated States and whether those permits can require or have in them certain limitations.

MR. QUINN: That's not the basis of my objection. The basis of my objection is Rule 26, which requires the statement of all opinions to be expressed by the witness, and it is not — this is an opinion and is not in the report, and for that reason I object.

THE COURT: I'll sustain the objection to that question.

BY MR. BAISE:

Q. Mr. Hartung, what is your understanding as to whether or not EPA could require a no discharge effluent limit in an NPDES Permit and if such a limit is not in the State Permit for the same facility?

MR. QUINN: Objection Your Honor, same grounds.

THE COURT: Sustained.

BY MR. BAISE:

Q. Mr. Hartung, would you describe the State's role in administering the NPDES Program?

A. For a delegated State or for both?

Q. For both.

A. For non-delegated State, they still have a major role in the States establish the water quality standards, they generate the effluent limitations based on those standards, and they, also, are required to certify every EPA-issued NPDES Permit as meeting their water quality standards before that permit can be issued.

In the case where they administer the NPDES Program, they take over the permit issuance and enforcement of that permit. EPA, then, has an overview role to make sure that they are following the procedures that's laid out in the laws and regulations, and that the EPA is the

authority — excuse me — to override a State's enforcement action and take EPA action on a violation that they deem fit.

Q. Based on your experience and EPA's Policies and Procedures, does EPA challenge State Permits if they do not assure that water quality standards are being met?

A. They can, yes, and do.

Q. Do EPA-issued NPDES Permits contain wasteload allocations, Mr. Hartung?

A. Yes, they contain water quality limited effluent limitations which are based upon State wasteload allocation studies, yes.

Q. Do those wasteload allocations that are included in those EPA-issued NPDES Permits, do they need to be approved by EPA?

A. Do they need to be approved?

Q. Yes, or must be approved?

A. Yes, they must. Yes.

Q. And why?

A. Because, again, it is required by the Clean Water Act and by the Regulations from that Act.

Q. So it's your testimony that EPA cannot ignore the approval process of wasteload allocations and incorporate the wasteload allocations in the NPDES permits?

MR. QUINN: Objection.

THE COURT: This is your witness. Don't lead him like that.

MR. BAISE: I'm sorry, Your Honor, I didn't hear you.

THE COURT: Don't lead the witness.

MR. BAISE: Thank you.

THE COURT: I realize that a certain amount of that is not offensive and we don't have a Jury here, but that's a little much.

Go ahead.

BY MR. BAISE:

Q. Mr. Hartung, in your expert report you have discussed major and minor dischargers.

Is there any hierarchy of enforcement with respect to major and minor dischargers under EPA's Policies and Procedures?

A. Yes, there is.

Q. What is it?

A. The first priority, as I explained earlier, it's a research concern with EPA, is the issuance and enforcement tracking and enforcement of major industrial permits, major municipal permits, municipal, including domestic waste permit, and then major Federal facilities, that is, like air bases and things of that nature.

The second priority would be the issuance of

permits and enforcement of those permits for minor municipals, minor industrials and Federal facilities.

Probably a third hierarchy would be the issuance and enforcement of what's called general permits that are issued for an entire State or entire region, let's say a County. Those would include some that we had in our region that were offshore oil and gas, permits for the Gulf of Mexico, general permits, general permits for industrial storm water and for confined animal feeding operations.

And then there's a fourth category, which is whatever is left, including domestic — private domestics.

Q. And in your experience with EPA, are all minor dischargers permitted through the NPDES Permit System?

A. There was an attempt early on to permit all of them, but to my knowledge, some of them were never permitted, still have never been permitted in our region, and our region being Region 6.

The problem was that it was an overwhelming job to do that, so the agency generally relied on if there was a parallel program on the State's issuing permits to the minors — State Permits to the minors.

Q. And in your experience, Mr. Hartung, have you ever seen a case where an NPDES Permit was denied to one of your facilities treating human waste and the plant was meeting water quality standards and effluent limitations in the

NPDES Permit?

A. No. I've never — no.

Q. Is your answer no?

A. My answer is no.

Q. And that's based on the review of 50,000 permits, Mr. Hartung?

A. It's based on my experience —

MR. QUINN: Objection.

THE COURT: You can ask him what it's based on.

BY MR. BAISE:

Q. What is that based on, Mr. Hartung?

A. Based on my experience in 23 years and working in this area and EPA Region 6, primarily.

MR. BAISE: That finishes my direct questioning of Mr. Hartung, Your Honor.

THE COURT: Mr. Bird, do you have any questions?

MR. BIRD: Just briefly, Your Honor.

EXAMINATION

BY MR. BIRD:

Q. Mr. Hartung, you testified that you oversaw enforcement in Region 6 for a period of time?

A. For 13 years, yes.

Q. And I believe, if I recall your testimony, you indicated that you oversaw some 50 criminal cases, 200 civil cases, 350 administrative penalty orders and some number of

administrative orders.
A. Around 10,000 administrative orders, yes.
Q. In any of those instances, did Region 6 take enforcement action against the parent corporation of the discharger?
A. No, we did not.
MR. KIRD: Thank you.
No more questions, Your Honor.
THE COURT: Mr. Quinn.

EXAMINATION

BY MR. QUINN:
Q. Good afternoon, Mr. Hartung.
A. Good afternoon.
Q. Sir, in listing the priorities of the Clean Water Act, you missed one, didn't you? Didn't you?
A. I said the three major ones. I thought were the three major ones, yes.
Q. Did you miss the fact that it is an objective of the Clean Water Act -- the first objective of the Clean Water Act is that it is the national goal that the discharge of pollutants into navigable waters be eliminated by 1985? Wasn't that a goal of the Clean Water Act, sir?
A. Yes, it was one of the original goals and a commission was set up by the Act to review that goal and that commission met -- I don't know --

THE COURT: Well, you've answered his question.
MR. QUINN: Thank you, Your Honor.
BY MR. QUINN:
Q. Sir, in the Permit Writers Guide, which is Exhibit -- Florida Cities Exhibit Number 7. I believe you have it in front of you.
A. Yes.
Q. Sir, if you turn to the third page of the Exhibit, please, and I want to ask a question and refer to something, okay? Tell me when you get there.
A. I have it. Page 3?
Q. Yes, sir.
Sir, this training manual is just a guidance, isn't it?
A. That's what it says in front of the manual, that's correct.
Q. It says, in fact, doesn't it say that the material in this manual is for instructional purposes only, it was developed to illustrate the applications of the technical principles of the NPDES Regulations and does not necessarily represent official policy of the USEPA?
A. That's what it says.
Q. Is that, in fact, what it is?
A. It contains a lot of official policy when it refers to the laws and regulations, of course.

Q. But the document itself does not represent the official policy of the USEPA; does it?
A. That's what it says.
Q. Sir, you're not here on behalf of the United States to testify on behalf of the United States today, are you?
A. No, sir.
Q. Sir, on page 1, numbered 1 of that same Exhibit, number 7, under purpose and format, one of the purposes -- withdrawn.
It is recognized that each EPA Regional Office or approved State will have NPDES Permit processing procedures which have been specifically adapted for a specific geographical area and which incorporate local requirements. Therefore, it is the purpose of this manual to provide an explanation of those elements of the program which are common to any State or Regional Office which issues NPDES Permits. Particular emphasis will be given to those areas which historically have been difficult steps in the permitting process.
Do you see that?
A. Yes.
Q. Is that what it says?
A. Yes, sir.
Q. It goes on to say, to the extent possible, practical examples are used to demonstrate the concepts which are

discussed. It says that?
A. Yes, sir.
Q. Sir, with regard to the next document, the TMDL Wasteload Allocation, which is Exhibit Number 4, Florida Cities Water Company Exhibit Number 4. Sir, on page C-1, this, again, is a guidance document, isn't it? The Wasteload Allocation, Exhibit Number 4?
A. Are you referring to a particular page?
Q. I want to ask you in general, sir; is this just a guidance document?
A. Yes, it is.
Q. Okay. And on page C-1, doesn't it say, since conditions, procedures and methodologies may vary between EPA Regions and their States, a general outline of an example agreement is provided? Does it say that?
A. Yes, sir.
Q. So differences do exist -- withdrawn.
You will acknowledge that differences exist between Regions; is that correct?
A. Oh, yes.
Q. And definitely within States within the Regions, too; right?
A. That's correct.
Q. Sir, on page 4 of that same document, I'd like to talk a little bit about TMDL's.

Sir, in Region 6, about how many streams or other water bodies are there in Region 6, which receive discharges from NPDES permitted facilities?
A. Almost all streams. I don't know the number.
Q. Thousands?
A. Oh, yes, thousands and thousands. Yes.
Q. How many of those streams and water bodies has a TMDL been done?
A. As of this date, probably all of them at least once.
Q. All of them have had TMDL's done; is that correct?
A. That's my understanding, yes.
Q. Sir, with regard to the State EPA Agreement, which is Exhibit Number 2, Florida Cities Water Company Exhibit Number 2.
A. Yes, sir.
Q. This document didn't set up anything required in stone, to your knowledge, did it? These are not in-stone requirements, are they?
A. This document lays out and reiterates what was in the law and the regulations, so it's pretty much in stone, I would say, for most of the things -- for the examples that I read from.
Q. I want to turn your attention to page 4, which is the first signature page that Mr. Cole on behalf of the State of Florida signed. Tell me when you find that, please.

A. Page 4?
Q. Yes, sir, of Exhibit 2.
A. Mr. Cole?
Q. Yes, where he signed off on it, sir.
A. Okay.
Q. Okay. About halfway down the paragraph, above the signature blocks it says, doesn't it, that both parties agree that the provisions of this document are reasonable and are understood to be goals toward which each party will strive. Doesn't it say that?
A. Yes, it does.
Q. It doesn't say anything about them being requirements, does it?
A. No, it doesn't say that.
Q. Thank you.
Mr. Hartung, is there any opinion in your expert report, which has been introduced as Defendant's Exhibit Number 1, is there any reference to the Florida Cities Barefoot Bay facility?
A. No, sir.
Q. Is there any reference in that report to Florida Cities Carrollwood facility?
A. No.
Q. Is there any reference in that report to Florida Cities Waterway Estates facility?

A. No, sir.
Q. Is there any reference to Florida Cities Water Company at all in that report?
A. No, sir.
Q. Thank you.
Sir, is there any reference in your expert report --
A. May I embellish my answer or just --
THE COURT: No, sir.
If counsel for the party calling you wishes to elicit something further, he can.
Go ahead.
BY MR. QUINN:
Q. Sir, is there anything in your expert report regarding the seriousness of the violation or violations alleged against Florida Cities Water Company?
A. No.
Q. Is there anything about the economic benefit, if any, resulting from the violations alleged against Florida Cities Water Company?
A. There is no mention of Florida Cities in that entire report.
Q. There's no mention of economic benefit, either, is there?
A. No, sir.

Q. Is there any mention of the history of such violations against Florida Cities Water Company?
A. No, sir.
Q. Is there any efforts about -- any reference to any good faith efforts to comply with the applicable requirements of the Clean Water Act in your report?
A. Concerning what?
Q. Is there any reference to any good faith efforts by Florida Cities to comply with the applicable requirements of the Clean Water Act in your expert report?
A. No, sir.
Q. Is there any reference in your expert report to the economic impact of the penalty upon the violator, Florida Cities Water Company?
A. No.
MR. QUINN: Your Honor, at this point the United States would again renew its motion to strike the testimony of Mr. Hartung.
THE COURT: Well, denied.
BY MR. QUINN:
Q. Mr. Hartung, how many articles have you published concerning EPA's general practices regarding permitting matters under the Clean Water Act?
A. By "published" what do you mean?
Q. Published in a journal of national distribution.

A. Probably half a dozen.
Q. In all those — each one of those was an article about permitting matters under the Clean Water Act; is that correct?
A. Yes.
Q. Sir, how many articles have you published concerning EPA's general practices regarding enforcement matters under the Clean Water Act?
A. Probably another half dozen.
Q. Sir, other than today, you've never testified as an expert witness on EPA's general practices and procedures regarding permitting and enforcement matters, have you?
A. No. I've given depositions when I was at EPA.
Q. Sir, you never worked in EPA Region 4, have you?
A. No.
Q. You've never supervised wasteload allocations in Region 4, have you?
A. No.
Q. You've never supervised anybody issuing permits in Region 4, have you?
A. No.
Q. You've never supervised any enforcements of Clean Water Act violations in Region 4, have you?
A. No.
Q. Sir, you didn't write the Clean Water Act, did you?

A. No. I would have to say no.
MR. BAISE: Objection, Your Honor. That is just not a relevant question.
THE COURT: Sustained.
BY MR. QUINN:
Q. You didn't write any code for Federal Regulations relating to permitting regulators — withdrawn.
You didn't write any of the permit regulations, did you?
A. No, not per se. No.
Q. Okay. You did not, by yourself, write the October 2nd, 1989, final version of the Revised Enforcement Management System, did you?
A. Say again.
Q. You did not, by yourself, write the October 2nd, 1989, final version of the Revised Enforcement Management System, did you?
A. Not by myself, no.
Q. That was written by a committee of EPA's Office of Water, located headquarters in Washington; right?
A. With input, major input from the regions.
Q. But you did not write, by yourself, the April 18th, 1986, National Guidance for Oversight —
THE COURT: He's already answered that, that he didn't, hasn't is?

MR. QUINN: It's a different question, Your Honor.
THE COURT: It just sounded the same.
All right.
BY MR. QUINN:
Q. Let me start over, Mr. Hartung. I'm sorry.
You did not, by yourself, write the April 18th, 1986, National Guidance for Oversight of NPDES Programs, did you?
A. No. I wrote that with the help of other States and EPA's Headquarters.
Q. That was written by Office of Water, located in headquarters in Washington, too; right?
A. They compiled it, yes.
Q. You didn't write the March 31st, 1992, Civil Penalty Assessment for Clean Water Wastewater Discharge Violations, did you?
A. What was the date?
Q. March 31, 1992.
A. No.
Q. Sir, you didn't write the May 1987, Training Manual for NPDES Permit Writers, did you?
A. No, I did not.
Q. You didn't write its predecessor, the one you were talking about on direct examination, either, did you?
A. No, I did not.

Q. You didn't — withdrawn.
Sir, have you ever supervised permit issuance?
A. Yes.
Q. When was that, sir?
A. The late 70's, when I was acting Deputy Water Division Director, EPA Region 6, and, also, in the early 90's when I was in detailed to that same job.
Q. But you've never supervised issuance of permits in Region 4, have you?
A. No, that's correct.
Q. Sir, can you please tell me what is a point source discharger?
A. Point source discharger is a term that was used to describe the difference between non-point source and point source, so that people could understand when you talk about a point source discharger, you were talking about a discrete point rather than sheet flow coming off of land somewhere.
Q. Is it correct that every point source discharger in the United States must receive an NPDES Permit from either the United States Environmental Protection Agency or a delegated State?
A. That's correct.
Q. Sir, you testified a little bit about a minor facility and I'd like to ask you again, what is a minor facility under Federal Regulations?

A. The minor facility is any facility, if you're talking about sanitary waste dischargers, that is below — has a flow below one million gallons per day. And if you're talking about industrial minor, there's a point rating system, so many points for toxicity, et cetera, et cetera, and if you get an 80, that declares you a major and if you are below 80 it declares you a minor.

Q. All minor facilities require NPDES Permit, don't they?

A. That's what the law says, yes.

Q. So failure to have an NPDES Permit is a violation of the law, isn't it?

A. That's correct.

Q. The NPDES Permit System is essential to enforcing effluent limitations; isn't that correct?

A. Well, yes. The system — you issue the permit with the effluent limits and you enforce the permit, which includes effluent limits.

Q. And the NPDES Permit System is essential to maintaining water quality standards, too; is that correct?

A. That's correct.

Q. Sir, whose responsibility is it to assure that a valid NPDES Permit is acquired; the discharger or the regulator?

A. The discharger.

Q. And whose responsibility is it to understand what the requirements of an NPDES Permit are; the discharger or the

regulator?

A. Say it again.

Q. Sure.

Whose responsibility is it to understand what the requirements of an NPDES Permit are; the discharger or the regulator?

A. I would say both, but, of course, it's the responsibility of the discharger.

Q. Sir, an Administrative — withdrawn.

Sir, an EPA-issued Administrative Compliance Order is not an NPDES Permit, is it?

A. No.

Q. An EPA-issued Administrative Penalty Order is not an NPDES Permit, either; is it?

A. No.

Q. And an State-issued Administrative Order is not an NPDES Permit, is it?

A. No.

Q. And a State-issued Permit in a non-delegated State is not an NPDES Permit; is it?

A. That's correct.

Q. And a State-issued Permit in a non-delegated State and an EPA-issued NPDES Permit are two different permits; correct?

A. Yes, that's correct.

Q. And each of those two different permits may have different requirements; isn't that correct?

A. That is, also, true.

Q. And compliance with the State-issued Permit in a non-delegated State does not excuse a violation of an NPDES Permit, does it?

MR. BAISE: Objection, Your Honor. All these questions go to liability. The Court has already found liability with respect to this Defendant.

THE COURT: Well, I'll — I'll allow the examination. I'll overrule the objection.

THE WITNESS: Can you repeat the last question? I'm sorry.

BY MR. QUINN:

Q. Yes, sir. Incompliance with the State-issued Permit in a non-delegated State does not excuse a violation of an NPDES Permit, does it?

A. No, it's still a violation.

Q. Sir, with all your experience in Region 6, how many enforcement cases have you supervised where the facility had no NPDES permit?

A. Oh, in the hundreds.

Q. And how many, in all of your experience, how many enforcement cases have you supervised?

A. I supervised every enforcement case for 13 years.

Q. How many cases would that be, approximately?

A. Are you talking about including administrative orders which —

Q. Yes.

A. Well, 10,000 of those and 400 of Administrative Penalty Orders, that's 10,400 and 10,000 civil judicial, that would be 10,600, plus another 50 — 10,650 cases, probably.

Q. So only a hundred out of the 10,650 cases were facilities for which no NPDES Permit was in place; is that correct?

MR. HIRD: Objection. I think that mischaracterises the testimony. I don't believe he said a hundred.

THE WITNESS: I said —

THE COURT: Well, I don't know whether he did or not. I'll overrule the objection.

BY MR. QUINN:

Q. Mr. Hartung?

A. I'm sorry. I keep asking you to repeat.

Q. Sure.

Isn't it correct that only about a hundred facilities out of the 10,650 cases that you've overseen were cases in which no NPDES Permit was in place?

A. That's correct. That's the only ones that we saw fit

to issue formal actions against.

MR. QUINN: Objection. Move to strike everything after "that's correct."

THE COURT: Denied.

BY MR. QUINN:

Q. Mr. Bartung, doesn't the decision to bring enforcement action require the exercise of discretion on the part of regulator?

A. Yes.

Q. Isn't it fair to say that as the level of EPA's enforcement response escalates, additional internal review is required.

A. It's done. I don't know if it's required. It makes sense.

Q. In Region 6, at the time that you retired, what level — what levels of review were required to issue a warning letter?

A. My section chief signed those — most of the warning letters, and I would look at them periodically, you know, maybe 10 percent.

Q. Just so I'm clear, is a section chief above you or would that be one of the people that reports to you?

A. No, I had three sections under me. I had a section chief or administrative section that took care of most of that.

Q. In Region 6, at the time you retired, what level of review was required to issue an Administrative Compliance Order?

A. It was reviewed by a technical section chief, administrative section chief and concurred on by myself and signed off on by the water division director above me.

Q. So you didn't have authority by yourself to issue Administrative Compliance Orders, did you?

A. That's correct. No branch chief did that. That's not delegable to the branch chiefs in the Region.

Q. How about with regard to Administrative Penalty Orders; is that the same?

A. No, it's not. For some strange reason I had the authority to issue Administrative Penalty Orders, but I didn't have authority to issue Administrative Orders. That was redelegated to me in about 1991.

Q. So it's a redelegation for Penalties Orders, but not a redelegation for Compliance Orders; is that correct?

A. That's correct. That was forbidden by some order out of Washington.

Q. Sir, in Region 6, at the time you retired, what levels of review were required to refer an action to the United States Department of Justice for enforcement?

A. Essentially the same levels of review, section chief, branch chief, division director, regional counsel, and,

also, the regional administrator and then it had to go forward to the EPA Headquarters before it went to the Department of Justice for their concurrence.

Q. Isn't it a fact, sir, that before a complaint can be filed in a Federal District Court, a trial lawyer and assistant section chief, section chief, deputy assistant attorney general, and the assistant attorney general for the Environment and Natural Resources Division must approve the filing; isn't that correct?

MR. BAISE: Your Honor, objection. He's asking for all of the procedures of the Justice Department in approving an action and that clearly is not in the expert's report nor brought out in his direct examination.

THE COURT: Objection overruled.

Can you answer that?

THE WITNESS: I — I don't know the answer to your question.

Most of those relate apparently to the Department of Justice approvals.

BY MR. QUINN:

Q. Sir, do you agree that an important goal of the NPDES Enforcement Program is to provide an appropriate deterrent effect to violators?

A. Absolutely.

Q. And a means of establishing a deterrent effect is the

imposition of a civil penalty; isn't that correct?

A. That's one means, yes.

Q. Sir, with regard to permitting, isn't it true that if a State objects to the provisions of a proposed NPDES Permit, it can bring those objections to EPA's attention prior to the time the permit is issued?

A. That's correct.

They're asked to certify the NPDES Permit as protecting the water quality standards.

Q. Once, also, a discharger obtains a final permit denial from EPA, aren't there specific appeal procedures set forth in the Clean Water Act and the Regulations for the permittee?

A. That's correct.

Q. And aren't there specific time limits within which permittees must file their appeals?

A. That's correct.

Q. Sir — withdrawn.

MR. QUINN: No more questions, sir.

THE COURT: Mr. Baise, do you have any redirect?

MR. BAISE: Yes. Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. BAISE:

Q. Mr. Bartung, counsel asked you about a commission that studied the goals of the Clean Water Act. Please describe

that commission for the record.
A. Actually, I believe I mentioned it, and he was talking about that one of the goals was elimination of — the total elimination of discharge.
My understanding was that the — as I recall, the Clean Water Act set up the commission when the Clean Water Act was passed in 1972, to see if that was a reasonable goal and that commission met and essentially admitted that that was a little bit too lofty a goal, and so that goal was dropped in my understanding.
I don't remember the exact date that everybody said that — in practicality it was dropped in the late 70's, because it was obvious to everyone that we could not eliminate all discharges.
Q. Do you know who was on that commission?
A. I don't recall. I just remember that the impression, it was pretty blue ribbon commission — I don't know why Rockefeller comes to mind. I don't know who was on it, though.
Q. Was this commission created by Congress to review the goals of the Clean Water Act?
A. That's right. That's correct. As part of the statute.
Q. Mr. Hartung, it has been brought out by counsel that a couple of the documents in evidence do not represent

official EPA policy.
Do you remember that question, Mr. Hartung?
A. Yes, sir.
Q. Could you describe EPA's practice and how it puts out documents relating to policies and procedures, if you know?
MR. QUINN: Objection, beyond the scope of direct and beyond the scope of cross.
THE COURT: I'll sustain the objection.
I don't think that's going to be very productive.
Let's move on.
BY MR. BAISE:
Q. Mr. Hartung, you indicated you have published articles?
A. Yes.
Q. Could you identify those articles you have published and the subject matter?
A. I published articles back in the 70's on — in some trade magazines on water quality planning activities, water quality standards, NPDES Permits, NPDES Enforcement Program.
I published one last year, formal paper, presented at a national conference on sanitary sewer overflows.
I published some material through the Dallas Morning News at one time back in the early 80's on wasteload allocations and their impact on the cities in that area.
There probably were more, but I don't recall them.

Q. Mr. Hartung, it's been brought out that you did not write a number of documents that are in question in this case.
Is it ever EPA's policy to have one person issue a document representing agency official or unofficial policy?
A. It is the policy of the agency to have the highest ranking, like the Director of the Office of Water Enforcement Permits, in this case, issue things likes the Oversight Guidance and the Enforcement Management System Guidance. It, generally, would recognize different regions for contributing or different States in some cases.
Q. Do teams of people generally produce documents such as are in evidence in this case, Mr. Hartung?
A. Yes, sir.
Q. Why was it your policy or procedure or EPA's policy or procedure not to permit minor dischargers for a period of time during, say, the last 10 years or 15 years, Mr. Hartung?
MR. QUINN: Objection. Mr. Hartung hasn't worked with EPA for the past two years, and I'm not sure that the purpose of this question — I think is —
MR. BAISE: I'll withdraw the question.
BY MR. BAISE:
Q. Mr. Hartung, did EPA have a policy of not permitting all minor dischargers into the waters of the United States?

A. I don't know that it was a written policy, but it became a practicality that the resources of the agency was spent issuing and reissuing majors and that was the top priority for sure, and so a lot of minor dischargers, if they were ever issued a permit to start with back in the 70's in the first round, never got another permit.
Q. Did it make a difference as to whether the State had permitted the minor discharger, Mr. Hartung?
A. Yes, sir.
Q. Why would that make a difference?
A. It made a difference because we at least knew they were being regulated and the State's generally paid more attention to minors than they did majors, so it's kind of like Jack Spratt and his wife —
THE COURT: Just a moment.
MR. QUINN: Objection, move to strike that response. Beyond the scope of direct and cross.
THE COURT: Overruled.
MR. BAISE: You may continue, Mr. Hartung.
THE WITNESS: I'm through.
BY MR. BAISE:
Q. Mr. Hartung, based on your experience in oversight of NPDES Permits in Region 6, and, also, your extensive experience in working with other regions, have you ever seen an enforcement action taken where EPA had taken an NPDES

Permit or NPDES Permit — discharger's permit many improperly?

MR. QUINN: Objection, calls for legal — sorry — calls for an expert opinion, which was not expressed in the report.

THE COURT: I'll sustain the objection.

BY MR. BAISE:

Q. Mr. Hartung, can you tell the Court and the record whether or not the majority of the enforcement actions that Region 6 or, based on your experience, EPA takes in enforcing NPDES Permits are mainly for injunctive relief?

A. The bulk of them. The purpose of enforcement actions, formal or informal, primarily was to get compliance, and so the bulk of the formal enforcement actions were for injunctive relief as well as sometimes for penalties.

MR. BAISE: No further questions, Your Honor.

THE COURT: Thank you, sir.

You may step down.

THE WITNESS: Thank you.

THE COURT: Call your next witness.

MR. BAISE: Your Honor, the Defendant Florida Cities, calls Mr. Patrick Lehman.

(Pause.)

THE CLERK: Raise your right hand.

Thereupon,

PATRICK LEHMAN,

having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Take a seat in the witness box.

MR. HIRD: Your Honor, before Mr. Lehman begins, last Thursday the Government introduced a document called United States Offer of Proof in Lieu of Testimony of Witnesses that Plead the Fifth Amendment.

There was some discussion at the end of the day on Thursday as to what response, if any, would be required of the Defendants and at what time.

You had indicated at that point that you were taking under advisement as to when or whether any response would be required or how that document would be treated, and you indicated to the Defendants that you would not require a response earlier than Wednesday.

Since the next Court date is Wednesday, I wanted to bring the matter to the Court's attention, so we were aware what our responsibilities are.

THE COURT: Right. I was going to mention that before we concluded the day's proceedings.

Does that have to do with this witness here?

MR. HIRD: No, Your Honor.

If you want to take it up at the end of the day —

MR. BAISE: We just wanted to make sure we had time to take that up, Your Honor, this evening.

THE COURT: Why don't we go ahead and do that now. That is —

MR. BAISE: Do you want to have Mr. Lehman step down while we undertake that, Your Honor?

THE COURT: Well, okay. You can step down, sir. Just have a seat in front of the Courtroom or back of the Courtroom there.

All right. Well, do you want to be heard on the response that the Court will expect?

MR. HIRD: Your Honor, if you have some thoughts you were going to share with us as to what the intentions were —

THE COURT: Not specifically. I was going to afford you the opportunity to respond to the United States' Offer of Proof and whether the Court would receive depositions.

MR. HIRD: Your Honor, I don't think this was in connection with depositions.

THE COURT: It was not. Okay.

Then — well, I thought part of the — I thought part of the proffer was to offer those portions of the depositions listed on page 34 of the joint pretrial statement where the witnesses invoked the Fifth Amendment.

MR. HIRD: I'm sorry. I think now I got confused. You were right, Your Honor.

I thought you were referring to the depositions that were brought up on Friday when asked that question, so you are correct, it's the depositions.

THE COURT: So, that's one — as I recall now, that was one of the things that the Court was going to receive submissions from the Defendants addressing the propriety of the Court's receiving those depositions wherein the witnesses listed on page 34 pled the Fifth Amendment.

MR. HIRD: Your Honor, I think, as I see it, there are three issues. One is the receipt of the depositions, two is whether it's appropriate to draw adverse inferences, and three, the document itself, which as if you recall, Your Honor, we had just had handed to us. We've now had a chance to read it. And appears to be less drawing of adverse inferences from lack of testimony questions, but more the Government's interpretation of the exhibits that it has entered into evidence, and in some instances exhibits which have not been entered into evidence.

I certainly think that we would like to brief for you the question of whether it is appropriate for you to draw adverse inferences. To the extent the receipt of the depositions is connected with that, I would see those two issues linked together.

The third question is a separate question, assuming you were to take adverse inferences, is this appropriate offer of proof, given what this is functionally is an analysis of the documents, and if you look at the documents themselves, in many instances the documents are inconsistent with the conclusions drawn by the Government or the alternative language that can be brought out in the various exhibits.

What I would propose that we do is that we at one stage brief the propriety separately of drawing an adverse inference and admission of the depositions, if that — if the Court Rules against the Defendants with respect to that, then we should somehow have an opportunity to respond within the documents themselves to show that the conclusions that the Government has drawn from the documents are not consistent with other things within the very same documents.

THE COURT: Okay. Yes.

MR. BULLOCK: Your Honor, along with that, the offer of proof presented by the Plaintiff made no — had no specific, either evidentiary or case law basis, to make an offer of proof under the auspices that they were attempting to make the offer of proof and I would just join with Mr. Hird in saying we would appreciate the opportunity to brief the issue of whether or not such a offer is actually an offer of proof and is permissible in that form under the

Rules.

THE COURT: Okay. Mr. Jacobs.

MR. JACOBS: Your Honor, I'm not sure whether the Court has any leanings one way or the other in terms of what it's inclined to do.

I would reemphasize that the Government has no objection, whatsoever, to the Defendants interpreting the documents that the are, in fact, discussed in the offer and interpreting them and suggesting whatever inferences they see fit as being attachable to those documents.

I'm instructed that all of the exhibits that are cited in the offer of proof are already in evidence.

MR. HIRD: I think that's one exception, Exhibit 253. That was Mr. Dresner's —

MR. JACOBS: If that's the memo I take Mr. Hird's representation to it being, then I stand corrected, there's only one of many, many, many exhibits that are not already in evidence.

I do quite agree with Mr. Hird, that in large part the adverse inferences that we asked the Court to draw are adverse inferences that we believe are legitimate and appropriate interpretations of these documents.

I have no objection, whatsoever, to one or both of the Defendants briefing as an initial matter, whether they believe an offer of proof of this nature is an appropriate

means to bring to the Court's attention the adverse inferences that should be drawn, and secondly — so that would be a procedural matter.

And secondly, I have no objection to the Defendants briefing from their own perspective what adverse inferences or what inferences, if they rather characterize it as such, should be drawn from the documents.

As I said, earlier — early last week, there was — there's no subterfuge, no trickery involved here. All we want to do is to make our offer, because the witnesses are unavailable, and that's something we've had no control over. It's something that the Defendants have had ultimately quite some say in, which witnesses would be called to testify. And I'm emphasized in the past that the witnesses, particularly the Avatar witnesses that were called to testify by Avatar Holdings, were the witnesses who did not have personal knowledge of the facts and circumstances directly relating to the allegations in the complaint, and it's the witnesses that we would like to call who are unavailable, and that's why we think we should be entitled to make the offer of proof.

THE COURT: Well, we have the issues presented or appear to be extant that as to the admissibility in the first instance of these depositions wherein these witnesses invoked the Fifth Amendment, and I suppose, I'm not sure

that the second issue can — can or really should be regarded as a separate issue, because the second issue, which we've talked about, is whether it is legitimate for the Government to be entitled to have the Court draw negative inferences from the invocation of the Fifth Amendment.

Now, if the Court were to find against the Government on those issues, then it seems to me we would not have to go further with respect to any matters pertaining to the offer of proof, because the offer of proof would not be an appropriate document.

So, I'm wondering if this briefing should be bifurcated, as I think Mr. Hird had suggested.

MR. JACOBS: Judge, I didn't address the matter of the depositions on — with respect to the present or former Avatar officers, that is to say, Messrs. Getman, Sladkus and Wilkov. I'm entitled to have those depositions into evidence, either because the person is a current officer of the company or because the person is unavailable as being outside of the jurisdiction, outside one hundred miles.

THE COURT: Well, I'm going to permit counsel for the Defendants to address those two issues; that is, the admissibility of the depositions and the inferences — the admissibility of the depositions and the issue regarding whether the Court — whether the Government is entitled to

have the Court draw inferences from the invocation of the Fifth Amendment, and I think the Government probably ought to have the opportunity to respond.

MR. HIRD: That procedure is perfectly satisfactory to us, although I would mention, I believe Your Honor has already ruled on the situation regarding Mr. Wilkov.

THE COURT: Yes, that's true.

MR. HIRD: The only question I guess is the question of the timing, when you would expect it, which may also get into questions about whether we — quite frankly about how long the trial will be —

THE COURT: Yeah. Well, okay. Well, you tell me; where do you think we are in this trial at the present time?

MR. BAISE: With respect to the Defendant, Florida Cities, Your Honor, we have a number of witnesses left. I haven't counted them up today, but I believe, somewhat like the situation with Mr. Armstrong, Mr. Hartung, our case is going to move along rather rapidly. And frankly, we are looking to see whether or not there are at least a couple of witnesses that we can cut out and attempt to finish this off by Friday. It may be difficult. Obviously, we cannot control the amount of cross-examination time that the Government is clearly entitled to, but assuming it stays within the ranges and bounds we have seen to date, there's

at least a possibility of our completing our case on Friday.

Now, obviously, we're out tomorrow, and we have one witness who's only available on Wednesday, and we may have to put him on out of our preferred order, but there's a possibility we could get on maybe four or five of the witnesses on Wednesday, and if that is successful, we have a real shot at completing on Friday. If that's not successful, it probably will go over a day or two.

THE COURT: Uh-huh.

MR. BAISE: I'm not speaking, of course, for Mr. Hird, who obviously has one or two witnesses that — well, I'll let Mr. Hird address it.

THE COURT: So, Mr. Baise, you say there's a possibility of you finishing your case by this Friday?

MR. BAISE: Yes, sir.

THE COURT: Mr. Hird?

MR. HIRD: Well, Your Honor, depending on the status of the offer of proof, I have three, what I believe is best described, three plus one. There's a Mr. Allen, who Mr. Baise will be calling in his case, and I had suggested that I would cross — I'm sorry — I would examine him with respect to my direct case when he appeared, so he appeared only once. So, if that happens, that would take that witness off.

I would then have two witnesses that I would go

forward with and as long as the status of the offer of proof is in doubt, there would be a third witness I would call. So, that would probably, assuming I can examine Mr. Allen at the time period suggested by Mr. Baise, that might add one more day.

THE COURT: Okay. Mr. Jacobs?

MR. JACOBS: Judge, first of all, I have no objection to Mr. Hird's suggestion that he examine Mr. Allen at the same time, for purposes of his case, as Florida Cities does — when they examine him. I think that's a fair request and will speed things along.

I, by my count, I think based on the representations that have been made and the witnesses that have been called to date, at this point in time, my best approximation is that the Defendants together have 23 witnesses remaining on their list, 20 for Florida Cities and 3 for Avatar Holdings.

You can tell that we are somewhat shorthanded compared to the other side of the podium, and to the extent that the Defendants would advance us the courtesy, if they are going to cut, as Mr. Baise suggested, witnesses from the list, to the extent they could share that with us at their earliest available point in time, that would probably both facilitate our preparation, as well as expedite the examination of the witnesses when and if they are called.

THE COURT: Mr. Baise.

MR. BAISE: May I?

THE COURT: Yes, sir.

MR. BAISE: I think what Mr. Jacobs is still relying on is an earlier list that had 26 witnesses on it. My original — excuse me — the updated list had 18 witnesses on it, of which we have already taken care of Mr. Smith, three of those witnesses are by deposition, and that should take no more than half hour, and we've got Mr. Hartung.

THE COURT: Who do we have left? Let's get specific here.

MR. BAISE: Okay.

MR. BULLOCK: Your Honor, on Monday last we submitted a witness list to the Government that had 19 witnesses, three of whom would be called by deposition. We have already put forward — let's see — 1, 2, 3, 4 — 4 witnesses. We have given them notice on Wednesday for approximately 7 witnesses.

THE COURT: The names? Well, I mean, you've given them the names?

MR. BAISE: In fact, my only list I've given to Mr. Jacobs. I wrote it out right after lunch hour, Your Honor. If he will hand me my list. On — just the number or the names themselves, Your Honor?

THE COURT: Well, as long as — since you have it, go ahead, yeah.

MR. BAISE: On Wednesday — at this point it looks like Mr. Lehman may not be on today, so Mr. Lehman, and then a Ms. Kagey from EPA, who is coming down at our request. So Mr. Lehman, Ms. Kagey and the three depositions, and then Mr. Ron Blackburn, a State Official from the Florida DEP out of Fort Myers, followed by Mr. Mike Acosta, a Florida Cities employee, a Mr. Larry Good, who would talk about the Carrollwood situation, Mr. Bradtmiller, a Florida Cities employee.

MR. JACOBS: Mr. Baise, forgive the interruption. He's available on? I beg your pardon. You said one was available on Wednesday?

MR. BAISE: Mr. Bradtmiller is available only on Wednesday and will be taken out of normal order. Then we would hope to get on Dr. Abdul Ahmadi, another State Official, and finish up the day with Gerald Allen.

MR. JACOBS: These are — I'm sorry — all 12 of these witnesses, then, on Wednesday?

MR. BAISE: Three of them are depositions and I believe there are 12 — 1, 2, 3, 4, 5, 6, plus, excuse me — Kagey and now we have Mr. Lehman, of course. I'm sorry, eight.

That's very ambitious.

THE COURT: Yes.

MR. BAISE: I realize that.

THE COURT: Okay.

MR. JACOBS: May I inquire further which ones, if you know now, you do not intend to call at all of the 19 on the list?

THE COURT: Yeah. Who will you not be calling from that list?

MR. BAISE: Out of the list I read you?

THE COURT: No, from the list that Mr. —

MR. BAISE: We haven't cut anyone yet. In fact, we were going to evaluate where we are this evening and see if there was anyone that we could cut from this, Your Honor.

I am advised by counsel that the Government may have a list that has a Mr. Michael Murphy on it, and we have decided to cut him off of the list. So that might help Mr. Jacobs with respect to the list he has.

MR. JACOBS: Your Honor, considering tomorrow we're not in Court, is it fair to request that we be advised tomorrow by the Defendants of any witnesses who also will be dropped from the list?

THE COURT: Yeah,

MR. BAISE: We can do that, Your Honor.

THE COURT: Yes. Advise them tomorrow of any additional witnesses that you — and I expect counsel to act

in good faith in doing so, by tomorrow.

MR. BAISE: We have a very good working relationship on these issues, Your Honor.

THE COURT: Now, getting back to the written submissions, counsel, I don't see any realistic way for us to finish this case this week based on what I'm hearing, but —

MR. HIRD: Your Honor, that's why I raised the question, because I think it would make better sense to follow Your Honor's original suggestion and have the briefing on the admissibility and then the briefing on any response to the document if it's accepted to occur after we conclude at least the trial activities this week. If we are going to come back at some later date, we can still be doing that in that hiatus.

THE COURT: Okay. Well — I'm going to — can you have your Defendants have their written submissions addressing the admissibility of the depositions listed on page 34 and, also, the issue regarding the entitlement of the Government to the Court's drawing negative inferences from that as a — well, drawing negative inferences from the invocation of the Fifth Amendment by Wednesday?

MR. HIRD: By a week from —

THE COURT: No, I was thinking in terms of this Wednesday, but I'm throwing that out as a —

MR. HIRD: Honestly, Your Honor, if we had understood that on Friday, I think we could have, and had not having heard direction from you, I don't think we can do that within that time period.

THE COURT: Uh-huh. Okay. Well, I guess I'm thinking now in terms of requiring your submissions later in the week and then the Government's opportunity to respond to that perhaps by the beginning of next week, sometime by Tuesday, say.

I guess maybe I'm asking for the submission — I don't think it will take a great deal on your part to address those initial issues, and I would like to have that by close of business on Thursday of this week, and then the Government's response to that by —

MR. JACOBS: Thursday of the following week, sir?

THE COURT: No. Tuesday of the following week.

MR. JACOBS: Yes, sir.

THE COURT: And then I'll rule on that. Subject to the Court's ruling, we may not have to deal with the other issue; that is, on the offer of proof that the Government has filed.

MR. BULLOCK: Your Honor, would you object to a joint memorandum from the Defendants?

THE COURT: I would appreciate a joint memorandum. I'm glad you thought of it.

MR. BULLOCK: And Your Honor, would that be, I believe, the standard 20-page limit?

THE COURT: I'll tell you what, since we're going over the time that we scheduled for trial, why don't we say Friday from you guys and Thursday from the Government?

MR. JACOBS: Thank you, Judge.

MR. HIRD: Friday close of business?

THE COURT: Yes, sir.

MR. HIRD: Thank you.

MR. BAISE: Your Honor, may I just bring one more point that's a bit of a clarification, I think? When I mentioned a moment ago I thought that DOJ counsel was looking at an older list. As I look at what we have accomplished to date, I only count 11 witnesses for us to have to put on over three days, not 19, not 23.

THE COURT: Well —

MR. BAISE: Excuse me.

THE COURT: We may be able to do it, and that's my fondest hope. But, even if we do, I am not inclined to feel that that necessitates a revision of this briefing schedule that I've indicated.

MR. BAISE: No, I wasn't suggesting that. I was just bringing the actual number to your attention, so you would have that as background.

THE COURT: Right.

I need to — these memoranda, how much — what length are you contemplating?

MR. BULLOCK: Your Honor —

MR. BAISE: Short as possible.

MR. HIRD: I can certainly live within the 20-page limit and my goal is to make it much, much shorter, but I haven't started writing it yet, so I can't project. I certainly don't need an extension of that, and I'm going to try to shoot to do it in 10 pages.

MR. JACOBS: Whatever he shoots for, I'll shoot for.

THE COURT: Shoot for 10 pages, and I will hold you to a 15-page maximum on this, but let's try — these are — I think these issues are pretty discrete, isolated issues here, so I think you can do it in 10 pages.

Now, I have a sentencing at 8:45 on Wednesday. It should not be a lengthy sentencing. I think I can do it in 15 minutes and we'll start at 9:00.

Anything else?

Okay.

MR. BAISE: Yes, Your Honor, one item.

First off, we want to thank the Court for allowing the Courtroom Deputy to open the Courthouse at 8:45 — 7:45. I'm sorry. Because we understand that there has to be certain orders issued for that to occur, and to the extent

that can continue when we have an 8:45 beginning, we would appreciate that.

THE COURT: We'll be starting at 9:00 on Wednesday, and to the extent that I can start earlier, I'll — let me see — you got your calendar there for next week?

THE CLERK: The rest of the week we have something early morning first thing.

THE COURT: We have — I have canceled the sentencing and postponing the 4:00 sentencing for Wednesday, and I have one scheduled for 8:45 Wednesday morning and one 8:45 Thursday morning and one at 8:30 Friday morning. So, I can't be putting off everything that I — everything else that I have. I've put off an emergency Grand Jury matter that would have taken some of this afternoon, and I'm going to try to hold that off until next week.

Okay. Then I'll see you all at 9:00 on Wednesday morning.

MR. BAISE: Thank you, Your Honor.

THE MARSHAL: All rise.

The Court will be in recess until 9:00 Wednesday.

Exhibit____(GHB-77)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	)	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' OFFER OF PROOF IN LIEU OF THE TESTIMONY OF WITNESSES WHO PLEAD THE FIFTH AMENDMENT

I. Introduction

Due to the unavailability of knowledgeable and high-ranking past and present Avatar officers to testify because they have asserted their Fifth Amendment rights, the United States' proof of Avatar's liability necessarily rests primarily on documentary evidence, from which the Court can draw such inferences as it deems fit in view of the absence of the testimonial evidence. The United States respectfully submits that the inference that can and must be drawn is that Avatar Holdings pervasively controlled the environmental practices of Florida Cities, and therefore must be held liable for the violations for which Florida Cities has been held liable.[1]

[1] The United States' theory of liability against Avatar Holdings, including its argument on adverse inferences, was thoroughly briefed in the United States' Memorandum in Support of Motion for Partial Summary Judgment, which is incorporated herein pursuant to Rule 10(c), Fed. R. Civ. P. While this offer of proof primarily addresses inferences relating to Avatar Holdings'

(continued...)

A vast number of documents demonstrate Avatar Holdings' pervasive involvement in the environmental affairs of Florida Cities. Indeed, officers and directors of Avatar Holdings, at the highest levels in both Coral Gables and New York City, managed those affairs. Significantly, each of five "key players" (Peter Sharp, John Sladkus, Lawrence Wilkov, Dennis Getman, and Robert Gordon) who is now unavailable, was personally and pervasively involved in events directly relating to violations of the Clean Water Act at the three wastewater treatment plants.[2] Hence, Avatar Holdings must be held liable for the violations.[3]

II. Avatar's Key Players

Peter Sharp

Peter Sharp was a New York City real estate tycoon who took a close personal interest in his new investment. Sharp initially moved to Florida in Avatar's early years to oversee the company, and subsequently presided over it from the offices of Peter Sharp

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[1](...continued)
liability, inferences can also be drawn from the evidence cited herein which relate to the appropriate penalty to be awarded, particularly inferences relating to Defendants' history of violations and efforts to comply with the applicable requirements.

[2] Sharp is deceased. The other key players have plead the Fifth Amendment.

[3] While the key Avatar documents are dated, many are "new" to the United States, having been produced only subsequent to the close of discovery in November 1995 and only after the Court ordered Avatar to produce them on the United States' Motion to Compel. Order, November 13, 1995. Thus, it bears noting, then, that they were not available to the United States when it filed its summary judgment motion in June 1995.

& Co. in New York.[4] Sharp initially served as the Chief Executive Officer, Chief Operating Officer, President, and Chairman of the Executive Committee of the Board of Directors of Avatar Holdings. Gov. Exhibit #518 at 18. Although presidents were subsequently appointed, Sharp remained the Chief Executive Officer of the company until 1990. Gov. Exhibit #547 at 5-6. Thereafter, Sharp remained the Chairman of the Executive Committee of the Board for an additional year, id., Gov. Exhibit #551 at 2, before taking ill.

According to Levy, Sharp was a workaholic micromanager, who paid such incredible attention to detail, for example, that he personally edited his lawyers' briefs. The documentary evidence demonstrates that Sharp's hand was everywhere; he personally and tightly controlled the company's pursestrings, including expenditures that were necessary to comply with the Clean Water Act, and his overwhelming focus on the bottom line necessarily impacted on the action of his subordinates.[5] Through this

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[4] A press release announcing the appointment of Avatar Holdings' corporate officers includes the following information about Mr. Sharp:

> Peter Sharp, a former Florida resident will establish a home in Miami and will devote substantial time to the management of Avatar. Through various companies, Mr. Sharp owns and manages more than $500 million in residential, commercial, industrial, hotel and specialty properties, primarily in the New York area.

Gov. Exhibit #517 at 23.

[5] Sharp's personal approval was necessary for any Avatar entity expenditure above $10,000, Gov. Exhibit #524, until 1989, when he gave Sladkus authority for professional contractor

(continued...)

control, Sharp pervasively controlled the environmental affairs of the wastewater treatment plants.

Peter Sharp died April 17, 1992.

John Sladkus

John Sladkus worked for Peter Sharp in New York City. He was Sharp's right-hand man at Avatar Holdings, and its Executive Vice-President - Land and Utility Operations until January 1,

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[5](...continued)
expenditures below $25,000, Gov. Exhibit #541.

A memo written from Sharp to Gordon about the Gulf Gate and South Gate wastewater treatment plants in Sarasota illustrates Sharp's micromanagement of the wastewater treatment plants:

> 1. If we have not had to put in emergency power generators for Gulf Gate and South Gate AWT's for the last 40 years, why do we need it now?
>
> 2. As to lift stations, if we absolutely feel we have to have it, it seems to me the cheaper emergency power would be batteries. These are cheap and can be periodically recharged from a mobile unit.
>
> 3. As to the AWT plant, we have excess capacity and I can't imagine that any power outage would last long enough to cause an overflow. If my memory serves me correctly, which it may not, emergency power was not installed in the AWT when it was recently built. If it is required by DER regulations, how come it was not done then?

Gov. Exhibit #543.

It bears noting that while the United States has exercised its discretion not to include in this action Clean Water Act violations at Gulf Gate and South Gate, Florida Cities concedes that violations did take place. See FCWC Amended Revised Responses to Plaintiff's First and Second Interrogatories.

1991. Gov. Exhibit #519 at 4, Gov. Exhibit #557 at 2.[6] His influence is best illustrated by virtue of the fact that only he, in addition to Levy and Sharp, had authority to sign checks over $100,000 on behalf of any Avatar entity. Gov. Exhibit #526 at 10. Trained in engineering, Sladkus apparently was Sharp's point man on major construction projects, necessarily including those relating to the Florida wastewater treatment plants. The documentary evidence shows that he was pervasively involved in environmental compliance issues at the three wastewater treatment plants.

John Sladkus has refused to testify in this case on Fifth Amendment grounds. See Deposition of John Sladkus, August 24, 1995.

Lawrence Wilkov

Lawrence Wilkov joined Avatar Holdings as its President and Chief Operating Officer in 1984, Gov. Exhibit #526 at 12, and became its Chief Executive Officer as well beginning in 1990. Gov. Exhibit #551 at 2. After major disagreements with Edwin Jacobson, who joined Avatar Holdings in 1992 as a Director and Chairman of the Executive Committee of the Board, Wilkov left the company in January 1994.[7] During his tenure, Wilkov presided over the company's headquarters in Coral Gables.

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[6] Upon leaving this Avatar Holdings position, Sladkus was given five-year consulting contracts with Avatar Properties and Avatar Utilities. Gov. Exhibit #557.

[7] Wilkov sued Avatar Holdings, Odyssey Partners and Jacobson over his employment. The suit was settled for $1,000,000. Gov. Exhibit #591.

The documentary evidence reflects that in his capacity as President and Chief Operating Officer of Avatar Holdings, Wilkov was personally and pervasively involved in decisions relating to environmental compliance at the three wastewater treatment plants.

Lawrence Wilkov has refused to testify on Fifth Amendment grounds. See Deposition of Lawrence Wilkov, March 7, 1995.

Dennis Getman

Dennis Getman joined Avatar Holdings as Senior Vice President & General Counsel in 1982, Gov. Exhibit #522 at 2, and since has become its Executive Vice President & General Counsel. He appears to have been responsible for all of the company's regulatory affairs, including, in particular, all matters relating to environmental compliance. The documentary evidence demonstrates that Getman, who utterly disclaimed environmental restrictions and regulators, was personally and pervasively involved in decisions relating to environmental compliance at the three wastewater treatment plants.

Dennis Getman has refused to testify on Fifth Amendment grounds. See Deposition of Dennis Getman, May 1, 1995.

Robert Gordon

President of Avatar Utilities, Inc. (which is now operationally defunct), Robert Gordon has been the central player in Avatar Holdings' utility operations since the company's inception, reporting directly to the Avatar Holdings president.

Robert Gordon has refused to testify in this case on Fifth Amendment grounds. See Deposition of Robert Gordon, May 1, 1995.

III. Avatar Holdings' Role at the Wastewater Treatment Plants Barefoot Bay

One of the GAC real estate holdings that Messrs. Sharp and Levy acquired when they purchased the company in 1980 was Barefoot Bay, an upscale mobile home community on the Atlantic Ocean in an otherwise largely undeveloped rural area of Brevard County home to citrus groves. Barefoot Bay represented both a real estate and utility operation to Avatar because Avatar owned, developed and managed the development, as well as provided water and wastewater services to its residents.[8]

When Levy and Sharp acquired GAC in 1980, they knew at the time that its previous owners had acquired the reputation of developing land without proper sewage facilities. Deposition of Leon Levy, December 6, 1995 at 132-34; 265-66 and Gov. Exhibit #253. As a sophisticated developer, Avatar also was well aware in 1980 that wastewater disposal was an important issue that

[8] Documents refer to Barefoot Bay as an **Avatar Holdings** real estate operation, project, or cost center, often without any reference to an Avatar subsidiary. Gov. Exhibit #58 at 8, Gov. Exhibit #518 at 7, Gov. Exhibit #550, and Gov. Exhibit #546 at 5. Avatar Holdings unconditionally guaranteed an unsecured $950,000 loan to Avatar Properties, up to $800,000 of which was to be used to finance Barefoot Bay inventory. Gov. Exhibit #51 at 3, 6-11. The loan documents are signed twice by Peter Kleinerman: once as Executive Vice President of Avatar Properties, the recipient of the loan, and once as Executive Vice President of Avatar Holdings, the guarantor of the loan. Gov. Exhibit #51 at 11.

needed to be addressed at any development.[9] Against this historical backdrop, Avatar Holdings simply took over where GAC left off in terms of developing the property without adequate sewage.

At the time Avatar Holdings acquired Barefoot Bay and its treatment plant, 1,444 of some 5,200 planned lots (the anticipated "buildout" number) had already been sold. Gov. Exhibit #30 at 2 (Table 1). The flow data reflects that as of 1980, the average daily flow from the development was 126,000 gallons/day, id., although the two percolation ponds built to date together at best only had the capacity for 100,000 gallons/day. As a result, unpermitted overflows into the Sebastian River were already occurring. In short, while buildout was a long way off, no provision was made for the increasing flows from the connection of additional lots to the sewage system. Yet, Avatar Holdings continued to market and develop the remaining lots, and to connect them to a sewage system which guaranteed that the additional flow would wind up in the Sebastian River. The conclusion is inevitable that Avatar continued to expand the Barefoot Bay development with knowledge that it would thereby increase the magnitude of the unpermitted discharge violations. Avatar made that business decision both as the developer of Barefoot Bay and as the parent company of Florida Cities, intentionally choosing not to defer developing

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[9] Wastewater Disposal appears as top line item in a generic "Summary of Procedures for Major Developments" prepared on January 18, 1980. Gov. Exhibit #516.

until it was able to comply with the law and ignoring the consequences to the environment.

As early as July 21, 1983, Avatar management meetings included discussion of land areas that were needed "for future construction to accommodate the complete build-out of Barefoot Bay," Gov. Exhibit #11, an apparent reference to the construction of additional percolation ponds on which to dispose of the effluent. At the July 27, 1984 Avatar Holdings Board of Directors meeting, Wilkov reminded the Board that "the Department of Environmental Regulation has been imposing stricter requirements, and that in his opinion **developmental growth within certain areas will depend heavily upon the availability of water and sewer facilities.**" Gov. Exhibit #21 at 5. [emphasis added].[10]

In a February 29, 1984 memorandum, Wilkov recognizes that the "[s]ituation requires immediate action. Increased capacity should be 'on line' by November 1984." Gov. Exhibit #15. In the same memorandum, Wilkov lists the issues associated with the construction of the percolation ponds. The primary issues relate to cost. Wilkov's estimate was $600,000-700,000. On the accounting question of whether the developer (Avatar Holdings) or the utility (Avatar Utilities) should be charged the cost, Wilkov

[10] Attached to the minutes of the same Board meeting is a detailed questionnaire relating to drinking water at Barefoot Bay, indicative of the environmental/regulatory matters which came directly to the Board's attention. Gov. Exhibit #21 at 6-7.

concludes that they should "find a way to have the utility fund entire amount." Id.

In a June 28, 1984 memorandum, Sharp issued what was to become one of his characteristic mandates on cost to Wilkov, Sladkus, and Gordon:

> We must be sure that the cost of the percolation pond and related construction end up 100% as part of Barefoot Bay's rate base on which rates can be charged to customers from day one.

Gov. Exhibit #18.

Having marching orders in hand about the cost, the next question was where to build the additional ponds. One possibility for the location of additional ponds was an adjacent orange grove.[11] Another possibility, conveyed by Gordon to Wilkov and Sladkus on October 23, 1984, was the acquisition of a neighboring parcel of land known as the Hearndon property, in which Avatar Holdings was interested primarily to expand the Barefoot Bay development. Gov. Exhibit #24. The Avatar Holdings Board of Directors approved obtaining an option on the Hearndon property at its November 30, 1984 Board meeting. Gov. Exhibit #25 at 4. This option was perceived as having the attraction of reducing land costs.

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[11] On July 18, 1984, on behalf of Avatar Utilities, Gordon signed a letter agreement, executed on July 25, 1984 by William E. Burnett, Jr., on behalf of WHS Groves, for Avatar Utilities to conduct percolation tests on his property. Gov. Exhibit #19. The testing apparently showed that the land was suitable for percolation ponds because Avatar Utilities apparently entered into a purchase agreement with WHS Groves on May 1, 1985. Gov. Exhibit #37. Later, however, Wilkov reported that the testing was wrong. Gov. Exhibit #53 at 3.

In a December 4, 1984 memorandum from Gordon to Sharp, Wilkov, Sladkus, Getman, and Kleinerman[12], among others, Gordon reports that "there appeared to be some higher sandy areas" on the property "that would be suitable" for pecolation basins. Gov. Exhibit #26. A letter drafted by Peter Sharp in December 1985 and (after editing by Wilkov) sent to a New York banker, describes how various Avatar entities are to benefit by the purchase:

> The property which is the subject of the contract consists of 270 acres immediately adjacent to Barefoot Bay to the north. The contract is conditioned on Avatar's satisfaction with regard to a number of conditions including soils and zoning. Avatar Utilities Inc. requires about 20% of the acreage for a leaching field. Avatar Utilities Inc. will pay its proportionate share of the purchase price and such amount will be included in its rate base. The balance will give Avatar's Barefoot Bay Development sufficient acreage to add another golf course and approximately 700-750 manufactured housing sites.

Gov. Exhibit s 27, 29.[13]

On March 13, 1985, Gordon wrote in a memo to Wilkov, with a copy to Sladkus, that "[w]e have exhausted the alternatives of wastewater effluent disposal at Barefoot Bay and suggest either of the following options...." Gov. Exhibit #31. The two options both entailed acquiring an additional 40 acres of land on which

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[12] Kleinerman was Executive Vice President, Treasurer and Chief Financial Officer of Avatar Holdings. Gov. Exhibit #351 at 1.

[13] Planning for the Hearndon development is very instructive in terms of where responsibilities fell -- the same key decision-makers on wastewater treatment issues at Barefoot Bay (Sladkus, Getman, and Gordon) were to plan wastewater treatment at the new neighboring development. Gov. Exhibit #28.

to construct additional percolation ponds. One of the sites was the orange grove; the other was on the Hearndon property. The cost of each option was roughly the same: $1.3-million.

Peter Sharp was personally and intimately involved in the decision-making relating to the acquisition of the additional property for wastewater disposal purposes. On August 2, 1985, he wrote a detailed memo to Gordon, entitled "Barefoot Bay - Land Acquisition for Wastewater Effluent Percolation Basins," referencing a July 30, 1985 memo from Gordon to Sharp, Wilkov and Getman (which was never produced), which appears to relate to a legal dispute with the grove owner over the purchase of the land. Gov. Exhibit #38. The memo reveals that Sharp was personally very aware of the necessity of building the additional percolation ponds, the government scrutiny to which environmental matters are subject, as well as very concerned about how much they will cost. Pertinent portions of the memo read as follows:

> 1. I think there is a better than 50/50 chance that we will lose this specific performance suit.
>
> . . . .
>
> 3. The $35,000 gamble is not a good one in my book because all government processes take much longer than anyone ever anticipates.
>
> . . . .
>
> 5. I can't understand what made anyone think you would get the necessary permits in the time period between May 6th and July 31st. Apparently we have not even filed the application with the DER.

Id.

Gordon updates Wilkov on October 10, 1985 (copying Getman, Kleinerman, and Sladkus) that the plans and specifications for the percolation ponds were submitted to the DER for their approval on August 27, 1985, Gov. Exhibit #41. In a January 29, 1986 letter, Sharp represents that "Avatar has recently acquired adjacent land for the purpose of increasing the capacity of its sewage plant." Gov. Exhibit #45.[14] [emphasis added] On February 11, 1986, Gordon gives Sladkus (with a copy to Wilkov and Kleinerman), a lengthy report which reflects that the DER had issued a construction permit on January 14, 1986, and that load testings were being scheduled. Gov. Exhibit #46. A similar status report to Sladkus (again with a copy to Wilkov and Kleinerman), followed on June 12, 1986. Gov. Exhibit #50.

The new parcels were never built, however, and on January 16, 1987, Sladkus updates Sharp, Wilkov, and Kleinerman by memorandum, on the apparent complete failure of the existing ones and suggesting the possibility of spray irrigation on a golf course to be constructed:

> ... Disposal ponds are not functioning. Further studies are underway to see whether they can be made functional by rotation, etc. If this is impossible, other means will have to be constructed, possibly a golf course. Deep well injection has been considered and ruled out as economically and, possibly technically unfeasible.

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[14] The purpose of the letter was to solicit interest in the Avatar-owned Barefoot Bay's cable television system. According to the minutes of the March 21, 1986 Avatar Holdings Board meeting, Avatar Holdings ultimately agreed to sell the Barefoot Bay cable television system for $2.8-million. Gov. Exhibit #48 at 8.

Gov. Exhibit #52. The minutes of the January 30, 1987, meeting of the Avatar Holdings Board of Directors also reflect that attention has turned to the spray irrigation option:

> Mr. Wilkov reported that under consideration is extending the option to purchase property contiguous to the Barefoot Bay subdivision, the purpose being to determine if the soil tests positive for spray irrigation. He advised that the 40 acres previously acquired by Avatar Utilities for such purpose have proven unsuitable for percolation ponds, and a damage claim against the testing engineer is being considered. He also advised that if the optioned property tests positive we could construct a golf course on approximately 80 acres and develop the remaining 190 acres for homesites.

Gov. Exhibit #53 at 3.

It appears from Wilkov's report to the Board that Avatar Holdings was only willing to use a limited portion of the 270-acre Hearndon property as a spray irrigation site in conjunction with its development as a golf course and homesites. Similarly, it appears from an April 13, 1987 memorandum from Wilkov to Kleinerman, Getman, and Gordon, among others, that Avatar Holdings officials were reluctant to devote substantial portions of Hearndon to effluent disposal instead of land development.[15] Gov. Exhibit #55. Yet, a May 1, 1987 memorandum to Wilkov, Getman, Kleinerman, and Gordon, among others, reveals that at the same time Avatar officials were acutely aware both that they already lacked sufficient wastewater disposal capacity and that proceeding towards "buildout" at Barefoot Bay would require still

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[15] Although the Hearndon property was finally acquired in early 1988, Gov. Exhibit #65 at 7, it appears that the property was never used for either purpose.

additional capacity. Gov. Exhibit #56. A May 26, 1977 memorandum to Wilkov (with copies to Getman and Gordon, among others) identifying its subject as "Barefoot Bay--Effluent Disposal" also suggests that Avatar officials were concerned about the cost of using the property for spray irrigation:

> Stating the obvious, I feel that it will be difficult to permit and construct an economically viable spray irrigation system under Hearndon [sic] property.

Gov. Exhibit #57. The same memorandum, reflects that Avatar officials were well aware of the potential for environmental harm caused by effluent disposal in the area:

> The Indian River Lagoons system is considered to be deteriorating as a result of fresh water discharges from storm water runoff, drainage canals, and wastewater effluent which has presumably killed seagrass beds and clambeds and have degraded water and sediment quality throughout the system.

Id.

Sladkus gives Sharp another full report on the Barefoot Bay wastewater problem on February 11, 1988, attaching a file memorandum written by Gordon (with copies to Getman, Sharp, Sladkus, and Wilkov, among others), memorializing a meeting with DER. Gov. Exhibit #61. The gist of Gordon's memo indicates that Defendants were balking at actually constructing the percolation ponds contemplated some four years earlier, even though Defendants were fully aware that they had an ongoing illegal discharge, and that DER wanted the percolation ponds built and the ongoing connections to cease. Gordon and his team convinced DER that they would construct a deep well system for the disposal of the effluent in lieu of the percolation ponds, that the land

on which the percolation ponds were to be situated would be used as a spray irrigation site, and that ongoing connections from Barefoot Bay lots could continue. They also promised DER they would upgrade the plant to AWT standards if a surface water discharge were approval. Sladkus' memo, which was originally intended for Sharp's eyes only ("No Circulation"), but was later copied to Leon Levy, reads as follows:

> 1. I am attaching a copy of Bob's memorandum of a meeting he had with the DER.
>
> 2. You will note that the proposed final resolution is as follows. We would immediately spray irrigate on the 40 acre Hearndon property. We would also proceed with the design and subsequent construction of a deep well injection system. The spray irrigation will pose no significant expense, since we have spare travelling irrigators on Plant #2 in Poinciana.
>
> 3. The deep well system will cost approximately $2,000,000. The risk there is that we can expect to expend approximately 1/2 of that before we will know whether the system is effective. We have confidence that it will be effective, because there are a number of deep wells in the area. In addition, if successful, it will solve our Barefoot Bay problem once and for all. And, finally, we really don't have any alternative.
>
> 3. [sic] **As you will note in the memo, Bob made a tentative commitment subject to the Board's approval. Meaning, of course, your consent to the above.**
>
> 4. Do you agree? (If possible, I would like to have your views before I leave for Florida, this afternoon.)

Id. [emphasis added].

This series of memos, as well as the ones that followed, make patently clear that Avatar Holdings was fully cognizant of the unlawful discharge at Barefoot Bay, and pervasively involved in critical decision-making relating to how it was to be

addressed. Indeed, these memos show that one man alone, Peter Sharp, personally involved himself in -- and controlled -- that decision-making. A March 15, 1988 memo from Sladkus to Sharp demonstrates that Sharp's pervasive involvement extended right down to the selection of the engineer who was to conduct the preliminary study for the deep well injection system. Gov. Exhibit #64. In that memo, Sladkus recommends to Sharp that they "retain CH2M Hill, primarily because they have been the engineers of the other successful deep well injections in the area." Id. Sharp was also personally involved in the selection of environmental auditors for Avatar utilities. Gov. Exhibit #538.

Memoranda to/from Sladkus and Gordon and Allen, See Gov. Exhibits ##67-69; 74, 76, 78, as well as Sladkus' own handwritten notes, Gov. Exhibit #77, show that Sladkus continued to closely monitor the situation at Barefoot Bay after the decision was made to build a deep well. Indeed, documents in the files of Peter Sharp and Co. reveal that when, in early 1989, Gordon became concerned that the deep well might fail, Sladkus became increasingly involved in the project. Gov. Exhibits ##81-85, 87, 91, and Wilkov and Getman were kept apprised as well. Gov. Exhibit #86.

In April 1989, Gordon forwarded to Sladkus an engineering report on deep well injection at Barefoot Bay. Gov. Exhibit #83. Gordon recommends that "we arrange a meeting to review the entire injection well controversy with CH2M Hill so that everyone has first hand information relative to the Barefoot Bay project's

success." Id. CH2M Hill was asked to prepare materials for the meeting, which took place on June 13, 1989 in New York. Gov. Exhibit #93. Gerald Allen's handwritten notes from the June 13, 1989 meeting reflect that it was attended by Wilkov, Kleinerman, Gordon, Sladkus, and Getman, who decided to "[c]ontinue to pursue deep well simultaneously with permit to irrigate." Gov. Exhibit #92.

By summer of 1989, however, the tide was turning towards dropping the deep well. In his August 16, 1989 utilities report to Sharp and Wilkov (with copies to Allen, Getman, Kleinerman, Levy, and Sladkus), Gordon states that "[t]he Company's confidence level for success is shrinking rather than expanding." Gov. Exhibit #96; Gordon then goes on to say that he is once again looking into the possibility of purchasing neighboring citrus groves, this time with an eye toward both using them for effluent disposal purposes as well as to produce oranges: "We feel that this is a good opportunity for the Company to acquire an earning asset as well as provide the base disposal area for treated effluent." Id. In a follow-up memo to Sharp and Wilkov on August 21, 1989, Gordon updates them on the availability of the neighboring orange groves. Gov. Exhibit #97. Sharp responded the very next day, asking to "be kept abreast of [his] efforts to resolve the disposition of the effluent at Barefoot Bay." Gov. Exhibit #98. Gordon updates Sharp on August 25, 1989, advising him that a meeting has been arranged with the FDER

District Director to review the plans for spray irrigation on orange groves. Gov. Exhibit #99.

An exchange of memos the following month between Sharp and Sladkus relating to a Conward for engineering services at the adjacent Hearndon site, again shows Sharp's close personal involvement. Gov. Exhibits ##103, 106.[16]

By September 1989, Avatar Holdings appears to have abandoned the deep well injection project. Gordon sent Sladkus a copy of a submittal to FDER proposing spray irrigation instead. Gov. Exhibit #105. In November 1989, Allen prepared a report entitled "Wastewater Disposal Alternatives to Deep Well Injection, Barefoot Bay" which he transmitted directly to Board members including Levy. Gov. Exhibit #115.

By January 1990, Avatar Holdings has decided to make an investment in spray irrigation. That decision is reflected in the execution of Conward #831, which Sladkus carefully considers and conditionally approves in a January 26, 1990 memorandum to Wilkov referencing "Barefoot Bay Effluent Disposal: Conward #831.[17]

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[16] Sharp writes on September 22, 1989: "I do not understand what the resolution is in Barefoot Bay for disposition of the effluent from the waste from this plant." Gov. Exhibit #103.

After Sladkus explains in a September 27, 1989 memo, Gov. Exhibit #106, Sharp writes back, "At a later date if we enlarge the Barefoot Bay plant, we will be able to include Hearndon in the service area and hook it up to the Barefoot Bay plant." Gov. Exhibit #106.

[17] "Even though we authorize the total amount, Dyer Riddle will be given a contract for no more than one task at a time." Gov. Exhibit #118.

In order to utilize spray irrigation, additional land must be purchased, and the Avatar officers again turn their attention to the neighboring orange groves, this time focussing on one grove in particular that they were determined to acquire, the Micco Groves. After early efforts by Getman to purchase the groves failed[18], on June 18, 1990, Sladkus inquired about the possibility of obtaining the property through condemnation proceedings. Gov. Exhibit #131. On the same day, Getman writes a memorandum saying that he has set up a meeting "for the four of us" [Getman, Gordon, Allen, and Wilkov] on the subject for June 22, 1990, noting in a "P.S." that "Mr. Sladkus would like to join this discussion by telephone conference." Gov. Exhibit #132.

On June 19, 1990 Gordon responds directly to Sladkus, with copies to Getman and Wilkov, saying that "condemnation of the Micco Grove property would be extremely difficult because (a) the property is not unique (other property would be available for a price) and (b) there are alternatives to spray irrigation." Gov. Exhibit #133. Sharp, however, is undeterred by Gordon's

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[18] In February 1990, Getman contacted Sun Bank regarding an outstanding Avatar offer to purchase the groves, which the bank held in trust. Gov. Exhibit #112. Using Avatar Holdings letterhead, he signed as Executive Vice President - General Counsel of Avatar Properties, Inc. Id. Using the same letterhead, but this time signing as Executive Vice President of Avatar Properties, he increases Avatar's offer on May 10, 1990, copying Wilkov and Kleinerman, among others. Gov. Exhibit #125. On June 14, 1990, a Getman memorandum to file referencing as its subject "Avatar Properties Inc./Avatar Utilities Inc. - Possible Purchase of Micco Grove Acreage in Brevard County, Florida," and copied to Gordon, Wilkov, and Kleinerman, among others, reflects that there is competition for the orange groves. Gov. Exhibit #129. Gordon responds to Getman's memo the next day copying Wilkov and Sladkus, among others. Gov. Exhibit #130.

forthright assessment, and, by memo of June 25, 1990, endorses Sladkus' June 15, 1990 suggestion that they use eminent domain powers to obtain the property. Gov. Exhibit #134. Finally, in a July 1, 1990 memorandum to Wilkov, Sharp personally makes the final decision on Micco:

> 1. I think your only solution to Barefoot Bay is condemnation of Micco Grove or another grove. I think we should pursue this.
>
> 2. I note Dennis [Getman] has a meeting on Monday. I would like to have the name of the attorney and the status of this matter after that meeting.

Gov. Exhibit #135.

The Monday (July 2, 1990) meeting was with Barry Davidson, the Miami lawyer Avatar hired to handle the condemnation action. On July 3, 1990, Getman writes a letter confirming the meeting and further instructing the lawyer. The letter, written on Avatar Holdings letterhead, but signed by Getman as General Counsel of Florida Cities Water Company, includes the following paragraph:

> From a standpoint of action of the Board of Directors of Florida Cities Water Company, we would like you to prepare draft meeting minutes in advance so that our future telephonic board meeting can be handled quickly and as mandated from a possible litigation standpoint.

Gov. Exhibit #136.

A note from Getman to Sharp, Sladkus, and Wilkov accompanying their "blind copies" ("bcc") copies of the letter reads as follows:

> Depending upon some unforeseeable circumstances, Mr. Davidson felt that FCWC had at least a "good" chance of obtaining a quick take for the property. We advised

> him that time was of the essence because of our DER Consent Order and he indicated that he felt that if things went somewhat smoothly that the eminent domain action could be completed as quickly as sixty days. Mr. Davidson does have a tremendous amount of experience in this area, and, basically, knows the judges who might get the case in Brevard County. As instructed, we are proceeding with a possible quick take eminent domain action.

Id.

After additional efforts to purchase the land also failed,[19] in March 1991, Avatar began condemnation proceedings, in accordance with Sharp's edict, and he was kept apprised of their progress. See Gov. Exhibit #165.

The Micco Grove illustration is useful from a number of perspectives. First and foremost, it highlights Avatar Holdings' direct and pervasive involvement in matters relating directly to the effluent disposal from the Barefoot Bay treatment plant. Indeed, it suggests not just that Avatar Holdings officers made critical decisions relating to environmental compliance at the Barefoot Bay plant, but that those decisions were made at the

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[19] On July 25, 1990, Getman, writing on Avatar Holdings letterhead, signing as "Executive Vice President" of Avatar Properties increases his offer again. Gov. Exhibit #138. On August 24, 1990, Getman ups his offer yet again. Gov. Exhibit #140. He again uses Avatar Holdings letterhead, but this time, he makes the offer on behalf of Florida Cities Water Company, signing as its "General Counsel." Id. The same day, Getman writes a letter about wastewater treatment to a state environmental regulator, again using Avatar Holdings letterhead, but this time signing on behalf of Barefoot Bay Development Corporation as its Executive Vice President - General Counsel. Gov. Exhibit #139.

Getman's role is obviously multi-faceted. As Getman himself put it in a memorandum, at times he wore both his "developer" hat and "utility" hat, purporting to represent both sides to an agreement. Gov. Exhibit #246.

highest level of the company, that is, by its Chief Executive officer at the time -- Peter Sharp. Second, the illustration is extraordinarily revealing in that it clearly demonstrates the veritable commonality of interests of the various Avatar entities involved at Barefoot Bay.[20]

Not long after, Sladkus thought better of spray irrigation. In a September 14, 1990 memo to file which he copied to Wilkov and Sharp referencing "Barefoot Bay - Waste Water Disposal," Sladkus again favored the construction of a deep well. Gov. Exhibit #143. By this point in time, he had learned that the risks of such a well had been exaggerated, and thought that it presented a more economically prudent solution to the wastewater disposal question.[21] Thus, he writes "for all these various reasons, it is now proposed that we reverse our decision. We are under severe pressure from the regulatory agencies to cease discharge into the Indian River and need to make an early decision." Id.[22] A November 14, 1990 handwritten note addressed

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[20] Notwithstanding the effort and resources that went into acquiring the Micco Groves, the property was never acquired. Deposition of Paul Bradtmiller II:97, although a March 13, 1991 memo from Gordon to Getman, Sharp, and Wilkov, among others, shows that mediation of the condemnation litigation did eventually result in a tentative agreement with Sun Bank for the purchase of the property. Gov. Exhibit #165.

[21] "It turns out that there has been only one failure of the deep well system and that the other plants, which were suspect in Brevard County, have performed in a satisfactory manner." Id.

[22] Sladkus might also have felt pressured by public opinion. A cartoon produced from the files of Peter Sharp. & Co., which appeared alongside an editorial in the Vero Beach Press Journal, depicts an outhouse with a pipe discharging into a water body.
(continued...)

to "Peter" [Sharp] which appears on the last page of an attachment to the memorandum reflects that a nearby deep well had been permitted. Id. Shortly thereafter, Sladkus resigns.

It bears noting that while this entire lengthy saga continued, so did the development of Barefoot Bay, with Sharp at the helm. Sharp was personally well aware that the additional connections to the sewage system resulted in added wastewater discharge. By memo of February 25, 1991 referencing "Barefoot Bay - Wastewater Effluent Disposal," Sharp specifically questioned Gordon about the discharge flow to be permitted in the context of the units connected to the system. See Gov. Exhibit #160. In his reply to Sharp the following day, Gordon details the flow data from the Barefoot Bay treatment plant, noting that as of December 31, 1990, there were "4,298 ERC's connected to the system with 754 additional vacant lots." Gov. Exhibit #162.

By this point in time, environmental audits had begun at the wastewater treatment plants, and Sharp wanted to keep track of them personally. By memo of March 12, 1991 to the Secretary of the Board, he ordered that "Update on Environmental Audits with respect to Utilities" be an agenda item "at least every other meeting." Gov. Exhibit #559.

An NPDES permit for the Barefoot Bay plant was issued on September 16, 1991 and took effect November 1, 1991, under a

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[22](...continued)
The cartoon character is quoted as saying, "I got the idea from the sewer plant in Barefoot Bay." Gov. Exhibit #3. Avatar retaliated against the newspaper for the bad press by cutting off all advertising. See Gov. Exhibit #194.

"Cease Discharge Schedule" which provided for annual progress reports culminating in the required cessation of the discharge by June 30, 1995. Gov. Exhibit #185, page I-4. The toxicity violations alleged in the United States' Second Amended Complaint resulted from Avatar's failure to upgrade the plant to advanced wastewater treatment standards (as promised DER in 1988), rendering it incapable of consistently meeting the toxicity requirements of the permit. Of course, had Avatar taken advantage of its many opportunities to cease the discharge entirely in previous years, an NPDES permit would not have been necessary and none of the violations alleged at Barefoot Bay would have occurred.

Carrollwood

Avatar Holdings was also pervasively involved in decision-making relating to the unpermitted discharge at Carrollwood. As far back as August 6, 1984, Gordon sent a memorandum to Sladkus, with a copy to Wilkov, which reads in pertinent part as follows:

> Attached is a letter from the EPA denying our application for an extension of our Temporary Operating Permit for the Carrollwood Wastewater Treatment Plant located in Hillsborough County. The plant discharges its effluent into Sweetwater Creek. In October 1979 the Company was advised that it would have to stop discharging into the creek and would have to find another method of effluent disposal. At that time, the Company looked into spray irrigation on golf courses, building percolation ponds and other possible methods of disposal, all of which were rejected for one reason or another.
>
> . . . .

> We intend to write to the EPA and inform them of our negotiations with the County and attempt to have them reconsider their position. If they refuse, I believe our only alternative is to fight their mandate through the courts.

Gov. Exhibit #270.

Notwithstanding the permit denial, Getman announced at the September 28, 1984 meeting of the Avatar Holdings Board of Directors that "in the last three years the Corporation has not been denied one permit." Gov. Exhibit #273 at 10. This announcement, together with Gordon's resolution that they would fight the matter in the courts perhaps account in part for why there is so little documentation of efforts to cease the discharge: Avatar simply decided to ignore that both their state and federal permits had not been denied and not to make any serious efforts to cease its illegal discharge.

By early 1986, it is clear that the Board is concerned about potential liability for environmental violations.[23] The minutes of the January 30, 1986 meeting of the Audit Committee of the Avatar Holdings Board of Directors reflect that "Mr. Gordon indicated that David Berz, Esquire, an environmental attorney with Avatar's General Counsel, Weil, Gotshal & Manges, had been contacted, requesting his assistance in assessing the utility company's environmental liability exposure with recommendation to

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[23] It bears noting that by late 1985, not simply the key players, but the entire Avatar Holdings Board of Directors had become familiar with wastewater treatment issues, having received a briefing from Gordon on Fiesta Village, a new advanced wastewater treatment plant, which included distribution of an informational brochure entitled "Nature's Way: How Wastewater Treatment Works for You." Gov. Exhibit #351 at 8, 17-18.

limit said exposure, if any." Gov. Exhibit #48 at 14. The minutes of the March 20, 1986 Audit Committee meeting reflect that Getman, Gordon, and Sladkus had met with Berz "to discuss Mr. Berz's review and assessment of the utility company's potential liability exposure," and that "Getman expressed Mr. Berz's opinion that the existing corporate structure and operating procedures provide adequate liability protection against an attempt to 'pierce the corporate veil', but that further assessments would be made." Gov. Exhibit #353 at 12.

By the July 30, 1986 Board meeting, a substantial portion, if not the majority of the meeting, relates to environmental issues, including further reports on meetings with Mr. Berz, sewage disposal at Poinciana (another Florida wastewater treatment plant), and litigation related to water contamination in Indiana. Gov. Exhibit #356 at 1-5.

Notwithstanding -- or perhaps because of -- the discussions that took place at the Board, the environmental violations not only continued, but increased. Indeed, because the actions of the key players following these meetings show no additional emphasis on compliance, it can only be concluded that Avatar Holdings' primary concern was not complying with the law, but was avoiding liability for not complying.

Indeed, a 1986 memorandum from Gordon to Getman makes it clear that Avatar decided to stall and continue its unpermitted discharge until Hillsborough County would accept the Carrollwood sewage:

> Enclosed is a proposed consent order to be entered into by FCWC with the DER to allow FCWC's Hillsborough WWTP to continue to discharge treated effluent into Sweetwater Creek. FCWC has been ordered by the DER to discontinue discharging its treated effluent to Sweetwater Creek. The solution to the problem is for the Company to connect to Hillsborough County's regional plant. The problem has been Hillsborough Countys [sic] inability to provide adequate capacity for our plant at this time.
>
> **The consent order will buy us time,** I do not see any resolve of the problem short of connecting to the Hillsborough plant. **I doubt that we will be connected by August 1988, expiration of consent order.**

Gov. Exhibit #280 [emphasis added].

Getman not only endorsed the stall, but also suggested that Gordon negotiate language that would a further stall with impunity. He wrote back as follows:

> You're probably 100% correct, in that a proposed Consent Order would only buy us further time.
>
> . . . .
>
> 2. I would be greatly surprised if the DER agreed without a fight to Paragraph #5 which states FCWC's only alternative. I believe that this language must be somewhere in the Consent Order as it is important for future leverage when, and if, FCWC is unable to comply with the cease and desist date of August 31, 1988.
>
> 3. Is there any chance that the aforesaid cease and desist date could be extended?

Gov. Exhibit #281.

Eventually, Avatar did begin to study the alternatives. In 1986, Wilkov and Sharp approved an expenditure for an engineering study of the design of a pumping station and force main (pipe) to transfer the Carrollwood wastewater to the Hillsborough County facility. Gov. Exhibit #282. Avatar apparently debated whether to tie in to another treatment plant or improve its own. Again,

money was the central issue. In March 1988, Gordon reported to Sladkus that he was working to get Hillsborough County to lower the fees it would charge to connect the Carrollwood system to its system, and that he viewed building an AWT plant as an alternative. Gov. Exhibit #291. As he did with the unpermitted discharge at Barefoot Bay, Sladkus closely monitored the situation. Gov. Exhibits ##74, 76-78.

Sharp was also personally involved. After executing a conward in April 1989 authorizing engineering services for the advanced wastewater treatment plant, Gov. Exhibit #567, Sharp wanted some questions answered about cost, flow, recovery of costs through rate base, and construction completion time. Gov. Exhibits #299-300.[24] Because the AWT plant was never built, the permit violations alleged in the Second Amended Complaint were inevitable.

Waterway Estates

The key players also were pervasively involved in critical decisions relating to environmental compliance at the Waterway Estates plant.

Against this background, on June 30, 1986, some six months before it actually denied Florida Cities' permit renewal at Waterway Estates, EPA sent a letter to Florida Cities advising it of the upcoming denial. Gov. Exhibit #355. On August 14, 1986, Gordon forwarded that letter to Avatar Holdings officials,

[24] While Sharp's memo was never actually produced, his questions can be inferred from the memoranda which addressed them.

including Sladkus, Getman, and Wilkov, with a brief explanation: "The EPA wants the Company to either discontinue discharging effluent to a canal which ultimately goes to the Caloosahatchee River or improve the treatment to AWT and seek a wasteload allocation to the Caloosahatchee." Gov. Exhibit #358.

On January 16, 1987, just seven days after EPA's permit denial took effect at Waterway Estates, Sladkus gave the following report to Sharp, Wilkov, and Kleinerman:

> Plant with a usable capacity of 750,000 GPD. Currently running at 600,000 GPD. Discharging into the canal which must terminate by August 1, 1988. Plant located on very limited (but valuable) site where it would be difficult, if not impossible, to convert to AWT Plant. **If we were to attempt such conversion, we would need to apply for [a] waste load allocation and build an outfall. Alternatively, we could attempt to negotiate a hook up into an existing private utility located approximately 4-5 miles away.** Apart from the cost of the forced main, we would have to pay the capacity charge and its attendant tax impact to the utility unless we could purchase a portion of the plant.

Gov. Exhibit #52. [Emphasis added].[25]

In June 1987, Gordon forwarded to Sladkus a copy of EPA's compliance order. Gov. Exhibit #365.[26] On August 31, 1987, Gordon forwarded to Sladkus a copy of an engineering report on

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[25] Wasteload allocations were apparently a familiar subject, not only for the key players, but even for the Avatar Holdings Board of Directors. Later, Getman personally briefed the Board about litigation with FDER about a wasteload allocation for discharging from the Poinciana plant into the Reedy Creek. Interestingly, these November 17, 1988 Board minutes discuss the plant as if it were an Avatar Holdings plant: there is no mention either of Florida Cities or Avatar Utilities. Gov. Exhibit #386 at 6.

[26] In January 1987, the permit denial had taken effect, and Waterway Estates simply continued discharging without a permit.

the feasibility of disposing of wastewater at the Waterway Estates plant. Gov. Exhibit #369. Cost remains the primary issue. Gordon wrote, "[a]s you can imagine from the recommended cost of treatment and disposal, additional work [on the options] will have to be done." On November 19, 1987, apparently after additional work was done, Gordon again writes to Sladkus attaching an options memorandum. Gov. Exhibit #373.

It is clear from the evidence that Avatar was evaluating whether to expend a large sum of money to upgrade the Waterway Estates plant or to contract with another private wastewater treatment company, North Fort Myers Utilities (NFMU) to treat its waste. Ultimately, Avatar made a business decision to forego connecting to NFMU (which used land disposal methods of disposing of its effluent). Gov. Exhibit #466.

An exchange of memoranda dated between August 1988 and October 1988 between Sharp and Gordon lends insight to the decision-making process. This exchange makes clear that far from considering yielding the Waterway Estates franchise to a competitor, whether public or private, Sharp had visions of taking over **all** of the water and wastewater utilities in Lee County. Gov. Exhibits ##70, 381, 383, and 384. Sharp's mandate to Gordon was as follows: "FCWC's long term objective should be to own the entire Lee County system--that is, the County's facilities as well as the City's." Gov. Exhibit #384. Ironically, the same documents also reveal that this mandate emerged after the Lee County options were discussed at Sharp's

behest at the same September 7, 1988 "utilities meeting," see Gov. Exhibit #383, at which environmental compliance at Waterways [sic] Estates, Barefoot Bay, and Hillsborough County [Carrollwood] were agenda items. Gov. Exhibit #70. Thus, the conclusion is all but inevitable that Sharp personally ruled out an immediately available compliance measure -- connecting to the North Ft. Myers system, in favor of what he perceived to be the long-term financial interests of Florida Cities.

North Ft. Myers Utilities had the capacity to accommodate the Waterway Estates discharge beginning in August 1988. Had the Waterway Estates wastewater been connected to the North Ft. Myers system in at that time, **none** of the Waterway Estates violations alleged in the Second Amended Complaint (which begin on October 1, 1988) would have occurred.

The plant upgrade and relocation of the outfall needed to be completed by November 1, 1989, the effective date of the new NPDES permit for Waterway Estates. Sladkus closely monitored the situation. Gov. Exhibits ##74, 76-78. He, in turn, was closely monitored by Sharp, right down to the approval of expenditures for such minor items as pumps. Gov. Exhibit #109. By memo of October 2, 1989, Sharp writes Sladkus that "[w]e must have assurance from Bob Gordon that the entire cost of the upgrade and expansion of this plant will be included as used and useful." Gov. Exhibit #400. By cover memo dated June 5, 1990, Allen sends Sladkus conward number 940 requesting approval for the Waterway Estates improvements. Gov. Exhibit #414. On June 11, 1990,

Sladkus rejects the conward. Gov. Exhibit #416. These additional documents suggest that delays in the upgrade and expansion necessary for compliance are also directly attributable to decisions made by Avatar officials.

Although Avatar knew in August 1986 that it needed to move the outfall from the canal to the River, the outfall was not moved until July 1991. When, in July 1991, it became clear that the Waterway Estates AWT improvements were behind schedule (making the NPDES permit violations inevitable), Allen wrote a memorandum directly to Sharp, with copies to Getman, Gordon, and Wilkov. Gov. Exhibit #455.

Avatar Holdings was not only directly involved in decision-making resulting in the violations, but also in strategy relating to EPA's enforcement actions as a result of the violations. Dennis Getman personally planned the strategy for negotiating a penalty for the Waterway Estates violations in a May 18, 1992 memorandum to Gerald Allen:

> At this point in time, I believe that the position of FCWC to the USEPA should be "firm" in nature without being too aggressive. Of course, that is not to say that we may not want to get aggressive at a later stage as sometimes you can cut a better deal with the attorneys at the Justice Department than you can with the "bunny hugger" environmentalist attorneys at the USEPA.

Gov. Exhibit #570.[27]

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[27] In another example of his disdain for environmentalists, Getman gave orders that his personal written approval was necessary before Avatar's newsletter was distributed to any environmental groups. Gov. Exhibit #556.

CONCLUSION

The United States submits that this offer of proof clearly establishes that Avatar Holdings acted in such a way that it should be considered a "person who violates" under section 309(d) of the Clean Water Act, 33 U.S.C. 1319(d). The evidence establishes that through its officers, Avatar Holdings was actually involved in critical decisions directly relating to the proven violations.[28] Under Jacksonville Electric v. Bernuth, 996 F.2d 1107, 1108-09 (11th Cir. 1993), such involvement is a "sufficient condition" for the imposition of liability. Moreover, Avatar Holdings caused or directed the violations by failing to direct and authorize actions which would have resulted either in the cessation of the discharge or the timely construction of advanced wastewater treatment facilities at each of the three plants. Finally, Avatar Holdings exercised actual and pervasive control over Florida Cities' environmental practices. Hence, the United States respectfully submits that it

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[28] The United States necessarily selected for discussion in this limited offer of proof the most enlightening documents. Other trial exhibits which were either authored or received by the key players and further support the inferences suggested herein are as follows: Gov. Exhibits ##16, 17, 20, 30, 33, 34, 54, 71-73, 80, 90, 94, 117, 122, 124, 126, 137, 149, 156, 159, 176, 178, 190, 192, 196, 198-201, 203, 209, 212, 219, 222, 233, 235, 237, 247, 250, 251, 287, 289, 307, 309, 312-314, 321, 368, 372, 378-380, 389, 395, 403, 423, 428, 429, 432, 434, 439, 441, 445, 447, 450, 462, 465, 476, 484-487, 493, 495-497, 512, 513, 515, 529, 530, 545, 548, 554, 560, 568, 573, 578, 579, 588, 589, 593.

has established Avatar Holdings' liability by a preponderance of the evidence.

Respectfully submitted,

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By: _____

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY, et al., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

DEFENDANTS' JOINT MEMORANDUM OF LAW ADDRESSING THE INVOCATION OF THE FIFTH AMENDMENT BY CERTAIN WITNESSES

I. Introduction

Florida Cities Water Company ("FCWC") and Avatar Holdings Inc. ("AHI") hereby submit this joint memorandum of law addressing the appropriateness of drawing adverse inferences against the defendants from the invocation of the Fifth Amendment by certain witnesses. Given the facts of this case and the compelling circumstances surrounding the individuals' invocation of the Fifth Amendment, this Court should not draw adverse inferences against the defendants.

II. Argument

A. It Is Not Proper to Draw Adverse Inferences In This Case

The United States Supreme Court has held that while a district court may draw inferences from a party's invocation of its Fifth Amendment rights in a civil case, a district court has the discretion to refuse to draw such an inference. See Baxter v. Palmigiano, 425 U.S. 308, 318 (1976); see also Daniels v.

Pipefitters' Ass'n, 983 F.2d 800 (7th Cir. 1993) (affirming trial court's refusal to draw an adverse inference from a witness's invocation of the Fifth Amendment and explaining that the inference "may be drawn" but "does not necessarily need to be drawn.");[1] Old Sec. Life Ins. Co. v. Continental Illinois Nat'l Bank & Trust Co., 740 F.2d 1384 (7th Cir. 1984) (affirming district court's decision not to draw inferences where the plaintiff's theory of the case was unsupported by the evidence). "The assertion of the privilege, particularly on the advice of counsel, is an ambiguous response,"[2] and questions regarding the appropriateness of drawing an adverse inference should be considered on a "case-by-case basis." See Brink's Inc. v. New York, 717 F.2d 700, 708, 710 (2d Cir. 1983); United States v. District Council, 832 F. Supp. 644, 652 (S.D.N.Y. 1993).

In this case, there are several compelling reasons why adverse inferences should not be drawn. In United States v. Weitzenhoff,[3] the United States Court of Appeals for the Ninth Circuit created an extremely broad standard of criminal liability under the Clean Water Act. Following the Supreme Court's denial of certiorari of that decision, certain individuals made personal decisions to invoke the Fifth Amendment. And despite multiple

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1. In Daniels, the Seventh Circuit stated that even if the district court erred in refusing to draw an adverse inference, any such error would have been harmless. 983 F.2d at 802.

2. Farace v. Independent Fire Ins. Co., 699 F.2d 204, 210-211 (5th Cir. 1983).

3. United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1994), cert. denied, 115 S. Ct. 939 (1995).

requests by counsel, the government failed to remove the threat of future criminal prosecution by granting immunity to these individuals in exchange for their testimony. Further, the government failed to ask particularized questions of the witnesses and cannot now ask the Court to speculate as to what questions the government might have asked in order to draw adverse inferences against the parties. In addition, the government has not been prejudiced because it had a full and fair opportunity to learn the facts of this case through numerous depositions of high ranking corporate officials, broad document requests, and site inspections.

B. The Decision to Invoke the Fifth Amendment In Light of Weitzenhoff Was Personal, Not Corporate

In Weitzenhoff, the Ninth Circuit interpreted broadly the criminal liability provision of the Clean Water Act, 33 U.S.C. § 1319(c)(2), and held that a person who knowingly discharged water could be convicted of a felony regardless of the individual's belief that their actions were innocent and lawful.[4] This decision instilled a legitimate fear of future criminal prosecution in certain individuals, principally the former employees of the defendants, and prompted those individuals to plead the Fifth Amendment at their depositions.[5]

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4. Accord United States v. Hopkins, 53 F.3d 533 (2d Cir. 1995), cert. denied, 116 S. Ct. 773 (1996).

5. As Judge Kleinfeld recognized in the dissenting opinion from the order rejecting the suggestion for rehearing en banc of Weitzenhoff:

(continued...)

The witnesses' decisions to invoke the Fifth Amendment in the wake of Weitzenhoff were personal, not corporate. See Veranda Beach Club Ltd. Partnership v. Western Sur. Co., 936 F.2d 1364, 1374 (1st Cir. 1991) ("An individual's invocation of his fifth amendment privilege against self-incrimination is a personal decision" and "cannot be imputed to a corporation.") Contrary to the government's representations, both defendants would have preferred that the individuals waive their fifth amendment rights. The deposition of John Sladkus illustrates this point. At his deposition, Mr. Sladkus was represented by independent personal counsel. AHI's counsel, David B. Hird, was also present and stated that "Avatar Holdings believes that Mr. Sladkus' testimony will be extremely helpful to Avatar and has requested that he testify." Sladkus Dep. at 8. The government fails to point out that the privilege belongs to the individual,

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5. (...continued)

> The harm our mistaken decision may do is not necessarily limited to Clean Water Act cases. Dilution of the traditional requirement of a criminal state of mind, and application of the criminal law to innocent conduct, reduces the moral authority of our system of criminal law. If we use prison to achieve social goals regardless of the morally innocent we incarcerate, then imprisonment loses its moral opprobrium and our criminal law becomes morally arbitrary.
>
> We have now made felons of a large number of innocent people doing socially valuable work.

Weitzenhoff, 35 F.3d at 1293 (Kleinfeld, J., dissenting).

not the corporation,[6] and it is for the individual to waive, not the corporation.

C. Despite Multiple Requests, the United States Failed to Grant These Individuals Immunity

Weitzenhoff created the threat that innocent conduct could be subject to criminal sanctions. The government is in a unique position to remove that threat through its exercise of the power of immunity but deliberately failed to take this step. Both counsel for FCWC and AHI requested that the government immunize these individuals from future criminal prosecution, and received no formal response.

In a letter dated July 13, 1995 (Exhibit A), FCWC's counsel formally requested that the government grant immunity to these individuals under 18 U.S.C. § § 6002 et seq. for the matters at issue in this litigation.

At the deposition of Mr. Sladkus, AHI's counsel urged the government to grant immunity to those individuals who pled the Fifth Amendment in light of Weitzenhoff. The following colloquy took place:

> Mr. Hird: I realize Mr. Scroggin has made this request on behalf of Florida Cities employees, but we request, with respect to Mr. Sladkus as well as other individuals, that the Government consider providing immunity so that Mr. Sladkus and those other individuals can testify at trial. . . . I make the request for immunity on behalf of Avatar Holdings for all witnesses that have been deposed and that have requested immunity because we believe that all of their

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6. United States v. White, 322 U.S. 694, 699 (1944).

> testimony would be helpful to Avatar Holdings.
>
> Mr. Jacobs: The government believes that all of these witnesses would be helpful in the government's case and we go as far as showing that Avatar Holdings and Florida Cities both are liable for all of the allegations in the Complaint. It's the witnesses' choice to assert the Fifth Amendment. It's not under the control of the government as to whether or not the witnesses assert the Fifth Amendment and the government must respect the assertion of the Fifth Amendment of the Constitution.
>
> Mr. Hird: It is also the government's option and power to provide immunity to any individuals who note the Fifth Amendment. And if the Government believes that that testimony would be useful to the government, and we believe this testimony would be useful to Avatar Holdings, I believe Mr. Scroggin believes the testimony would be helpful to Florida Cities. Why don't we get the immunity?
>
> Mr. Jacobs: Mr. Hird, any questions for the witness?

Sladkus Dep. at 10-12. Government counsel did not take steps to obtain immunity but simply forwarded the defendants' request that witnesses be provided with immunity to another office in the Justice Department with no interest in the case. See Letter of July 31, 1995 from the Department of Justice to Don G. Scroggin and Sladkus Dep. at 13. (Exhibit B) The Department of Justice provided no further response.

It is disingenuous for the government to now seek to have negative inferences drawn from these individuals' invocations of the Fifth Amendment when there was no effort to alleviate the individual's fears, despite multiple requests for immunity. If the government truly wanted the testimony of these

individuals, rather than rest its case on negative inferences, it could have acceded to defendants' requests for immunity. The only conclusion that can be reached is that the government would rather have the Court draw the inference than have the actual testimony of these individuals presented to the Court.

D. This Enforcement Action For Punitive Relief Bears Greater Resemblance to A Criminal Action

This Court should refuse to draw adverse inferences against the Defendants for another significant reason. It is well-established that the Fifth Amendment prohibits the drawing of adverse inferences against a defendant from the defendants' invocation of the Fifth Amendment in criminal cases. See Griffin v. California, 380 U.S. 609 (1965). The Fifth Amendment privilege against self-incrimination was designed to protect "the innocent who otherwise might be ensnared by ambiguous circumstances,"[7] and prevents governmental compulsion of incriminating statements. The rule forbidding the drawing of adverse inferences in criminal cases prevents the government from reaping the undue benefits from the silence of a potentially innocent individual.

The present action has more characteristics of a criminal trial, than a civil one. It is not a dispute between two private parties but an enforcement action brought by the Department of Justice for punitive relief. The same element of governmental compulsion exists in this case as exists in criminal

7. Slochower v. Board of Educ., 350 U.S. 551, 557-558 (1956).

cases. The same danger of allowing the government to reap undue benefits from an innocent individual's silence is present here, as it is in so many criminal cases.[8]

E. No Adverse Inference Should Be Drawn Because The Government Asked No Specific Questions of the Witnesses

The government's failure to pose specific questions to the witnesses should bar any adverse inferences. The government engaged in a generalized inquiry and, in many instances, did not refer to specific documents. All of the deposition transcripts were less than twenty-five pages in length. The government should have followed the proper procedure of asking the witnesses particular questions. See United States v. Argomaniz, 925 F.2d 1349 (11th Cir. 1991). Then the government could request that inferences be made with respect to specific questions, instead of asking the Court to speculate as to what questions the government might have asked and in reference to which the individuals may have invoked the Fifth Amendment.

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8. As Justice Brennan wrote in dissent of Baxter v. Palmigiano, 425 U.S. 308, 335 (1976):

> In a civil suit involving only private parties, no party brings to the battle the awesome powers of the government, and therefore to permit an adverse inference to be drawn does not implicate the policy considerations underlying the privilege. But where the government "deliberately seeks" the answers to incriminating questions, allowing it to benefit from the exercise of the privilege aids, indeed encourages, governmental circumvention of our adversary system.

F. The Government Had A Full and Fair Opportunity to Learn the Facts of This Case

These witnesses did not invoke the Fifth Amendment for the purpose of hampering the government's efforts to obtain facts through the discovery process. The government has engaged in thorough and wide-ranging discovery. Defendants combined produced well over 500,000 pages of documents. In addition, the government conducted a series of site inspections at all three facilities, including two inspections at Waterway Estates. Plaintiff has deposed eight FCWC officials for a total of ten days of testimony.[9]

Plaintiff also deposed the officials with greatest authority in AHI. AHI's Chairman of the Board, Leon Levy, AHI's President Edwin Jacobson, and AHI's Chief Financial Officer, Charles McNairy, answered all questions propounded to them by the government during deposition, and will testify at trial.[10]

Due to the government's sweeping and exhaustive discovery, the Court should not draw any adverse inferences against the defendants.

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9. These witnesses are: Gerald Allen, President of FCWC, Julie Karleskint, Operations Manager, FCWC, Larry L. Good, Regional Manager for Sarasota Division and North Division, FCWC, William Sansbury, Division Manager, Barefoot Bay Division, FCWC, Glen Siler, Wastewater Operator, Barefoot Bay Plant, FCWC, Johnnie Overton, Senior Vice President, FCWC, 1992-1994 (currently Executive Vice President and Chief Operating Officer, Avatar Utilities Services, Inc.), Paul Bradtmiller, Executive Vice President and Chief Operating Officer, FCWC, and Jack Tompkins, former Operations Manager, FCWC.

10. The government also had the opportunity to depose Juanita Kerrigan, Secretary of AHI, who has been with the Company for several years, but failed to do so.

G. It is Inappropriate for the Court to Draw Adverse Inferences From the Individuals Highlighted By the Government In its Offer of Proof

1. Peter Sharp

Peter Sharp, former Chief Executive Officer of AHI, never invoked the Fifth Amendment or was deposed by the government. In fact, Peter Sharp died in April 1992, a year and a half before the government instituted this action against FCWC, and three years before AHI was added to this case. There is no authority for the proposition that the government is entitled to adverse inferences from his inability to testify.

2. Lawrence Wilkov

On March 28, 1996, this Court ruled that no adverse inferences should be drawn from Lawrence Wilkov's invocation of the Fifth Amendment. Mr. Wilkov was a former employee of AHI at the time of his deposition. Moreover, after leaving AHI in 1994, he sued AHI in a dispute arising out of his employment.

3. Robert Gordon

No adverse inference should be drawn against AHI from the invocation of the Fifth Amendment by Robert Gordon, President of Avatar Utilities. As Leon Levy testified, on March 28, 1996, Trial Tr. at 126, Mr. Gordon has never been an officer, director or employee of AHI.

In light of the number of FCWC employees who came forward to testify, including Gerald Allen, President of FCWC and Executive Vice President of Avatar Utilities, and Paul

Bradtmiller, Executive Vice President of FCWC, no adverse inference should be drawn against FCWC.

Significantly, Mr. Gordon's deposition only lasted 11 pages, adjourning after a short series of general questions.

4. John Sladkus

John Sladkus was a former employee of AHI at the time of his deposition. He resigned from AHI on January 1, 1991,[11] almost five years prior to his deposition, on August 24, 1995. At his deposition, he was represented by personal counsel. Retired from a lifetime of hard work, his personal concerns far outweighed any loyalty he still felt for AHI.

Mr. Sladkus' resignation predates the period in which most of the alleged violations occurred. All of the allegations relating to Carrollwood date from July 1991 to December 1991, seven months after Mr. Sladkus already left AHI. The allegations relating to Barefoot Bay date from November 1991 to June 1993, again, months after Mr. Sladkus' resignation. The allegations regarding Waterway Estates overlap Mr. Sladkus' employment only for approximately seven months.

At Mr. Sladkus' deposition, the government asked no specific questions regarding AHI's liability. The deposition took 14 pages, most of which was consumed by colloquy among counsel. The government cannot now reap the benefit of pure

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11. John Sladkus did have a consulting arrangement with Avatar Holdings after retirement but there is no evidence that this arrangement involved him in any aspect of the issues before this Court.

speculation as to what questions might have been asked and in reference to which the Fifth Amendment might have been invoked, in order to draw adverse inferences against the parties.

5. Dennis Getman

Dennis Getman is general counsel to both FCWC and AHI. As Edwin Jacobson, AHI's President, testified at his deposition, Mr. Getman's business responsibilities at AHI are minor, and do not relate to utility operations. See Jacobson Dep. at 167-70. Had he not taken the Fifth Amendment, specific questions propounded to him would have been objectionable on the grounds of attorney-client privilege. In addition, his deposition was noticed prior to AHI's addition as a party to this action.

Mr. Getman's deposition lasted 13 pages, most of which was consumed by colloquy among counsel. As with the other depositions discussed above, the government did not ask specific questions to Mr. Getman at his deposition regarding AHI's liability and therefore cannot now force this Court to speculate as what questions might have been asked and in reference to which the Fifth Amendment might have been invoked. Moreover, the government has not been prejudiced in any way with respect to Mr. Getman's invocation of the Fifth Amendment. As represented by the government in Court, 99 privileged documents were inadvertently produced to them, many of which contained legal advice provided to FCWC by Mr. Getman.

6. James Elder and Antoine Reeves[12]

James Elder and Antoine Reeves have never been employees, directors, or officers of AHI. They are former employees of FCWC. At their depositions, both were represented by personal counsel. Their decisions to invoke the Fifth Amendment were purely personal. Therefore, no adverse inferences should be drawn against the defendants. Mr. Elder's deposition was 23 pages and Mr. Reeves' deposition was only 11 pages.

H. The Depositions of the Individuals who Invoked the Fifth Amendment Are Irrelevant

For the reasons enumerated above, this Court should not draw adverse inferences against the Defendants. If the Court rules in favor of the Defendants on this issue, we ask that the Court also exclude from evidence all depositions where the individual invoked the Fifth Amendment. The depositions would be irrelevant and thus inadmissible under Federal Rule of Evidence 402.

III. Conclusion

Under the facts and circumstances of this case, this Court should not draw adverse inferences against the defendants.

In light of the Weitzenhoff decision, certain individuals made personal decisions to invoke the Fifth Amendment. The government failed to alleviate the personal fears

12. These individuals were not discussed in the government's offer of proof, which is primarily addressed against Avatar Holdings. However, the government wishes to have the depositions at which these individuals invoked the Fifth Amendment admitted into evidence.

of these individuals through its power of immunity despite requests to do so, and now seeks to prejudice the defendants. Drawing adverse inferences in this governmental enforcement action for punitive relief presents many of the same dangers of doing so in a criminal action. Further, the government did not ask particularized questions of the witnesses and cannot now ask the Court to speculate as to what questions regarding the defendants the government might have asked and in reference to which the Fifth Amendment might have been invoked, in order to draw adverse inferences against the parties. Perhaps the most important point is that the government has had a full and fair opportunity to obtain the facts in this case through wide-ranging discovery. It has not been prejudiced in any way.

With respect to all individuals referenced in the government's purported offer of proof and the Revised Joint Pretrial Statement, at 34, defendants maintain that the drawing of adverse inferences is inappropriate.

Finally, in the event the Court finds it inappropriate to draw adverse inferences, defendants request that the depositions of these individuals who invoked the Fifth Amendment be excluded as irrelevant.

Respectfully submitted,

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April 5, 1996

Exhibit_____(GHB-79)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS INC., Defendants.	)	CIVIL ACTION NO.: 93-281-CIV-FTM-21

Florida Cities Water Company's
List of Witnesses for Direct Examination

Florida Cities Water Company ("Florida Cities") hereby propounds the following list of witnesses which it intends to call in its case in chief at the trial of this action. Florida Cities is providing this witness list in accordance with the agreement of counsel to exchange witness lists on Friday, March 15, 1996 at 2:00 P.M.. At trial, Florida Cities proposes to call the following witnesses for direct testimony:

1) Michael Acosta
2) Dr. Abdul Ahmadi
3) Gerald Allen
4) Randall Armstrong
5) Bruce Barrett (by deposition)
6) Ronald Blackburn
7) Paul Bradtmiller
8) Keith Cardey
9) Roosevelt Childress (by deposition)
10) Larry Good
11) James Greenfield (by deposition)
12) Roger Hartung

13) Charles Hill
14) Connie Kagey
15) Julie Karleskint
16) Patrick Lehman
17) Michael McWeeny
18) Michael Murphy
19) Douglas Smith

This list includes those witnesses which Florida Cities intends to call in its case in chief. Providing this list in no way limits Florida Cities' right to call rebuttal witnesses as necessary. Additionally, all counsel have agreed that each party will provide the names of out-of-state witnesses forty-eight (48) hours in advance of the day that the witness will be called to testify and twenty-four (24) hours in advance of the day that other witnesses will be called, including a proposed, non-binding order of witnesses for the next day. These exchanges will occur at 8:30 A.M. on the morning of the day before the witnesses are to be called.

Respectfully submitted,

By: Gary H Baise

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March 15, 1996

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of "Florida Cities Water Company's Trial Witness List" has this March 15, 1996, has been served upon the following persons by facsimile transmission:

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FLORIDA CITIES
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Florida Cities Water Company
Waterway Estates Wastewater Treatment Plant

Review of
Plant Effluent Quality
and
Sequence and Schedule of 1992 Modifications

Black & Veatch

October, 1995

Def. FCWC's Exhibit
No. 1469

Def. Trial Exhibit
FCWC No. 92

Florida Cities Water Company
Waterway Estates Wastewater Treatment Plant

Review of Plant Effluent Quality and Sequence and Schedule of 1992 Modifications

Black & Veatch
October, 1995

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CERTIFICATIONS

The information contained in this report is true and correct to the best of my knowledge. The report was prepared either by me or under my direct supervision, in accordance with sound engineering principles.

E. Barcus Jernigan, PhD., P.E.
Project Manager

Douglas G. Smith, P.E.
Senior Partner

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I. SUMMARY AND CONCLUSIONS

INTRODUCTION

On behalf of the U.S. EPA, the Department of Justice charged FCWC with operating the Waterway Estates plant in violation of the requirements of the NPDES permit issued for the plant. The purpose of this report is to present an overview of factors related to the allegations, to provide a fair perspective of the significance of the permit exceedances experienced by the plant over several months in 1991 and 1992.

The report includes a description of the Waterway Estates wastewater treatment plant and the water quality of the Caloosahatchee River. It includes a description of the reasons for permit requirements for limiting nitrogen, phosphorous and toxicity, as well as a review of wastewater treatment plant processes and their typical performance to control these substances. Finally, this report reviews the schedule of the planning, design and construction of the improvements to the plant that occurred between 1986 and 1992 and their effects on construction of the Waterway Estates plant improvements, since it was the delays in completing the plant improvements which caused the permit exceedances.

The Waterway Estates wastewater treatment plant (WWTP) is located on the north shore of the Caloosahatchee River, directly across from the City of Ft. Myers, and northeast of the City of Cape Coral in south Florida. From its beginning in 1965 through 1986 the plant operated successfully, in full compliance with all regulatory agency permits. In 1986 the U.S. Environmental Protection Agency (EPA) denied an application submitted by the Florida Cities Water Company (FCWC) for renewal of the Waterway Estates plant's National Pollutant Discharge Elimination System (NPDES) permit. Over the next six years FCWC planned, designed, constructed and placed in service an upgraded WWTP. Following expiration of the 1986 NPDES permit, the plant operated under EPA Administrative Orders. A new NPDES permit was issued, effective November 1, 1989. The new effluent limits were based on treatment levels to be provided by the upgraded plant, by October 1991. Construction of the upgraded plant was not completed until April 1992, and the old plant was not capable of meeting the effluent limits contained in the 1989 permit. On several occasions during construction of the plant, FCWC reported exceedances of the conditions and

effluent limits contained in the Administrative Orders and the 1989 NPDES permit. This report addresses the alleged violations for discharge of excessive amounts of nitrogen, for failure of the plant effluent to pass toxicity tests, and for failure to move the point of discharge from a canal near the river's edge out to the main channel of the river on schedule.

By April 1992 the upgraded plant was in operation, and by June all limits established by the 1989 NPDES permit were consistently being met. The point of discharge had been moved by July 11, 1991. The sequence of events between 1986 and 1992 which included permit administration and the planning, design, construction and placing into operation the upgraded Waterway Estates plant are outlined in detail in Section II, and discussed in Section VIII of this report.

WATERWAY ESTATES AND CALOOSAHATCHEE RIVER

In the vicinity of Waterway Estates the Caloosahatchee River is affected by the tides of the Gulf of Mexico, and it flows both upstream and downstream on a daily basis in response to the relative elevations of the Gulf and the upstream water levels. Thus, "average" or "normal" flow is complex and difficult to generalize.

Municipal wastewater treatment plants are designed with the capacity to treat the flow of wastewater projected to be generated by the service area, and to provide the level of treatment required by EPA and FDEP. Plants are modified and expanded from time to time to meet increasing flow from the service area and to meet more stringent treatment requirements set by the regulatory agencies. The Waterway Estates wastewater treatment plant was planned, designed, constructed, and first placed into operation in 1965. The plant capacity was expanded in 1976 and additional treatment process units were added in 1980 to improve the level of treatment. Between 1986 and 1992 the plant was again modified to provide higher levels of treatment. From its beginning in 1965 to the present, the Waterway Estates plant has been a modern, effective plant which was well operated and maintained, and was consistently in substantial compliance with effluent limits established by the State of Florida.

Prior to 1986 the Waterway Estates plant's NPDES discharge permits required removal of about 85 percent of the typical sewage pollutants (biochemical oxygen demand and total suspended solids) on a monthly average. The plant provided a level of treatment which resulted in removal of about 98

percent of the typical sewage pollutants on a routine basis. Prior to 1986 the permits included no limits for the amount of nitrogen or phosphorous which could be discharged, and had no requirement for testing the effluent for toxicity. About one half of the nitrogen and phosphorous was removed by the treatment plant processes prior to 1992, and following the plant modifications completed in 1992 the nitrogen and phosphorous removal was increased to about 90 percent.

NITROGEN

Nitrogen and phosphorous are common elements found in domestic wastewater. They are also nutrients which are essential to the growth of plants and animals. When present in excessive amounts, nitrogen and phosphorous can contribute to undesirable growths of algae in natural water bodies. Studies by FDER in the early 1980's concluded that the total nitrogen discharged by wastewater treatment plants to the Caloosahatchee River should be limited to 1225 lb/day in order to prevent excessive algae populations in the river, and the limits should be incorporated into the NPDES permits of the plants. Limits were also placed on phosphorous. Prior to this there had been no limits placed on nitrogen discharges, so the Waterway Estates plant did not have treatment processes which could effectively remove nitrogen as required by the new limits.

.Effluent limits for nitrogen and phosphorous were for the first time imposed by the 1989 NPDES permit. The permit limited the amount of nitrogen contributed to the Caloosahatchee River by the Waterway Estates plant to 25 lb/day, which corresponds to an average concentration of 3 mg/L of total nitrogen in the plant effluent, at the plant's rated capacity of 1.0 mgd. Since construction of the processes necessary for removal of nitrogen to this level was not completed until April 1992, the plant discharged more nitrogen than allowed by the permit until construction was complete. This amounted to approximately 100 lb/day. However, even though the Waterway Estates plant discharged more than its 25 lb/day allocation, the total nitrogen contributed by it and the other wastewater plants in the vicinity was in the range of 300 to 400 lb/day, which was well below the 1225 lb/day established by FDER as an acceptable upper limit.

It was concluded that the even though the Waterway Estates treatment plant did not meet the 1989 NPDES permit effluent limits for total nitrogen in a timely fashion, this had no measurable or observable effect on the amount of algae in the Caloosahatchee River, and therefore no adverse effect on the river water quality.

TOXICITY

Wastewater which receives routine treatment at a wastewater treatment plant can still be toxic to sensitive species. The most common causes of toxicity are ammonia remaining in the treated wastewater or a deficiency of oxygen. Prior to April and June 1992 when new treatment processes were placed in operation, the Waterway Estates plant was not designed to effectively control ammonia. The effluent did, however, normally contain ample dissolved oxygen. Thus, prior to June 1992 it would not be unusual for the effluent to exhibit toxicity in a laboratory test. Effluent tests for toxicity were for the first time imposed by the 1989 NPDES permit, effective October 31, 1991. After the upgraded plant processes completed in June 1992 were successfully placed in operation, the plant consistently passed the toxicity monitoring tests.

The effluent from the Waterway Estates plant is discharged through a series of small pipes (diffusers) into the Caloosahatchee River where it mixes with the river water. The amount of mixing and consequent dilution is highly variable, depending primarily on the flow and velocity of the river currents, and the difference in density between the effluent and the river. Since the flow from the Waterway Estates plant averages about 1 mgd, the flow in the Caloosahatchee River averages over 1000 mgd, and the density of the effluent and the river are quite similar, significant dilution normally takes place. Typically, a zone will be present in the vicinity of the point of discharge where the concentration of effluent rapidly declines from full strength to trace amounts. The size of the mixing zone will vary from day to day, as the flow in the river and plant effluent vary.

The plant effluent was discharged through the diffusers and was diluted in the mixing zones during the time the plant effluent failed the toxicity tests. Any toxicity manifest by laboratory tests on the full strength, undiluted effluent was greatly diminished as the effluent passed through the mixing zone and was diluted by the natural flow of the river. Also, since the mixing zone in the vicinity of the point of discharge is typically small, any mobile organisms can readily escape or avoid immersion in the effluent, thus avoiding the toxic or noxious effects.

If the plant effluent exhibits toxicity in the laboratory tests, such as that caused by ammonia generated from the decomposition of organic matter, the toxic nature of the effluent would be rapidly dissipated as the discharge was mixed with the river water. From this it was concluded that the toxicity exhibited by the plant effluent before the modifications were completed in April and June 1992

was not a serious problem, and that little, if any, damage was experienced by the Caloosahatchee River. The plant was operating as it had been for many years: toxicity tests had never before been required; the level of treatment needed to eliminate most sources of toxicity had not been required prior to the 1989 NPDES permit.

LOCATION OF DISCHARGE

Administrative Order 89-109 established a schedule which required the Waterway Estates plant effluent pipe to be relocated from the canal adjacent to the plant out to near the center of the Caloosahatchee River, with the relocation work to be completed by August 1, 1991. Construction was begun in 1990 and completed in July 1991 on this relocation, ahead of the schedule established by Administrative Order 89-109.

The relocation work included construction of a pipeline 500 ft along the bottom of the access canal and 2000 ft along the Caloosahatchee River bottom out towards the center of the river near the main channel, where the depth reached six feet. A diffuser pipe 100 ft long with 10 individual discharge ports was attached to the end of the 2000 ft line.

In a 1990 report concerning the water quality in the Caloosahatchee River the FDER concluded that the magnitude of the improvement in water quality resulting from the relocation of the Waterway Estates plant's point of discharge could not be determined with certainty. This was based on the results of mathematical model simulations of the system, with the first plant discharge point at the canal, and the second at a new location near the center of the river. The results showed virtually no improvement in water quality in the river with the discharge point at the second location. However, actual measurements of water quality in the vicinity of the Waterways Estates discharge point revealed that with the treatment levels provided at that time, the concentration of algae was about ten percent higher than target values considered to be satisfactory. It was concluded by FDER that moving the point of discharge would improve the quality of the water in the Waterway Estates canals and in the Caloosahatchee River in the vicinity of the canals and the discharge. Improvements of this magnitude would be imperceptible, and would be expected to take place gradually over many months.

From a review of the FDER evaluations and data, Black & Veatch concluded that any delay in completing the relocation of the Waterway Estates discharge pipeline had minimal effect on the water quality in the Caloosahatchee River.

SCHEDULE

In 1986, EPA denied FCWC's application for renewal of an NPDES permit for the Waterway Estates plant, indicating that FCWC did not have an FDER waste load allocation to discharge Waterway Estates plant effluent to the Caloosahatchee River. This led FCWC to undertake a series of activities which eventually resulted in the construction of improvements to the Waterway Estates plant. Several alternatives were available to FCWC for disposing of the effluent from the plant. Each alternative involved significant construction of new facilities. FCWC opted to upgrade the existing Waterway Estates plant. Based on extensive evaluations, this alternative was considered to provide the lowest cost to the customers and to be the most implementable alternative from a technical and permittability standpoint. The Florida Public Service Commission, which regulates FCWC's financial activities, reviewed the decision and concluded that it was "prudent" for FCWC to upgrade the Waterway Estates plant. The resulting wastewater treatment facility consistently meets all environmental regulations.

Black & Veatch estimates that a project similar to the upgrade of the Waterway Estates plant typically requires about four years to plan, design, obtain permits, and construct. This duration assumes no significant uncontrollable delays resulting from external sources. The upgrade of the Waterway Estates plant required about five years and six months. Review of the project files reveals a number of reasons for the long duration, many of which were beyond the control of FCWC.

The first deadline established by EPA for completing construction of the necessary plant improvements was clearly unrealistic. As the project evolved and various delays occurred, EPA issued two extensions to the compliance deadline. The final requirement for completion of construction by August 1, 1991 was set forth in Administrative Order 89-109, issued on September 26, 1989. Major process components necessary for meeting the NPDES permit limits were completed and placed in operation by March 16, 1992, 227 days beyond the compliance deadline. Additional delays, which were beyond the control of FCWC

staff, occurred late in the project. These delays were significant enough to account for the 227 day delay. FCWC requested a third extension to account for the additional delays, but the request was denied by EPA.

II. INTRODUCTION

On behalf of the U.S. EPA, the Department of Justice charged FCWC with operating the Waterway Estates plant in violation of the requirements of the NPDES permit issued for the plant. The purpose of this report is to present an overview of factors related to the allegations, to provide a fair perspective of the significance of the permit exceedances experienced by the plant over several months in 1991 and 1992.

The report includes a description of the Waterway Estates wastewater treatment plant and the water quality of the Caloosahatchee River. It includes a description of the reasons for permit requirements for limiting nitrogen and toxicity, as well as a review of wastewater treatment plant processes and their typical performance to control these substances. Finally, this report reviews the schedule of the planning, design and construction of the improvements to the plant that occurred between 1986 and 1992 and their effects on construction of the Waterway Estates plant improvements, since it was the delays in completing the plant improvements which caused the permit exceedances.

CALOOSAHATCHEE RIVER

The Waterway Estates wastewater treatment plant is located on the north shore of the Caloosahatchee River, directly across from the City of Ft. Myers, and northeast of the City of Cape Coral in south Florida. The lower reach of the Caloosahatchee is a tidal river / estuary. The river extends from the northeast to the southwest across southwestern Florida, reaching the Gulf of Mexico at the city of Cape Coral, near Sanibel Island. It originates at Lake Okeechobee as a fresh water river. The flow is controlled by locks and dams, and the channel is maintained as a navigable waterway with a six ft channel depth. The river forms the western half of the Okeechobee Waterway that extends from the Gulf to the Atlantic Ocean. In the vicinity of Waterway Estates and down to its mouth the Caloosahatchee is shallow (less than ten ft deep) across its full width of approximately one mile.

As an estuary, the Caloosahatchee River is affected by the tides of the Gulf of Mexico, and flows both upstream and downstream on a daily basis in response to the relative elevations of the Gulf and the upstream water levels. Thus, "average" or "normal" flow is complex and difficult to generalize. Also, since the

river is extremely wide and quite shallow, the flow is strongly influenced by other natural factors such as winds and bottom irregularities. The average river flow over 23 years at a lock and dam about 15 miles upstream was about 1125 mgd. and ranged from zero flow on several occasions to a peak of about 13,800 mgd one day in 1970.

There are five major point source discharges of treated municipal sewage to the Caloosahatchee River in the vicinity of the Waterway Estates plant. The Waterway Estates plant is the smallest. In 1990 the City of Cape Coral sewage treatment plant discharged approximately 7.3 million gallons per day (mgd); the Central and South plants of the City of Ft. Myers, 11 and 12 mgd. respectively; the Fiesta Village plant, 5 mgd; and the Waterway Estates plant, 1.0 mgd.

WATERWAY ESTATES

Waterway Estates is a residential community on the north shore of the Caloosahatchee River, directly across from the City of Ft. Myers, and northeast of the City of Cape Coral. The total area of the community is about 2000 acres (3.1 sq miles). The total sewage produced by the community in 1991 averaged about 0.96 mgd, and the Waterways Estates sewage treatment plant was permitted to treat an average daily flow of 1.08 mgd. The flow was projected to increase to 1.5 mgd by the year 2000. Waterway Estates is a residential community with no major commercial or any industrial facilities in the service area. Thus, the wastewater delivered to the treatment plant consists exclusively of domestic sewage, with no unusual or deleterious waste products that could be generated by business and industry.

SEQUENCE OF EVENTS

The events pertinent to this case occurred over the course of about six years, between 1986 and 1992. During that time, a series of activities involving hundreds of participants took place. In order to have a better perspective of the facts presented in this report, a clear understanding of the progression of key events is needed.

On April 4, 1986, EPA notified FCWC of the upcoming expiration of the NPDES permit for the Waterway Estates plant. FCWC submitted a timely application to renew the NPDES permit. EPA denied FCWC's application for permit renewal, based on its interpretation that FCWC did not have an FDER

waste load allocation to discharge to the Caloosahatchee River. FCWC subsequently renewed its waste load allocation, and proceeded with designing, submitting permit applications and constructing an upgraded plant around the existing Waterway Estates plant. The new plant was designed to meet the discharge requirements of the waste load allocation. The new plant was substantially complete by June 5, 1992.

A listing of key events is presented below.

- April 7, 1986: EPA notifies FCWC that the NPDES permit for the Waterway Estates WWTP will expire in less than 180 days.
- May 9, 1986: FCWC applies to EPA for NPDES permit renewal.
- December 8, 1986: EPA denies FCWC's NPDES permit application.
- March 27, 1987: FCWC contracts with engineering consultant, ESE, to evaluate alternatives to achieve compliance with EPA regulations. Based on ESE's report and additional research by FCWC staff, FCWC concludes that the best alternative is to upgrade the Waterway Estates WWTP and obtain FDER authorization to discharge through a waste load allocation.
- May 11, 1987: EPA issues Administrative Order (AO) 87-085, citing FCWC with discharging to the Caloosahatchee River without an NPDES permit. AO 87- 085 defines a schedule for ceasing discharge and orders continued compliance with the previous NPDES permit in the interim.
- December 1, 1987: FCWC requests from FDER a waste load allocation for the Waterway Estates WWTP to continue discharging to the Caloosahatchee River.
- February 29, 1988: FCWC contracts with engineering consultant Source, Inc. to design, prepare permit applications, and provide construction phase services for upgrading the Waterway Estates plant and relocating the plant discharge pipe.
- August 31, 1988: EPA issues an amendment to AO 87-085 which revises the compliance schedule to begin any necessary construction by February 1, 1989 and to cease discharge to the Caloosahatchee by November 1, 1990.
- March 30, 1989: EPA notifies FCWC of continued non-compliance with AO 87-085, for failure to begin construction by February 1, 1989.
- May 16, 1989: EPA issues a notice of violation to FCWC regarding the Waterway Estates plant effluent.

- June 26, 1989: FCWC submits an application to EPA for an NPDES permit for the upgraded Waterway Estates plant with a relocated discharge pipe.
- September 26, 1989: EPA issues AO 89-109 citing FCWC with continuing to discharge to the Caloosahatchee River without an NPDES permit. AO 89-109 orders FCWC to start construction according to the schedule submitted in their recent NPDES permit application, in accordance with a revised compliance schedule. The revised schedule requires construction to start by August 1, 1990; completion of construction by August 1, 1991; and full compliance with NPDES requirements by October 1, 1991.
- September 29, 1989: EPA issues NPDES permit No. FL0030325.
- March 1, 1990: FDER issues a permit to FCWC to construct the plant improvements necessary to meet the NPDES permit requirements.
- May 17, 1990: FCWC proposes a revised schedule for compliance with the new NPDES permit.
- July 24, 1990: EPA issues amendment to AO 89-109. The amendment changes the required date for starting construction to August 1, 1990. The remaining compliance dates are unchanged.
- August 2, 1990: FCWC awards the construction contract to Cardinal Contractors.
- FCWC awards an engineering contract to Stone & Webster to replace Source, Inc.
- October 31, 1990: Cardinal Contractors receives Notice of Commencement.
- December 27, 1990: Lee County issues building permit.
- June 12, 1991: FCWC and EPA attend a show-cause hearing to discuss scheduling of the project.
- July 11, 1991: Relocated discharge pipe is certified and put to service.
- March 16, 1992: Major process components necessary for achieving NPDES limits are complete and on-line.
- April 1, 1992: Waterway Estates AWT plant is consistently meeting NPDES permit discharge limit for nitrogen.
- June 5, 1992: AWT plant construction achieves substantial completion.
- September 16, 1992: EPA issues a notice of violation regarding toxicity in effluent in February, April and June, 1992 and issues AO 92-093 requiring additional monitoring.

III. WATER QUALITY ISSUES

Florida has classified all public water bodies in the state into five categories, according to the highest and best use suitable for each. FDEP classifies the Caloosahatchee River as a Class III water body, which means it is suitable for recreation and the propagation and maintenance of a healthy, well-balanced population of fish and wildlife. Discharges to the river are limited as necessary to maintain Class III water quality standards. The limits are imposed and enforced through permits which are issued by EPA and the State of Florida.

NPDES PERMITS

NPDES permits are issued by EPA. The permits include requirements which limit the quantity of pollutants which can be discharged from a plant. Discharge limits generally are one of two types.

1) Where the quality of the water body receiving the wastewater treatment plant effluent is good, and the quality will not be significantly affected by the plant's effluent, NPDES permits typically require the plant to provide a level of treatment based on standard wastewater treatment processes. All plants must meet these minimum standards.

2) Where the quality of the water body receiving the wastewater treatment plant does not meet water quality standards or where the quality would be significantly affected by the discharge. the NPDES permits typically require a higher level of treatment. The higher level of treatment is based on an evaluation of the receiving water and all pollutants discharged to it. The evaluation is called a "waste load allocation" study. Following review and approval by EPA, the results of a waste load allocation study are used to establish the level of treatment required for each plant effluent. The waste load allocations are typically incorporated into the NPDES permit requirements, along with other requirements such as monitoring to assure the water quality is attained.

From 1965 through 1986 the Waterway Estates plant's NPDES permit was a type 1) permit. Following a waste load allocation study by FDER, the Waterways Estates plant was issued a type 2) NPDES permit, which required higher levels of treatment and more monitoring than the former permits.

EFFLUENT LIMITS

The effluent limits included in the Waterway Estates treatment plant NPDES discharge permit were developed by FDER as those required to maintain the quality of water in the Caloosahatchee River at an acceptable level. In 1984 and in 1990 FDER reviewed effluent limits for all discharges to the Caloosahatchee, including Waterway Estates. The 1990 FDER study used a mathematical model to represent the water quality and hydraulic characteristics of the river, and to estimate the effects of discharges on the water quality of the river. The FDER analyses and modeling work were reported in a 1990 FDER report titled, "Caloosahatchee River Water Quality Based Effluent Limitations Documentation", Water Quality Technical Series Volume 2, Number 121. In the 1990 report FDER stated that the dissolved oxygen concentration and nutrient (i.e. nitrogen and phosphorous) concentrations were the water quality parameters considered to be of primary importance in maintaining the quality of the river.

Effluent limits set by FDEP and EPA normally include allowances for the uncertainty inherent in defining acceptable upper limits, and for the natural variability and complexity of the systems involved. The Caloosahatchee River is an extremely complex system, and the water quality is highly variable. The water quality is strongly affected by the natural forces of rainfall and runoff and the chemicals carried into the river, and the natural water quality has been permanently altered by the effects of human activity along the river's full length, especially land clearing for farming and ranching, and the regular application of fertilizers and pesticides. The "natural population" of algae or the "natural concentration" of nutrients and other water quality parameters can only be estimated. Effluent limits for discharges are normally established based on the best estimates of FDEP and EPA and the results of mathematical models of the natural conditions of the river.

Previous work by FDER on the Caloosahatchee River in 1976-1977 and 1980-1981 established that pollutants in the sewage treatment plant discharges to the river would not cause the concentration of dissolved oxygen to decline below 5.0 mg/L, the minimum established by water quality standards. The 1990 report accepted these findings and did not consider oxygen concentrations in detail.

NUTRIENT LIMITS

For nutrient concentrations, the Class III standards require that in no case shall they be altered so as to cause an imbalance in natural populations of flora or fauna (plants or animals). In most situations, including the Caloosahatchee, algae is the natural population which is of concern, since algae growth in the receiving water is stimulated by increases in the nutrient concentrations. The concentration of nitrogen in the effluents is limited by the discharge permits in order to prevent an imbalance (increase) in the natural population of algae. In setting the effluent limits for individual discharges FDEP takes into account the existing or natural background levels as well as the contributions of the problem pollutants from all sources, including other point source discharges and stormwater runoff.

Excessive populations of algae can cause serious water quality problems in some circumstances, but in the Caloosahatchee River case, too much algae is simply a minor aesthetic problem. The river does not experience serious problems with excessive amounts of algae, and the water quality standards will help to prevent algae from becoming a problem. In the Caloosahatchee River the algae population is far too small to cause serious water quality problems such as floating mats, odors, significant oxygen depletion and changes in pH. In the Caloosahatchee, too much algae can cause the color of the river to appear slightly more green or brown than its natural color, and it can cause the river water to appear more cloudy (turbid).

The effluent limits on all dischargers were set by FDER and EPA to prevent the algae population from exceeding natural levels. As long as the total amount of nutrients added to the river from all sources remains below the level set by FDER and EPA, there should be no imbalance in the natural populations of plants and animals, including algae.

Chlorophyll-a is used as a convenient parameter to obtain a quantitative estimate of the total mass of algae present in a sample. The test for chlorphyll-a measures the amount of green pigment (chlorophyll-a) found in the suspended solids contained in a sample. Assuming that chlorophyll-a constitutes, on the average, 1.5 percent of the dry weight of algae, the total algae can be estimated by multiplying the chlorophyll-a content by a factor of 67.

A mathematical model of the Caloosahatchee River was used to guide the setting of the permit limits. Previous work by FDER on the Caloosahatchee in 1976-1977 found nitrogen and phosphorous as co-limiting nutrients; and a target

chlorophyll-a concentration of 0.020 mg/L was determined to represent a healthy condition. The 1990 analysis employed an average concentration of 0.011 mg/L of chlorophyll-a to represent the existing background concentration of algae in the river. The model predicted that increases in chlorophyll-a average concentrations caused by all five of the treatment plant effluents would be approximately 0.0025 mg/L if the plants only provided secondary treatment. If the five plants provided advanced treatment (as required by the permits) the average increase would be approximately 0.0004 mg/L. From the measurements of the existing water quality and the model's predictions of the effects of increasing nitrogen concentrations in the river, FDER concluded that the total nitrogen load to the river from individual dischargers could be as high as 1225 lb/day without causing an excessive increase in the algae population in the Caloosahatchee River. This value was used to establish effluent limits for each of the treatment plants discharging to the Caloosahatchee River, including Waterway Estates.

CONCENTRATION v. TOTAL LOAD

NPDES permits typically limit both the concentration of nitrogen in the effluent, and the total quantity (load) of nitrogen discharged to the river in a specified time. The two are directly related. The load depends on both the concentration as well as the wastewater flow and is calculated by multiplying the concentration times the flow and a constant:

Load (lb/day) = Concentration (mg/L) x Flow (mgd) x 8.34

In 1991 and 1992 the effluent nitrogen concentration from the Waterway Estates plant was limited to 3 mg/L as the monthly average of weekly samples, and the total nitrogen load was limited to 25.0 lb/day as the monthly average of weekly samples. The plant was designed with the capacity to treat a flow of 1.0 mgd. The discharge load limit of 25.0 lb/day is equivalent to a concentration of 3 mg/L in a flow of 1.0 mgd.

The potential for harm to the river is related to the total load of nitrogen discharged to the river from all sources, not to its concentration in the discharges. The permit limit on concentration can be considered to be an interim measure, intended to require the treatment plant to provide a satisfactory level of treatment during the time when the total flow to the plant is less than the plant's design capacity. As the flow to the plant increases to its design capacity and the level of

treatment (i.e. effluent concentration) remains constant, the total load limit is reached. At that point the two effluent limits are redundant.

The treatment plant operations staff has some control over the effluent concentration, down to the level of treatment that can be achieved using the processes at the plant. The treatment plant operations staff has essentially no control over the flow of wastewater to the plant. Thus, when the plant is operating at its flow capacity, if the plant operations are not satisfactory resulting in the concentration of nitrogen in the effluent to be greater than 3 mg/L both the permit limits on flow and load will be exceeded due to the single operations problem. There are no measures that plant operations staff can take to reduce the flow to the plant so that the load limits will not be exceeded.

TOXICITY LIMITS

Toxicity tests are routinely used to evaluate the acute toxicity of wastewater to the biological life of the receiving stream. The tests provide a good measure of the combined effects of all substances in the wastewater discharge. Normal domestic sewage contains few substances which are directly toxic to the biological life of a water body, but contains substances which can be deleterious. For example, inadequately treated sewage can contain organic matter that serves as a food source for microorganisms in a receiving water body. The food source can produce unnaturally high concentrations of the microorganisms, and their consumption of the organic matter can deplete the oxygen concentration in the water. If the oxygen concentration is lowered too much, it can be harmful to organisms which require oxygen for respiration.

Another example of harmful effects of inadequately treated sewage would be a situation where the sewage treatment processes decompose complex organic matter to produce ammonia. Concentrations of ammonia can be produced which are directly toxic to sensitive species in the water body. In fact, experience has shown that ammonia is the most common cause of toxicity in normal domestic sewage.

The effluent from the Waterway Estates plant is discharged through a pipe into the Caloosahatchee River where it mixes with the river water. The amount of mixing and consequent dilution is highly variable, depending primarily on the flow and velocity of the river currents, and the difference in density between the effluent and the river. Since the flow from the Waterway Estates plant averages

about 1 mgd, the flow in the Caloosahatchee River averages over 1000 mgd, and the density of the effluent and the river are quite similar, significant dilution normally takes place. Typically, a zone will be present in the vicinity of the point of discharge where the concentration of effluent rapidly declines from full strength to trace amounts. The size of the mixing zone will vary from day to day, as the flow in the river and plant effluent vary.

Any toxicity manifest by the full strength, undiluted effluent will be greatly diminished as the effluent passes through the mixing zone and is diluted by the natural flow of the river. Also, since the mixing zone in the vicinity of the point of discharge is typically small, any mobile organisms can readily escape or avoid immersion in the effluent, thus avoiding the toxic or noxious effects.

IV. SEWAGE TREATMENT

The Waterway Estates sewage treatment plant has always been a modern, effective plant which is well operated and maintained. Except for the brief period in 1991 and 1992 the plant has always consistently met its effluent limits. It has always provided a high level of treatment and has never posed a significant threat to the health or well being of its environment, including the Caloosahatchee River.

DOMESTIC SEWAGE

Domestic sewage is a dilute solution of solid matter suspended or dissolved in water, with high concentrations of bacteria and other microorganisms. Typical sewage is more than 99.3 percent just plain water. About half of the 0.7 of one percent of the solid matter in sewage consists of dissolved chemicals normally present in the drinking water used in the community, leaving only about 0.35 of one percent of the total as offensive matter.

The offensive matter contained in typical sewage is highly variable, and consists of sand and grit washed into sewers through leaking pipes; sticks, rags, paper and plastic items of all shapes and sizes; organic matter from garbage grinders, restaurants, toilets and showers; and dissolved chemicals and organic matter from household and commercial wastes.

TREATMENT PLANT CATEGORIES

Sewage treatment plants can be generally classified according to the level of treatment provided to remove the offensive matter from the sewage.

"Secondary" treatment plants provides a level of treatment suitable for most locations in the United States. This is the level of treatment typically required by NPDES permits if the quality of water in the receiving stream is acceptable and if the plant discharge will not cause water quality problems in the stream. Secondary treatment plants remove approximately 85 percent of the typical sewage pollutants (biochemical oxygen demand and total suspended solids) and effectively remove most bacteria, but remove only about half of the total nitrogen and total phosphorous.

Where the quality of the water in the receiving stream warrants a higher level of treatment, a "tertiary" treatment plant can be provided (90 to 95 percent removal of typical sewage pollutants).

An even higher level of treatment can be achieved with an "advanced" wastewater treatment (AWT) plant (97 percent removal of typical sewage pollutants).

A variety of treatment processes can be employed to achieve either secondary or higher treatment levels, and specific processes are available to target any particular pollutant. Plants are typically designed and operated to meet the limits established by the NPDES discharge permits.

Before construction of the plant modifications at Waterway Estates was completed in 1992, it was classified as a tertiary treatment plant. This plant routinely removed about 98 percent of the typical sewage pollutants (biochemical oxygen demand and total suspended solids), and 50 percent of the total nitrogen and total phosphorous.

The plant modifications completed in 1992 converted it to an AWT plant to reduce the concentration of nutrients in the effluent, as required by the 1989 NPDES permit. The new permit maintained the same limits on the typical sewage pollutants (biochemical oxygen demand, and total suspended solids) at a monthly average of 30 mg/L. Since completion of the 1992 plant upgrade the plant now routinely removes about 91 and 94 percent of the nitrogen and phosphorous, respectively.

SEWAGE TREATMENT PROCESSES

The basic concepts behind wastewater treatment are relatively simple. The wastewater flows in one end and out the other end of a series of tanks, called process units or treatment units. Each process unit is designed to remove some of the solid matter or to convert the solids from one form to another using physical, chemical or biological reactions.

The first treatment process removes large objects that can damage equipment or interfere with later processes. At the Waterway Estates plant, large suspended solids carried by the wastewater such as sticks, plastic items, and rags are caught on heavy mechanical grinders which cut them into small pieces.

In a secondary treatment plant most suspended and dissolved organic matter is removed from the wastewater by microorganisms. In principle, the process works like a farm growing biological products. The wastewater treatment plant grows microorganisms. The microorganisms are fed the organic matter present in the wastewater. They are grown in a large, well mixed basin. Air is mechanically

mixed and dissolved into the wastewater to provide oxygen required for the reproduction and growth of the microorganisms. As the quantity of microorganisms increases, some are removed from the process to maintain a fairly constant concentration in the process tank.

The excess microorganisms are removed from the process in a separate tank (secondary clarifier) where they are allowed to settle to the bottom. are raked to a central sump, and pumped out. The microorganisms produced by the treatment process are called sludge. Processing and disposing of the sludge produced by the plant is one of the final stages of wastewater treatment.

In a secondary treatment plant the microorganisms are effective in removing most of the organic matter from the wastewater, but some typically remain and constitute much of the waste matter in the plant effluent. In a tertiary treatment plant, the first series of treatment processes are the same as found in a secondary treatment plant, but additional processes are added. The most common additional process is simply a filter which strains out much of the suspended solids remaining from the secondary processes. The ammonia created from decomposition of organic matter often remains in both secondary and tertiary treatment plant effluent, thus creating the potential for ammonia toxicity problems.

In an AWT plant, additional treatment processes are added to those used for a tertiary treatment plant. These processes reduce the amount of nitrogen and phosphorous in the plant effluent. At the Waterway Estate plant the modifications completed in 1992 provide treatment processes that remove both the nitrogen and phosphorous using adaptations of the biological processes provided for secondary treatment.

The final treatment process in essentially all sewage treatment plants is to kill disease causing bacteria or viruses that survived the treatment processes. At the Waterway Estates plant the effluent is disinfected using an intense ultraviolet light which effectively kills bacteria and viruses.

SUMMARY

A sewage treatment plant employs a sequence of treatment processes to remove the solid matter from the wastewater and kill disease causing bacteria and viruses. The degree of treatment required is established by the FDER and the EPA, based on the characteristics of the stream where the treated wastewater is discharged and other factors.

Prior to 1992 the Waterway Estates plant provided a high degree of treatment for the typical sewage pollutants (biochemical oxygen demand and total suspended solids), which resulted in removal of about 98 percent of these pollutants on a routine basis. Prior to 1986 the NPDES discharge permits only required removal of about 85 percent of these pollutants on a monthly average. About one half of the nitrogen and phosphorous was removed by the treatment plant. However, the treatment processes were not designed to control ammonia. which is the probable source of toxicity experienced in early 1992. Following plant modifications completed in 1992 the nitrogen and phosphorous removal was increased to about 90 percent, and the new treatment processes provided for removal of ammonia as well as the other common pollutants.

V. NITROGEN

BACKGROUND

Nitrogen is a common element. About 80 percent of the earth's atmosphere is nitrogen as nitrogen gas (N_2) (meaning two atoms of the element nitrogen bound together to form one molecule of gas). Nitrogen combines with other elements such as carbon, hydrogen, phosphorous and numerous others (in very small amounts) to form organic matter. Thus, nitrogen is a common component of natural organic matter, including plant and animal tissue (e.g. protein) and liquids (e.g. urea). About 14 percent of the total weight of protein is nitrogen.

Since nitrogen is a common component of plant and animal matter, it is also required for the normal growth of plants and animals; and it is found in their normal foods. Protein and fertilizer are good food in large part because of the nitrogen they contain. The nitrogen found in fertilizer is frequently in the form of nitrate (NO_3), which is not suitable food for animals, but is good for plants.

Nitrogen is readily converted from one form of nitrogen compound to another by plants and animals, as well as through chemical processes such as the manufacture of fertilizer. Plants and animals routinely incorporate nitrogen into plant and animal tissue, as well as obtain chemical energy from the conversion of nitrogen from one compound to another. Also, where there is ample food, the populations of plants and animals flourish; whereas the absence of one or more necessary nutrients will limit the population. Nitrogen is one of the critical nutrients which control the population of plants and animals in water bodies.

Nitrogen dissolved in natural water bodies is used by the plants and animals, and the kinds and density of the plants and animals present in a water body can be related to the amount of nitrogen available for their use. Where there is a "natural" amount of nitrogen, a "natural" number of plants and animals will inhabit the waters. When there is an excessive amount of nitrogen, it can be used by the plants and animals to produce an unnaturally high population.

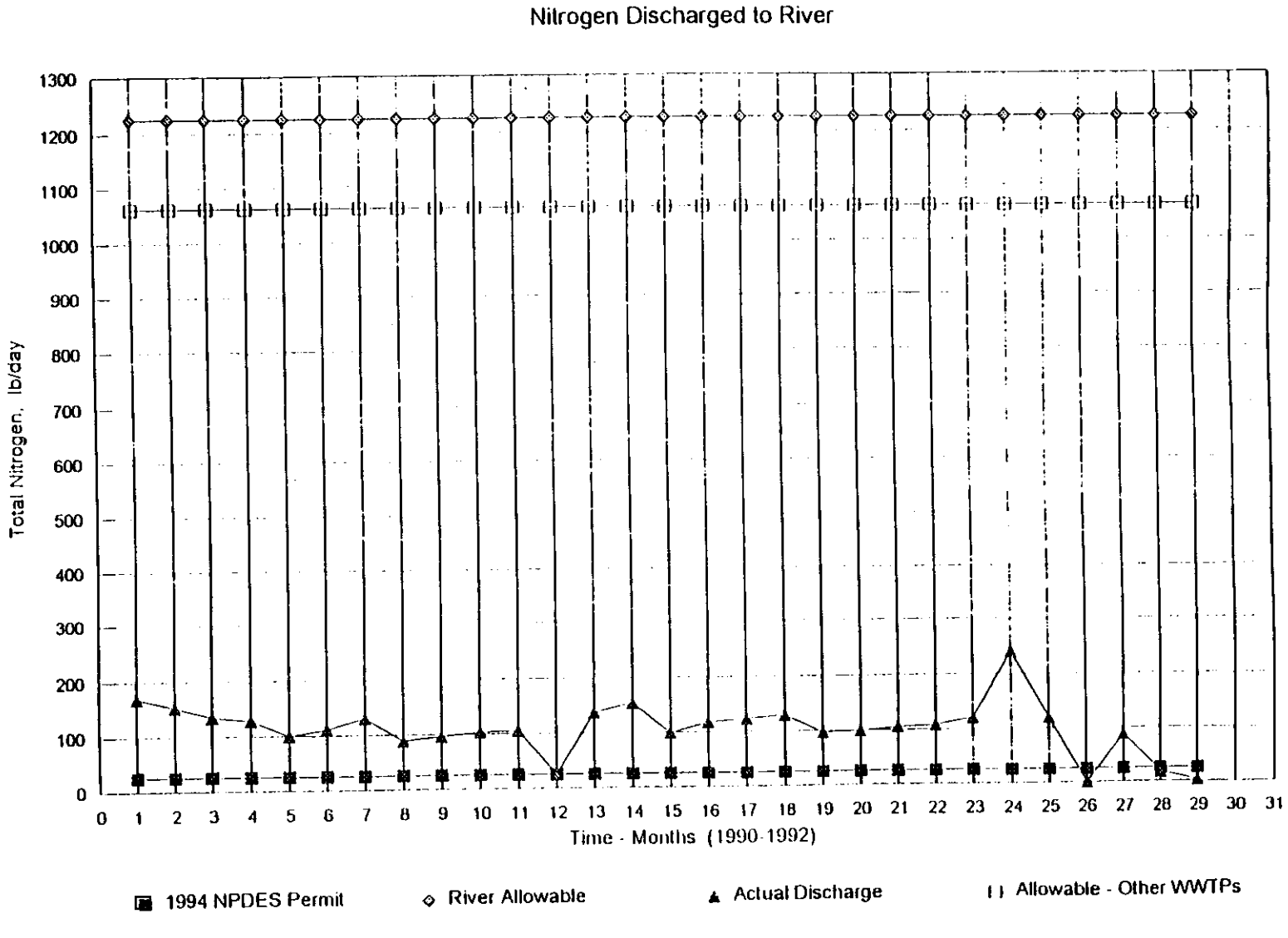
The common compounds containing nitrogen that are significant in domestic sewage are complex organic matter (garbage grinder products, shower drainage, toilet wastes, etc.), urea (partially decomposed protein, urine), and ammonia (from decomposing protein and urine). Secondary and tertiary sewage treatment plants are typically designed to break down complex organic matter. Nitrogen released from the organic matter is incorporated into new microorganism tissue, and some

of the nitrogen is released into the wastewater as ammonia. Advanced wastewater treatment processes are designed to convert and remove most of the remaining nitrogen products.

NITROGEN DISCHARGES

In the second half of 1991 and first four months of 1992 the Waterway Estates plant operated as it had for the preceding ten years, providing effective removal of organic matter and a portion of the nutrients, and disinfecting the sewage before discharge to the river. However, the treatment processes did not effectively control ammonia. The 1989 NPDES permit contained limits on the total amount of nitrogen that could be discharged which were lower than could be achieved by the Waterway Estates plant using its existing treatment process units. Plant performance did not meet the new requirements until April, 1992.

The relative magnitudes of the total nitrogen discharges to the Caloosahatchee River are illustrated by the graph on the following page. The graph presents the average discharge for each month from January 1990 through December 1992. The nitrogen is expressed as lb/day of total nitrogen, representing the nitrogen present in all chemical compounds, including organic matter, nitrites and nitrates. The line across the top of the graph represents 1225 lb/day.. This is the total amount of nitrogen considered to be acceptable by FDER, which will not result in an unacceptable increase in the population of plants (algae) and animals. The second line across the top of the graph represents 1075 lb/day. It is the total amount of nitrogen allocated by FDER to the other four municipal sewage treatment plants in the vicinity of the Waterway Estates plant. The straight line across the bottom of the graph represents 25 lb/day, which is the amount of nitrogen allocated by FDER to the Waterway Estates plant, and the limit included in the 1989 NPDES permit. The irregular line across the bottom of the graph represents the actual amount of total nitrogen discharged by the Waterway Estates plant during this time period, which was generally about 100 lb/day. A review of data from the other four municipal wastewater treatment plants in the vicinity of Waterway Estates indicated that the combined total discharged from those four generally amounted in the 300 to 500 lb/day range. The total of the 300 to 500 lb/day contributed by the other four plants plus the 100 lb/day contributed by the Waterway Estates plant was well



Waterway Estates

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below the 1225 lb/day total allowable discharge considered to be acceptable by FDER.

It can be concluded that the failure of the Waterway Estates treatment plant to meet the new effluent limits for total nitrogen in a timely fashion had no measurable effect on the amount of algae in the Caloosahatchee River, and therefore no adverse effect on the river.

VI. TOXICITY

The permit limits under which the Waterway Estates plant operated in 1991 and 1992 required the effluent to be tested every six months for toxicity using a standard bioassay test. Bioassay tests are routinely used to evaluate the acute toxicity of wastewater to the biological life of the receiving stream. Rather than conducting a large number of tests for specific chemicals that could be toxic to organisms, the bioassay test simply places sensitive organisms in a series of aquariums under controlled conditions and observes the response of the organisms. The usual objectives of bioassay tests are to determine the concentration of effluent which will kill 50 percent of the organisms in a specified period (LC_{50}), and to determine the maximum concentration that will have no apparent effect on the test organisms in 96 hours.

The 1989 NPDES permit required the Waterway Estates plant to test the effluent using two kinds of organisms (shrimp and minnows) using standard test procedures. Samples of plant effluent were collected at four different times over a one day period, and aquariums were filled with 100 percent plant effluent obtained in these samples. The test organisms were placed in the aquariums. The effluent was considered to fail the test if more than half of the test species died in one or more aquariums. The permit required the tests for toxicity to be performed once every two months for the first year, and once every six months thereafter.

Toxicity of treated domestic sewage can result from a variety of causes. Probably most often it is due to the presence of ammonia formed during the consumption of the organic matter by microorganisms in the treatment processes. Rarely is it due to the presence of chemicals dumped into the sewers by residential customers, because most household chemicals would be readily diluted to non-toxic levels as they are transported in the sewage and effectively removed by the sewage treatment processes. Also, there are no industries or commercial operations in the Waterway Estates service area which would discharge significant amounts of toxic wastes. Thus, the most likely cause of any toxicity in the plant discharge would be due to the presence of ammonia, or possibly to a diminished oxygen content.

TEST RESULTS

A bioassay test only registers whether any of the test animals die during the test. No information is provided on what might have been the cause of death. Also, the bioassay tests only indicate acute toxicity which occurs during the test itself. The results cannot be extrapolated to draw conclusions concerning long term toxicity.

The toxicity tests required by the 1989 NPDES permit included testing the organisms in 100 percent, undiluted plant effluent. The effluent failed the test if more than half of the organisms died within 48 hours from exposure to the undiluted effluent. Since the plant effluent is discharged directly into the Caloosahatchee River where it is mixed with the river flow, the total volume or region in the vicinity of the discharge where the effluent would remain undiluted would be small. Thus, any mobile organisms could readily move away from the undiluted effluent plume to avoid prolonged exposure.

If the plant effluent should exhibit toxicity, such as that caused by ammonia generated from the decomposition of organic matter, the toxic nature of the effluent would be rapidly dissipated as the discharge was mixed with the river water.

The Waterway Estates plant had operated for years discharging effluent that was essentially of the same quality as that discharged during the late spring of 1989. This was not a new discharge released into waters which had not been exposed to the effluent in the past. It is not likely that sensitive species were present in the vicinity which would be harmed by the effluent during this time period.

From this it was concluded that toxicity was not a serious problem with the Waterway Estates plant, and that little damage was experienced by the Caloosahatchee River, even when the bioassay tests indicated the presence of toxicity.

VII. LOCATION OF DISCHARGE

The Waterway Estates sewage treatment plant was originally constructed near the Caloosahatchee River and the intersection of two of the canals which comprise the access waterways of the Waterway Estates. The plant discharged its effluent directly to the canal along the south side of the property. The effluent mixed with the water in the canal and flowed about 500 ft east along the canal to the intersection with the Caloosahatchee. The canal is 60 ft wide in that reach and approximately 4.5 ft deep. When it reached the river, the effluent mingled with the flow of the river and was carried away according to the direction of the local currents.

At this location the Caloosahatchee River is approximately one mile wide, with a typical depth of less than five ft across most of its width. Channels are typically dredged about six ft deep to provide boat access to the shore. The main river channel is near the center of the river width, and is itself only about six ft deep.

The shallow depth across most of the river width combined with the relatively low flow in the river and the tidal influences result in river currents which are irregular in direction and velocity, and typically slow or non-existent near the shore lines. These conditions are unfavorable for the dispersion and dissipation of the effluent from the Waterway Estates plant.

The 1989 NPDES required the Waterway Estates plant effluent pipe to be relocated from the canal adjacent to the plant out to near the center of the Caloosahatchee River. Administrative Order 89-109 established a schedule which required the relocation work to be completed by August 1, 1991. Construction was begun in 1990 and completed in July 1991 on this relocation, ahead of the schedule established by Administrative Order 89-109.

The construction begun in 1990 on modifications to the plant included relocation of the plant discharge point from the canal adjacent to the plant out to the center of the Caloosahatchee River. The work included construction of a pipeline 500 ft along the bottom of the access canal and 2000 ft along the Caloosahatchee River bottom out to the center of the river near the main channel. A 100 ft long diffuser pipe with 10 individual discharge ports was attached to the end of the 2000 ft line.

The purpose of relocating the point of discharge was to obtain better dispersion and dissipation of the effluent by placing it near the main channel where most of the river flow occurred. This should reduce the impact of the effluent on water quality in the immediate vicinity of the discharge, such as lowering the nutrients available for algae growth.

In the 1990 report concerning the water quality in the Caloosahatchee River and waste load allocations, the FDER concluded that the magnitude of the improvement in water quality resulting from the relocation of the Waterway Estates plant's point of discharge could not be determined with certainty. This was based on the results of a mathematical model of the system. The model first evaluated water quality resulting from effluent released at the canal, and second, from effluent released at a new location near the center of the river. The results showed virtually no improvement in water quality in the river with the discharge point near the middle of the river. However, actual measurements of Caloosahatchee River water quality in the vicinity of the Waterways Estates discharge point revealed that with the treatment levels provided at that time, the concentration of algae was about ten percent higher than target values considered to be satisfactory for the river. FDER concluded that moving the point of discharge would improve the quality of the water in the Caloosahatchee River and the Waterway Estates canals, even though the improvement could not be documented with the mathematical model. Improvements of this magnitude would be imperceptible, and would be expected to take place gradually over many months.

From this it was concluded that any delay in completing the relocation of the Waterway Estates discharge pipeline had minimal effect on the water quality in the Caloosahatchee River.

VIII. SCHEDULE OF WATERWAY ESTATES PLANT MODIFICATIONS

PURPOSE

This section of the report presents an evaluation of the schedule followed by FCWC in pursuit of compliance with EPA regulations. The purpose of the evaluation was to determine whether FCWC pursued the necessary tasks in an appropriate, timely manner.

BACKGROUND

The completion of planning, design and construction of a wastewater treatment facility is not simply a technical, engineering process, but is a complicated effort requiring careful planning and contributions from many professionals with various expertise. Decisions made throughout the course of the project must balance many criteria, including technical feasibility, economics, and schedule.

Construction at the Waterway Estates WWTP presented an additional challenge to the engineers and construction contractor due to the unusually small and crowded conditions at the site. The existing plant had to remain in operation while it was essentially being completely rebuilt. The very compact construction site and the need to continue operating the existing plant throughout construction definitely resulted in a longer construction schedule than would have been possible at a more accessible site.

Projects require a substantial effort in coordination and administration to meet a variety of regulatory requirements. More stringent environmental protection laws have created an expansion of regulatory agencies on the local, state and federal level. Agencies at different levels of government frequently have overlapping jurisdiction and sometimes conflicting requirements. Regulations evolve, so nearly a full time effort for utilities to maintain a current understanding of the regulations and make corresponding modifications to their operations and facilities.

Changes in regulations can require a utility to undertake the expensive and time consuming task of upgrading or expanding their treatment facilities. This requires a series of complex tasks of uncertain and relatively unpredictable duration. A utility can anticipate regulation and/or scrutiny from the following

sources during the course of a project similar in nature to the modifications to the Waterway Estates plant completed in 1992:

- An array of environmental regulatory agencies with varying concerns such as wetlands protection, pollution control, public health, and endangered species protection, etc.

- Agencies with other concerns such as state and local transportation, energy efficiency and conservation, and building code enforcement.

- Concurrency review Committee, local zoning board, and utility departments.

- Private groups concerned with the effect of the new facilities on their personal lives and property values.

- Public entities controlling the use of public funds used in design and construction.

- Private interests seeking to influence design decisions for their own benefit.

Issues originating from each of these parties must be addressed over the duration of a project. At the same time, responding to legitimate concerns and issues impacts the primary project activities of defining, designing and constructing the required improvements.

These essential project activities must be accomplished while continuing to perform the primary function of a utility. In the case of FCWC that function includes serving Waterway Estates through the uninterrupted collection, treatment, and disposal of wastewater in an environmentally and economically responsible manner.

Because of the complexity, it is difficult to develop an accurate schedule for completing the series of tasks leading to an upgraded wastewater treatment facility. It is impossible to predict all potential sources of delay; and in many cases, it would not be possible to control or avoid such delays even if they were

anticipated. It is equally difficult, even for experienced professionals, to guide a project efficiently through the process of obtaining all required approvals and permits. This is due not only to the complexity and abundance of regulations, but also to the constantly changing and sometimes conflicting requirements. Despite the considerable challenge of defining an attainable schedule for completing a plant upgrade, EPA routinely imposes deadlines for compliance with its regulations. These deadlines are often imposed without the benefit of detailed knowledge of the circumstances surrounding each particular project.

EVALUATION

The evaluation of the FCWC schedule for accomplishing the modifications to the Waterway Estates plant consisted of the following tasks:

1. Review of FCWC's evaluation and selection of an alternative to comply with EPA requirements.

2. Development of a list of tasks which would normally be necessary to attain regulatory compliance, and definition of a normal schedule under which each task could be completed under typical conditions.

3. Review of FCWC files to determine the schedule under which tasks were actually completed.

4. Identification of the cause of any significant variance from the normal schedule and evaluation of FCWC's ability to control such variances.

1. Evaluation of Selected Alternative:

EPA's permit denial and Administrative Order (AO) 87-085 issued by EPA in May of 1987 did not specifically mandate the particular modifications which were eventually made to the Waterway Estates plant. AO 87-085 simply required FCWC to discontinue discharging Waterway Estates effluent to a canal to the Caloosahatchee River. This "No Discharge" requirement was based on FDER's Wasteload Allocation Documentation - Lee county, 1981 which assigned "No Discharge" to the Waterway Estates plant due to an incorrect assumption that Waterway Estates flow would eventually be diverted to the Cape Coral WWTP for

treatment. Contrary to EPA's interpretation of the 1981 document, the Waterway Estates WWTP had continuously discharged to the river under the authority of FDER permits and consent orders.

In determining a strategy for complying with AO 87-085, FCWC considered several alternatives including:

- Construct facilities to transport treated effluent from the plant and pump it into the ground via injection wells located off-site.

- Abandon the Waterway Estates Plant, construct facilities to transport untreated sewage to the North Fort Myers Utility (NFMU) collection system, and pay NFMU to accept the additional sewage.

- Construct facilities to upgrade the level of treatment provided by the existing Waterway Estates WWTP including a relocated discharge to the main channel of the Caloosahatchee River, and renew the FDER waste load allocation for upgraded treatment and the new discharge location.

- Construct a new advanced treatment facility which would discharge to the Caloosahatchee River, and obtain a waste load allocation from FDER.

Through the efforts of an environmental engineering consultant and FCWC staff, the alternatives were evaluated with regard to cost, schedule, and technical feasibility. In a memorandum dated October 27, 1987, FCWC concluded that the best alternative was to upgrade the existing Waterway Estates plant and renew the waste load allocation from FDER for discharging effluent to a different location in the Caloosahatchee River. This conclusion was based on the finding that the alternative was technically sound, environmentally acceptable, would be eligible for necessary permits, and would result in the lowest cost to the customers. It was not, however, estimated to require the shortest duration.

Financial considerations are legitimate criteria to be considered by FCWC since its actions are regulated by the Florida Public Service Commission (FPSC). FCWC spends thousands of hours every year justifying its actions and decisions to the FPSC. The FPSC routinely scrutinizes FCWC's capital and operational expenditures and decides whether the expenditures are "prudent" and in the best

interest of the customers. Any expenditure which does not meet FPSC's rules and policies may not be passed on to the customers in the service rates. In 1992, the FPSC held hearings to evaluate FCWC's request to raise customer rates to pay for the capital expenditure to upgrade the Waterway Estates plant. After evaluating the planning reports and hearing testimony from both the public and FCWC staff, the FPSC concluded that the proposed project was prudent, and approved a 174 percent rate increase to pay for the improvements. The amount of revenue which the FPSC allows FCWC to collect is directly related to the amount of the company's capital expenditures. Therefore, FCWC does not benefit financially from selecting the least cost alternative.

To summarize, the compliance alternative selected by FCWC was not considered to be the fastest method of achieving compliance. However, FCWC must balance the concerns of the various entities which control and/or scrutinize its decisions. In this case, EPA's desire for the earliest possible compliance was clearly in conflict with FPSC's desire for financial prudence. FCWC chose to upgrade the existing Waterway Estates WWTP, concluding that the alternative was implementable, permittable, and most economically beneficial for its customers. Ultimately, the decision was supported by FPSC. The resulting facility was granted all necessary environmental permits and consistently meets the requirements of those permits.

2. List of Sequential of Tasks:

Providing a new or expanded or upgraded wastewater treatment plant involves much more than just construction of the facility. The planning, design, permit administration, and construction of a wastewater treatment facility is composed of many individual tasks. While some of the tasks can be performed simultaneously, others must be completed in sequence. That is, the commencement of one task is dependent on the successful completion of a previous task. The series of sequential tasks which requires the longest overall duration defines the shortest possible time necessary to complete the entire project. This is known as the "critical path" concept, and it is a common scheduling tool used in design and construction for project planning and management. If a delay is experienced in the completion of any task on the critical path, the overall project schedule will be similarly delayed. Table 1 presents the sequential tasks which make up the critical path for the Waterway

Table 1. Schedule of Sequential Tasks

Task	Anticipated Duration (days)	Actual Duration (days)	Date Complete
Project Initiation			
EPA denies NPDES permit	N/A		08-Dec-86
Preliminary Engineering			
FCWC prepares/issues RFP	14	—	10-Nov-86
Consultants prepare/submit proposals	30	23	03-Dec-86
FCWC evaluates, selects, negotiates :awards contract	60	114	27-Mar-87
Consultant performs study,submits report	120	132	06-Aug-87
FCWC evaluates report, selects alternative	45	91	05-Nov-87
Detailed Design / Permit Submittal			
FCWC prepares/issues RFP for design services	14	39	14-Dec-87
Consultants prepare/submit proposals	30	30	13-Jan-88
FCWC evaluates, selects, negotiates .awards contract	60	47	29-Feb-88
Consultant designs facil., submits permit apps to FDER	240	442	16-May-89
Permitting			
FDER reviews application, issues RFI	30		
Consultant prepares / issues response to RFI	30		
FDER evaluates response, deems complete	30	251	22-Jan-90
FDER reviews applications / issues permit	90	38	01-Mar-90
Construction			
FCWC reproduces, advertises	14		
Contractors prepare/submit bids	30	47	17-Apr-90
FCWC evaluates bids, awards contract	90	107	02-Aug-90
FCWC issues notice-to-proceed	30	22	24-Aug-90
Contractor achieves substantial completion	480	651	05-Jun-92
Total Time:	1437	2006	

Estates plant upgrade project. Each task listed in the schedule is considered by Black & Veatch to be essential for the responsible execution of plant modifications such as were made at Waterway Estates.

Each anticipated task duration presented in Table 1 is an estimate of the time which would be needed complete the activity under typical conditions on a similar size and type project. The anticipated durations assume no unexpected, significant delays or obstacles due to external sources. These durations represent Black & Veatch's best estimate, based on extensive experience on similar projects involving preliminary planning, design, permitting, and construction activities. The sum obtained by adding all of the anticipated durations together represents the minimum completion time for the whole project, assuming the timely completion of every task on the critical path, and no delays originating from external sources.

3. Progression of the Waterway Estates Project:

Table 1 also presents the date on which each activity was actually completed, as shown in the FCWC project files, and the number of days associated with each activity. The progression of the critical path tasks for the Waterway Estates project is illustrated in Figure 1.

4. Variances from Anticipated Durations:

As shown in Table 1, six activities required significantly more time to actually complete than estimated to be necessary on similar projects. A discussion of each of these activities follows.

a. FCWC selection of, negotiation with, and award of a contract to a preliminary engineering consultant: FCWC received proposals from three consultants on December 3, 1986. A preliminary engineering contract was officially awarded to Environmental Science Engineering (ESE) 114 days later on March 27, 1987. The anticipated time to complete this activity is 60 days.

Documentation in FCWC's project files indicates that correspondence with EPA and FDER was underway to verify the renewal of the waste load allocation and confirm the actual requirements which must be met. Such unknowns would serve to complicate the definition of a scope of engineering services and slow down negotiations.

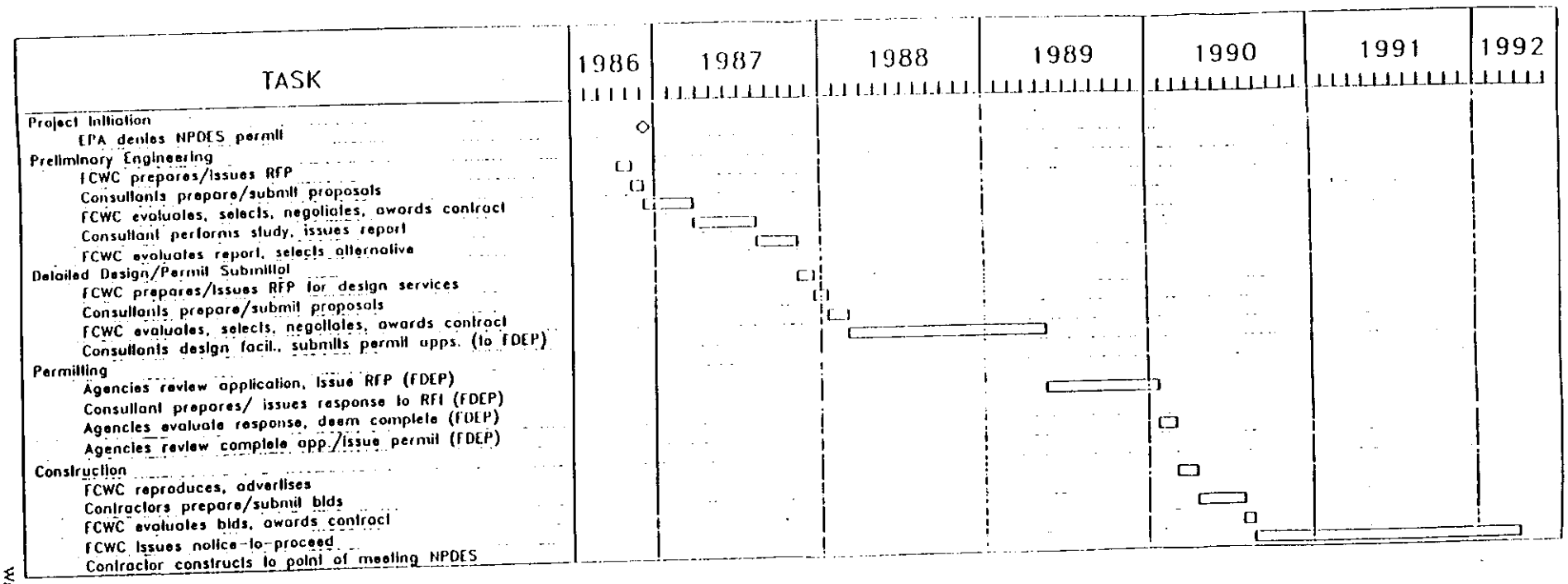

Figure 1

Progression of Critical Path Tasks Completed for the 1992 Waterways Estates WWTP Upgrade

b. FCWC evaluates the ESE report and selects a compliance alternative: ESE issued its report to FCWC on August 6, 1987. After conducting additional research and reviewing the issue internally, FCWC made a selection 91 days later on November 5, 1989. The anticipated time typically necessary to complete this task is 45 days.

Documentation in the files indicates that FCWC staff conducted further negotiations and correspondence with NFMU regarding their acceptance of sewage from Waterway Estates.

Again, this option proved to be infeasible due to high cost. During this period FCWC also continued to pursue a waste load allocation by FDER.

c. Source, Inc. designs facility and submits permit applications: Source, Inc. required 442 days following award of the design contract, to complete the design and submit a construction permit application to FDER on May 16. 1989. The anticipated time to complete this task is 240 days.

It is apparent from reviewing the project files that this phase of the project was hampered by a series of delays originating from a number of external sources. The delays were largely beyond the control of FCWC staff. They included the following:

- FDER's involvement in design process significantly slowed the progress of the design. In a September 14, 1988 letter, FDER disapproved Source, Inc.'s design concept. This disapproval resulted in a series of meetings and correspondence between FDER staff, Source, Inc. design staff and FCWC to discuss FDER's concern. Additionally, FCWC hired Barth Tec, Inc. as a consultant with expertise in treatment processes to review and comment on Source, Inc.'s process design in an effort to satisfy FDER's concerns. Barth Tec, Inc.'s report was provided to FDER for review. FDER's review resulted in relatively minor design revisions which were transmitted to Source, Inc. by FCWC in a letter dated December 21, 1988. Despite a 98 day delay to the progress of the design, the treatment process remained essentially as originally designed by Source, Inc.

- The acquisition of Lee County Zoning and Development Exemptions and approvals required nearly daily attention, from the original submittal date of

August 4, 1988 until the exemption from the development standards ordinance was granted on April 12, 1989. FCWC pursuit of this approval included the hiring of Montgomery, Esq., Pavese, Shields, Garner et.al. as legal representation and issuing a contract amendment for Source, Inc. on April 17, 1989. Submittal of the FDER construction permit application was delayed considerably while Lee County approvals were obtained.

- Source, Inc. and FCWC were in continual contact with EPA and FDER, addressing a number of issues. These activities diverted attention away from the design and permitting tasks. Dealings with EPA and FDER during this time included

  (1) continued pursuit of a waste load allocation from FDER,

  (2) pursuit of adjustment to the compliance schedules from EPA and FDER,

  (3) repeated reports updating EPA and FDER on the progress of the project.

  (4) a joint EPA/FDER inspection of the Waterway Estates plant.

  (5) EPA notice of non-compliance received March 30, 1989 requiring a massive submittal of FCWC internal data.

- Source, Inc. required 224 days longer to complete plans and specifications than indicated in its project schedule. The events discussed above account for part of this delay. Problems with the consultant's failure to meet the project schedule could not be anticipated by FCWC. Even when it became evident that Source, Inc. was not meeting the project schedule, FCWC could not have improved the situation by changing to a different consultant. FCWC's initial selection of Source, Inc. was based on an appropriate evaluation of potential consultants which considered experience, responsiveness to the request for proposals, and fee proposal.

  In order to retain a more responsive consultant, FCWC eventually replaced Source, Inc. just before the start of construction. However, it would not have been effective to replace Source, Inc. during design in order to speed progress. This would have required a lengthy selection process as well as an orientation period for the new consultant.

d. FDER Construction Permit application is made complete: A construction permit application was submitted to FDER on May 16, 1989. It was not until 251 days later, on January 22, 1990, that FDER declared the application complete. The estimated time required to complete this task is 90 days.

The 90 day estimated duration of this task is based on allowing 30 days for FDER to conduct an initial review for completeness and request additional data. 30 days for Source, Inc. to assemble and submit the additional information, and 30 days for FDER to review the additional information and issue a letter of completeness. The following events contributed to the delay in achieving a complete submittal:

- The initial request for information (RFI) was received by FCWC on June 16, 1989. At that time, Source, Inc. declined to respond the RFI without an additional contract amendment. After negotiations and the issuance of a contract amendment, Source, Inc. responded to the RFI on August 14, 1989, 29 days later than anticipated.

- FDER issued a second RFI on September 13, 1989. Again, Source, Inc. requested a contract amendment. FCWC staff prepared the response and issued it to FDER on October 10, 1989. A thorough initial review by FDER and an appropriate response by the consultant is typically expected to result in a complete permit application. A second RFI from FDER is not normally expected. This is particularly true of this project, considering FDER's involvement in the design process. The additional RFI resulted in a 57 day delay.

- The intervention of several other agencies disrupted the permitting process. These included the U.S. Department of the Interior which expressed concern for manatee habitat, North Fort Myers Utility in a final offer to provide wastewater service to Waterway Estates, and Lee County. The interventions ultimately resulted in no significant action, but they required a series of meetings, correspondence and telephone conversations on nearly a daily basis during the permitting process.

- FDER informed FCWC in a letter of October 11, 1989, that FCWC must comply with FDER's new antidegradation rule. The rule requires the preparation and submittal of an evaluation of the technological and economic feasibility of a wastewater reuse system which utilizes treatment plant effluent to offset the consumption of potable water. FCWC staff conducted the necessary research and transmitted the report to FDER on December 4, 1989. A minimum delay of 54 days can be attributed to the antidegradation requirement.

e. Cardinal Contractors constructs plant upgrade: On August 24, 1990, FCWC issued a Notice of Commencement to Cardinal Contractors instructing them to proceed with construction. Substantial completion was achieved 651 days later on June 5, 1992. The estimated time required to complete this task is 480 days.

Review of the documentation in FCWC's files revealed the following cause of delay:

- Following the issuance of the Notice of Commencement, Cardinal Contractors was denied a building permit by Lee County. The denial was based on a recently enacted Lee County requirement for a concurrency review and approval to precede the processing of a building permit application. FCWC and Stone & Webster, the new engineering consultant, prepared and submitted the concurrency review documents to the County, and Cardinal Contractors was issued a building permit on December 27, 1990, 125 days following the Notice of Commencement. Cardinal Contractors mobilized and began some construction activities before receiving the building permit. However, very little flexibility was available in the construction schedule which would allow lost time to be recovered. This was due to the extremely small space available at the site which limited the contractor's movements, and the need to maintain the existing plant in continuous operation.

  The major treatment process components necessary for achieving the NPDES permit limits were in place and on-line by March 16, 1992, 81 days before final completion.

SUMMARY

In Administrative Order 87-085, EPA issued a schedule which required FCWC to achieve compliance by September 30, 1988, 661 days after denial of the NPDES permit. This schedule was clearly unrealistic to complete any of the compliance alternatives available to FCWC.

EPA has historically been flexible regarding compliance schedules and frequently extends schedules as projects evolve as long as the permittee demonstrates an earnest effort towards compliance. As the project progressed, the inadequacy of the original compliance schedule became apparent. On August 31, 1988, EPA issued an amendment to AO 87-085 which extended the compliance date to November 1, 1990.

Subsequent to EPA's August 31, 1989 amendment, several events in design and permitting which were beyond the control of FCWC further delayed the project. This led to FCWC requesting a second extension to the compliance schedule. The revised schedule, issued by EPA with AO 89-109 on September 26, 1989, required completion of construction by August 1, 1991.

Additional delays beyond the control of FCWC occurred following the September 26, 1989 amendment. On May 17, 1990, FCWC requested an additional extension to the compliance deadline due to these ongoing delays. This request was denied by EPA. As detailed previously, these delays included:

- 57 days for issuance of an response to a second RFI regarding the FDER construction permit application.

- 54 days to respond to FDER's new antidegradation rule.

- 125 days delay obtaining a Lee County building permit due to Lee County's new concurrency review requirement.

The sum of these delays amounts to 236 days, and they do not include any delays associated with interference from various other sources. Major process components necessary for achieving NPDES effluent limits were complete and on-line by March 16, 1992, 227 days after the required completion date. The 236 days of delays which were clearly beyond the control of FCWC account for more time than the 227 days that construction missed the EPA deadline for completion.

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1. Florida Department of Environmental Regulation. July, 1990. "Caloosahatchee River Water Quality Based Effluent Limitations Documentation (Lee County)", Water Quality Technical Series, Vol 2, No. 121.

2. APHA, AWWA, WEF. 1992. Standard Methods for the Examination of Water and Wastewater, 18th Ed.

3. Metcalf & Eddy, Inc. 1979. Wastewater Engineering: Treatment, Disposal, Reuse. McGraw-Hill.

4. Environmental Science and Engineering, Inc. August, 1987. "Florida Cities Water Company Waterway Estates Wastewater Treatment Plant Preliminary Engineering Report".

5. Florida Cities Water Company, Waterway Estates Facility. NPDES Discharge Monitoring Reports. 1988, 1989, 1990, 1991, 1992.

6. U.S. Department of Interior, Geological Survey. Miscellaneous Data. Caloosahatchee River historical discharge records and daily records at S-79 , Near Olga, FL for 1987, 1988, 1989. Miscellaneous flow, lockage, chloride data for Caloosahatchee River near W.P. Franklin Dam for 1986-1990.

7. Black & Veatch. November, 1992. "Waterway Estates WWTP Preliminary Design Report".

Glossary and Abbreviations

AO - Administrative Order
APHA - American Public Health Association
AWT - Advanced Wastewater Treatment
AWWA- American Water Works Association
DMR - Discharge Monitoring Report
EPA - United States Environmental Protection Agency
FCWC - Florida Cities Water Company
FDEP - Florida Department of Environmental Protection (Formerly FDER)
FDER - Florida Department of Environmental Regulation (Changed to FDEP)
FPSC - Florida Public Service Commission
mgd - million gallons per day
mg/L - milligrams of substance per liter of solution (1 mg/L is essentially equivalent to 1 lb of a substance per million pounds of solution)
NPDES - National Pollutant Discharge Elimination System
RFI - Request for information
WEF - Water Environment Federation
WWE - Waterway Estates
WWTP - Wastewater Treatment Plant

Exhibit_____(GHB-81)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION NO.:**
	)	**93-281-CIV-FTM-21**
FLORIDA CITIES WATER COMPANY	)	
and	)	
AVATAR HOLDINGS INC.,	)	
	)	
Defendants.	)	
	)	

FLORIDA CITIES WATER COMPANY'S MOTION TO STRIKE THE DEPOSITION TESTIMONY OF JACK WILLIAM TOMPKINS, OBJECTIONS AND COUNTER- DESIGNATIONS

Florida Cities Water Company ("Florida Cities") hereby renews its motion to strike the testimony, by deposition, of Jack W. Tompkins, notes objections to the remaining deposition testimony proffered by Plaintiff, and files counter-designations to the portions of the deposition which have been proffered by Plaintiff. Plaintiff has attempted to proffer the testimony of Mr. Tompkins as part of its contested rebuttal case, even though Plaintiff had previously tendered the deposition as a part of its case in chief. Then, after the defendants rested their respective cases, Plaintiff sought to offer Mr. Tompkins' deposition testimony as rebuttal to the testimony of Gerald Allen, Paul Braditmiller, and Julie Karleskint. Plaintiff has not articulated any grounds which support its argument that this testimony is proper rebuttal evidence. Accordingly, Mr. Tompkins deposition testimony should be stricken.

a) **Plaintiff is not entitled to rebuttal against Florida Cities.**

Under the Clean Water Act, a party which has been found liable for violations bears the burden of proof regarding mitigation. In the present case, Plaintiff still bears the burden of proof to establish liability against Avatar Holdings Inc. ("Avatar Holdings") while Florida Cities bears the burden of proof regarding mitigation. Although Plaintiff presented its evidence first in its attempt to establish liability against Avatar Holdings, this order of proof does not change the underlying burdens placed upon each party. Plaintiff seeks to have rebuttal against both Florida Cities and Avatar Holdings even though each of these defendants is in a different procedural posture. Because Florida Cities bears the burden of proof in this case, Plaintiff is not entitled to present any rebuttal evidence.

b) **The Tompkins deposition is not proper rebuttal evidence.**

At trial, Plaintiff argued that it offered Mr. Tompkins testimony as rebuttal evidence against Florida Cities in response to the testimony of Mr. Allen, Mr. Bradtmiller, and Ms. Karleskint. Although Plaintiff has not specified the nature of this rebuttal evidence, it appears that this testimony is being offered on the issues of construction delays at Waterway Estates, disposal options at Barefoot Bay, and the Carrollwood facility's status with EPA, state and local regulatory bodies during Mr. Tompkins' tenure at Florida Cities. Plaintiff proffered the testimony of Mr. Tompkins in its case in chief but withdrew its proffer. (Trial transcript ("Tr.") of March 29 at p. 5, l. 16 - p. 6, l. 21.) Instead, Plaintiff chose to present only Mr. Klingensein's testimony on these issues. Now, after Florida Cities has rested its case, Plaintiff is attempting to reoffer the testimony without any

showing that this testimony is proper rebuttal testimony. (Tr. of March 29 at p. 6, l. 22 - p. 8, l. 14.) In response to both defendants' objections and the Court's inquiry Plaintiff stated:

> THE COURT: Now, that's where I believe I made a comment about if this is – if this is deposition testimony that is properly to be presented during your case in chief, you can't just wait until later on and just throw it in as rebuttal. I do remember that.
>
> MR. JACOBS: I remember you saying something quite along those lines, It was, if it's properly rebutted, then you don't need to reserve the right, would be my recollection. And we can pull that transcript as well.
>
> But I respectfully suggest we've spent ten minutes discussing it and it will take only about ten to fifteen minutes if the Court would like to read it. If the Court would like to reserve judgment as to whether it's legitimate rebuttal –.

(Tr. of April 5 at p. 255, l. 24 - p. 256, l. 11.) Plaintiff made no further showing that this testimony was proper rebuttal evidence, even after reading approximately thirty minutes of testimony. In short, Plaintiff has made no compelling argument that it could not and should not have presented this evidence in its direct case.

Plaintiff was fully capable of offering this testimony during its case in chief. Indeed, Mr. Klingenstein offered opinions regarding the reasons for construction delays at Waterway Estates, disposal options at Barefoot Bay, and Florida Cities' knowledge of its status with the various environmental regulatory agencies. The portion of Mr. Tompkins' deposition offered by Plaintiff addresses the exact same issues. Additionally, many of the documents referenced in Mr. Tompkins's deposition were entered into evidence in through and in support of Mr. Klingenstein's opinions, not in response to any issues raised by Florida Cities' direct evidence. Any additional testimony on these issues should have been offered in Plaintiff's case in chief.

Plaintiff cannot claim surprise as a result of any testimony of Mr. Allen, Mr. Bradtmiller, or Ms. Karleskint because each of these witnesses testified in a manner which was consistent with their deposition testimony. While, on a number of occasions, Plaintiff attempted to impeach the testimony of these witnesses, it was unable to identify any substantive inconsistencies in any of these witnesses testimony. Plaintiff had reserved the right to call witnesses listed by Florida Cities in its case in chief. Plaintiff was free to call Mr. Allen, Mr. Bradtmiller, and Ms. Karleskint as its own witnesses. Instead, Plaintiff made a strategic choice to not call these witnesses and to withdraw the Tompkins deposition from its direct case. Plaintiff should not now be allowed to present this evidence in the guise of "rebuttal evidence."

Objections and Counter-designations

As a preliminary objection, Florida Cities notes that Plaintiff has made no effort to cross-reference the deposition exhibits referred to in the Tompkins deposition to the actual trial exhibit numbers. Without any system of cross-references, Plaintiff's designations add a needless layer of confusion to the presentation of the evidence.

Plaintiff's Designations and Specific Objections:

1) 142:1-143:9	Relevance, testimony out of context. **Counter-designation: p. 143, l. 10 - p.144, l. 23.**
2) 144:14-145:11	Relevance, lack of foundation.
3) 146:3-8, 16-19	Relevance, lack of foundation, testimony out of context. **Counter-designation: p. 146, ll. 9-21.**
4) 149:17-151:20	Relevance, lack of foundation, argumentative.
5) 153:7-154:11	Relevance, lack of foundation. **Counter-designation: p. 154, ll. 12-24.**

6) 158:6-8, 17-20	**Counter-designation: p. 158, ll. 9-16, ll. 21-25; p. 159, ll. 1-8.**
7) 174:5-15	Relevance, lack of foundation.
8) 182:19-24	Relevance, testimony out of context. **Counter-designation: p. 181, l. 8 - 185, l. 5.**
9) 208:21-209:2	Relevance, witness' lack of personal knowledge.
10) 222:24-223:8	Relevance, testimony taken out of context. **Counter-designation: p. 226, l. 7 - 228, l. 13.**

Other general Counter-designations:

p. 54, l. 22 through p. 55, l. 4

p. 59, l. 15 through p. 61, l. 20

p. 80, ll. 4-12

p. 82, l. 4 through p. 83, l. 11 -- In response to Plaintiff's motion to strike, Florida Cities responds that counsel asked for an engineering conclusion at p. 82, ll. 24-25 and Mr. Tompkins forthrightly answered the question posed to him.

p. 90, l. 21 through p. 91, l. 1

p. 96, l. 17 (which is referring to United States trial exhibit 410) through p. 97, l. 25.

p. 98, l. 22 through p. 99, l. 14

p. 104, l. 1 through p. 105, l. 105

p. 109, l. 8 through p. 110, l. 16

p. 115, l. 12 through p. 116, l. 5

p. 133, l. 1 through p. 134, l. 8

p. 221, l. 12 through p. 222, l. 10

p. 226, l. 13 through p. 227, l. 23

p. 229, l. 16 through p. 230, l. 7.

Conclusion

Plaintiff is not entitled to present the deposition of Jack W. Tompkins as rebuttal evidence against Florida Cities at this point in the case. Plaintiff had a full and fair opportunity to present this deposition during its case-in-chief and chose to withdraw this evidence. Once Plaintiff made this strategic choice, it must show that it is entitled to rebuttal evidence against Florida Cities and that the Tompkins deposition is, in fact, proper rebuttal evidence. Plaintiff has failed to establish either of these factors. Because Florida Cities bears the burden of proof, Plaintiff is not entitled to a rebuttal case. Additionally, the Tompkins deposition is not proper rebuttal evidence. Plaintiff could and should have presented this deposition in its case in chief. Mr. Tompkins' deposition does not rebut the testimony of any of Florida Cities' witnesses, but is merely an attempt to offer additional testimony about issues and documents addressed in Plaintiff's case-in-chief. Therefore Florida Cities respectfully requests that this testimony be stricken from the record in this trial.

Respectfully submitted,

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April 16, 1996

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of "Florida Cities Water Company's Trial Witness List" has this April 16, 1996, has been served upon the following persons by first class mail, properly addressed and postage prepaid:

Daniel S. Jacobs, Esq. (By fax)
T. Anthony Quinn, Esq. (By fax)
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Exhibit_____(GHB-82)

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DAVID B. HIRD
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April 18, 1996

VIA FEDERAL EXPRESS

Honorable Ralph W. Nimmons, Jr.
United States District Court for
the Middle District of Florida
311 W. Monroe Street
Jacksonville, Florida 32201

Re: United States v. Florida Cities Water Company et al. No. 93-281-CIV-FTM-21

Dear Judge Nimmons:

Enclosed is a courtesy copy of the Parties' Proposals for Posttrial Submissions. We have also sent a copy to your chambers in Tampa.

Sincerely,

David Hird

David B. Hird

Enclosures

cc: Alexander M. Bullock, Esq.
Don G. Scroggin, Esq.
T. Anthony Quinn, Esq.

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April 18, 1996

VIA FEDERAL EXPRESS

Honorable Ralph W. Nimmons, Jr.
United States District Court for
the Middle District of Florida
611 North Florida Avenue
3rd Floor
Tampa, Florida 33602

Re: United States v. Florida Cities Water Company et al. No. 93-281-CIV-FTM-21

Dear Judge Nimmons:

Enclosed is a courtesy copy of the Parties' Proposals for Posttrial Submissions. We have also sent a copy to chambers in Jacksonville.

Sincerely,

David B. Hird

David B. Hird

Enclosures

cc: Alexander M. Bullock, Esq.
Don G. Scroggin, Esq.
T. Anthony Quinn, Esq.

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April 18, 1996

VIA FEDERAL EXPRESS

Mr. David L. Edwards
Clerk of the Court
United States District Court
for the Middle District of Florida
2301 First Street
Ft. Meyers, Florida 33901

Re: United States v. Florida Cities Water Company et al. No. 93-281-CIV-FTM-21

Dear Mr. Edwards:

Enclosed for filing is the Parties' Proposals for Post-trial Submissions. Also enclosed is a copy to be date-stamped and returned in the self-addressed envelope provided.

Sincerely,

David B. Hird

David B. Hird

Enclosures

cc: Alexander M. Bullock, Esq.
Don G. Scroggin, Esq.
T. Anthony Quinn, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC. and FLORIDA CITIES WATER COMPANY, INC., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

PARTIES' PROPOSALS FOR POSTTRIAL SUBMISSIONS

In accordance with the Court's instructions, the parties submit the following proposals for posttrial submissions in this matter.

United States' Proposal:

The United States proposes that the parties each file no later than April 26, 1996 (1) Posttrial Proposed Findings of Fact and Conclusions of Law and (2) Posttrial Brief. The Defendants should be required to file a joint Posttrial Brief.

While the United States recognizes that the Court has not yet ruled on the adverse inference issue or Avatar Holdings' rule 52(c) motion, the United States believes that it is preferable to have all briefing completed in an expedited and concise manner so that the parties will not delay the Court's ruling. To the extent that the proposed findings and/or brief need to be revised in light of a subsequent court ruling, a party may seek leave of Court to do so.

Defendants' Response:

A deadline of April 26, 1996 is impractical. Before the defendants can submit their individual posttrial briefs and proposed findings of fact and conclusions of law,[1] other events must occur. First, the Court must rule on the appropriateness of drawing adverse inferences from certain witnesses' invocations of the Fifth Amendment. See Trial Tr. at 284, April 5, 1996 (where the Court states "apparently the Court is going to need to resolve those issues before the Court receives -- reasonably can expect to receive anything further from counsel"). Second, if the Court rules against the defendants on that issue, the Court has stated that it will then give the defendants an opportunity to respond to the government's Offer of Proof. See Trial Tr. at 287, April 5, 1996 (where the Court explains "assuming that I rule adversely to the Defendants on that issue, then I will need to give counsel for the Defendants the opportunity to address the proffer.").

In addition, Avatar Holdings Inc. (Avatar Holdings") is renewing its Rule 52(c) motion. The Court clearly indicated that if Avatar Holdings renewed its motion, its renewal must be taken into account by the parties in devising a logical and reasonable posttrial briefing schedule. Id. at 286 (All transcript pages referenced in Defendants' proposals are attached).

---

[1] We note that each defendant submitted a separate pretrial brief and set of proposed findings of fact and conclusions of law. Each defendant should be permitted to file a separate posttrial brief and set of proposed findings of fact and conclusions of law.

Because all of these factors must be taken into account in the briefing schedule, a deadline of April 26 for the parties' posttrial briefs and proposed findings of facts and conclusions of law is impractical and does not address the needs presented by this particular case. A ruling on the Fifth Amendment issue will affect the way the defendants will brief their case. The government's suggestion that we submit briefs and proposed findings of fact and conclusions of law by April 26 and then revise them upon leave of Court is not feasible, and may lead to a duplication of effort.

Defendants' Proposal:

1. 15 Days after the Court rules on drawing adverse inferences based on certain witnesses invoking the Fifth Amendment:

a. Defendants shall submit a response to plaintiff's offer of proof, not to exceed the number of pages of the offer of proof. No such submission need be made if the court declines to draw adverse inferences.

b. Avatar Holdings will file its memorandum in support of its motion under Rule 52(c), not to exceed 20 pages.

Avatar Holdings will serve its memorandum in support of its motion under Rule 52(c) on plaintiff the same day it submits the memorandum to Court.

This proposal is consistent with the Court's statement on April 5, 1996, Trial Tr. at 287: "Assuming that I rule adversely to the Defendants on that issue, then I will need to

give counsel or the defendants the opportunity to address the proffer." We also note that, the government stated on April 1, 1996, that it had no objection to one or both of the defendants briefing whether they believe an "offer of proof is an appropriate means to bring to the Court's attention the adverse inferences that should be drawn," and that it had no objection to the defendants briefing what inferences should be drawn from the documents referenced in the Offer of Proof. Trial Tr. 209-10.

Finally, the Court indicated that Avatar Holdings would have the opportunity to renew its Rule 52(c) motion, and its renewal should be taken into account in devising a briefing schedule. April 5, 1996, Trial Tr. 286.

United States' Response:

a. Although Defendants had the opportunity to rebut the United States' Offer of Proof during their cases, the United States does not object to a joint reply not to exceed the number of pages in the Offer if the Court believes Defendants require a further opportunity to reply.

b. If Avatar Holdings is to renew its Rule 52(c) motion, it should do so without further delay. The United States notes that Defendant Avatar Holdings made its Rule 52(c) motion at the conclusion of the United States' case-in-chief, and the United States responded, so only limited briefing, if any, should be necessary.

Defendants' Proposal:

2. Within ten calendar days after Avatar Holdings serves its memorandum in support of its motion under Rule 52(c), the government will submit its memorandum in opposition to Avatar Holdings' Rule 52(c) motion, not to exceed 20 pages.

United States' Response:

2. If the Court wishes to entertain a brief in support of this motion, the United States should have ten days from service of such a brief in which to file a response, pursuant to Local Rule 3.01(b).

Defendants' Proposal:

3. Within 30 days of the Court's ruling on whether to draw inferences from certain witnesses' invocation of the Fifth Amendment, all parties will submit posttrial briefs (not to exceed 25 pages) and proposed findings of fact and conclusions of law.

United States' Response:

3. The United States stands by its proposal that posttrial briefs and proposed findings of fact and conclusions of law be filed on or before April 26, 1996, so that the Court will be fully apprised and will not be delayed by excessive posttrial briefing.

Defendants' Proposal:

4. Closing Statements, 14 days after submission of posttrial briefs, or as soon thereafter as is consistent with Court's calendar. Plaintiff shall have 45 minutes, as shall the defendants collectively.

Defendants believe it is necessary for each side to have an additional 15 minutes for closing arguments (for a total of 45 minutes per side) given the complexity of the case. The Court stated the following "If need be, I will reconvene and hear arguments, but I'm going to leave that to you all to initiate a plan in that respect, taking into consideration both motions as well as summations." Trial Tr. at 286, April 5, 1996.

United States' Response:

4. The Court stated at the conclusion of the trial that if need be, it would reconvene to hear closing arguments. Trial Tr., April 5, 1996 at 286. In view of the lengthy trial and ample posttrial briefing, the United States does not believe that is necessary for the Court to reconvene to hear closing arguments in this bench trial. To the extent that the Court believes such arguments may be helpful to it in rendering final judgment, however, the United States proposes that the closings, like the

openings, be limited to thirty minutes per side (i.e., 30 minutes for the Defendants collectively).

DATED: April 18, 1996

Respectfully submitted,

FOR PLAINTIFF,
THE UNITED STATES OF AMERICA

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Trial Day 5

Monday, April 1, 1996

U.S. v. Florida Cities Water Company

Judge Ralph W. Nimmons
Tampa, Florida
(No. 93-281-CIV-FTM-21, M.D. Fla.)

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The third question is a separate question, assuming you were to take adverse inferences, is this appropriate offer of proof, given what this is functionally is an analysis of the documents, and if you look at the documents themselves, in many instances the documents are inconsistent with the conclusions drawn by the Government or the alternative language that can be brought out in the various exhibits.

What I would propose that we do is that we at one stage brief the propriety separately of drawing an adverse inference and admission of the depositions, if that -- if the Court Rules against the Defendants with respect to that, then we should somehow have an opportunity to respond within the documents themselves to show that the conclusions that the Government has drawn from the documents are not consistent with other things within the very same documents.

THE COURT: Okay. Yes.

MR. KELLOCK: Your Honor, Along with that, the offer of proof presented by the Plaintiff made no -- had no specific, either evidentiary or case law basis, to make an offer of proof under the auspices that they were attempting to make the offer of proof and I would just join with Mr. Kind in saying we would appreciate the opportunity to brief the issue of whether or not such a offer is actually an offer of proof and is permissible in that form under the

Rules.

THE COURT: Okay. Mr. Jacobs.

MR. JACOBS: Your Honor, I'm not sure whether the Court has any leanings one way or the other in terms of what it's inclined to do.

I would reemphasize that the Government has no objection, whatsoever, to the Defendants interpreting the documents that are, in fact, discussed in the offer and interpreting them and supporting whatever inferences they see fit as being attachable to those documents.

I'm instructed that all of the exhibits that are cited in the offer of proof are already in evidence.

MR. KIND: I think that's one exception, Exhibit 251. That was Mr. Dresdner's --

MR. JACOBS: If that's the same I take Mr. Kind's representation to it being, then I stand corrected, there's only one of many, many, many exhibits that are not already in evidence.

I do quite agree with Mr. Kind, that in large part the adverse inferences that we asked the Court to draw are adverse inferences that we believe are legitimate and appropriate interpretations of these documents.

I have no objection, whatsoever, to one or both of the Defendants briefing as an initial matter, whether they believe an offer of proof of this nature is an appropriate

means to bring to the Court's attention the adverse inferences that should be drawn, and secondly -- so that would be a procedural matter.

And secondly, I have no objection to the Defendants briefing from their own perspective what adverse inferences or what inferences, if they rather characterize it as such, should be drawn from the documents.

As I said, earlier -- early last week, there was -- there's no subterfuge, no trickery involved here. All we want to do is to make our offer, because the witnesses are unavailable, and that's something we've had no control over. It's something that the Defendants have had ultimately quite some say in, which witnesses would be called to testify. And I'm emphasized in the part that the witnesses, particularly the Avatar witnesses that were called to testify by Avatar Holdings, were the witnesses who did not have personal knowledge of the facts and circumstances directly relating to the allegations in the complaint, and it's the witnesses that we would like to call who are unavailable, and that's why we think we should be entitled to make the offer of proof.

THE COURT: Well, we have the issues presented or appear to be extant that as to the admissibility in the first instance of these depositions wherein these witnesses invoked the Fifth Amendment, and I suppose, I'm not sure

that the second issue can -- can or really should be regarded as a separate issue, because the second issue, which we've talked about, is whether it is legitimate for the Government to be entitled to have the Court draw negative inferences from the invocation of the Fifth Amendment.

Now, if the Court were to find against the Government on those issues, then it seems to me we would not have to go further with respect to any matters pertaining to the offer of proof, because the offer of proof would not be an appropriate endeavor.

So, I'm wondering if this briefing should be bifurcated, as I think Mr. Kind had suggested.

MR. JACOBS: Judge, I didn't address the matter of the depositions as -- with respect to the present or former Avatar officers, that is to say, Messrs. Gerson, Sladkus and Volkov. I'm entitled to have those depositions into evidence, either because the person is a current officer of the company or because the person is unavailable as being outside of the jurisdiction, outside the subpoena power.

THE COURT: Well, I'm going to permit counsel for the Defendants to address those two issues; that is, the admissibility of the depositions and the interviews -- the admissibility of the depositions and the issue regarding whether the Court -- whether the Government is entitled to

Gabeler, Battocchi & Griggs

Trial Day 8

(Last Day of Trial)
Friday, April 5, 1996

U.S. v. Florida Cities Water Company

Judge Ralph W. Nimmons
Tampa, Florida
(No. 93-281-CIV-FTM-21, M.D. Fla.)

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possible, and in this case, I am proposing some temporary measures that can be taken to improve our effluent quality and also I'm proposing a modification to the existing facility to allow construction to proceed quicker.

Q. How do these items relate to the completion of the new outfall line?

A. To the extent that the new outfall line would be placed in service, it was my intention to maximize treatment to attempt to meet the new effluent limits.

Q. Okay.

Is it fair to say that what you're recommending here would achieve compliance sooner than what was being done at the time?

A. Yes, sir.

Q. In fact, at the very end of your memo you say, quote, if approved by FDER, we will have substantially reduced construction time for the project, unquote; is that correct?

A. That is correct.

Q. Now, did you receive authorization to proceed in the manner that you recommended in this memorandum?

A. Uh, to be honest with you, I don't recall.

Q. Well, you would have had to receive authorization from Mr. Breedmiller; is that correct?

A. Yes, it is.

Q. Who is his boss?

THE COURT: I tell you what we're going to do. We're not going to read anymore tonight and I'm going to let you submit a copy of the balance of the portions that you want the Court to consider, and I will allow counsel to state their objections to the balance of the deposition.

MR. BULLOCK: Do I need to renew my motion to strike at this time or may I -- do you want me to?

THE COURT: You can do that when you file your submission objecting to not only the deposition itself, basically, but also portions that Mr. Jacobs is designating.

And, Mr. Jacobs, I would ask that you file your designations specifically by Wednesday of next week. And counsel for the Defendants, now this will -- you'll need to submit to the Court a copy unless you want to leave this with the Court.

MR. JACOBS: I think the original actually has already been filed with the Court and I'm ready to --

THE COURT: Well --

MR. JACOBS: -- leave that one as well, sir.

THE COURT: All right.

Then, all you'll need to do is just to designate a document. I know that you've got that in the pre-trial statement, but in order to make sure that the designations are accurate, I would ask that you file your written designation by -- I think you can do that actually by Tuesday, do that by

A. Mr. Reeves.

Q. If you look at the third page of Exhibit 155, there's a handwritten notation in the upper righthand corner. Do you know whose handwriting that is?

A. Yes, that is in my handwriting.

Q. What does it say, sir?

A. It says, quote, draft not sent per A.A.R., unquote.

Q. Who is A.A.R.?

A. That is Mr. Reeves.

Q. Does that refresh your recollection as to whether or not your recommendation was accepted?

A. Well, if you look at the date on that draft letter, it's March 28, 1991, versus my memorandum, which is May 17, 1991. It may be that the March 28th draft was something that I proposed earlier and was not approved and I was proposing it again. I don't know. I mean, the dates don't match up very well.

MR. BAISE: Again I would object that this is certainly confusing. It's not relevant to the time period. Actually we are talking about the contract that is, as stated earlier, was underway, the pipeline was constructed within a very quick and timely manner.

MR. JACOBS: Judge, he's testifying. The issue -- what is going on here is we're still before the compliance date and they're still out of compliance. This relates directly --

Tuesday, and then the Defendants can have until the following Tuesday, whatever date that is, to file your objections to the designations, but we're not going to sit here any longer. It's five till 6:00 now.

MR. JACOBS: I apologize. I obviously underestimated how long it would take, Judge. Do you want me to just list the designations?

THE COURT: Yes, sir. The remaining designations will be sufficient and that starts, I guess, with page 142.

MR. JACOBS: Yes, sir.

THE COURT: Okay.

I tell you what I'm inclined to do is instead of my telling you, I'd like to give counsel the opportunity to maybe put their heads together, including counsel for both sides, and proposing what you would recommend -- what you would suggest to the Court in terms of additional oral and/or written submissions in terms of final arguments, including any motions that you want the Court to consider. And I've done this before and it's worked fairly well.

I have received the Defendant's joint memorandum addressing the Fifth Amendment, invocation of the Fifth Amendment by certain witnesses and I have already indicated to the Government that they will have until a certain time to file their response to that.

But I think at this point, I would suggest that and

would ask that counsel assimilate what we have procedurally remaining, including the issues that are addressed by the joint memorandum that I just referred to. And it may be that the Court -- apparently the Court is going to need to resolve those issues before the Court receives -- reasonably can expect to receive anything further from counsel.

But I would suggest that you put that in the mix and come up with a recommendation as to how you feel that the Court should procedurally deal with the balance of what remains to be done, including, as I say, any -- if you feel that we ought to reconvene for purposes of hearing oral arguments, summation, then include that in your written submission.

Now, it may be that counsel for the Government and the Defendants can come to joint recommendations regarding these procedures and recommendations for written submissions, and all the better.

I had an admiralty case that was pretty complex and pretty involved and this is a little reminiscent of that, and they were able to come up with an effective plan, which I modified to some extent, but it was very helpful to the Court. I think it's helpful to counsel to have an opportunity to come up with a recommendation regarding that.

Do you all have any objections or questions regarding that?

MR. JACOBS: That sounds fine. I'm willing to

suggest something right now or we can work it out later and get back to the Court.

MR. BAISE: I would suggest we work it out later.

THE COURT: I think so.

MR. BAISE: We had a long day. We might -- I doubt we would not, but obviously --

THE COURT: Yeah. I will ask that you file your submissions by -- how much time do you want?

MR. JACOBS: Well, Judge, I have to do a brief by next Thursday on what I've just received today on the Fifth Amendment issue. May I propose the following: Thursday or Friday, two weeks from today, for these suggestions?

MR. BAISE: That would be acceptable to me. A couple of us are going to take some time to go fishing, so we're going to be out of pocket.

THE COURT: So you're suggesting, Mr. Jacobs, what would the date be?

MR. JACOBS: The 19th of April to file.

THE COURT: All right.

I will expect to receive -- to have you file with a courtesy copy to chambers your hopefully joint recommendations. And to the extent that you can't concur on your --

MR. BAISE: We can file them both places, I heard her question.

THE COURT: File a courtesy copy, yeah, because I'm

going to probably be in Jacksonville, still be in Jacksonville at that time, so, yeah, a joint recommendation. And to the extent that you can't agree, then your individual variations of what you're suggesting. Yes, sir.

MR. HIRD: Just for clarification, you reserved on our motion on Rule 52(c). I assume that's part of what we will be discussing in the submissions.

THE COURT: Right. You'll be -- I reserved on that, and I assume that a renewed motion will be made.

MR. HIRD: I certainly will, Your Honor.

THE COURT: And as a part of your considerations, you may want to include what you are recommending regarding how the Court will consider such motions and whether you want to address those in writing, including a briefing schedule on that.

Now, the Rule 52 motion, that will need to be resolved before -- before your summations -- before your final arguments, for obvious reasons. So, I'd like for you to take that into consideration when you -- when you deal with the procedures of the additional presentations to make to the Court.

If need be, I will reconvene and hear arguments, but I'm going to leave that to you all to initiate a plan in that respect, taking into consideration both the motions as well as summations.

MR. HIRD: And one more thing that I assume would be included, just for clarification. I assume the Court will rule on the Fifth Amendment issue, and if the ruling is adverse to the Defendants, they will have an opportunity to respond to the Government's offer of proof based on --

THE COURT: Yeah. You will recall that I did suggest that you address the Fifth Amendment issues, which you have apparently done, and the Court is going to need to rule on that and give the Defendants -- assuming that I rule adversely to the Defendants on that issue, then I will need to give counsel for the Defendants the opportunity to address the proffer.

And again, I think you need to take that into consideration in devising a meaningful organized briefing or procedural manner, a suggested procedural manner for finishing out what remains to be done.

Yes, Mr. Quinn.

MR. QUINN: Final question, sir, about the bench copy of the exhibits. Do you want to keep that in addition to the original, sir, for your use?

THE COURT: Yeah. Well, let's see. Actually, I'm not sure that that is necessary. The Court will have available to it the original exhibits which are also bound in three ring binders.

MR. QUINN: No, sir, the United States' Exhibits are not bound.

MR. BULLOCK: The binders in the corner are Florida Cities' and I believe -- I don't know if Avatar Holdings' are over there or not.

THE COURT: I think probably the Court better retain the copies that are presently bound. We'll find a place for them where we can keep them and have ready access to them until we're through.

Yes, sir.

MR. BAISE: Going back to the Charles Hill witness that Your Honor will recall, obviously -- going back to the Charles Hill matter, because he was unable to attend because of illness, and as you indicated, there certainly has been some testimony with regard to the PSC issues. I'm trying to think of a way of possibly providing like an affidavit or summary even with regard to what he would have testified to.

Obviously, counsel will have a response to that if we deem it necessary. I mean, we need to go back and look at what has been testified to with regard to the PSC testimony in order to stop any further testimony.

THE COURT: No, we're -- unless counsel wants to stipulate to that.

MR. BAISE: Okay.

THE COURT: We're --

MR. BAISE: I wanted that clarified. Thank you.

THE COURT: All right.

CLAUDIA M. FRY OFFICIAL U.S. COURT REPORTER

Anything further?

MR. BAISE: I beg your pardon?

THE COURT: Anything further? All right.

MR. BAISE: Thank you very much, Your Honor.

THE COURT: We'll be in recess.

(Thereupon, the proceedings were concluded.)

CLAUDIA M. FRY OFFICIAL U.S. COURT REPORTER

CERTIFICATE

STATE OF FLORIDA)
COUNTY OF HILLSBOROUGH)

I, CLAUDIA M. FRY, DENNIS MIRACLE and JAMES M. SPANGLER, Official Court Reporters for the United States District Court, Middle District, Tampa, Division,

DO HEREBY CERTIFY, that we were authorized to and did, through use of Computer Aided Transcription, report in shorthand the proceedings and evidence in the above-styled cause, as stated in the caption hereto, and that the foregoing pages numbered 1 to 250, inclusive, constitute a true and correct transcription of our shorthand report of said proceedings and evidence.

IN WITNESS WHEREOF we have hereunto set our hand in the City of Tampa, County of Hillsborough, State of Florida, this 5th day of April, 1996.

CLAUDIA M. FRY, RPR, CSR, CP, CM

DENNIS MIRACLE

JAMES M. SPANGLER

CLAUDIA M. FRY OFFICIAL U.S. COURT REPORTER

Exhibit_____(GHB-83)

FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

96 MAY -9 AM 10: 14

CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

UNITED STATES OF AMERICA

Plaintiff,

V.

CASE NO. 93-281-CIV-FTM-21

AVATAR HOLDINGS, INC., and
FLORIDA CITIES WATER COMPANY,

Defendants.
_____/

ORDER

This cause comes before the Court on Defendants' Joint Memorandum of Law Addressing the Invocation of the Fifth Amendment by Certain Witnesses (Dkt. 301) and Plaintiff's Memorandum of Law in Support of its Request that the Court Draw Inferences From the Refusal to Testify by Defendants' Present and Former Officers and Managers (Dkt. 304).

Plaintiff states in its memorandum that the following inferences should be drawn from the refusal to testify by several witnesses, who are former and present officers and managers of Defendants, when said witnesses' refusal to testify is considered in conjunction with other evidence presented at trial: (1) that Avatar Holdings pervasively controlled the environmental practices of Florida Cities; (2) that Avatar Holdings officers were personally and pervasively involved in matters directly relating to the violations at the three wastewater treatment plants; (3) that the violations were serious; (4) that the Defendants have an extensive history of violations; and (5) that the Defendants patently failed to make meaningful good faith efforts to

comply with the applicable requirements. Plaintiff relies in part on Baxter v. Palmigiano, 425 U.S. 308, 318 (1976), wherein the Supreme Court found that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.

Defendants assert that there are several reasons why adverse inferences should not be drawn in this case. First, Defendants argue that in light of the legitimate fear of criminal prosecution produced by the Ninth Circuit decision United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1994), cert. denied, 115 S.Ct. 939 (1995), the individuals' decisions to invoke the Fifth Amendment were personal, not corporate decisions. Next, Defendants point out that despite requests by Defendants, the United States has not granted immunity to the witnesses who invoked the Fifth Amendment. Defendants argue that the government could have granted immunity and that its decision not to do so leads to the conclusion that the government preferred for the Court to draw a negative inference rather than for the Court to hear the testimony of these witnesses. Next, Defendants argue that this enforcement action for punitive relief has more characteristics of a criminal trial than a civil one and that the element of governmental compulsion exists in this case. Defendants therefore assert that no adverse inferences should be drawn in order to prevent the government from reaping undue benefits from the silence of a potentially innocent individual. Defendants also argue that because no specific questions were asked of the witnesses, the Court should not be asked to speculate as to what the government might have asked in order to draw adverse inferences against the parties. Additionally, Defendants point out that Plaintiff had a full and fair opportunity through discovery, broad document requests, and site inspections, to learn the facts of this case. Finally, Defendants raise specific objections to the drawing of adverse

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(Rev. 8/82)

inferences from each of the witnesses' decision to invoke the Fifth Amendment. Defendants maintain that because the Court should not draw adverse inferences, the Court should exclude all depositions where the witness invoked the Fifth Amendment as such depositions would be irrelevant and thus inadmissible under Federal Rule of Evidence 402.

In response, the Plaintiff first requests that the Court reconsider its ruling from the bench that the deposition of Lawrence Wilkov, a former employee of Avatar Holdings who had filed suit against Avatar Holdings, was not admissible. Plaintiff asserts that the Court should not infer that Mr. Wilkov's potential testimony might be unreliable because he at one time filed suit against Avatar Holdings because the lawsuit did not arise from an environmental matter, but rather from a disagreement over the direction of the company. Further, Plaintiff points out that Mr. Wilkov received $1,000,000 in settlement of the suit, and he is bound by the terms of the settlement agreement to assist Avatar Holdings in this litigation and not assist the United States. Finally, Plaintiff points out that Defendants are paying for the personal representation of its present and former employees. The Court, however, finds that Plaintiff's assertions do not merit a departure from the Court's bench ruling, and the motion to reconsider the ruling that the Wilkov deposition is not admissible is DENIED.

Next, Plaintiff asserts that based upon Eleventh Circuit case law, the only test of whether an adverse inference is to be drawn is whether there is other probative evidence, citing United States v. A Single Family Residence, 803 F.2d 625, 629, n.4 (11th Cir. 1986) and Director of the Office of Thrift Supervision v. Lopez, 960 F.2d 958, 965 (11th Cir. 1992). Plaintiff points out that in A Single Family Residence, the Eleventh Circuit permitted an adverse inference to be drawn from the invocation of the Fifth Amendment by a corporate representative. 803 F.2d

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at 629, n.4. Additionally, Plaintiff points out that the fact that Plaintiff chose not to grant immunity is inconsequential to the determination of whether to draw adverse inferences because, as the Eleventh Circuit held in United States v. Georgia Waste Systems, Inc., 731 F.2d 1580, 1582 (11th Cir. 1984), "The Government has no duty under the Sixth Amendment or otherwise to immunize witnesses for the benefit of the defense. The Government's power to grant immunity is discretionary and the defendants have no right to subject its decision to judicial review." Further, Plaintiff asserts that the deposition transcripts show that the United States went through a litany of questions about each wastewater treatment plant and proffered numerous documents about each plant and that there was no doubt that each witness was invoking the Fifth Amendment in response to each substantive question. Finally, Plaintiff opposes Defendants' arguments with respect to each witness and asserts that a negative inference should be drawn by the pleading of the Fifth Amendment by Robert Gordon, John Sladkus, Dennis Getman, James Elder and Antone Reeves when considered together with other evidence in the record.

The Court agrees that in order to draw the adverse inferences in this civil case, there must be some other evidence to show that an adverse inference is appropriate. With respect to Robert Gordon, Plaintiff submits that he was identified by Mr. Levy as the person who was responsible for ensuring that the Clean Water Act was not violated and identified by Mr. Jacobson as having personal knowledge of the operation of the wastewater treatment plants. Plaintiff further states without supporting citation that there is abundant documentary evidence linking Gordon directly to the violations. With respect to John Sladkus, Plaintiff submits that he was identified by Mr. Levy as having significant authority, and Plaintiff asserts that his position of authority together with the documentary evidence, to which Plaintiff does not cite, show that he exercised his

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authority in decisions relating directly to the violations in this case. With respect to Dennis Getman, Plaintiff submits that it is questionable whether his activities as Executive Vice President/General Counsel of Avatar Holdings and General Counsel of Florida Cities would have been shielded from discovery on the basis of the attorney-client privilege and that the documentary evidence, to which Plaintiff does not cite, shows that Getman was intimately involved in matters directly relating to the violations at issue in this case. Finally, with respect to James Elder and Antone Reeves, Plaintiff submits that they were sufficiently high-ranking to have knowledge of Avatar Holdings' role in the violations and that based on documentary evidence, to which Plaintiff does not cite, these witnesses could have given testimony adverse to Defendants. The Court finds that Plaintiff's assertions do not form a sufficient predicate upon which to base adverse inferences. The mere fact that the witnesses held positions of authority and responsibility does not without more lead to the conclusion that they would have given testimony that would support Plaintiff's liability case against Avatar Holdings and Plaintiff's penalty case against both Defendants. Further, Plaintiff has not set forth the substance of any documentary evidence, for the purposes of this motion, which demonstrates that the witnesses would have given adverse testimony.

Moreover, the Court finds no legal basis for drawing adverse inferences against Avatar Holdings for the Fifth Amendment invocations by Robert Gordon, James Elder, and Antoine Reeves, who were never officers, directors, or employees of Avatar Holdings. Further, the Court finds that there is a likelihood that because Dennis Getman holds the position of general counsel to both Defendants as well as other positions, Plaintiff's questions to him would have been objectionable on the grounds of attorney-client privilege.

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Upon consideration of the foregoing, it is hereby **ORDERED and ADJUDGED** that Plaintiff's request that the Court draw adverse inferences from the refusal to testify by Defendants' present and former officers and managers is **DENIED**, and the depositions of Lawrence Wilkov, Robert Gordon, John Sladkus, Dennis Getman, James Elder, and Antoine Reeves are **NOT ADMISSIBLE.**

DONE AND ORDERED, at Tampa, Florida, this 8th day of May, 1996.

RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of record

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(Rev. 8/82)

Exhibit_____(GHB-84)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	)	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' POSTTRIAL MEMORANDUM

I. Introduction

The United States brought this law suit for civil penalties under the Clean Water Act, 33 U.S.C. § 1319(b), to redress unlawful pollutant discharges from three Florida Cities Water Company wastewater treatment plants. These plants are the Barefoot Bay plant in Brevard County, which discharges into the Sebastian Creek, near the confluence of the Sebastian and Indian Rivers; the Carrollwood plant, in Tampa, which until its closure in 1992 discharged into the Sweetwater Creek; and the Waterway Estates plant in North Ft. Myers, which discharges into the Caloosahatchee River.

The Court granted the United States summary judgment on liability against Defendant Florida Cities on the United States' claims for unpermitted discharges, discharges to an unpermitted location and National Pollutant Discharge Elimination System (NPDES) permit violations at Waterway Estates, and claims for

NPDES permit violations at Barefoot Bay and Carrollwood.[1] The remaining issues at trial were the amount of the civil penalty to be awarded against Florida Cities, Defendant Avatar Holdings' liability as Florida Cities' parent company, and the penalty to be assessed against Avatar Holdings if it is held liable.

The United States contends that a substantial civil penalty is warranted in this case, primarily because of the extensive history of serious Clean Water Act violations at these plants and the Defendants' lack of serious, timely efforts to remedy them. In each instance, Defendants simply chose not to take the steps necessary to remedy long-standing problems, putting their short-term financial self-interest ahead of compliance with the law and care for the environment. The United States contends that Avatar Holdings should be held liable for the violations, and should also be subject to a substantial civil penalty, because it caused or directed the violations through its pervasive control of the environmental affairs of Florida Cities and its acts and omissions relating directly to the violations.

II. Penalty Calculation Under the Clean Water Act

The Clean Water Act was intended "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Gwaltney of Smithfield v. Chesapeake Bay Foundation,

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[1] The Court granted Florida Cities summary judgment on the claims for unpermitted discharges at Barefoot Bay and Carrollwood and for EPA Administrative Order violations at Barefoot Bay. The Court denied the United States summary judgment on all claims as to Defendant Avatar Holdings, and granted Avatar Holdings' Motion for Judgment on the Pleadings for claims (or parts of claims) for violations which took place prior to May 5, 1990.

484 U.S. 49, 52 (1987) (quoting Section 101(a) of the Act). As Congress noted when it passed the Act, "no one has the right to pollute." S. Rep. No. 414, 92d Cong., 1st Sess. 8 (1971); See United States v. City of Menominee and Menominee Paper Co., 727 F. Supp. 1110, 1122 (W.D. Mich. 1989) ("No right exists to pollute our nation's waters.").

The penalty provisions of the Clean Water Act are set out in section 309(d) of the Act, 33 U.S.C. § 1319(d), which provides in pertinent part as follows:

> Any person who violates [specified sections of the Act] shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

33 U.S.C. § 1319(d).

The seminal case interpreting section 309(d) is the Eleventh Circuit opinion in Atlantic States Legal Foundation v. Tyson Foods, 897 F.2d 1128 (11th Cir. 1990). In Tyson Foods, the Eleventh Circuit sets out explicit guidance on the obligations of regulated entities under the Clean Water Act, and the purpose of, and criteria to be used in the assessment of a civil penalty for violations of the Act. One overriding principle in Tyson Foods is that a regulated entity simply is prohibited from discharging pollutants unless and until it can comply with the Act. The Court held as follows:

> There was one simple and straightforward way for Tyson to avoid paying civil penalties for violations of the Clean Water Act: After purchasing the plant, Tyson could have ceased operations until it was able to discharge pollutants without violating the requirements of its NPDES permit. Tyson chose not to do this and it must now bear the consequences of that decision.

Id. at 1141-42.

Compliance with the Clean Water Act at hundreds of thousands of facilities across the nation inevitably depends on the good faith voluntary efforts of citizens and corporations. To ensure voluntary compliance, it is vital that those who are found not to have complied be subjected to penalties, both to deter them from committing further violations ("specific deterrence") and to deter violations by others ("general deterrence"). As the Tyson Foods court stated:

> In Tull v. United States, 481 U.S. 412, 422-25, the Supreme Court made clear that economic gain and restoration of the status quo is not the only basis on which penalties should be awarded under the Clean Water Act. In addition, the penalties are designed to punish violators for their non-compliance and to serve the goal of retribution.

897 F.2d at 1141. See Tull v. United States, 481 U.S. 412, 423 (1987) (Punishment, in turn, would "further . . . deterrence" from future violations by potentially like minded dischargers.); Student Public Interest Research Group of New Jersey, Inc. v. AT & T Bell Laboratories, 617 F. Supp. 1190, 1197 (D.N.J. 1985) (Even if the defendant has corrected the violations, a substantial penalty is warranted to deter others).

The Eleventh Circuit also spelled out in detail how civil penalties are to be calculated. "In deciding upon the penalty to

be assessed against a defendant who has violated its NPDES permit, the point of departure for the district court should be the maximum fines for such violations permitted by the Clean Water Act." Id. at 1137.[2] The court "is to take each listed factor into account as well as any additional factors the court feels have bearing on the question of penalties." Id. at 1141. It is undisputed that because Florida Cities has already been found to be liable, it bears the burden of demonstrating that a given factor warrants mitigation of the penalty.[3]

III. The Statutory Maximum and the Penalty Factors Applied to Defendants' Violations

The Statutory Maximum

The United States has computed the statutory maximum in accordance with Tyson Foods and the Court's November 22, 1995 Order as follows: $6,725,000 for the Barefoot Bay violations, $14,700,000 for the Carrollwood violations, and $32,025,000 for the Waterway Estates violations.[4] Under Tyson Foods, then, $53,450,000 is the point of departure for assessing the amount of

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[2] In calculating the statutory maximum, it is important to note that "the daily maximum penalty applies separately to each violation of an express limitation," id. at 1138, and that a monthly limitation violation subjects the violator to a maximum penalty for each day of that month (e.g., $750,000 for a monthly violation in a month with thirty days), id. at 1139.

[3] See Florida Cities' Water Company's Motion to Strike the Deposition Testimony of Jack William Tompkins, Objections and Counter-Designations at 2.

[4] Defendants' violations are summarized in table form in Gov. Exhibits 1, 255, and 348, and in calculations attached hereto. The number of violations is based on the Court's summary judgment order, with the exception of five additional Barefoot Bay toxicity violations, which were since admitted in Defendant Florida Cities Water Company's Amended Revised Responses to Plaintiff's First and Second Interrogatories at 19-20 (response 26.a) (in evidence). All daily violations were multiplied by $25,000 and all monthly violations were multiplied by the number of days in the month in which they occurred and then multiplied by $25,000.

the penalty to be imposed in this case. As shown in the discussion which follows, based on the penalty factors Defendants are entitled to only limited mitigation.

Seriousness of the Violations

Defendants' discharge violations, which include discharging without an NPDES permit, discharging at an unpermitted location, and discharging in violation of the terms and conditions of three NPDES permits, were all serious to varying degrees, largely because they all presented the potential for environmental harm.[5] Under the Clean Water Act, the United States need not show **actual** environmental harm to demonstrate that the violations were serious. The unrebutted expert testimony presented at trial proved that all of the discharge violations had the potential to cause environmental harm. This evidence should suffice to establish seriousness, particularly because the violations were of an act expressly designed to protect the environment and the public welfare. A "particularized showing of the harm" is not required and proof of the overall risk of the pollutants is sufficient. See Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminal, Inc., 913 F.2d 64, 79 (3rd Cir. 1990), cert. denied, 111 S. Ct. 1018 (1990); Chesapeake Bay Foundation v. Gwaltney of Smithfield, 611 Supp. 1542, 1560, 64

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[5] The monitoring violations at Barefoot Bay were less significant in the circumstances of this case than would often be true of monitoring violations. Florida Cities had monitored for CBOD, instead of BOD as required by its permit. Once the company actually requested a change in the permit parameter, EPA permitted it to report CBOD. Nonetheless, it was the company's responsibility to report the correct pollutant parameter, and its failure to do so warrants the imposition of some penalty.

(E.D. Va. 1985), aff'd, 791 F.2d 304 (4th Cir. 1986), cert. denied, 479 U.S. 1029 (1987) ("The gravity [seriousness] component should account for the risk of environmental harm as well as any actual environmental harm").[6]

Indeed, in view of Defendants' undisputed burden to establish mitigating circumstances, it is Defendants' burden to prove that there was no environmental harm, not the government's burden to prove that there was environmental harm. Defendants have failed to meet that burden. While Defendants' expert testified that any harm was minimal, he based that opinion in part on his conclusion that aquatic life would likely not have been harmed by Defendants' violations because the aquatic life would have been driven off by Defendants' earlier violations. Even if true, the argument that the damage had already been done by the time of the instant violations should not be a basis upon which to mitigate the penalty: to permit such a benefit to inure to a violator would clearly negate the deterrence goal under Tyson Foods.

The Barefoot Bay plant discharges into an agricultural canal leading to the Sebastian Creek, at a point approximately two miles from its confluence with the Indian River. Klingenstein Report, Gov. Ex. 597 at 3; 597/C (photos 118-21, 129-30); 505

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[6] Indeed, in passing the Act in 1972, Congress abandoned harm to the receiving waters as the basis of the nation's water control program. The 1972 Act contained "a major change in the enforcement mechanism of the Federal water pollution control program from water quality standards to effluent limits." Id., 1972 U.S. Code Cong. & Ad. News at 3674. Thus, to require a showing of actual environmental harm to demonstrate that the violations were serious would contradict the underlying premises of the Clean Water Act and amount to regression to pre-1972 water control law.

(video); Klingenstein Testimony, March 25, 1996, at 102-103. The Sebastian Creek and Indian River are part of the Indian River Lagoon Basin, a protected and sensitive water body, which has been adversely impacted by discharges from wastewater treatment plants. Klingenstein Testimony, March 25, 1996 at 85-86; Report at 11; Gov. Exs. 57; Gov. Ex. 249 at 11; see also Indian River Lagoon System and Basin Act, 1990 Fla. Sess. Law Serv. 90-262. The Total Residual Chlorine (TRC) and toxicity violations at Barefoot Bay had the potential to cause further environmental harm to these already-damaged and sensitive water bodies. Klingenstein Testimony, March 25, 1996 at 85, 93-94; Klingenstein Report at 12.[7] Further, the wood stork, an endangered species which inhabits the Barefoot Bay area, would have been susceptible to harm from excessive chlorine ingested by the organisms in the waters receiving the Barefoot Bay discharge. Klingenstein Testimony, March 25, 1994 at 93-94; Gov. Ex. 179.

Until Florida Cities closed its Carrollwood plant, it discharged into the Sweetwater Creek, which flows into Tampa Bay. Klingenstein Report at 6 (and topographic map attached thereto); Gov. Ex. 597/C (photos 7, 9-12). Like the Indian River Lagoon Basin, Tampa Bay was the source of serious water quality concerns, Gov. Ex. 294. Hence, the wholesale NPDES permit violations at the Carrollwood plant also had the potential to

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[7] Toxicity tests measure the potential effect of the effluent on aquatic organisms in the receiving waters, and therefore provide a means of determining whether the effluent poses a danger to them. Klingenstein Testimony, March 25, 1996 at 83-84. Chlorine, which is used as a disinfectant in the wastewater, can be toxic. Id. at 92.

cause environmental harm given the nature of the water bodies and point of discharge. Klingenstein Testimony, March 25, 1996 at 125. The pollutants which accounted for the most frequent violations at Carrollwood, chlorine, phosphorous, and nitrogen, all have the potential for negatively impacting water quality, habitat, and fish. Smith Testimony, March 29, 1996, at 111-114.

The Waterway Estates plant has discharged either directly or indirectly into the Caloosahatchee River. It is undisputed that the river had the ability to assimilate wastewater treatment discharges, but, to avoid localized impacts of pollutant discharges, it was best protected if such discharges were at the six-foot contour line of the River itself. Klingenstein Testimony, March 25, 1996 at 146; Klingenstein Report at 15; Smith Testimony, April 1, 1996 at 10; Armstrong Testimony at 112. Gov. Ex. 349 (pp. 10, 14); Gov. Ex. 422. Having lost its NPDES permit because it had no wasteload allocation and its discharge point was improperly located, the Waterway Estates plant continued to discharge into a boat canal leading to the Caloosahatchee River without a permit from January 9, 1987 until October 31, 1989.[8] Once it received a new permit, effective November 1, 1989, the plant continued to discharge to the canal instead of the River until July 1991. Until the plant was upgraded to advanced wastewater treatment standards in April

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[8] Because the initial Complaint was filed in this matter on October 1, 1993, the statute of limitations bars claims before October 1, 1988. Hence, paragraph 43 of the Second Amended Complaint pleads violations occurring on and after that date.

1992, it violated the nitrogen and toxicity limitations in its NPDES permit.

Discharging without an NPDES permit goes to the very heart of the Act itself, and is inherently a matter of grave concern, as such disregard of the basic regulatory requirement undermines the efficiency of the Clean Water Act and merits a substantial penalty. All of the unlawful discharges to the canal, as well as the permit violations, had the potential to cause environmental harm given the nature of the water bodies and points of discharge. Klingenstein Testimony, March 25, 1996 at 149; see Klingenstein Report at 14-15; Smith Testimony, March 29, 1996, at 111-114 (impact of nitrogen).

The United States recognizes that although the violations were by and large serious, there is no demonstrable evidence of harm. Due to the frequency and duration of the violations, however, when coupled with the potential for environmental harm, Defendants are entitled to only limited mitigation of the statutory maximum based on the seriousness of the violations.

Economic Benefit Resulting from the Violations

The United States was not permitted to introduce evidence relating to its economic benefit calculations, the Court holding that such calculations were required to take the form of expert testimony. Trial Transcript, March 30, 1996 at 22. Defendants' expert testified that because Florida Cities would have been able to pass its compliance expenditures along to its customers through increased rates, it realized no net economic benefit

through its non-compliance. Cardey Testimony, April 5, 1996 at 101, 114.[9] Assuming that is true, rather than providing a basis for mitigation of the penalty, this argument only serves to suggest that the violations were all the more inexcusable, since Defendants could have made the investments necessary to comply with the law without any long-term financial impact. Most importantly, any investment that was subsequently not approved by the Florida Public Service Commission could not have been recouped, Cardey Testimony, April 4, 1996 at 114, a perpetual and overwhelming consideration to the defendants as they made critical decisions relating to the violations at issue.

History of Violations

The evidence at trial established that the three wastewater treatment plants operated illegally without NPDES permits for a cumulative total of over two decades: from 1980-91 at Barefoot Bay, Gov. Exs. 30 (Table 1), 153, 155, FCWC Admission No. 10; 1981-92 at Carrollwood, FCWC Admission No. 24; and 1986-88 at Waterway Estates, FCWC Admission No. 31. In addition, Florida Cities violated EPA administrative orders at all three facilities. Gov. Exs. 146, 151, 154, 157, 163, 166, 169, 170,

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[9] Anticipating this argument, the United States sought to introduce expert testimony that Avatar had derived substantial profits (in amounts that would have been calculated in the testimony) by proceeding with its residential development of Barefoot Bay without obtaining an NDPES permit for discharges from its wastewater treatment plant. The Court excluded that testimony from evidence on the ground that it related to periods of unpermitted discharges that were addressed in an earlier EPA administrative order and are not directly at issue in this action. The United States then sought to introduce an alternative calculation of economic benefit, based on the value to Florida Cities of delaying expenditures to come into compliance, through an EPA official. The Court excluded this economic benefit testimony, holding that such calculations were required to take the form of expert testimony.

310, 364, 382. Thus, Defendants have a long record of violating the Clean Water Act, on the basis of which there is no reason to mitigate the penalty.

Efforts to Comply and Alternatives to Noncompliance

A considerable amount of trial testimony related to the means that were available to ensure compliance at each of the three plants, as contrasted against the measures Florida Cities actually took to timely comply with the Act and its permits. That testimony revealed that while Florida Cities did make sporadic attempts to remedy violations at each of the three plants at issue, those efforts were halfhearted and insufficient under the circumstances, particularly in view of the duration of the periods of violations. Most significantly, at each plant, Florida Cities knowingly chose, for financial reasons, to forego a readily available alternative to continuing its unpermitted discharges, delaying compliance for years.

The Barefoot Bay plant is located in a very rural area of Brevard County, where there is an abundance of undeveloped land, much of which is used as orange groves. Klingenstein Report of at 16; (and topographic Map); Gov. Exs. 597/C (photos), 505 (video). As Gerald Allen, then the Avatar Utilities vice-president overseeing the study of the discharge alternatives at Barefoot Bay, wrote in a 1989 report, "Approximately 3,000 acres of orange groves are located within 1.5 miles of the Barefoot Bay Wastewater Treatment Plant." Gov. Ex. 114 at 3, Allen Testimony, April 4, 1996 at 218. This land could have been used to build

additional percolation ponds, for spray irrigation purposes, or to construct a deep well. Klingenstein Testimony, March 25, 1996, at 115-16 (ponds); 116 (irrigation); 119 (deep well); Exhibit 597/D/1 [timeline]; see Klingenstein Report at 16-17. Instead of utilizing one of these technically and technologically feasible disposal options, Klingenstein Testimony, March 25, 1996, at 116, 119-20; Testimony of Jack Tompkins at 208-09; Defendants chose to continue their discharges for over a decade, finally obtaining a permit in 1991.[10]

While the trial record supports the conclusion that the Defendants did study and consider these three options, the record also supports the conclusion that all of them were ultimately rejected due to their cost, and the concern that the cost ultimately might not be recovered through rate base increases if the Florida Public Service Commission did not subsequently approve the expenditure. Building additional percolation ponds meant both purchasing additional land and incurring construction costs. Defendants did not thoroughly pursue this option because of the cost involved. Klingenstein Report at 16. Negotiations with the neighboring grove owners might well have succeeded had Florida Cities not insisted that the grove owners pay for the

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[10] In March 1990, Florida Cities did implement limited spray irrigation, which allowed for the disposal of approximately 90,000 gallons per day of effluent during dry weather. Klingenstein Testimony, March 25, 1996 at 118; Klingenstein Report, Gov. Ex. 597/D/1 [timeline].

It bears noting that the NPDES permit was issued with the express proviso that Florida Cities cease discharging into the Sebastian Creek by June 30, 1995. Based on the testimony of Gerald Allen, Florida Cities continued to discharge into the Sebastian Creek, notwithstanding this deadline. Allen Testimony, April 4, 1996 at 231.

effluent and refused to indemnify them. See Allen Test., April 4, 1996 at 133-138, 219-220. Defendants did not contract to purchase neighboring land for spray irrigation purposes until 1995 because they perceived the cost as being too high. Allen Test., April 4, 1996 at 221-222. And, Defendants did not build a deep well because they perceived the risk to be too high that the well would fail and they would not be able to recover their costs through their customers. Allen Test., April 4, 1996 at 208-209.[11]

Had Defendants made the necessary investment to simply cease the discharge, the permit violations at Barefoot Bay would never have occurred. Klingenstein Testimony, March 25, 1996 at 118. Alternatively, Defendants could have invested earlier in an advanced wastewater treatment plant, such as they finally constructed after this case was brought, to meet permit limits for toxicity and Total Residual Chlorine, Klingenstein Report at 18; Klingenstein Testimony, March 25, 1996 at 92, as well as in the sulphur dioxide unit which corrected the Total Residual Chlorine violations, Karleskint Testimony, April 5, 1996, at 82.

Viable alternatives also existed at Carrollwood which would have prevented the violations in this case. From 1983 until 1986, and beginning again in approximately 1988, the City of Tampa's 60-million gallon/day plant had the capacity to allow Florida Cities to connect its Carrollwood customers to the City

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[11] In reality, though, of the numerous deep wells within 100 miles of the Barefoot Bay plant along the east coast of Florida, only one had failed, Allen Test., April 4, 1996 at 223-226, Gov. Ex. 137.

of Tampa system. See Testimony of William Schafer at 9-10. Had Defendants availed themselves of this opportunity, they could have avoided **seven years** of unpermitted discharges (from 1984-91) to a very small water body with limited ability to sustain a pollutant discharge, as well as the NPDES permit violations in the instant case, see Klingenstein Testimony, March 25, 1996 at 127-28.

Instead of connecting to the Tampa system, Defendants chose to wait until the Hillsborough County system had capacity to treat the Carrollwood wastewater in 1992. Again, the reasons were financial. Under cross-examination at trial, Florida Cities' own regional manager conceded that the company chose not to connect to the Tampa wastewater treatment system because the perceived costs of doing so ($1.5-million) were too high. Good Testimony, April 4, 1996 at 92-94.

Alternatively, in order to meet its NPDES permit limits, Defendants could have built an advanced wastewater treatment plant (as they at one time contemplated) in order to timely meet permit limits and prevent the violations. As Florida Cities itself admits, "[t]he Carrollwood facility at issue was a Secondary Treatment facility and therefore could not comply with an AWT permit." FCWC Amended Revised Interrogatory Answers at 4.

Defendants also had both interconnection and upgrade options at the Waterway Estates plant which would have prevented the violations. North Fort Myers Utilities, a neighboring private utility, both had capacity for -- and interest in -- treating

the Waterway Estates wastewater. From early 1987 through early 1990, North Fort Myers Utilities negotiated with Florida Cities Water Company regarding the possibility of providing wastewater treatment service to the Waterway Estates customers, only to have Florida Cities reject its offers. Schenkman Testimony, March 27, 1996 at 230-43, Gov. Exs. 362, 385, 397, 408. Indeed, North Fort Myers Utilities ultimately was prepared to provide wastewater treatment services for the Waterway Estates wastewater at a cost of no more than the cost Florida Cities represented it would incur to upgrade its Waterway Estates plant at the time. Schenkman Testimony, March 27, 1996 at 238. Furthermore, that option was a particularly attractive one from an environmental standpoint because the North Fort Myers plant uses deep well injection and spray irrigation to dispose of its treated effluent without any surface water discharge. Id. at 230.

Defendants chose not to avail themselves of the North Ft. Myers Utilities option. Again, the reason was financial. To connect to North Ft. Myers Utilities meant giving up the Waterway Estates plant, an investment Defendants simply were not willing to lose, particularly in view of the Avatar Holdings' CEO's mandate that Florida Cities' "long term objective should be to own the entire Lee County system--that is, the County's facilities as well as the City's." Gov. Ex. 384.

Had Waterway Estates connected to the North Ft. Myers Utilities plant, none of the Waterway Estates violations in this case would have occurred. Klingenstein Report at 20-21.

Alternatively, Defendants were free at any time to apply for a wasteload allocation, build an advanced wastewater treatment plant, and move the discharge location -- as they eventually did -- to enable them to obtain and meet the terms and conditions of an NPDES permit. Id. A 1980 FDER study of the Caloosahatchee River which resulted in a 1981 wasteload allocation document allocating a "zero wasteload" (i.e., no discharge) to the Waterway Estates plant was premised on the assumption that the plant would tie in to a larger regional plant then under consideration. Gov. Ex. 349 at 12. When the plans for that plant fell through Defendants knew or should have known that they needed to make alternative arrangements for the discharge because the 1981 study made clear that their discharge to the canal could not continue. Id. at 10.

Notwithstanding that they had no wasteload allocation to discharge to the canal, and that in order to continue to discharge to the River at any location the plant would need to be upgraded to advanced wastewater treatment standards, in 1986, Defendants chose to apply for a renewal of the NPDES permit without making any provisions to upgrade the plant or change the outfall location. Gov. Ex. 352. Although EPA notified Florida Cities six months prior to the formal date that EPA took action on the renewal application that it intended to deny the application, Gov. Ex. 354, Florida Cities neither pursued its administrative remedies with EPA, Kagey Testimony, April 3, 1996 at 140-43, nor took any immediate measures to upgrade the plant

and move its discharge point.

After the formal permit denial, Gov. Ex. 361, Florida Cities again failed to pursue its administrative remedies with EPA, FCWC Admission No. 29, (whose decision ultimately could have been appealed to the U.S. Court of Appeals), as was its right, nor took action to correct the situation in an expeditious manner, resulting in years of violations. Instead, Defendants leisurely proceeded to debate what course of action to take, and, after finally coming to the conclusion that they would indeed upgrade the plant and move the outfall, finally applied for a wasteload allocation in December 1987. Lehman Testimony, April 3, 1996, at 96-97.[12]

It is undisputed that Florida Cities made a poor choice of a design engineer for the project, Smith Testimony, April 1, 1996 at 21-22, which was contrary to the recommendations of its own operations manager and construction engineer, Lehman Testimony, April 3, 1996, at 101-102. Cost appears to have been the

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[12] The testimony of FDEP employees equating temporary state operating permits with wasteload allocations is neither particularly credible, nor of any legal significance in this federal action brought in pertinent part for discharges without a federal permit and for discharges to a location not permitted by a federal permit. FDEP's own 1983 records indicate not that there were formal wasteload allocations, but only that there was capacity for a wasteload allocation at advanced wastewater treatment levels, assuming proper location of the outfall at the six-foot contour line of the River itself. FCWC Ex. 19.

EPA was entitled, as it did, to premise its permit denial on the absence of a formal wasteload allocation. To the extent that the FDEP testimony appears to have been introduced in a belated effort to challenge the denial of the permit renewal, in its November 22, 1995 Order, the Court has already ruled that the Defendants are barred by statute from now challenging the denial of the permit renewal, having not exhausted either their administrative or judicial remedies at the time. See 33 U.S.C. § 1369(b)(2); 40 C.F.R. Part 124; Middlesex Count Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 14 (1981).

dispositive factor in the selection. Because of this and other contractor disputes and delays, many of which also appeared to relate to cost, Gov. Exs. 406, 411, 424, 425, 431, 437, 442, 444; Tompkins Testimony (by deposition) at 153-54, the design and construction process exceeded even the time Defendants' own expert testified it should take, Smith Testimony, April 1, 1996 at 20-21. As a result, Defendants failed to come into compliance at the Waterway Estates plant until 1992.[13]

In sum, viable alternatives were available which would have allowed Defendants to cease discharging in a timely manner at each of the three plants at issue, and, alternatively, to build advanced wastewater treatment plants capable of meeting the terms and conditions of the NPDES permits. Defendants knew of those options, but simply failed to avail themselves of them because they were concerned that they risked making or losing financial investments that they would not be able to recover through their customers. While it is true that the Defendants finally came into compliance at all three plants, compliance followed only after both the United States and the State of Florida had taken repeated enforcement actions.

All of the violations in this case were clearly avoidable. That they occurred reflects an indifference to the law and the environment, which is clearly unacceptable under Tyson Foods.

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[13] After Florida Cities finally applied for an NPDES permit, EPA issued one on September 29, 1989, which took effect on November 1, 1989, Gov. Ex. 399.

Thus, there is no basis to mitigate the penalty as a result of good faith efforts to comply.

Economic Impact of Penalties on the Defendants

The United States acknowledges that the imposition of the statutory maximum of $53,450,000 would have a substantial economic impact on the defendants, and that such an impact alone provides an appropriate basis for mitigation of the penalty in this case. Both defendants, however, do have the ability to pay a substantial civil penalty in this case. The unrebutted testimony of the United States' financial expert, Ms. Zimmer, who analyzed the financial conditions of both defendants by examining publicly available materials, SEC filings, and financial statements, both audited and unaudited, conclusively established that each can afford to pay a penalty in excess of $7.5 million without adverse impact. See Expert Report of Eileen Zimmer at 8-11; Testimony of Eileen Zimmer at 196-97.

Proposed Penalty

The United States proposes the following assessment of the civil penalties in this action, based upon the Clean Water Act penalty factors and the deterrent objectives Tyson Foods, as applied to the facts of the case:

Unpermitted Discharges	396 days @ $5,000/day $1,980,000
Discharges at Unpermitted Location	621 days @ $3,000/day $1,800,000
Permit Discharge Violations	1042 days @ $1,000/day $1,042,000
Permit Monitoring Violations	79 days @ $500/day

	39,500
TOTAL CIVIL PENALTY	$4,861,500

District courts awarding penalties in Clean Water Act cases have taken a variety of approaches in determining an appropriate penalty. A sliding scale, as suggested above, can account for the different levels in the seriousness of the violations. Percentages of the total statutory maximum also are not uncommon, and the ability to pay is obviously an important consideration. On balance, the United States respectfully suggests that the $4,861,500 figure, which represents roughly two-thirds of each defendant's ability to pay, but less than ten per cent of the statutory maximum penalty, is a fair penalty.

IV. Avatar's Liability

Drawing on Jacksonville Electric v. Bernuth, 996 F.2d 1107, 1110 (11th Cir. 1993), this Court has ruled that in order for Avatar Holdings to be held liable for the violations at issue, it must have acted in such a way that it should be considered a "person who violates" under section 309(d) of the Clean Water Act, 33 U.S.C. 1319(d). See Court's Order, November 22, 1996 at 28-29. Under Bernuth, a case brought under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund"), involvement in the decisions that resulted in the pollution is alone a "sufficient condition" for the imposition of liability upon a parent as an operator of its subsidiary's business: "[A]ctual involvement in decision regarding the disposal of hazardous substances is a sufficient, but not a necessary, condition to the imposition of operator

liability." 996 F.2d at 1110.

Thus, while actual and pervasive control can be demonstrated by actual involvement in daily operations, participation in the decisions that resulted in the pollution can by itself be a sufficient basis for liability. Id. Moreover, Bernuth should not be construed to mean that the parent has to interact on a daily basis with the subsidiary or, for that matter, that the actual involvement need relate to all aspects of the subsidiary's operations. See United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990), cert. denied, 498 U.S. 1046 (1991) (actual day-to-day involvement is not necessary).[14]

As discussed by the United States in earlier pleadings, there is ample precedent under the Clean Water Act itself for a parent company to be held liable under a direct theory of liability, albeit no published opinions directly on the subject. In perhaps the most famous Clean Water Act case in American history, the United States named the parent under such a theory and the Court held that the parent company could be held criminally liable for the acts of its subsidiary if it exercised sufficient control over it. United States v. Exxon Corporation and Exxon Shipping Company, No. A90-015 CR (D. Alaska, October 29, 1990) (copy attached hereto) at 9. In so holding, the Court made specific reference to the "important public interest at stake with respect to protection of the environment." Id. at 6.

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[14] The panel in Bernuth acknowledged that the panel in Fleet intended that "participation in management decisions relating to hazardous waste" alone was sufficient to impose operator liability under CERCLA. 996 F.2d at 1110, n.2.

The documentary evidence at trial clearly established that Avatar Holdings acted in such a way that it should be considered a "person who violates" under section 309(d) of the Clean Water Act, 33 U.S.C. 1319(d) because Avatar Holdings exercised actual and pervasive control over Florida Cities' environmental practices in general and particularly at the three wastewater treatment plants which were operating in violation of the law. Through its officers, Avatar Holdings not only was actually involved in critical decisions directly relating to the proven violations, but caused or directed the violations through actions and inactions which resulted in the continuation of unlawful discharges and the failure to timely construct advanced wastewater treatment facilities at each of the three plants.

The documentary evidence shows that in particular five "key players" (Peter Sharp, John Sladkus, Lawrence Wilkov, Dennis Getman, and Robert Gordon), acting on behalf of Avatar Holdings, were personally and pervasively involved in Florida Cities' environmental affairs, relevant events relating to the three wastewater treatment plants, and the violations at issue.[15]

Barefoot Bay

Barefoot Bay represents both a real estate and utility investment to Avatar Holdings because it owns, markets, and

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[15] Peter Sharp was Avatar Holdings' Chief Executive Officer, Levy Testimony at 37, 40; Gov. Ex. 518. Lawrence Wilkov was formerly Avatar Holdings' President Levy Testimony at 47-48; Gov. Exs. 526, 551, 591; Dennis Getman is Avatar Holdings' Executive Vice-President/General Counsel, see Gov. Exhibit #522 at 2; Robert Gordon is Avatar Utilities' President, Levy Testimony at 63.; and John Sladkus was formerly Avatar Holdings Executive Vice-President, Land & Utility Operations, Levy Testimony at 43-46; Gov. Exs. 519, 526.

manages the development, as well as provides water and wastewater services to its residents.[16] Avatar was well aware in 1980, when it acquired Barefoot Bay, that wastewater disposal was an important issue that needed to be addressed at any development. Gov. Ex. 516. It was also aware as early as the early 1980s that Barefoot Bay did not have adequate sewage disposal facilities, but proceeded to develop the property anyway.[17] While Avatar Holdings did make efforts to address the problem, those efforts were hampered by an overwhelming focus on cost, which resulted in the problem continuing unabated while the development expanded. As demonstrated below, the documentary evidence shows that the sewage disposal problem at Barefoot Bay was personally and directly handled and supervised by Avatar Holdings officials, with essentially only staff-level support by subsidiary employees.

As early as July 21, 1983, Avatar management meetings included discussion of land areas that were needed "for future construction to accommodate the complete build-out of Barefoot Bay," Gov. Ex. 11, an apparent reference to the construction of

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[16] Documents refer to Barefoot Bay as an **Avatar Holdings** real estate operation, project, or cost center, often without any reference to an Avatar subsidiary. Gov. Ex. 58 at 8, Gov. Ex. 518 at 7, Gov. Ex. 550, and Gov. Ex. 546 at 5. Avatar Holdings financed the Barefoot Bay inventory. Gov. Ex. 51 at 3, 6-11.

[17] When Avatar Holdings acquired Barefoot Bay and its treatment plant in 1980, 1,444 of some 5,200 planned lots (the anticipated "buildout" number) had been sold. Gov. Ex. 30 at 2 (Table 1). The effluent flow data reflects that as of 1980, the average daily flow from the development was 126,000 gallons/day, id., although the two percolation ponds built to date together at best only had the capacity for 100,000 gallons/day. Klingenstein Testimony, March 25, 1996 at 103-04. As a result, unpermitted overflows into the Sebastian River were already occurring.

additional percolation ponds on which to dispose of the effluent. In a February 29, 1984 memorandum, Wilkov recognized that the "[s]ituation requires immediate action," and states that "[i]ncreased capacity should be 'on line' by November 1984." Gov. Ex. 15. Wilkov also says that Avatar Holdings should "find a way to have the utility [i.e., Avatar Utilities] fund the entire amount [estimated at $600,000-700,000]" id., a concept which Peter Sharp later ratified as follows in a June 28, 1984 memorandum to Wilkov, Sladkus, and Gordon:

> We must be sure that the cost of the percolation pond and related construction end up 100% as part of Barefoot Bay's rate base on which rates can be charged to customers from day one.

Gov. Ex. 18.

The cost allocation issue resolved, the next question was where to build the additional ponds. On March 13, 1985, Gordon wrote in a memo to Wilkov, with a copy to Sladkus, suggesting either an adjacent orange grove or the neighboring "Hearndon" property, costing out each option at $1.3 million, while noting that "[w]e have exhausted the alternatives of wastewater effluent disposal at Barefoot Bay." Gov. Ex. 31.

An August 1985 memo shows that Peter Sharp remained personally aware of the necessity of building the additional percolation ponds, as well as very concerned about how much they would cost, and well aware of the government scrutiny to which

environmental matters are subject. Gov. Ex. 38.[18] The new ponds were never built, however, and on January 16, 1987, Sladkus updates Sharp, Wilkov, and Kleinerman by memorandum, on the apparent complete failure of the existing ponds, suggesting the possibility of spray irrigation. Gov. Ex. 52. Again, cost was an issue.[19] At the same time, Avatar officials were aware of the potential for environmental harm caused by effluent disposal in the area:

> The Indian River Lagoons system is considered to be deteriorating as a result of fresh water discharges from storm water runoff, drainage canals, and wastewater effluent which has presumably killed seagrass beds and clambeds and have degraded water and sediment quality throughout the system.

Gov. Ex. 57.

Sladkus gave Sharp another full report on the Barefoot Bay wastewater problem on February 11, 1988, attaching a file memorandum written by Gordon, memorializing a meeting with FDER at which Gordon and his team convinced FDER that they would construct a deep well system for the disposal of the effluent in

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[18] Gordon updates Wilkov on October 10, 1985 (copying Getman, Kleinerman, and Sladkus) that the plans and specifications for the percolation ponds were submitted to the DER for their approval on August 27, 1985, Gov. Ex. 41. In a January 29, 1986 letter, Sharp represents that "Avatar has recently acquired adjacent land for the purpose of increasing the capacity of its sewage plant." Gov. Ex. 45. (emphasis added) Status reports from Gordon to Sladkus (with a copy to Wilkov and Kleinerman) followed. Gov. Exs. 46, 50.

[19] Again, there was the question of where. Avatar Holdings was only willing to use a limited portion of the 270-acre Hearndon property as a spray irrigation site in conjunction with its development as a golf course and homesites. Gov. Ex. 53 at 3; Gov. Ex. 55, 57. Yet, a May 1, 1987 memorandum to reveals that at this time Avatar Holdings officials were acutely aware that they already lacked sufficient wastewater disposal capacity at Barefoot Bay and that proceeding towards "buildout" would require still additional capacity. Gov. Ex. 56.

lieu of the percolation ponds, that the land on which the percolation ponds were to be situated would be used as a spray irrigation site, and that ongoing connections from Barefoot Bay lots could continue. Gov. Ex. 61. They also promised FDER that the plant would be upgraded to advanced wastewater treatment (AWT) standards if a surface water discharge were approved.[20] Id.

Avatar Holdings soon abandoned the idea of the deep well, however, because it was concerned that it would have to bear the cost of the well if it failed. Allen Testimony, April 4, 1996 at 208-09.[21] After travelling to New York in June 1989 to brief Avatar Holdings officials on the issue, Gov. Exs. 83, 92, in November 1989, Gerald Allen prepared a report entitled "Wastewater Disposal Alternatives to Deep Well Injection, Barefoot Bay" which he transmitted directly to Avatar Holdings'

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[20] The gist of Gordon's memo (copies of which went to Getman, Sharp, Sladkus, and Wilkov, among others) indicates that Defendants were balking at actually constructing the percolation ponds contemplated some four years earlier, even though Defendants were fully aware that they had an ongoing illegal discharge, and that DER wanted the percolation ponds built and the ongoing connections to cease.

[21] A March 15, 1988 memo from Sladkus to Sharp demonstrates that Sharp's pervasive involvement extended right down to the selection of the engineer who was to conduct the preliminary study for the deep well injection system. Gov. Ex. 64. Memoranda to/from Sladkus and Gordon and Allen, See Gov. Exs. 67-69, 74, 76, 78, as well as Sladkus' own handwritten notes, Gov. Ex. 77, show that Sladkus continued to closely monitor the situation at Barefoot Bay after the decision was made to build a deep well, and became increasingly involved in the project, when, in early 1989, Gordon became concerned that the deep well might fail. Gov. Exs. 81-85, 87, 91. Wilkov and Getman were also kept apprised. Gov. Ex. 86. Later, not long before resigning, Sladkus reconsidered, recommending the construction of a deep well in a September 14, 1990 memo to file which he copied to Wilkov and Sharp. Gov. Ex. 143. By this point in time, he had learned that the risks of such a well had been exaggerated, and thought that it presented a more economically prudent solution to the wastewater disposal question. Thus, he writes "for all these various reasons, it is now proposed that we reverse our decision. We are under severe pressure from the regulatory agencies to cease discharge into the Indian River and need to make an early decision." Id.

Board members and officers, Gov. Ex. 115, but not to any Florida Cities officers. Allen Testimony, April 4, 1996 at 214-15.[22] In a January 26, 1990 memorandum to Wilkov, Sladkus considered and conditionally approved spray irrigation as the alterative of choice. Gov. Ex. 118. Avatar officers then focussed on acquiring a neighboring orange grove known as the Micco Groves to use as the spray irrigation site. Although the Micco Groves were not ever ultimately acquired, the efforts to acquire them, like the earlier efforts relating to the percolation ponds and the deep well illustrate Avatar Holdings' direct and pervasive involvement -- at the highest levels -- in matters relating directly to the Barefoot Bay effluent disposal issue.[23]

In sum, the documentary evidence makes patently clear that Avatar Holdings' officers and directors were fully cognizant of the unlawful discharge at Barefoot Bay, and were pervasively involved in critical decision-making on how it was to be addressed. Solving the effluent disposal problem yielded to

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[22] By this point in time, Avatar Holdings was concerned about the risk of having to bear the cost of the failure of a deep well, Allen Testimony, April 4, 1996 at 208-09, and the focus of its highest officers turned instead toward spray irrigation. Gov. Exs. 96-99, 103, 105, 106.

[23] After numerous unsuccessful efforts to purchase the groves by Getman, acting in various capacities on behalf of various Avatar entities, Gov. Exs. 112, 125, 129, 130, 138, 140, 139, in March 1991, Avatar began condemnation proceedings, in accordance with Sharp's earlier orders, who continued to be kept apprised of their progress. See Gov. Ex. 165. On June 19, 1990 Gordon responded directly to Sladkus, with copies to Getman and Wilkov, saying that "condemnation of the Micco Grove property would be extremely difficult because (a) the property is not unique (other property would be available for a price) and (b) there are alternatives to spray irrigation." Gov. Ex. 133. Sharp, however, was undeterred by Gordon's forthright assessment, and, by memo of June 25, 1990, endorses Sladkus' June 15, 1990 suggestion that they use eminent domain powers to obtain the property. Gov. Ex. 134. Finally, in a July 1, 1990 memorandum to Wilkov, Sharp ordered that eminent domain be pursued, Gov. Ex. 135, and that he be given a status report, which indeed followed. Gov. Ex. 136. See also, Gov. Exs. 131-32.

Avatar Holdings' primary goal of developing Barefoot Bay.[24] Had Avatar Holdings taken advantage of the many opportunities to cease the discharge entirely in previous years, an NPDES permit would not have been necessary and none of the violations at Barefoot Bay would have occurred. Alternatively, it should have made the investment to upgrade the plant in a timely manner.

Carrollwood

Avatar Holdings was also pervasively involved in decision-making relating to the unpermitted discharge at Carrollwood. As far back as August 6, 1984, Gordon sent a memorandum to Sladkus, with a copy to Wilkov, which confirms that Florida Cities was advised in October 1979 that it would have to stop discharging into the Sweetwater Creek, but that it found the available alternatives unacceptable; that its temporary operating permit was subsequently denied; and that it intended to fight the matter in the courts if necessary. Gov. Ex. 270.

An exchange of memoranda between Gordon and Getman in 1986 makes it clear that Avatar endorsed tactics resulting in the continuation of the unpermitted discharge until Hillsborough County would accept the Carrollwood sewage. Gov. Exs. 280-81. In March 1988, Gordon reported to Sladkus that he was working to

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[24] Sharp was personally well aware that the additional connections to the sewage system resulted in added wastewater discharge. By memo of February 25, 1991, Sharp specifically questioned Gordon about the discharge flow to be permitted in the context of the units connected to the system. See Gov. Ex. 160. In his reply to Sharp the following day, Gordon details the flow data from the Barefoot Bay treatment plant, noting that as of December 31, 1990, there were "4,298 ERC's connected to the system with 754 additional vacant lots." Gov. Ex. 162. Thus, in the decade since 1980, Avatar had added nearly 3,000 hook-ups, without remedying the effluent disposal problem.

get Hillsborough County to lower the fees it would charge to connect the Carrollwood system to its system, and that he viewed building an AWT plant as an alternative. Gov. Ex. 291. Both Sharp and Sladkus were personally involved in the process. See Gov. Exs. 74, 76-78. After executing a "conward" in April 1989 authorizing engineering services for the AWT plant, Gov. Ex. 567, Sharp wanted some questions answered about cost, flow, recovery of costs through rate base, and construction completion time.[25] Clearly, Avatar Holdings officials were resolved not to cease the unlawful discharge into the Sweetwater Creek unless and until the effluent from the plant could be connected to the Hillsborough County system at a favorable price, or failing, that to build an AWT plant. Had they been willing to make the timely investment in an alternative disposal option, or, for that matter, to upgrade the plant to advanced wastewater treatment standards, none of the violations in the instant case would have occurred.

Waterway Estates

Avatar Holdings was also pervasively involved in critical decisions relating to environmental compliance at the Waterway Estates plant. On August 14, 1986, Gordon sent word of EPA's intent to deny the permit renewal to Avatar Holdings officials, including Sladkus, Getman, and Wilkov, with a brief explanation: "The EPA wants the Company to either discontinue discharging

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[25] Gov. Exs. 299-300. While Sharp's memo was not produced in discovery, his questions can be inferred from the memoranda which addressed them.

effluent to a canal which ultimately goes to the Caloosahatchee River or improve the treatment to AWT and seek a wasteload allocation to the Caloosahatchee." Gov. Ex. 358.

On January 16, 1987, just seven days after EPA's permit denial took effect at Waterway Estates, Sladkus reported to Sharp, Wilkov, and Kleinerman that the plant either needed to apply for a wasteload allocation and upgrade to AWT or connect to North Fort Myers Utilities (NFMU), a neighboring privately-owned wastewater treatment plant. Gov. Ex. 52. In June 1987, Gordon forwarded to Sladkus a copy of EPA's compliance order. Gov. Ex. 365. On August 31, 1987, Gordon forwarded to Sladkus a copy of an engineering report on the feasibility of disposing of the Waterway Estates wastewater, indicating that cost remained the primary issue: "[a]s you can imagine from the recommended cost of treatment and disposal, additional work [on the options] will have to be done." Gov. Ex. 369. On November 19, 1987, apparently after additional work was done, Gordon again writes to Sladkus attaching an options memorandum. Gov. Ex. 373.

It is clear from the evidence that Avatar was evaluating whether to expend a large sum of money to upgrade the Waterway Estates plant or to contract with NFMU to treat its waste. Ultimately, Avatar made a business decision to forego connecting to NFMU. Gov. Ex. 466. An exchange of memoranda dated between August 1988 and October 1988 between Sharp and Gordon indicates that, far from considering yielding the Waterway Estates franchise to a competitor, whether public or private, Sharp had

visions of taking over all of the water and wastewater utilities in Lee County. Gov. Exs. 70, 381, 383. Sharp's final mandate to Gordon was as follows: "FCWC's long term objective should be to own the entire Lee County system--that is, the County's facilities as well as the City's." Gov. Ex. 384.

The same documents reveal that this mandate emerged after the Lee County options were discussed at the same September 7, 1988 "utilities meeting," see Gov. Ex. 383, at which environmental compliance at Waterway Estates, Barefoot Bay, and Carrollwood were agenda items. Gov. Ex. 70. As Leon Levy testified, shutting down the Waterway Estates plant would have been inconsistent with Sharp's stated objective. Levy Testimony, March 28, 1996, at 96. The most likely inference from this evidence is that Sharp personally ruled out an immediately available compliance measure -- connecting to the North Ft. Myers system -- which would have avoided all of the violations at Waterway Estates, in favor of what he perceived to be the long-term financial interests of Florida Cities.

For the Waterway Estates plant to comply with its new NPDES permit, the upgrade and relocation of the outfall needed to be completed by November 1, 1989, its effective date. Gov. Ex. 399. Sladkus closely monitored the situation. Gov. Exs. 74, 76-78. He, in turn, was closely monitored by Sharp, right down to the approval of expenditures for such minor items as pumps. Gov. Ex. 109. By memo of October 2, 1989, Sharp wrote Sladkus that "[w]e must have assurance from Bob Gordon that the entire cost of the

upgrade and expansion of this plant will be included as used and useful." Gov. Ex. 400. By cover memo dated June 5, 1990, Allen sent Sladkus a conward requesting approval for the Waterway Estates improvements. Gov. Ex. 414. On June 11, 1990, Sladkus rejected the conward. Gov. Ex. 416. These additional documents suggest that cost was an overwhelming consideration to Avatar Holdings in the upgrade and expansion necessary for compliance.

When, in July 1991, it became clear that the Waterway Estates AWT improvements were behind schedule (making the NPDES permit violations inevitable), Allen wrote a memorandum directly to Sharp, with copies to Getman, Gordon, and Wilkov. Gov. Ex. 455. As noted earlier, additional measures -- requiring additional expenditures -- could have been taken to expedite compliance. Again, apparently for financial reasons, such expenditures were not authorized.

In sum, the United States respectfully submits that a preponderance of the evidence establishes that Avatar Holdings a sufficiently direct role in causing or directing the violations, and should be held liable for them.[26]

IV. Conclusion

Florida Cities is a sophisticated company which is in a

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[26] Finally, it bears noting that as far back as 1986 the Avatar Holdings Board of Directors was concerned about potential liability for environmental violations, Levy Testimony, March 28, 1996 at 98, and engaged an environmental lawyer to assist it with the environmental affairs of its utilities. The minutes of the Avatar Holdings Board level suggest that Avatar Holdings' primary concern was not complying with environmental laws, but ensuring that it was sufficiently distanced from the utilities to avoid liability for not complying. Gov. Ex. 48 at 14, Gov. Ex. 353 at 12, Gov. Ex. 356 at 1-5. Avatar Holdings should not be permitted to succeed in that effort.

business heavily regulated by both the State of Florida and the federal government. The utility operations of its parent company, Avatar Holdings, comprised a major component of its business at all times relevant to this law suit. Both companies clearly had the experience, knowledge, and resources to comply with the law. Instead of complying, they chose to flout the law for approximately a decade, arrogating a right to pollute where one clearly does not exist.

Under the rationale set forth in Tyson Foods, Avatar should not have allowed any development at Barefoot Bay while its wastewater plant was in violation of the Clean Water Act, and should have required and authorized Florida Cities to implement the discharge alternative that most immediately resulted in compliance with the Clean Water Act at all three plants.

Applying the section 309(d) penalty factors as required by Tyson Foods leads to the following conclusions: all of the discharge violations were at least moderately serious in that they had the potential to cause environmental harm; Defendants have an extraordinarily long history of Clean Water Act violations at all three plants; Defendants' efforts to comply were sporadic and lacking in either diligence or determination; and each defendant can afford to pay a penalty of at least $7,500,000. There is a limited basis on which the penalty should be mitigated due to the lack of demonstrable extensive environmental harm, the ability to pay, and the asserted lack of net economic benefit.

Tyson Foods speaks in terms of punishment for the sake of deterrence. A substantial penalty will send an important message to those who would pollute the nation's waters. Similarly, the imposition of a substantial civil penalty on Avatar Holdings will send an important message to parent companies that, when they exercise pervasive control over a subsidiary, and particularly a subsidiary's environmental practices, that control should include the mandate that the subsidiary comply with environmental laws and permits. Such messages help curb disrespect both for the law and the environment, and further the goals of the Clean Water Act, as construed in Tyson Foods.

Accordingly, the United States respectfully requests that the Court impose a civil penalty of $4,861,500 on each Defendant for the violations alleged in the Second Amended Complaint.

Respectfully submitted,

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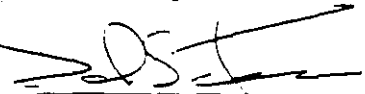
By: 

Dated: June 5, 1996

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I certify that I caused copies of the United States' Posttrial Memorandum to be served by U.S. Mail on June 5, 1996 on the following attorneys of record:

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Exhibit_____(GHB-85)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC. and FLORIDA CITIES WATER COMPANY, INC., Defendants.	)	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' POSTTRIAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. PROPOSED FINDINGS OF FACT

Barefoot Bay

A. Violations

1. The NPDES permit violations at the Barefoot Bay plant, which discharges to the Sebastian Creek, were as follows: 182 Total Residual Chlorine ("TRC") violations, Order, 11/22/95 at 16; 8 chronic whole effluent toxicity test violations ("toxicity"), id., Defendant Florida Cities Water Company's Amended Revised Responses to Plaintiff's First and Second Interrogatories [hereinafter "FCWC's Amended Revised Interrogatory Responses"] at 19 (response 26.a); and 79 Biological Oxygen Demand ("BOD") monitoring violations at Barefoot Bay, Order, 11/22/95 at 16.

B. Seriousness of Violations

2. The Sebastian Creek and Indian River are part of the Indian River Lagoon Basin, a protected and sensitive water body, which has been adversely impacted by discharges from wastewater treatment plants. Klingenstein Testimony, March 25,

1996 at 86; Klingenstein Report. at 11; Gov. Exs. 57; Gov. Ex. 249 at 11; See Indian River Lagoon System and Basin Act, 1990 Fla. Sess. Law Serv. 90-262.

3. Toxicity tests measure the potential effect of the effluent on aquatic organisms in the receiving waters, and therefore proivde a means of determining whether the effluent poses a danger to them. Klingenstein Testimony, March 25, 1996 at 83-84. Chlorine, which is used to disinfect the wastewater, can be toxic. Id. at 92.

4. The TRC and toxicity violations had the potential to cause environmental harm, Klingenstein Testimony, March 25, 1996 at 85 (toxicity); 93-94 (TRC); Klingenstein Report at 12, although the BOD monitoring violations did not.

5. The wood stork, an endangered species which inhabits the Barefoot Bay area, would have been susceptible to harm from excessive chlorine ingested by the organisms in the waters receiving the Barefoot Bay discharge. Klingenstein Testimony, March 25, 1994 at 93-94; Gov. Ex. 179.

C. History of Violations

6. The Barefoot Bay treatment plant discharged to the Sebastian Creek without an NPDES permit during the period 1980-1991. Gov. Exs. 30 (Table 1, , 153, 155; FCWC Admission No. 10.

7. The BOD, Fecal Coliform, Total Suspended Solids ("TSS"), pH, and Dissolved Oxygen ("DO") limits of EPA Administrative Order No. 90-106 were violated. FCWC's Amended Revised Interrogatory Responses at 46-49.

8. There is a long history of serious Clean Water Act violations at the Barefoot Bay plant, spanning over a decade, which had the potential of causing environmental harm. Klingenstein Report at 3-6.

D. Efforts to Comply

9. There was an abundance of undeveloped land in the vicinity of the Barefoot Bay plant on which the effluent could have been discharged through additional percolation ponds, spray irrigation, or deep well injection. Klingenstein Testimony, March 25, 1996, at 115-16 (ponds); 116 (spray irrigation); 119 (deep well); See Klingenstein Report at 16-17 and timeline (Gov. Ex. 597/D/1).

10. There was no technological or technical reason why any of those three options could not have been utilized to cease the Barefoot Bay discharge to the Sebastian Creek, id.; Tompkins Testimony (by deposition) at 208-09; and thereby avoid all of the current violations. Klingenstein Testimony, March 25, 1996 at 118.

11. Testimony by Florida Cities' current president (formerly Avatar Utilities vice-president) suggests that the reason those options were not implemented was financial. Allen Testimony, April 4, 1996 at 133-138, 208-09; 219-222.

12. In addition to these options to cease the discharge, Defendants could have constructed an advanced wastewater treatment ("AWT") plant that would meet the Barefoot Bay NPDES permit limits and thereby prevented the TRC and

toxicity violations. Klingenstein Report at 18; Klingenstein Testimony, March 25, 1996 at 93.

13. Florida Cities promised the Florida Department of Environmental Regulation ("FDER") in 1988 that the plant would be upgraded to advanced wastewater treatment standards if a surface water discharge were approved. Gov. Ex. 61.

14. The TRC violations at Barefoot Bay resulted in part from poor operation and maintenance practices, Klingenstein Report at 5-6; these violations ceased after Florida Cities installed a sulphur dioxide unit at the plant. Karleskint Testimony, April 5, 1996, at 82.

15. Florida Cities failed to adequately monitor the performance of its contract laboratory, with the result that it reported the Carbonaceous Biochemical Oxygen Demand ("CBOD") of its effluent instead of the BOD of its effluent. Id. at 24-25.

Carrollwood

A. Violations

16. There was a total of 234 NPDES permit violations at the Carrollwood plant, which discharged to the Sweetwater Creek leading in to Tampa Bay, as follows: Phosphorus (25), CBOD (4), Nitrogen (10), TRC(184), Total Suspended Solids (6) and Fecal Coliform (5). Order, 11/22/95 at 18-19; Gov. Ex. 255.

B. Seriousness

17. In 1979, FDER determined that there should not be any wastewater discharge to the Sweetwater Creek because of concerns about the water quality in Tampa Bay. Smith Testimony,

March 29, 1996, at 197-198.

18. The NPDES permit violations at Carrollwood had the potential to cause environmental harm given the nature of the water bodies they affected and the point of discharge. Klingenstein Testimony, March 25, 1996, at 125; Gov. Ex. 294.

19. The pollutants which accounted for most frequent violations at Carrollwood, chlorine, phosophorous, and nitrogen, all have the potential for negatively impacting water quality, habitat, and fish. Smith Testimony, March 29, 1996, at 111-114.

C. History of Violations

20. The Carrollwood wastewater treatment plant discharged effluent into the Sweetwater Creek on a daily basis without an NPDES permit from November 1, 1984 to June 30, 1991, FCWC Admission No. 24.

21. The discharge from the Carrollwood plant violated federal, state, and local laws and regulations. Defendant Florida Cities Water Company's Amended Revised Responses to Plaintiff's First and Second Interrogatories at 51-57; Tompkins Testimony at 222-23.

D. Efforts to Comply

22. The NPDES permit violations at Carrollwood are attributable to Defendants' failure to cease discharge or build an AWT plant in a timely manner. Klingenstein Testimony, March 25, 1996 at 127; FCWC Amended Revised Interrogatory Answers at 4.

23. The Carrollwood effluent could have been connected to the City of Tampa system, which had capacity for the

Carrollwood effluent from 1983 until 1986, and beginning again in approximately 1988. Schafer Testimony, March 28, 1996, at 9-10. Although connecting to the City of Tampa system would have allowed Florida Cities to cease its discharge into Sweetwater Creek, the company perceived the costs of doing so ($1.5-million) as too high. Good Testimony, April 4, 1996, at 92-94.

24. Florida Cities preferred instead to connect to the Hillsborough County system. Good Testimony, April 4, 1996, at 104-105. At no time prior to 1991, however, did Hillsborough County have the capacity to accept the Carrollwood wastewater into its system for treatment at a sufficiently close plant, and Defendants reach an agreement for the County to accept the wastewater until 1991. McWeeney Testimony, March 29, 1996, at 56, 61; Klingenstein Testimony, March 25, 1996 at 133. It was not until January 1992 that the Carrollwood plant shut down and its wastewater was connected to the Hillsborough County system. McWeeney Testimony, March 29, 1996, at 57-58; Gov. Ex. 341.

25. As early as April 1984, Florida Cities' regional manager had come to the conclusion that Hillsborough County was not a reliable tie-in point for the Carrollwood system, Good Testimony, April 4, 1996, at 97. Any initial obligation imposed by FDER for Carrollwood to connect to the County of Hillsborough's treatment system was terminated when Florida Cities and the County failed to reach an agreement by April 1, 1984 to connect to the County system. Good Testimony, April 4, 1996, at 104. FCWC Ex. 97.

26. Had the Carrollwood plant been connected to the Tampa system, the permit violations for which Florida Cities has been held liable would not have occurred. See Expert Report of Mark Klingenstein at 12.

27. Other disposal options which were technically and technologically feasible would have resulted in the cessation of the discharge to the Sweetwater Creek, and thereby avoided all of the violations. Klingenstein Testimony, March 25, 1996 at 133; Exhibit 268; Gov. Ex. 597/D/2 (timeline). An advanced wastewater treatment plant could also have been constructed, in order to avoid the violations. Klingenstein Report at 13.

Waterway Estates

A. Violations

28. The violations at Waterway Estates, which discharged directly and indirectly to the Caloosahatchee River, were as follows:

--396 days of unpermitted discharges;

--621 days of discharges to an unpermitted location;

--21 Total Nitrogen (TN) permit effluent violations; and

--8 chronic whole effluent toxicity test violations.

Order, 11/22/95 at 2, 19-20, 23-24; See Klingenstein Report at 9; Gov. Exs. 456, 505, 597/C (photos 87, 88, 90).

B. Seriousness of Violations

29. Based on studies conducted by FDER, the water quality of the Caloosahatchee River would be better protected if the Waterway Estates plant discharged to the six-foot contour

line of the River itself instead of to the canal. Klingenstein Testimony, March 25, 1996 at 146; Klingenstein Report at 15; Smith Testimony, April 1, 1996 at 10; Armstrong Testimony, April 1, 1996, at 112. Gov. Exs. 349 (pp. 10, 14); 422.

30. All of the violations at Waterway Estates had the potential to cause environmental harm given the nature of the water bodies and points of discharge. In particular, discharging to the canal instead instead of the River itself was deemed likely to result in "localized impacts" of the pollutant discharges. See id.; Klingenstein Testimony, March 25, 1996 at 149; Klingenstein Report at 14-15.

C. History of Violations

31. Unpermitted discharges from the Waterway Estates plant began in January 1987, when EPA's denial of the plant's NDPES permit renewal application took effect. FCWC Admission No. 31.

D. Efforts to Comply

32. Notwithstanding the absence of an NPDES permit after January 9, 1987, Florida Cities continued to discharge without an NPDES permit, FCWC Admission No. 31, until EPA issued an NPDES permit effective November 1, 1989, which authorized the Waterway Estates plant to discharge directly into the Caloosahatchee River at the six-foot contour line at advanced wastewater treatment levels. Gov. Ex. 399. FCWC Admission No. 33.

33. The Waterway Estates outfall was not relocated to

the six-foot contour line of the River until July 1991. Gov. Ex. 456.

34. North Ft. Myers Utilities ("NFMU"), another privately-owned utility which operates a wastewater treatment plant approximately 5 miles from the Waterway Estates plant, Allen Testimony, April 4, 1996, at 238, and uses spray irrigation and deep well injection to dispose of its effluent without any surface water discharge. Schenkman Testimony, March 27, 1996, at 230. NFMU offered to connect the Waterway Estates wastewater to its plant at a cost of $3.2-million, which NFMU understood to be less than the cost of upgrading the plant and relocating the outfall. Schenkman Testimony, March 27, 1996, at 230-43, Gov. Exs. 362, 385, 397, 408.

35. Defendants chose not to avail themselves of the NFMU and other available options to cease the discharge at Waterway Estates. If they had, none of the Waterway Estates violations at issue here would have occurred. Klingenstein Report at 20-21; Gov. Ex. 597/D/3 (timeline). Alternatively, they could have upgraded the plant and moved the outfall in a timely manner.

36. Capacity was available in the Caloosahatchee River for the Waterway Estates discharge as early as 1983, assuming proper location of the outfall. FCWC Ex. 19.

37. There is no technical or technological reason why Florida Cities, before applying to renew its permit in 1986, could not have applied for a wasteload allocation, moved the

outfall, and upgraded the plant to AWT capability. Klingenstein Testimony, March 25, 1996 at 168.

38. Defendants (and/or their agents) were responsible for significant delays in the construction necessary to upgrade the Waterway Estates plant and relocate its outfall, including the poor choice of a design engineer for the project. Klingenstein Testimony, March 25, 1996, at 164-167; Gov. Ex. 406, 411, 424, 425, 431, 437, 442, 444; Tompkins Testimony (by deposition), January 9, 1995, at 153-54; Lehman Testimony, April 4, 1996, at 101-102.

39. Florida Cities failed to take measures that would have resulted in compliance at an earlier date, Tompkins Testimony at 120, 134-37; 139-43; 144-46, which can be attributed to financial reasons, id. at 149-51, Gov. Ex. 424; Acosta Testimony, March 28, 1996, at 67-68.

B. Avatar Holdings' Liability

40. Avatar Holdings, Inc. is Florida Cities' de facto and ultimate parent company, none of the intermediary corporate entities having any employees. Allen Testimony, April 4, 1996, at 191-93.

41. Avatar Holdings directly and pervasively controls Florida Cities' environmental practices.

42. Five "key players" (Peter Sharp, John Sladkus, Lawrence Wilkov, Dennis Getman, and Robert Gordon), acting on behalf of Avatar Holdings, were personally and pervasively involved in Florida Cities' environmental affairs, relevant

events relating to the three wastewater treatment plants, and the violations at issue.

43. Peter Sharp was Avatar Holdings' Chief Executive Officer, Levy Testimony, March 28, 1996 at 37, 40; Gov. Ex. 518. Lawrence Wilkov was formerly Avatar Holdings' President (and later also its Chief Executive Officer), Levy Testimony at 47-48; Gov. Exs. 526, 551, 591; Dennis Getman is Avatar Holdings' Executive Vice-President/General Counsel, see Gov. Ex. 522 at 2; Robert Gordon is Avatar Utilities' President, Levy Testimony at 63; and John Sladkus was formerly Avatar Holdings Executive Vice-President, Land & Utility Operations, Levy Testimony at 43-46; Gov. Exs. 519, 526.

44. Avatar Holdings' water and wastewater utilities holdings were significant when Peter Sharp and Leon Levy acquired the company in 1980, and these holdings continued to play a large role in Avatar Holdings' business until it sold off the mid-west utilities in 1993 for approximately $60-million. Levy Testimony at 58-59.

45. Barefoot Bay represents both a real estate and utility investment to Avatar Holdings because it finances, markets, and manages the development, as well as provides water and wastewater services to its residents. See Gov. Ex. 51 at 3, 6-11, Gov. Ex. 58 at 8, Gov. Ex. 518 at 7, Gov. Ex. 550, and Gov. Ex. 546 at 5.

46. Cost was a major factor to Avatar Holdings in the consideration of available options to cease the unpermitted

discharges from the Barefoot Bay wastewater treatment plant. See Gov. Exs. 12, 14, 16-17, 22-23, 3-32, 35, 38, 49, 62-632, 66, 88, 104, 109, 112, 119, 121, 126, 184, 191, 235.

47. That only 1,444 of some 5,200 planned lots (the anticipated "buildout" number) had been sold when Avatar Holdings acquired Barefoot Bay and its treatment plant in 1980, see Gov. Ex. 30 at 2 (Table 1), whereas as of December 31, 1990, there were "4,298 ERC's connected to the system with 754 additional vacant lots," Gov. Ex. 162, leads to the conclusion that Avatar Holdings was more concerned during that decade with developing Barefoot Bay than with solving the effluent disposal problem at its wastewater treatment plant.

48. Avatar Holdings officials were aware of the potential for environmental harm caused by effluent disposal in the Barefoot Bay area. Gov. Ex. 57.

49. None of the violations at Barefoot Bay would have occurred had Avatar Holdings been willing to make the investment in any of the available cease discharge alternatives (since an NPDES permit then would not have been necessary) or made an earlier investment to upgrade the plant in a timely manner.

50. Avatar Holdings was aware as of August 6, 1984, that Florida Cities was advised in October 1979 that it would have to stop discharging into the Sweetwater Creek, but that it found the available alternatives unacceptable; that its temporary operating permit was subsequently denied; and that Robert Gordon intended to fight the matter in the courts if necessary. Gov.

Ex. 270.

51. Avatar Holdings endorsed tactics that resulted to in the continuation of the unpermitted discharge into the Sweetwater Creek until Hillsborough County could accept the Carrollwood sewage. Gov. Exs. 280-81.

52. Avatar Holdings was aware on August 14, 1986, of EPA's intent to deny the Waterway Estates permit renewal, and that EPA wanted Florida Cities to either discontinue discharging effluent to a canal which ultimately goes to the Caloosahatchee River or improve the treatment to AWT and seek a wasteload allocation to the Caloosahatchee. Gov. Ex. 358.

53. Avatar Holdings was aware on January 16, 1987, (just seven days after EPA's permit denial took effect at Waterway Estates), that the Waterway Estates plant either needed to apply for a wasteload allocation and upgrade to AWT or connect to North Fort Myers Utilities (NFMU), a neighboring privately-owned wastewater treatment plant. Gov. Ex. 52.

54. Avatar Holdings was aware in June 1987 that EPA had issued an administrative compliance order for the Waterway Estates plant. Gov. Ex. 365.

55. Cost was the primary issue in Avatar Holdings' consideration of the wastewater disposal options at the Waterway Estates plant. Gov. Ex. 369.

56. Peter Sharp issued a mandate requiring that "FCWC's long term objective should be to own the entire Lee County system--that is, the County's facilities as well as the

City's." Gov. Ex. 384.

57. Shutting down the Waterway Estates plant, and connecting the effluent to North Ft. Myers Utilities would have been inconsistent with Sharp's stated objective, which was never countermanded. Levy Testimony, March 28, 1996, at 94, 96.

58. After the decision was made to upgrade the Waterway Estates plant, Sharp demanded assurances "that the entire cost of the upgrade and expansion of this plant will be included as used and useful." Gov. Ex. 400.

59. Avatar Holdings was integrally involved in -- and responsible for -- critical decisions relating to rejection of alternative disposal options and whether and when to upgrade all three plants to advanced wastewater treatment standards, decisions that resulted in, or could have prevented, the violations for which this action has been brought.

C. Ability to Pay

60. Each defendant can afford to pay a penalty in excess of $7.5 million without adverse economic impact. See Expert Report of Eileen Zimmer at 8-11; Testimony of Eileen Zimmer, March 28, 1996, at 196-97.

II. PROPOSED CONCLUSIONS OF LAW

1. The objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 101(a) of the Clean Water Act, 33 U.S.C. § 1251(a); Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. 49, 52 (1987).

2. No one has the right to pollute. S. Rep. No. 414, 92d Cong., 1st Sess. 8 (1971).

3. In determining the appropriate civil penalty to be imposed, the Court is guided by Section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), and the holding in Atlantic States Legal Foundation v. Tyson Foods, 897 F.2d 1128 (11th Cir. 1990).

4. In deciding upon the penalty to be assessed against a defendant who has violated its NPDES permit, the point of departure for the district court should be the maximum fines for such violations permitted by the Clean Water Act. Tyson Foods at 1137.

5. In calculating the statutory maximum, "the daily maximum penalty applies separately to each violation of an express limitation," Tyson Foods at 1138, and a monthly limitation violation subjects the violator to a maximum penalty for each day of that month (e.g., $750,000 for a monthly violation in a month with thirty days), Tyson Foods at 1139.

6. In order for Avatar Holdings to be held liable for the violations at issue, it must have acted in such a way that it should be considered a "person who violates" under section 309(d) of the Clean Water Act, 33 U.S.C. 1319(d). See Court's Order, November 22, 1996 at 28-29.

7. Under Jacksonville Electric v. Bernuth, 996 F.2d 1107, 1110 (11th Cir. 1993), involvement in the decisions that resulted in the pollution is alone a "sufficient condition" for the imposition of liability upon a parent of its subsidiary's

business.

8. Under Bernuth, parent company liability may also be predicated on actual and pervasive control demonstrated by actual involvement in daily operations, but such control should not be construed to mean that the parent has to interact on a daily basis with the subsidiary or, for that matter, that the actual involvement need related to all aspects of the subsidiary's operations. See also, United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990), cert. denied, 498 U.S. 1046 (1991).

9. Through its officers, Avatar Holdings not only was actually involved in critical decisions directly relating to the proven violations, but caused or directed the violations through actions and inactions which resulted in the continuation of unlawful discharges and the failure to timely construct advanced wastewater treatment facilities at each of the three plants.

10. Avatar Holdings is liable for the all of the violations for which Florida Cities has been found liable (with the exception of violations occurring on or before May 1, 1990) because Avatar Holdings caused or directed those violations within the meaning of the Clean Water Act.

11. Defendants are liable for a total of 264 separate days of violation at the Barefoot Bay facility, 588 separate days of violation at the Carrollwood facility,[1] and 1281 separate

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[1] Under Tyson Foods, because some of the NPDES violations were of monthly limitations, defendants are liable for: (a) 92 separate days of violation for Total Suspended Solids (TSS); (b) 153 separate days of violation for Total Phosphorus (TP); (c) five (5) separate days of violation for Fecal Coliform (FC);

days of violation at the Waterway Estates facility, for a total statutory maximum penalty of $53,325,000.[2]

12. The purposes of a civil penalty are restitution, deterrence, and retribution. Tull v. United States, 481 U.S. 412, 422-25.

13. Under the Clean Water Act, the United States need not show actual environmental harm to demonstrate that the violations were serious. See Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminal, Inc., 913 F.2d 64, 79 (3rd Cir. 1990), cert. denied, 111 S. Ct. 1018 (1990); Chesapeake Bay Foundation v. Gwaltney of Smithfield, 611 Supp. 1542, 1560, 64 (E.D. Va. 1985), aff'd, 791 F.2d 304 (4th Cir. 1986), cert. denied, 479 U.S. 1029 (1987).

14. Defendants bear the burden of proving mitigating circumstances sufficient to reduce the maximum penalty.

15. Defendants are not entitled to mitigation of the statutory maximum penalty based on the history of the violations, or good faith efforts to comply.

16. The seriousness of the violations, as well as Defendants' asserted lack of economic benefit derived from the violations and the economic impact of the penalty on the

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(d) 122 separate days of violation for Total Nitrogen (TN);
(e) 32 separate days of violation for failures to properly monitor for Carbonaceous Biological Oxygen Demand (CBOD); and,
(f) 184 separate days of violation for Total Residual Chlorine.

[2] Under Tyson Foods, because the Total Nitrogen (TN) violations were of monthly limitations, defendants are liable for 261 separate days of violation.

violators, provide a limited basis for mitigation of the penalty.

17. In accordance with Section 309(d) of the Clean Water Act, each defendant shall pay a civil penalty of $4,819,500 to the United States Treasury.

DATED: June 5, 1996

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I caused copies of the United States' Proposed Posttrial Findings of Fact and Conclusions of Law to be served by U.S. Mail on _____ on the following attorneys of record:

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Florida Cities Water Company
Docket No._____
Rate Application for Recovery
of Legal Expenses
Exhibits____(GHB-76 thru GHB-110)
Gary H. Baise
Volume 7 of 7

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663-WS EXHIBIT NO. 6-Vol. 7
COMPANY/
WITNESS: Baise
DATE: 8-12-98

FLORIDA CITIES WATER COMPANY

RATE APPLICATION FOR RECOVERY OF LEGAL EXPENSES

EXHIBITS____(GHB-1 THRU GHB-110) OF

GARY H. BAISE

Exhibit List for Testimony of Gary H. Baise

Exhibit	Document
1	Player's List
2	TIME LINE, *U.S. v. Florida Cities Water Company*
3	Resume of Gary H. Baise
4	List of Gary H. Baise's reported cases
5	Court's Standard Interrogatories
6	United States' Answers to Court's Standard Interrogatories
7	Defendant Florida Cities Water Company's Answers to Court's Standard Interrogatories
8	Motion for Extension of Time in Which to File Motion to Strike Affirmative Defenses
9	United States' Motion to Strike Affirmative Defenses
10	Memorandum in Support of United States' Motion to Strike Affirmative Defenses
11	United States' First Request for Production of Documents
12	Deposition digest of Julie Karleskint Deposition
13	Defendant's Motion for a Protective Order
14	Order re: Florida Cities Water Company's Motion for Protective Order (dated April 18, 1994)
15	Letter to Mr. Jacobs from Mr. Scroggin (dated April 19, 1994)
16	Letter to Mr. Scroggin from Mr. Jacobs (dated April 20, 1994)
17	Memorandum in Support of United States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees
18	Memorandum in Opposition to Plaintiff's Motion for an Order Allowing

Ex Parte Contacts with Former Employees

19	Motion and Memorandum for Permission to File Reply Memorandum in Support of United States' Motion for an Order Allowing Ex-Parte Contacts with Former Employees
20	Order re: Defendant's Emergency Motion for a Temporary Protective Order (dated Feb. 13, 1995)
21	Order re: Plaintiff's Motion for an order allowing ex parte contacts (dated March 16, 1995)
22	Deposition digest of John Marlar deposition
23	Deposition digest of Peter McGarry deposition
24	Defendant's Motion to Disqualify Counsel
25	Transcript of February 15, 1995 hearing before U.S. District Judge Swartz
26	Order re: Motion to Allow Ex-Parte Contacts and Motion to Disqualify Counsel
27	United States' Second Request for Production of Documents
28	Deposition digest of Connie Kagey deposition
29	Deposition digest of Bruce Barrett deposition
30	Defendant Florida Cities Water Company's Motion for Partial Summary Judgment and Request for Oral Argument
31	Deposition digest of Paul Bradtmiller deposition
32	Deposition digest of Johnnie Overton deposition
33	Deposition digest of Jack Tompkins deposition
34	Letter to Mr. Baise from Mr. Jacobs (dated Jan. 30, 1995)
35	United States' Reply to Defendant's Emergency Motion for a Temporary Protective Order and Defendant's Request for Oral Argument in Connection with Defendant's Motion to Disqualify Counsel

36	*United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994)
37	United States' First Set of Interrogatories to Defendant Florida Cities Water Company
38	Defendant's Second Request for Production of Documents to Plaintiff United States of America
39	Defendant's Offer of Judgment
40	Defendant's Notice of Intention to Oppose Constructive Motion by United States for Leave to File Amended Complaint
41	Defendant's Memorandum in Partial Opposition to Plaintiff's Motion for Leave to Amend Complaint
42	Order re: United States' Revised Amended Complaint (dated April 26, 1995)
43	Revised Amended Complaint
44	Defendant Florida Cities Water Company's Motion to Strike
45	United States' Motion for Reconsideration of Court's Order on Amendment of Complaint
46	Defendant Florida Cities Water Company's Answer to Revised Amended Complaint
47	United States' Opposition to Defendant Florida Cities Water Company's Motion to Strike
48	United States' Third Request for Production of Documents
49	Defendant's Motion for Partial Summary Judgment
50	United States' Opposition to Defendant Florida Cities Water Company's Motion for Partial Summary Judgment
51	Order Denying FCWC's Motion for Partial Summary Judgment
52	United States' Motion for Partial Summary Judgment (exhibits omitted)
53	United States' Second Set of Interrogatories and First Request for Admissions

54	Research Memos
55	FCWC Motion for Partial Summary Judgment and Request for Oral Argument
56	Deposition Summaries
57	Deposition Summaries
58	FCWC's Fourth Request for Production of Documents and Third Request for Interrogatories
59	United States' Fifth Request for Production of Documents
60	FCWC's Notice of Dispositive Authority
61	Order re: Summary Judgment Motions
62	FCWC Exhibit List and Stipulations
63	DOJ Exhibits
64	Joint Pretrial Statements
65	United States' Motion for an Order Permitting Discovery of Defendant's Late-Named Witnesses
66	FCWC Memorandum in Opposition to Plaintiff's Motion for an Order Admitting Discovery of Defendant's Late-Named Witnesses and for Expedited Consideration
67	Order re: Discovery of Late-Named Witnesses
68	United States' Motion for Expedited Reconsideration of the Court's Ruling on Res Judicata and in Reply to Avatar Holdings' Motion for Clarification of the Court's Order
69	Order re: Motion for Reconsideration on Res Judicata and Motion for Clarification
70	FCWC Proposed Findings of Fact and Conclusions of Law
71	FCWC's Pretrial Brief

72	Defendant's Joint Motion in Limine to Exclude the Testimony and Report of Mark J. Klingenstein.
73	United States' Motion in Limine
74	Defendant's Joint Motion in Limine to Exclude the Testimony and Report of Eileen Zimmer
75	Berz Settlement Proposal
76	Trial Transcript
77	United States' Offer of Proof in Lieu of the Testimony of Witnesses who Plead the Fifth Amendment
78	Defendants' Joint Memorandum of Law Addressing the Invocation of the Fifth Amendment
79	FCWC's Witness List
80	Plant Effluent Quality Report (Black & Veatch)
81	FCWC Motion to Strike the Deposition Testimony of Jack Williams Tompkins
82	Parties' Proposals for Post-Trial Submissions
83	Order Regarding Fifth Amendment and Request Court Draw Inferences from Refusal to Testify
84	United States' Post-Trial Memorandum
85	United States' Post-Trial Proposed Findings of Fact and Conclusions of Law
86	FCWC Post-Trial Brief
87	FCWC Proposed Findings of Fact and Conclusions of Law
88	United States' Motion for Reconsideration on Adverse Inferences and Extension of Page Limits
89	FCWC Memorandum in Opposition to Motion for Reconsideration
90	Order Granting in Part and Denying in Part Motion for Reconsideration

91	United States' Citation of Additional Authority
92	Defendants' Joint Response to Plaintiff's Citation of Additional Authority
93	Order Directing Parties to File Memorandums on Borough of Ridgeway
94	United States' Reply Memorandum in Support of Reinstatement of Res Judicata
95	Defendants' Joint Response to Memorandum Seeking Reinstatement of Res Judicata
96	Order Reaffirming Res Judicata Effects
97	Opinion
98	FCWC Verified Motion for Attorney Fees
99	FCWC Motion for Bill of Costs
100	United States' Memorandum in Opposition to Attorney Fees
101	Order Denying Attorney Fees
102	United States' Notice of Appeal
103	FCWC Notice of Cross Appeal
104	Order Granting Motion to Dismiss with Prejudice
105	Pleadings Table
106	Depositions Table
107	Correspondence re: Fees
108	Billing Chart
109	Cover Letter to Bills
110	Letter to Avatar on Fees

Exhibit_____(GHB-86)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS INC., Defendants.	)	CIVIL ACTION NO.: 93-281-CIV-FTM-21

Florida Cities Water Company's Post-Trial Brief

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INTRODUCTION

Defendant Florida Cities Water Company ("Florida Cities") hereby submits its post-trial brief, proposed findings of fact, and proposed conclusions of law. The mitigation evidence which Florida Cities presented at trial demonstrates that none of Florida Cities' actions resulted in serious violations of the Clean Water Act ("CWA"), that none of these violations caused any environmental harm or placed the state of Florida's surface waters at risk, that Florida Cities did not profit from any non-compliance with the CWA, and that Florida Cities at all times cooperated in good faith with the Environmental Protection Agency ("EPA") and the Florida Department of Environmental Protection ("FDEP"). Moreover, more than one-third of the violations at issue (those relating to discharge without a permit at Waterway Estates and total residual chlorine at Barefoot Bay) would not have occurred but for EPA's own mistakes or omissions. Indeed, the amendments to the Complaint to add two more facilities to Plaintiff's initial action in this case occurred not in the timely course of EPA's enforcement, but in an apparent effort in this litigation to prop up a case that had proven weak. In sum, the evidence presented at trial establishes that any penalty assessed by this Court for the violations at issue should be de minimis, no more than $48,000.

STATEMENT OF THE LAW

Congress has set forth a specific procedure to determine the amount of any civil judicial penalty assessed under the CWA. As articulated in Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.:

> [The Court] should first determine the maximum fine for which [a defendant] may be held liable. If it chooses not to impose the maximum, it must reduce the fine in accordance with the factors spelled out in section 1319(d), clearly indicating the weight it gives each of the factors in the statute and the factual findings that support its conclusions.

897 F.2d 1128, 1142 (11th Cir. 1990).

Section 1319(d) (CWA § 309(d)) sets forth the following six factors which the Court shall consider in determining an appropriate penalty:

a) the seriousness of the violation or violations;
b) the economic benefit (if any) resulting from the violation;
c) any history of such violations;
d) any good-faith efforts to comply with the applicable requirements;
e) the economic impact of the penalty on the violator;
f) and such other factors as justice may require.

Thus, the amount of the penalty, pursuant to CWA section 1319(d), is within the discretion of the trial court. Id.; Hawaii's Thousand Friends v. City and County of Honolulu, 821 F. Supp. 1368 (D. Haw. 1993). As discussed more fully below, applying each of these factors to the violations at issue establishes that Florida Cities should be subject to only a de minimis fine, which should not exceed $48,000.

This trial concerned events at three Florida wastewater treatment plants ("WWTPs") owned and operated by Florida Cities: Waterway Estates (near Fort Myers), Carrollwood (near Tampa), and Barefoot Bay (near Sebastian). See Florida Cities' attached Proposed Findings of Fact ("FoF") 4, 20, 29.

WATERWAY ESTATES

A) Discharge Without a Permit

The evidence presented at trial demonstrated that Waterway Estates operated without an NPDES permit due to EPA's mistake in improperly denying the facility's 1986 permit renewal. FoF 5, 6. Throughout the period in question, Waterway Estates was at all times under the regulatory supervision of both EPA and FDEP and was discharging effluent in full compliance with the limitations established by each of these agencies. FoF 4, 7, 13, 14, 16. Florida Cities

cooperated fully in timely constructing a new advanced wastewater treatment ("AWT") facility and in timely moving the outfall to a new approved location. In addition, Florida Cities explored in good faith other alternatives, none of which, after careful examination, proved feasible.

1) Seriousness of the Violations

At trial, Plaintiff stipulated that it had no evidence of harm to public health or the environment as a result of any discharge from Waterway Estates. FoF 1. This acknowledged lack of environmental damage significantly mitigates the seriousness of the violations when calculating penalties.[1] Additionally, Plaintiff has presented no credible evidence of any potential environmental harm that might have resulted from the discharge without a permit. Rather, the evidence at trial demonstrated the absence of any risk of harm, as described below.

First, Randall Armstrong, Florida Cities' expert on water quality, testified that he reviewed the available data on the water quality of the Caloosahatchee River and concluded that there were no data indicating that the water quality in the river had deteriorated between 1980 and 1991. Additionally, Douglas Smith, a nationally recognized wastewater engineer, testified that the total effluent from all of the regulated dischargers into the lower Caloosahatchee River (of which Waterway Estates' discharge constituted only about 10%) at no time ever threatened to exceed the assimilative capacity of the river.

Second, EPA issued two administrative orders that authorized Florida Cities to continue to discharge secondarily treated effluent from Waterway Estates between January 1987 and October 1991. FoF 7, 14. EPA could have placed more stringent limitations on the effluent

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[1] Atlantic States Legal Foundation v. Universal Tool & Stamping Co., Inc., 786 F.Supp. 743 (N.D. Ind. 1992); United States v. Roll Coater, Inc., 1991 U.S. Dist. LEXIS 8790.

had the Agency been concerned about water quality. However, both of these administrative orders mandated that Waterway Estates continue to meet the effluent limitations contained in its previous NPDES permit issued in 1981. FoF 7, 14. EPA never sought to enjoin Florida Cities from discharging secondarily treated effluent from Waterway Estates, nor did it even require Florida Cities to reduce the volume of its discharge. Plaintiff presented no evidence at trial indicating that EPA had any concerns regarding potential risk of harm to the environment or public health from the continuing secondarily treated discharges from Waterway Estates during the construction period.

Moreover, the secondary discharge from Waterway Estates was continuously authorized at all relevant times both by EPA administrative orders and by FDEP permits and consent orders, all of which contained strict effluent limitations. FoF 4, 7, 13, 14, 16. At trial, the responsible FDEP officials, Dr. Abdul Ahmadi (Administrator of Water Facilities, FDEP South District) and Ronald Blackburn (District Manager, FDEP South District) testified that FDEP has no evidence that the relatively small outflow of treated effluent discharged from Waterway Estates had any impact on the water quality of the Caloosahatchee River. Apr. 5, Tr. 146-148. Also, there was no discernible improvement in water quality once Waterway Estates upgraded to AWT and moved its outfall farther into the river. In sum, the water quality of the Caloosahatchee River was neither threatened nor impacted in any discernible way by any effluent discharges from Waterway Estates.

Plaintiff's only evidence regarding risk of harm from these violations is the unsupported opinion testimony of Mark Klingenstein based on his review of documents selected by Plaintiff's attorneys. Mr. Klingenstein's opinion regarding the seriousness of the violations is unreliable for two reasons. First, the majority of his opinion regarding this group of violations is based on

his misunderstanding of Plaintiff's exhibits 349 (the 1981 waste load allocation ("WLA") study) and 422 (the 1990 follow-up to the 1981 WLA study). Mr. Klingenstein mistakenly concluded that these two studies demonstrate that discharges from Waterway Estates had a negative impact upon the canal and the Caloosahatchee River and that these two documents establish that Florida Cities should have upgraded to AWT and moved the plant outfall in the early 1980s. Mar. 25, Tr. 143-148. However, on cross-examination Mr. Klingenstein acknowledged that the 1981 and 1990 studies were based not upon any actual data, but rather on computer modeling. Mar. 27, Tr. 22. Significantly, these computer models were based upon assumed scenarios which, in fact, never occurred between 1980 and 1991. Id. at 33. Mr. Klingenstein admitted that he had seen no actual data supporting any opinions regarding risk of harm from Waterway Estates' secondarily treated effluent but, had relied upon his own mistaken understanding of the two computer modeling studies. Id.

Second, Mr. Klingenstein assumes that the 1981 study put Florida Cities on notice that it had no wasteload allocation for Waterway Estates and that the plant would have to cease discharge. Mr. Klingenstein's assumption is wrong, as demonstrated by the evidence presented at trial. As noted above, Mr. Armstrong and Dr. Ahmadi testified that the 1981 study was merely a planning document, not a binding wasteload allocation.

2) Economic Benefit

This Court has held, in its March 25, 1996 Order, that the CWA's economic benefit factor means avoided or delayed costs from noncompliance. There are no such avoided costs here. The rates charged for treatment of wastewater by Florida Cities are regulated by the Florida Public Service Commission ("PSC") or in certain jurisdictions within Florida, by the county equivalent of the PSC. For a publicly regulated utility to obtain any return on its capital

investments, the cost of these investments must be included in the utility's rate base. Any change in the rate base must be approved by the PSC, which insures that Florida Cities's revenue and profit level are reasonable. Apr. 4, Tr. 122. The PSC rate approval process mandates that any capital expenditure to be included in the utility's rate base must be reasonable and prudent. Until a capital improvement is approved by the PSC as "used and useful," a utility cannot include the cost of the capital improvement in the company's rate base and thereby benefit economically. FoF 40, 41. Therefore, under PSC regulation, Florida Cities can realize an economic benefit only from investing, not from deferring investment.

The PSC's regulation of Florida Cities' rates and profit margins sharply distinguishes this case from CWA cases involving private manufacturing or other industrial dischargers. Only such non-PSC-regulated dischargers can receive the economic benefit of greater profits from non-compliance with the CWA by delaying expenditure of capital or other costs of compliance.[2] In contrast, a regulated utility such as Florida Cities realizes a return on its investment only when the costs of improvements are included in the utility's rate base. Under this arrangement, a privately owned, publicly regulated utility such as Florida Cities has no incentive to delay expenditures for environmental compliance. Unlike the majority of the private sector, a regulated utility is guaranteed a return on its investment in environmental compliance, but it must demonstrate to the PSC that its expenditures were reasonable and prudent.

In the present case, Florida Cities demonstrated that it did not receive any economic benefit as a result of discharging without an NPDES permit. FoF 41. The evidence presented

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2 See also Hughey v. JMS Development Corporation, 78 F.3d 1523 (11th Cir. 1996) (where private land development firm did not benefit when it demonstrated factual impossibility of eliminating discharge and compliance with state/local pollution standards).

demonstrated that Florida Cities had no warning that it would lose its permit in 1986. During the 1987-1989 period at issue, Waterway Estates continued to discharge pursuant to the same effluent limitations and operated the plant in the same manner required by its 1981 NPDES permit. FoF 7. When it received its 1989 NPDES permit and accompanying administrative order, the facility was allowed to discharge at the same treatment levels required by the previous permit. FoF 14,15. Because it could not include any costs of upgrading to AWT until these costs were included in the rate base, Florida Cities did not benefit from discharging without a permit.

3) History of Violations

There is no history of violations at the Waterway Estates facility which would support the imposition of any penalties. EPA's denial of Florida Cities' 1986 renewal application was based solely on EPA's misinterpretation of the 1981 WLA planning document, not on any history of violations. FoF 5, 6. Additionally, the DMRs for Waterway Estates demonstrate that the facility consistently met or exceeded its treatment requirements. Waterway Estates was always within the regulatory framework of both EPA's NPDES program and FDEP's stringent regulatory program. Florida Cities submitted monthly DMRs to EPA and worked closely with EPA and FDEP during all relevant periods.

4) Good Faith Efforts To Comply with the Regulations

Once Florida Cities received the denial of its 1986 renewal application, it immediately began working with EPA and FDEP in an attempt to find alternatives to discharging. FoF 8, 9, 10. Florida Cities' hired a technical consultant, Environmental Sciences Engineering ("ESE") to evaluate alternatives. As soon as ESE recommended that Florida Cities upgrade the plant to AWT, Florida Cities began the process to design the plant modifications. FoF 9, 10. Both Dr.

Ahmadi, the FDEP official who directly oversaw the permitting of the plant, and Douglas Smith testified that the design and construction of the plant occurred in a reasonable period of time, given the numerous and extensive delays caused by various regulatory agencies. FoF 12, 17.

5) Economic Impact of a Penalty upon Florida Cities

At trial Florida Cities demonstrated that the company does not have the ability to pay a large penalty. As noted above, Florida Cities' rates, profit margin, and rate of return are regulated by the PSC. FoF 40, 41. Over the last several years the company has expended large amounts of capital to upgrade several of its facilities to AWT status. Until these improvements are completed, the costs cannot be included in the rate base. The cost of carrying these long-term capital improvements has placed a significant drain on the company's financial resources. FoF 42. Even Plaintiff's financial expert witness, Eileen Zimmer, acknowledged that Florida Cities had a negative net income for the last several years. FoF 42. Ms. Zimmer suggested that the company could borrow the money to pay a large penalty. However, she acknowledged that the only source likely to loan money for this purpose would be its parent, Avatar Holdings Inc. ("Avatar Holdings"), who Zimmer admitted had lost money in each of the last five years. This evidence demonstrates that Florida Cities is unable to withstand a large penalty.

6) Other Factors which Justice May Require

The evidence presented at trial demonstrates that Ms. Kagey's mistaken belief, that FDEP had taken away Waterway Estates' wasteload allocation, was the genesis of this lawsuit. At all relevant times, Waterway Estates had a wasteload allocation to discharge secondarily treated effluent into the canal. Plaintiff now seeks to penalize Florida Cities for discharge without the permit that EPA itself wrongfully refused to renew. EPA never sought to enjoin discharges from the Waterway Estates facility, and was willing to allow continued discharge at

secondary treatment levels between January 1987 and October 1991. In light of these facts, EPA's claim that these discharges were serious violations is without merit.

B) Discharge to an Unpermitted Location

When Waterway Estates was constructed, the plant's outfall discharged to a tidally influenced canal adjacent to the Caloosahatchee River. This outfall was approved as the discharge point in both the 1975 and 1981 NPDES permits and the 1981, 1983, and 1988 FDEP permits. During the 1980s, FDEP began to require facilities which were discharging into the Caloosahatchee River and which were also seeking to expand their capacity to move their outfalls to the middle of the river. However, until Waterway Estates received its September 1988 FDEP permit, no government agency ever required that the outfall should be moved. Apr. 5, Tr. 148.

EPA issued administrative order ("AO") 89-109 on September 26, 1989. FoF 14. It authorized Florida Cities to continue to discharge into the canal until the outfall was relocated. It set a construction schedule mandating that the plant outfall must be operating at the six-foot contour line by August 1, 1991. FoF 14. Despite construction delays caused by unexpected problems with rock in the river bottom, the outfall was in place and operating on July 14, 1991, over two weeks ahead of the construction schedule contained in AO 89-109, and over one year ahead of the state construction schedule. FoF 18. Now Plaintiff seeks to recover penalties for discharge into the canal during the time in which compliance with the permit was physically impossible even when the permit was issued. Applying the CWA's six mitigation factors demonstrates that, at best, the Court should assess a minimal penalty.

1) Seriousness of the Violation

These violations are extremely minor. Mar. 27, Tr. 91. The 1989 NPDES permit, along with AO 89-109, contained the first EPA requirement for Florida Cities to move the outfall. As noted above, AO 89-109 contained a construction schedule for the outfall's relocation. EPA, which had full control over the contents of the AO, never raised any concerns about the length of the construction schedule and was aware that Florida Cities completed, ahead of the construction schedule's deadline, the extension of the outfall to change the discharge location.

At trial, Plaintiff attempted to establish that Florida Cities should have been on notice through the 1981 WLA study to move the outfall prior to receiving the 1988 FDEP permit. This theory is belied by the facility's 1981 NPDES permit, the 1981 and 1983 FDEP permits, the various joint inspection reports of EPA and FDEP, and the testimony of Ronald Blackburn and Abdul Ahmadi, all of which indicate that Waterway Estates was authorized to discharge secondarily treated effluent into the canal during the 1980s.

2) Economic Benefit Caused by Non-compliance

At trial, Florida Cities demonstrated that it gained no economic benefit from these violations. As Keith Cardey, Florida Cities' expert in economic impacts of PSC regulation, testified, the company could not benefit from any avoided costs by delaying construction, because the company can only earn a return on facilities that have been placed in the rate base. FoF 41. While there was technical non-compliance with the permit's implied discharge location, the company was discharging in accordance with EPA AO 89-109. Once the company received all the necessary government permits, it immediately sought to begin construction of the new outfall. As noted above, Florida Cities exceeded EPA's construction schedule, placing

the new outfall in service over two weeks ahead of schedule. FoF 18. Because Florida Cities met the requirements of AO 89-109, it did not delay compliance or receive economic benefit.

3) History of Violations, and 4) Good Faith Efforts To Comply with Regulations

Florida Cities does not have a history of such violations at this facility. The first requirement to move the outfall was contained in the 1989 NPDES permit. Even Mr. Klingenstein acknowledged that immediate compliance with the 1989 NPDES permit was impossible. Both the 1975 and 1981 NPDES permits, as well as the FDEP discharge permits during this period, allowed the facility to discharge into the drainage canal. FoF 4 When it granted the 1989 permit, EPA was aware that the outfall must be moved from the drainage canal to the six-foot contour line and provided a corresponding construction schedule, which was met by Florida Cities. This effort demonstrates Florida Cities' good faith.

C. **Permit Exceedances**

Waterway Estates' 1989 NPDES permit contained effluent limits for treatment at AWT levels, including limits on nitrogen. FoF 15. Between August 1991 and April 1992, Waterway Estates was able to meet its permit limits for all other parameters contained in the permit. However, because the final plant upgrade had not been completed, Florida Cities was unable to meet the nitrogen limitations. The company did lower the levels of nitrogen in the effluent by adding temporary equipment to the treatment process as an interim treatment method. FoF 19. The excess nitrogen in the effluent resulted in nitrogen violations as well as toxicity test failures.

1) Seriousness of the violations

a) Nitrogen violations

The evidence presented at trial established that both the nitrogen violations and the toxicity test failures were minor violations. Douglas Smith testified that the nitrogen effluent violations had no measurable impact on the river. Mar. 29, Tr. 170. Plaintiff stipulated that it had no evidence of environmental harm from these violations. Plaintiff's only evidence addressed the risk of harm. Mr. Klingenstein testified that the Waterway Estates nitrogen permit exceedances, which occurred between August 1991 and April 1992, were "serious" violations because the Caloosahatchee River is a "threatened" river. However, Mr. Klingenstein offered no evidence regarding how the river was placed at higher risk by these exceedances.

In contrast to Mr. Klingenstein's unsubstantiated testimony, Douglas Smith testified that these nitrogen exceedances were well within the river's assimilative capacity for nitrogen. Mr. Smith and Mr. Armstrong reviewed data regarding the health of the river and found no indication that the river had been harmed by these discharges and no increases in algae concentrations which would threaten the health of the river. Dr. Ahmadi testified that these discharges did not violate the state's water quality standards. During this period Florida Cities was discharging in accordance with FDEP's interim effluent limits, which were not scheduled to change until September 1992. FoF 16. It is important to note that EPA was willing to allow nitrogen discharges at secondary levels from 1987 until October 1991 and FDEP was willing to allow these discharges until September 1992. Apr. 5, Tr. 147. Had either of these agencies been concerned about the increased risk of harm, they could have demanded lower effluent

levels at any time. The evidence at trial demonstrated that these nitrogen exceedances were minor violations of the CWA.

b) Toxicity violations

Under the 1989 NPDES permit, Florida Cities was required to perform toxicity tests on the Waterway Estates effluent. Toxicity tests involve subjecting one of several species of fragile, aquatic organisms (such as water fleas or fat head minnows) to 100% plant effluent in a laboratory setting. These animals are particularly sensitive to ammonia in the effluent. Toxicity tests are conducted in a laboratory to determine the impact in the laboratory of 100% effluent on sensitive test organisms, not actual toxic impacts in the receiving waters. Once the effluent was discharged, any negative effects would immediately dissipate in the canal. Mar. 29, Tr. 143.

In the present case, both Plaintiff and Florida Cities agree that these exceedances were caused by the nitrogen levels in the effluent. Mr. Klingenstein opined that these exceedances were serious, but he provided no explanation or data to support this opinion. In contrast, Mr. Smith explained the nature of the toxicity test, the fact that the test addresses laboratory conditions, not actual conditions in the river, and that the effluent would have had a non-measurable impact on the river. Waterway Estates had been discharging secondarily treated effluent into the river for at least fifteen years prior to the start of toxicity testing with no negative impact on the Caloosahatchee River. As noted previously, between September 1991 and April 1992, Florida Cities was able to reduce the level of nitrogen (and hence ammonia) in the effluent through temporary measures. FoF 19. Once the complete nitrogen process was in place, the toxicity failures ceased. The evidence presented at trial demonstrated that these toxicity violations were, at most, minor violations for which this court should assess a de minimis penalty.

2) Economic Benefit Caused by Noncompliance and 3) History of Such Violations

There was no economic benefit caused by these effluent limitation violations, nor was there any history of such violations at Waterway Estates.

4) Good Faith Efforts To Comply with the Regulations

Plaintiff also argued that Florida Cities could have chosen other options, such as connection with the North Fort Myers Utilities plant, deep well injection, percolation ponds, or spray irrigation, all of which would have avoided any discharges into the river. In fact, Florida Cities explored all of these options before choosing to pursue an upgrade to AWT. FoF 8. The testimony at trial established that connecting with the North Fort Myers Utility would have been the most expensive option for Florida Cities' customers, and this alternative probably would not have been approved by the PSC. FoF 10. Florida Cities hired ESE in 1987 to explore these other options. FoF 9. ESE found that sufficient land not available for percolation ponds or spray fields, no readily available golf courses or agricultural land available for spray irrigation, and serious concerns about the long-term viability of deep well injection systems. Mr. Klingenstein made no independent effort to establish whether any of these options were viable, but instead merely argued that these were options which the company did not pursue vigorously. It is important to note that the PSC reviewed the company's actions and found that Florida Cities acted prudently in choosing to upgrade the Waterway Estates plant. Apr. 4, Tr. 126.

Mr. Klingenstein also argued that Florida Cities took too long to design, permit, and construct the AWT upgrade. However, on cross-examination, Mr. Klingenstein acknowledged that he has no experience designing wastewater treatment plants for a privately owned, publicly regulated utility. He has no experience in obtaining permits for such a facility. He has no experience in obtaining permits from Lee County, from the various water management districts,

or from FDEP. In contrast, Mr. Smith, who has vast experience in all of the above areas, testified that Florida Cities acted in a timely fashion considering the regulatory delays from local, regional, state, and federal agencies.[3/] The upgrade was completed six months ahead of the FDEP construction schedule. FoF 18. Dr. Ahmadi, who oversaw the upgrade on behalf of FDEP, testified that given the construction delays it faced, Florida Cities completed the upgrade in a timely manner.

CARROLLWOOD

A) Permit Exceedances

Florida Cities' Carrollwood wastewater treatment plant, located in Hillsborough County, at all times relevant to Plaintiff's Complaint discharged effluent in compliance with secondary standards, and actually achieved the more stringent AWT standards for two pollutants -- biochemical oxygen demand ("BOD") and total suspended solids ("TSS ") -- before the facility was taken out of service. FoF 20. The permit exceedances were solely the result of having an AWT permit for a secondary facility during this short period.

As discussed below, application of the CWA's mitigation factors demonstrate that a de minimis penalty is appropriate.

1) Seriousness of the Violations

As with the other violations at issue, EPA admits that it has no evidence of environmental harm from these violations. FoF 1. Plaintiff's only evidence regarding risk of harm was Mr. Klingenstein's opinion, unsupported by any evidence, that Sweetwater Creek and

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3Hughey v. JMS Development Corp., 78 F.3d 1523, 1530 (11th Cir. 1996). See United States v. Ohio Edison Co., 725 F.Supp. 928, 933 (N.D. Ohio 1989) (good faith adherence to government directives and a lack of effective communication between federal and state government mitigates the penalty).

Tampa Bay were potentially seriously impacted by these discharges. Mr. Smith testified that the Carrollwood plant was providing better than secondary treatment during the period in question. While it was physically impossible for the effluent to meet AWT treatment levels consistently, the plant was able to meet some of its AWT parameters. Mr. Smith testified that these discharges would have had a minimal negative impact on the receiving waters and that any impact would not have been measurable. Mar. 29, Tr. 152.

Significantly, these are violations of the AWT standards in the new AWT permit, not violations of the secondary standards in AO 90-100. Although the plant was able to meet the AWT treatment limits in some instances, in general it could not meet these levels consistently. FoF 25, 26. Had EPA, FDEP, or the Hillsborough County Environmental Protection Commission been concerned about any increased risk of harm from these discharges, any of these agencies could have imposed more stringent effluent limitations. However, from July 1990 through January 6, 1992, all of these agencies continued to authorize Carrollwood to discharge secondarily treated effluent into Sweetwater Creek, which demonstrates that these regulatory agencies saw no risk of harm from the discharges.

2) Economic Benefit

Florida Cities respectfully refers the Court to its discussion of economic benefit contained in the Waterway Estates section, which addresses regulated private utilities and rate base issues. Additionally, at trial Florida Cities established that it spent hundreds of thousands of dollars seeking alternatives to discharge at Carrollwood, money that it will never be able to recover through the rate base. These costs include the various water quality studies, the design costs for the proposed AWT plant, and other engineering costs for these alternatives. Thus, not only did Florida Cities fail to benefit from noncompliance, but it actually lost money in its

vigorous efforts to respond to the regulatory dilemma created not by Florida Cities, but by the complex interactions of the federal, state, and local agencies.

3) History of Violations

There is no history of violations of AWT standards at the Carrollwood facility prior to the issuance of the AWT NPDES permit for the secondary treatment facility in 1991.

4) Good Faith Efforts To Comply with the Regulations

Florida Cities made good faith efforts to comply with the requirements of its NPDES permit and was able to meet the effluent limitations on some occasions. Temporary measures are evidence of good faith.[4] Moreover, Florida Cities complied at all times with the requirements of AO 90-100, which EPA kept active during the time in which the secondary treatment facility could not possibly meet the new permit's AWT limits. FoF 26, 27. EPA kept AO 90-100 in effect until March 6, 1992, when it informed Florida Cities that the company had fully complied with the administrative order and that the Agency was "inactivating" the order. FoF 27.

5) Economic Impact of a Penalty upon Florida Cities

Florida Cities respectfully refers the Court to the discussion of this factor contained in the Waterway Estates section of this brief.

6) Other Factors which Justice may Require

The testimony regarding Carrollwood demonstrates that Florida Cities made every effort to resolve issues resulting from the discharge. As noted above, the actual NPDES violations were for a level of treatment beyond the physical capacity of the plant. FoF 25. No

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[4]Roll Coater, U.S. Dist LEXIS at 22; Universal Tool & Stamping, 786 F.Supp. at 753.

environmental harm occurred, and the plant was taken out of service six months after the NPDES permit was granted. Significantly, Plaintiff raised these violations for the first time only when it amended the Complaint in 1995 and now seeks to recover millions of dollars in penalties. The evidence demonstrates that any penalty assessed should be de minimis.

BAREFOOT BAY

The total residual chlorine ("TRC"), BOD, and toxicity violations at Barefoot Bay are minor for a number of reasons and deserve de minimis penalties.

1) Seriousness of the Violations

Most of the TRC violations at Barefoot Bay would not have occurred but for EPA's failure to inform Florida Cities of EPA's policy for filling out monthly Discharge Monitoring Reports ("DMRs"). As with all other violations at issue, Plaintiff stipulated that it has no evidence of environmental harm which occurred from the violations at Barefoot Bay. Additionally, Plaintiff has presented no credible evidence of any risk of harm that might have resulted from the discharges at Barefoot Bay.

a) TRC Violations

The TRC violations are in fact false alarms resulting from EPA's failure to provide instructions regarding how to report extremely low levels of chlorine. These false alarms do not indicate excess chlorine in the effluent. Beginning in September 1992 the Barefoot Bay plant replaced its old DPD colorimeter with a new DPD colorimeter. Although the DPD colorimeter is approved in the Code of Federal Regulations and specifically allowed in the NPDES permit by EPA, the method is not accurate at levels below 0.2 milligrams per liter (mg/l). FoF 33. Indeed, in its own guidance, EPA recognizes the fact that the DPD colorimeter is inaccurate below 0.2 mg/l. FoF 34. Thus, compliance with the NPDES permit's limit of 0.01 mg/l could

not physically be determined with accuracy by the very test method EPA had approved. To address this inconsistency, EPA developed guidance instructing the discharger in these circumstances to report any measurements at or below 0.1 mg/l as "Not detectable" FoF 34. Thus, measurements using the DPD colorimetric method at or below 0.1 mg/l could have been properly reported as "ND" and been in full compliance with the NPDES permit limit of 0.01 mg/l. Significantly, during the period of time at issue (between September 1992 and April 1993), Barefoot Bay's measured values using this test method were at or below 0.1 mg/l. Had Florida Cities been informed by the EPA regulators of the reporting guidance, this guidance would have rendered these TRC "violations" as full compliance with the permit. However, EPA never communicated to Florida Cities this critical information regarding how to report such low readings. Had Florida Cities known of EPA's guidance on this issue, it would have reported "Not detectable" on its DMRs, and the TRC violations would not be before this Court. The fact that Barefoot Bay could have reported "Not detectable" and been in compliance with its permit and the CWA demonstrates the minimal nature of these violations. Indeed, Florida Cities' Operations Manager, Julie Karleskint, performed subsequent tests which demonstrated that the DPD method found false positive readings for chlorine in water known to be chlorine free.

b) BOD/CBOD violations

At trial Plaintiff acknowledged that the BOD/CBOD violations are not serious violations. The FDEP had required Florida Cities to report CBOD instead of BOD. The laboratory hired by Barefoot Bay measured CBOD, but mistakenly reported the results as "BOD." Ms. Karleskint testified that when Florida Cities discovered this error it asked the laboratory to report both measurements. After the mistaken reporting came to light, Barefoot Bay applied for

a modification to its permit to report CBOD instead of BOD, as FDEP required. FoF 36. EPA granted this modification in March 1994, thus recognizing that the CBOD numbers reported all along by Barefoot Bay were indeed the appropriate parameter for this facility.

There was no environmental harm from these violations. FoF 1. Mr. Smith testified that CBOD test results may be easily extrapolated to BOD values. FoF 37. Mr. Smith performed such a conversion and established that none of the CBOD data would have been a violation of BOD effluent limitations. FoF 37. Thus, these reporting errors were minor violations.

Plaintiff's principal argument regarding Barefoot Bay is that Florida Cities should have implemented other options to discharge. However, as with the other facilities at issue, Plaintiff presented no evidence to support this contention. Mr. Klingenstein conducted no independent analysis of any alternatives to demonstrate that Florida Cities should have chosen an alternative. The evidence demonstrated that Florida Cities explored a number of alternatives to discharge, including building additional percolation ponds, deep well injection systems, and various forms of spray irrigation. FoF 38. In each instance, Florida Cities was faced with conflicting regulatory requirements, local opposition, or property owners who would not sell land on commercially reasonable terms. At the end of this process FDEP agreed that these options were not viable and that surface water discharge was the best option.

c) Chronic Toxicity

Likewise, the chronic toxicity violations are not serious. The chronic toxicity failures frequently occur as a result of nitrogen present in the effluent. Barefoot Bay's secondary treatment facility was not designed to remove any nitrogen, nor did EPA include nitrogen limits in the facility's NPDES permit. Thus, there is an inherent inconsistency between allowing

nitrogen in the effluent, but limiting the consequent toxicity. However, Mr. Smith testified that any excess ammonia in the effluent would have no measurable impact upon the receiving waters. Mar. 29, Tr. 146.

2) Economic Benefit

Florida Cities received no economic benefit as a result of the violations at Barefoot Bay for the same reasons stated previously.

3) History of Violations

There is no history of violations for TRC, toxicity, or misreporting of CBOD measurements at Barefoot Bay. Barefoot Bay has paid penalties to EPA for discharge without a permit. In assessing this penalty, EPA indicated that the discharges had not caused any environmental harm and would have been in compliance with an NPDES permit, had one been in effect. The enforcement staff of EPA Region IV noted in its enforcement file that Florida Cities had been very cooperative with both EPA and FDEP in attempting to resolve the discharge issue.

At all times since the mid-1980's, the Barefoot Bay plant has had authority from the State of Florida to discharge pollutants to the agricultural drainage canal. FoF 30. The state has required Barefoot Bay to investigate many options to cease the discharge, and Florida Cities has complied with those requirements. FoF 38. However, no discharge option has proven feasible. FoF 39.

4) Good Faith Efforts to Comply with the Regulations

Florida Cities has constructed an AWT facility at Barefoot Bay until the planned cessation of discharge through total reuse occurs by the required date of 1997. FoF 39. Florida Cities has always dealt in good faith to comply with the CWA. For example, upon discovery of

APPROPRIATE PENALTY UNDER THE CLEAN WATER ACT

A de minimis penalty for the violations in this case is appropriate, given judicial precedent and Plaintiff's own prior determinations regarding appropriate penalties for similar violations from these same facilities. Trial courts have broad discretion when deciding the appropriate civil penalty amount in Clean Water Act enforcement actions.[5/] Hawaii's Thousand Friends v. City and County of Honolulu, 821 F.Supp. 1368, 1395 (D. Haw. 1993) is particularly instructive. There, the court found the City of Honolulu liable for 9,870 treatment violations and 104 bypass and reporting violations of the NPDES permit at defendant's WWTP, which (in contrast to all of Florida Cities' facilities at issue) had continuously failed to meet secondary treatment standards. After calculating the statutory maximum of almost $250 million, the court applied the six mitigation factors of CWA section 1319(d) and imposed a penalty of $718,000 -- a reduction of 99.71%. The court based this significant reduction upon considerations of the lack of measurable environmental harm, the negligible economic benefit from the violations, and the City's good faith reliance on the state's water quality regulations. Other trial courts mitigated penalties well over 99% even in situations where these mitigation factors were not present and where the actual or potential environmental harm was significant.[6/]

5Tull v. United States, 481 U.S. 412 (1987) (determination of penalty is "highly discretionary"); Sierra Club v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996) (trial court's determination is "highly discretionary"); Hawaii's Thousand Friends, 821 F.Supp. at 1395 (court found that mitigation of 99.71% was within its "sound discretion," even though the discharges failed to meet secondary treatment standards, discharges of raw sewage were numerous and unreported, and there was a lack of good faith efforts to come into compliance).

6See Hawaii's Thousand Friends, 821 F.Supp. 1368; Sierra Club v. Cedar Point Oil Co., 73 F.3d 546 (reduction of 99.08% appropriate for moderately serious violations and no demonstration of good faith or exploration of alternatives to discharge); United States v. Wayne County, Michigan, 1994 U.S. Dist. LEXIS 18775 (E.D. Mi. 1994) (consent decree entered for a $417,000 penalty for the discharges of raw sewage into the Detroit River at a 115 mgd wastewater treatment plant).

Florida Cities has proven at trial that for the violations present here, there was no risk of harm, no actual harm, no economic benefit, evidence that a significant penalty would have a seriously adverse impact on Florida Cities, an abundance of good faith efforts to come into compliance with the Clean Water Act, and local, state, and federal regulations -- which frequently were contradictory.

Plaintiff's prior actions also offer guidance regarding the Agency's valuations of similar violations. Of the 1539 violations found in this case, a penalty of up to $1000 per violation may be appropriate for those violations for which mitigation is less (even though secondary standards were consistently met) -- 21 nitrogen violations and 3 toxicity violations at Waterway Estates and 3 toxicity violations at Barefoot Bay (a total of 27 violations). In its pretrial brief, Plaintiff suggests a penalty of $1,000 per day for effluent violations. Florida Cities acknowledges that $1,000 per violation may be an appropriate upper limit for these 27 violations ($27,000).

For the remaining 1512 remaining violations, a lower penalty is appropriate. First, Plaintiff has asserted in its pretrial brief that discharge without a permit is the most serious category of CWA violation in this case. Second, EPA's own valuation of discharge without a permit violations at Carrollwood is instructive in setting a standard for the remaining violations. In AO 90-100 for the Carrollwood facility, after considering all relevant factors, EPA found that 37 months of discharge without a permit was worth $15,000 or $13.51 per day. Exhibit 201. Florida Cities suggests that given the mitigation evidence presented at trial, EPA's valuation from Carrollwood's discharge without a permit is, at a maximum, appropriate to be applied to all remaining lesser violations. Therefore, for the remaining 1512 violations, this Court should assess a penalty of no more than 1512 times $13.51, or $20,428 for all remaining violations.

The total amount of these two calculations is a total penalty of no more than $48,000, which is consistent not only with EPA's prior determinations, but also the case law supporting greater than 99% reductions in the statutory maximum fine where these mitigation factors are present.

CONCLUSION

Although this Court has found Florida Cities liable for various violations of the Clean Water Act, the evidence at trial demonstrated that at each facility in question, mitigating circumstances should significantly reduce the imposition of monetary penalties to a de minimis amount.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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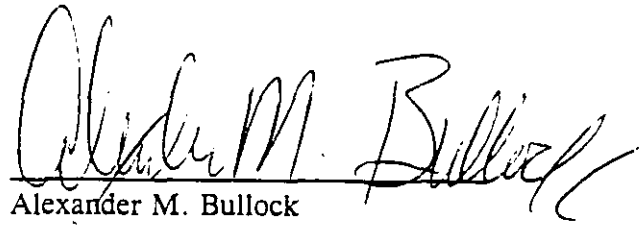

Alexander M. Bullock

Exhibit_____(GHB-87)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS INC., Defendants.	)	CIVIL ACTION NO.: 93-281-CIV-FTM-21

Florida Cities Water Company's Proposed Findings Of Fact And Conclusions of Law

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I. FLORIDA CITIES WATER COMPANY'S PROPOSED FINDINGS OF FACT

A. GENERAL

1. The United States stipulates that no evidence exists of any actual environmental harm resulting from any violation in this case.[1]

2. At the time of the violations alleged in the Second Amended Complaint, the Barefoot Bay, Carrollwood, and Waterway Estates plants provided better than secondary wastewater treatment. Secondary wastewater treatment, by far the most common type of wastewater treatment in the United States, removes pollutants primarily through biological treatment processes, whereby 85% of the biochemical oxygen demand ("BOD") and total suspended solids ("TSS") are cleansed from the raw sewage.[2]

3. Advanced Wastewater Treatment ("AWT") goes beyond secondary treatment to remove approximately 97% of the pollutants from the wastewater including nitrogen and phosphorous. Less than 10% of the wastewater treatment plants in the United States provide AWT.[3]

B. WATERWAY ESTATES

4. In 1975 Florida Cities received a wasteload allocation and NPDES permit number FL0030325 which authorized Waterway Estates to discharge 1.08 mgd of secondarily treated effluent to a canal leading to the Caloosahatchee River. EPA renewed this permit without any modifications in 1981. Florida Cities also received permits from FDER in 1975, 1981, and 1983 for discharge

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[1] Stipulation on the record: Day 2, p. 46, ll. 6-15.

[2] Day 1, p. 71, ll. 1-13; Also Day 4, p. 100, ll. 8-12; p. 103, ll. 17-21; p. 106, ll. 17-22; p. 111, l. 2-10; Also Day 8, p. 23, ll. 14-21; *Florida Cities' exhibit(s):*92, 157, 183; *United States exhibit(s):*505 (videotape).

[3] Day 4, p. 107, l. 13 - p. 110, l. 8; *Florida Cities' exhibit(s):*92, 157, 183.

to the canal which placed stringent and detailed requirements on the Waterway Estates effluent.[4]

5. On May 9, 1986, Florida Cities applied to EPA Region IV for what should have been a routine renewal of its NPDES permit. However, permit writer Connie Kagey denied the application.[5]

6. The permit denial was based upon Connie Kagey's review of the cover page and page 17 of the January 1981 Caloosahatchee River Wasteload Allocation Documentation ("1981 Study"), a preliminary planning document drafted as guidance to FDER regional offices making permitting decisions, whereby she wrongly determined that Waterway Estates had no wasteload allocation to discharge effluent. Basing the permit denial on this planning document was erroneous.[6]

7. Once the existing NPDES permit expired in January 1987, EPA issued Administrative Order ("AO") 87-085 whereby EPA authorized Waterway Estates to continue discharging effluent under the terms of the now expired 1981 NPDES permit and directed that the facility cease its discharges by September 30, 1988.[7]

8. In light of the deadline, Florida Cities began immediate efforts to find alternatives to surface water discharge, including public access spray irrigation, restricted access irrigation, percolation ponds, deep well injection, and upgrading the existing plant to AWT.[8]

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[4] Day 2, p. 36, l. 8 - p. 37, l. 24; Also Day 6, p. 17, l. 16 - p. 18, l. 7; Also Day 8, p. 124, l. 20 - p. 127, l. 16; p. 140, l. 9 - p. 142, l. 10; p. 143, l. 16 - p. 145, l. 4; *Florida Cities' exhibit(s):*15, 17, 18, 20.

[5] Day 6, p. 116, l. 24 - p. 117, l. 10; p. 124, ll. 2-21; p. 126, ll. 13-16; p. 134, l. 23 - p. 136, l. 16; p. 164, ll. 2-5; p. 164, l. 9 - p. 165, l. 11; p. 231, ll. 14-20; p. 239, ll. 10-17; p. 245; *Florida Cities' exhibit(s):*1, 3, 20, 21, 22, 23, 27, 33; *United States' exhibit(s):*349.

[6] Day 2 p. 22, ll. 19-20; Also Day 5, p. 93, l. 8 - p. 94, l. 9; p. 97, l. 1 - p. 98, l. 18; p. 101; Also Day 6, p. 169, l. 7 - p.. 170, l. 9; p. 226, ll. 3-21; Also Day 8, p. 134, ll. 3-20; *United States' exhibit(s):*349.

[7] Day 6, p. 37, l. 4 - p. 38, l. 20; *Florida Cities' exhibit(s):*28.

[8] Day 6, p. 24, l. 9 - p. 26, l. 13; p. 31, l. 7 - p. 33, l. 9 *Florida Cities' exhibit(s):*21, 23, 24, 27, 28

9. After careful study, Environmental Science and Engineering Inc. ("ESE"), consultants hired by Florida Cities, determined that upgrading the facility to AWT was the most technologically sound, cost effective, and prudent method of treating wastewater at Waterway Estates.[9]

10. In addition to ESE's recommendation, Florida Cities evaluated a possible interconnection with North Fort Myers. The problems associated therewith, including the greatest price increase to ratepayers out of all disposal alternatives, did not alter the conclusion that construction of an AWT facility was best from engineering and business perspectives.[10]

11. In early 1988, Florida Cities hired Source, Inc. as the design engineer to design the upgrade. Once Source completed its design, Florida Cities applied for required state and local permits.[11]

12. Substantial construction delays, beyond Florida Cities' control, were caused by local, state, and federal regulatory requirements, such as the local zoning issues, the Army Corps of Engineers' permit, and the FDER construction permit, that had to be fulfilled before construction could begin.[12]

13. In August 1988, EPA amended its May 1987 AO to require Waterway Estates to complete construction and meet final effluent requirements by November 1, 1990. Concurrently, FDER issued a temporary operating permit also requiring compliance with effluent limitations by November 1, 1990. The FDER permit specifically allowed secondary discharges to the canal

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[9] Day 6, p. 39, l. 7 - p. 51, l. 24; p. 61, ll. 4-22; *Florida Cities' exhibit(s)*:30, 194; *United States' exhibit(s)*:371.

[10] Day 7, p. 125, l. 21 - p. 126, l. 5.

[11] Day 6, p. 71, l. 13 - p. 72, l. 6; *Florida Cities' exhibit(s)*:190, 193.

[12] Day 7, p. 13, l. 15 - p. 14, l. 22; p. 16, l. 22 - p. 17, l. 9; p. 17, l. 23 - p. 18, l. 4; p. 18, ll. 14-19; p. 35, l. 1 - p. 36, l. 20; Also Day 2, p. 92, ll. 5-20; *Florida Cities' exhibit(s)*:42, 44.

until that date, and EPA did not challenge or comment on the issuance of this permit.[13]

14. On September 26, 1989, EPA issued AO 89-109, which contained a construction schedule for the AWT upgrade, a construction schedule for the relocation of the outfall to the 6-foot contour line of the Caloosahatchee River, and interim secondary treatment effluent limitations from the 1981 NPDES permit until the AWT construction was completed.[14]

15. At the same time, on September 29, 1989, Florida Cities received NPDES permit No. FL0030325 which contained effluent limitations for an AWT facility, though EPA knew Waterway Estates could not satisfy the limitations until the AWT upgrade was complete.[15]

16. In March 1990 FDER issued Florida Cities a construction permit, the effective date of which was subsequently extended by FDER through September 1992, for the AWT upgrade and relocation of the outfall.[16]

17. Because of the numerous permitting delays, on December 11, 1990, Florida Cities requested that EPA extend AO 89-109 to match the September 1992 construction deadline set by FDER. EPA never responded to this request.[17]

18. Once Florida Cities had completed the lengthy and complex process to plan and design the AWT upgrade and the outfall, including obtaining all necessary permits, construction of the outfall was completed ahead of both the FDER and EPA schedules. The AWT upgrade was completed

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[13] Day 6, p. 73, l. 2 - p. 75, l. 15; Also Day 8, p. 170, l. 2 - p. 171, l. 20; p. 175, ll. 12-16; *Florida Cities' exhibit(s):*31/52, 33.

[14] Day 2, p. 86, ll. 11-14; *Florida Cities' exhibit(s):*195.

[15] *Florida Cities' exhibit(s):*195, 196; *United States' exhibit(s):*407.

[16] Day 7, p. 19, ll. 16-19; p. 44, l. 21 - p. 45, l. 21; Also Day 8, p. 171, l. 21 - p. 172, l. 6; *Florida Cities' exhibit(s):*41, 51.

[17] Day 7, p. 47, l. 24 - p. 49, l. 10; *Florida Cities' exhibit(s):*54.

ahead of FDER's schedule, but failed to meet the deadline set in AO 89-109, even though delays beyond Florida Cities' control were experienced.[18]

19. During the period of violations at issue, Florida Cities installed temporary measures to reduce nitrogen in the effluent--thus improving the operation beyond secondary treatment and approaching the nitrogen removal level of AWT.[19]

B. CARROLLWOOD

20. Carrollwood was located in Hillsborough County until January 6, 1992 when it was taken out of service and ceased its discharges. Until then, Carrollwood discharged secondarily treated effluent to Sweetwater Creek. The violations at issue occurred between July 1991 and January 1992, when the facility was being taken out of service and was operating pursuant to an NPDES permit which contained AWT effluent limits.[20]

21. Between 1975 and January 1992, Carrollwood was authorized and required by a series of FDER permits and consent orders to discharge secondarily treated effluent to Sweetwater Creek. In addition, since the late 1970s Florida Cities was required to interconnect Carrollwood with Hillsborough County's wastewater system. Throughout the 1980s and early 1990s, Florida Cities pursued interconnection, only to have the County delay all interconnection dates. Hillsborough County did not have capacity to accept flows until the second quarter of 1991.[21]

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[18] Day 4, p. 173, l. 3 - p. 178, l. 17; Also Day 7, p. 43, l. 20 - p. 44, l. 16; Also Day 2, p. 91, ll. 23-25; *United States' exhibit(s):*456, *Florida Cities' exhibit(s):*51, 80, 92, 195.

[19] Day 8, p. 67, l. 22 - p. 68, l. 17; Also Day 2, p. 96, ll. 11-18.

[20] Day 1, p. 122, l. 25 - p. 123, l. 9; p. 134, ll. 1-8; Also Day 4, p. 148, l. 2 - p. 149, l. 18; p. 151 - 152; *Florida Cities' exhibit(s):*157.

[21] Day 2, p. 106, ll. 17-23; p. 131, ll. 10-16; p. 135, ll. 11-21; Also Day 4, p. 48, ll. 2-8; p. 51, ll. 2-21; p. 52, l. 10 - p. 53, l. 5; p. 55, l. 24 - p. 56, l. 7; Also Day 1, p. 128, ll. 19-22; p. 133, ll. 8-11; *United States' exhibit(s):*260; *Florida Cities' exhibit(s):*97, 99, 106, 108, 125, 132.

22. Since late 1990, Florida Cities had been operating Carrollwood under EPA AO 90-100 which imposed secondary treatment limits. No violations of secondary treatment limits were recorded between July 1, 1991 and January 6, 1992 at Carrollwood.[22]

23. In early 1991, Florida Cities simultaneously pursued two tracks for compliance at Carrollwood: an AWT upgrade and interconnection with Hillsborough County. Florida Cities fully informed EPA about the dual tracks.[23]

24. Shortly thereafter, Hillsborough County agreed to waive a $5.5 million capacity fee, which led to an agreement , signed on June 5, 1991, to interconnect the two facilities by January 1992, and Florida Cities abandoned plans to construct AWT.[24]

25. Also in early 1991, Florida Cities was expecting issuance of a new NPDES permit for an AWT facility. EPA was aware as early as October 1990 that AWT limits could not be met until January 1992 when construction of AWT was anticipated to be complete. Consequently, even before the agreement with Hillsborough County, Florida Cities repeatedly requested secondary interim limits and relief from AWT. Then, in light of the interconnection agreement, Florida Cities further pursued such relief. In May 1991, the NPDES permit was issued with AWT limits. Because timing of the AWT limits posed a problem. EPA requested that Tom Plouff of the enforcement section guide Florida Cities.[25]

26. Every month between July 1991 and January 1992, with every DMR it filed, Florida Cities

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[22] Day 2, p. 146, l. 4 - p. 147, l. 4; *Florida Cities' exhibit(s):*156; *United States' exhibit(s):*310.

[23] Day 6, p. 179, l. 13 - p. 180, l. 3; Also Day 2, p. 139, l. 12 - p. 140, l. 3; *Florida Cities exhibit(s):*139, 142.

[24] Day 4, p. 56, ll. 11-25; Also Day 6, p. 186, ll. 3-10; *Florida Cities' exhibit(s):*141.

[25] Day 6, p. 188, l. 15 - p. 192, l. 9; Also Day 2 p. 142, l. 6 - p. 143, l. 13; *Florida Cities exhibit(s):*135, 137, 138, 139, 140, 141, 142.

notified EPA that Carrollwood could not meet the AWT limits under any scenario and requested that AO 90-100, with secondary treatment limits, remain in effect.[26]

27. At the same time, EPA never revoked AO 90-100, which authorized secondary treatment, until March 1992, two months after the interconnection with Hillsborough County had occurred and the discharge ceased.[27]

28. In 1991, EPA assessed a $15,000 penalty ($13.51/day) under CWA § 309 for discharges without an NPDES permit between June 1987 and July 1990 at Carrollwood. EPA considered the non-serious nature of the discharges, the lack of economic benefit, the lack of any history of violations, and other matters that justice might require.[28]

C. BAREFOOT BAY

29. The Barefoot Bay treatment plant in Brevard County discharged secondarily treated effluent into an agricultural canal which provides drainage and which also receives non-point source pollution from agricultural runoff.[29]

30. Since the early 1980s, Barefoot Bay has been fully authorized by FDER to discharge secondarily treated effluent to the agricultural drainage canal, and during the period at issue there is no evidence that the discharges have had any perceptible impact on the receiving waters.[30]

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[26] Day 6, ll. 16-24; Also Day 2 pp. 134, 138, 139, 143, 145; *United States' exhibit(s):*341; *Florida Cities' exhibit(s):*131, 135, 139, 142, 145, 147, 148, 150, 151, 152, 154.

[27] *United States' exhibit(s):*310; *Florida Cities' exhibit(s):*156.

[28] Day 2, p. 120, l. 8 - p. 121, l. 7; Also Day 8, p. 3, l. 22 - p. 4, l. 13; *Florida Cities exhibit(s):*201.

[29] Day 2, p. 161, ll. 2-12; Also Day 1, p. 77, ll. 10-12; p. 80, ll. 11-24; Also Day 4, p. 119, ll. 10-17; p. 123, ll. 7-24; *Florida Cities' exhibit(s):*183.

[30] Day 4, p. 113, ll. 1-24, p. 129, l. 19 - p. 130, l. 12; p. 136, l. 25 - p. 138, l. 8; p. 141; Also Day 1, p. 92, ll. 6-18, p. 100, ll. 10-13; Also Day 2, p. 179, ll. 13-17; *Florida Cities' exhibit(s):*183.

31. On November 1, 1991, NPDES permit number FL0042293 became effective. It required Florida Cities to report to EPA BOD levels, total residual chlorine levels, and toxicity test results.[31]

32. In September 1992 Barefoot Bay began reporting TRC exceedances after purchasing a new DPD test kit, and Florida Cities addressed the perceived violations by installing a sulphur dioxide system and purchasing an amperometric titrator.[32]

33. At the time, Florida Cities was reporting TRC exceedances at levels between 0.06 and 0.10 milligrams per liter, and the permitted test method that was being used, the DPD colorimetric test method, had a detection limit of approximately 0.2 milligrams per liter.[33]

34. EPA guidance materials state that detected values below the detection limit for the appropriate test method should be reported "Not Detectable," a standard that would comply with the NPDES permit. Had Florida Cities been informed by EPA to report "Not detectable," as opposed to reporting the actual values, it would have done so and been in compliance with its permit.[34]

35. During the period in question, Florida Cities used the carbonaceous biochemical oxygen demand (CBOD) test, a modification of the BOD test, to measure the oxygen demand exerted by treated effluent on the receiving stream.[35]

36. Once it was discovered that Florida Cities inadvertently had been submitting CBOD values instead of BOD values, Florida Cities immediately applied for a NPDES permit modification to

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[31] Day 1, p. 105, ll. 13-17; *Florida Cities' exhibit(s):* 192.

[32] Day 8, p. 81, l. 7 - p. 83, l. 4.

[33] Day 8, p. 37, ll. 21-25; *Florida Cities' exhibit(s):* 209.

[34] Day 8, p. 49, l. 21 - p. 50, l. 3, p. 52, l. 3 - p. 53, l. 20; *Florida Cities' exhibit(s):* 158, 192, 209; *United States' exhibit(s):* 1.

[35] Day 1, p. 96, ll. 2-11.

allow for CBOD--a request to which EPA agreed with no change to the actual limit.[36]

37. BOD levels can be extrapolated with a reasonable degree of accuracy from the reported CBOD levels. Even though Barefoot Bay misreported CBOD values, the effluent would have complied with the applicable permit limits.[37]

38. In cooperation with state and local regulatory authority, Florida Cities investigated various alternatives to discharge, such as deep well injection, which was approved by FDER but blocked by St. John's Water Management District, and spray irrigation, which was approved by FDER but blocked by neighboring citrus grove owners, until it was decided that Florida Cities should be allowed to construct an AWT facility at Barefoot Bay.[38]

39. After all of the difficulties caused by unrelated third parties while exploring discharge alternatives, Florida Cities has upgraded the Barefoot Bay facility to AWT at a cost of several million dollars and is allowed to discharge effluent to the drainage canal.[39]

E. ECONOMIC BENEFIT AND IMPACT OF PENALTY ON FLORIDA CITIES

40. In Florida, a utility must demonstrate to the Florida Public Service Commission that decisions related to the expenditure of funds for both operations and capital improvements are prudent before being allowed to recover those expenditures from the rate payers.[40]

41. As a regulated entity under the PSC, Florida Cities must invest in capital improvements before the PSC will allow Florida Cities to earn a rate of return and Florida Cities cannot receive any

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[36] Day 8, p. 27, l. 18 - p. 28, l. 20; *Florida Cities' exhibit(s):* 176, 177, 179.

[37] Day 4, p. 131, l. 19 - p. 134, l. 20; *Florida Cities' exhibit(s):* 183.

[38] Day 7, p. 127, l. 25 - p. 131, l. 14; p. 132, l. 23 - p. 143, l. 12; p. 219, l. 14 - p. 220, l. 7; Also Day 1, p. 117, l. 10 - p. 118, l. 2; p. 119, ll. 2-11; Also Day 2, p. 181, ll. 9-15 .

[39] Day 7, p. 143, l. 22 - p. 144, l. 19.

[40] Day 7, p. 117, l. 18 - p. 118, l. 5; p. 122.

economic benefit from delaying expenditures.[41]

42. The government's own expert witness concludes in her report that Florida Cities working capital and liquidity are poor. Since the time her report, Florida Cities' debts have risen by approximately $4.3 million, further reinforcing her conclusion.[42]

43. Florida Cities has major mandatory preferred stock redemption obligations every year between 1997 and 2001. The cash from this stock redemption will flow to Allstate Insurance Company, not to an Avatar Holdings related entity.[43]

44. Florida Cities and Avatar Utilities Inc. have approximately $17 million of budgeted capital expenditures for 1996 going toward many enhancements and improvements to the water and wastewater facilities. These expenditures will exhaust the available lines of credit.[44]

45. Clean Water Act penalties are not tax deductible. Therefore, Florida Cities would have to increase its revenues by an amount equivalent to the penalty plus an appropriate amount to cover income taxes. Such freedom to increase revenues is not available under PSC regulation.[45]

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[41] Day 8, p. 101, ll. 17-20; p. 105, ll. 1-8; p. 106, ll. 3-9; p. 106, l. 22 - p. 107, l. 6; *Florida Cities' exhibit(s):* 184.

[42] Day 3, p. 203, ll. 4-6, p. 199, l. 25 - p. 200; *United States' exhibit(s):* 594; 598 (part 2).

[43] Day 8, p. 243, l. 1 - p. 244, l. 2; Also Day 3, p. 207, ll. 1-22; Also Day 7, p. 181, l. 14 - p. 182, l. 14; *United States' exhibit(s):* 585, 594, 598 (part 2).

[44] Day 8, p. 240, l. 25 - p. 242, l. 7.

[45] Day 3, p. 218, l. 23 - p. 219, l. 7.

II. FLORIDA CITIES WATER COMPANY'S PROPOSED CONCLUSIONS OF LAW

A. GENERAL BACKGROUND

46. The Clean Water Act ("CWA") was enacted by Congress in 1972 with the express objective of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a); Hawaii's Thousand Friends v. City and County of Honolulu, 821 F.Supp. 1368, 1391 (D. Haw. 1993).

47. Pursuant to 33 U.S.C. § 1319(d) of the CWA, Florida Cities is liable for civil penalties under the Clean Water Act. In determining the amount of a civil penalty the court is required to consider each of the following factors:

a. the seriousness of the violation or violations;
b. the economic benefit (if any) resulting from the violation;
c. any history of such violations;
d. any good-faith efforts to comply with the applicable requirements;
e. the economic impact of the penalty on the violator;
f. and such other matters as justice may require.

33 U.S.C. § 1319(d); Atlantic States Legal Foundation v. Tyson Foods, Inc., 897 F.2d 1128, 1140-41 (11th Cir. 1990). The existence of any one of these factors can mitigate against the imposition of the statutory maximum penalty.

48. First, the Court needs to determine the maximum fine for which Florida Cities may be liable. Tyson Foods at 1142. The Court determines the maximum civil penalty in a CWA case by (1) determining the categories of violations, (2) adding up the number of daily violations in each category, (3) totaling the violations in each category, and (4) multiplying this total by $25,000. Hawaii's Thousand Friends at 1395. Second, if the Court decides to reduce the maximum fine, it should reduce the fine in accordance with the factors spelled out in 33 U.S.C. § 1319(d).

49. The determination of the appropriate civil penalty is highly discretionary and within the sound discretion of the trial court. Tull v. United States, 481 U.S. 412, 425 (1987); Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 576 (5th Cir. 1996); Hawaii's Thousand Friends at 1395.

50. The Court's primary focus should be on the statutory framework of 33 U.S.C. § 1319(d), but the Court may refer to EPA's internal policies and guidance. Tyson Foods at 1142; see also Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125, 84 L.Ed.2d 90, 105 S.Ct. 1102 (1985) ("[the] view of the agency charged with administering the statute is entitled to considerable deference").

51. In evaluating the "seriousness of the violations," the Court may evaluate several indicators, including the number of violations, their duration, their significance (the degree of exceedance and the relative importance of the provision violated), and the actual or potential harm to human health and the environment. Hawaii's Thousand Friends at 1383.

52. Large violations or exceedances do not mandate that a Court impose large penalties. United States v. Roll Coater, Inc., 1991 U.S. Dist. Lexis 8790 at 10. "Serious," as used in the CWA, means more than the amount of pollutant over that authorized by regulations, and lack of environmental damage significantly mitigates the seriousness of the violation when calculating penalties. Roll Coater at 11; Atlantic States Legal Foundation v. Universal Tool & Stamping Co., Inc., 786 F.Supp. 743 (N.D. Ind. 1992).

53. "Economic benefit" is meant to quantify the economic gains resulting from delaying capital expenditures necessary to come into compliance with the CWA. Hawaii's Thousand Friends at 1387. The implication of the economic benefit factor is that unless the discharger is fined an amount at least as great as the economic benefit in not complying with the regulations, the statute

serves little deterrent value. But, the Court retains the discretion to reduce the imposed penalty below the calculated economic benefit. Roll Coater at 12. The statute implies that "economic benefit" need not exist in every case.

54. The "history of violations" refers to previous violations not related to the instant litigation. Roll Coater at 16. Florida Cities has paid penalties to EPA for discharge without a permit at Barefoot Bay and Carrollwood. In the aggregate, the total of the Barefoot Bay and Carrollwood penalties amounted to $21,000 dollars which considered over 8 years of discharges without a permit violations, approximately 2950 days. In imposing those penalties, EPA assessed many of the same factors that the Court is considering in this case. These penalties equate to roughly $7.11 per day.

55. "Good faith efforts to comply with the applicable requirements" includes consideration of matters such as the investigation of alternatives, the difficulty of compliance, and compliance with the requirements imposed by state and local regulatory agencies. Roll Coater at 18; United States v. Edison Co., 725 F.Supp. 928, 933 (N.D. Ohio 1989)(good faith adherence to Ohio EPA's directives and guidance as well as possible lack of effective communication between Ohio EPA and the United States EPA mitigates against a substantial penalty); Hughey v. JMS Development Corporation, 78 F.3d 1523, 1530 (11th Cir. 1996). If the defendant can demonstrate that it has been proceeding in an attempt to come into compliance with the CWA, then credit will be given under this mitigation factor. Universal Tool & Stamping Co. at 751-52.

56. Reliance on and compliance with interim standards in permits and administrative orders is a significant mitigating factor. Hawaii's Thousand Friends at 1396.

57. Temporary measures taken by a discharger geared towards pollution control evidence good faith.

Roll Coater at 22; Universal Tool & Stamping at 753.

58. "Such other matters as justice might require" is a catch-all consideration for the court. "The fact that a violator is 'without fault' in committing violations of the CWA does not absolve the violator from penalties, although it may mitigate the amount of penalties assessed." Hawaii's Thousand Friends v. City and County of Honolulu, 821 F.Supp. 1368, 1391 (D. Haw. 1993) (citations omitted).

B. WATERWAY ESTATES

59. The violations of the CWA at Waterway Estates are not serious and did not cause any environmental harm. Plaintiff admits that it has no evidence of any environmental harm resulting from the Waterway Estates discharges, and the risk of harm is negligible due to the nature of the pollutants. Moreover, the FDER, the state agency charged with protecting Florida's water quality, had fully permitted FDER and Waterway Estates always discharged within those effluent limits

60. Likewise, Waterway Estates' discharge to the canal is not serious. Administrative Order 89-109 indicated that Waterway Estates could continue to discharge to the canal until August 1, 1991. Waterway Estates ceased discharge to the canal on July 14, 1991, two weeks ahead of the schedule in the Administrative Order and more than a year in advance of the state-imposed deadline.

61. The nitrogen and toxicity violations are not serious. Waterway Estates was constructing an advanced wastewater treatment facility at the time of the violations. Moreover, the assimilative capacity for nitrogen of the Caloosahatchee River was never exceeded or even approached. In light of these considerations, Florida Cities is entitled to significant mitigation of the penalty.

62. Florida Cities did not derive any economic benefit from delaying capital expenditures at Waterway Estates. As the statute implies, there is no requirement that there be any economic benefit for noncompliance. Under PSC regulation, Florida Cities can not benefit from a delay because a return on capital can only be earned once an investment is made: without an investment, there is no return. Therefore, there is a total lack of economic benefit.

63. At Waterway Estates, Florida Cities does not have any history of violations for discharge without a permit, or discharge at the wrong location, or nitrogen or toxicity exceedances. Therefore, Florida Cities is entitled to significant mitigation of any penalty due to this factor.

64. Florida Cities has made substantial good-faith efforts to comply with the applicable requirements at Waterway Estates. Upon notification of the denial of their NPDES permit in 1986, Florida Cities immediately began the process to seek out alternatives to discharge. Once alternatives had been reviewed and the AWT alternative chosen, Florida Cities began the lengthy and complex process of designing and permitting the AWT construction. The construction schedule was hampered by the myriad federal, state and local regulations and approval processes, over which Florida Cities had no control. Yet, Florida Cities completed the construction of the new outfall by July 1991, ahead of the schedule in EPA's Administrative Order 89-109, and finished the AWT by April 1992.

65. At all times between October 1, 1988 and June 1992, Waterway Estates was complying with FDER directives and local regulation. FDER, charged with the responsibility to protect Florida's waters, permitted the AWT construction and secondary treatment limits through September 1992. Moreover, EPA never objected to any FDER permit or indicated any imminent threat of harm to human health or the environment. Florida Cities met the FDER construction deadlines

which will substantially mitigate the penalty.

66. Further, there is no indication that Florida Cities failed to advise EPA of the construction delays caused by federal, state and local regulators. During this time, EPA was informed of the construction progress and of the nature of the discharges through a series of DMRs, progress reports, and other communications.

67. Finally, EPA's erroneous refusal to renew the 1986 NPDES permit is the genesis of this action against Waterway Estates. Basing its decision upon a preliminary planning document that neither posed wasteload allocation requirements nor was approved by the agency within the statutorily mandated 30 day window under CWA § 303, the EPA acted without legitimate basis and outside of its authority. Moreover, EPA is required to defer to a state's effluent limitations unless EPA can show clear error or that the state was ignoring its own water quality standards. Because of the nature of a discharging wastewater treatment plant is such that it cannot immediately cease operations without fear of causing a significant human health risk and because the FDER had permitted secondary discharges at the time the 1986 denial occurred, the penalty against Florida Cities will be substantially mitigated.

C. Carrollwood

68. The NPDES violations at Carrollwood are not serious and did not cause any environmental harm. There is no evidence of any environmental harm or risk of harm resulting from the discharges to Sweetwater Creek. In fact, the evidence has shown that the plant almost achieved AWT effluent characteristics, so the risk of harm is very low. Under this factor, the penalty will be substantially mitigated.

69. Also, Carrollwood was being regulated under AO 90-100 which permitted secondary discharges

to Sweetwater Creek. Between July 1991 and January 1992 Carrollwood did not violate any secondary treatment effluent limits or this AO.

70. The Carrollwood violations result from the issuance of an AWT permit for a facility upgrade which was eventually abandoned in favor of an alternative solution. In fact, the interconnection with Hillsborough County was just as timely as the AWT upgrade, having been implemented in January 1992, and eliminated all discharges to Sweetwater Creek, while saving the ratepayers several million dollars in rate increases.

71. On the same basis articulated in Conclusion of Law number 62, Florida Cities has not derived any economic benefit from delaying capital expenditures at Carrollwood.

72. Florida Cities does not have a history of effluent limit violations, although it has paid a minor penalty for discharging without a NPDES permit. After consideration of many of the same factors at issue before the Court, such as the seriousness of the violation, the economic benefit, the ability to pay, good faith efforts to comply with the CWA, and other matters that justice might require, EPA fined Carrollwood $13.51 per violation for discharging without a permit.

73. Florida Cities has engaged in numerous good-faith efforts to comply with the requirements of the CWA. Since the late 1970s, Carrollwood was required by FDER permits to interconnect its facility with Hillsborough County. Hillsborough County could not offer wastewater treatment service until spring 1991. Additionally, Florida Cities assessed alternatives to interconnection with Hillsborough County, but no alternative proved feasible until 1989 when FDER allowed Florida Cities to construct AWT. Even after deciding to construct AWT, Florida Cities did not abandon its pursuit of an interconnection agreement with Hillsborough County. The penalty will be substantially mitigated due to Florida Cities good faith efforts to comply.

74. Further, the evidence shows that Florida Cities kept EPA fully informed of the two alternatives it was pursuing. EPA received numerous letters explaining the dual AWT and interconnection solutions. Further, EPA was made aware on numerous occasions that Carrollwood would not be able to meet AWT limits until January 1992, and Florida Cities continuously requested interim relief from the forthcoming AWT permit. EPA had clear notice since October 1990 that secondarily treated effluent would be discharged until January 1992.

75. At all times between July 1991 and January 1992, Carrollwood complied with state permits and consent orders, which required the facility to continue its operations and imposed secondary treatment standards. Florida Cities' compliance with state regulations and directives will substantially mitigate the penalty.

D. Barefoot Bay

76. The NPDES violations at Barefoot Bay are not serious and did not result in any environmental harm. There is no showing that any environmental harm or risk of harm resulted from the chlorine, toxicity, or BOD violations. The violations were of short duration, and were corrected quickly. Further, any pollution from Barefoot Bay would be diluted and dissipate almost immediately in the agricultural drainage canal. Therefore, Florida Cities is entitled to significant mitigation of the penalty.

77. On the same basis articulated in Conclusion of Law number 62, Florida Cities has not derived any economic benefit from delaying capital expenditures at Barefoot Bay.

78. Florida Cities does not have a history of TRC, toxicity, or BOD violations at Barefoot Bay although it has paid a minor penalty for discharging without a NPDES permit. After consideration of many factors, including disposal options that Florida Cities pursued, the lack of

economic benefit, the good faith attempts to come into compliance, the state authorized discharges, and the lack of environmental harm. EPA assessed a $6000 penalty in consideration for over 5 years of discharging without a permit.

79. Florida Cities has repeatedly engaged in good-faith efforts to comply with the applicable requirements of the CWA. Florida Cities pursued many disposal options only to be delayed and hampered by conflicting viewpoints of various regulatory agencies and neighboring citrus grove owners who appealed the FDER construction permit for a spray field. Florida Cities had no control over those delays. For each violation at issue, Florida Cities promptly notified EPA of the violations and expeditiously sought remedies for them. There is no evidence that Florida Cities intentionally failed to report information or intended to mislead EPA. Therefore, Florida Cities is entitled to significant mitigation of the penalty due to their good faith efforts to comply.

80. At all times relevant to this action, Barefoot Bay has been authorized by FDER and the St. John's River Water Management District to discharge secondarily treated effluent to the agricultural drainage canal, and Florida Cities has been pursuing the ultimate elimination of the discharges in manners acceptable to the state and local regulators. Florida Cities' compliance with state and local directives will further mitigates the penalty.

E. Economic Impact of a Penalty on Florida Cities

81. Any civil penalty will have an substantial economic impact on Florida Cities. Currently, Florida Cities' has major mandatory financial obligations in the near future, but has few liquid assets with which it can pay. Additionally, Florida Cities debt level has substantially increased. As a utility being regulated by the PSC, Florida Cities can not raise its rates at will to cover a penalty.

82. Florida Cities must finance its capital projects to survive and keep pace with regulatory

mandates. Any substantial penalty will adversely affect Florida Cities' ability to finance capital projects and will place risk on Florida Cities' continued viability.

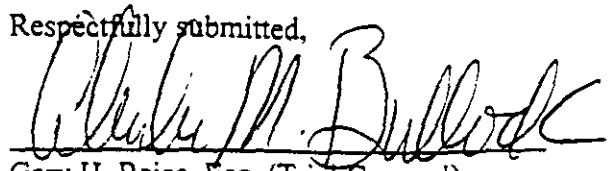
E. Penalties

83. In 1991, EPA assessed penalties against Florida Cities for discharging without permits at Barefoot Bay and at Carrollwood. In assessing those administrative penalties, EPA found that Class I administrative penalties were warranted, and EPA chose not to pursue those claims in a federal court for $25,000/day/violation. EPA found an abundance of facts that warranted substantial mitigation and fined Florida Cities $6,000 and $15,000 respectively for more than 8 years of discharging without permits. This equates to approximately a 99.99% reduction from the conceivable statutory maximum penalty.

84. Upon consideration of the factors enumerated in § 309(d) for all three Florida Cities facilities in this case, this Court will reduce the penalty 99.99% from the statutory maximum.

85. Recent case law supports at least a 99% reduction from the statutory maximum penalty. Even in cases where there was evidence of environmental harm, a substantial risk of environmental harm, lack of good faith efforts to comply with the CWA, or no investigation of alternatives courts have reduced the penalty to a fraction of 1% of the statutory maximum. See Hawaii's Thousand Friends v. City and County of Honolulu, 821 F.Supp. 1368 (D. Haw. 1993); Sierra Club v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996).

Respectfully submitted,



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June 6, 1996

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of "Defendant Florida Cities Water Company's Proposed Findings of Fact and Conclusions of Law" has this June 6, 1996 been sent to the following persons by United States first class mail, properly addressed and postage prepaid.

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Exhibit ____ (GHB-88)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' MOTION FOR RECONSIDERATION OF THE COURT'S RULING ON ADVERSE INFERENCES AND FOR EXTENSION OF PAGE LIMITS FOR POSTTRIAL SUBMISSIONS

By Order of May 8, 1996, the Court denied the United States' request that the Court draw adverse inferences from the refusal to testify by Defendants' present and former officers and managers and ruled that the depositions of these individuals are inadmissible. While implicitly recognizing that adverse inferences may be drawn in this civil case, the Court concluded that the United States did not set forth the substance of any documentary evidence supporting adverse inferences. Because there is abundant documentary evidence supporting adverse inferences which was set forth extensively in the United States' Offer of Proof submitted at trial, and which the Court has apparently overlooked, the United States moves the Court to reconsider its ruling.

By separate Order of May 8, 1996, the Court also set out a posttrial briefing schedule. The United States also moves the

Court to amend that order to permit the United States additional pages in which to brief the issue of Avatar Holdings' liability.

Respectfully submitted,

LOIS J. SCHIFFER
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By: _____

Dated: May 16, 1996

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I certify that copies of the foregoing "United States' Motion for Reconsideration of the Court's Ruling on Adverse Inferences and for Extension of Page Limit for Posttrial Submissions" were served by fax (unless otherwise indicated) on the 16th day of May, 1996, to the following attorneys of record:

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RECEIVED
MAY 16 1996
GHB

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC.,

Defendants.

CIVIL ACTION NO.
93-281-CIV-FTM-21

UNITED STATES' MEMORANDUM IN SUPPORT OF ITS MOTION FOR RECONSIDERATION OF THE COURT'S RULING ON ADVERSE INFERENCES AND FOR EXTENSION OF PAGE LIMITS FOR POSTTRIAL SUBMISSIONS

I. Introduction

By Order of May 8, 1996, the Court denied the United States' request that the Court draw adverse inferences from the refusal to testify by Defendants' present and former officers and managers and ruled that the depositions of these individuals are inadmissible. While implicitly recognizing that adverse inferences may be drawn in this civil case, the Court concluded that the United States did not set forth the substance of any documentary evidence supporting adverse inferences. Because there is abundant documentary evidence supporting adverse inferences which was set forth extensively in the United States' Offer of Proof submitted at trial, and which the Court has apparently overlooked, the United States summarizes that evidence

below and respectfully requests the Court to reconsider its ruling.[1]

By separate Order of May 8, 1996, the Court also set out a posttrial briefing schedule. The United States also moves the Court to amend that order to permit the United States additional pages in which to brief the issue of Avatar Holdings' liability.

II. Avatar Holdings' Role at the Wastewater Treatment Plants

A vast number of documents demonstrate Avatar Holdings' pervasive involvement, through its officers and directors, in the environmental affairs of Florida Cities and events and decision-making directly relating to violations of the Clean Water Act at issue.[2] In particular, these documents establish that five "key players" (Peter Sharp, John Sladkus, Lawrence Wilkov, Dennis Getman, and Robert Gordon), acting on behalf of Avatar Holdings, were personally and pervasively involved in relevant events relating to the three wastewater treatment plants. While Sharp is deceased, the testimony of Sladkus, Wilkov, Getman, and Gordon, would have supported the inferences suggested below had they not pled the Fifth Amendment.

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[1] The United States' Offer of Proof, attached hereto as exhibit A, was incorporated by reference pursuant to Fed. R. Civ. P. 10(c) into the United States' Memorandum in Support of its Request that the Court Draw Adverse Inferences from the Refusal to Testify by Defendants' Present and Former Officers and Managers at footnote 1. The United States also attached to its brief lists which cross-reference the depositions exhibits to trial exhibits.

[2] While the key Avatar documents are dated, many are "new" to the United States, having been produced only subsequent to the close of discovery in November 1995 and only after the Court ordered Avatar to produce them on the United States' Motion to Compel. Order, November 13, 1995. Thus, it bears noting, that they were not available to the United States when it filed its summary judgment motion in June 1995.

Barefoot Bay

Barefoot Bay represents both a real estate and utility investment to Avatar Holdings because it owns, markets, and manages the development, as well as provides water and wastewater services to its residents.[3] As a sophisticated developer, Avatar was well aware in 1980, when it acquired Barefoot Bay, that wastewater disposal was an important issue that needed to be addressed at any development. Gov. Ex. 516. Nonetheless, the documentary evidence demonstrates Avatar Holdings proceeded to develop the Barefoot Bay property without adequate sewage.

When Avatar Holdings acquired Barefoot Bay and its treatment plant in 1980, 1,444 of some 5,200 planned lots (the anticipated "buildout" number) had been sold. Gov. Ex. 30 at 2 (Table 1). The effluent flow data reflects that as of 1980, the average daily flow from the development was 126,000 gallons/day, id., although the two percolation ponds built to date together at best only had the capacity for 100,000 gallons/day. Klingenstein Tr. Test., March 25, 1996 at 103-04. As a result, unpermitted overflows into the Sebastian River were already occurring. In short, while buildout was a long way off, no provision was made for the increasing flows from the connection of additional lots

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[3] Documents refer to Barefoot Bay as an Avatar Holdings real estate operation, project, or cost center, often without any reference to an Avatar subsidiary. Gov. Ex. 58 at 8, Gov. Ex. 518 at 7, Gov. Ex. 550, and Gov. Ex. 546 at 5. Avatar Holdings unconditionally guaranteed an unsecured $950,000 loan to Avatar Properties, up to $800,000 of which was to be used to finance Barefoot Bay inventory. Gov. Ex. 51 at 3, 6-11. The loan documents are signed twice by Peter Kleinerman: once as Executive Vice President of Avatar Properties, the recipient of the loan, and once as Executive Vice President of Avatar Holdings, the guarantor of the loan. Gov. Ex. 51 at 11.

to the sewage system. Yet, Avatar Holdings continued to market and develop the remaining lots, and to connect them to a sewage system which guaranteed that the additional flow would wind up in the Sebastian River. As demonstrated below, the documentary evidence reveals that Avatar continued to expand the Barefoot Bay development with knowledge of the inadequate sewage provisions and the increasing volume of the unpermitted discharge violations.

As early as July 21, 1983, Avatar management meetings included discussion of land areas that were needed "for future construction to accommodate the complete build-out of Barefoot Bay," Gov. Ex. 11, an apparent reference to the construction of additional percolation ponds on which to dispose of the effluent. At the July 27, 1984 Avatar Holdings Board of Directors meeting, Wilkov reminded the Board that "the Department of Environmental Regulation has been imposing stricter requirements, and that in his opinion developmental growth within certain areas will depend heavily upon the availability of water and sewer facilities." Gov. Ex. 21 at 5. [emphasis added].[4] In a February 29, 1984 memorandum, Wilkov recognizes that the "[s]ituation requires immediate action," and states that "[i]ncreased capacity should be 'on line' by November 1984." Gov. Ex. 15. Wilkov also says that they should "find a way to have the utility [i.e., Avatar

[4] Attached to the minutes of the same Board meeting is a detailed questionnaire relating to drinking water at Barefoot Bay, which is also indicative of the environmental/regulatory matters which came directly to the Board's attention. Gov. Ex. 21 at 6-7.

Utilities] fund the entire amount [estimated at $600,000-700,000]" id., instead of Avatar Holdings, a concept which Peter Sharp later ratified as follows in a June 28, 1984 memorandum to Wilkov, Sladkus, and Gordon:

> We must be sure that the cost of the percolation pond and related construction end up 100% as part of Barefoot Bay's rate base on which rates can be charged to customers from day one.

Gov. Ex. 18.

The cost allocation issue resolved, the next question was where to build the additional ponds. One possibility for the location of additional ponds was an adjacent orange grove. See Gov. Exs. 19, 37. Another possibility, suggested by Gordon to Wilkov and Sladkus on October 23, 1984, was the acquisition of a neighboring parcel of land known as the Hearndon property, in which Avatar Holdings was interested primarily to expand the Barefoot Bay development.[5] Gov. Ex. 24. The Avatar Holdings Board of Directors approved obtaining an option on the Hearndon property at its November 30, 1984 Board meeting. Gov. Ex. 25 at 4. This option was perceived as having the attraction of reducing land costs since a separate land acquisition would not be necessary for the new ponds.[6] On March 13, 1985, Gordon wrote

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[5] In a December 4, 1984 memorandum from Gordon to Sharp, Wilkov, Sladkus, Getman, and Kleinerman (Executive Vice President, Treasurer and Chief Financial Officer of Avatar Holdings, Gov. Ex. 351 at 1), among others, Gordon reports that "there appeared to be some higher sandy areas" on the Hearndon property "that would be suitable" for pecolation basins. Gov. Ex. 26.

[6] A letter drafted by Peter Sharp in December 1985 and (after editing by Wilkov) sent to a New York banker, describes how various Avatar entities are to benefit by the purchase, Gov. Exs. 27, 29.

in a memo to Wilkov, with a copy to Sladkus, that "[w]e have exhausted the alternatives of wastewater effluent disposal at Barefoot Bay," and suggested either of the two options, each of which he costed out at 1.3 million. Gov. Ex. 31.

Peter Sharp remained personally involved in the decision-making relating to the acquisition of the additional property for wastewater disposal purposes. On August 2, 1985, he wrote a detailed memo to Gordon, entitled "Barefoot Bay - Land Acquisition for Wastewater Effluent Percolation Basins," referencing a July 30, 1985 memo from Gordon to Sharp, Wilkov and Getman (which was never produced), which appears to relate to a legal dispute with the grove owner over the purchase of the land. Gov. Ex. 38. The memo reveals that Sharp was personally aware of the necessity of building the additional percolation ponds, as well as very concerned about how much they would cost, and well aware of the government scrutiny to which environmental matters are subject.

Gordon updates Wilkov on October 10, 1985 (copying Getman, Kleinerman, and Sladkus) that the plans and specifications for the percolation ponds were submitted to the DER for their approval on August 27, 1985, Gov. Ex. 41. In a January 29, 1986 letter, Sharp represents that "Avatar has recently acquired adjacent land for the purpose of increasing the capacity of its sewage plant." Gov. Ex. 45. [emphasis added] On February 11, 1986, Gordon gives Sladkus (with a copy to Wilkov and Kleinerman), a lengthy report which reflects that the DER had

issued a construction permit on January 14, 1986, and that load testings were being scheduled. Gov. Ex. 46. A similar status report to Sladkus (again with a copy to Wilkov and Kleinerman), followed on June 12, 1986. Gov. Ex. 50.

The new ponds were never built, however, and on January 16, 1987, Sladkus updates Sharp, Wilkov, and Kleinerman by memorandum, on the apparent complete failure of the existing ponds, suggesting the possibility of spray irrigation. Gov. Ex. 52. The minutes of the January 30, 1987, meeting of the Avatar Holdings Board of Directors reflect that Avatar Holdings was only willing to use a limited portion of the 270-acre Hearndon property as a spray irrigation site in conjunction with its development as a golf course and homesites. Gov. Ex. 53 at 3. Similarly, it appears from an April 13, 1987 memorandum from Wilkov to Kleinerman, Getman, and Gordon, among others, that Avatar Holdings officials were reluctant to devote substantial portions of Hearndon to effluent disposal instead of land development.[7] Gov. Ex. 55. Yet, a May 1, 1987 memorandum to Wilkov, Getman, Kleinerman, and Gordon, among others, reveals that at this time Avatar officials were acutely aware that they already lacked sufficient wastewater disposal capacity at Barefoot Bay and that proceeding towards "buildout" would require still additional capacity. Gov. Ex. 56. A May 26, 1977 memorandum to Wilkov (with copies to Getman and Gordon, among

[7] Although the Hearndon property was finally acquired in early 1988, Gov. Ex. 65 at 7, it appears that the property was never used for either purpose.

others) also suggests that Avatar officials were concerned about the cost of using the Hearndon property for spray irrigation, and documents Avatar officials' awareness of the potential for environmental harm caused by effluent disposal in the area:

> The Indian River Lagoons system is considered to be deteriorating as a result of fresh water discharges from storm water runoff, drainage canals, and wastewater effluent which has presumably killed seagrass beds and clambeds and have degraded water and sediment quality throughout the system.

Gov. Ex. 57.

Sladkus gives Sharp another full report on the Barefoot Bay wastewater problem on February 11, 1988, attaching a file memorandum written by Gordon (with copies to Getman, Sharp, Sladkus, and Wilkov, among others), memorializing a meeting with DER. Gov. Ex. 61. The gist of Gordon's memo indicates that Defendants were balking at actually constructing the percolation ponds contemplated some four years earlier, even though Defendants were fully aware that they had an ongoing illegal discharge, and that DER wanted the percolation ponds built and the ongoing connections to cease. Gordon and his team convinced DER that they would construct a deep well system for the disposal of the effluent in lieu of the percolation ponds, that the land on which the percolation ponds were to be situated would be used as a spray irrigation site, and that ongoing connections from Barefoot Bay lots could continue. They also promised DER they would upgrade the plant to advanced wastewater treatment (AWT) standards if a surface water discharge were approved.

A March 15, 1988 memo from Sladkus to Sharp demonstrates that Sharp's pervasive involvement extended right down to the selection of the engineer who was to conduct the preliminary study for the deep well injection system. Gov. Ex. 64. Memoranda to/from Sladkus and Gordon and Allen, See Gov. Exs. 67-69, 74, 76, 78, as well as Sladkus' own handwritten notes, Gov. Ex. 77, show that Sladkus continued to closely monitor the situation at Barefoot Bay after the decision was made to build a deep well, and became increasingly involved in the project, when, in early 1989, Gordon became concerned that the deep well might fail. Gov. Exs. 81-85, 87, 91. Wilkov and Getman were also kept apprised. Gov. Ex. 86.

In April 1989, Gordon forwarded to Sladkus an engineering report on deep well injection at Barefoot Bay, recommending that "we arrange a meeting to review the entire injection well controversy with CH2M Hill so that everyone has first hand information relative to the Barefoot Bay project's success." Gov. Ex. 83. CH2M Hill was asked to prepare materials for the meeting, which took place on June 13, 1989 in New York, Gov. Ex. 93, and was attended by Wilkov, Kleinerman, Gordon, Sladkus, and Getman, who decided to "[c]ontinue to pursue deep well simultaneously with permit to irrigate." Gov. Ex. 92.

By the time of his August 16, 1989 utilities report to Sharp and Wilkov (with copies to Allen, Getman, Kleinerman, Levy, and Sladkus), Gordon states that "[t]he Company's confidence level for success [in the deep well] is shrinking rather than

expanding." Gov. Ex. 96. Gordon then goes on to say that he is once again looking into the possibility of purchasing neighboring citrus groves, this time with an eye toward both using them for effluent disposal purposes as well as to produce oranges. In a follow-up memo to Sharp and Wilkov on August 21, 1989, Gordon updates them on the availability of the neighboring orange groves. Gov. Ex. 97. Sharp responds the very next day, asking to "be kept abreast of efforts to resolve the disposition of the effluent at Barefoot Bay." Gov. Ex. 98. Gordon updates Sharp on August 25, 1989, advising him that a meeting has been arranged with the FDER District Director to review the plans for spray irrigation on orange groves. Gov. Ex. 99. An exchange of memos the following month between Sharp and Sladkus again shows Sharp's ongoing close personal involvement in the Barefoot Bay effluent disposal issue. Gov. Exs. 103, 106.

In September 1989, Gordon sends Sladkus a copy of a submittal to FDER proposing spray irrigation instead of deep well injection. Gov. Ex. 105. In November 1989, Allen prepared a report entitled "Wastewater Disposal Alternatives to Deep Well Injection, Barefoot Bay" which he transmitted directly to Avatar Holdings' Board members and officers, Gov. Ex. 115, but not to any Florida Cities officers. [Allen Tr. Test., April 4, 1996 at 214-15]

In a January 26, 1990 memorandum to Wilkov, Sladkus carefully considers and conditionally approves spray irrigation. Gov. Ex. 118. In order to utilize spray irrigation, additional

land must be purchased, and the Avatar officers again turn their attention to the neighboring orange groves, this time focussing on one grove in particular that they were determined to acquire, the Micco Groves. After early unsuccessful efforts to purchase the groves by Getman, acting in various capacities on behalf of various Avatar entities, Gov. Exs. 112, 125, 129, 130,[8] on June 18, 1990, Sladkus inquired about the possibility of obtaining the property through condemnation proceedings. Gov. Ex 131. On the same day, Getman writes a memorandum saying that he has set up a meeting "for the four of us" [Getman, Gordon, Allen, and Wilkov] on the subject for June 22, 1990, noting in a "P.S." that "Mr. Sladkus would like to join this discussion by telephone conference." Gov. Ex. 132.

On June 19, 1990 Gordon responds directly to Sladkus, with copies to Getman and Wilkov, saying that "condemnation of the Micco Grove property would be extremely difficult because (a) the property is not unique (other property would be available for a price) and (b) there are alternatives to spray irrigation." Gov. Ex. 133. Sharp, however, is undeterred by Gordon's forthright assessment, and, by memo of June 25, 1990, endorses Sladkus' June 15, 1990 suggestion that they use eminent domain powers to obtain the property. Gov. Ex. 134. Finally, in a July 1, 1990 memorandum to Wilkov, Sharp orders that eminent domain be pursued, and that he be given a status report of an upcoming

[8] Getman's role is obviously multi-faceted. As Getman himself put it in a memorandum, at times he wore both his "developer" hat and "utility" hat, purporting to represent both sides to an agreement. Gov. Ex. 246.

meeting with an attorney on the subject. Gov. Ex. 135. Getman's status report reads as follows:

> Depending upon some unforeseeable circumstances, Mr. Davidson felt that FCWC had at least a "good" chance of obtaining a quick take for the property. We advised him that time was of the essence because of our DER Consent Order and he indicated that he felt that if things went somewhat smoothly that the eminent domain action could be completed as quickly as sixty days. Mr. Davidson does have a tremendous amount of experience in this area, and, basically, knows the judges who might get the case in Brevard County. As instructed, we are proceeding with a possible quick take eminent domain action.

Gov. Ex. 136.[9]

Meanwhile, Sladkus thought better of spray irrigation, and again recommended the construction of a deep well in a September 14, 1990 memo to file which he copied to Wilkov and Sharp. Gov. Ex. 143. By this point in time, he had learned that the risks of such a well had been exaggerated, and thought that it presented a more economically prudent solution to the wastewater disposal question. Thus, he writes "for all these various reasons, it is now proposed that we reverse our decision. We are under severe pressure from the regulatory agencies to cease discharge into the Indian River and need to make an early decision." Id. A November 14, 1990 handwritten note addressed to "Peter" [Sharp] which appears on the last page of an attachment to the memorandum

[9] The report took the form of a note from Getman to Sharp, Sladkus, and Wilkov which accompanies their "blind copies" ("bcc") copies of a letter, written by Getman on Avatar Holdings letterhead to the attorney after the meeting, instructing him to prepare draft minutes of a Florida Cities telephonic Board meeting yet to occur.

reflects that a nearby deep well had been permitted. Id. Shortly thereafter, Sladkus resigns.

After additional unsuccessful efforts to purchase the land by Getman, again acting in various capacities on behalf of various Avatar entities, Gov. Exs. 138, 140, 139, in March 1991, Avatar began condemnation proceedings, in accordance with Sharp's earlier orders, and he continued to be kept apprised of their progress. See Gov. Ex. 165. Although never actually successful, the attempts to acquire Micco Groves illustrate Avatar Holdings' direct and pervasive involvement -- at the highest levels -- in matters relating directly to the Barefoot Bay effluent disposal issue, and Florida Cities' distinct lack of involvement.

It bears noting that while this entire lengthy saga continued, so did the development of Barefoot Bay, with Sharp at the helm. Sharp was personally well aware that the additional connections to the sewage system resulted in added wastewater discharge. By memo of February 25, 1991 referencing "Barefoot Bay - Wastewater Effluent Disposal," Sharp specifically questioned Gordon about the discharge flow to be permitted in the context of the units connected to the system. See Gov. Ex. 160. In his reply to Sharp the following day, Gordon details the flow data from the Barefoot Bay treatment plant, noting that as of December 31, 1990, there were "4,298 ERC's connected to the system with 754 additional vacant lots." Gov. Ex. 162.

In sum, the documentary evidence makes patently clear that Avatar Holdings' officers and directors were fully cognizant of

the unlawful discharge at Barefoot Bay, and pervasively involved in critical decision-making relating to how it was to be addressed.

An NPDES permit for the Barefoot Bay plant was issued on September 16, 1991 and took effect November 1, 1991, under a "Cease Discharge Schedule" which provided for annual progress reports culminating in the required cessation of the discharge by June 30, 1995. Gov. Ex. 185, page I-4. It is unrefuted that the toxicity violations alleged in the United States' Second Amended Complaint resulted from the failure to upgrade the plant to AWT standards (as promised DER in 1988), rendering it incapable of consistently meeting the toxicity requirements of the permit. Had Defendants taken advantage of the many opportunities to cease the discharge entirely in previous years, an NPDES permit would not have been necessary and none of the violations at Barefoot Bay would have occurred.

Carrollwood

Avatar Holdings was also pervasively involved in decision-making relating to the unpermitted discharge at Carrollwood. As far back as August 6, 1984, Gordon sent a memorandum to Sladkus, with a copy to Wilkov, which confirms that Florida Cities was advised in October 1979 that it would have to stop discharging into the Sweetwater Creek, but that it found the available alternatives unacceptable; that its temporary operating permit was subsequently denied; and that it intended to fight the matter in the courts if necessary. Gov. Ex. 270. Gordon's

resolution that they would fight the matter in the courts perhaps accounts in part for why there is so little documentation of efforts to cease the discharge: Avatar simply decided not to make any serious efforts to timely cease its illegal discharge.

Discussions that took place at the Avatar Holdings Board level suggest Avatar Holdings' primary concern was not complying with environmental laws, but avoiding liability for not complying. Gov. Ex. 48 at 14, Gov. Ex. 353 at 12, Gov. Ex. 356 at 1-5. Indeed, a 1986 memorandum from Gordon to Getman makes it clear that Avatar decided to stall and continue its unpermitted discharge until Hillsborough County would accept the Carrollwood sewage. Gov. Ex. 280. Getman not only endorsed the stall, but also suggested that Gordon negotiate language that would facilitate a further stall with impunity. Gov. Ex. 281.

Eventually, Avatar did begin to study the alternatives. In 1986, Wilkov and Sharp approved an expenditure for an engineering study of the design of a pumping station and force main (pipe) to transfer the Carrollwood wastewater to the Hillsborough County facility. Gov. Ex. 282. Avatar apparently debated whether to tie in to another treatment plant or improve its own. Again, money was the central issue. In March 1988, Gordon reported to Sladkus that he was working to get Hillsborough County to lower the fees it would charge to connect the Carrollwood system to its system, and that he viewed building an AWT plant as an alternative. Gov. Ex. 291. As he did with the unpermitted

discharge at Barefoot Bay, Sladkus closely monitored the situation. Gov. Exs. 74, 76-78.

Sharp was also personally involved. After executing a conward in April 1989 authorizing engineering services for the AWT plant, Gov. Ex. 567, Sharp wanted some questions answered about cost, flow, recovery of costs through rate base, and construction completion time. Gov. Exs. 299-300.[10] It is unrefuted that because the AWT plant was never built, the permit violations alleged in the Second Amended Complaint were inevitable.

Waterway Estates

The key players also were pervasively involved in critical decisions relating to environmental compliance at the Waterway Estates plant.

On June 30, 1986, some six months before it actually denied Florida Cities' permit renewal at Waterway Estates, EPA sent a letter to Florida Cities advising it of the upcoming denial. Gov. Ex. 355. On August 14, 1986, Gordon forwarded that letter to Avatar Holdings officials, including Sladkus, Getman, and Wilkov, with a brief explanation: "The EPA wants the Company to either discontinue discharging effluent to a canal which ultimately goes to the Caloosahatchee River or improve the treatment to AWT and seek a wasteload allocation to the Caloosahatchee." Gov. Ex. 358.

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[10] While Sharp's memo was never actually produced, his questions can be inferred from the memoranda which addressed them.

On January 16, 1987, just seven days after EPA's permit denial took effect at Waterway Estates, Sladkus reported to Sharp, Wilkov, and Kleinerman that the plant either needed to apply for a wasteload allocation and upgrade to AWT or connect to North Fort Myers Utilities (NFMU), a neighboring privately-owned wastewater treatment plant. Gov. Ex. 52.[11] In June 1987, Gordon forwarded to Sladkus a copy of EPA's compliance order. Gov. Ex. 365. On August 31, 1987, Gordon forwarded to Sladkus a copy of an engineering report on the feasibility of disposing of the Waterway Estates wastewater. Gov. Ex. 369. Cost remains the primary issue. Gordon wrote, "[a]s you can imagine from the recommended cost of treatment and disposal, additional work [on the options] will have to be done." On November 19, 1987, apparently after additional work was done, Gordon again writes to Sladkus attaching an options memorandum. Gov. Ex. 373.

It is clear from the evidence that Avatar was evaluating whether to expend a large sum of money to upgrade the Waterway Estates plant or to contract with NFMU to treat its waste. Ultimately, Avatar made a business decision to forego connecting to NFMU. Gov. Ex. 466. An exchange of memoranda dated between August 1988 and October 1988 between Sharp and Gordon lends insight to the decision-making process. This exchange makes clear that far from considering yielding the Waterway Estates franchise to a competitor, whether public or private, Sharp had

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[11] Wasteload allocations were apparently a familiar subject, not only for the key players, but even for the Avatar Holdings Board of Directors. See Gov. Exhibit #386 at 6.

visions of taking over all of the water and wastewater utilities in Lee County. Gov. Exs. 70, 381, 383, and 384. Sharp's mandate to Gordon was as follows: "FCWC's long term objective should be to own the entire Lee County system--that is, the County's facilities as well as the City's." Gov. Ex. 384. Ironically, the same documents also reveal that this mandate emerged after the Lee County options were discussed at Sharp's behest at the same September 7, 1988 "utilities meeting," see Gov. Ex. 383, at which environmental compliance at Waterway Estates, Barefoot Bay, and Carrollwood were agenda items. Gov. Ex. 70. Thus, the conclusion is all but inevitable that Sharp personally ruled out an immediately available compliance measure -- connecting to the North Ft. Myers system -- in favor of what he perceived to be the long-term financial interests of Florida Cities in upgrading the plant and relocating its outfall. Had the Waterway Estates wastewater been connected to the North Ft. Myers system in at that time, none of the Waterway Estates violations alleged in the Second Amended Complaint (which begin on October 1, 1988) would have occurred.

The plant upgrade and relocation of the outfall needed to be completed by November 1, 1989, the effective date of the new NPDES permit for Waterway Estates. Sladkus closely monitored the situation. Gov. Exs. 74, 76-78. He, in turn, was closely monitored by Sharp, right down to the approval of expenditures for such minor items as pumps. Gov. Ex. 109. By memo of October 2, 1989, Sharp writes Sladkus that "[w]e must have assurance from

Bob Gordon that the entire cost of the upgrade and expansion of this plant will be included as used and useful." Gov. Ex. 400. By cover memo dated June 5, 1990, Allen sends Sladkus conward number 940 requesting approval for the Waterway Estates improvements. Gov. Ex. 414. On June 11, 1990, Sladkus rejects the conward. Gov. Ex. 416. These additional documents suggest that delays in the upgrade and expansion necessary for compliance are also directly attributable to decisions made by Avatar officials.

Although Avatar knew in August 1986 that it needed to move the outfall from the canal to the River, the outfall was not moved until July 1991. When, in July 1991, it became clear that the Waterway Estates AWT improvements were behind schedule (making the NPDES permit violations inevitable), Allen wrote a memorandum directly to Sharp, with copies to Getman, Gordon, and Wilkov. Gov. Ex. 455.

CONCLUSION

The United States cites above to no fewer than 107 exhibits in evidence which support its case against Avatar Holdings, few of which could be the subjects of trial testimony because their authors and recipients pled the Fifth Amendment.[12] In short,

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[12] The United States necessarily selected for discussion in this brief the most enlightening documents. Other trial exhibits which were either authored or received by the key players and are relevant to Avatar Holdings' liability are as follows: Gov. Exs. 16, 17, 20, 28, 30, 33, 34, 48, 54, 71-73, 80, 90, 94, 117, 122, 124, 126, 137, 149, 156, 159, 176, 178, 190, 192, 196, 198-201, 203, 209, 212, 219, 222, 233, 235, 237, 247, 250, 251, 273, 287, 289, 307, 309, 312-314, 321, 351 368, 372, 378-380, 389, 395, 403, 423, 428, 429, 432, 434, 439, 441, 445, 447, 450, 462, 476, 484-487, 493, 495-497, 529, 530, 538, 545, 548, 559, 560, 568, 573, 579, 588, 589, 593.

this evidence establishes that Avatar Holdings' officers and directors were personally and intimately involved both in Florida Cities' environmental affairs and in acts and omissions relating to the violations at issue. While the officers and directors have the right to plead the Fifth Amendment, Avatar Holdings cannot be permitted to evade liability by being the beneficiary of the assertion of these individual rights. Adverse inferences therefore should be drawn from their failure to testify.

Finally, in view of this failure to testify, in order to more fully describe the evidence against Avatar Holdings, the United States requests that it be permitted to file a posttrial brief that devotes 15 pages to Avatar Holdings' liability, for a total of 40 pages, and proposed findings of fact and conclusions of law that devote 10 pages to Avatar Holdings' liability for a total of 20 pages. These page totals are equitable since they are the sum of the limits the Defendants have been permitted in the aggregate.

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General

By: _____

Dated: May 16, 1996

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing "United States' Memorandum in Support of Its Motion for Reconsideration of the Court's Ruling on Adverse Inferences and for Extension of Page Limit for Posttrial Submissions" were personally served (unless otherwise indicated) on the 16th day of May, 1996, to the following attorneys of record:

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RECEIVED
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GHB

Exhibit_____(GHB-89)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS INC., Defendants.	)	CIVIL ACTION NO.: 93-281-CIV-FTM-21

Defendant Florida Cities Water Company's Memorandum in Opposition To Plaintiff's Motion for Reconsideration

Florida Cities Water Company ("Florida Cities") hereby files its opposition to Plaintiff's Motion for Reconsideration of this Court's May 8, 1996 Orders. Plaintiff's motion should be denied on two grounds. First, the motion does not meet the appropriate standard for reconsideration as set forth by this Court in its Order of December 21, 1996. Second, Plaintiff's supporting memorandum sets forth no supporting case law regarding either a motion for reconsideration or the issue of whether adverse inferences should be drawn in this case. Plaintiff's filing reargues its purported "Offer of Proof" which was offered at trial and which is now being re-offered as an exhibit to its memorandum. Accordingly, Florida Cities respectfully requests that this Court deny Plaintiff's Motion for Reconsideration.

Legal Standard for Reconsideration

In order to prevail on a motion for reconsideration, a moving party must meet a high standard of review. Reconsideration would be appropriate:

> where, for example, the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension. A further basis for a motion to reconsider would be a controlling or significant change in the law or facts since the submission of the issue to the Court. Such problems rarely arise and the motion to reconsider should be equally rare. . . [A] motion for reconsideration does not provide an opportunity simply to reargue an issue the Court has once determined.

Order of December 21, 1995 at 3, citing Times Newspapers Ltd. v. Times Publishing Co., 1993 WL 120614 at *9 (M.D. Fla. Feb 16, 1993)(citations omitted).[1] In the present case. Plaintiff does not base any of its arguments for reconsideration upon the grounds set forth above. Instead, Plaintiff merely identifies those portions of the May 8 Order with which it disagrees and states the reasons why it believes that the Court's ruling was in error. Plaintiff's motion fails to meet the initial standard of proof recognized by this Court and therefore should be denied.

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[1] Florida Cities notes that Plaintiff's Motion for Reconsideration is the *sixth* such motion filed by the plaintiff in this action: United States' Memorandum in Opposition to Defendant's Motion for Extension of Time to File Objections to Magistrate's Order and Request for Reconsideration of Court's Order Granting That Motion (April 1995); United States' Memorandum in Support of Its Motion for Reconsideration of Court's Order on Amendment of Complaint (May 1995); United States Motion for Expedited Reconsideration of the Court's Ruling on Res Judicata and in Reply to Avatar Holdings' Motion for Clarification of the Court's Order (December 1995); United States' Trial Memorandum at page 18 urging the Court to "reconsider the standard its has articulated for imposing liability on a parent company under the Clean Water Act" (December 1995); United States' Memorandum in Support of its request that the Court draw adverse inferences from the refusal to testify at 3 "respectfully request[ing] the Court to reconsider [its ruling on the admissibility of the Wilkov deposition] (April 1996); and United States' Motion for Reconsideration of the Court's Ruling on Adverse Inferences and for Extension of Page Limits for Posttrial Submissions (May 1996).

Plaintiff's Motion Is Merely A Reargument of Plaintiff's Previous Memoranda

Plaintiff's memorandum is merely a reargument of its April 10, 1996 Memorandum in support of adverse inferences as well as its "Offer of Proof". Plaintiff has not presented any new or additional arguments which address whether this Court should draw adverse inferences. Instead, the memorandum repeats the same arguments presented in the "Offer of Proof."[2] Several passages and footnotes in the memorandum appear to have been copied from Plaintiff's previous memoranda with only minimal changes.[3] Plaintiff has neither identified any new supporting authority nor identified any error of misunderstanding or of

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[2] In fact, Plaintiff has now filed approximately 70 pages of argument on these issues, the 35 page "Offer of Proof", its 15 page responsive memorandum served on April 10, and this 20 page Motion for Reconsideration.

[3]To provide limited examples, compare the following paragraphs from the Plaintiff's Offer of Proof and Plaintiff's most recent Motion for Reconsideration:

- Offer of Proof, p. 2, paragraph beginning "A vast number of documents demonstrate[. . .]" with Motion for Reconsideration, p. 2, paragraph beginning "A vast number of documents demonstrate[. . .]";
- Offer of Proof, p. 8, paragraph beginning "At the time Avatar Holdings acquired Barefoot Bay and its treatment plant[. . .]" with Motion for Reconsideration, p. 3, paragraph beginning "When Avatar Holdings acquired Barefoot Bay and its treatment plant[. . .]";
- Offer of Proof, p. 12, paragraph beginning "Peter Sharp was personally and intimately involved in the decision-making[. . .]" with Motion for Reconsideration, p. 6, paragraph beginning "Peter Sharp remained personally involved in the decision-making[. . .]";
- Offer of Proof, p. 15, paragraph beginning "Sladkus gives Sharp another full report[. . .]" with Motion for Reconsideration, p. 8, paragraph beginning "Sladkus gives Sharp another full report[. . .]";
- Offer of Proof, p. 28, paragraph beginning "Eventually, Avatar did begin to study the alternatives." with Motion for Reconsideration, p. 15, paragraph beginning "Eventually, Avatar did begin to study the alternatives.";
- Offer of Proof, p. 31, paragraph beginning "It is clear from the evidence that Avatar was evaluating[. . .]" with Motion for Reconsideration, p. 17, paragraph beginning "It is clear from the evidence that Avatar was evaluating[. . .];
- Offer of Proof, fn. 28 with Motion for Reconsideration, fn. 12.

apprehension by this Court. Finally, Plaintiff has failed to set forth any changed facts or circumstances which would warrant reconsideration. Plaintiff should not now be allowed to conceal what is simple reargument in the guise of reconsideration.

Conclusion

Plaintiff has failed to identify any compelling reason why this Court should reconsider its May 8, 1996 Orders. In fact, Plaintiff's Memorandum ignores the basic requirements for reconsideration set forth by this Court in its previous rulings. Florida Cities respectfully requests that the Court deny Plaintiff's Motion for Reconsideration and retain the briefing schedule and page limitations as previously set forth.

Respectfully submitted,

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May 20, 1996

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of "Florida Cities Water Company's Memorandum in Opposition to Plaintiff's Motion for Reconsideration" has this May 21, 1996, has been served upon the following persons by U.S. mail, properly addressed and postage prepaid:

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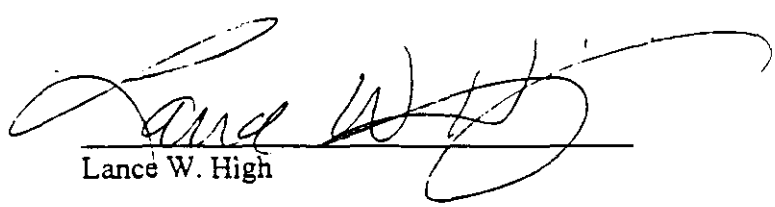

Lance W. High

Exhibit_____(GHB-90)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

Plaintiff,

V.

CASE NO. 93-281-CIV-FTM-21

AVATAR HOLDINGS, INC., and
FLORIDA CITIES WATER COMPANY,

Defendants.

DENNIS J. GETMAN
RECEIVED
JUN 03 1996
LEGAL DEPT.

ORDER

This cause comes before the Court on United States' Motion for Reconsideration of the Court's Ruling on Adverse Inferences and for Extension of Page Limits on Posttrial Submissions (Dkt. 320) and Defendants' responses (Dkts. 322 & 323) in opposition thereto.

I. Motion for Reconsideration

Plaintiff moves for reconsideration of the Court's May 8, 1996 Order (Dkt. 315) wherein the Court denied the Plaintiff's request that the Court draw adverse inferences from the refusal to testify by several of Defendants' officers and managers and held that the depositions of those persons are inadmissible. This is Plaintiff's sixth motion for reconsideration in this action. Plaintiff states that it seeks in the motion for reconsideration to summarize the documentary evidence set forth in its Offer of Proof. Defendants oppose Plaintiff's motion in part because Plaintiff has not submitted case law on the legal issue before the Court, the issue of whether inferences should be drawn, but rather Plaintiff reargues its Offer of Proof. Avatar Holdings

32.

points out that the Plaintiff failed to explain in its fifteen page memorandum in support of its position on adverse inferences (Dkt. 304) the relevance of any of the documents in the Offer of Proof. Defendants also oppose Plaintiff's motion on the basis that it does not satisfy the requirements for a proper motion for reconsideration. Defendants point out that a motion to reconsider is:

> appropriate where, for example, the court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the court by the parties, or has made an error not of reasoning but of apprehension. A further basis for a motion to reconsider would be a controlling or significant change in the law or facts since the submission of the issue to the court. Such problems rarely arise and the motion to reconsider should be equally rare. But a motion for reconsideration does not provide an opportunity simply to reargue an issue the Court has once determined.

Times Newspapers, Ltd. v. Times Publishing Co., 1993 WL 120614 at *9 (M.D. Fla. Feb. 16, 1993)(citations omitted).

At trial, on Monday, April 1, 1996, the Court determined, following discussion and agreement among the parties, that the briefing concerning the issue of adverse inferences would be bifurcated. The Defendants would first brief the issue of the admissibility of and the drawing of adverse inferences from the depositions wherein the witnesses invoked the Fifth Amendment. Secondly, the Court indicated that, if it finds in favor of the Government on those issues, the Defendants would then have the opportunity to brief what inferences should be drawn from the documents and to respond to the conclusions in the Offer of Proof and that the Plaintiff would have an opportunity to respond.[1]

[1]Mr. Bullock, for Florida Cities, stated at trial that it sought the opportunity to brief the issue of whether such an offer is actually an offer of proof and is permissible in that form under the applicable rules. Mr. Hird, for Avatar Holdings, indicated that the Offer of Proof appeared "to be less drawing of adverse inferences from lack of testimony questions, but more the Government's interpretation of the exhibits that it has entered into evidence, and in some (continued...)

On May 8, 1996, the Court entered its Order holding that in order to draw adverse inferences in this case, there must be some other evidence to show that an adverse inference is appropriate and finding that Plaintiff had not cited in its memorandum to supporting evidence. The Court also denied the drawing of adverse inferences on the basis of Wilkov's having filed a lawsuit against Avatar Holdings, on the basis of Gordon, Elder and Reeves not being Avatar Holdings' employees, and on the basis of Getman's position as corporate counsel creating an attorney/client privilege concern. Thus, the Court held a hard, fast line to the briefing allowances permitted at trial and found that the Plaintiff had not shown any evidentiary support for its position in its memorandum in support of adverse inferences.[2] However, as the Court has agreed to the rule asserted by Plaintiff that there must be other evidence in support of the drawing of inferences, the Court has considered Plaintiff's motion for reconsideration and the documentary evidence referred to in the memorandum in support of the motion for reconsideration. The Court finds that said memorandum appears to be a memorandum in support of Avatar Holding's liability rather than in support of the proposition that, based upon the evidence, the drawing of adverse inferences is appropriate or warranted. Plaintiff has not explained how the documentary evidence is relevant to the issue of whether drawing inferences

[1](...continued)
instances exhibits which have not been entered into evidence." On April 5, 1996, the Court stated that if it accepted the Plaintiff's Offer of Proof, the Defendants would be given an opportunity to respond.

[2]Avatar Holdings asserts that the Plaintiff cannot correct the deficiency in its memorandum by claiming that the Offer of Proof is incorporated by reference as an exhibit to its brief under Rule 10 (c), Federal Rules of Civil Procedure. Avatar Holdings points out that Rule 10 (c) allows the incorporation of statements in a pleading by reference into pleadings or in any motion and that Rule 7 (a), Federal Rules of Civil Procedure, defines "pleadings" to include a complaint, an answer, and a reply. Avatar Holding therefore asserts that the Offer of Proof is not a "pleading." The Court agrees that the Plaintiff's incorporation by reference is procedurally improper under the Federal Rules of Civil Procedure. Further, the incorporation by reference is improper in that it effectively violates the page limitations on the briefs and the determination made at trial that the issue of what conclusions would be drawn from the Offer of Proof would be the second part of the bifurcated briefing.

AO 72A
(Rev. 8/82)

is proper. Additionally, the memorandum intermingles evidence of the activities of Peter Sharp, who was not deposed and did not invoke the Fifth Amendment because he was deceased. As conceded by Plaintiff at trial on Thursday, March 28, 1996, with respect to Sharp, the Plaintiff seeks to draw some inference, as opposed to an adverse inference, from the documentary evidence. Thus, the intermingling of evidence pertaining to Sharp's activities confuses the issue of whether the drawing of adverse inferences is appropriate. For these reasons, the Court will not recede from its May 8, 1996 Order.

II. Request for Extension of Page Limits

Plaintiff first requests that it be permitted to file a posttrial brief that devotes 15 pages to Avatar Holdings' liability, for a total of 40 pages, as opposed to the 25 pages permitted by the Court's Order (Dkt. 316). Plaintiff also requests that it be permitted to file proposed findings of fact and conclusions of law that devote 10 pages to Avatar Holdings' liability, for a total of 20 pages, as opposed to the 10 pages permitted by the Court's Order. Avatar Holdings forcefully opposes Plaintiff's requests for extensions. The Court will grant the Plaintiff's requests in part as provided below.

Upon consideration of the foregoing, it is hereby **ORDERED and ADJUDGED** that United States' Motion for Reconsideration of the Court's Ruling on Adverse Inferences and for Extension of Page Limits on Posttrial Submissions (Dkt. 320) is **GRANTED IN PART and DENIED IN PART**. The motion is **GRANTED** insofar as Plaintiff shall be permitted to file a posttrial brief that is not to exceed thirty five (35) pages and findings of fact and conclusions of law not to exceed eighteen (18) pages. The motion is otherwise **DENIED**.

AO 72A
(Rev. 8/82)

DONE AND ORDERED, at Tampa, Florida, this 31st day of May, 1996.

RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of record

AO 72A
(Rev. 8/82)

Exhibit_____(GHB-91)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

RECEIVED
JUL 17 1996
GHB

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' CITATION OF ADDITIONAL AUTHORITY

The United States respectfully notifies the Court of two relevant cases which have been decided since trial of the instant case, United States v. Dean Dairy Products Company, CV-94-0621 (M.D. Penn., July 10, 1996), and In re: Borough of Ridgway, Pennsylvania, CWA Appeal No. 95-2 (EPA Env. Appeals Board, May 30, 1996), copies of which are attached hereto for the convenience of the Court and counsel.

Dean Dairy, the only other Clean Water Act NPDES civil enforcement action tried by the United States thus far in 1996, is highly relevant to the calculation of the civil penalty in the instant case. Faced with facts and issues strikingly similar to those in the instant case in a number of respects, the court in Dean Dairy imposed a civil penalty of $4,031,000. The decision contains instructive and relevant discussion of the application of the Clean Water Act penalty factors relating to the (1) seriousness and history of the violations, including a focus on the number and type of the violations as well as environmental harm; (2) economic impact of the penalty, including the impact on the parent company;

and (3) good faith efforts to comply.

In Dean Dairy, the court found that the violations were serious on the basis of sheer number (2,360) and continuity (six years), notwithstanding that the discharges were not toxic, while emphasizing that actual harm to the environment need not be proven to establish that substantial penalties are appropriate, see slip op. at 16-17. The court also found that the defendant's delay in committing itself to a serious solution to its violations reflected poorly on its good faith, id. at 19, and that in assessing the economic impact of the penalty, the court should look to the parent's finances because of its close interconnection with the subsidiary, id. at 19-20.[1]

Borough of Ridgway is relevant to the unpermitted discharge violations at Barefoot Bay and Carrollwood, which the Court held in its November 22, 1995 order are barred by res judicata. In Borough of Ridgway, the Environmental Appeals Board of the EPA reversed the decision of its administrative law judge first called to the Court's attention by Florida Cities in its October 31, 1995 "Citation of Dispositive Authority." Relying in part on Manning v. City of Auburn, 953 F.2d 1355, 1360 (11th Cir. 1992) (cited by the United States in its December 19, 1995 memorandum in support of its motion for reconsideration on this issue), the Board held that EPA "cannot possibly be held ... to have forfeited its authority to

[1] While the court imposed a penalty equal to twice the economic benefit of noncompliance, it noted that such an approach would be inappropriate in cases in which the violator receives little or no economic benefit. Id. at 21 and n. 4.

penalize [the defendant] for NPDES permit violations" which arose after the filing of the complaint. Borough of Ridgway at 15-16.

The United States would be pleased to fully brief either or both of these decisions and their applicability to the instant case if the Court so pleases.[2]

DATED: July 16, 1996

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

By: _____

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[2] In deciding upon the penalty in the instant case, the Court may also find helpful the United States Court of Appeals for the Fifth Circuit's recent discussion of the Clean Water Act penalty in United States v. Marine Shale Processors, 81 F.3d 1329 at 1335-39 (5th Cir. 1996). The appellate court vacated and remanded the $3,000,000 civil penalty in that case as a result of what it characterized as an insignificant but nonetheless clearly erroneous finding of fact which it concluded warranted recalculation of the penalty. In so doing, the circuit court suggested that the recalculation of the penalty, which it noted represented less than eight per cent of the $45,000,000 statutory maximum, was at the defendant's peril. Id. at 1337.

CERTIFICATE OF SERVICE

I certify that I caused copies of the United States' Citation of Additional Authority to be served by U.S. Mail on July 16, 1996 on the following attorneys of record:

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Brenda Morris

Under Plead 7-10-96

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	CIVIL ACTION NO. 1:CV-94-0621
Plaintiff	:	
v.	:	
THE MUNICIPAL AUTHORITY OF UNION TOWNSHIP; and DEAN DAIRY PRODUCTS COMPANY, INC. d/b/a FAIRMONT PRODUCTS,	:	
Defendants	:	

FILED
HARRISBURG, PA
JUL 1 1996
MARY E. D'ANDREA, CLERK
Per

M E M O R A N D U M

I. Introduction

On December 14, 1995, the court awarded summary judgment to the United States on the question of Fairmont Products' liability under the Federal Water Pollution Control Act ("the Clean Water Act" or "the Act"), 33 U.S.C. § 1251 et seq., for 1,754 violations of its Industrial User Wastewater Discharge permit ("IU permit"), and 79 instances of interference with the Municipal Authority of Union Township's Publicly Owned Treatment Works ("POTW"). The United States seeks the imposition of a civil penalty under 33 U.S.C. § 1319(d) for Fairmont's violations of the Act. Section 1319(d) provides that the violator of a permit issued pursuant to the Act shall be subject to a civil penalty not to exceed $25,000 per day for each violation. This penalty

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provision further states that in assessing the penalty, the court shall consider the following factors:

> [T]he seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, and history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

33 U.S.C. § 1319(d).

The court conducted a trial on the penalty issue on January 29 to 31, 1996. The parties have submitted extensive post-trial proposed findings of fact, and the issue is now ripe for disposition. Also ripe for disposition are motions in limine filed by both Fairmont and the United States.

II. Factual Determinations

A. Background

Dean Foods, Inc. ("Dean Foods") is a national corporation in the business of processing and distributing dairy and other food products, and is the largest fluid milk processor in the United States. On June 7, 1987, Dean Foods purchased Fairmont Products through a 100% stock purchase, and in so doing it acquired Fairmont's dairy plant located in Belleville, Pennsylvania. In April 1992, Dean Foods merged the Fairmont plant with Dean Foods of Pennsylvania. The newly formed entity, Dean Dairy Products, Inc. ("Dean Dairy"), is a wholly owned subsidiary

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of Dean Foods, and includes the Fairmont plant and another dairy plant located in Sharpsville, Pennsylvania.

Robert Horton, who was assistant plant manager at Fairmont prior to the stock purchase, was made plant manager shortly after Dean Foods acquired Fairmont. Horton was the Fairmont plant manager until approximately October 1991, when Dave Koontz, a Dean Foods employee since 1981, was made plant manager. Koontz remains Fairmont's plant manager.

In 1974, the predecessor company to Fairmont, Abbott's dairy, entered into an agreement with Union Township to construct a POTW to be used by the dairy plant for wastewater treatment. Pursuant to the agreement, the plant owner would pay a monthly user fee to the POTW based upon the level of flow, Biological Oxygen Demand ("BOD") and Total Suspended Solids ("TSS") discharged into the POTW. The wastewater stream from the plant discharged into the POTW resulted from equipment rinsing, product spills and sewage at the plant. Fairmont continued this use of the POTW after Dean Foods acquired it.

In 1983, the United States Environmental Protection Agency ("EPA") required Union Township to develop a pretreatment program to regulate the discharge of industrial users of the POTW, including the Fairmont plant. The EPA approved Union Township's pretreatment program in October 1984. In June 1989, pursuant to the pretreatment program, Union Township issued an IU permit to the Fairmont plant. The IU permit limits the BOD, TSS, pH and

flow which Fairmont can discharge into the POTW; the permit has monthly average limits and daily maximum limits for TSS and BOD. The IU permit requires Fairmont to submit discharge monitoring reports to Union Township on a monthly basis.

B. History And Seriousness Of Violations

The court has ruled that Fairmont is liable for 1,754 violations of its IU permit and 79 instances of interference with Union Township's POTW between July 1989 and April 1994, when this suit was filed. Fairmont continued to violate its IU permit even after this action was commenced, however. When all of Fairmont's IU permit violations are aggregated between July 1989 and April 1995, at which point Fairmont brought its wastewater problems under control, Fairmont committed approximately 2,360 violations.

Between July 1989 and February 1995, Fairmont violated its IU permit with respect to either BOD or TSS monthly average limits in 54 of 68 months. And, in virtually all months in which there was no monthly average TSS or BOD violation, Fairmont still violated daily maximum limits. On average, the violations for which the court has found Fairmont liable exceeded its IU permit limit by roughly the following percentages: 30% over monthly average TSS limit; 34% over daily maximum TSS limit; 21% over monthly average BOD limit; 23% over daily maximum BOD limit. In eight months Fairmont exceeded its monthly average TSS limit by over 100%.

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BOD and TSS are "conventional" and not "toxic" pollutants. While Union Township's POTW was designed to treat these pollutants, among others, excessive quantities of BOD and TSS can cause interference with a POTW and can damage waterways.

Union Township's POTW discharges into the Kishacoquillas Creek ("the Creek"). As of 1984, it was evident that the POTW was degrading the Creek, and by 1990, poor substrate conditions resulting from solids deposition and bacterial growths were directly affecting the benthic community, resulting in greater numbers of pollution-tolerant taxa. In 1992, the Creek was found to be further degraded by solids deposition, nutrient enrichment and organic overloading. The organic overloading and the substrate degradation was limiting the diversity of the benthic community and increasing the density of a few pollution-tolerant taxa. This degradation was caused by the discharge from Union Township's POTW. Because of this environmental damage to the Creek, the Pennsylvania Fish and Boat Commission ceased stocking the Creek in the vicinity of the POTW's discharge point. The cessation of the fish stocking program in 1993 removed 3,200 trout from 3.8 miles of the Creek.

When the court held Fairmont liable for 79 instances of interference with Union's POTW, that determination entailed a finding that in each instance Fairmont inhibited or disrupted Union Township's POTW and in so doing contributed to a violation of the POTW's National Pollutant Discharge Elimination System

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("NPDES") permit. Because Union Township's NPDES permit violations resulted in the discharge of excess pollutants into the Creek, Fairmont contributed to the degradation of the Creek by contributing to the NPDES permit violations. However, neither party presented evidence which permits an approximation of the degree of Fairmont's responsibility for the degradation of the Creek.

C. Good Faith Efforts To Comply

Because the IU permit requires that Dean submit monitoring reports to the POTW on a monthly basis, Fairmont was aware of its violations from the time of its first monitoring report in July 1989. Mr. Koontz, Fairmont's plant manager since October 1991, acknowledged that the plant manager who preceded him at Fairmont "did not address the violations seriously." The record supports Koontz' observation that during the first two years and three months of the violations no meaningful action was taken by Fairmont to remedy the situation. Indeed, during this period Fairmont showed no concern whatsoever with its chronic violation of the Clean Water Act.

Fairmont's first significant effort to address some of its permit exceedance problems was to install a flow equalization tank and reroute certain piping into the tank. In November 1991, almost immediately after Mr. Koontz was made plant manager, he asked Dean Foods officials to approve funds for the flow

equalization tank in Fairmont's capital budget for the fiscal year beginning June 1992. Funding for the project was approved by Dean Foods in March 1992. Construction started in June 1992 and was competed in October 1992 at a cost of approximately $86,000. Thus, Fairmont's first serious response to its wastewater problems became effective approximately three years and three months after Fairmont learned of the problem.

It is clear that the flow equalization tank was intended principally to address Fairmont's flow violations, which were persistent prior to installation of the tank. While it was believed by certain individuals at Fairmont that the tank may cause reductions in BOD and TSS, there was not a serious expectation by Fairmont that the tank would resolve its BOD and TSS permit exceedances. This is not surprising with respect to BOD since Fairmont's violations of its monthly average BOD limit did not begin until February 1992, after Koontz had requested funding for the flow equalization tank. However, the TSS violations were a consistent problem beginning in June 1989, and, as of October 1992, when the flow equalization tank came on line, Fairmont still did not have a specific plan to ensure compliance with their IU permit with respect to either BOD or TSS. The flow equalization tank resolved Fairmont's flow violations, as it was intended to do, but it did not contribute to any reduction in BOD or TSS exceedances.

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Between February and April 1993, Fairmont retained several consulting companies to analyze its IU permit exceedances and recommend remedial action. Fairmont implemented some but not all of the consultants' recommendations. The most significant recommendation implemented was the diversion into a storage tank of certain materials which had previously been discharged to the POTW; this material was sold to farmers for use as hog feed. The implementation of the consultants' recommendations did not reduce Fairmont's BOD and TSS levels.

Between 1991 and 1994, Fairmont made the following additional efforts to address its BOD and TSS violations: (1) reduced water usage in several of its cleaning systems; (2) educated employees regarding potential sources of BOD and TSS in the plant and the need to eliminate these sources, and requested employee participation in addressing the problem; (3) attempted to reduce product leaks and spills wherever possible, and to encourage reporting of product spills; (4) looked for equipment, which it considered economically feasible, to reduce solids and BOD loadings in the waste drains. These efforts did not reduce Fairmont's BOD and TSS exceedances.

The final step taken by Fairmont to address its BOD and TSS violations, and the one which proved to be successful, was to install a pretreatment system. Fairmont began to consider installing a pretreatment system sometime prior to January 1992. The court believes that it was evident to Fairmont by this time

that a pretreatment system was an option very likely to resolve its IU permit violations -- but it was also far more costly than any of Fairmont's efforts described above. After much deliberation, Fairmont reached a final decision to install a pretreatment system in approximately March or April of 1994. It started construction immediately and the facility became operational in April 1995. Since that time Fairmont has been in compliance with its IU permit with only a few exceptions.

Some of Fairmont's delay in committing to the installation of the pretreatment system resulted from its uncertainty about whether it wished to participate in a planned expansion of Union Township's POTW, and about how such an expansion would affect its ability to comply with its IU permit. However, it is clear that the principal and overriding cause of the passage of several years between the time that Fairmont began to consider pretreatment and when it firmly and finally decided to commit to it was the system's high cost. The pretreatment facility was installed at a cost of approximately $865,000.

During the nearly six year period in which the violations occurred, Fairmont could have achieved compliance with its IU permit by reducing its production volume, and it was aware of this fact. Instead, while Fairmont delayed committing itself to a serious solution to its violations, it continued to produce at a volume which it recognized was very likely to generate levels of BOD and TSS beyond that allowed by its IU permit. Fairmont

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chose not to reduce production volume because it viewed the concomitant reduction in earnings as too high a price to pay for compliance with the Clean Water Act. Fairmont vacillated between operating at a profit and operating at a loss during the period of the violations and Mr. Koontz claims to have believed that Dean Foods would close the plant if he reduced volume and profits in order to achieve compliance with the IU permit.

D. Economic Benefit To Violator

The parties stipulate that Fairmont did not realize any economic benefit from delaying the capital investments necessary to achieve compliance with its IU permit. Fairmont did, however, realize an economic benefit during the period of the violations by producing at a volume above that which would have allowed it to operate within its IU permit. Fairmont itself concluded, in assessing its wastewater treatment options, that to comply with its IU permit by reducing volume would have caused a reduction in earnings of $417,000 in its 1994 fiscal year. Production volume at Fairmont was higher in each year from 1989 to 1993 than it was in 1994, and, therefore, it is reasonable to believe that Fairmont gained at least $417,000 in earnings annually during the period of its violations. On this basis, the court concludes that between July 1989 and April 1994, Fairmont gained approximately $2,015,500 by violating its IU permit.

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E. Economic Impact Of Penalty

As will be explained in the legal discussion below, Dean Foods is the corporate entity whose assets should be examined to determine the economic impact of the penalty on the violator. The following factual findings support this conclusion.

Dean Dairy is a wholly owned subsidiary of Dean Foods. Dean Foods receives the profits of its subsidiaries, such as Dean Dairy and its Fairmont plant. Dean Foods then provides its subsidiaries with funding for expenses through annual capital budgets. Therefore, Dean Foods retains the ultimate decision making authority regarding whether and when capital investments will be made for equipment necessary to allow Fairmont to operate within its IU permit. For example, the expenditures for the equalization tank, the repiping and the pretreatment system all required approval and appropriations from Dean Foods through the capital budget process. Dean Foods listed expenditures for the pretreatment system as a major capital improvement in its 10(k) report for its 1995 fiscal year.

Dean Foods was closely involved with Fairmont in considering the alternatives available to address Fairmont's wastewater problems. This involvement extended to the point of Dean Foods officials attending numerous Union Township meetings on the issue. It was abundantly clear to both Mr. Koontz and Dean Foods officials that Dean Foods would make the final decision of whether Fairmont would participate in Union Township's plans to

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expand its POTW, and, if so, to what degree, and whether Fairmont would install a pretreatment facility. Mr. Koontz has acknowledged the fact that he was taking instruction from his superiors at Dean Foods on this matter. Dean Foods had complete control over whether and when Fairmont would come into compliance with its IU permit.

For its 1995 fiscal year, Dean Foods reported approximately $519,000,000 in assets and $304,000,000 in liabilities. Dean Foods' assets therefore exceed its liabilities for this period by approximately $215,000,000. The magnitude of fine which the court believes to be warranted in this case can be easily absorbed by Dean Foods without threatening its solvency.

III. Conclusions Of Law

A. General Framework

The Clean Water Act's penalty provision is aimed at deterrence with respect to both the violator's future conduct (specific deterrence) and the general population regulated by the Act (general deterrence). Student Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc., 19 Envtl. L. Rep. 20903, 20904, 1989 WL 159629, *3 (D.N.J. April 6, 1989) (citing Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd., 611 F. Supp. 1542, 1557 (E.D. Va. 1985) (subsequent history omitted)). The goal of deterrence requires that a penalty have two components. First, it must encompass the economic benefit of noncompliance to ensure

that the violator does not profit from its violation of the law. Second, the penalty must include a punitive component in the form of a sum in addition to economic benefit which accounts for the degree of seriousness and/or willfulness of the violations. Without the second component, those regulated by the Clean Water Act would understand that they have nothing to lose by violating it. Id. The court will apply this framework to the findings of fact set forth above.

In adopting this approach, the court rejects the United States' contention that the proper methodology for arriving at a penalty requires that the court begin at the statutory maximum ($45,825,000 in this case), and move down from that figure to the degree warranted by mitigating factors. The United States relies upon Atlantic States Legal Foundation v. Tyson Foods, 897 F.2d 1128, 1142 (11th Cir. 1990), as support for this contention. While the court agrees with United States' reading of Tyson, it disagrees with Tyson, and prefers instead to begin with economic gain and add a sum to that figure guided by the other § 1319(d) factors and the need for punishment and deterrence. This method of calculating the civil penalty in a Clear Water Act case is clearly the majority view. See supra Hercules and Gwaltney; see also Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc., 40 ERC 1917, 1995 WL 461252, *16 (D.N.J. March 9, 1995) (economic benefit is the "starting point" and the other § 1319(d) factors are used to increase that amount); Student

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Public Interest Research Group of New Jersey, Inc. v. Monsanto Company, 18 Envtl. L. Rep. 20999, 1988 WL 156691, *16 (D.N.J. March 24, 1988) (specifically rejecting the "top down" method).

B. Economic Benefit

As stated above, the court estimates that Fairmont benefited by $2,015,500 as a result of its violations of the Act. Fairmont insists, however, that this figure is not an acceptable measure of economic benefit because: (1) it is speculative; (2) the EPA's Clean Water Act Settlement Policy does not recognize this theory of economic benefit; and (3) it represents a potential reduction in "revenue" and not "profit."

The court rejects all three arguments. First, if a violator of the Act can achieve compliance with the Act by reducing production volume, it is incumbent upon the violator to do so. Tyson Foods, 897 F.2d at 1141-42. While the court acknowledges that its determination of Fairmont's economic benefit is somewhat speculative, it is in the nature of this factor that its quantification will be imprecise. Hercules, 19 Envtl. L. Rep. at 20905, 1995 WL 159629 at *5 (citing Gwaltney, 611 F. Supp. at 1558). Nevertheless, the court must endeavor to reach a " 'rational estimate of [the violator's] economic benefit, resolving uncertainties in favor of a higher estimate.' " Id. (quoting Gwaltney, 611 F. Supp. at 1558) (emphasis added). The estimate "must encompass every benefit that defendants received

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from violation of the law." United States v. Mac's Muffler Shop, Inc., 25 ERC 1369, 1986 WL 15443, *8 (N.D. Ga. Nov. 4, 1986)(emphasis added). It would eviscerate the Act to allow violators to escape civil penalties on the ground that such penalties cannot be calculated with precision. Moreover, Fairmont itself produced the figure which the court is relying upon to estimate economic gain when it weighed the option of reducing production volume as a means of complying with its IU permit. This fact mitigates the uncertainty in calculating economic benefit in this case.

The court is also unpersuaded by the fact that the EPA's settlement policy does not specifically recognize this theory of economic benefit. The court believes that its approach is faithful to the plain meaning of § 1319(d) and is consistent with the authority cited above. The court is, of course, not bound by EPA settlement policy.

Finally, Defendant asserts, in conclusory fashion, that the $417,000 figure represents a potential annual loss in "revenue" and not "profit" and therefore is not an appropriate basis for measuring economic gain. In fact, the Fairmont document at issue states that the "plant effect" of reducing volume to achieve compliance with the Act would be a reduction in "projected earnings" of $417,000. This appears to the court to be a sensible basis to estimate Fairmont's net economic gain from noncompliance and Defendant proposes no reason to believe otherwise.

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C. Seriousness And History Of Violations

In evaluating the seriousness and history of Fairmont's violations, the court will first consider the number, frequency and degree of the violations. Student Public Interest Research Group of New Jersey, Inc. v. Monsanto Company, 18 Envtl. L. Rep. 20999, 1988 WL 156691, *15 (D.N.J. March 24, 1988). In doing so, the court may weigh all of Fairmont's violations in the record, not just those regarding which liability has been determined. Hercules, 19 Envtl. L. Rep. at 20904, 1989 WL 159629 at *4; Mac's Muffler Shop, 25 ERC 1369, 1986 WL 15443 at *11 n.1.[1] In addition, the court must consider the harm to the environment caused by the violations. Hercules, 19 Envtl. L. Rep. at 20905, 1989 WL 159629 at *6-7. It must be emphasized, however, that because actual harm to the environment is by nature difficult and sometimes impossible to demonstrate, it need not be proven to establish that substantial penalties are appropriate in a Clean Water Act case. Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc., 40 ERC 1917, 1995 WL 461252, *17 (D.N.J. March 9, 1995)(collecting cases).

The instant case involves a very large number of violations -- the court has ruled that Fairmont is liable for 1,754 violations of its IU permit with respect to BOD and TSS, and has found that Fairmont committed a total of approximately 2,360

1. Accordingly, the court will deny Fairmont's motion in limine to exclude evidence of its IU permit violations after April 1994.

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violations of its IU permit between July 1989 and April 1995. These violations were essentially continuous for nearly six years. In view of the large number of Fairmont's IU permit exceedances, and their continuity over such a lengthy period, the court considers the violations to be serious. This seriousness is magnified by the fact that the violations contributed to tangible degradation of Kishacoquillas Creek.[2]

The court acknowledges, at the same time, that this case is not among the most egregious when compared with reported Clean Water Act cases. It involves conventional and not toxic pollutants. While conventional pollutants such as TSS and BOD are regulated by the Act and can cause serious damage to waterways, it is appropriate to consider the toxic/conventional pollutant distinction when weighing the seriousness of a permit violation. See, e.g., PIRG v. Powell Duffryn Terminals, Inc., 720 F. Supp.

2. Fairmont has made a motion in limine to exclude evidence that discharge from the POTW damaged the Creek. Fairmont argues that: (1) any damage to the Creek resulting from Union Township's violation of its NPDES permit has already been resolved by a settlement between Union Township and the Pennsylvania Department of Environmental Protection ("PDEP"); and (2) the United States failed to produce certain evidence of the condition of the Creek within the discovery deadline. With respect to the first argument, the court finds the settlement between Union Township and PDEP to be irrelevant to Fairmont's liability. With respect to the second argument, it is inconsequential because there is sufficient evidence in the record which was timely produced to support the court's conclusion that discharge from Union Township's POTW degraded the Creek. Accordingly, the first part of the motion in limine will be denied and the second part will be deemed irrelevant and dismissed.

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1158, 1161 (D.N.J. 1989). Toxic pollutants generally pose a greater threat to human life. Id.

Furthermore, the degree of the exceedances in this case -- 30% over monthly average TSS limit and 21% over monthly average BOD limit -- appear to be lower than in many cases cited by the parties. See, e.g., Duffryn, 720 F. Supp. at 1161 (majority of violations exceeded permit by over 200%; approximately 1/3 of violations exceeded permit by 400%; substantial number of violations exceeded permit by over 1000%); Hercules, 19 Envtl. L. Rep. at 20906, 1989 WL 159629 at *8 (majority of violations exceeded permit by over 140%; approximately 1/4 of violations exceeded permit by over 300%). The court does not intend to minimize the degree of Fairmont's violations, and notes, again, that in eight months Fairmont exceeded its monthly average TSS limit by over 100%. The court nonetheless believes that the appropriate penalty is this case will be lower than if, for example, Fairmont's average violations for both TSS and BOD were over 100%.

D. Good Faith/Willfulness Of Violations

For a period of approximately two years and three months following the issuance of Fairmont's IU permit in July 1989, Fairmont knowingly exceeded its IU permit limits and was essentially indifferent to its violations of the Clean Water Act. After Mr. Koontz arrived at Fairmont in October 1991, Fairmont

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engaged in investigation, deliberation, planning and piecemeal efforts to deal with the problem for approximately another two and one-half years before it undertook the costly course of action necessary to come to terms with the violations -- that is, the installation of a pretreatment facility. While Fairmont delayed committing itself to a serious solution to its violations, it continued to produce at a volume which it recognized was very likely to generate levels of BOD and TSS beyond that allowed by its IU permit. Although Mr. Koontz may have believed that reducing production volume could threaten the viability of Fairmont, the observance of laws duly enacted by Congress is not left to the discretion of a regulated entity, after consultation with its accountant. Fairmont's lengthy delay in meaningfully confronting its IU permit violations, and its unwillingness to reduce production volume until its wastewater problem was under control, do not speak highly of its good faith in this matter.

E. Economic Impact On The Violator

In assessing the economic impact of the penalty, the court will look to the finances of Dean Foods because it is so closely interconnected with Fairmont for purposes of the instant suit that the two should be treated as a single entity. Public Interest Research Group of New Jersey, Inc. v. Top North Metal Finishing Co., Inc., 29 ERC 1022, 1988 WL 155725, *7 (D.N.J. Dec. 23, 1988); see also Magnesium Elektron, 40 ERC 1917, 1995 WL

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461252 at *17 (court looked to assets of parent corporation of violator to determine economic impact of penalty when economic benefit of noncompliance was transferred to parent corporation). "[T]he piercing of the corporate veil . . . is a 'tool of equity that is appropriately utilized when the court must prevent fraud, illegality or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from pubic liability for a crime.' " Carpenters Health and Welfare Fund of Philadelphia and Vicinity v. Kenneth R. Ambrose, Inc., 727 F.2d 279, 284 (3d Cir. 1983)(quoting Publicker Industries, Inc. v. Roman Ceramics Corp., 603 F.2d 1065, 1069 (3d Cir. 1979))(brackets and internal quotations omitted). Here, Dean Foods was closely involved with Fairmont in evaluating the options for resolving Fairmont's wastewater problems, and it had complete control over whether and when Fairmont would achieve compliance with its ND permit. At the same time, Dean Foods was siphoning off profits from Fairmont. It would constitute a serious injustice to allow Dean Foods to profit from Fairmont's violations of the Act, which occurred while Dean Foods retained control over Fairmont's wastewater problem and failed to take timely remedial action, and at the same allow Dean Foods to escape liability for the violations. Judicial sanction of such an arrangement would surely encourage violation of the Clean Water Act.[1]

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1. Accordingly, Fairmont's motion in limine to exclude evidence of Dean Foods' financial condition will be denied.

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F. Aggregate Penalty

When determining what sum should be added to the violator's economic gain to serve the function of punishment and general deterrence, the court must bear in mind that "[i]f the regulated community perceives that violations of the law are treated lightly, the government's regulatory program is subverted." Mac's Muffler Shop, 25 ERC 1369, 1986 WL 15443 at *10. The penalty must be " 'high enough to insure that polluters cannot simply absorb the penalty as a cost of doing business.' " Natural Resources Defense Counsel v. Texaco, 800 F. Supp. 1, 27 (D. Del. 1992)(quoting Duffy, 720 F. Supp. at 1166). This judgment must be made on a case by case basis. Under the particular circumstances of this case, the court believes that the ends of punishment and deterrence will be served if the penalty for noncompliance, in addition to the loss of economic benefit, is an additional sum equal to the economic benefit from noncompliance. With this approach it is hoped that the potential economic gain which would tempt a regulated entity to violate the Clean Water Act, when converted into a potential economic loss of the same magnitude, will inspire fidelity to the law.[4]

4. Of course, in cases in which the violator receives little or no economic benefit from noncompliance, this approach to assessing the civil penalty will be inappropriate.

Accordingly, the court will impose a civil penalty of $4,031,000. An appropriate order will be issued.

SYLVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

Dated: July 10, 1996.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	CIVIL ACTION NO. 1:CV-94-0621
Plaintiff	:	
v.	:	
THE MUNICIPAL AUTHORITY OF UNION TOWNSHIP; and DEAN DAIRY PRODUCTS COMPANY, INC. d/b/a FAIRMONT PRODUCTS,	:	
Defendants	:	

FILED
HARRISBURG, PA
JUL 1 1996
MARY E. D'ANDREA, CLERK
Per _____

O R D E R

In accordance with the accompanying memorandum, IT IS HEREBY ORDERED THAT:

1. The Clerk of Court is directed to enter judgment for the United States and against Fairmont in the amount of $4,031,000.

2. Fairmont's motion in limine to exclude evidence of its IT permit violations after April 1994 is denied.

3. Fairmont's motion in limine to exclude all evidence of damage to the Kishacoquillas Creek is denied.

4. Fairmont's motion in limine to exclude evidence of Dean Foods' financial condition is denied.

5. The parties' motions in limine are otherwise deemed irrelevant and dismissed.

6. The Clerk of Court is directed to close the file.

SYLVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

Dated: July 10, 1996.

(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the Environmental Administrative Decisions (E.A.D.). Readers are requested to notify the Environmental Appeals Board, U.S. Environmental Protection Agency, Washington, D.C. 20460, of any typographical or other formal errors, in order that corrections may be made before publication.

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	
Borough of Ridgway, Pennsylvania	CWA Appeal No. 95-2
Docket No. CWA-III-141	

[Decided May 30, 1996]

REMAND ORDER

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.

BOROUGH OF RIDGWAY, PENNSYLVANIA

CWA Appeal No. 95-2

REMAND ORDER

Decided May 30, 1996

Syllabus

The U.S. Environmental Protection Agency, Region III, filed two separate Clean Water Act administrative enforcement actions against the Borough of Ridgway, Pennsylvania, the first in July 1994 and the second in January 1995. Each action sought penalties based on alleged violations of discharge limitations in Ridgway's National Pollutant Discharge Elimination System permit, including the limitations governing carbonaceous biochemical oxygen demand ($CBOD_5$) and total suspended solids (TSS). In the first action, the violations charged were alleged to have occurred during January, February, March, and April 1994; in the second action, the violations charged were alleged to have occurred during May, June, July, and August 1994. Each action was filed as a Class I administrative penalty action under Clean Water Act § 309(g)(2)(A), and in each action the penalty proposed to be assessed was less than the $25,000 statutory maximum penalty that EPA is authorized to assess through the Class I procedures. When aggregated, however, the penalties proposed to be assessed against Ridgway in the two actions exceeded $25,000. Ridgway objected that, as a matter of law, the Region's two actions against it arose from a single "transaction" that could not be arbitrarily subdivided for purposes of satisfying the Class I penalty cap. Ridgway argued that the second action filed against it produced a violation of the cap and should therefore be dismissed.

On cross-motions for summary determination and for accelerated recommended decision filed in the second action, the Presiding Officer agreed with Ridgway and recommended that the Region's second complaint be withdrawn with prejudice. He opined that a permittee's continuous noncompliance with a particular discharge limitation, such as a limitation governing CBOD, or TSS, represents a single "transaction" and gives rise to a single enforcement "cause of action" embracing all violations of that limitation from the initial failure to comply until compliance is actually achieved. He further opined that if EPA brings a penalty action charging violations of a kind that are still ongoing at the time the action is commenced, EPA is precluded from later bringing a second penalty action based on

the same kind of violation. For those reasons, the Presiding Officer concluded, EPA was precluded from bringing a second penalty action against Ridgway, in January 1995, based on the same kinds of ($CBOD_5$ and TSS) violations previously alleged in the Region's July 1994 action. On July 6, 1995, the Regional Administrator accepted the Presiding Officer's recommendation and ordered that the second complaint against Ridgway be withdrawn with prejudice. The Environmental Appeals Board undertook sua sponte review of the Regional Administrator's order.

Held: The reasons stated by the Regional Administrator did not adequately support an order requiring withdrawal of the second complaint against Ridgway. Specifically, the Regional Administrator's analysis failed to distinguish between two different kinds of constraints on EPA's enforcement authority: (1) the doctrine of res judicata, and (2) the Clean Water Act's $25,000 Class I penalty cap.

The Regional Administrator relied on the doctrine of res judicata as grounds for dismissal of the second complaint. Res judicata, however, only precludes the assertion in subsequent litigation of claims that were or could have been brought in a prior action between the same parties that has already been reduced to judgment. Because the Region's first enforcement action against Ridgway has not produced a final judgment, the claims asserted in the Region's second action cannot possibly be barred by res judicata principles. The Regional Administrator's res judicata analysis is also flawed because many of the violations alleged in the Region's second action had not yet occurred at the time the first action against Ridgway was commenced; such violations could not possibly have formed the basis for a penalty claim in the first action, and therefore their assertion in a second action cannot be barred by res judicata principles.

The Regional Administrator may also have implicitly concluded that, by filing its second complaint, the Region violated the Clean Water Act's Class I administrative penalty cap. If so, however, neither that conclusion nor the factual findings that would support it were explicitly stated. Because whatever findings and conclusions the Regional Administrator may have reached in regard to that issue are not evident from the existing record, the Board reinstates the second complaint and remands for further proceedings to determine whether the Region's maintenance of the second action would be consistent with the Class I penalty cap.

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.

Opinion of the Board by Judge Reich:

This administrative penalty action arises under section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), and is before the Environmental Appeals Board pursuant to section 28.29 of the Proposed Non-APA, Consolidated Rules of Practice for the Administrative Assessment of Civil Penalties (56 Fed. Reg. 29,995, 30,033 (1991)).[1] By order dated July 19, 1995, the Board suspended and undertook to review, sua sponte, the "Final Decision and Order of Withdrawal" issued in this matter by the Regional Administrator for U.S. EPA Region III. Based on its review, the Board concludes that the Regional Administrator's decision to withdraw the complaint filed against respondent, the Borough of Ridgway, Pennsylvania (Ridgway), was premised on an incorrect application of the doctrine of res judicata. The Board therefore remands this matter to the Regional Administrator for reinstatement of the complaint and for further proceedings consistent with the discussion herein.

I. *Background*

Ridgway operates a sewage treatment plant that discharges to the Clarion River under a Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit.[2] The facility received its initial NPDES permit in 1985, and that permit was most recently reissued, by the Commonwealth of Pennsylvania, in 1993.

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[1]The proposed Part 28 Rules of Practice are currently being implemented as guidance in Class I administrative penalty actions commenced under Clean Water Act § 309(g), 33 U.S.C. § 1319(g). Section 28.29 of the proposed rules authorizes the Administrator to suspend implementation of the Regional Administrator's final order in a contested or default action and to review, sua sponte, "its conclusions of law or its sufficiency pursuant to § 28.28(a)(3)." *See infra* note 6. The Administrator has delegated that authority to the Environmental Appeals Board. EPA Delegation of Authority 2-51 (Jan. 24, 1992).

[2]Under the Clean Water Act, pollutant discharges to waters of the United States, like the Ridgway sewage treatment facility's discharge to the Clarion River, are unlawful except to the extent authorized by permit. CWA § 301(a). The National Pollutant Discharge Elimination System is the principal permitting program under the Clean Water Act. *Id.* § 402.

The permit is enforceable both by the State and by EPA. *See, e.g.*, Clean Water Act § 309(g)(1)(A) (authorizing EPA to assess a civil penalty for violation of a State-issued NPDES permit).

In July 1994, Region III's Water Management Division issued an administrative complaint alleging that Ridgway had violated its NPDES permit by discharging pollutants in excess of permit limits between January 1994 and April 1994. Specifically, the complaint alleged daily violations pertaining to Carbonaceous Biochemical Oxygen Demand (CBOD5) throughout January, February, March, and April of 1994; daily violations pertaining to Total Suspended Solids throughout January, February, March, and April of 1994; and a single violation pertaining to effluent pH during March 1994.[2] The complaint proposed to assess a "Class I" administrative penalty against Ridgway in the amount of $24,800. Ridgway filed a response to the complaint pursuant to section 28.20 of the proposed Part 28 rules, and a Regional official, Benjamin Kalkstein, was designated as the Presiding Officer to adjudicate the matter. The action initiated by the Region's July 1994 complaint remains pending before Presiding Officer Kalkstein.

The dispute that is now before us had its origin in the Region's decision in July 1994 to institute a Class I administrative penalty action against Ridgway rather than a Class II action. Clean Water Act § 309(g) establishes two different classes of administrative penalties,[3] and the two classes of penalties are governed by two different sets of adjudication procedures. A *Class II* penalty, which can range as high as $125,000, can be imposed only after an opportunity is provided for a "hearing on the record" under the standards of the Administrative Procedure Act (5 U.S.C. § 554), as

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[2] For purposes of this decision only, the Board will assume that the violations occurred as alleged.

[3] In addition, the Clean Water Act provides for a judicial civil action for penalties of up to $25,000 per day for each violation. CWA § 309(d), 33 U.S.C. § 1319(d).

implemented by EPA regulations at 40 C.F.R. Part 22. *See* CWA § 309(g)(2)(B). A *Class I* penalty is statutorily limited as follows: "The amount of a class I civil penalty * * * may not exceed $10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed $25,000." CWA § 309(g)(2)(A). In assessing a Class I penalty, the Agency must provide the respondent with "a reasonable opportunity to be heard and to present evidence" (*id.*), but, unlike Class II proceedings, Class I penalty actions are not subject to the APA-derived procedures in Part 22. As previously noted, Class I adjudications under the Clean Water Act are currently governed by the procedures in EPA's proposed 40 C.F.R. Part 28.

The Region's July 1994 complaint, in proposing a penalty of $24,800, thus proposed a penalty very near the upper limit of the range of penalties that can be assessed through the Part 28 procedures. Had the Region wished to assess a penalty in excess of $25,000, it would have had to institute either a civil judicial action under section 309(d) or a Class II administrative penalty action, in which Ridgway would have been entitled to an adjudication of its liability by an administrative law judge under Part 22.

The controversy now before the Board arose when, in January 1995, the Region filed a second complaint (Docket No. CWA-III-141) for Class I penalties against Ridgway. The 1995 complaint was based on daily violations of Ridgway's NPDES permit that allegedly occurred during May, June, July, and August 1994. Specifically, the second complaint alleged daily violations pertaining to $CBOD_5$ throughout May, June, and July of 1994; and daily violations pertaining to Total Suspended Solids throughout May, June, July, and August 1994. The second complaint proposed to assess a Class I penalty against Ridgway in the amount of $21,500.

In its answer to the Region's second complaint, Ridgway asserted, among other things, that the Region was attempting to circumvent the $25,000 statutory limitation applicable to Class I penalty actions, by filing two separate Class I actions that, in

combination, sought total penalties in excess of $25,000. According to Ridgway, the Region "consciously and intentionally bifurcated its enforcement actions" in order to proceed under the Class I (non-APA) rules, rather than filing a single Class II penalty action that would be subject to the rules in 40 C.F.R. Part 22. Answer at 11. This matter was also referred to Benjamin Kalkstein, the Presiding Officer hearing the first action.

In an April 7, 1995, motion for summary determination and for an accelerated recommended decision, the Region responded to Ridgway's argument by denying any attempt to manipulate penalty amounts so as to deprive Ridgway of an Administrative Procedure Act hearing under Part 22. The Region explained that it had chosen to examine Ridgway's compliance with its NPDES permit at four-month intervals, and to determine, at those intervals, whether further enforcement action was warranted. The Region argued that other possible enforcement strategies – for example, filing a new enforcement action for each month based on the discharge monitoring report (DMR) submitted to the Region for that particular month,[5] or taking no enforcement action while amassing evidence of violations so numerous as to justify referral to the Justice Department for a judicial filing – would have been impracticable and/or an inefficient use of Agency resources. The Region further argued that its choice among alternative enforcement strategies is, in any event, a discretionary matter.

On April 25, 1995, Ridgway cross-moved for summary determination and for an accelerated recommended decision. In its motion, Ridgway argued that the timing of the Region's two administrative complaints, the penalty amounts claimed, and the

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[5] All NPDES permits require the permittee to monitor its own effluent for compliance with permit limitations and to report the results of such monitoring, at specified intervals, on a standard form known as a Discharge Monitoring Report or "DMR." *See* 40 C.F.R. §§ 122.41, 122.48. It is evident from the record that Ridgway was filing such reports with Region III on a monthly basis during the period of the violations alleged in the Region's two enforcement actions.

nature of the alleged violations combined to suggest a deliberate abuse of the Region's statutory authority to impose penalties through non-APA hearing procedures. Specifically, as to timing, Ridgway stated that its May 1994 DMR had been mailed to the Region on or about June 8, 1994, well before the Region filed its first Class I complaint on July 14 of that year; the July 1994 complaint did not, however, allege any violations based on the excessive CBOD$_5$ and TSS discharges reported by Ridgway in its May 1994 DMR. Noting that the penalty proposed in the first complaint was $24,800, or only $200 less than the statutory maximum, Ridgway argued that Region III must deliberately have refrained from including any allegations pertaining to May 1994 in the initial complaint, solely in order to channel Ridgway into a Class I forum under the Part 28 procedural rules.

Moreover, Ridgway claimed that it had been constructing modifications to its sewage treatment plant throughout the period of the violations alleged in both complaints, and that the Region knew, with absolute certainty, that the facility's excessive TSS and CBOD$_5$ discharges would be corrected only upon completion of that construction project. Thus, according to Ridgway, as of July 14, 1994 the Region knew or should have known (1) that Ridgway's discharge had failed to comply with permit limits governing CBOD$_5$ and TSS during May 1994, and (2) that the same kinds of violations would continue to occur for the foreseeable future, until the completion of an ongoing facility modification. With access to that information, the Region had nonetheless chosen to address the Ridgway facility's noncompliant discharge in the context of a Class I penalty action subject to a $25,000 penalty cap. Having made that choice, the Region should now be required to abide by the jurisdictional limitations of the forum it had chosen. For these reasons, the filing of the Region's second complaint – which, in its practical effect, raised the proposed penalty against Ridgway from $24,800 to $46,300 for a single course of violative conduct – represented an improper use of the Class I procedure, and the second complaint should therefore be dismissed.

The Region, in a responsive memorandum, acknowledged that it had probably received Ridgway's May 1994 DMR on or about June 16, 1994. But the Region denied having intentionally disregarded the May DMR during its preparation of its first complaint against Ridgway:

> EPA was examining the trend of improvement (or lack thereof) in Respondent's effluent violations over four-month periods. Thus, as of July 14, 1994 [the date of the first complaint], no decision had been rendered as to what, if any enforcement action, would be taken with respect to the May 1994 violations. Moreover, counsel for Complainant submits that the actual date of filing of the first complaint is not relevant, but should be viewed as a function of the cumbersome internal approval process imposed by EPA upon such documents. EPA would have been perfectly within the realm of its enforcement discretion to file sequential penalty actions for each month's violations on a monthly basis. In fact, the approach adopted by EPA conserved the resources expended by the [Presiding Officer] as well as Respondent and the Agency.

Complainant's Response to Second Motion for Summary Determination at pp. 3-4.

The Presiding Officer heard oral argument on the parties' cross-motions for summary determination on June 19, 1995, and granted Ridgway's motion in an order dated June 29, 1995. Consistent with this order, in a July 3, 1995 recommended decision, the Presiding Officer recommended to the Regional Administrator that the second of the two complaints against Ridgway be ordered withdrawn with prejudice. The Presiding Officer concluded that Ridgway's continuous and uninterrupted pollutant discharges in excess of permit limits gave rise to one, and only one, enforcement "cause of action." Because the Region chose, in its initial complaint,

to pursue that cause of action only as to violations committed through April of 1994, the institution of a second action addressing subsequent violations of the same permit provisions constituted impermissible "claim splitting," and the second action was therefore barred under the doctrine of *res judicata*. The Regional Administrator agreed with the Presiding Officer's recommendation and, in a Final Decision and Order dated July 6, 1995, ordered the second action (Docket No. CWA-III-141) withdrawn with prejudice.

This Board suspended implementation of the Regional Administrator's Final Decision and undertook, sua sponte, to review the decision pursuant to proposed 40 C.F.R. § 28.29. The Board heard oral argument on September 27, 1995, and now issues this decision. For the reasons discussed below, the Board concludes that the Regional Administrator's order to withdraw the second complaint based on *res judicata* grounds was erroneous. However, the Board further concludes that upon remand of this matter to the Regional Administrator, he should determine whether Ridgway has raised a sufficient claim of abuse of the Class I process to warrant an inquiry along the lines discussed *infra* in Section II.B.2 of this decision.

II. *Discussion*

A. Scope of Review

Under the proposed Part 28 rules, the Board is authorized to review the Regional Administrator's decision and order in a Class I penalty matter only for legal error and for compliance with the requirements of proposed § 28.28(a)(3).[4] The Board is bound by the Regional Administrator's factual determinations. *See* proposed 40 C.F.R. § 28.29(c) ("The Regional Administrator's findings of fact are

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[4]Proposed 40 C.F.R. § 28.28(a)(3) itemizes certain matters that the Regional Administrators are expected to include in their final decisions in Class I penalty matters - for example, factual findings sufficient to establish jurisdiction, statements regarding the availability of judicial review, and the like.

* * * not subject to review by the Administrator."). After reviewing the Regional Administrator's decision and order, the Board may "amend its conclusions of law, withdraw the order, remand the order for appropriate action by the Regional Administrator, or * * * allow the order to issue unchanged." Proposed 40 C.F.R. § 28.29.

B. The Merits

As we understand the Regional Administrator's decision, his rejection of the second complaint against Ridgway was based on a theory of compulsory joinder of claims that the Regional Administrator derived from the doctrine of res judicata. Thus, his decision concludes that where two actions are pending between the same parties, the later-filed action should be dismissed if the matters alleged in both actions can be viewed, according to a res judicata analysis, as parts of a single "claim":

> [W]hen consecutively-filed DMRs show a clear pattern of continuing noncompliance, the discrete violations merge into a larger claim, indicative of a larger problem. If Complainant chooses to pursue a limited number of discrete violations in one case, knowing that there are other, closely related violations that could be brought in the same action, he will lose the right to pursue the latter violations.

Final Decision at 4. The Regional Administrator's reliance on res judicata principles is evident from his references to the "merger" of "closely related violations" into a "larger claim," and most unmistakably from his reference to unasserted violations that "could be brought" in the complainant's first action.

The Regional Administrator did not, we recognize, employ the term "res judicata" in his final decision, nor does that term appear in the Presiding Officer's recommended decision to withdraw the Region's second complaint against Ridgway. Rather, the Presiding Officer's recommended decision, and the final decision of

the Regional Administrator that is before us for review, refer only to a prohibition against "claim-splitting" as grounds for dismissal of the second complaint. *See* Final Decision at 3 ("Under the 'claim-splitting' doctrine, the entire claim should have been brought in a single case, not in sequentially-filed complaints.").

However, the Presiding Officer made clear, in his June 29, 1995 order granting Ridgway's motion for summary determination, that his references to "claim splitting" were to be understood as invoking the rules of res judicata (claim preclusion) that actually determine whether related claims should be joined in a single action and that define the consequences of a litigant's failure to do so. Thus, the Presiding Officer's reasons for recommending withdrawal of the second complaint appear in a section of his June 29 order titled "Preclusion," and his discussion includes the statement that "[t]he 'claim-splitting' and 'claim-preclusion' doctrines would preclude the initiation of a new action involving causes of action that could or should have been brought with a pending action." Order on Motions for Summary Determination and Accelerated Recommended Decision at 16. Indeed, to the extent that a prohibition against "claim splitting" has any meaning, it "is simply another name for [the claim preclusion aspect of] res judicata." *Prisco v. State of New York*, No. 91 Civ. 3990 (RLC), 1992 U.S. Dist. Lexis 5273 at *12 (S.D.N.Y. 1992). *See also Hapbey v. Linn County*, 924 F.2d 1512, 1517 (9th Cir. 1991) ("[T]he rule against splitting a cause of action has no teeth to it apart from the doctrine of claim preclusion. A plaintiff may split his cause of action in an initial suit and this initial suit may be reduced to judgment without infirmity. In a subsequent suit, however, the plaintiff is prevented by the doctrine of claim preclusion from raising any item of damage or ground of recovery that was a 'part' of the first cause of action."), *vacated in part on other grounds*, 953 F.2d 549 (9th Cir. 1992) (en banc).[7]

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[7] The Presiding Officer's references to "claim splitting" also appear to reflect a judgment about the proper application of the Clean Water Act's Class I penalty cap -- though it is far from clear that the Presiding Officer actually intended to rely on the (continued...)

For the reasons set forth in Section B.1, *infra*, we conclude that the Regional Administrator's application of *res judicata* principles was incorrect and that his order to withdraw the second complaint on that basis was erroneous. That conclusion does not, however, dispose of Ridgway's contention that successive Class I penalty actions claiming aggregate penalties in excess of $25,000 are, at least in some circumstances, inconsistent with the Clean Water Act's administrative enforcement framework.

With respect to that issue, we think it clear that the Class I penalty cap is intended to impose a limit on EPA's otherwise considerable discretion in choosing among the enforcement mechanisms established in the Clean Water Act. Thus, we do not accept Region III's claim of absolute discretion to utilize, without regard to the circumstances of the particular violations at issue, a series of smaller administrative penalty actions in lieu of a single larger action. Rather, if the Regional Administrator finds that EPA's institution of multiple Class I actions against a respondent represents an attempt to deny a Class II hearing to which the respondent is properly entitled, the Regional Administrator may direct that one or more of those actions be withdrawn so as to reduce the Region's aggregate penalty claim to an amount that will not exceed $25,000. At that point, if the Region wishes to seek additional penalties based on the violations alleged in the withdrawn complaint or complaints,

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[(...continued)

penalty cap in support of his decision. Ridgway's counsel has, in any event, sought to employ the term "claim splitting" in some such alternative sense, as in his statement that EPA enforcement staff "took their cause of action, split it in two," because "[t]here's no discovery rights under Class One." Transcript of September 27, 1995 Oral Argument at 31. The implication of that statement is not that the Region's second action was barred by *res judicata*, but that the Region was using Class I procedures to limit Ridgway's opportunity for discovery in what should really have been a Class II case. In the interest of clarity, throughout the remainder of this opinion we will avoid the ambiguous term "claim splitting," and will refer to the two analytically distinct issues arising from the Region's second enforcement action as (1) *res judicata* and (2) the penalty cap.

the Region may do so only if the enforcement proceedings that are still pending are reconfigured in one of the ways described later in this opinion. The basis for our conclusions, and a suggested framework for further proceedings on remand, are set forth in the discussion that follows.

1. *Res Judicata*

Initially, we conclude that the Regional Administrator committed two fundamental errors in his application of res judicata principles. First, the Regional Administrator erred by applying res judicata in the absence of any prior adjudication of Ridgway's Clean Water Act penalty liability; res judicata principles come into play only after litigation between the parties has resulted in a final judgment. Second, the Regional Administrator erred by applying res judicata to preclude the assertion, in a second action, of claims based on conduct that had not yet occurred as of the time the first action was filed.

In the absence of a final judgment resulting from the Region's first enforcement action against Ridgway, res judicata simply could not apply to bar the initiation of a second action. "Application of the claim preclusive aspect of the res judicata doctrine requires a showing * * * that there has been * * * a final judgment on the merits in a prior suit." *United States v. Athlone Industries*, 746 F.2d 977, 983 (3d Cir. 1984). The *Restatement (Second) of Judgments*, on which the Presiding Officer sought to rely, clearly states that "[t]he rules of res judicata are applicable only when a final judgment is rendered." *Restatement (Second) of Judgments* § 13, at 132. *See also id.* Comment a ("The rules of res judicata state when a judgment in one action is to be carried over to a second action and given a conclusive effect there * * *."); *International Harvester Co. v. Occupational Safety & Health Review Comm'n*, 628 F.2d 982, 984-85 (7th Cir. 1980) (preclusion of a second administrative enforcement action by a prior administrative action presupposes a final agency resolution of the first action equivalent to a civil "judgment on the merits"; such preclusion can occur only after the agency "resolves disputed issues of fact

properly before it which the parties have had an adequate opportunity to litigate"[8]; and *see generally* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4404 (1981). The Regional Administrator and the Presiding Officer, by focusing their analysis exclusively on the scope of a "claim" under the Clean Water Act, overlooked the fact that the Region's "claim" against Ridgway – whatever it might consist of – had not yet been adjudicated,[9] and that res judicata does not apply in the absence of a final judgment.[10]

The foregoing considerations are enough to require that the Regional Administrator's final decision be withdrawn and the matter remanded. It might be useful, however, if we were briefly to address a second kind of error that appears to have affected the Regional Administrator's res judicata analysis. Specifically, the Regional

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[8]The formulation quoted in the text is derived from *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), which states:

> "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.

Id. at 422 (quoted in *International Harvester*, 628 F.2d at 984). *See also Restatement (Second) of Judgments* § 83(1) ("A *valid and final adjudicative determination* by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court.") (emphasis added).

[9]Indeed, the litigation to which the Regional Administrator's decision would accord preclusive effect is still pending before the Presiding Officer.

[10]The *Restatement* would interpret "finality" less rigorously in the context of collateral estoppel (issue preclusion), and would require only that a previous adjudication of the relevant issue be "sufficiently firm to be accorded conclusive effect." *Restatement (Second) of Judgments* § 13. Actual finality would be required, however, in the context of claim preclusion, with which we are concerned in the present case. *Id.* In any event, even if a "firm" adjudication of Ridgway's Clean Water Act liability were sufficient for claim preclusion purposes, no such adjudication has occurred.

Administrator failed to consider the fact that the Region's second action was based on new conduct by Ridgway, much of which allegedly occurred after the Region filed its first action. Instead, the Regional Administrator treated the Region's second action as if it were merely based on new consequences of the same conduct by Ridgway already alleged in the first action. As a result, the Regional Administrator erroneously held that the Region should have included, in its first complaint, claims based on pollutant discharges that had not yet occurred when the first complaint was filed – and ultimately held that the Region was precluded from asserting those claims in a subsequent action.

Contrary to the Regional Administrator's analysis, a litigant is not required, and indeed is generally not permitted, to assert speculative claims based on conduct that has not yet occurred, and res judicata principles therefore do not require joinder of claims based on such conduct. *See Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955) (res judicata does not extinguish claims that could not have been sued upon in prior litigation); *see also International Harvester Co.*, 628 F.2d at 985-86 (continuing violations of a single administrative regulation give rise to multiple enforcement causes of action); *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 915 (7th Cir. 1993) (under a res judicata analysis, "plaintiffs need not amend their filings to include issues that arise after the original suit is filed") (citing 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4409 (1981)); *Manning v. City of Auburn*, 953 F.2d 1355, 1360 (11th Cir. 1992) ("[W]e do not believe that the res judicata preclusion of claims that 'could have been brought' in earlier litigation includes claims which arise after the original pleading is filed in the earlier litigation."). Thus Region III cannot possibly be held, by filing a complaint on July 14, 1994, to have forfeited its authority to penalize Ridgway for NPDES permit violations that Ridgway had not yet

committed, or had not yet reported to the Region, as of July 14, 1994.[11]

The principal case cited by the Presiding Officer, *Supporters to Oppose Pollution Inc. v. Heritage Group*, 973 F.2d 1320 (7th Cir. 1992), actually illustrates the error that affected his analysis. In *Supporters*, res judicata was applied to preclude a second action based

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[11]The Presiding Officer, in recommending a more expansive rule of preclusion, cited *Alyeska Pipeline Service Co. v. United States*, 688 F.2d 765 (Ct. Cl. 1982). The *Alyeska* court rejected, as have all other courts, the contention that a final judgment between two parties bars subsequent litigation based on similar conduct occurring after the entry of judgment. *Alyeska* did suggest, however, that claims arising between the date of the complaint and the date of judgment may be extinguished by res judicata once judgment is entered; the court thus imposed, in effect, a duty to amend one's complaint to include related claims when and as they mature. The Court of Claims appears to be alone in recognizing any such duty:

> Most cases assume that an action need include only the portions of the claim due at the time of commencing that action. The Court of Claims, however, appears to follow a rule that requires a plaintiff to amend to add later maturing claims. The difficulty presented by this alternative lies in identifying a suitable stopping point. Substantial disruption could result from forced amendment at any time after significant discovery has been accomplished, and it is hard to justify any test relating to the progress of discovery or other pretrial events so clear that plaintiffs could afford to apply it without seeking explicit judicial guidance. Perhaps the best rule would be that claims for damages need include only matters arising before the commencement of suit, while claims for declaratory or injunctive relief that intrinsically deal with conduct persisting through trial or into the future should embrace all matters arising prior to the close of trial or even judgment.

18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4409, at 76-77. Among the cases rejecting an *Alyeska*-type duty to amend, and endorsing the contrary rule described in the Wright, Miller & Cooper treatise, are *Green v. Illinois Dep't of Transportation*, 609 F. Supp. 1021 (N.D. Ill. 1985); *United Food & Commercial Workers Local 100-A v. City Foods, Inc.*, 878 F. Supp. 122 (N.D. Ill. 1995); *Doe*, *supra*, 985 F.2d at 915; and *In re Gain Electronics Corp.*, 138 Bankr. 464 (Bankr. D.N.J. 1992).

on new consequences of conduct that occurred before the first action was commenced. In the first action, the plaintiff successfully sued a landfill operator under RCRA, but was unable to state a claim against a second entity – the Heritage Group – that the plaintiff attempted to add as a defendant in that action. When the landfill operator went out of business, having closed the offending landfill but having failed to clean it up, the same plaintiff filed a second action against the Heritage Group, relying on a modestly different theory of liability than the one rejected in the prior litigation. Specifically, although no new wastes were being deposited at the landfill in question, the second action alleged that there remained a risk of ground water contamination due to continuing migration from the landfill of previously deposited wastes.

The court held those allegations insufficient to state a new "claim" against Heritage. Heritage was not alleged to have engaged in any new conduct violative of RCRA since the first action was filed. Although the violations already litigated were continuing to generate further consequences in the form of additional environmental harm, no new conduct by the defendant was alleged. Accordingly, the plaintiff could have presented its alternative theory of liability against Heritage in the first action, and was precluded from doing so in a subsequent lawsuit:

> Traditional principles of preclusion allow additional litigation if some new wrong occurs. [Plaintiff] contends that ongoing releases are new wrongs. Yet ongoing releases were known at the time of the initial suit; they were the principal basis of the claim. That the size of the release is better known now than then takes us nowhere; new evidence of injury differs from a new wrong. Additional knowledge about the loss from a tort does not authorize new suits. There is no new wrongful conduct by Heritage after the conclusion of [the first action]. [Plaintiff] relies on *Lawlor v. National Screen*

Service Corp., 349 U.S. 322, 327 (1955), but that case involved new conduct and so is beside the point.

Supporters, 973 F.2d at 1326 (citations omitted).[12] In this case, in sharp contrast, the allegations of the Region's second complaint are based on "new wrongful conduct" by Ridgway: The first complaint alleges that Ridgway discharged pollutants in violation of permit limits during one four-month period, whereas the second complaint alleges that Ridgway discharged pollutants in violation of permit limits during a different, non-overlapping four-month period. Each complaint seeks only to redress violations alleged to have occurred within the time frame covered by that complaint. The principles discussed in *Supporters* in no way suggest that the Region's second action was barred by res judicata, and the Regional Administrator erred by so holding.

2. *The Class I Penalty Cap*

Although res judicata principles do not require EPA to combine a multiplicity of Clean Water Act violations in a single enforcement action, the Agency must exercise its Clean Water Act administrative penalty authority in a manner consistent with the Act. As previously noted, the Act distinguishes between Class I and Class II penalty actions based on the magnitude of EPA's civil penalty claim, and the number of violations combined in a single action will sometimes tip the balance between a Class I penalty and a Class II penalty. Violations that continue to occur during the pendency of a Class I penalty action can give rise to some difficult issues where, as in this case, the respondent's aggregate penalty exposure (based on violations alleged in the original Class I action and subsequent violations of the same permit limits) eventually exceeds the $25,000

[12] *See also United States v. Athlone Industries*, 746 F.2d 977, 984 (3d Cir. 1984) (in determining whether two complaints reflect the same "cause of action" for res judicata purposes, the primary focus is on "whether the acts complained of [are] the same, whether the material facts alleged in each suit [are] the same and whether the witnesses and documentation required to prove such allegations [are] the same").

Class I penalty cap. Under those circumstances, the Agency's interest in prompt and effective Clean Water Act enforcement may be at odds with the respondent's interest in having access, to the extent afforded by statute, to an APA "hearing on the record" under Part 22 to contest the imposition of the penalty.[3] The present case requires us to address those potentially conflicting interests.

Both Ridgway and the Region find support for their preferred resolution in the text and structure of Clean Water Act § 309. Ridgway simply points to the greater procedural protections that Congress explicitly provided for larger administrative penalty actions. To allow the Region to bring a series of small enforcement actions under non-APA procedures would, Ridgway argues, effectively nullify the congressional determination that greater potential liability should be accompanied by a higher level of procedural formality.

Region III, for its part, points to the varied array of enforcement mechanisms made available in section 309 – including

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[3]In their rulings in this matter, the Presiding Officer and the Regional Administrator did not explicitly discuss Ridgway's claimed entitlement to an APA hearing. Their predominant concern, instead, seems to have arisen from Ridgway's suggestion that the Region's use of two separate complaints (where one Class II complaint would arguably have sufficed) represented a form of "harassment." *See* Ridgway's Memorandum in Support of Motion for Summary Determination at 7-8. That claim does not, however, furnish an adequate basis for dismissal of the second action against Ridgway. Courts have occasionally used the term "harassment" (or "duplicative prosecution") to refer to a particular kind of due process concern arising when a governmental entity, having failed to secure a desired remedy in one litigation setting, proceeds to file multiple additional actions based on the very same conduct, in disregard of the res judicata or collateral estoppel effect of the previous adjudication. *See, e.g., Facchiano v. United States Dep't of Labor*, 859 F.2d 1163, 1168 (3d Cir. 1988), *cert. denied*, 490 U.S. 1097 (1989) (court may intervene where "an agency's malicious prosecution and disregard for the principles of preclusion amount to a violation of a party's due process"). Because the complaints against Ridgway are not "duplicative" and the fundamental prerequisites for applying the preclusion doctrines are not met in this case, EPA's failure to apply those doctrines cannot constitute "harassment."

Class I administrative penalty actions, Class II administrative penalty actions, and judicial penalty and injunctive actions – as evidence that Congress sought to *confer* a high degree of flexibility and of "prosecutorial" discretion in the Clean Water Act enforcement context. Based on that understanding of the statutory purpose, the Region argues that it must be afforded a very wide latitude in determining how many violations to address in any given enforcement action, what remedies to seek, and what enforcement mechanism to use. By undermining the finality of those determinations we would, according to the Region, force Agency enforcement staff to maximize (perhaps unnecessarily or even counterproductively) both the number of violations alleged in an initial enforcement action and the scope of the relief requested in such an action; a comprehensive initial complaint would be needed to assure EPA's ability to address all of a permittee's violations, but to require such comprehensiveness would, the Region argues, be inconsistent with the enforcement flexibility intended by the 1987 Water Quality Act amendments. The Region therefore claims, in substance, that its decision whether to file a Class I action or a Class II action should not be open to challenge under any circumstances.

The Region buttresses that contention with a number of compelling practical observations. Among other things, the Region points out that there are valid and laudable reasons for filing a Class I action – such as to encourage Clean Water Act compliance without resorting to a large penalty claim – that may be difficult to discern in hindsight. It is also a simple matter for a respondent to claim, in hindsight, that a particular kind of violation was likely to continue without interruption, whereas the Region, without the benefit of hindsight, might well have concluded at the relevant time that a Class I penalty action would cause the violations to stop. Even where a violation cannot be immediately remedied, a Class I action may provide sufficient impetus towards moving the respondent to compliance so as to make any further enforcement action unnecessary. It would be anomalous and inappropriate, the Region contends, to allow a respondent such as Ridgway to cite its own

continuing noncompliance as a basis for challenging the legitimacy of a regulatory agency's discretionary enforcement decisions.

We believe that Congress did indeed, in the 1987 amendments, intend to enable EPA to respond flexibly and efficiently to Clean Water Act violations, and we agree that the Region is entitled to flexibility in its choice of an enforcement action to the fullest extent consistent with the statute. However, it is clear from the statutory text that the Region's discretion in this regard is not unconstrained. As the Region itself concedes, the 1987 Water Quality Act amendments clearly created an administrative enforcement structure offering more procedural safeguards to a respondent faced with a larger penalty claim.[4] EPA must, we conclude, give effect to the congressional policy reflected in the creation of two different Clean Water Act administrative penalty classes governed by two different sets of adjudication procedures, even if doing so means that EPA must occasionally resort to a more time-consuming or resource-intensive set of penalty assessment procedures. That obligation is rooted in the basic principle that "[a] statute must, if possible, be construed in such a fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992). In order to give "operative effect" to Congress's choice of one adjudication procedure for smaller penalty actions and a different procedure for larger actions, we reject the Region's claim of unlimited authority to institute a series of Class I penalty actions against a single discharger no matter what the circumstances. Rather, the Region's decision must be subject to review, within the context of the Class I process, to ensure that the Region has not instituted a series of Class I actions for the improper

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[4] While the Region emphasizes that Class I procedures are sufficient to afford due process (see, e.g., Oral Argument Transcript at 50-51), the Region has also acknowledged that "broader procedural rights are available [to the respondent] under 40 C.F.R. Part 22 than under proposed 40 C.F.R. Part 28." Region's Response to Respondent's Second Motion for Summary Determination at 6.

purpose of denying the respondent an opportunity for an Administrative Procedure Act hearing.[5]

The question whether the institution of serial Class I actions represents an abuse of the Region's Class I authority is necessarily fact-dependent, and is therefore properly decided by the Regional Administrator, upon the recommendation of the Presiding Officer. If the Presiding Officer concludes that a reasonable claim of abuse has been suggested – based, for example, on a contention that the violations in question were certain to continue and that the Region had made clear its intention to seek additional penalties in the event the violations continued – he or she may undertake such factfinding as may be necessary to resolve that claim. However, if the Presiding Officer chooses to examine such allegations, EPA's decision to proceed under Class I should be regarded as presumptively valid, in light of EPA's generally broad discretion to select from among its enforcement options under the Clean Water Act. The respondent must therefore bear the burden of going forward with facts to support a claim that, when the Region filed the first of multiple Class I actions addressing substantially identical permit violations, the Region was attempting to avoid the Class II hearing process in a circumstance where, as of the date of the initial filing, the Region's penalty claim already exceeded (or was certain to exceed) $25,000. In addition, the Region's decision to proceed under Class I, if challenged, cannot legitimately be judged with the benefit of hindsight, but only on the basis of the information available to the Region at the time of its decision. The Region is therefore entitled to the benefit of any uncertainty that existed at the time of its decision. The Presiding Officer and the Regional Administrator may not overturn a reasonable decision to proceed under Class I simply because, in the exercise of their own independent judgment, they conclude that they would have chosen to proceed under Class II

[5] For similar reasons, multiple Class II penalty actions instituted against a single discharger, seeking an aggregate penalty in excess of $125,000, would presumably be subject to examination by an administrative law judge to ensure against a violation of the Class II penalty cap.

instead. Rather, the Presiding Officer and the Regional Administrator may overturn the enforcement staff's decision to proceed under Class I only where necessary to protect against a clear abuse of the Class I process.

If the Presiding Officer concludes that an abuse of the Agency's Class I penalty authority has occurred, the Presiding Officer may on that basis recommend to the Regional Administrator that one or more of the Class I actions pending against the respondent be withdrawn, thereby reducing the aggregate penalty claim against the respondent to an amount not exceeding the $25,000 statutory cap. In the event that withdrawal is ordered on those grounds, the complainant may request leave to withdraw its remaining Class I action or actions, so as to consolidate all of its penalty claims into a unitary Class II administrative action or into a judicial action under Clean Water Act § 309(d); in the alternative, the complainant may request leave to consolidate all of its penalty claims into a single Class I action, provided that the complainant reduces its total penalty claim to no more than $25,000 in that action.[16]

We emphasize that by acknowledging the possibility of an abuse of the Agency's Class I penalty authority, we do not mean to suggest that such an abuse occurred in this case. Having decided to order the withdrawal of the Region's second action on other grounds, neither the Presiding Officer nor the Regional Administrator in this case undertook a factual inquiry into whether the Region's use of Class I was based on impermissible considerations. Thus, neither the Presiding Officer nor the Regional Administrator made any finding as to whether the Regional enforcement staff refrained from including, in their initial Class I complaint, additional known permit violations substantially identical

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[16]Such a request for leave to withdraw or to amend would be governed by proposed 40 C.F.R. § 28.18. A withdrawal without prejudice or an amendment may be made as of right prior to the filing of a response to the complaint; thereafter, a complaint may be amended or withdrawn without prejudice only by stipulation with the respondent or by permission of the Presiding Officer.

to violations that were included in that complaint, solely to keep the penalties sought in that action below the Class I penalty cap. Nor did the Presiding Officer or Regional Administrator make any finding of fact with respect to Ridgway's alternative contention (which the Region has denied) that the Regional enforcement staff knew the violations claimed in the initial Class I complaint would continue indefinitely and that they would lead inevitably to additional penalty claims. Therefore, upon reinstatement of the second complaint, the Regional Administrator should determine whether Ridgway has raised a sufficient claim of abuse of the Class I process to justify an inquiry along the lines discussed in this decision and, if so, proceed in accordance with the discussion herein.

III. *Conclusion*

For the reasons stated herein, the Regional Administrator's Final Decision and Order of Withdrawal is vacated and this matter is remanded for further proceedings consistent with this order.

So ordered.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Remand Order in the matter of the Borough of Ridgway, Pennsylvania, CWA Appeal No. 95-2, were served upon the following persons in the manner indicated:

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Mildred T. Johnson
Secretary

Dated: 5/30/96

Exhibit_____(GHB-92)

COPY

IN THE UNITED STATES DISTRICT COURT 96 JUL 19 PM 3:18
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS, FLORIDA

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS INC., Defendants.	CIVIL ACTION NO.: 93-281-CIV-FTM-21

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Defendants' Joint Response To Plaintiff's Citation of Additional Authority

The Defendants Florida Cities Water Company ("Florida Cities") and Avatar Holdings Inc. ("Avatar Holdings") hereby respond to Plaintiff's Citation of Additional Authority. Plaintiff cites United States v. Dean Dairy Products Co., CV-94-0621 (M.D. Pa. July 10, 1996), as additional support for its proposed penalty under the Clean Water Act ("CWA"). Additionally, Plaintiff cites In re: Borough of Ridgeway, Pennsylvania, CWA Appeal 95-2 (EPA Env. Appeals Board, May 30, 1996) in an implicit effort to seek reconsideration of this Court's November 22, 1995 and December 21, 1995 Orders. Neither of these decisions contain any guidance relevant to the issues presented in the parties' post-trial briefs.

a) Dean Dairy Products Co.

Plaintiff claims that the facts in Dean Dairy are "strikingly similar" to the facts of the present case, rendering the trial judge's penalty calculations in that case relevant to the present action. The facts of Dean Dairy are dramatically different from the facts of the present case in

at least five significant aspects, briefly set forth below.

First, the court in Dean Dairy found that the defendant's discharges significantly contributed to the degradation of the receiving waters. Slip op. at p. 5. However, in the present case, Plaintiff has stipulated that there is no evidence that any discharge from any of Florida Cities' facilities caused any environmental harm. Tr. of 3/27/96 at p. 46. Moreover, the evidence shows that virtually all of Florida Cities' discharges met the standards set for secondary treatment of effluent. Tr. of 3/29/96 at pp. 129, 149-152, 168.

Second, the court in Dean Dairy Products found that the defendant realized an economic benefit of $2,015,500 from its violations of the CWA. Slip op. at p. 10. This finding of an economic benefit was crucial to the court's penalty determination, since the final penalty of $4,031,000 was calculated at twice this economic benefit. In contrast, Florida Cities and Avatar Holdings presented evidence which demonstrated that they received no economic benefit from any CWA violations. Tr. of 4/5/96 at pp. 105-107. Plaintiff did not introduce any evidence to the contrary.

Third, the court in Dean Dairy relied upon testimony from the defendant's plant manager that, during certain periods of time, good faith efforts were not undertaken by the defendant to comply with the CWA. Slip op. at p.6. In the present case, however, there is substantial evidence of Florida Cities' good faith efforts to comply with the CWA and the significant practical and bureaucratic hurdles that the company faced in its attempts to do so. Tr. of 4/3/96 at pp. 255-256 and 4/4/96 at pp. 13-23.

Fourth, there is no indication in Dean Dairy that the CWA violations at issue were the result of actions by any other party. However, in the present case, Florida Cities presented

evidence that a substantial portion of violations (including discharge without a permit at Waterway Estates and TRC violations at Barefoot Bay) were actually a result of EPA's own errors and omissions. Tr. of 4/3/96 at pp. 124, 133-136, 169-174, 231.

Fifth, Dean Dairy was penalized for a substantial number of violations which occurred after the complaint was filed. Slip op. at p. 4. In the present case, all of the facilities were in compliance with the CWA at the time that these complaints were brought, and there were no ongoing CWA violations at any of these facilities.

b) **In re: Borough of Ridgway, Pennsylvania**

Plaintiff also cites In re: Borough of Ridgway, Pennsylvania for the implicit proposition that this Court should reverse those portions of its November 22, 1995 Order (reaffirmed December 21, 1995) which dismissed Plaintiff's allegations of discharge without an NPDES permit at the Barefoot Bay and Carrollwood plants on the grounds of res judicata. There are three reasons why this additional authority is irrelevant in the present action. First, Plaintiff's citation to Borough of Ridgway serves as Plaintiff's seventh request for reconsideration in this case. Second, Plaintiff has not set forth any of the grounds necessary for reconsideration, as set forth in this Court's earlier Orders. In its November 22, 1995 Order, this Court relied upon well established Eleventh Circuit precedent supporting its finding of res judicata, not upon Borough of Ridgway. Third, the Environmental Appeals Board reversed the Presiding Officer's decision regarding the applicability of res judicata upon factual grounds that are not relevant to the present case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of Defendant Joint Response to Plaintiff's Citation of Additional Authority has this 19th day of July, 1996, been sent to the following persons by facsimile transmission or United States Mail:

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Exhibit_____(GHB-93)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

FILED
96 JUL 23 PM 4:36
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS, FLORIDA

UNITED STATES OF AMERICA

Plaintiff,

V.

CASE NO. 93-281-CIV-FTM-21

AVATAR HOLDINGS, INC., and
FLORIDA CITIES WATER COMPANY,

Defendants.
_____/

ORDER

The Court has reviewed the case of In re: Borough of Ridgway, Pennsylvania, CWA Appeal No. 95-2 (EPA Env. Appeals Board, May 30, 1996), submitted with the Plaintiff's submissions of additional authority (Dkt. 333). The Court has also reviewed the case of Manning v. City of Auburn, 953 F.2d 1355, 1360 (11th Cir. 1992), a case relied upon by the Environmental Appeals Board in Borough of Ridgway but not previously cited to the Court by any of the parties herein. The parties are DIRECTED to file a memorandum addressing the question:

> What is the effect of In re: Borough of Ridgway, Pennsylvania, CWA Appeal No. 95-2 and Manning v. City of Auburn, 953 F.2d 1355, 1360 (11th Cir. 1992) on the Court's November 22, 1995 Order precluding the claims in paragraphs 16, 17-23 and 30?

In addressing the above question, the parties should delineate relevant facts, such as which document, if any, constitutes the "original pleading" in the prior administrative proceedings for Barefoot Bay and Carrollwood. For convenience of reference, copies of pertinent record

AO 72A
Rev. 8/82)

evidence should be attached as exhibits to the memorandum. To the extent that a party suggests that the Court's prior preclusion of claims was overly inclusive, the party should clearly indicate the specific claims which it believes were properly precluded and those which it believes were not properly precluded.

Further, given the present post-trial but pre-judgment posture of this case, the parties may also include in their memoranda comment upon the proper procedure by which the Court may readdress its claims preclusion ruling of the November 22, 1995 Order.

The above referred memoranda shall not exceed fourteen (14) pages and shall be filed on or before Friday, August 2, 1996. Thereafter, the parties may file, on or before Friday, August 9, 1996, responsive memoranda not exceeding eight (8) pages.

DONE AND ORDERED, at Tampa, Florida, this 23rd day of July, 1996.

RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of record

AO 72A
(Rev. 8/82)

Exhibit_____(GHB-94)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	)	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' REPLY MEMORANDUM IN SUPPORT OF REINSTATEMENT OF THE CLAIMS EXCLUDED BY THE COURT ON RES JUDICATA GROUNDS

INTRODUCTION

In their "Joint Memorandum in Response to the Court's Order of July 23, 1996," Defendants both fail to discuss relevant and important principles enunciated in In re: Borough of Ridgway, Pennsylvania, CWA Appeal No. 95-2 (EPA Env. Appeals Board, May 30, 1996) and Manning v. City of Auburn, 953 F.2d 1355, 1360 (11th Cir. 1992), and fail to acknowledge their effect on the claims precluded by the Court's November 22, 1995 Order. Defendants instead attempt to rehash the merits of their defense that the administrative consent agreements at issue were intended to resolve all unpermitted discharge claims at Barefoot Bay and Carrollwood, a defense expressly rejected by the Court in its June 21, 1995 Order. Because the Court correctly held in that Order that the unpermitted discharge violations and administrative order violations were separate violations, and these violations are not barred by res judicata under Ridgway and

Manning as applied to this case, the Court should reinstate those claims.

DISCUSSION

I. Manning and Ridgway

The fundamental question highlighted by both parties in their initial briefs is whether the claims at issue constitute separate causes of action for res judicata purposes. Defendants overlook important principles and language in both Manning and Ridgway which stand for the proposition that, at a minimum, certain of the claims at issue allege new wrongful conduct which are indeed separate causes of action. And, Defendants overlook the language of the Clean Water Act itself, as construed in Atlantic States Legal Foundation v. Tyson Foods, 897 F. 2d 1128, 1139-39 (11th Cir. 1990), and this Court's June 21, 1995 Order, which makes clear that each day that a violation of the Act occurs is a separate cause of action. Nonetheless, even under the Defendants' limited analysis of Manning and Ridgway, the claims at issue must be considered separate causes of action which should be reinstated.

Defendants cite, as does Manning, to NAACP v. Hunt, 891 F.2d 1555, 1561 (11th Cir. 1990), which holds that "the principal test for comparing causes of action is whether the primary right and duty or wrong are the same in each action", and that "[r]es judicata applies not only to the precise legal theory presented in the prior case, but to all legal theories and claims arising out of the same nucleus of operative fact." [emphasis added to

highlight language omitted from Defendants' quotation] As Defendants note in their brief, the Court in Manning cautions against oversimplication in such a comparison: "A Court 'must look to the factual issues to be resolved [in the second cause of action] and compare them with the issues explored in' the first cause of action." 953 F.2d at 1359 [bracketed material original; citation omitted].

Applying these principles above to the instant case, even without reference to Ridgway, yields the conclusion that none of the United States' claims should be precluded. The factual issue before the Court in this action is whether Defendants violated the Clean Water Act during the time periods and in the manners alleged in the complaint. The factual issue in the earlier administrative proceedings was whether Florida Cities violated the Clean Water Act during the earlier time periods and in the manners described in the administrative consent agreements. Because each day of violation of the act constitutes a separate cause of action under Tyson Foods, and the time periods involved are different, the factual issues to be resolved in this civil action are distinct from those in the earlier administrative proceedings.

An examination of the administrative agreements reveals that the previous administrative actions simply did not involve or resolve any future violations arising after the dates specified

in the agreements themselves.[1] Indeed, while Defendants actually admitted to -- and paid a penalty for -- the violations specifically covered by the administrative consent agreements, they neither admitted to -- nor paid a penalty for -- any other violations.[2] Thus, they cannot be said to have resolved, within the meaning of Manning, the additional later violations alleged in the instant case.[3]

While Defendants now strain to distinguish the facts in Ridgway, it was this very set of facts which Florida Cities earlier found so compelling and relevant as to warrant its filing a "Notice of Dispositive Authority" in which it quoted from the Presiding Officer's erroneous holding that "once a transaction has been litigated between parties, those parties may not raise new causes of action involving that transaction in a new case in

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[1] In addition, there was no mention whatsoever of administrative order violations in the Barefoot Bay administrative complaint or settlement.

[2] As previously noted, the administrative consent agreements set out specifically what violations had been committed, and that the orders settled those violations. See Exhibits C and D to United States' initial brief. While non-admission of liability language is often standard in some settlement documents, in these agreements, defendants actually admit liability for the specified violations. They do not admit liability in the agreements, however, for future violations, and have never argued that the agreements establish their liability for future violations. It stands to reason, then, that if the consent agreements are not res judicata as to liability for future violations, they cannot be res judicata as to penalty for future violations.

[3] While the unpermitted discharge violations in both actions may involve the same underlying cause -- Defendants' failure to timely apply for and obtain NPDES permits -- the nuclei of operative fact are distinctly different because they involve separate violations which occurred on different (and later) dates.

any forum." Florida Cities' Notice of Dispositive Authority at 2 [emphasis added by Florida Cities]. Clearly, as described in the United States' initial brief, the facts in Ridgway were indeed similar to those in the instant case. And, just as clearly, the Presiding Officer in Ridgway was wrong: a party may indeed raise a new cause of action in a later proceeding. Because the claims at issue involve new causes of action, the United States is not precluded from raising them in this proceeding.[4]

II. Additional Authorities

Defendants' reliance on Supporters to Oppose Pollution Inc. v. Heritage Group, 973 F.2d 1320 (7th Cir. 1992), is misplaced. Having previously been party to a civil action seeking redress for the disposal of hazardous wastes, the private party plaintiff in STOP argued that it was entitled to bring a new civil action because there were ongoing releases of hazardous substances from materials already deposited. The Seventh Circuit noted that the landfill operator had already closed the dump, so no new hazardous materials were being deposited. 973 F.2d at 1323. The court therefore held that the plaintiff had failed to establish that these ongoing releases constituted new wrongful conduct

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[4] EPA is precluded by the administrative consent agreements from revisiting the lenient penalties assessed for the periods specified therein. Thus, Florida Cities has fully received the benefit of its bargain. By the same token, it must also accept the consequences, which have always included the possibility of additional penalties for additional violations.

occurring since the earlier civil action. 973 F.2d at 1326.[5] This distinction was precisely the basis upon which the EPA Environmental Appeals Board in Ridgway found that the STOP case did not involve new wrongful conduct, in "sharp contrast" to the facts in Ridgway itself, where new NPDES violations had occurred. Ridgway at 18.

Were the United States relying in the instant case on an argument that the violations resolved in the administrative consent agreements were continuing to cause damage to the aquatic environments of the Sebastian and Indian Rivers, and the Sweetwater Creek and Tampa Bay respectively, then there might be a basis for res judicata to apply under the STOP case. The United States has never made any such argument. Rather, the United States has consistently argued that the claims at issue in the instant case involve new and separate violations (i.e., new wrongful conduct) which were not previously resolved. The United States is entitled, as a matter of law, to bring these claims as separate causes of action.[6]

Although they concede that "the underlying principles referred to in Manning and Ridgway are applicable to this case,"

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[5] Similarly, in United States v. Gurley, 43 F.3d 1188, 1196 (8th Cir. 1995), cited by Defendants, the court held that both the earlier action and the later action involved the disposal and later release of hazardous wastes. Having chosen to bring a Clean Water Action for disposal and release, EPA was precluded from bringing a subsequent CERCLA action for the same wrong. Id. at 1197.

[6] That the new and separate violations arguably were foreseeable, an argument advanced both by Defendants and the violators in Ridgway, is irrelevant to the question of whether the violations constitute separate causes of action.

Defendants' brief at 6, Defendants decline to actually apply these principles to the facts at bar. And, while frequently repeating that res judicata should apply to bar the claims at issue because they allegedly arise from the "same nucleus of operative fact," Defendants fail to actually define what that so-called identical nucleus is in each case. Instead, they embark on an unsubstantiated extra-record argument based on a distorted version of facts already rejected by the Court in its June 21, 1995 Order, which is a substantial digression from the res judicata issue the Court ordered briefed. Because this discussion is beyond the scope of the Court's July 23, 1996 Order, it merits no further consideration.[7]

III. Procedural posture

The only additional evidence Defendants actually identify as being necessary in their view if the Court reinstates the claims at issue is evidence relating to the negotiation of the consent agreements. In its November 22, 1995 Order (p. 12 at n.10), however, the Court held such evidence irrelevant because the agreements themselves are "not ambiguous" and "'the scope of a consent decree must be discovered within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.' Paradise v. Prescott, 767 F.2d 1514, 1525 (11th Cir. 1985) (citations omitted.)" Thus, there is no reason to

[7] To the extent that the Court does wish to revisit the discussion of the events leading up to the administrative consent agreements, it is respectfully referred to the United States' Memorandum in Support of its Motion for Reconsideration of Court's Order on Amendment of Complaint, filed May 15, 1995.

reopen the record to admit such evidence. Moreover, at their insistence, Defendants had an eight-day trial in which to present evidence of mitigation. It is hard to conceive of what additional evidence they would need to present even if the claims are reinstated.

CONCLUSION

Defendants have failed to carry their burden of demonstrating that the United States' claims for unpermitted discharges at Barefoot Bay and Carrollwood and Administrative Order violations at Barefoot Bay should be barred by res judicata. In accordance, then, with the Ridgway and Manning decisions, and the other authorities cited herein and in the United States' initial brief, these claims should be reinstated. Summary judgment should be entered in favor of the United States on those claims, and penalties assessed for the violations alleged therein in accordance with the penalty scheme previously proposed.

Respectfully submitted,

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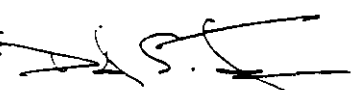
Assistant Attorney General

By: 

Dated: August 8, 1996

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CERTIFICATE OF SERVICE

I certify that I caused copies of the United States' Reply Memorandum in Support of Reinstatement of the Claims Excluded by the Court on Res Judicata Grounds to be served by mail on August 8, 1996 on the following attorneys of record:

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Exhibit_____(GHB-95)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS INC., Defendants.	)	CIVIL ACTION NO.: 93-281-CIV-FTM-21

Defendants' Response to Plaintiff's Memorandum Seeking Reinstatement Of Claims Previously Dismissed On the Grounds of Res Judicata

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I) PRELIMINARY STATEMENT

The Defendants, Florida Cities Water Company ("Florida Cities") and Avatar Holdings Inc. ("Avatar Holdings"), hereby file this joint response to Plaintiff's "Memorandum in Support of Reinstatement of the Claims Excluded by the Court on the Grounds of Res Judicata." Plaintiff's arguments are without merit and are not supported by Eleventh Circuit precedent or the Clean Water Act, 33 U.S.C. §§ 1251 et. seq. ("CWA"). This Court's application of res judicata to the facts of this case, as set forth in its November 22, 1995 Order ("Order"), is correct. Defendants respectfully request that the Court reaffirm its prior rulings. All four factors required for res judicata to bar the claims alleged in paragraphs 16-23 and 30 of Plaintiff's Second Amended Complaint are present in this action.

II) ARGUMENT

a) All of the Elements of Res Judicata are Present.

In the first section of its brief, Plaintiff argues that In re: Borough of Ridgway, CWA 95-2 (May 30, 1996), stands for the proposition that res judicata bars only claims that arose before the violations alleged in the administrative complaint. Plaintiff's argument ignores the elements of res judicata, as set forth in I.A. Durbin, Inc. v. Jefferson National Bank, 793 F.2d 1541, 1549 (11th Cir. 1986) and Manning v. City of Auburn, 953 F.2d 1355 (11th Cir. 1992) ("Manning"). These cases hold that res judicata bars subsequent claims when the following four elements are present:

1) a final judgment on the merits,
2) decided by a court of competent jurisdiction,
3) the parties from each suit must be identical,
4) the same cause of action must be involved in both cases.

Manning, 953 F.2d at 1358. All of these elements are present in this case. Because elements (2)

and (3) above are not in dispute, the following discussion addresses only elements (1) and (4).

1. The same cause of action is involved in both cases.

Plaintiff argues that Manning stands for the proposition that res judicata cannot bar claims that arose after the dates of the administrative complaint. However, the Manning court did not limit the application of res judicata so narrowly. The court explained that "[i]n this circuit, the determination of whether the causes of action in two proceedings are the same is governed by whether the primary right and duty are the same." Manning, 953 F.2d at 1358. The court emphasized that the test is one of substance, not form. Id. Contrary to Plaintiff's argument, the court's focus in Manning was whether the operative facts of the first and second suits were the same. The Eleventh Circuit found that the facts surrounding the discrimination complained of in Manning's complaint arose out of a different "operative nucleus of fact" than that alleged in the prior class action. Therefore, only the claims in the second action that arise out of a different operative nucleus of fact are exempt from res judicata.

Plaintiff also argues that the Environmental Appeals Board in Ridgway held that only those claims that arose before the dates of the violations alleged in the administrative complaint would be barred. Pl. Mem. at 3. However, this position is supported neither by Ridgway nor by Eleventh Circuit precedent, as set forth in Manning and Durbin. In Ridgway, the Environmental Appeals Board ("Board") overturned the EPA Region III Administrator's decision principally on the ground that there was no final adjudication of the claims alleged in the first complaint, holding that without this final adjudication, res judicata could not bar the claims in the second complaint. In addition, the Board noted that the violations alleged in the first complaint (for effluent limitation violations from January through April 1994) were different from the

allegations of the second administrative complaint (for effluent limitation violations from May through July 1994) in that these violations constituted "new conduct by Ridgway," which would not be barred by res judicata. Ridgway, CWA Appeal No. 95-2 at 13.

Unlike the scenarios found in Manning and Ridgway, the allegations of paragraphs 16-23 (Barefoot Bay) and paragraph 30 (Carrollwood) arose from a "common nucleus of operative fact," with respect to each facility. First, there is a fundamental difference between the unpermitted discharge violations at Barefoot Bay and Carrollwood, and the permit effluent limitation violations which occurred in Ridgway. That difference is EPA's unique power to determine the issuance and effective date of an NPDES permit. Whereas a series of effluent violations may be caused by different and unpredictable reasons from day to day, the unpermitted discharges are a result of the same reason each day. The reason for not having an NPDES permit was considered by EPA in the prior administrative hearings, as is evidenced by the "Notes on Proposed Penalty Assessment" for both Barefoot Bay and Carrollwood. The evidence needed to establish liability for the unpermitted discharge claims alleged in the Second Amended Complaint would be exactly the same as the evidence considered five years ago by EPA at the time of the administrative settlement.

Second, EPA was anticipating the issuance of NPDES permits at the time of each settlement. At Carrollwood, Florida Cities applied for its permit on July 31, 1990. EPA issued its "Intent to Issue" an NPDES permit for Carrollwood on September 15, 1990. On September 25, 1990 EPA filed Administrative Complaint No. CWA-IV-90-542. alleging discharge without a permit "since 1987." EPA did not issue the "Consent Agreement and Order Assessing Penalties" until April 19, 1991, and did not issue the permit until May 28, 1991. All of the

violations at Carrollwood clearly arose from the "same operative nucleus of fact," i.e., the facility's lack of an NPDES permit. At the time of the Administrative Complaint and the Consent Agreement, EPA knew that the facility did not have a permit and knew that a permit application had been submitted. During the period between August 1990 and June 1991, when the application was pending, EPA was the only party that could determine how long the discharge without a permit would continue. When EPA filed CWA-IV 90-542 on September 25, 1990, EPA anticipated that a permit would be granted in February of 1991. (Florida Cities Trial Exhibit 201). Because the permit was not actually granted until May 28, 1991, and did not become effective until July 1,1991, Plaintiff now seeks to recover for additional days of discharge without a permit, even though the permit's issuance was completely within the Agency's control.[1]

The facts at Barefoot Bay are analogous to those at Carrollwood. Florida Cities applied for an NPDES permit for Barefoot Bay on February 28, 1990. EPA did not issue the permit until September 16, 1991, with an activation date of November 1, 1991, a delay of eighteen months. By the time that EPA filed Administrative Complaint CWA-IV 91-538 on September 25, 1991, Florida Cities had its permit, and by the date of the Consent Agreement the permit was in effect. While the Administrative Complaint alleges only violations on September 14, 1989, the Notes on

[1] Plaintiff argues that these additional days of unpermitted discharge at Carrollwood are worth an additional $5,000.00 per day in penalties. The evidence presented at trial demonstrated that the Region IV enforcement officers who actually investigated the violations, who met with Florida Cities' officials, and who were most familiar with the facts of the case levied a $15,000.00 penalty for thirty-seven months of discharge without a permit (or $13.51 per day). Now, over five years after the original investigation, without any testimony from the investigating officers, and without presenting any evidence that would support such a tremendous penalty, Plaintiff seeks to recover over $1,000,000.00 for these additional ten months of unpermitted discharge.

Proposed Penalty Assessment, which are part of the administrative record, demonstrate that EPA was aware of the ongoing discharges at Barefoot Bay since 1985 but elected not to include any other days of discharge in the administrative complaint, even though additional allegations for those violations could have been brought at that time. (Florida Cities Trial Exhibit 202). As with Carrollwood, all of the unpermitted discharges at Barefoot Bay arose out of the "same operative nucleus of fact," i.e., discharge without a permit. The facts demonstrate that EPA knew of all of the unpermitted discharges and alleged administrative order violations, as a result of receiving Florida Cities' discharge monitoring reports, when it brought the administrative complaint. EPA could have brought all of the claims in Paragraphs 16-23 of the Second Amended Complaint as a part of the administrative penalty action. EPA's election not pursue all possible claims bars EPA from resurrecting them in this case.

Plaintiff also argues that under Atlantic States Legal Foundation v. Tyson Foods, Inc., 897 F. 2d 1128, 1139-40 (11th Cir. 1990), each day of violation constitutes a new cause of action and, therefore, actions for subsequent days of violations are not barred by res judicata. Rather, the portion of the opinion to which Plaintiff cites, stands only for the proposition that each day can be considered a separate day of violation for the purpose of calculating a penalty, not for purposes of res judicata. Tyson Foods simply does not address whether each day of violation converts one cause of action into a series of mini-causes of action for the purposes of res judicata.

More important, Plaintiff's reading of Tyson Foods is at odds with Eleventh Circuit precedent addressing res judicata in the context of the "same operative nucleus of fact." See, Manning, 953 F.2d at 1538, and NAACP v. Hunt, 891 F.2d 1555, 1561 (11th Cir. 1990). Even

if each day of a CWA violation is an independent cause of action, res judicata bars subsequent actions if they derive from the "same operative nucleus of fact."

2. There was a final judgment on the merits.

Plaintiff attempts to distinguish EPA's administrative penalty actions from judicial penalty actions by asserting that the statutory penalty caps on administrative penalties do not make the administrative and judicial forums equivalent for purposes of res judicata. First, Plaintiff cites no authority for the proposition that the CWA preempts the doctrine of res judicata. Second, Plaintiff's argument fails to acknowledge that EPA chose voluntarily from an array of enforcement options to assess administrative penalties. Under the 1987 CWA Amendments, EPA had three options for assessing penalties against Florida Cities: EPA could have chosen to proceed in an enforcement action to assess (1) administrative Class I penalties, (2) administrative Class II penalties, or (3) civil judicial penalties. After assessing factors listed under CWA § 309(g)(3), EPA exercised its prosecutorial discretion by pursuing penalty actions for Class I administrative penalties. At the time, EPA knew that this election would result in its permanent preclusion from re-litigating those matters in another forum.[2] A subsequent lawsuit is barred regardless of whether the penalties are paid in administrative or judicial forums. See Astoria Federal S&L v. Solimino, 501 U.S. 104 (1991); United States v. Holloway Oil Co., Case No. 88-59-Civ-J-14, 28 ERC (BNA) 1990 (M.D. Fla. 1988).

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[2] Plaintiff asserts that the difference in the CWA's civil judicial penalty provisions and administrative civil penalty provisions renders an administrative adjudication incompetent for res judicata purposes. Yet these different options for enforcement of the CWA do not affect what claims can be addressed, how many claims can be addressed, or how these claims are resolved, other than the amount of the potential maximum penalty per violation.

With regard to Barefoot Bay and Carrollwood, EPA exercised its enforcement discretion and determined that a Class I penalty was warranted for the violations alleged in the earlier administrative actions. Plaintiff now seeks to re-open that litigation. Plaintiff should not be allowed to re-litigate those issues that were or could have been brought in the prior penalty action because all four elements of res judicata are present.

III) STATE OF THE RECORD

The Court's Order was issued in the context of cross-motions for partial summary judgment. Plaintiff's suggestion that the Court should reverse itself and award summary judgment to the government ignores the standard necessary to prevail on a summary judgment motion, namely, whether there exist any genuine issues of material fact. If this Court determines that a genuine issue of material fact exists, then this Court may need to hear testimony on liability, not just penalties. However, Defendants maintain that the Order should be reaffirmed.

Second, Plaintiff suggests that if the Court were to modify its Order by awarding it summary judgment, then no further evidence would be necessary. As stated in the previous filing, Defendants did not present several witnesses and exhibits because the penalty issues were moot in light of the November Order. Plaintiff apparently presented such evidence, and states that it needs no further direct testimony. Therefore, if penalty issues are re-opened, Defendants would request that this Court limit Plaintiff to cross-examination in any such proceeding, and allow Defendants to present further direct testimony on penalty mitigation.

Third, even if the Order were modified, the Court should not accept the testimony or report of expert witness Eileen Zimmer. Plaintiff's argument that Zimmer's report is of "renewed relevance" is incorrect. For the same reasons set forth in "Defendants' Joint Motion In

Limine to Exclude the Testimony and Report of Eileen Zimmer," her testimony and report remain flawed on multiple bases and should be excluded. Plaintiff's suggestion that the Court should hear her testimony amounts to nothing more than another motion for reconsideration, and Plaintiff has not met any legal standard that would give this Court reason to reconsider its previous evidentiary ruling. Plaintiff contends that the decision in United States v. Dean Dairy Products Co., CV-94-0621 (M.D. Pa. July 10, 1995) supports its own "wrongful profits" argument; however, this argument is flawed on two grounds. The Dean Dairy court's rationale addressing "wrongful profits," like Ms. Zimmer's analysis, is contrary to the majority position for calculating economic benefit as set forth in this Court's Order of March 25, 1996. Also, in Dean Dairy, the court found that the subsidiary discharger actually profited from its delayed capital expenditure. In the present case, the testimony and evidence presented demonstrated that Florida Cities made no profit from any delayed capital expenditure. (Testimony of Keith Cardey; Apr. 5 tr., pp. 101-107) If the Court were to hear Ms. Zimmer's testimony, Defendants would need additional cross-examination.[3]

IV) CONCLUSION

For the reasons set forth above, Florida Cities and Avatar Holdings respectfully request that this Court reaffirm its November 22, 1995 Order and deny Plaintiff's efforts to reinstate the allegations of Paragraphs 16-23 and 30 of Plaintiff's Second Amended Complaint.

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[3] Defendants also note that, contrary to Plaintiff's statement contained in footnote 13 of its memorandum (Pl. Mem. at 13), Defendants presented the testimony of Charles McNairy, who testified that the defendants would be unable to pay a significant penalty. Day 8, p.245.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of "Defendants' Response to Plaintiff's Memorandum Seeking Reinstatement of Claims Previously Dismissed on the Grounds of Res Judicata" has this 9th day of August, 1996, been sent to the following persons by either United States Mail or hand delivery:

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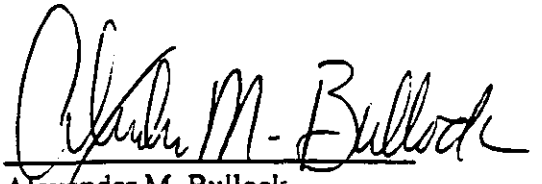

Alexander M. Bullock

Exhibit_____(GHB-96)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

Plaintiff,

V.

CASE NO. 93-281-CIV-FTM-21

AVATAR HOLDINGS, INC., and
FLORIDA CITIES WATER COMPANY,

Defendants.

ORDER

On July 23, 1996, in light of the Plaintiff's submissions of additional authority (Dkt. 33), the Court entered an Order (Dkt. 335) directing the parties to file memoranda and responsive memoranda addressing the question: "What is the effect of In re: Borough of Ridgway, Pennsylvania, CWA Appeal No. 95-2 and Manning v. City of Auburn, 953 F.2d 1355, 1360 (11th Cir. 1992) on the Court's November 22, 1995 Order precluding the claims in paragraphs 16, 17-23 and 307" The Court further directed the parties to delineate relevant facts, such as which document, if any, constitutes the "original pleading" in the prior administrative proceedings for Barefoot Bay and Carrollwood. The parties have filed their memoranda (Dkts. 336 & 337)[1] and their responses to each others' initial memoranda (Dkts. 338 & 339).

[1]The Court notes that the Plaintiff has referred the Court to the United States' Memorandum in Support of its Motion for Reconsideration of Court's Order on Amendment of Complaint, filed May 15, 1995 (Dkt. 87) and the United States Memorandum in Support of its Motion for Expedited Reconsideration of the Court's Ruling on Res Judicata and in Reply to Avatar Holding's Motion for Clarification of the Court's Order, filed December 19, 1995 (Dkt. 230).

$2.00

Upon consideration of the parties' memoranda and upon review of the applicable law and relevant portions of the file in this case, the Court finds that its prior determination that the claims in paragraphs 16, 17-23 and 30 were barred by res judicata was correct. The Court will, however, clarify its reasoning as set forth in its November 22, 1995 Order (Dkt. 212) and state its reasons for upholding the prior determination. The Court notes that the parties agree that the Administrative Complaints in the prior administrative proceedings constitute the original pleadings in those proceedings for purposes of the instant res judicata analysis.

The Plaintiff argues that while Manning involved facts and circumstances readily distinguishable from the instant case, Manning sets out relevant and binding principles which should be understood as barring, not requiring, the application of res judicata to certain claims in the instant case. The Eleventh Circuit in Manning stated:

> [W]e do not believe that the res judicata preclusion of claims that 'could have been brought' in earlier litigation includes claims which arise after the original pleading is filed in the earlier litigation. Instead we believe that, for res judicata purposes, claims that 'could have been brought' are claims in existence at the time the original complaint is filed or claims actually asserted by supplemental pleadings or otherwise in the earlier action.

953 F.2d at 1360 (emph. in original). The Plaintiff argues that under Manning, res judicata cannot bar claims that arose after the dates of the administrative complaints in the instant case. Further, Plaintiff asserts, Manning shows that the EPA was under no duty to supplement its administrative complaints to include subsequent violations. Additionally, Plaintiff argues that Ridgway indicates that only those claims that arose before the dates of the violations alleged in the administrative complaints may be barred. The EPA Environmental Appeals Board in Ridgway stated:

> [T]he Regional Administrator failed to consider the fact that the Region's second action was based on new conduct by Ridgway, much of which allegedly occurred after the Region filed its first action. . . [A] litigant is not required, and indeed is generally not permitted, to assert speculative claims based on conduct that has not yet occurred, and res judicata principles therefore do not require joinder of claims based on such conduct.

CWA Appeal No. 95-2 (EPA Env. Appeals Board, May 30, 1996) at 14-15. Plaintiff further argues that under Ridgway, any claim that arises after the date of the violation(s) in the complaint is "new wrongful conduct" that can be the subject of a separate action. Thus, Plaintiff argues that all claims arising after those alleged in the Administrative Complaints may be brought in the instant action.

Plaintiff also asserts that while the principles in Manning and Ridgway protect nearly all of the claims at issue from being barred by res judicata, the facts in this case are such that the doctrine of res judicata should not apply beyond the claims that were expressly addressed in the Administrative Orders. Plaintiff argues that the settlement is unambiguous, and by its own terms, sets out its own preclusive effect. Plaintiff also argues that Congress has legislated the extent of the preclusive effect of an administrative order in the Clean Water Act and that the doctrine of res judicata cannot be used to extend the protection afforded by statutory law.[2]

The Defendants argue, on the other hand, that while the underlying legal principles referred to in Manning and Ridgway are applicable to this case, the distinguishing facts render the results in those cases irrelevant to this action. Defendants state that in Manning, the issue

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[2]Plaintiff points out that the Clean Water Act provides that "Action taken by the Administrator . . . under this subsection shall not affect or limit the Administrator's . . . authority to enforce any provision of this chapter" except for any violation which has been the subject of an administrative order. 33 U.S.C. 1319 (g)(6). Further, Plaintiff points out that under the Clean Water Act, each day of an unpermitted discharge or effluent violation is a separate violation, such that each violation constitutes a separate cause of action. 33 U.S.C. § 1319 (d), Atlantic States Legal Foundation v. Tyson Foods, 897 F.2d 1128, 1139-40 (11th Cir. 1990).

is whether the two suits involved the same cause of action, and the Eleventh Circuit found that the two suits were based upon different sets of facts. Defendant further states that the main issue in Ridgway is whether the prior suit was a final judgment. Defendants assert that in the instant case, the allegations arose out of the same nucleus of operative fact for each facility and that final adjudication had occurred. Defendants assert that a review of the facts of the present case, including a time line of the events at Barefoot Bay and Carrollwood, demonstrates that res judicata is applicable to the instant case. Defendants point out the following facts for Barefoot Bay:

September 14, 1989	EPA Region IV enforcement officer Roy Herwig visits the Barefoot Bay WWTP and informs Florida Cities that the company needs a NPDES permit for the facility.
February 28, 1990	Florida Cities files its application for a NPDES permit with Region IV. EPA loses this application, thus delaying the process of acquiring a permit by over three months.
June 8, 1990	Florida Cities reapplies for an NPDES permit. EPA acknowledges that it lost the first application.
September 26, 1990	Region IV issues Administrative Order 90-106, which contains interim effluent limitations for the facility's discharges and requires the facility to submit monthly discharge monitoring reports.
September 16, 1991	Region IV issues NPDES Permit No. FL0042293 for Barefoot Bay, but delays the effective date of the permit until November 1, 1991. This permit contains permanent effluent limitations for the facility.
September 25, 1991	Region IV issues Administrative Complaint CWA-IV 91-538 seeking penalties for discharge without a NPDES permit. EPA's "Notes on Proposed Penalty Assessment" state that EPA is fully aware that discharges have occurred since 1985.
November 1, 1991	NPDES Permit No. FL0042293 becomes effective.

November 6, 1991 — Region IV issues the Consent Agreement and Order Assessing Administrative Penalties ("Consent Agreement") for CWA-IV 91-538 in the amount of $6,000.00.

The Defendant asserts, and the Court agrees, that the time line demonstrates that Region IV knew with certainty at the time it issued the Administrative Complaint that the unpermitted discharges would continue until November 1, 1991 because Region IV issued and determined the effective date of the permit on September 16, 1991. Region IV was solely responsible for granting the permit and selecting its effective date. Thus, all of the discharges without a permit for the period of time between September 25, 1991, the date the Administrative Complaint was filed, and November 1, 1991, the day the NPDES permit became effective, resulted from the same nucleus of operative fact: the absence of an NPDES permit. The Court therefore finds that res judicata bars the claims in paragraph 16,[3] as Plaintiff knew of those claims and could have asserted them in the prior Administrative Complaint.

Additionally, Region IV knew of the claims in paragraphs 17-23[4] when it brought the Administrative Complaint on September 25, 1991 and could have asserted them in that Administrative Complaint, as the Notes on Proposed Penalty Assessment show that they were within the scope of that proceeding. Therefore, those claims are also properly precluded by res judicata. Thus, the Court finds that Manning and Ridgway are distinguishable, because the claims sought to be asserted in this case are not different claims based on new conduct; rather

[3]Paragraph 16 alleges that Defendants discharged pollutants from Barefoot Bay without an NPDES permit from July 1, 1990 to October 31, 1991.

[4]Paragraphs 17-23 allege that Defendants violated EPA Administrative Order 90-106 for Barefoot Bay from September 26, 1990 to October 31, 1991.

they are the same type of claims, they were not speculative claims, and they were known at the time the original pleading was filed in the underlying litigation.[5]

Defendants have also pointed out the following facts for Carrollwood:

August 15, 1975	Region IV issues NPDES Permit No. FL0029319 for the Carrollwood WWTP.
April, 1980	Florida Cities applies to renew it NPDES permit.
September 27, 1984	Region IV denies Florida Cities' permit renewal application based upon the Florida Department of Environmental Regulation's (FDER's) unwillingness to renew its operating permit for the facility.
November 27, 1984	Region IV issues Administrative Order 85-044, which oversees the Carrollwood facility's continued discharge until June 1987.
July, 1987	The Florida Legislature enacts the Grizzle-Figg Act which authorized discharges into Sweetwater Creek within certain limitations.
November 17, 1989	After compliance with the prerequisites of Grizzle-Figg, Florida Cities applies for a FDER construction permit, a necessary prerequisite to obtain an NPDES permit.
July 27, 1990	FDER grants the construction permit.
July 31, 1990	Florida Cities applies to Region IV for a NPDES permit.
September 15, 1990	EPA issued its "Intent to Issue" an NPDES permit for Carrollwood.
September 25, 1990	Region IV issues Administrative Complaint No. CWA-IV 90-542 seeking penalties for discharge without a NPDES permit at Carrollwood "since June 1987."
April 19, 1991	Region IV issues CWA-IV 90-542 Consent Agreement and Order Assessing Penalties for discharge without a permit from July 1987 to July 1990 containing a $15,000 penalty.

[5]The Court recedes from its previous reliance on Supporters to Oppose Pollution Inc. v. Heritage Group, 973 F.2d 1320 (7th Cir. 1992).

2)

May 28, 1991	Region IV issues NPDES Permit No. FL0029319 for an AWT facility at Carrollwood, which became effective on July 1, 1991.
July 1, 1991	NPDES Permit No. FL0029319 becomes effective.
January 6, 1992	The Carrollwood WWTP ceases discharge into Sweetwater Creek. The facility is taken out of service and the effluent is transferred to a Hillsborough County facility, pursuant to the interconnection agreement of June 5, 1991.

The Defendant asserts, and the Court agrees, that the time line demonstrates that Region IV knew at the time that it filed the Administrative Complaint that the unpermitted discharges would continue until the Region IV issued and determined the effective date of the permit based on the permit application that was pending. During the period between Florida Cities' application for an NPDES permit and the issuance of the permit, Region IV was solely responsible for granting the permit and selecting its effective date, which thereby determined how long the discharge without a permit would continue. Thus, all of the discharges without a permit for the period of time between September 25, 1990, the date the Administrative Complaint was filed, and July 1, 1991, the day the NPDES permit became effective, resulted from the same nucleus of operative fact: the absence of an NPDES permit. The Court therefore finds that Manning and Ridgway are distinguishable and that res judicata bars the claims in paragraph 30,[6] as Plaintiff knew of those claims and could have asserted them in the prior Administrative Complaint.

Upon consideration of the foregoing, the Court REAFFIRMS its November 22, 1995 Order granting res judicata effect to the claims in paragraphs 16, 17-23 and 30 of the Second Amended Complaint.

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[6]Paragraph 30 alleges that Defendants discharged pollutants from Carrollwood without an NPDES permit from August, 1990 to June, 1991.

DONE AND ORDERED, at Tampa, Florida, this 16th day of August, 1996.

RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of record

Exhibit_____(GHB-97)

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

MIDDLE DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

V.

AVATAR HOLDINGS, INC., and
FLORIDA CITIES WATER COMPANY

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 93-281-Civ-FTM-21

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. ~~This action came to trial or hearing before the Court.~~ The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of plaintiff United States of America and against defendant Florida Cities Water Company for the violations at the three wastewater treatment plants as follows:

Barefoot Bay	$5,610.00
Carrollwood	$14,675.00
Waterway Estates	$289,425.00
TOTAL	$309,710.00

Judgment is entered in favor of defendant Avatar Holdings, Inc. and against plaintiff United States of America on plaintiff's claims against it.

AUG 2 0 1996
Date

RICHARD D. SLETTEN
Clerk

Ginger K McClerk
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

TAMPA, FLORIDA

UNITED STATES OF AMERICA

Plaintiff,

V. CASE NO. 93-281-CIV-FTM-21

AVATAR HOLDINGS, INC., and
FLORIDA CITIES WATER COMPANY,

Defendants.
_____/

MEMORANDUM ORDER

This is an action by the United States of America ("Plaintiff") against Florida Cities Water Company ("Florida Cities"), a private utility company, and its parent company, Avatar Holdings, Inc. ("Avatar Holdings"), brought pursuant to the civil penalty provisions of the Clean Water Act (CWA), 33 U.S.C. § 1319 (b). The action was tried to the Court sitting without a jury. Upon due consideration of the testimony and evidence presented herein, the arguments of counsel, and the proposed findings submitted by the parties, the Court issues the following opinion as its findings of fact and conclusions of law in accordance with Rule 52, Federal Rules of Civil Procedure.

PROCEDURAL BACKGROUND

Prior to trial, the Court decided summary judgment motions of all three parties. The Court granted Plaintiff summary judgment on liability against Florida Cities on the Plaintiff's claims for National Pollutant Discharge System (NPDES) permit violations at Barefoot Bay and

Carrollwood and claims for unpermitted discharges, discharges to an unpermitted location and NPDES permit violations at Waterway Estates. The Court granted Florida Cities summary judgment on the allegations in paragraphs 16-23 and 30 of the Second Amended Complaint, which consisted of a claim for discharge from Barefoot Bay without an NPDES permit, claims for violations of Administrative Order (AO) 90-106 for discharging without a permit from Barefoot Bay, and a claim for discharge without an NPDES permit from Carrollwood. The Court also granted Avatar Holdings partial judgment on the pleadings as to all allegations against Avatar Holdings that date back more than five years due to the five year statute of limitations, 28 U.S.C. § 2462. The remaining issues at trial were the amount of civil penalty to be assessed against Florida Cities[1], the liability of Avatar Holdings as Florida Cities' parent company, and the amount of civil penalty to be assessed against Avatar Holdings if it is found to be liable. The parties have filed their proposed findings of fact and conclusions of law and post-trial briefs, and Avatar Holdings has additionally filed a memorandum of law in support of judgment as a matter of law and Plaintiff has filed a memorandum in opposition thereto.

FINDINGS OF FACT — FLORIDA CITIES[2]

Florida Cities is a utility company, which owns and operates the three wastewater treatment plants that are involved in this case: Barefoot Bay, Carrollwood, which is no longer

[1]In accordance with the Pretrial Order (Dkt. 248), the trial of this case proceeded upon the Revised Joint Pretrial Statement (Dkt. 264), and said pretrial statement is controlling. In the pretrial statement, the parties indicated that the only issue to be tried with respect to Florida Cities was the amount of the civil penalty to be assessed. Therefore, the Court will base the amount of penalties on the number of violations determined in the Court's prior Orders in this case.

[2]Additional findings of fact are incorporated into the Court's discussion of the six factors to consider in assessing the amount of the civil penalty, as is required by the Eleventh Circuit in Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1142 (11th Cir. 1990)(stating that in determining the amount of penalty, the district court must indicate the weight it gives to factors in the applicable statute and the factual findings that support its conclusions).

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in operation, and Waterway Estates. In order for a company to discharge to surface waters of the United States, it must obtain an NPDES permit issued from the Environmental Protection Agency (EPA) or by a state to which the EPA has delegated NPDES permitting authority. Prior to May 1, 1995, Florida was a "non-delegated" state under the CWA such that dischargers in Florida were required to be permitted by both the EPA and the Florida Department of Environmental Protection (FDEP)[3].

I. Barefoot Bay

The Barefoot Bay plant is located in Brevard County, Florida, and it discharges treated effluent into an agricultural drainage canal which leads to the Sebastian River. Barefoot Bay utilizes two percolation ponds. Barefoot Bay provides secondary wastewater treatment to a residential community and is currently undergoing a plant modification to provide advanced wastewater treatment. On November 1, 1991, NPDES permit FL0042293 became effective. The permit required Florida Cities to report to EPA total residual chlorine (TRC) levels, toxicity test results, and biochemical oxygen demand (BOD) levels. The 269 Clean Water Act violations pertaining to Barefoot Bay in this case are the following exceedances of NPDES permit FL0042293: 182 violations of the TRC limitation between September 1992 and March 1993; 3 chronic toxicity test failures in September-October 1992, May 1993, and February 1994; and 79 violations for failure to report BOD on a weekly basis between November 1991 and June 1993 and twice in November 1993.

[3]The Florida Department of Environmental Protection (FDEP) was formerly known as the Florida Department of Environmental Regulation (FDER). Throughout this Memorandum Order, FDEP should be read to mean either FDEP or its predecessor agency, FDER, depending on the relevant time period.

In September 1992, Barefoot Bay purchased and put into use a new Hach DPD DR-100 chlorine tester, which is an EPA approved method for testing chlorine limits of 0.01 milligrams per liter. However, the EPA guidance materials acknowledge that the DPD DR-100 colorimeter is inaccurate below levels of 0.1 milligrams per liter. Thus, the EPA guidance materials allow dischargers who test for TRC with the DPD DR-100 colorimeter to report measurements below 0.1 milligrams per liter as non-detectable. Between September 1992 and March 1993, Florida Cities reported chlorine residuals at or below 0.1 milligrams per liter. Had Florida Cities reported the chlorine as non-detectable rather than as an actual number, Florida Cities would have been deemed to be in compliance with chlorine limits under the Clean Water Act. In any event, after reporting the chlorine residuals at Barefoot Bay, Florida Cities constructed, permitted and placed into service by March 3, 1993 an amperometric titrator and a sulfur dioxide feed, which eliminates chlorine through the combination of sulfur dioxide with the chlorine residual.

With respect to the chronic toxicity test violations, the testimony presented at trial established that the most common cause of chronic toxicity failures is the presence of ammonia in the effluent. Ammonia is made of nitrogen and hydrogen (NH_3). Although advanced wastewater treatment provides for nutrient removal from effluent, secondary treatment does not provide for removal of nutrients such as nitrogen or phosphorus. Thus, Barefoot Bay, a secondary treatment plant, was not designed to remove the nitrogen which resulted in the chronic toxicity test violations.

With respect to the BOD violations, Florida Cities had been reporting carbonaceous biochemical oxygen demand (CBOD) rather than BOD as required in the permit. The BOD test measures the oxygen demand exerted by treated effluent on the receiving system. In October

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1993, Barefoot Bay applied to EPA for a modification of NPDES permit FL0042293 to allow monitoring for CBOD instead of BOD, and EPA granted the modification request with no change in the actual limit. The testimony at trial showed that BOD levels can be extrapolated with a reasonable degree of accuracy from CBOD levels. Thus, even though Barefoot Bay improperly reported CBOD levels, the effluent would have complied with the applicable permit limits.

II. Carrollwood

Until it was closed on January 6, 1992, the Carrollwood plant was located in Hillsborough County, Florida, and provided secondary wastewater treatment to a residential community. Between 1975 and January 1992, Carrollwood discharged secondarily treated effluent into the Sweetwater Creek pursuant to a series of FDEP permits and consent orders. In May 1991, the EPA issued NPDES permit FL0029319, which imposed advanced wastewater treatment standards. The 234 Clean Water Act violations pertaining to Carrollwood in this case are exceedances of the NPDES permit limitations for phosphorus, CBOD, nitrogen, TRC, Total Suspended Solids (TSS), and fecal coliform between July 1991 and January 1992.

In 1979, the FDEP determined that there should be no discharge into Sweetwater Creek, which leads to Tampa Bay, in order to reduce the amount of pollution going to Tampa Bay. In 1984, the EPA denied Florida Cities' NPDES renewal application to discharge into the Sweetwater Creek. In April 1988, FDEP issued Carrollwood an operating permit to the Carrollwood facility requiring Florida Cities to connect to the Hillsborough County system or to construct an advanced wastewater treatment facility by October 1, 1990. In the summer of 1990, Florida Cities applied to the FDEP for another operation permit and the permit application was denied. However, Florida Cities and FDEP entered into a consent order in January 1991

reincorporating the effluent limitations of the April 1988 operating permit and extending until April 1992 the construction deadline for interconnection to Hillsborough County or completion of advanced wastewater treatment. The consent order also required Florida Cities to continue to operate the wastewater treatment plant in accordance with the 1988 effluent limitations.

Since late 1990, Carrollwood also operated under EPA AO 90-100, which imposed secondary treatment limits. No violations of secondary treatments were recorded between July 1, 1991 and January 6, 1992, and Florida Cities met the effluent limitations and monitoring requirements of the active administrative orders. In May 1991, the EPA issued the NPDES permit with advanced wastewater treatment limits. The level of treatment required by the NPDES permit reflected increased treatment requirements for phosphorous and nitrogen which were unattainable by the secondary treatment plant.

In 1991, Florida Cities simultaneously pursued two remedial options: connection to the Hillsborough County system and construction of an advanced wastewater treatment. Hillsborough County did not have capacity to accept effluent until the second quarter of 1991. After Hillsborough County agreed to waive a $5.5 million capacity fee, an agreement was signed on June 5, 1991 to interconnect the two facilities by January 1992. Florida Cities then abandoned plans to construct an advanced wastewater facility. Both before and after the agreement with Hillsborough County, Florida Cities requested that the EPA allow secondary interim limits and relief from the advanced wastewater treatment requirements. The EPA never revoked AO 90-100, which authorized secondary treatment, until March 1992, two months after the interconnection with Hillsborough County was completed. In 1991, the EPA assessed a

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$15,000 penalty ($13.51/day) under the CWA for discharges without an NPDES permit between June 1987 and July 1990 at Carrollwood.

III. Waterway Estates

The Waterway Estates plant is located in Lee County, Florida. Since April 1992, Waterway Estates has provided advanced wastewater treatment, and prior to that time, it provided secondary wastewater treatment. Waterway Estates has discharged treated effluent into the Caloosahatchee River since July 14, 1991, and prior to July 14, 1991, it discharged treated effluent into a canal which led to the Caloosahatchee River. The Waterway Estates plant exceeded NPDES permit FL0030325, which imposed advanced wastewater treatment standards, for a total of 1038 Clean Water Act violations consisting of: 396 violations for discharge without an NPDES permit between October 1, 1988 and October 31, 1989; 621 violations for discharging into a canal, instead of to the 6-foot contour line of the Caloosahatchee River between November 1, 1989 and July 14, 1991; 18 violations of total nitrogen loading and concentration; and 3 toxicity test violations.

In 1975, Florida Cities received a wasteload allocation and an NPDES permit which authorized Waterway Estates to discharge secondarily treated effluent to a canal leading to the Caloosahatchee River. The EPA renewed the permit in 1981 and 1983, and on May 9, 1986, Florida Cities applied to EPA Region IV for a routine renewal of its NPDES permit. At that time, permit writer Connie Kagey denied the application. Ms. Kagey based her denial on her review of the cover page and page 17 of the January 1981 Caloosahatchee River Wasteload Allocation Documentation, which is a preliminary planning document drafted as guidance by FDEP regional offices making permitting decisions. Based on her review of the planning

document, Ms. Kagey determined that Waterway Estates had no wasteload allocation. However, Florida Cities was given opportunities to bring any errors to the EPA's attention at several occasions: after receiving the letter indicating that there would be a public notice period, during the public notice period, and after the issuance of the permit decision when Florida Cities could have requested a hearing under 40 C.F.R. §§ 124.74 or 124.114.

Once the existing NPDES permit expired in 1987, the EPA issued AO 87-085, whereby the EPA authorized Waterway Estates to continue discharging effluent under the terms of the 1981 NPDES permit and directed that the facility cease its discharges by September 30, 1988. Florida Cities then decided to construct an advanced wastewater treatment facility and hired Source, Inc. in early 1988 to design the upgrade. In August 1988, the EPA amended its 1987 administrative order to require Waterway Estates to complete construction and meet final effluent requirements by November 1, 1990. The FDEP also issued a temporary operating permit requiring compliance with effluent limitations by November 1, 1990. The temporary permit allowed secondary discharges to the canal until November 1, 1990, and the EPA did not challenge or comment on the issuance of this permit.

On September 26, 1989, the EPA issued AO 89-109, which contained a construction schedule for the advanced wastewater treatment upgrade, a construction schedule for the relocation of the outfall to the 6-foot contour line of the Caloosahatchee River, and interim secondary treatment effluent limitations from the 1981 NPDES permit until the advanced wastewater treatment construction was completed. Additionally, on September 29, 1989, the EPA issued NPDES permit No. FL0030325, which contained effluent limitations for an advanced wastewater treatment facility. The FDEP also issued a construction permit which

provided an extension of time for the advanced wastewater treatment upgrade and relocation of the outfall to September 1992. Florida Cities requested that the EPA extend AO 89-109 to match the September 1992 construction deadline set by the FDEP, but the EPA did not respond to the request. Florida Cities then completed the advanced wastewater treatment upgrade in April 1992, ahead of the FDEP's schedule, but failed to meet the deadline set in AO 89-109 for October 1, 1991. The outfall to the six-foot contour line of the Caloosahatchee River was operational on July 14, 1991, ahead of the deadlines established in the state construction permit and EPA AO 89-109.

CONCLUSIONS OF LAW — FLORIDA CITIES

The penalty provisions of the Clean Water Act are set forth in 33 U.S.C. § 1319 (d), which provides in pertinent part:

> Any person who violates [specified sections of the Act] shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

The Clean Water Act was intended "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. 49, 52 (1987)(quoting Section 101(a) of the Act). In Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc., the Eleventh Circuit stated that in determining penalties under the Clean Water Act, "the point of departure for the district court should be the maximum fines for such violations permitted by the Clean Water Act." 897 F.2d 1128, 1137 (11th Cir. 1990). The Court further stated that if the district court chooses not to impose the maximum

fine, "it must reduce the fine in accordance with the factors spelled out in section 1319(d), clearly indicating the weight it gives to each of the factors in the statute and the factual findings that support its conclusions." Id. at 1142. The Court also noted that in Tull v. United States, 481 U.S. 412, 422-425 (1987), "the Supreme Court made clear that economic gain and restoration of the status quo is not the only basis on which penalties should be awarded under the Clean Water Act. In addition, the penalties are designed to punish violators for their non-compliance and to serve the goal of retribution." Id. at 1141.

The statutory maximum for the violations at issue is calculated by multiplying daily violations by $25,000. In order to calculate the statutory maximum for monthly violations, the number of monthly violations is multiplied by the number of days in the month they occurred and that number is multiplied by $25,000. Thus, the Court's computation of the statutory maximum is as follows: $6,600,000 (264 x 25,000) for the Barefoot Bay violations, $14,675,000 (587[4] x 25,000) for the Carrollwood violations, and $32,025,000 (1281[5] x 25,000) for the Waterway Estates violations. The total is $53,300,000. In accordance with Tyson Foods, this statutory maximum is the Court's departure point, and the Court will consider Defendants' arguments to reduce the penalty in accordance with the factors in § 1319 (d). The Plaintiff argues that the penalty should only be reduced to $4,861,500.

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[4]The Carrollwood violations consist of violations of the following parameters, several of which are monthly violations: (1) Phosphorus from July-November 1991, the equivalent of 153 days of violations; (2) Carbonaceous Biological Oxygen Demand (CBOD) in October 1991, the equivalent of 31 days of violations; (3) Nitrogen in July 1991 and from September-November 1991, the equivalent of 122 days of violations; (4) Total Residual Chlorine, amounting to 184 violations; (5) Total Suspended Solids from October-December 1991, the equivalent of 92 days of violations; and (6) Fecal Coliform, amounting to 5 violations. The sum of these violations is 587.

[5]The Waterway Estates violations consist of the following: 396 days of unpermitted discharges; 621 days of discharges to an unpermitted location; Nitrogen violations between July 1991 - March 1992, the equivalent of 261 separate days of violations; and 3 chronic toxicity test violations. The sum of these violations is 1281.

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Florida Cities maintains that the penalty should be de minimis — no more than $48,000. Florida Cities points out that trial courts have broad discretion when deciding the appropriate civil penalty amount in Clean Water Act enforcement actions, citing Hawaii's Thousand Friends v. City and County of Honolulu, 821 F.Supp. 1368, 1395 (D.Haw. 1993). Florida Cities points out that in Hawaii's Thousand Friends, the court found that mitigation in the amount of 99.71% of the maximum statutory penalty was within its "sound discretion," even though the discharges failed to meet secondary treatment standards, discharges of raw sewage were numerous and unreported, and the court found a lack of good faith efforts to comply with the NPDES permit or avoid other violations. The courts' determination of the penalty under the Clean Water Act has been characterized as "highly discretionary." Tull v. United States, 481 U.S. 412, 413 (1987), Sierra Club v. Cedar Point Oil Co., 73 F.2d 546, 575 (5th Cir. 1996).

Florida Cities asserts that the Court should use its discretion to find that a penalty of up to $1,000 per violation is appropriate for the following violations in which mitigation is less: 18 nitrogen violations and 3 toxicity violations at Waterway Estates and 3 toxicity violations at Barefoot Bay (a total of 24 violations), which amounts to a penalty of $24,000. For the remaining 1512 violations, Florida Cities says that the EPA's own valuation of discharge without a permit violations at Carrollwood is instructive in setting a standard for the remaining violations. In AO 90-100 for Carrollwood, the EPA found that 37 months of discharge without a permit between June 1987 and July 1990 was worth $15,000 or $13.51 per day. Thus, Florida Cities suggests that, for the remaining 1512 violations, the Court should assess a penalty of no more than $20,428 (1512 x 13.51) for all remaining violations.

I. Seriousness of the Violations

In evaluating the seriousness of the violations at issue in this case, the Court considers the number, duration and degree of the violations as well as the actual or potential harm to human health and environment. United States v. Dean Dairy Products Co., CV-94-0621, p. 16 (M.D. Penn., July 10, 1996), Hawaii's Thousand Friends v. City and County of Honolulu, 821 F.Supp. 1368, 1383 (D. Hawaii 1993). A substantial reduction in the maximum statutory penalty is warranted where the violations caused minimal environmental damage. Id. at 1397, Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co., Inc., 786 F.Supp. 743, 753 (N.D. Ind. 1992). In the instant case, the Court finds that most of the violations of total residual chlorine (TRC), toxicity violations and BOD at Barefoot Bay are not serious. First, although Plaintiff concedes no harm, it asserts that a "particularized showing of harm" is not required and that proof of overall risk of pollutants is sufficient, relying upon Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminal, Inc., 913 F.2d 64, 79 (3rd Cir. 1990), cert. denied, 111 S.Ct. 1018 (1990); Chesapeake Bay Foundation v. Gwaltney of Smithfield, 611 F.Supp. 1542, 1560 (E.D. Va. 1985), aff'd, 791 F.2d 304 (4th Cir. 1986), cert. denied, 479 U.S. 1029 (1987); Dean Dairy, supra at p. 16. Plaintiff's expert Mark Klingenstein, pointed out that a potential risk of harm exists, as the discharge from Barefoot Bay proceeds to the Sebastian River and the Indian River Lagoon, which water bodies have been identified as a habitat for fish, wildlife, and the wood stork, an endangered species. Klingenstein also pointed out that those water bodies have been identified as "threatened water bodies that were being negatively impacted by nutrient load" in the Surface Water Improvement and

Management Act. The Court notes, however, that, with respect to all of the violations, Plaintiff has not in any way quantified the risk of environmental harm.

Further, although the number of violations is relatively high (182 TRC, 3 chronic toxicity, 79 BOD) and the duration of the violations is considerable,[6] the degree of the violations lessens the seriousness of the violations. The TRC violations occurred because Florida Cities was unaware that the test method approved by the EPA did not provide precise results and that the levels measured could have been reported as "not detectable," such that Florida Cities would have been deemed to be in compliance with the NPDES permit. Further, the Plaintiff has acknowledged that the BOD violations are not serious, as they occurred simply because Florida Cities mistakenly reported CBOD instead of BOD. Douglas Smith's testimony established that a conversion of the CBOD test results was possible, and that such conversion showed that none of the CBOD data would have been a violation of BOD effluent limitations. With respect to the chronic toxicity test failures, which occur as a result of nitrogen present in the effluent, the Court notes that Barefoot Bay's secondary treatment facility was not designed to remove nitrogen, and the EPA did not include nitrogen limits in the NPDES permit for Barefoot Bay. Thus, there appears to be an inconsistency between allowing nitrogen in the effluent while limiting the consequent toxicity. Upon consideration of the foregoing evidence, the Court finds that the TRC and BOD violations at Barefoot Bay are not serious, and that the toxicity test violations are somewhat serious.

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[6]The 182 total residual chlorine violations occurred between September 1992 and March 1993; the 3 chronic toxicity test failures occurred in September-October 1992, May 1993, and February 1994; and the 79 violations for failure to report biochemical oxygen demand occurred on a weekly basis between November 1991 and June 1993, and twice in November 1993.

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Second, the Court finds that the NPDES violations at Carrollwood are not serious. First, the Plaintiff admits that it has no evidence of environmental damage from these violations. Although Klingenstein testified that there is a potential risk of harm to the Sweetwater Creek and Tampa Bay due to the nature of the water bodies, the evidence does not demonstrate a quantifiable risk of environmental harm. Further, Smith testified that the Carrollwood plant was providing better than secondary treatment during the period in question and that the environmental impact of BOD and TSS was very small or essentially not measurable. The Court also notes that it is appropriate for the Court to consider the toxic/conventional pollutant distinction when weighing the seriousness of a violation and for the Court to consider that conventional pollutants such as TSS and BOD are not among the most egregious pollutants. Dean Dairy, supra, p. 17, citing PIRG v. Powell Duffryn Terminals, Inc., 720 F.Supp. 1158, 1161 (D.N.J. 1989). Additionally, although the total number of NPDES violations is high (234), the duration was not extended (between July 1991 and January 1992). The Court also finds that the degree of the violations was not substantial because the EPA kept AO 90-100 in effect, thereby authorizing Carrollwood to discharge secondarily treated effluent into Sweetwater Creek. The violations at Carrollwood are violations of the advanced wastewater treatment standards in the July 1991 NPDES permit, not violations of the secondary standards in AO 90-100. The FDEP also permitted Carrollwood to discharge secondarily treated effluent to Sweetwater Creek, which further demonstrates that the degree of the violations was not substantial.

Third, the Court finds that most of the violations at Waterway Estates are not serious. Plaintiff has conceded that there is no evidence of environmental damage as a result of discharges

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from Waterway Estates. However, Klingenstein testified that to avoid localized impacts of pollutant discharges, the Caloosahatchee River was best protected if such discharges were at the six-foot contour line of the River itself. Klingenstein further testified that the permit violations had the potential to cause environmental harm due to the nature of the water bodies. The Court notes, however, that Plaintiff has not demonstrated a quantifiable risk of environmental harm. Rather, as Klingenstein acknowledged on cross-examination, his opinion that the discharges from Waterway Estates had a negative impact upon the canal and the Caloosahatchee River was based upon two studies consisting of computer models of assumed scenarios. Further, Klingenstein admitted that he had not reviewed in detail the actual data concerning the canal and the Caloosahatchee River but indicated that he believed that certain characteristics indicated by the model were useful. Next, the Court notes that the number of violations at Waterway Estates (1038) is sizable and the duration of the violations is somewhat extended.[7] However, the Court finds that the degree of most of the violations is not substantial. The EPA issued two administrative orders that authorized Florida Cities to continue to discharge secondarily treated effluent from Waterway Estates and to meet the effluent limitations in the 1981 NPDES permit between January 1987 and October 1991. Thus, the secondary discharge from Waterway Estates was continuously authorized at all relevant times by both EPA administrative orders and by FDEP permits and consent orders. Further, the EPA did not require Waterway Estates to reduce the volume of its discharge. Additionally, the discharges to an unpermitted location violations are somewhat mitigated by the fact that the canal was a previously approved discharge location.

[7]The 396 violations for discharge without an NPDES permit occurred between October 1, 1988 and October 31, 1989, and the 621 violations for discharging into a canal, instead of to the 6-foot contour line of the Caloosahatchee River, occurred between November 1, 1989 and July 14, 1991.

II. Economic Benefit

The Court finds that the consideration of whether Florida Cities enjoyed an economic benefit as a result of the violations does not weigh in favor of mitigation of the penalties. Florida Cities argues that when a capital improvement, such as an upgrade in a wastewater treatment plant, is approved by the Florida Public Service Commission (PSC) as "used and useful," the utility can include the cost of the capital improvement in the rate base and thereby benefit economically, such that Florida Cities can realize an economic benefit only from investing, not from deferring investment. Mr. Keith Cardey testified, based on the assumption that the Florida PSC's rate increase is in effect as soon as the advanced wastewater treatment plants begin service, that Florida Cities did not enjoy an economic benefit as a result of its violations at any of the three facilities at issue in this case.[8] However, as Plaintiff points out, any investment that was subsequently not approved by the PSC could not have been recouped. Further, Florida Cities has not established that the cost of the capital improvement would be immediately approved and included in the rate base. Thus, the Court disagrees with Florida Cities' contention that it can only realize an economic benefit from investing, not deferring investment.

[8]With respect to Barefoot Bay, Cardey testified that if Florida Cities had constructed the advanced wastewater treatment plant and had it in service by April 1, 1990, Florida Cities would have generated $803,000 more than they actually experienced. With respect to Carrollwood, Cardey testified that if Florida Cities had constructed the advanced wastewater treatment plant and had it in service by November 1, 1984, the operation would have generated $1,827,000 more than they actually experienced. With respect to Waterway Estates, Cardey testified that, if Florida Cities had constructed the advanced wastewater treatment plant and had it in service by October 1, 1988, the operation would have generated $1,997,000 more than they actually experienced.

III. History of Violations

The Court has considered the history of violations at the three facilities at issue and finds that this factor supports some mitigation of the penalties. With respect to Barefoot Bay, Florida Cities admits that prior to November 1, 1991, it did not have an NPDES permit to discharge effluent from Barefoot Bay and that it has paid penalties for discharge without a permit. Further, the Court notes that Barefoot Bay exceeded AO 90-106 from September 26, 1990 to October 31, 1991. However, Florida Cities points out that it entered into a Consent Order with the FDEP which permitted discharges until a feasible alternative could be found. Additionally, the Court notes that there is no history of violations for TRC, toxicity, or misreporting of BOD measurements at Barefoot Bay. At Carrollwood, Florida Cities discharged without a permit from November 1, 1984 to June 30, 1991. However, the FDEP issued permits effective June 1980 through May 1985 and April 1988 through October 1990 for Carrollwood. In September 1990, the EPA issued AO 90-100, which provided effluent guidelines and limitations. Further, the Court notes that there is no history of violations of advanced wastewater treatment standards at Carrollwood prior to the issuance of the NPDES permit containing advanced wastewater treatment standards in 1991. At Waterway Estates, the Court again finds no history of violations which support imposition of maximum penalties. Although Waterway Estates discharged without a permit from January 1987, after the EPA's denial of the NPDES permit took effect, until October 1, 1988, Waterway Estates consistently met its secondary wastewater treatment requirements during all relevant periods.

IV. Good Faith Efforts to Comply with Requirements

The Court has considered Florida Cities' efforts to comply with its various requirements and finds that the efforts to comply in some instances support a small mitigation of the penalties. First, with respect to Barefoot Bay, Plaintiff points out that it is located in a rural area of Brevard County, where there are approximately 3,000 acres of orange groves within 1.5 miles which could have been used to build additional percolation ponds, spray irrigation, or a deep well. Although the evidence at trial shows that these options were considered since the mid-1980s, and that Florida Cities purchased a 40 acre site in December 1985, the alternatives were rejected due to cost and effectiveness concerns. Klingenstein gave his opinion that these alternatives were feasible and would have eliminated the violations at Barefoot Bay. Further, Plaintiff maintains that Florida Cities could have invested earlier in a sulfur dioxide unit and an advanced wastewater treatment plant in order to meet permit limits for toxicity and TRC. The Court agrees that Florida Cities' efforts to comply with the applicable requirements of the Clean Water Act were prolonged, and decisions were made slowly over the course of several years due to much concern regarding the cost of the options, such that Florida Cities did not purchase the 316 acres of the H&S groves for spray irrigation until July 1995. Nevertheless, the Court gives due weight to Florida Cities' efforts in investigating means to comply with the requirements, and the Court notes that some delays were caused by third parties outside of Florida Cities' control, such as delays caused by challengers to the construction permit for a spray field system on a 300-acre spray field site, which led to administrative proceedings and hearings. Further, the Court notes that Florida Cities acted promptly to solve the TRC exceedances and misreporting of CBOD.

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With respect to Carrollwood, Plaintiff points out that Florida Cities could have connected with the City of Tampa's plant, which had available capacity, or could have built an advanced wastewater treatment plant after the Grizzle-Figg legislation took effect in 1987, in order to prevent unpermitted discharges in the years 1984 through 1991 and permit violations after July 1991.[9] Rather, Florida Cities waited until the Hillsborough County system had capacity to treat the Carrollwood wastewater in 1992 due to the perceived high costs of connecting to the Tampa wastewater treatment plant, which involved the construction of a force main of between 10,000 and 15,000 feet. The Court agrees that Florida Cities was dilatory in proceeding in its efforts and making its decisions to correct the violations at Carrollwood. However, the Court also gives due weight to Florida Cities' efforts to comply with the requirements of the EPA. Florida Cities complied at all times with the requirements of AO 90-100, which the EPA kept active during the time in which the secondary treatment facility could not meet the NPDES permit's advanced wastewater treatment limits.

With respect to Waterway Estates, Plaintiff points out that Defendants knew or should have known that they needed to consider alternative arrangements for Waterway Estates due to the 1981 study which indicated that the discharge to the canal could not continue. Plaintiff also points out that Florida Cities had interconnection and advanced wastewater treatment upgrade options which would have prevented the violations. From February 1987 through February 1990, North Fort Myers Utilities discussed the possibility of providing wastewater treatment service to Waterway Estates, but Florida Cities rejected this option for reasons of cost and concern that the PSC may not approve such connection. Plaintiff asserts that this option was a

[9]Klingenstein's report also indicates the opinion that spray irrigation, percolation ponds, and deep well injection were other options.

particularly attractive one from an environmental standpoint because the North Fort Myers plant uses deep well injection and spray irrigation to dispose of its treated effluent without any surface water discharge. In 1986 Florida Cities applied for a renewal of its NPDES permit, which was denied in January 1987. In December 1987, having decided to upgrade its plant and move the outfall, Florida Cities applied for a wasteload allocation. In November 1989, Florida Cities' new NPDES permit became effective. Due to contractor disputes and delays, the design and construction process for the upgrade was delayed, and Defendants failed to comply with its NPDES permit until 1992. Additionally, in its efforts to prevent discharges to an unpermitted location, Florida Cities did not begin the construction of the outfall extension until December 1990, and the new outfall was not completed until July 1991. The Court again finds that Florida Cities' efforts and decisions proceeded slowly such that the violations were not eliminated expeditiously. However, the Court gives due weight to the efforts of Florida Cities to construct its advanced wastewater treatment plant within a reasonable time despite the delays caused by third parties. The Court also notes that Florida Cities had explored alternatives to surface water discharge, including public access spray irrigation, restricted access irrigation, percolation ponds, and deep well injection.

V. Economic Impact of the Penalty

The Court finds that Florida Cities does not have the ability to pay the statutory maximum penalty and that the economic impact of the penalty on Florida Cities constitutes a mitigating factor. The Court notes that Eileen Zimmer testified for the Plaintiff that Florida Cities can afford to pay a penalty up to of $7.5 million (if the penalty is paid over the course of five years) without a material adverse affect on the company. Ms. Zimmer indicated that she analyzed

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publicly available materials, SEC filings, and financial statements of Florida Cities, and in her report she stated that she considered "the stable nature of the business the company is in, its historical ability to generate income and its dividend payment history." Ms. Zimmer suggested that Florida Cities could borrow the $7.5 million to pay for the penalty; however, she acknowledged that the only source likely for a loan would be Avatar Holdings, who Zimmer conceded lost money in each of the last five years. Further, Zimmer conceded that Florida Cities' liquidity as represented by its current equity to debt ratio and working capital is poor and that long term debt has increased somewhat and remains at moderate levels. At trial, she also stated that short term liabilities increased between 1993 an 1994 by about $4.3 million. Further, the record shows that Florida Cities is obligated to pay Allstate Insurance Company preferred stock redemption obligations every year between 1997 and 2001. Additionally, the Court finds significant the testimony of Charles McNairy[10] that Florida Cities and Avatar Utilities, Inc. have approximately $17 million of planned capital expenditures for enhancements, improvements, and expansions to the existing water treatment plants which will exhaust the available lines of credit. Finally, as a utility being regulated by the PSC, Florida Cities cannot simply raise its rates to cover a penalty, and the payment of the penalty is not tax deductible.

VI. Other Matters as Justice May Require

Florida Cities argues that the Court should consider several facts pertaining to each of the facilities at issue in this case. The Court finds that the facts noted by Florida Cities, such as Barefoot Bay's compliance with the directives and authorizations of the FDEP, Carrollwood's inability to meet the NPDES requirements which were beyond the physical capacity of the plant,

[10]Charles McNairy testified that he is currently the Executive Vice-President, treasurer, and Chief Financial Officer of Avatar Holdings, Inc.

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and Waterway Estates' possession of a wasteload allocation to discharge secondarily treated effluent when Kagey denied the permit renewal based upon her review of a planning document, have already been considered by this Court in connection with the above five factors. Florida Cities does raise a new argument, however, that the Plaintiff raised the violations pertaining to Carrollwood for the first time when it amended the Complaint in 1995 and should not be allowed to recover millions of dollars in penalties by including those violations. Nevertheless, the Court finds the above five factors to be determinative of the mitigation of the penalty to be assessed.

VII. Penalties

Having considered the factors discussed above, the Court finds that the statutory maximum should be mitigated as set forth herein. First, the 79 violations of BOD at Barefoot Bay will be penalized in the amount of $10 per day of each violation. The 182 TRC violations will be penalized at $10 per day of each violation. The three (3) chronic toxicity test violations will be penalized in the amount of $1,000 per day of each violation. With respect to the 234 Carrollwood NPDES permit violations, the penalty will be in the amount of $25 per day of each violation. The 18 nitrogen and three (3) chronic toxicity test violations at Waterway Estates will be penalized in the amount of $1,000 per day. The 621 days of discharges to an unpermitted location will be penalized in the amount of $25 per day. Finally, the 396 days of unpermitted discharges from Waterway Estates will be penalized in the amount of $25 per day.

FINDINGS OF FACT — AVATAR HOLDINGS

Avatar Holdings is a diversified company which has more than 60 direct and indirect subsidiaries engaged in a variety of business operations including home construction, vacation ownership, resort operations, retail land sales, property management, commercial and industrial

development, and water and wastewater utilities operations. Avatar Holdings places its principal emphasis on the real estate operations. Avatar Utilities, Inc. ("Avatar Utilities") is a subsidiary of Avatar Holdings and is the parent for all of Avatar Holdings' utility subsidiaries. Until 1993, Avatar Utilities was the parent of numerous utility companies which operated approximately 37 water supply companies and 13 wastewater plants. In late 1993, Avatar Utilities downsized through the sale of 29 plants.

The formal relationship between Avatar Holdings and Florida Cities is as follows: Avatar Holdings is the parent of Avatar Utilities; Avatar Utilities is the parent of Consolidated Water Company; Consolidated Water Company is the parent of Florida Cities Water Company Holdings, Inc.; and Florida Cities Water Company Holdings, Inc. is the parent of Florida Cities. However, the evidence in this case has shown the involvement of employees of only three of these entities: Avatar Holdings, Avatar Utilities, and Florida Cities. Further, the evidence established that Avatar Holdings does not control any of Florida Cities' individual plants on a daily basis. The utilities subsidiaries make decisions concerning plant operation, not Avatar Holdings. When Florida Cities chooses a contractor for a particular project involving a capital expenditure exceeding $75,000, it seeks contract award ("conward") approval form Avatar Holdings. Avatar Holdings has never rejected a conward request from Florida Cities or Avatar Utilities relating to the operation of plant facilities or environmental compliance.

Further, Avatar Holdings officers and directors generally held utility operations review meetings once a year to discuss financial matters, budget performance, and future budget plans. With respect to the three facilities at issue in this case, Avatar Holdings officers and directors discussed and sent memoranda concerning planning matters. As for Barefoot Bay, the Plaintiff

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introduced evidence at trial showing that in 1983, "Avatar" management meetings included discussion of land areas needed "for future construction to accommodate the complete build-out of Barefoot Bay." Further, in February 1984, Lawrence Wilkov, former President of Avatar Holdings, wrote a file memorandum which noted the cost to acquire and build ponds, stated that a way should be found to have the utility fund the entire amount, and stated that the situation requires immediate action as increased capacity should be "on line" by November 1984. In June 1984, Peter Sharp, former Chief Executive Officer of Avatar Holdings, wrote to Wilkov, John Sladkus,[11] and Robert Gordon[12] that they "must be sure that the cost of the percolation pond and related construction end up 100% as part of Barefoot Bay's rate base on which rates can be charged to customers from day one." Further, in 1985 Gordon informed Wilkov of cost estimates of percolation ponds for Barefoot Bay and Sharp gave his opinions to Gordon regarding Gordon's efforts in acquiring land for percolation ponds. In 1986, Gordon sent Sladkus status reports on the Barefoot Bay plant. In January 1987, Sladkus informed Sharp and Wilkov by memorandum that the ponds were not functioning and suggested the possibility of spray irrigation. In 1988, Sladkus gave Sharp another report on Barefoot Bay attaching a file memorandum written by Gordon concerning Gordon's meeting with the FDEP, and Sladkus also sent Sharp a memorandum recommending the retention of a particular engineering company. The Plaintiff also points to memoranda between Sladkus, Wilkov, Dennis Getman[13] and Sharp

[11]John Sladkus was Avatar Holdings' Executive Vice President.

[12]Robert Gordon is President of Avatar Utilities.

[13]Dennis Getman is Avatar Holdings' Executive Vice-President, and he is also General Counsel for Avatar Holdings, Avatar Utilities and Florida Cities.

indicating their awareness of or involvement in the deep well project or alternatives to deep well injection, such as spray irrigation, at Barefoot Bay.

With respect to Carrollwood, Sladkus was informed by two memos in December 1988 and by participation in a meeting at Avatar Utilities in January 1989 of the status and schedules pertaining to Carrollwood projects. Further, Sharp was concerned with cost, flow, recovery of costs through the rate base, and construction completion time. However, Paul Bradtmiller, Executive Vice-President of Florida Cites, who was involved in the advanced wastewater treatment construction process and was the principal negotiator on behalf of Florida Cities with respect to connection to Hillsborough County, testified that he never discussed the advanced wastewater treatment process or the negotiations with Hillsborough County with any officials of Avatar Holdings. Further, the testimony of William Shafer, Head of Planning for the Sanitary Sewer Department of the City of Tampa, who was involved in negotiations with Florida Cities regarding possible connection to Tampa in the 1980s, did not show any involvement by Avatar Holdings in the negotiation process.

With respect to Waterway Estates, in January 1987, Sladkus reported to Sharp and Wilkov that the plant either needed to apply for a wasteload allocation and upgrade to advanced wastewater treatment or connect to North Fort Myers Utilities. In June 1987, Gordon forwarded to Sladkus a copy of the EPA's compliance order for Waterway Estates. In August 1987, Gordon forwarded to Sladkus a copy of an engineering report on the feasibility of disposing of the Waterway Estates wastewater, noting that due to the recommended cost of treatment and disposal, additional work would be necessary. In November 1987, Gordon again wrote to Sladkus attaching a memorandum outlining various options regarding upgrading Waterway

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Estates. On October 3, 1988, Gordon wrote Sharp and Wilkov a memorandum stating that County Commissioner Bigelow indicated that he wanted the County Commission to get out of the water and wastewater day-to-day operations and felt that could only be accomplished through privatization or establishment of a water/sewer authority which would take over the direction and operation of the utility systems. On October 7, 1988, Sharp wrote to Gordon that Florida Cities' "long term objective should be to own the entire Lee County system--that is, the County's facilities as well as the City's."

Further, Sladkus was informed by two memos in December 1988 and by participation in a meeting at Avatar Utilities in January 1989 of the status and schedules pertaining to Waterway Estates projects. Sladkus also informed Sharp of the budgeted items for Waterway Estates. In October 1989, Sharp wrote Sladkus that "[w]e must have assurance from Bob Gordon that the entire cost of the upgrade and expansion of this plant will be included as used and useful." In July 1991, when it became clear that the Waterway Estates advanced wastewater treatment improvements were behind schedule, Gerald Allen, President of Florida Cities and formerly Vice-President of Avatar Utilities, wrote a memorandum to Sharp with copies to Getman, Gordon, and Wilkov updating them on the status of the project.

However, Allen and Patrick Lehman[14], who were involved in the selection of discharge alternatives at Waterway Estates, stated at trial that it was not Avatar Holdings, but rather Florida Cities and Avatar Utilities, that made the decisions regarding the alternatives. Further, Lehman testified that the alternatives were not discussed with Avatar Holdings. Additionally, in a memorandum to Sladkus on June 5, 1990, Allen requested approval of a conward to upgrade

[14]Patrick Lehman was employed at Florida Cities between June 1984 and April 1989, initially as an Operations Manager and later as Vice-President of Operations.

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the Waterway Estates facility. When Sladkus responded with a recommendation that the project be rebid because the price appeared high, Allen informed him of the disadvantages of rebidding the project. Sladkus then did not seek to have Florida Cities rebid the contract, and the contract was approved with the original bidder.

In the fall of 1988, Avatar Utilities developed an Environmental Assurance Program. This was not an Avatar Holdings' program. Allen did not make any reports to the full Avatar Holdings Board of Directors regarding audits performed under the Environmental Assurance Program, but did report to the Avatar Holdings Audit Committee. Allen's reports provided the progressive status as to whether a field audit, draft audit, or final audit report had been completed. Allen did not provide the reports of field audits themselves or describe the findings of the field audit reports to the Avatar Holdings Audit Committee. Allen did not describe for the Avatar Holdings Audit Committee the alleged violations at Barefoot Bay, Carrollwood, or Waterway Estates.

CONCLUSIONS OF LAW — AVATAR HOLDINGS

This Court previously determined in its November 22, 1995 Order that, in determining whether Avatar Holdings is liable as a parent corporation under the Clean Water Act, the standard of liability in § 107 of the Comprehensive Environmental Response and Liability Act (CERCLA) does not apply. Under that standard, a parent corporation is liable as an "operator" under CERCLA if it "directly and pervasively controlled" the actions of the subsidiary "to the extent of actually involving itself in the daily operations of the subsidiary." Jacksonville Electric Authority v. Bernuth Corp., 996 F.2d 1107, 1110 (11th Cir. 1993). This Court stated in its Order that, under the Clean Water Act, "the mere fact of being a parent exercising control over

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a violating subsidiary does not properly subject the parent company to liability." Although the Court indicated that it would consider evidence showing "actual and pervasive control of Florida Cities to the extent of actually being involved in the daily operations of Florida Cities," the various portions of the Court's opinion show that the Court intended the standard for Avatar Holdings' liability as a parent corporation to be based on a stricter standard of "directing or causing" the violations in such a way that it may be considered a "person who violates" under § 309 (d) of the Clean Water Act. To the extent the Court's language in the November 22, 1995 Order broadened this intended standard, the Court recedes from that portion of its November 22, 1995 opinion.

The Court finds that the evidence adduced at trial does not establish that Avatar Holdings directed or caused any of the violations of the Clean Water Act at issue in this case. Thus, the Court finds that Avatar Holdings is not a "person who violates" under section 309 (d) of the Clean Water Act. The evidence as a whole shows that Avatar Holdings' role in the operations of the three Florida Cities' facilities was limited to overall financial review and long term strategic planning, as Avatar Holdings' officers were concerned with large costs and budgetary planning. The fact that Avatar Holdings officials were informed of environmental compliance issues and discussed the costs of large projects that would eventually eliminate violations does not amount to the type of action or direction for which liability arises under the Clean Water Act. Further, the evidence shows that Avatar Holdings did not make the type of operational decisions that amount to directing or causing the violations in this case. Additionally, there is no legal basis under the Clean Water Act for holding Avatar Holdings liable for any failure to

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act because it was not the entity responsible for decisions regarding operations and environmental compliance.

With respect to Barefoot Bay, the evidence does not establish that Avatar Holdings caused or directed the violations of TRC, toxicity test failures, and failure to monitor BOD. First, there is no evidence that Avatar Holdings' officials were aware of these violations or that they ever discussed these violations. Further, there is no evidence that Avatar Holdings had any involvement in the measurements of these tests or knowledge or control regarding how the measurements of these tests are conducted or how such measurements are reported to the EPA. Although the Plaintiff argues that Avatar Holdings caused the Barefoot Bay violations because of an alleged profit motive in having its indirect subsidiary, Barefoot Bay Development Corporation, develop a mobile home community at Barefoot Bay, the evidence does not establish any link between the development of the mobile home community and the Barefoot Bay NPDES violations. Further, the evidence regarding Avatar Holdings' concern for costs and long-term planning of large projects such as percolation ponds or alternative discharge options does not establish that Avatar Holdings controlled the discharge options at Barefoot Bay such that it could have directed or caused the Barefoot Bay violations.

With respect to Carrollwood, the evidence again does not establish that Avatar Holdings caused or directed the violations of TSS, phosphorus, nitrogen, CBOD, TRC, or fecal coliform. Although the Plaintiff argued that Avatar Holdings caused the violations because it was not willing to connect to Hillsborough County sooner or build an advanced wastewater treatment plant sooner, the evidence does not establish any link between Avatar Holdings' actions and statements and the Carrollwood violations. Rather, the evidence shows that the utilities

subsidiaries devised and considered the alternatives and made the decision to proceed with the Hillsborough County connection. Additionally, there is no evidence that Avatar Holdings' officials were aware of the Carrollwood NPDES violations or that they ever discussed these violations. There is also no evidence that Avatar Holdings had any involvement in the measurements of these tests or knowledge or control regarding how the measurements of these tests are conducted or how such measurements are reported to the EPA. Moreover, the evidence regarding Avatar Holdings' concern for costs and long-term planning of large projects does not establish that Avatar Holdings controlled the discharge options at Carrollwood such that it could have directed or caused the Carrollwood violations.

With respect to Waterway Estates, the evidence again does not establish that Avatar Holdings caused or directed the violations of alleged discharges into an unpermitted location during the period of May 5, 1990 through July 14, 1991 or the NPDES permit violations relating to nitrogen levels and toxicity test failures.[15] First, although the Plaintiff argues that Avatar Holdings caused the delays in upgrading Waterway Estates to an advanced wastewater facility, the evidence does not show that Avatar Holdings was involved in the selection of alternatives or the construction of the advanced wastewater treatment plant. Further, the fact that Sharp expressed his opinion that the long term objective should be to own the entire Lee County system does not amount to a strategy on the part of Sharp to do so, and there is no evidence that Avatar Holdings took steps to acquire the entire Lee County system. Moreover, both Allen and Lehman testified at trial that they were unaware of any plan by Avatar Holdings to acquire the Lee

[15]The Court's November 22, 1995 Order barred certain claims against Avatar Holdings based on the statute of limitations, 28 U.S.C. § 2462. Thus, with respect to Waterway Estates, Avatar Holdings is potentially subject to liability only for the violations of discharges to an unpermitted location during the period of May 5, 1990 through July 14, 1991 and the NPDES violations at Waterway Estates.

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County system. Additionally, the evidence shows that the delays in the construction of the advanced wastewater treatment plant involved difficulties in the permitting process, and the evidence shows that Avatar Holdings was not involved in the permitting process. The evidence does not establish that Avatar Holdings delayed construction; rather, it shows that Avatar Holdings approved a conward to upgrade the Waterway Estates facility without a rebidding for the project. Finally, the evidence regarding Avatar Holdings' concern for costs and knowledge of the alternatives and the status and schedules of the projects does not amount to an exercise of control, decision-making or other activity that caused or directed the violations at Waterway Estates.

CONCLUSION

Upon consideration of the foregoing, it is hereby **ORDERED and ADJUDGED** that:

1. The Clerk is **DIRECTED** to enter judgment in favor of Plaintiff and against Florida Cities. The amount of civil penalties to be assessed against Florida Cities for the violations at the three wastewater treatment plants are as follows:

Barefoot Bay	$ 5,610.00
Carrollwood	$14,675.00
Waterway Estates	$289,425.00
TOTAL	**$309,710.00**

2. The Clerk is **DIRECTED** to enter judgment in favor of Defendant Avatar Holdings and against Plaintiff on Plaintiff's claims against it.

3. Avatar Holding's Rule 52 (c) Motion for Judgment as a Matter of Law is **DENIED as moot.**

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DONE AND ORDERED, at Tampa, Florida, this 20th day of August, 1996.

RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of record

Exhibit_____(GHB-98)

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS INC., and FLORIDA CITIES WATER COMPANY, Defendants,	)	Civil Action No. 93-281-Civ-FTM-21

Florida Cities Water Company's Verified Motion for Attorneys Fees

Pursuant to Fed. R. Civ. P. 54 and Local Rule 4.18, Florida Cities Water Company hereby moves to recover its attorneys fees with respect to the claims barred by the Court's ruling concerning the doctrine of res judicata. The amount sought is $407,634.50.

The support for this motion is set forth in the accompanying memorandum of law. Counsel for Florida Cities has conferred with counsel for Plaintiff in a good faith effort to resolve the issues raised by this motion, and counsel have been unable to agree on the resolution of the motion.

Respectfully submitted,

By: Gary H. Baise
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SFH

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September 3, 1996

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v.. AVATAR HOLDINGS INC., and FLORIDA CITIES WATER COMPANY, Defendants,	Civil Action No. 93-281-Civ-FTM-21

Florida Cities Water Company's Memorandum of Law in Support of Its Verified Motion for Attorneys Fees

I. Preliminary statement

Pursuant to Rule 54 of the Federal Rules of Civil Procedure and Local Rule 4.18, Florida Cities Water Company ("Florida Cities") submits this memorandum of law in support of its application for attorneys fees incurred in defending against claims contained in paragraphs 16 - 23, 28, 30, and 45 of Plaintiff's second amended complaint, and brought against two of its facilities, Barefoot Bay and Carrollwood. This Court determined that these claims were barred by the doctrine of res judicata. Florida Cities seeks to recover its attorneys fees incurred due to Plaintiff's initial discovery efforts beginning in about January, 1995 relating to Barefoot Bay and Carrollwood, defending against the amendments to the complaint, handling discovery issues relating to the two facilities, and moving for summary judgment. By filing the claims identified above against Barefoot Bay and Carrollwood, the Plaintiff has created costly litigation for

Florida Cities, which was unnecessary. The Plaintiff failed to review key documents in its own files and failed to talk with its own employees who had knowledge of the facts at issue. The documents and key employees' testimony demonstrated that the Plaintiff failed to conduct a competent preliminary review and factual inquiry before filing this action. Plaintiff's pursuit of the above-mentioned claims, which are barred by res judicata, therefore can constitute bad faith and can provide support for a reward of attorneys fees incurred in defending against the barred claims. Florida Cities submits its verified motion for attorneys fees in the amount of $407,634.50. A detailed listing of these attorneys fees is appended as Attachment A.

II. Florida Cities is Entitled to Attorneys Fees with respect to the Claims Barred by Res Judicata

The Court has inherent authority to award attorneys fees "when a losing party has acted in bad faith." Kreager v. Solomon, P.A., 775 F.2d 1541, 1543 (11th Cir. 1985); see also Chambers v. Nasco, Inc., 501 U.S. 32 (1991). This power may be exercised against the United States pursuant to the waiver of sovereign immunity contained in 28 U.S.C. § 2412(b), a provision of the Equal Access to Justice Act, without regard to the prevailing party's net worth. See American Hosp. Ass'n v. Sullivan, 938 F.2d 216, 219 (D.C. Cir. 1991).

Courts have found that a Plaintiff's pursuit of claims which are barred by res judicata can constitute bad faith and support an award of attorneys fees incurred in defending against the barred claims. See Ellingson v. Burlington Northern, Inc., 653 F.2d 1327, 1332 (9th Circ. 1981) (affirming award of fees and awarding fees on appeal where "the gravamen of the present complaint was resolved before [an administrative tribunal]" and was accordingly "patently barred by res judicata"); United States v. Nesglo, Inc., 744 F.2d 887,891 (1st Cir. 1984) (affirming

award of attorneys fees and awarding fees on appeal where third-party plaintiff pursued third-party complaint which was "barred under well-settled principles of res judicata"); see also Pallante v. Paine Webber, Jackson and Curtis, Inc., Fed. Sec. L. Rep., (CCH) P92,219 (S.D.N.Y. 1985) (awarding fees and costs to defendant for plaintiff's pursuit of case barred by res judicata, noting "responsibilities of counsel in specialized areas of the law to refrain from pursuing litigation that they must have known lacked an adequate basis in law").

The Department of Justice and EPA's lawyers could have made one simple phone call and determined from their own staff people that prior EPA administrative actions had disposed of the claims of unpermitted discharges at Barefoot Bay and Carrollwood. By this simple act, they would have known the claims they were about to bring were barred by res judicata. The facts are overwhelming that neither the Department of Justice nor EPA ever discussed this issue with the appropriate EPA staff. In fact, Florida Cities had to expend tremendous resources to find Roy Herwig, the EPA enforcement officer for Barefoot Bay, who declared that he believed that the issue of discharge without an NPDES permit was fully resolved at Barefoot Bay and "none of this would be revisited."

It is fundamental that the Plaintiff should base its allegations on known facts. In fact, Plaintiff presented no credible evidence to refute EPA's own administrative record relating to Barefoot Bay. As a result, the Plaintiff engaged in bad faith and reckless disregard of its responsibility by burdening the Defendants with the costs of relitigating the barred claims against Florida Cities. The Court's Order of November 22, 1995 demonstrates that the Plaintiff failed to initiate a reasonable inquiry into the scope of the administrative action taken by EPA at Barefoot Bay. The same simple phone call would have produced the same result with regard to

Carrollwood, and Florida Cities would not have been forced to expend enormous funds to defend itself on administrative claims that had already been settled. Again, the Plaintiff failed to undertake a reasonable inquiry at Carrollwood to determine the facts. EPA's principal negotiator of the Carollwood settlement testified that, when the Carrollwood consent agreement was signed, he knew that Florida Cities would be discharging without a permit, and this did not warrant an increase in the penalty because "the case was settled, long since settled." As with the Barefoot Bay allegation, the Department of Justice and EPA failed to check with the EPA enforcement officer who negotiated the Carrollwood settlement. It is also clear the Plaintiff did not undertake any due diligence to verify the enforcement officer's interpretation of the documents in the closed file.

The consequence of these reckless actions by the Department of Justice and the Environmental Protection Agency has been that Florida Cities has been subjected to expensive litigation costs in relitigating issues that had long been settled by EPA. Florida Cities is therefore eligible for an award of attorneys fees that it has incurred in defending against claims already settled by EPA and thus barred from being relitigated under the res judicata doctrine. Florida Cities seeks to recover all attorneys fees relating to the claims which were barred by the Court's Order of November 22, 1995. It is difficult to precisely identify all the attorneys fees relating to these claims; however, the attached affidavit and list of fees created by Gary H. Baise is the best calculation available.

III. Conclusion

For the foregoing reasons, Florida Cities should be awarded attorneys fees in the amount of $407,634.50.

Respectfully submitted,

By: _____

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September 3, 1996

DATE	AMOUNT	ATTY	DESCRIPTION OF WORK
01/03/95	595.00	SFH	Review BFB & CW material to summarize for GHB.
01/04/95	500.00	DGS	Review documents re: BFB incidents & notes from DOJ inspection.
01/05/95	765.00	SFH	Work on chronology of CW for GHB.
01/06/95	100.00	DGS	Review BFB documents.
01/06/95	1,020.00	SFH	Prepare chronology of CW.
01/09/95	680.00	SFH	Prepare chronology of CW.
01/10/95	1,360.00	SFH	Continue preparing chronology of CW; look at effect of administrative order.
01/11/95	1,190.00	SFH	Work on BFB & CW chronology.
01/11/95	700.00	DGS	Work on research assignments & review BFB documents.
01/13/95	680.00	SFH	Prepare list of potential deponents of CW; revise chronologies of BFB CW.
01/13/95	1,150.00	DGS	Review BFB & CW matters for future depositions.
01/16/95	220.00	LWH	Index depositions of Good.
01/18/95	220.00	LWH	Index depositions of Siler re: BFB.

TOTAL ATTORNEY TIME FOR JANUARY $9,180.00

DATE	AMOUNT	ATTY	DESCRIPTION OF WORK
02/08/95	363.00	LWH	Work on assignment and history of BFB.
02/08/95	600.00	GHB	Review BFB & deposition strategy.
02/17/95	935.00	LWH	Work on summary judgment data for BFB.
02/18/95	385.00	LWH	Work on BFB chronology.
02/20/95	715.00	LWH	Work on CW chronology.
02/21/95	770.00	LW	Work on CW chronology.
02/22/95	1,600.00	DGS	Work on issues re: BFB.
02/24/95	100.00	GHB	Conference re: CW.
02/24/95	660.00	LWH	Work on CW & BFB memos.
02/27/95	220.00	LWH	Prepare CW summary.

TOTAL ATTORNEY TIME FOR FEBRUARY $6,348.00

DATE	AMOUNT	ATTY	DESCRIPTION OF WORK
03/01/95	140.00	LP	Prepare file on facts in BFB & CW.
03/01/95	847.00	LWH	Develop BFB & CW defenses.
03/02/95	600.00	GHB	Review documents on CW.
03/02/95	880.00	LWH	Work on interrogatory request.
03/03/95	300.00	GHB	Conference on CW.
03/03/95	330.00	LWH	Work on BFB & CW timeline.
03/06/95	220.00	LWH	Review Siler deposition.
03/07/95	715.00	LWH	Review Good deposition & points to defend.
03/10/95	110.00	LWH	Work on interrogatory response.
03/10/95	1,275.00	SFH	Work on response to DOJ interrogatories.
03/13/95	330.00	LWH	Edit interrogatory responses.
03/13/95	1,105.00	SFH	Work on BFB & CW responses to DOJ.
03/14/95	170.00	SFH	Respond to DOJ interrogatory.
03/14/95	400.00	DGS	Work on document production.
03/16/95	1,275.00	SFH	Prepare response to DOJ interrogatory.
03/17/95	400.00	DGS	Prepare response to DOJ interrogatory re: BFB & CW.
03/17/95	1,275.00	SFH	Work on interrogatory response.
03/18/95	800.00	DGS	Review DOJ documents re: BFB & CW.
03/20/95	1,400.00	DGS	Review DOJ documents re: BFB & CW.
03/20/95	510.00	SFH	Draft interrogatory response.
03/21/96	400.00	DGS	Work on BFB & CW documents.
03/21/95	340.00	SFH	Prepare draft interrogatory response.
03/23/95	850.00	SFH	Prepare draft interrogatory response.
03/24/95	510.00	SFH	Prepare draft interrogatory response.
03/26/95	510.00	SFH	Prepare draft interrogatory response.
03/27/95	510.00	SFH	Prepare draft interrogatory response.
03/27/95	600.00	LWH	Prepare draft interrogatory response.
03/30/95	100.00	GHB	Review of new complaint filed by DOJ.
03/31/95	420.00	LP	Start preparation for answers to amended complaint on BFB & CW.

TOTAL ATTORNEY TIME FOR MARCH	$17,322.00

DATE	AMOUNT	ATTY	DESCRIPTION OF WORK
04/01/95	450.00	DGS	Review pleadings.
04/03/95	1,317.00	SFH	Begin work to respond to amended complaint.
04/03/95	700.00	GHB	Meeting re: amended complaint.
04/03/95	525.00	LP	Research re: denial for amended complaint.
04/03/95	400.00	DGS	Planning & assignments re: CW & BFB.
04/04/95	1,700.00	SFH	Work on response to BFB & CW amended complaint.
04/05/95	1,530.00	SFH	Respond to amended complaint.
04/05/95	110.00	LWH	Work on Sec. 309 issues re: BFB & CW.
04/05/95	1,950.00	DGS	Work on document production.
04/06/95	1,530.00	SFH	Prepare opposition for leave to file amended complaint.
04/06/95	200.00	GHB	Review BFB documents.
04/06/95	490.00	LP	Research criteria for denial of amended complaint.
04/07/95	1,105.00	SFH	Prepare opposition to motion to amend.
04/07/95	1,400.00	DGS	Work on BFB & CW documents.
04/08/95	1,100.00	GHB	Review new DOJ complaint with team.
04/08/95	330.00	LWH	Work on BFB data base.
04/08/95	450.00	RB	Work on Hirsch motion to oppose amending complaint.
04/08/95	1,100.00	DGS	Review complaint item by item with GHB.
04/09/95	340.00	SFH	Work on motion to oppose amended complaint.
	7,875.00	PL	Work on documents from Region IV re: BFB & CW.

TOTAL ATTORNEY TIME FOR APRIL $24,602.00

DATE	AMOUNT	ATTY	DESCRIPTION OF WORK
05/01/95	660.00	LWH	Research on motions to strike re: BFB & CW.
05/01/95	1,600.00	DGS	Document production re: BFB Development Corp.
05/02/95	660.00	LWH	Work on motion to strike re: BFB & CW.
05/03/95	852.50	LWH	Work on motion to strike re: BFB & CW.
05/03/95	1,900.00	DGS	Work on document production at EPA Region IV on BFB & CW.
05/04/95	1,045.00	LWH	Document production re: BFB & CW in Atlanta.
05/04/95	1,600.00	DGS	Work on document production re: BFB & CW in Atlanta
05/04/95	170.00	SFH	Review revised amended complaint re: BFB & CW.
05/05/95	907.50	LWH	Document production re: BFB & CW in Atlanta.
05/05/95	1,300.00	DGS	Document production & work on motion to strike re: BFB & CW.
05/05/95	680.00	SFH	Review materials re: motion to strike re: BFB & CW.
05/06/95	1,250.00	DGS	Review new amended complaint from DOJ & meet with GHB to plan overall litigation strategy re: BFB & CW.
05/07/95	330.00	LWH	Preparation for depositions on BFB & CW.
05/07/95	1,200.00	DGS	Review discovery correspondence from Atlanta re: BFB &CW.
05/07/95	1,020.00	SFH	Prepare draft motion to strike re: BFB &CW.
05/08/95	962.50	LWH	Research on motion to strike & work on depositions re: BFB & CW.
05/08/95	1,850.00	DGS	Review cases on motion to strike & review documents from EPA Regior IV re: BFB & CW.
05/09/95	962.50	LWH	Continue to review EPA documents re: BFB & CW.
05/09/95	1,600.00	DGS	Review documents in Atlanta re: BFB & CW.
05/09/95	1,020.00	SFH	Prepare & file motion to strike re: BFB & CW.
05/10/95	1,200.00	DGS	Continue review of exhibits & documents from Atlanta re: BFB & CW.
05/12/95	700.00	LP	Legal research on effect of amended complaint on original complaint & pending motions re: BFB & CW.
05/12/95	1,000.00	DGS	Continue review of EPA Region IV BFB & CW documents; work with paralegals on database handling of said documents.
05/16/95	630.00	LP	Continue research on original complaint & the effect of amending during pending motions re: BFB & CW.
05/16/95	1,020.00	SFH	Review interrogatories & requests for admissions from DOJ re: BFB & CW.
05/16/95	350.00	GHB	Review DOJ request for interrogatories & first request for admissions.

05/17/95	680.00	SFH	Work on producing documents for BFB & CW.
05/19/95	1,047.50	SFH	Work on motion for reconsideration & review Blizzard documents re: & CW.
05/20/95	440.00	LWH	Work on documents to be produced to DOJ; revise answer to DOJ re: amended complaint.
05/20/95	1,000.00	DGS	Review & revise answer to DOJ amended complaint re: BFB & CW.
05/22/95	100.00	RB	Conference with SFH re: opposition to reconsideration motion.
05/22/95	1,062.50	SFH	Prepare opposition to motion of reconsideration re: BFB & CW.
05/30/95	330.00	LWH	Begin answers to US second request for interrogatories re: BFB & CW
05/31/95	770.00	LWH	Work on interrogatory responses re: BFB & CW.
	3,620.00	PL	Document production re: BFB & CW.

TOTAL ATTORNEY TIME FOR MAY $35,520.00

DATE	AMOUNT	ATTY	DESCRIPTION OF WORK
06/01/95	1,000.00	DGS	DOJ visit to BFB; document inspection & production: conduct site vis BFB facility.
06/01/95	797.50	LWH	Work on responses for DOJ request for admissions and interrogatories
06/02/95	1,200.00	DGS	Work on DOJ request for admissions and document requests re: BFB CW.
06/05/95	1,200.00	DGS	Work on admissions & interrogatories re: BFB & CW.
06/05/95	1,020.00	SFH	Prepare responses to requests for admissions re: BFB & CW.
06/06/95	400.00	DGS	Revise requests for admissions & interrogatories re: BFB & CW.
06/07/95	1,000.00	DGS	Revise requests for documents; work with SFH on interrogatories for E & CW facilities.
06/07/95	980.00	SFH	Prepare response to requests for admissions re: BFB & CW.
06/07/95	550.00	LWH	Final edits for admissions and interrogatories re: BFB & CW.
06/08/95	1,360.00	SFH	Work on response to second set of interrogatories re: BFB & CW.
06/09/95	400.00	DGS	Work with K. Cardey on expert analysis re: BFB & CW.
06/09/95	1,020.00	SFH	Prepare & serve response to request for admissions & second set of interrogatories.
06/15/95	1,190.00	SFH	Review materials re: administrative orders at BFB & CW precludes civi penalties.
06/20/95	110.00	LWH	Telephone conference re: CW upgrade & permit.
06/22/95	1,200.00	DGS	Meet with J. Landers; telephone conference with K. Blizzard re: BFB negotiations with EPA; review documents re: same in Florida; review Landers file.
06/22/95	880.00	LWH	Review & copy documents from J. Landers' file re: BFB.
06/26/95	400.00	DGS	Review DOJ summary judgment memo re: BFB & CW.
06/26/95	1,050.00	AMB	Study DOJ summary judgment memo; review exhibits re: BFB & CW.
06/27/95	800.00	DGS	Meet with K. Cardey re: expanded report on BFB & CW facilities.
06/27/95	750.00	AMB	Begin response to plaintiff's summary judgment motion re: BFB & CW.
06/27/95	200.00	GHB	Review Blizzard documents on BFB.
06/28/95	800.00	DGS	Work with GHB & paralegals on how to respond to new BFB & CW components of DOJ case.
06/28/95	350.00	GHB	Review of Blizzard notes & documents & compare with new complaint from DOJ.
06/30/95	450.00	AMB	Finalize & forward answer to second amended complaint.

	6,000.00	PL	Document handling relating to BFB & CW.

TOTAL ATTORNEY TIME FOR JUNE **$25,107.50**

DATE	AMOUNT	ATTY	DESCRIPTION OF WORK
07/01/95	337.50	AMB	Review of pleadings notebooks and prepare scheduling order.
07/02/95	225.00	AMB	Drafting scheduling order.
07/03/95	800.00	DGS	Review of draft reports from expert witnesses.
07/05/95	200.00	DGS	Discuss BFB and CW analysis with experts.
07/05/95	340.00	SFH	Production of documents re: BFB & CW.
07/06/95	1,537.50	AMB	Scheduling order, drafting motion and proposed order.
07/07/95	200.00	GHB	Staff meeting re: additional burdens re: discovery on BFB & CW.
07/07/95	1,000.00	DGS	Responding to DOJ & the Court re: extension of time for discovery.
07/10/95	450.00	AMB	Draft deposition notices for fact witnesses & review chronology of BFB and CW.
07/11/95	1,800.00	DGS	Work on expert testimony & analysis of BFB and CW facilities.
07/11/95	680.00	SFH	Draft answers to second request for admissions, third set of interrogatories & fourth request for documents re: BFB & CW.
07/12/95	1,750.00	DGS	Work on expert testimony relating to BFB financial issues.
07/12/95	1,700.00	SFH	Prepare answers to second request for admissions, third set of interrogatories & fourth document production.
07/12/95	300.00	AMB	Production of expert witness reports.
07/13/95	680.00	SFH	Prepare answers to second request for admissions, third set of interrogatories & fourth request for production.
07/14/95	1,400.00	DGS	Work on BFB Development Corp. financial analysis.
07/14/95	1,190.00	SFH	Prepare & serve answers to second request for admissions, third set of interrogatories & fourth request for production of documents.
07/16/95	1,000.00	DGS	Review EPA documents re: document production on BFB & CW in Atlanta.
07/17/95	1,600.00	DGS	Review documents at Region IV & review financial analysis of BFB.
07/17/95	1,155.00	LWH	BFB & CW document review in Atlanta.
07/17/95	510.00	SFH	Review EPA production of documents re: BFB & CW.
07/18/95	1,387.50	AMB	Review document production from EPA Region IV.
07/18/95	1,850.00	DGS	Review of EPA Region IV documents re: BFB & CW.
07/18/95	330.00	LWH	Review of EPA Region IV documents re: BFB & CW.
07/19/95	150.00	AMB	Letter to T. Quinn re: witness depositions.

07/19/95	2,150.00	DGS	Work on document production from Atlanta re: BFB & CW.
07/20/95	600.00	AMB	Work on outline for BFB & CW.
07/20/95	1,000.00	DGS	Review of documents re: BFB & CW from Region IV.
07/20/95	550.00	LWH	Work on timeline charts for BFB & CW.
07/21/95	1,400.00	DGS	Work on expert reports and analysis of BFB & CW.
07/21/95	510.00	SFH	Review BFB & CW materials.
07/22/95	975.00	AMB	Prepare deposition questions for BFB & CW.
07/22/95	1,850.00	DGS	Prepare for depositions re: BFB & CW.
07/22/95	500.00	GHB	Develop deposition targets in Atlanta re: BFB & CW.
07/22/95	1,100.00	LWH	Prepare for 30(b)(6) depositions for BFB & CW.
07/23/95	1,800.00	DGS	Prepare for depositions and review of BFB corporation issues.
07/23/95	852.50	LWH	Prepare for 30(b)(6) depositions for BFB & CW.
07/25/95	1,050.00	AMB	Work on penalty policy & Cardey report.
07/25/95	1,600.00	DGS	Work on BFB financial issues.
07/26/95	1,000.00	LWH	Prepare for Roger Pfaff deposition.
07/27/95	400.00	DGS	Review exhibits re: BFB & CW for deposition.
07/28/95	1,800.00	DGS	Roger Pfaff deposition.
07/28/95	990.00	LWH	Roger Pfaff deposition.
07/31/95	770.00	LWH	Research administrative orders & permits; review Administrative Order defenses and arguments.
	6,000.00	PL	Document organization relating to BFB & CW.

TOTAL ATTORNEY TIME IN JULY: **$49,470.00**

DATE	AMOUNT	ATTY	DESCRIPTION OF WORK
08/01/95	1,000.00	DGS	Review exhibits & prepare schedules/assignments re: BFB & CW.
08/01/95	220.00	LWH	Read cases re: administrative orders.
08/02/95	330.00	LWH	Review administrative order cases.
08/02/95	300.00	AMB	Review case law on administrative orders.
08/03/95	220.00	LWH	Research on comparable state law and administrative orders.
08/08/95	1,300.00	DGS	Review depositions & prepare for depositions of R. Pfaff, T. Plouff & R. Herwig.
08/10/95	900.00	AMB	Research on summary judgment motion.
08/11/95	400.00	DGS	Conference on legal analysis on administrative orders for BFB & CW, priority of administrative orders over NPDES permitting requirements.
08/14/95	220.00	LWH	Prepare for Herwig deposition on BFB.
08/15/95	2,000.00	DGS	Deposition of R. Herwig re: BFB.
08/15/95	880.00	LWH	Deposition of R. Herwig.
08/16/95	1,400.00	DGS	Deposition of R. Herwig.
08/16/95	150.00	AMB	Prepare deposition notices for T. Plouff & M. Hom.
08/16/95	825.00	LWH	Deposition of R. Herwig.
08/17/95	1,800.00	DGS	Deposition of Pfaff.
08/17/95	300.00	AMB	Review DOJ's revised summary judgment motion.
08/17/95	825.00	LWH	Deposition of Pfaff.
08/18/95	1,000.00	DGS	Review summary judgment positions & deposition notes:make assignments.
08/19/95	800.00	DGS	Review notes from Herwig deposition for use in summary judgment memo.
08/19/95	525.00	AMB	Work on summary judgment memo.
08/21/95	1,200.00	DGS	Work on summary judgment legal issues.
08/21/95	712.50	AMB	Review of Herwig deposition & work on summary judgment memo.
08/21/95	412.50	LWH	Work on BFB & Herwig deposition.
08/22/95	220.00	LWH	Review Herwig deposition for BFB.
08/22/95	350.00	GHB	Review BFB & CW portions of complaint& settlement options.

08/23/95	600.00	AMB	Research re: summary judgment motion.
08/23/95	220.00	LWH	Draft section on administrative orders for BFB & CW.
08/24/95	600.00	AMB	Research re: summary judgment motion.
08/24/95	220.00	LWH	Draft section on administrative order for brief.
08/24/95	170.00	SFH	Review Herwig deposition for summary judgment motion.
08/26/95	110.00	LWH	Prepare for Plouff deposition.
08/27/95	800.00	DGS	Prepare for depositions on CW.
08/27/95	110.00	LWH	Review parts of administrative order section.
08/28/95	1,200.00	DGS	Conduct Pfaff & Plouff depositions.
08/28/95	675.00	AMB	Conference on case & draft summary judgment motion.
08/28/95	825.00	LWH	Prepare for Plouff deposition.
08/29/95	750.00	AMB	Draft summary judgment motion.
08/30/95	400.00	DGS	Prepare for deposition of M. Hom.
08/30/95	900.00	AMB	Continue drafting summary judgment motion.
08/31/95	1,600.00	DGS	Deposition of M. Hom.
08/31/95	770.00	LWH	Deposition of M. Hom.
	4,000.00	PL	Document work related to BFB & CW.

TOTAL ATTORNEY TIME FOR AUGUST **$32,240.00**

DATE	AMOUNT	ATTY	DESCRIPTION OF WORK
09/01/95	937.50	AMB	Draft summary judgment memo.
09/01/95	1,700.00	DGS	Work on summary judgment memo.
09/02/95	525.00	AMB	Draft summary judgment motion.
09/03/95	800.00	DGS	Review video deposition of Kwan re: BFB & CW.
09/04/95	712.50	AMB	Draft summary judgment motion.
09/04/95	1,450.00	DGS	Work on summary judgment motion.
09/05/95	1,200.00	AMB	Work on summary judgment; review Plouff deposition.
09/05/95	2,000.00	DGS	Draft & review summary judgment motion.
09/05/96	420.00	LP	Prepare summary judgment motion.
09/06/95	1,162.50	AMB	Revise summary judgment motion.
09/06/95	1,800.00	DGS	Work on summary judgment motion.
09/06/95	825.00	LWH	Draft portions of summary judgment motion.
09/06/95	510.00	SFH	Work on summary judgment motion.
09/07/95	1,050.00	AMB	Draft summary judgment memo.
09/07/95	1,750.00	DGS	Work on summary judgment memo.
09/07/95	340.00	SFH	Work on partial summary judgment motion.
09/07/95	825.00	LWH	Rewrite summary judgment defense.
09/08/95	1,350.00	AMB	Work on summary judgment for BFB & CW.
09/08/95	1,600.00	DGS	Draft & revise summary judgment memo.
09/08/95	770.00	LWH	Rewrite & edit summary judgment memo.
09/08/95	170.00	SFH	Work on privilege log.
09/08/95	600.00	GHB	Review & revise summary judgment draft.
09/09/95	1,162.50	AMB	Conference calls on brief & revision of summary judgment brief re: BFB & CW.
09/09/95	1,600.00	DGS	Revise summary judgment memo re: BFB & CW.
09/09/95	770.00	LWH	Work on brief re: BFB & CW.
09/09/95	900.00	GHB	Review & revise Friday draft re: BFB & CW.
09/10/95	712.50	AMB	Finalize summary judgment memorandum.

09/27/95	140.00	LP	Prepare memo on effect of Blizzard & Landers declarations on attorney client privilege.
09/27/95	900.00	AMB	Review DOJ's summary judgment memo & confer with clients.
09/29/95	630.00	LP	Continue preparation of Blizzard/Landers memo re: BFB & CW.
	4,000.00	PL	Document organization re: BFB & CW.

TOTAL ATTORNEY TIME FOR SEPTEMBER **$50,877.50**

09/10/95	1,600.00	DGS	Edit final version of summary judgment memo & assembling final package.
09/10/95	880.00	LWH	Edit brief.
09/11/95	490.00	LP	Assist in final preparation of motion for summary judgment.
09/11/95	200.00	DGS	Finish organizational matters for summary judgment.
09/11/95	200.00	GHB	Review DOJ motion for summary judgment re: BFB & CW.
09/12/95	600.00	AMB	Review Plouff deposition.
09/12/95	1,000.00	DGS	Work on schedules for depositions & trial preparations re: BFB & CW.
09/12/95	100.00	RB	Discuss whether to depose EPA lawyers who negotiated settlements at BFB & CW.
09/14/95	300.00	AMB	Review of M. Hom deposition on administrative orders re: BFB & CW.
09/14/95	1,000.00	DGS	Review discovery transmittals from DOJ re: BFB & CW.
09/14/95	577.50	LWH	Work on fourth request for document production & third request for interrogatories.
09/15/95	750.00	AMB	Work on fourth request for document production.
09/15/95	1,200.00	DGS	Trial preparation re: BFB & CW.
09/15/95	550.00	LWH	Continue discovery request work.
09/18/95	110.00	LWH	Review DOJ's fifth request for document production re: BFB & CW.
09/18/95	1,600.00	DGS	Work on state officials' involvement in BFB & CW; receive DOJ's fifth request for production of documents re: BFB & CW.
09/19/95	600.00	DGS	Review discovery documents from DOJ re: BFB & CW.
09/21/95	525.00	LP	Review of BFB & CW outside lawyer declarations re: attorney client issues.
09/22/95	665.00	LP	Legal research re: BFB & CW attorney declarations.
09/22/95	1,162.50	AMB	Review Hillsborough Co. records.
09/22/95	1,800.00	DGS	Review Hillsborough Co. records.
09/23/95	850.00	DGS	Review notes re: CW meetings.
09/26/95	490.00	LP	Continue to research re: effect of Blizzard & Landers declarations.
09/26/95	150.00	AMB	Review DOJ's memo in opposition to FCWC motion for summary judgment.
09/26/95	165.00	LWH	Review DOJ's summary judgment opposition.

DATE	AMOUNT	ATTY	DESCRIPTION OF WORK
10/02/95	440.00	LWH	Work on responses to DOJ's fifth production request.
10/02/95	800.00	DGS	Work on DOJ production request & review exhibits re: BFB & CW.
10/03/95	220.00	LWH	Review BFB expert witness report.
10/03/95	560.00	LP	Draft memo re: Blizzard & Landers declarations.
10/04/95	220.00	LWH	Work on BFB report & telephone conference with R. Hartung.
10/04/95	1,550.00	DGS	Review history of exceedances at FCWC facilities.
10/06/95	700.00	LP	Research on Blizzard & Landers attorney work product privileges.
10/06/95	600.00	DGS	Work on responses to DOJ.
10/09/95	220.00	LWH	Work on BFB reports & trial outline.
10/09/95	337.50	AMB	Telephone conference on BFB report.
10/10/95	330.00	LWH	Review BFB report & water quality report.
10/12/95	900.00	AMB	Review Black & Veatch reports & draft response to DOJ's fifth request..
10/13/95	550.00	LWH	Review expert reports.
10/13/95	680.00	SFH	Review materials to be produced per fifth request.
10/14/95	467.50	LWH	Review Zimmer report.
10/15/95	600.00	DGS	Review Black & Veatch report.
10/16/95	770.00	LWH	Review attorney working files on documents for trial.
10/16/95	900.00	AMB	Finalize and send response re: DOJ's fifth request for production.
10/17/95	715.00	LWH	Continue file review for proof issues re: BFB & CW.
10/17/95	280.00	LP	Research re: BFB Development Corp.
10/17/95	200.00	GHB	Review complaint to determine further depositions.
10/17/95	450.00	AMB	Work on future depositions issue & review Klingenstein report.
10/21/95	1,700.00	DGS	Prepare for Klingenstein deposition.
10/22/95	220.00	LWH	Prepare for Klingenstein deposition.
10/22/95	1,600.00	DGS	Prepare for Klingenstein deposition.
10/22/95	600.00	AMB	Review Klingenstein report & prepare questions for deposition.
10/23/95	550.00	LWH	Prepare for Eileen Zimmer deposition.
10/23/95	680.00	SFH	Review documents remaining to be produced to DOJ.

10/23/95	1,200.00	DGS	Prepare for & take Klingenstein deposition.
10/23/95	900.00	AMB	Attend Klingenstein deposition.
10/24/95	440.00	LWH	Prepare for Zimmer deposition.
10/24/95	630.00	LP	Research on claim-splitting re: BFB.
10/25/95	880.00	LWH	Prepare for Zimmer deposition.
10/25/95	560.00	LP	Legal research on claim-splitting re: BFB & CW.
10/25/95	800.00	DGS	Work with LWH on Zimmer deposition; review expert witness report for BFB & CW.
10/26/95	825.00	LWH	Prepare for Zimmer deposition.
10/26/95	1,200.00	DGS	Participate in deposition of E. Zimmer.
10/28/95	1,500.00	DGS	Prepare for Doug Smith deposition.
10/29/95	1,300.00	DGS	Prepare for Doug Smith deposition.
10/30/95	1,000.00	GHB	Review of documents for counts 1 & 2 re: CW.
10/30/95	977.50	SFH	Review documents to be produced re: DOJ's motion to compel.
10/30/95	1,750.00	DGS	Work with Doug Smith in preparation of deposition.
10/31/95	1,045.00	LWH	Respond to DOJ's motion to compel re: BFB & CW documents.
10/31/95	935.00	SFH	Review documents to be produced for BFB & CW.
	12,000.00	PL	Document handling & preparation re: BFB & CW.

TOTAL ATTORNEY TIME FOR OCTOBER **$45,782.50**

DATE	AMOUNT	ATTY	DESCRIPTION OF WORK
11/03/95	1,350.00	AMB	Prepare for hearing before Judge Swartz re: production of BFB & CW documents.
11/07/95	700.00	LP	Review Klingenstein report for inadmissible conclusions of law and unsupported opinions.
11/09/95	680.00	SFH	Complete review of US discovery requests.
11/11/95	1,450.00	DGS	Prepare G. Allen re: CW negotiations.
11/12/95	1,450.00	DGS	Prepare for G. Allen deposition & review his testimony re: BFB.
11/13/95	2,150.00	DGS	Defend G. Allen deposition & prepare for meetings with Hillsborough Co.
11/13/95	900.00	GHB	Work on BFB portion of complaint & script for trial.
11/13/95	510.00	SFH	Work with GHB on BFB trial preparation.
11/14/95	2,250.00	DGS	Work on CW with Hillsborough Co. officials.
11/14/95	400.00	GHB	Work on paragraphs 23-24 re: BFB.
11/15/95	600.00	GHB	Review each paragraph of BFB charges with AMB.
11/15/95	1,462.50	AMB	Work with GHB on BFB charges; respond to DOJ interrogatories.
11/16/95	1,800.00	DGS	Prepare potential exhibits for trial; respond to court order.
11/16/95	1,200.00	GHB	Continue work on BFB & CW portions of trial.
11/17/95	1,750.00	DGS	Respond to DOJ interrogatories.
11/17/95	770.00	LWH	Work on interrogatory responses.
11/17/95	1,500.00	AMB	Work on interrogatory responses.
11/17/95	1,200.00	GHB	Review all documents provided by FCWC to DOJ as exhibits.
11/17/95	700.00	LP	Assist in reviewing all documents produced for DOJ for trial.
11/17/95	850.00	SFH	Revise interrogatory responses.
11/18/95	1,400.00	DGS	Finalize & transmit to DOJ final responses to interrogatories.
11/18/95	990.00	LWH	Review documents produced to DOJ.
11/18/95	1,800.00	GHB	Review all documents produced to DOJ.
11/18/95	900.00	AMB	Review production documents for trial.
11/19/95	467.50	LWH	Review documents for trial exhibits.
11/19/95	562.50	AMB	Review production documents for trial exhibits.
11/19/95	850.00	GHB	Review of all CW documents.

11/19/95	840.00	LP	Assist in reviewing BFB & CW documents.
11/20/95	400.00	DGS	Work with GHB re: trial exhibits.
11/20/95	600.00	AMB	Document review for trial exhibits..
11/20/95	2,000.00	GHB	Continued review of BFB documents.
11/21/95	715.00	LWH	Prepare with GHB facilities chronologies.
11/21/95	1,800.00	GHB	Review of BFB documents & prepare timeline.
11/21/95	560.00	LP	Assist GHB in reviewing documents for trial exhibits.
11/22/95	330.00	LWH	Continued review of trial exhibits.
11/22/95	800.00	GHB	Continued review of BFB documents & develop timeline.
11/22/95	665.00	LP	Assist GHB in reviewing BFB & CW documents.
11/23/95	1,300.00	GHB	Work through expert reports re: each paragraph in DOJ complaint re: BFB & CW.
11/24/95	825.00	LWH	Organize trial documents for DOJ.
11/24/95	630.00	LP	Assist GHB in review of BFB & CW documents.
11/24/95	1,400.00	GHB	Continue work on documents for trial exhibit.
11/26/95	1,000.00	DGS	Work with paralegals on marking & organization of exhibits for pretrial meeting with DOJ.
11/26/95	550.00	LWH	Work with GHB to organize trial documents.
11/26/95	1,087.50	AMB	Work with GHB to organize exhibits for DOJ pretrial meeting.
11/26/95	1,400.00	GHB	CW document review & timeline development.
11/27/95	1,100.00	LWH	Prepare for pretrial meeting with DOJ.
11/27/95	1,200.00	AMB	Prepare for pretrial meeting with DOJ.
11/27/95	1,000.00	GHB	Continue preparation of time lines for BFB & CW.
11/28/95	1,000.00	DGS	Work on pretrial meeting with DOJ & meet with DOJ re: document exchange.
11/28/95	550.00	LWH	Pretrial meeting with DOJ for exhibit exchange.
11/28/95	750.00	AMB	Pretrial meeting with DOJ for exchange of documents.
11/29/95	1,600.00	DGS	Review DOJ trial exhibits & begin work on trial brief.
11/29/95	550.00	LWH	Prepare trial exhibit list.
11/30/95	1,400.00	DGS	Continue to work on pretrial statement.
11/30/95	1,000.00	GHB	Work on expert reports & compare with complaint paragraphs.

	14,000.00	PL	Document exhibit preparation.

TOTAL ATTORNEY TIME FOR NOVEMBER $71,695.00

DATE	AMOUNT	ATTY	DESCRIPTION OF WORK
12/01/95	1,000.00	DGS	Work on pretrial statement.
12/01/95	1,200.00	AMB	Work on pretrial statement.
12/02/95	1,000.00	DGS	Work on pretrial statement.
12/02/95	750.00	AMB	Work on joint pretrial statement.
12/03/95	550.00	LWH	Designate page & line no. for Pfaff & Hom depositions.
12/04/95	1,200.00	AMB	Review Herwig & Plouff depositions for page & line designations.
12/06/95	900.00	AMB	Revise & finalize pretrial statement.
12/10/95	550.00	LWH	Prepare new list of trial exhibits.
12/10/95	750.00	AMB	Prepare new list of trial exhibits.
12/10/95	1,800.00	GHB	Prepare new trial exhibit, cut out 500 documents related to BFB & CW.
12/13/95	1,200.00	AMB	Deposition of Mike McWeeny.
12/17/95	300.00	AMB	Draft trial brief.
12/17/95	800.00	GHB	Review documents relating to G. Allen & P. Bradtmiller re: BFB & CW.
12/18/95	1,000.00	DGS	Trial preparation of G. Allen.
12/18/95	990.00	LWH	Work on findings of fact & conclusions of law for BFB & CW because court has not ruled on DOJ request for ruling on Res Judicata.
12/18/95	1,800.00	GHB	Work with G. Allen on BFB & CW issues.
12/19/95	1,182.50	LWH	Prepare draft of opposition for DOJ motion for reconsideration.
12/19/95	1,200.00	AMB	Work on opposition to DOJ's motion for reconsideration & clarification.
12/19/95	560.00	LP	Review case law within DOJ motion for reconsideration.
12/20/95	1,072.50	LWH	Continue work on opposition to DOJ motion for reconsideration; work on CW portion of findings of fact.
12/21/95	660.00	LWH	Work on motion opposing DOJ reconsideration.
12/21/95	1,125.00	AMB	Draft & finalize response to DOJ motion.
12/21/95	700.00	LP	Help prepare response to DOJ motion to reconsider & review Court's order.
12/21/95	200.00	GHB	Conference call & advised of Court's order denying DOJ motion for reconsideration on BFB & CW.

	17,000.00	PL	Prepare trial exhibits for BFB & CW before Court denied DOJ motio: to reconsider BFB & CW.

TOTAL ATTORNEY TIME FOR DECEMBER $39,490.00

GRAND TOTAL FOR ATTORNEY TIME $407,634.50

Affidavit of Gary H. Baise on Motion for Attorneys Fees

I, Gary H. Baise, a partner in the law firm of Baise & Miller, P.C. was retained by Florida Cities Water Company ("Florida Cities") in 1993 to represent its interests in a Clean Water Act action filed by the United States Department of Justice and U.S. Environmental Protection Agency in the Middle District of Florida. I am Trial Counsel for Florida Cities, and am responsible for the defense of that action. I am personally knowledgeable about each and every action taken in defense of that action. I am familiar with the services rendered in connection with the Barefoot and Carrollwood claims found to have been barred by res judicata. I have prepared and reviewed the attached Motion for Attorneys Fees. To the best of my knowledge, it is correct, these listed fees were necessarily incurred in the case, and the services for which fees have been charged were actually and necessarily performed.

I declare, under penalty of perjury, that the listed fees are true and correct, to the best of my knowledge.

Gary H. Baise

Date: September 2, 1996

Gary H. Baise

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

United States of America,

Plaintiff,

v.

Avatar Holdings Inc.,

and

Florida Cities Water Company,

Defendants.

Civil Action No.:
93-281-Civ-FTM-21

Order

The Court having considered Florida Cities Water Company's Verified Motion for Attorneys Fees, and having determined that the imposition of attorneys fees against Plaintiff is warranted in the amount of $407,634.50, it is hereby ORDERED that Florida Cities' motion is GRANTED.

United States District Judge
Ralph W. Nimmons, Jr.

Copies to :

Daniel S. Jacobs
Trial Attorney
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044

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Certificate of Service

I hereby certify that copies of the foregoing Defendant Florida Cities Water Company's Verified Motion for Attorneys Fees was sent on this 3rd day of September, 1996, by first-class mail, postage prepaid, to the following:

Daniel S. Jacobs
T. Anthony Quinn
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
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Washington, D.C. 20005

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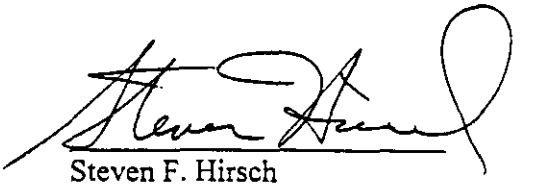
Washington, D.C. 20036



Steven F. Hirsch

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

United States of America, Plaintiff, v. Avatar Holdings Inc., and Florida Cities Water Company, Defendants.	Civil Action No.: 93-281-Civ-FTM-21

Defendant Florida Cities Water Company's Motion for Bill of Costs

Pursuant to Fed. R. Civ. P. 54 and Local Rule 4.18, Defendant Florida Cities Water Company ("Florida Cities") hereby submits its motion for bill of costs in the amount of $87,157.20 for certain costs incurred in this action. A detailed listing of these costs is appended as Attachment A. Counsel for Florida Cities has conferred with counsel for Plaintiff in a good faith effort to resolve the issues raised by this motion, and counsel have been unable to agree on the resolution of the motion.

On March 30, 1995, an Offer of Judgment in the amount of $500,000.00 plus costs was served by hand upon counsel for Plaintiff. This Offer of Judgment was not accepted. On August 20, 1996, a judgment for Plaintiff and against Defendant Florida Cities was entered in the amount of $309,710.00. As stated by Fed. R. Civ. P. 68, if the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the

making of the offer. On August 28, 1996, Florida Cities gave notice to the Court of the Offer of Judgment; for the convenience of the Court, the Offer of Judgment is appended as Attachment B. Accordingly, Defendant Florida Cities requests its costs in this action from March 30, 1995 to date.

The costs to be awarded include all costs properly awardable in an action. Blumel v. Mylander, 165 F.R.D. 113 (M.D. Fla. 1996). The costs that may be awarded are set forth in 28 U.S.C. § 1920. Parkes v. Hall, 906 F.2d 658 (11th Cir. 1990); Barneby v. E.F. Hutton & Co., 130 F.R.D. 679 (M.D. Fla. 1990). Additional descriptions of the fees payable are set forth in 28 U.S.C. § 1821.

The Court is accorded great latitude in determining taxable costs. Loughan v. Firestone Tire and Rubber Co., 749 F.2d 1519 (11th Cir. 1985). A district court's determination of costs will be overturned only for an abuse of discretion. Tanker Management, Inc. v. Brunson, M.D., 918 F.2d 1524 (11th Cir. 1990).

For the reasons stated above, Defendant Florida Cities respectfully requests that it be awarded its costs in the amount of $87,157.20.

Respectfully submitted,

By: Gary H. Baise SFH
Counsel for Florida Cities Water Company

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Fax: (305) 448-9927

September 3, 1996

Attachment A

Costs

28 U.S.C. § 1920		
(1) Fees of the clerk and marshal.	Not applicable.	
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case.		Discovery depositions are recoverable if it was necessary in light of facts known at the time that the deposition was taken. Desisto College, Inc. v. Town of Howey-on-the-Hills, 718 F.Supp. 906 (M.D. Fla. 1989). There is no blanket rule that a deposition must be admitted in evidence in order to be recoverable. Murphy v. City of Flager Beach, 761 F.2d 622, 631 (11th Cir. 1985).
Date	Amount	Description
4/5/95	$74.50	Southern Reporting
5/18/95	$419.00	Court reporter
6/1/95	$74.50	Court reporter
6/16/95	$635.10	Court reporter
6/29/95	$491.10	McCorkle Court Reporters, Inc. - Transcript of E. Jacobson's deposition
7/31/95	$144.01	Ballowe Reporting Service

7/31/95	$1,384.05	Brown Reporting Service
8/14/95	$223.00	Wheeler Reporting - Deposition of F. Wagener
8/18/95	$1,975.00	Wheeler Reporting - Deposition of R. Pfaff and R. Herwig
8/26/95	$75.24	Court reporter - Deposition of G. Allen and A. Reeves
8/31/95	$1,322.00	Parkman & Associates - Deposition of K. Kwan
9/1/95	$2,356.20	Wheeler Reporting - Deposition of K.Kwan
9/7/95	$932.50	Parkman & Associates - Deposition of K. Kwan
9/8/95	$4,369.24	Wheeler Reporting - Depositions of T. Plouff, K. Kwan, M. Hom. R. Childress, R. Pfaff
9/30/95	$144.01	Ballowe Reporting Service
10/18/95	$602.50	Fernandez & Matters, Inc. - Deposition of C. McNairy
11/2/95	$186.10	Court reporter - Deposition of K. Cardey
11/2/95	$565.00	Wheeler Reporting - Deposition of J. Marlar
11/2/95	$467.00	Court reporter - Deposition of E. Zimmer
11/3/95	$370.50	Southwest Florida Reporting - Transcript of hearing before Magistrate Swartz on discovery motions
11/8/95	$427.15	Von Ahn Reporting - Deposition of B. Shoemaker
11/10/95	$699.50	O'Connell, Pollack, Bosch & Eaton

11/10/95	$377.00	Court reporter - Deposition of D. Smith
11/10/95	$699.50	Court reporter - Deposition of M. Klingenstein
11/30/95	$209.25	Ballowe Reporting - Deposition of R. Armstrong
11/30/95	$464.60	Southern Reporting - Deposition of J. Karleskint, P. Lehman, and M. Murphy
12/26/95	$48.07	Audio transcript - Deposition of P. Lehman
12/31/95	$232.00	Court reporter - Deposition of A. Ahmadi
1/11/96	$394.20	Southern Reporting - Depositions of M. McWeeny and G.Allen
3/15/96	$146.50	Southwest Reporting Service - sealed transcripts for use at trial
3/22/96	$142.70	Brown Reporting Service - sealed transcript of J. Greenfield
3/25/96	$10,140.00	Dennis Miracle - trial transcripts
4/30/96	$304.75	Court reporter - Transcript of pretrial conference
Total	$31,095.77	

(3) Fees and disbursements for printing and witnesses.		Witness fees are limited by 28 U.S.C. § 1821 to $40 per day. See Crawford Fitting Co. v. J.T. Gibbons, 482 U.S. 437 (1987); Parkes v. Hall, 906 F.2d 658 (11th Cir. 1990). Mileage, travel, and subsistence expenses are recoverable under §§ 1821 and 1920, however, to the extent they are reasonable. Cullen v. Georgia Dept. of Trans., 29 F.3d 1489 (11th Cir. 1994); Desisto College at 913.
Date	Amount	Description
3/29/96, 4/1/96	$80.00	Black & Veatch - Testimony at trial of D. Smith
4/1/96	$40.00	Phoenix Environmental - Testimony at trial of R. Armstrong (expert on wasteload allocations; expert on scientific issues)
c. 4/1/96	$595.00	Phoenix Environmental expenses (excludes witness fee)
4/1/96	$40.00	Testimony at trial of R. Hartung (expert on EPA wasteload allocation)
c. 4/1/96	$703.82	R. Hartung expenses (excludes witness fee)
4/5/96	$40.00	Testimony at trial of K. Cardey
c. 4/5/96	$447.00 (est.)	K. Cardey expenses (excludes witness fee)

Total	$1,945.82	Pursuant to the Order of Magistrate Judge Swartz on November 3, 1995, Florida Cities will seek expert witness fees and expenses for the depositions of certain experts. This request will be made separately from the motion for bill of costs.
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case		Photocopying necessary for maintenance of an action is recoverable under § 1920(4). Desisto College at 913-14; Allen v. United States Steel Corp., 665 F.2d 689, 697 n.5 (5th Cir. 1982). Copies attributable to discovery, copies of exhibits, and documents prepared for the Court's consideration are recoverable. Fressell v. AT&T Technologies, Inc., 103 F.R.D. 111, 115-16 (N.D. Ga. 1984). Copies obtained only for the convenience of counsel are not recoverable. Allen v. Freeman, 122 F.R.D. 589, 591 (S.D. Fla. 1988). Extra copies of filed papers, correspondence, and copies of cases are considered only for the convenience of counsel. Fressell at 116.
Date	Amount	Description
4/1/95	$1,347.20	Gabeler, Baise & Miller, P.C. Copies
4/26/95	$21.37	Gabeler, Baise & Miller, P.C. Copies - Atlanta

5/1/95	$275.60	Gabeler, Baise & Miller, P.C. Copies
5/1/95	$1276.63	Gabeler, Baise & Miller, P.C. Copies
5/1/95	$26.44	Gabeler, Baise & Miller, P.C. Copies
5/18/95	$1599.60	Gabeler, Baise & Miller, P.C. Copies
6/1/95	$2390.41	Gabeler, Baise & Miller, P.C. Copies
6/16/95	$0.20	Gabeler, Baise & Miller, P.C. Copies
6/27/95	$0.20	Gabeler, Baise & Miller, P.C. Copies
6/27/95	$0.20	Gabeler, Baise & Miller, P.C. Copies
6/28/95	$0.20	Gabeler, Baise & Miller, P.C. Copies
6/29/95	$0.20	Gabeler, Baise & Miller, P.C. Copies
6/29/95	$0.20	Gabeler, Baise & Miller, P.C. Copies
7/31/95	$4,222.06	Document Production at EPA Region IV
7/31/95	$348.94	Gabeler, Baise & Miller, P.C. Copies
7/31/95	$984.00	Gabeler, Baise & Miller, P.C. Copies
8/3/95	$840.40	Gabeler, Baise & Miller, P.C. Copies
8/8/95	$715.00	Gabeler, Baise & Miller, P.C. Copies

8/11/95	$715.71	Atlanta Legal Copies - Document Production at EPA Region IV
8/15/95	$600.20	Gabeler, Baise & Miller, P.C. Copies
8/23/95	$437.00	Gabeler, Baise & Miller, P.C. Copies
8/31/95	$1,890.20	Gabeler, Baise & Miller, P.C. Copies
9/11/95	$355.72	Gabeler, Baise & Miller, P.C. - Kinko's Copies
9/12/95	$66.91	Gabeler, Baise & Miller, P.C. Copies
9/15/95	$276.29	Gabeler, Baise & Miller, P.C. - Kinko's Copies
9/25/95	$736.98	Copies of documents from the Environmental Protection Commission of Hillsborough County
9/30/95	$1,995.60	Gabeler, Baise & Miller, P.C. Copies
10/2/95	$56.40	Gabeler, Baise & Miller, P.C. Copies
10/2/95	$649.20	Copies of documents from the Environmental Protection Commission of Hillsborough County
10/6/95	$578.40	Gabeler, Baise & Miller, P.C. - Kwik Copy
10/6/95	$93.12	Gabeler, Baise & Miller, P.C. Copies
10/16/95	$318.06	Gabeler, Baise & Miller, P.C. - Kinko's Copies

10/18/95	$271.39	Gabeler, Baise & Miller, P.C. - Kinko's Copies
10/19/95	$65.00	Gabeler, Baise & Miller, P.C. - Kwik Copy
10/27/95	$157.60	Gabeler, Baise & Miller, P.C. - Kwik Copy
10/27/95	$653.20	Gabeler, Baise & Miller, P.C. - Kwik Copy
10/31/95	$1,788.60	Gabeler, Baise & Miller, P.C. Copies
10/31/95	$538.00	Gabeler, Baise & Miller, P.C. - Kwik Copy
11/1/95	$312.50	Gabeler, Baise & Miller, P.C. - Kwik Copy
11/2/95	$41.22	Gabeler, Baise & Miller, P.C. Copies - M. Klingenstein Report
11/3/95	$114.00	Gabeler, Baise & Miller, P.C. - Kwik Copy
11/6/95	$72.13	Gabeler, Baise & Miller, P.C. - Kinko's Copies
11/7/95	$36.09	Gabeler, Baise & Miller, P.C. - Kinko's Copies
11/8/95	$42.87	Gabeler, Baise & Miller, P.C. - Kinko's Copies
11/10/95	$71.32	Gabeler, Baise & Miller, P.C. - Kinko's Copies for Depositions and Trial Exhibits
11/10/95	$93.13	Gabeler, Baise & Miller, P.C. - Kinko's Copies
11/13/95	$207.38	Gabeler, Baise & Miller, P.C. - Kinko's Copies for Depositions and Trial Exhibits

11/15/95	$116.68	Gabeler, Baise & Miller, P.C. - Kinko's Copies for Depositions and Trial Exhibits
11/15/95	$355.72	Gabeler, Baise & Miller, P.C. - Kinko's Copies for Depositions and Trial Exhibits
11/15/95	$66.91	Gabeler, Baise & Miller, P.C. - Kinko's Copies for Depositions and Trial Exhibits
11/27/95	$1,158.64	Gabeler, Baise & Miller, P.C. - Kinko's Copies for exhibits to be turned over to DOJ
11/30/95	$1,676.20	Gabeler, Baise & Miller, P.C. Copies
12/1/95	$419.19	Gabeler, Baise & Miller, P.C. - Kinko's Copies
12/1/95	$623.14	Gabeler, Baise & Miller, P.C. - Kinko's Copies
12/1/95	$116.31	Gabeler, Baise & Miller, P.C. - Kinko's Copies
12/6/95	$163.86	Gabeler, Baise & Miller, P.C. - Kinko's Copies
12/7/95	$21.21	Gabeler, Baise & Miller, P.C. - Kinko's Copies
12/11/95	$2,504.16	Gabeler, Baise & Miller, P.C. Copies - Trial exhibits
12/12/95	$933.75	Gabeler, Baise & Miller, P.C. Copies -Trial exhibits
12/18/95	$2,327.42	Gabeler, Baise & Miller, P.C. Copies -Trial exhibits
12/22/95	$2,665.22	Gabeler, Baise & Miller, P.C. Copies -Trial exhibits

12/30/95	$785.90	Gabeler, Baise & Miller, P.C. Copies
1/12/96	$85.01	Baise & Miller, P.C. - Allen's Copy Center
2/13/96	$1,488.15	Baise & Miller, P.C. Copies
2/13/96	$1,125.45	Baise & Miller, P.C. Copies
3/11-12/96	$645.07	Corporate Visions, Inc. - Prepare trial exhibits
3/13-14/96	$244.27	Corporate Visions, Inc. - Prepate trial exhibits
3/16/96	$12.97	Florida Reprographics - Copies of Exhibits required for trial
3/22/96	$58.17	Infinite Photo and Imaging - Copies of Exhibits required for trial
3/31/96	$8,583.00	Baise & Miller, P.C. - Copies required for trial
4/30/96	$188.40	Baise & Miller, P.C. Copies
5/31/96	$166.20	Baise & Miller, P.C. Copies
6/19/96	$371.60	Baise & Miller, P.C. Copies
7/31/96	$232.80	Baise & Miller, P.C. Copies
6/19/95	$196.53	Henderson, Franklin Copies
8/21/95	$11.25	Henderson, Franklin Copies
9/29/95	$4.50	Henderson, Franklin Copies
12/13/95	$6.50	Holland & Knight Copies
12/13/95	$10.75	Henderson, Franklin Copies
12/28/95	$72.40	Holland & Knight Copies
1/5/96	$101.75	Henderson, Franklin Copies
2/9/96	$4.60	Holland & Knight Copies

2/9/96	$303.50	Henderson, Franklin Copies
3/15/96	$7,666.34	Gabeler, Battocchi & Griggs, LLP Copies (January 1996)
4/18/96	$2.00	Henderson, Franklin Copies
5/16/96	$1.00	Holland & Knight Copies
5/21/96	$1,365.89	Gabeler, Battocchi & Griggs, LLP Copies (March 1996)
5/28/96	$118.20	Gabeler, Battocchi & Griggs, LLP Copies (Feb. 1996)
6/24/96	$6.25	Henderson, Franklin Copies
7/9/96	$48.00	Holland & Knight Copies
7/19/96	$2,019.36	Gabeler, Battocchi & Griggs, LLP Copies (April 1996)
7/19/96	$42.12	Gabeler, Battocchi & Griggs, LLP Copies (May 1996)
7/19/96	$69.00	Henderson, Franklin Copies
7/31/96	$1,043.14	Gabeler, Battocchi & Griggs, LLP Copies (June 1996)
8/19/96	$177.96	Gabeler, Battocchi & Griggs, LLP Copies (July 1996)
Subtotal	$67,689.51	
	($13,573.90)	Approximately 20% of the copying may be attributed to the copying of cases and copies only for the convenience of counsel. These costs, in the amount of $13,573.90, are omitted.
Total	$54,115.61	

(5) Docket fees under section 1923 of this title.	Not applicable.	
(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.	Not applicable.	
Grand Total	$87,157.20	

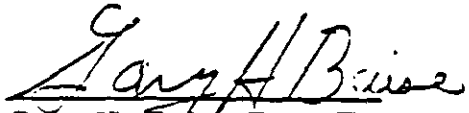
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.:
	)	93-281-CIV-FTM-21
FLORIDA CITIES WATER COMPANY,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S OFFER OF JUDGMENT

Defendant Florida Cities Water Company, pursuant to F.R.Civ.P. 68. hereby offers to allow judgment to be taken against it in the amount of five hundred thousand dollars ($500.000.00). and costs thus far accrued.

Respectfully submitted,



Gary H. Baise, Esq. (Trial Counsel)
Don G. Scroggin, Esq.
Gabeler, Baise & Miller, P.C.
Suite 200
1320 Old Chain Bridge Road
McLean. VA 22101
Phone: 703-790-3456
Fax: 703-790-5862

Certificate of Service

I certify that, although I have not filed this document with the Court, on March 30, 1995 I caused a copy of this "Defendant's Offer of Judgment" to be served by hand, and also by certified mail, upon:

Daniel S. Jacobs, Esquire
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Room 11002
1425 New York Avenue, Northwest
Washington, D.C. 20005

and was sent by first class mail, properly addressed and postage prepaid, to:

Lois J. Schiffer, Esquire
Acting Assistant Attorney General
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044

Douglas N. Frazier, Esquire
United States Attorney
Middle District of Florida
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Fax: 813-332-4494

Of Counsel:

Dennis J. Getman, Esq.
General Counsel
Florida Cities Water Company
P.O. Box 523000
Miami, FL 33152-3000
Phone: 305-442-7000
Fax: 305-448-9927

March 14. 1995

Affidavit of Gary H. Baise on Motion for Bill of Costs

I, Gary H. Baise, a partner in the law firm of Baise & Miller, P.C. was retained by Florida Cities Water Company ("Florida Cities") in 1993 to represent its interests in a Clean Water Act action filed by the United States Department of Justice and U.S. Environmental Protection Agency in the Middle District of Florida. I am Trial Counsel for Florida Cities, and am responsible for the defense of that action. I am personally knowledgeable about each and every action taken in defense of that action. With the approval of Florida Cities, I authorized the preparation and presentation of the Offer of Judgment, served on opposing counsel on March 30, 1995. I have reviewed the attached Motion for Bill of Costs, and, to the best of my knowledge, it is correct, these listed costs were necessarily incurred in the case, and the services for which fees have been charged were actually and necessarily performed.

I declare, under penalty of perjury, that the listed costs are true and correct, to the best of my knowledge.

Date: September 2, 1996

Gary H. Baise

Gary H. Baise

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

United States of America,

Plaintiff,

v.

Avatar Holdings Inc.,

and

Florida Cities Water Company,

Defendants.

Civil Action No.:
93-281-Civ-FTM-21

Order

The Court having considered Florida Cities Water Company's Motion for Bill of Costs, and having determined that the imposition of costs against Plaintiff is warranted in the amount of $87,157.20, it is hereby ORDERED that Florida Cities' motion is GRANTED.

United States District Judge
Ralph W. Nimmons, Jr.

Copies to :

Daniel S. Jacobs
Trial Attorney
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044

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815 Connecticut Avenue, N.W., Suite 620
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Certificate of Service

I hereby certify that copies of the foregoing Defendant Florida Cities Water Company's Motion for Bill of Costs was sent on this 3rd day of September, 1996, by first-class mail, postage prepaid, to the following:

Daniel S. Jacobs
T. Anthony Quinn
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Room 11002
1425 New York Avenue, N.W.
Washington, D.C. 20005

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David R. Berz
David B. Hird
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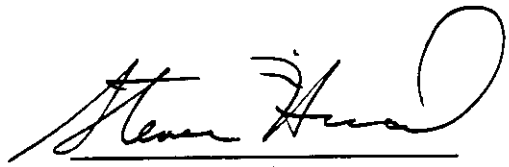
Washington, D.C. 20036



Steven F. Hirsch

Exhibit_____(GHB-100)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

RECEIVED
SEP 23 1996
GHB

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

UNITED STATES' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS FOR COSTS AND ATTORNEYS' FEES

Introduction

Both of the defendants have requested costs and attorneys' fees in this action. Defendants seek attorneys' fees under section "b" of the Equal Access to Justice Act, ("EAJA"), 28 U.S.C. § 2412(b), in connection with their successful defense of the United States' claims for unpermitted discharges at Barefoot Bay and Carrollwood, and the United States' claims for administrative order violations at Barefoot Bay. The fee request is based on Defendants' assertion that these claims were brought in "bad faith" because the United States should have known that they were barred by res judicata.

Avatar Holdings has also applied to recover all of its costs pursuant to section "a" of EAJA, 28 U.S.C. § 2412(a), which allows the award of costs to "the prevailing party." Florida Cities has moved to recover the costs it incurred subsequent to March 30, 1995, on the grounds that it made an offer of judgment

on that date under Rule 68, Fed. R. Civ. P., which it asserts was more favorable than the judgment subsequently obtained from the Court.

Defendants plainly cannot meet the common law "bad faith" standard for an award of attorneys' fees incorporated in section "b" of EAJA. Although the Court ultimately ruled that the unpermitted discharge claims in question are barred by res judicata, the United States' position that those claims were not barred was based on a reasonable reading of the facts and law. Thus, the requests for attorneys' fees should be rejected.

The United States concedes that Avatar, as a prevailing party at trial, is entitled to costs under section "a" of EAJA. However, in its application for costs, Avatar has failed to adequately document many of its claimed costs or to show that the specific costs claimed were necessary, as required under 28 U.S.C. § 1920. Therefore, the Court should allow only $1,841.25 of the costs claimed by Avatar.

Florida Cities is not entitled to its costs because costs may be awarded against the United States only to the extent an underlying statute waives sovereign immunity for such costs. In any event, the United States' own costs, to which it is entitled under EAJA section "a", fully offset Florida Cities' legitimate costs.

Accordingly, the Court should award Avatar the portion of its costs that it has adequately documented and justified, and should deny the Defendants' other requests for fees and costs.

I. The Law Governing Awards of Costs and Fees Against the United States

A. EAJA

EAJA, as amended, governs the award of costs and fees in civil actions in which the United States is a party. Under section "a" of EAJA, the court may award costs to the prevailing party in any civil action brought by or against the United States. Under section "b" of EAJA, the court may award reasonable fees and expenses to the prevailing party in any civil action brought by or against the United States. The relevant section of the statute reads as follows:

> **§ 2412. Costs and fees**
>
> **(a)(1)** Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part, the prevailing party for the costs incurred by such party in the litigation.
>
> . . . .
>
> **(b)** Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

28 U.S.C. § 2412.

Rule 54, Fed. R. Civ. P., also governs the awards of costs to prevailing parties. It reads in pertinent part as follows:

> Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; **but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law.**

Rule 54(d)(1), Fed. R. Civ. P. [emphasis added]. It is clear, then, under Rule 54, that costs may be imposed against the United States only to the extent permitted by applicable law, which in this case is EAJA.

Prior to the enactment of EAJA, costs could never be assessed against the United States, even when an opposing party prevailed, unless a statute expressly waived the United States' sovereign immunity for costs in that type of action. See United States v. Bodcaw Company, 440 U.S. 202 (1979). EAJA operates as a limited waiver of sovereign immunity that permits a court to award costs and, where appropriate, fees to a "prevailing party" in litigation with the United States: section "a" of EAJA constitutes the United States' limited waiver of sovereign immunity to cost awards, and section "b" of EAJA, 42 U.S.C. § 2412(b), constitutes the United States' limited waiver of sovereign immunity to fee awards. Section "b," then, subjects the United States to the traditional two exceptions to the

American Rule against fee-shifting.[1] These exceptions are (1) the "bad faith" exception, which allows fee-shifting when the non-prevailing party acted "in bad faith, vexatiously, wantonly, or for oppressive reasons," Spencer v. N.L.R.B., 712 F.2d 539, 543 (D.C. Cir. 1983), cert. denied, 466 U.S. 936 (1984); and (2) the "common benefit" exception, which allows a litigant whose legal actions has the effect of preserving or recovering a fund for the benefit of others in addition to him or herself to recover attorneys' fees from the fund or from the benefitted parties. Id.

B. Costs awardable under 28 U.S.C. § 1920

Under section "a" of EAJA, costs may be taxed in favor of the prevailing party in accordance with 28 U.S.C. § 1920, which provides in its entirety as follows:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
> (5) Docket fees under section 1923 of this title;
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this

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[1] Under the "American Rule," prevailing parties generally cannot recover attorneys' fees from their opponents. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247 (1975). Where awards of attorneys' fees against the United States are involved, a rule similar to the American Rule comes into play. Id. at 250-56. Such awards require explicit waivers of sovereign immunity. Id. The statute generally governing such awards is EAJA.

title.

The court is vested with broad discretion on the allowance of costs pursuant to section 1920, Loughan v. Firestone Tire & Rubber Co., 749 F.2d 1519 (11th Cir. 1985), a statute through which Congress intended to impose "rigid controls on cost-shifting in federal courts," Parkes v. Hall, 906 F.2d 658, 659 (11th Cir. 1990), citing Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). The party seeking to tax costs under EAJA, bears the burden of establishing that "the incurrence of any particular expense was reasonably necessary to the case." Harrisburg Coalition Against Ruining the Environment v. Volpe, 65 F.R.D. 608, 611 (M.D. Pa. 1974).

C. Rule 68

Rule 68, Fed. R. Civ. P., generally provides that a party who finally obtains a judgment which is not more favorable than an offer of judgment that it declined to accept must pay the costs incurred after the offer was made. However, because Rule 68 does not by itself constitute a wavier of sovereign immunity, it applies to the United States only to the extent that there is a waiver of sovereign immunity in the underlying statute. An Advisory Committee note to Rule 68 reads as follows: "For recovery of costs against the United States, see Rule 54(d)." Rule 54(d), as noted above, provides that an award of costs against the United States shall be imposed only "to the extent permitted by law." Because the Clean Water Act itself, 33 U.S.C. § 1251, et. seq., is silent on the subject of awarding costs

and fees in cases brought by the United States, EAJA governs such cases.

EAJA's limited and specific waiver of sovereign immunity, however, should not be read to allow Rule 68 to extend to all cases where costs would be allowable against a private party. Rather, the terms of EAJA's waiver of sovereign immunity should be strictly construed. In 1983, the Supreme Court declined to expand a specific and limited waiver of sovereign immunity in the Clean Air Act to allow the non-prevailing party to shift fees in the case, holding that waivers of sovereign immunity "'must be strictly construed in favor of the sovereign' . . . and not 'enlarge[d] . . . beyond what the language requires.'" Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 (1983) [citations omitted]. In a 1992 Clean Water Act case, the Supreme Court cited to the quoted language from Sierra Club in holding that "any waiver of the National Government's sovereign immunity must be unequivocal." U.S. Dept. of Energy v. Ohio, 503 U.S. 607, 615 (1992). See also United States v. Bodcaw Company, 440 U.S. 202, 204 n. 3 (1979)("It is settled that litigation costs cannot be assessed against the United States in the absence of statutory authorization."). As for EAJA itself, the Fifth Circuit has held that "as a limited waiver of sovereign immunity, section 2412 is to be strictly observed." Fenton v. Federal Insurance Administrator, 633 F.2d 1119, 1122 (5th Cir. 1981).

Thus, the law is clear that an award of costs, like any award against the United States, requires an unequivocal waiver

of sovereign immunity. EAJA provides a waiver of sovereign immunity for costs, but only in favor of the "prevailing party." Because the United States has not waived its sovereign immunity to costs in Clean Water Act cases beyond the terms of EAJA, Rule 68 cannot be applied against the United States as prevailing plaintiff in this case.[2]

II. Defendants' Motions for Fees

Both defendants rely on section "b" of EAJA, 28 U.S.C. § 2412(b) as the legal basis for the claims for fees. As a threshold matter, Florida Cities is not entitled to be considered for such an award because it did not prevail in this action. In any event, neither Avatar nor Florida Cities is entitled to recover section "b" attorneys' fees because neither the common law nor any statute would authorize an award of attorneys' fees against the United States under the circumstances of this case.

The sole basis upon which Defendants claim they are entitled to attorneys' fees is the United States' alleged "bad faith" in bringing the claims which the court held barred by res judicata. Avatar claims that the so-called bad faith entitles it to the attorneys' fees it incurred in bringing a motion for clarification of the court's summary judgment order to determine whether the court's res judicata ruling extended to Avatar

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[2] The Rules Enabling Act, 28 U.S.C. § 2072, also precludes the application of Rule 68 here. That Act expressly prohibits an application of the rules of civil procedure which would "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). A court may not apply Rule 68 where, as here, to do so would create an enlarged right to costs beyond what Congress has chosen, through EAJA, to provide.

Holdings, and Florida Cities claims it is entitled to over $400,000 in attorneys' fees it says it incurred since January 1995 in defending against the claims the court ultimately barred by res judicata.

There are no circumstances, least of all bad faith, which warrant the award of attorneys' fees in the instant action. There were both ample factual and legal bases for the United States to bring the claims at issue. Indeed, this Court, before allowing the United States to amend its complaint, made the following factual finding, which stands to this day:

> Upon careful review of the relevant pleadings and exhibits, the Court finds....Section 1319(g)(6)(A)(iii) provides that only violations that are expressly resolved in a final administrative order, and for which the violator has paid a penalty, may not be the subject of a subsequent judicial proceeding for civil penalties. 33 U.S.C. § 1319(g)(6)(A)(iii). Each day that illegal conduct continues constitutes a separate day of violation and may be penalized separately. 33 U.S.C. § 1319(d); Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1138-39 (11th Cir. 1990). . . . Further, the Court finds unpersuasive Florida Cities' argument that the timing of the Consent Agreements indicates that they were in complete settlement of all past alleged violations. The language of the Consent Agreement is clear as to which violations are covered: those on September 14, 1989 at Barefoot Bay and June 1987-July 1990 at Carrollwood. Had the parties intended the Consent Agreements to reflect a full settlement of all claims, then the specific paragraphs in the Consent Agreement should have indicated those claims were covered.

Order, June 21, 1995, pp 5-6. See also, Order, November 22, 1995, p. 12 n.10.

While Florida Cities accuses the United States of failing to properly investigate whether the claims at issue had been settled, the United States, before moving to amend the complaint,

performed just such an investigation, and found, as did the court, that only specific earlier claims had been settled. The proposed amended complaint purposely pled only later violations.

While the Court ultimately determined that the claims at issue were barred by res judicata, the United States believes that there was and is substantial support for its position that the claims are not barred. See, e.g., Manning v. City of Auburn, 953 F.2d 1355, 1360 (11th Cir. 1992); In re: Borough of Ridgway, Pennsylvania, CWA Appeal No. 95-2 (EPA Env. Appeals Board, May 30, 1996). Indeed, as recently as last month, the Court ordered the parties to rebrief this very issue in light of those decisions, plainly implying that the resolution of the res judicata issue was by no means obvious, even after the extensive earlier briefing. In these circumstances, there is no possible basis for asserting that the United States maintained its position in bad faith.[3]

In short, by no stretch of the imagination, can it be said that the United States acted in bad faith in bringing the claims the Court ruled barred by res judicata. Hence, no basis exists upon which the Court may impose attorneys' fees against the United States.

---

[3] It is worth noting that Florida Cities itself failed to argue that the claims at issue were barred by res judicata in both its brief opposing amendment of the initial complaint and in its affirmative brief opposing summary judgment on those claims. Not until it later filed a Notice of Disposition Authority in which it relied on an EPA Presiding Officer's erroneous decision, which was since overturned by EPA's highest administrative tribunal, did Florida Cities itself argue res judicata.

III. Avatar Holdings' Application for Costs

Because Avatar Holdings may be considered a "prevailing party," within the meaning of section "a" of EAJA and Rule 54(d), the Court may elect to award it such costs as are allowable under 28 U.S.C. § 1920 and are properly documented and justified. Assuming that the Court elects to allow costs in this case, the specific costs claimed should be closely scrutinized. Under close scrutiny, it appears that only a small part of the costs claimed in Avatar Holdings' application is properly justified and documented.[4]

Transcript fees

Avatar Holdings has requested that it be allowed the costs of its copies of transcripts of four discovery depositions taken by the United States and of one pretrial conference before the magistrate judge.

In order for transcript fees to be awarded, under Desisto College, Inc. v. Town of Howey-in-the-Hills, 718 F. Supp. 906 (M.D. Fla. 1989), aff'd, 914 F.2d 267 (11th Cir. 1990), they must have been necessarily obtained for use in the case and not merely for the convenience of counsel.[5] Three of the four deposition transcripts for which Avatar claims costs were of depositions of

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[4] Moreover, the verification submitted with Avatar's application for costs is legally insufficient because it was not filed under penalty of perjury as required by 28 U.S.C. § 1746.

[5] In Desisto, the court allowed the defendant the costs of transcripts for discovery depositions which it took (i.e., affirmative discovery), which the court found to be necessary in light of the facts known at the time.

Avatar Holdings' own officers and/or directors, Leon Levy (two transcripts) and Edwin Jacobson. Avatar cites to no precedent for awarding the costs of transcripts of depositions of a party's own officers/directors, and fails to explain how these were truly "necessarily obtained for use in the case," within the meaning of section 1920. The fourth transcript was of a brief deposition of a former Avatar Holdings officer, John Sladkus, who refused to testify on Fifth Amendment grounds. While arguably the minimal cost incurred for that transcript may be awardable, in its application for costs, Avatar Holdings chose to lump the cost of that transcript with the cost for a copy of Mr. Levy's deposition, with the result that it is undiscernible how much the 16-page Sladkus transcript cost.[6] Solely to avoid burdening the court with an argument about such a relatively small sum, the United States will concede that Avatar Holdings is entitled to the entire $1,284.45 it claims for the four deposition transcripts.

While the cost of a transcript of a pretrial conference might be considered necessary depending on the circumstances, the December 11, 1995 pretrial conference for which Avatar Holdings seeks reimbursement involved almost exclusively a discussion of the res judicata issue now very familiar to the court. Avatar

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[6] The United States does not wish to split hairs over whether the so-called colloquy (which consisted largely of a monologue by counsel for Avatar Holdings about the unfairness of criminal prosecution under the Clean Water Act which Defendants' counsel insisted on repeating at **each** deposition at which the Fifth Amendment was asserted) which accounted for most the transcript was truly necessary.

Holdings fails to explain how a copy of the transcript of that conference was in any way necessary and not merely for the convenience for counsel as he subsequently briefed the issue.[7] Hence, the cost sought for the first pretrial conference should not be allowed.

Witness Disbursements

Avatar Holdings submits that it is entitled to the travel expenses of bringing four of its officers/directors to trial as witnesses, as well as per diem for those witnesses.[8] None of these expenses, however, are itemized, and, there is no explanation given for why Mr. McNairy's and Ms. Metcalf's expenses were more than twice Mr. Jacobson's.[9] And, because Mr. Levy was the designated corporate representative of Avatar Holdings at trial, his travel expenses are not recoverable. Ezelle v. Bauer Corp., 154 F.R.D. 149, 154 (S.D. Miss. 1994)[10]

---

[7] Only the second pretrial conference, held on December 28, 1995, truly related to the conduct of the upcoming trial itself and arguably may be considered necessary.

[8] According to Avatar Holdings, Georgia Metcalf is technically an officer not of Avatar Holdings itself, but of its subsidiary, Barefoot Bay Development Corporation.

[9] Avatar claims $185.60 in unitemized expenses for Mr. Jacobson's brief testimony, but $365.00 and $399.82 in unitemized expenses for Mr. McNairy's and Ms. Metcalf's even briefer testimony. Mr. Jacobson is based in Chicago and Miami, Mr. McNairy in Miami, and Ms. Metcalf, in Brevard County.

[10] If the court finds that Avatar Holdings is entitled to be reimbursed for Mr. Levy's attendance because he was called as a witness by the United States, the reimbursement should be limited to per diem and travel by common carrier from Miami, Avatar Holdings' corporate residence. Having given notice at the pretrial conference that it would call Mr. Levy as a witness at trial, the United States should not be responsible for flying Mr. Levy to

Solely to avoid burdening the court and the parties with any further argument on the subject, the United States will concede that Avatar Holdings is entitled to $185.60 each in expenses for Messrs. Jacobson and McNairy, and Ms. Metcalf, for a total of $556.80.

Duplicating costs

While Avatar Holdings ordinarily would be entitled to recover reasonable duplicating costs for necessary photocopies, it has patently failed to describe or itemize in any way the enormous expense it claims under this category ($16,363.90). Under Cullens v. Georgia Department of Transportation, 29 F.3d 1489, 1494 (11th Cir. 1994) and Desisto, 718 F. Supp. at 914, photocopying costs are disallowed in their entirety when no itemized evidence is presented which distinguishes between copies which were necessary and copies which were merely convenient.[11] This cost therefore should not be allowed.

In sum, because Avatar Holdings' Bill of Costs is defective in so many respects, it should be disallowed, except to the extent of $1,841.25

Tampa from the Bahamas, because Mr. Levy chose to be "on vacation" there during trial, and, in any event, finds questionable Avatar Holdings' assertion that no common carrier was available for the trip from the Bahamas to Tampa.

[11] Avatar Holdings' unsubstantiated approximation that only 20% of all copying was for the convenience of counsel is insufficient. The $16,363.90 lump sum figure, which is completely silent as to the nature and purpose of the materials copied, number of copies, per-page cost, and date of the costs, is simply unacceptable.

IV. Florida Cities' Motion for Bill of Costs

Florida Cities bases its claim for costs on Rule 68. In its motion, Florida Cities fails to cite any authority which supports the proposition that costs under Rule 68 are available against the United States when it is the prevailing party.[12] As discussed at length above, however, there is ample authority to the contrary.

Because Florida Cities is not the prevailing party entitled to costs under EAJA, its offer of judgment does not provide an independent basis for awarding costs. Assuming arguendo that the court finds that Rule 68 costs can be awarded to Florida Cities in this case, however, the specific costs it claims, like those of Avatar, must be closely scrutinized. Under close scrutiny, its bill must be vastly diminished. And, any costs to which Florida Cities ultimately is found to be entitled must be offset against the costs to which the United States is entitled as the prevailing plaintiff under EAJA.[13]

Several examples suffice to demonstrate that Florida Cities

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[12] Florida Cities has failed to file a brief in support of this motion, as required by Local Rule 3.01(a). In its brief in support of its motion for attorneys fees (not costs) Florida Cities itself recognizes that EAJA constitutes a waiver of sovereign immunity, Florida Cities Water Company's Memorandum of Law in Support of its Verified Motion for Attorneys Fees at 2, but its motion for costs is silent on the subject of sovereign immunity insofar as it relates to an award of costs under Rule 68. The United States' research in this case has not located any published authority to support the proposition that the United States has waived its sovereign immunity to an award of costs under Rule 68.

[13] While the United States elected not to file its own affirmative motion for an award of costs under EAJA, that election should not deprive it from benefiting from such an offset.

has failed to carry its burden in justifying its costs. Florida Cities has not even begun to demonstrate, as required by 28 U.S.C. § 1920, how, in just one year, it incurred $54,115.61 in photocopying costs that were "necessarily obtained for use in the case." Not a single photocopying line item reveals the volume of material photocopied or the per copy rate charged, which, judging by the cost alone, was excessive.[14]

The purpose of the copying also is rarely revealed, and, to the extent that it is, many of the broadbrush labels used to describe the purpose suggest that the copying was much more likely to have been for the convenience of counsel, than necessarily obtained for use in the case.[15] So, too, does the

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[14] By way of further example, Florida Cities claims one charge of over $4,000 for photocopying of EPA documents. The United States offered to make EPA documents available to Florida Cities without any charge other than an offset against the photocopying charges that Florida Cities imposed on the United States for copies of documents it produced. The United States should not bear the excessive charges Florida Cities apparently incurred because it declined that offer. Similarly, the United States offered to provide Florida Cities with copies of exhibits used at depositions, also to be offset against charges the United States incurred for photocopying of Florida Cities' documents, but again Florida Cities elected to decline the offer and incur its own copying charges.

[15] According to Florida Cities' Bill of Costs, it paid $27,688.89 to Gabeler, Baise & Miller, P.C.; $12,155.60 to Baise and Miller, P.C.; $12,433.01 to Gabeler, Battocchi & Griggs, LLP; $705.83 to Henderson, Franklin; and $132.50 to Holland & Knight. These figures **exclude** payments purportedly made to a law firm for copying charges the firm incurred through a subcontractor such as a copy center such as Kinko's. While the bulk of the copying appears to have been performed by the law firms, they apparently also engaged contractors for some tasks. These tasks are no better described or justified.

Although trial concluded on April 5, 1996, a July 19, 1996 charge of $2,019.36 is attributed to April 1996 copying by Gabeler, Battocchi & Griggs, as is a July 31, 1996 charge of $1,043.14 for

sheer volume of the copying, and the multiplicity of counsel and law firms.[16] There also seems to have been a good deal of duplicative copying.[17] And, in not a single instance, does Florida Cities state that a particular item for which it was charged for photocopying was of a document actually filed with the court. Under Cullens, 29 F.3d at 1494, and Desisto, 718 F. Supp. at 914, then, the photocopying claim should be disallowed in its entirety.

Similarly, some of the court reporter charges do not even specify the name of the deponent or even the court reporter (see Florida Cities' Motion for Bill of Costs, Attachment A, page 1),

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June 1996 copying.

[16] The extraordinarily and unexplained large photocopying costs paid to law firms at least also raise the question of whether a substantial volume of photocopying resulted from the repeated reconfiguration of law firms involved in the case. For example, there is an unexplained $7,666.34 charge for copying at Gabeler, Battocchi & Griggs during the month of January 1996, when the case was dormant (trial having been continued on January 4, 1996 at Defendants' behest). Florida Cities filed a notice on January 2, 1996, reflecting a January 1, 1996 reconfiguration of Gabeler, Baise & Miller resulting in Mr. Baise becoming affiliated with Baise & Miller and Mr. Scroggin becoming affiliated with Gabeler, Battocchi & Griggs. The reasonable inference is that the unexplained $7,666.34 was incurred as a result of this reconfiguration and was therefore for the convenience of counsel rather than necessarily obtained for purposes of the case.

In the absence of any other plausible explanation, it seems fair to conclude that the sheer number of counsel active on behalf of Florida Cities at one time or another in this case, together with their various and evolving affiliations, resulted in photocopying for their convenience.

[17] For example, there are over $8,000 in trial exhibit copying charges listed in late December 1995, and over $8,000 listed again on March 31, 1996 as "copies required for trial."

and very few actually identify a given charge as being for a stenographic transcript as distinguished from the many other services provided by court reporters.[18] None of the witness expenses, all of which are associated with Florida Cities' expert witnesses, are itemized.

Assuming Florida Cities is entitled to recover any of its costs in this action, which the United States vigorously denies, it is incumbent upon Florida Cities to submit a proper Bill of Costs. Because, even under a relatively cursory audit, Florida Cities' Bill of Costs is so overinflated, undocumented and otherwise suspect, it should be entirely disallowed by the court. To the extent that any of Florida Cities' costs are allowed, the United States is entitled to an offset of its own costs, which, for transcripts, trial exhibits, and duplication total $29,204.83. See Declaration of Gayle Simmons (and attachment).

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[18] Only court reporter fees for stenographic transcripts can be taxed as costs under 28 U.S.C. § 1920. In some instances, however, Florida Cities charges for duplicative videotapes and stenographic recordings of identical depositions (Id., "Kwan" charges on p. 2). In another instance, Florida Cities charges for the transcript of a deposition it unilaterally took after the close of discovery (Id., "Shoemaker" charge on p. 2), without the Court's permission or the United States' attendance. In one instance, Florida Cities claims a charge for an "audio transcript" of a deposition for which it also claims a stenographic transcript (in fact, it subpoenaed the tapes from the court reporter) (Id., "Lehman" charges on p.3).

It is also unclear in how many instances, for convenience of counsel, Florida Cities ordered expedited copies of transcripts, resulting in higher-than-normal transcription charges. For example, Florida Cities ordered daily copy of the trial transcript, at a cost of over $10,000.

Conclusion

Each party should bear its own costs and fees in this action, with the exception of the $1,841.25 the United States has agreed to pay to Avatar Holdings.

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

By: _____

Dated: September 19, 1996

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC. and FLORIDA CITIES WATER COMPANY, INC., Defendants.	)	CIVIL ACTION NO. 93-281-CIV-FTM-21

DECLARATION OF GAYLE SIMMONS

I, Gayle Simmons, declare:

1. I am a paralegal employed by the Environmental Enforcement Section of the Environment and Natural Resources Division of the United States Department of Justice. In that capacity, I was assigned to assist counsel for the United States of America in this litigation.

2. I have reviewed Justice Department records relating to the costs incurred in this case, and I have verified that the said costs were in fact incurred in connection with this action.

3. Attached to this declaration is an accurate listing of the costs incurred by the United States in this action. Based on the information I reviewed, the costs appearing on this attachment are correct.

I declare, under penalty of perjury that the above statements are true.

DATED: September 19, 1996

GAYLE SIMMONS

ATTACHMENT TO DECLARATION OF GAYLE SIMMONS

VENDOR	DESCRIPTION	PAYMENT DATE	AMOUNT
BALLOWE REPORTING SERVICE	DEPOSITIONS: L. GOOD TAKEN ON 10/10/94, W. SANSBURY TAKEN ON 10/11/94, G.SILER TAKEN ON 10/12/94	01/03/95	2,245.30
	DEPOSITIONS: J. ELDER TAKEN ON 3/6/95, L. WILKOV TAKEN ON 3/7/95	04/07/95	240.35
	DEPOSITION: D. GETMAN TAKEN ON 5/1/95, R. GORDON TAKEN ON 5/1/95	08/30/95	140.10
	DEPOSITON: R. ARMSTRONG TAKEN ON 10/24/95	09/05/96	414.55
BROWN REPORTING INC.	DEPOSITION: JOHN T. MARLAR TAKEN ON 5/5/94	6/15/94	263.50
	DEPOSITION: PETER T. MC GARRY TAKEN ON 5/17/94	6/7/94	269.20
	DEPOSITION: CONNIE KAGEY TAKEN ON 10/24/94	12/7/94	366.20
	DEPOSITION: PRISCILLA OLIVER TAKEN ON 10/31/94	12/6/94	149.60
	DEPOSITION: BRUCE BARRETT TAKEN ON 10/25/94	12/13/94	229.20
	DEPOSITION: JAMES M.GREENFIELD, VOL. I TAKEN ON 5/18/95	7/13/95	315.20

VENDOR	DESCRIPTION	PAYMENT DATE	AMOUNT
	DEPOSITIONS: JAMES M. GREENFIELD, VOL. II TAKEN ON 5/19/95, ROOSEVELT CHILDRESS VOL. 1 TAKEN ON 5/19/95	9/8/95	377.90
CULLERS COPY	PHOTOCOPIES & BOOKS BOUND	6/14/94	444.76
DIVERSIFIED REPORTING	TRANSCRIPT OF MEETING OF COUNSEL 11/28/95 (82 PAGES)	2/9/96	332.10
FERNANDEZ & MATHERS	DEPOSITION: JAMES A. MILLER TAKEN ON 11/1/95	5/1/96	387.50
	DEPOSITION: CHARLES L. MCNAIRY TAKEN ON 10/18/95	5/1/96	378.00
PAT HIBBETT	DEPOSITION: JACK TOMPKINS TAKEN ON 1/9/95	4/7/95	1,415.00
MCCORKLE COURT REPORTING	DEPOSITION: EDWIN JACOBSON TAKEN ON 6/26/95	10/24/95	918.90
	DEPOSITION: KEITH CARDY TAKEN ON 11/2/95	12/11/95	523.40
MGM COURT REPORTING	DEPOSITIONS: LEON LEVY TAKEN ON 8/24/95, JOHN SLADKUS TAKEN ON 8/24/95	11/20/95	770.64
	DEPOSITION OF LEON LEVY TAKEN ON 12/6/95	2/28/96	1,050.00
DENNIS MIRACLE	TRIAL TRANSCRIPTS	5/1/96	2,188.00
O'CONNELL, POLLACK, BOSCH & EATEN	DEPOSITION: MARK KLINGENSTEIN TAKEN ON 10/23/95	2/9/96	417.00

VENDOR	DESCRIPTION	PAYMENT DATE	AMOUNT
PARKMAN & ASSO.	VIDEOTAPE DEPOSITION: KENNETH KWAN TAKEN ON 8/29/95 AND 8/30/95	11/1/95	290.00
SCLAFANI WM COURT	DEPOSITION: JULIE KARLESKINT TAKEN ON 4/21/94	6/15/94	1,043.00
SHERRY ROE & ASSOCIATES	DEPOSITION: EILEEN ZIMMER TAKEN ON 10/26/95	3/4/96	279.97
SOUTHERN RPT	DEPOSITIONS: PAUL BRADTMILLER TAKEN ON 11/18/94, PAUL BRADTMILLER TAKEN ON 11/21/94, JOHNNIE OVERTON TAKEN ON 11/17/94	1/23/95	596.10 781.90 943.90
	DEPOSITIONS: GERALD ALLEN TAKEN ON 3/27/95, ANTHONY REEVES TAKEN ON 3/28/95	5/2/95	206.70
	DEPOSITIONS: MICHAEL MCWEENY TAKEN ON 12/13/95, GERALD ALLEN TAKEN ON 11/13/95 AND 12/15/95	2/9/96	1,031.65
	DEPOSITIONS: JULIE KARLESKINT TAKEN ON 10/2/95 AND 10/16/95, PATRICK LEHMAN TAKEN ON 10/3/95, MICHAEL MURPHY TAKEN ON 10/19/95	2/21/96	1,201.45
	DEPOSITION: DOUGLAS SMITH TAKEN ON 10/30/95	2/28/96	977.75
SOUTHWEST FLORIDA RPT.	DEPOSITION: ABDUL AHMADI TAKEN ON 10/20/95	5/1/96	395.25

VENDOR	DESCRIPTION	PAYMENT DATE	AMOUNT
VON AHN RPT	DEPOSITION: BENNIE SHOEMAKER TAKEN ON 11/08/95	2/28/96	152.75
WHEELER RPT	DEPOSITIONS: MICHAEL PLOUFF TAKEN ON 8/28/95, MICHAEL HOM TAKEN ON 8/31/95, JOHN MARLAR TAKEN ON 11/2/95, ROOSEVELT CHILDRESS, VOL. 2 ON 8/14/95, ROGER PFAFF TAKEN ON 7/28/95	11/7/95	1,851.00
	DEPOSITIONS: ROGER PFAFF TAKEN ON 8/17/95, ROY HERWIG TAKEN ON 8/15/95 AND 8/16/95	9/21/95	850.00
	DEPOSITIONS: KEN KWAN, VOL. 1, 2 & 3 TAKEN ON 7/25/95, 7/26/95, AND 7/27/95		1,195.00
	DEPOSITION: FRITZ WAGENER TAKEN ON 7/24/95		147.00
SAIC	EXHIBIT PRODUCTION (GRAPHICS)		2,476.75
	PHOTOCOPIES		698.84
	VIDEO PRODUCTION		41.76
	PHOTO PROCESSING		207.66
TOTAL			$29,204.83

CERTIFICATE OF SERVICE

I certify that I caused copies of the United States' Memorandum in Opposition to Defendants' Motions for Costs and Fees to be served by mail on September 20, 1996 on the following attorneys of record:

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Roberta Malone

Exhibit_____(GHB-101)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

97 FEB -3 AM 10:48

UNITED STATES OF AMERICA

Plaintiff,

V.

CASE NO. 93-281-CIV-FTM-21-I

FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS, INC.,

Defendants.
_____/

ORDER

This cause comes before the Court on motions of the Defendants Florida Cities Water Company ("Florida Cities") and Avatar Holdings, Inc. ("Avatar Holdings" or "Avatar") to tax costs and certain attorney's fees against the Plaintiff United States of America. Specifically, filed herein are Defendant Florida Cities' Motion for Bill of Costs (Dkt. 346) and Verified Motion for Attorneys Fees (Dkt. 347) and Defendant Avatar Holdings' Motion for Judgment of Costs (Dkt. 348) and Application for Attorney Fees (Dkt. 349) and Memorandum (Dkt. 350) in support thereof. Plaintiff has filed a Response (Dkt. 352)[1] to these filings.

[1] To the extent that Plaintiff's Response (Dkt. 352) asserts the United States' entitlement to an award of costs under 28 U.S.C. § 2412(a), such request is untimely under Rule 4.18, Local Rules, Middle District of Florida, as it was submitted more than fourteen days after the entry of judgment. The filings prompted by Plaintiff's Response (Dkt. 352) are discussed below in part IV.

Defendants also filed a Joint Motion to Extend Time in Which to Apply for Costs and Attorney Fees and for Expedited Consideration (Dkt. 345). However, since both Defendants timely submitted their applications for costs and attorney's fees,[2] the motion to extend time will be denied as moot.

BACKGROUND

This action was instituted by Plaintiff, the United States of America, against Florida Cities Water Company ("Florida Cities"), a private utility company, and its parent company, Avatar Holdings Inc. ("Avatar Holdings"), pursuant to the civil penalty provisions of the Clean Water Act (CWA), 33 U.S.C. § 1319 (b). As more fully set out in prior orders of this Court, the Court previously granted partial summary judgment in favor of Defendant Florida Cities and partial judgment on the pleadings in favor of Defendant Avatar on several counts of Plaintiff's Second Amended Complaint, based on various grounds.

The action was tried to the Court sitting without a jury, after which the Court issued a Memorandum Order (Dkt. 341) containing its findings of fact and conclusions of law, pursuant to Rule 52, FRCP, and entered judgment (Dkt. 342) in favor of Defendant Avatar Holdings on all of Plaintiff's claims, but in favor of Plaintiff on its claims against Florida Cities in the amount of $309,710.00, id. Thereafter the Defendants submitted the above-referenced motions for costs and attorney's fees pursuant to Rule 54, FRCP and Rule 4.18, Local Rules, Middle District of Florida.[3]

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[2] See Rule 4.18, Local Rules, Middle District of Florida; Rule 54, Federal Rules of Civil Procedure.

[3] The Court notes that, subsequently, the United States has filed a Notice of Appeal (Dkt. 357) of this Court's judgment. The pendency of this appeal does not remove this Court's jurisdiction to hear the Defendants' timely filed motions for attorney's fees and costs. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 202 (1989) ("[A] decision on the merits is a 'final decision' for purposes of [28 U.S.C.] § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case."); see also Andrews v. Employee's Retirement Plan of First Alabama Bancshares, Inc., 938 F.2d 1245, 1247 n.3 (11th Cir. 1991)(recognizing same).

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Avatar Holdings seeks to recover its costs incurred in defending this suit as a prevailing party under 28 U.S.C. § 2412(a). Florida Cities, having made a Rule 68 offer of judgment to Plaintiff that was greater than the amount which Plaintiff ultimately recovered, seeks to recover those costs it incurred subsequent to making that offer. Both Defendants seek to recover their attorney's fees under 28 U.S.C § 2412(b) and the common law bad faith exception to the American Rule, contending that the United States' relitigation of those claims which this Court held to be barred by res judicata constitutes bad faith.[4]

The United States, in its Response (Dkt. 352), concedes Avatar Holdings entitlement to costs under 28 U.S.C. § 2412(a), but contends that Avatar's inadequate documentation thereof significantly reduces the amount which it claims, and argues that Florida Cities is not entitled to costs under Rule 68 absent an underlying waiver of the United States' sovereign immunity against such awards. Regarding the Defendants' claims for attorneys' fees under 28 U.S.C. § 2412(b), Plaintiff argues that the circumstances and procedural history of this case demonstrate that the United States did not litigate in bad faith.

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[4] As a general proposition, parties can seek to recover their attorney's fees incurred in litigation with the United States under either one of two sections of the Equal Access to Justice Act, 28 U.S.C. § 2412. While both sections may be applicable in a particular situation, the amount recoverable and standards applicable under each section are significantly different. Compare 28 U.S.C. § 2412(b) with 28 U.S.C. § 2412(d). Application of the common law bad faith exception to the American Rule through § 2412(b) requires a showing of egregious conduct by the United States, but allows for recovery of fees at the market rate. Section 2412(d) requires a lesser showing to recover fees against the United States, but recovery thereunder is, inter alia, subject to the "substantial justification" and "special circumstances" exceptions, is limited to a rate of $75 per hour absent special justification, and requires submission of an application in a particular form. See generally Brown v. Sullivan, 916 F.2d 492, 495 (9th Cir. 1990)(discussing differences between § 2412(b) & (d)); Garcia v. Sullivan, 781 F. Supp. 969, 973-74 (S.D.N.Y. 1991)(same); Fitzgerald v. Hampton, 545 F. Supp. 53, 56 & n.8 (D.C.D.C. 1982)(same).

As the Defendants submitted their requests for attorney's fees pursuant to 28 U.S.C. § 2412(b), basing their right to recovery on the United States' alleged bad faith (which standard is only applicable under § 2412(b)), and did not submit a fee application in the form required by § 2412(d)(1)(B), the Court need not and will not consider the Defendants' rights to fees, if any, under § 2412(d).

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I. PRELIMINARY CONSIDERATIONS: 28 U.S.C. § 2412, Rule 54, Sovereign Immunity, & The American Rule on Attorney's Fees

Rule 54, FRCP, provides the procedure by which a party may seek recovery of costs and attorney's fees.

> Rule 54. Judgments; Costs
>
> (d) Costs; Attorneys' Fees
>
> (1) Costs Other than Attorneys' Fees. Except when express provision therefor is either in a statue of the United States or in these rules, costs other than attorney's fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. . . .
>
> * * *
>
> (2) Attorney's Fees
>
> (A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

It is beyond peradventure that the United States, as Sovereign, is immune from suit as well as liability in its courts unless it expressly consents thereto[5]. This principle is equally applicable to the payment of costs and attorney's fees in litigation in which the United States is involved. Without its consent, the United States cannot be held liable for the payment of costs[6] or attorney's fees.[7]

Rule 54 (d)(1), FRCP provides that, "costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law," but is merely declaratory of that proposition. The section has been held "not [to] effect any change in principle[s]" of sovereign immunity. 10 C. Wright et al., Federal Practice & Procedure, § 2672 p.236 (citing RFC v. J.G. Menihan Corp., 312 U.S. 81, 85

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[5] See 14 C. Wright et al., Federal Practice & Procedure § 3654 pp.186-193 (1985 & Supp. 1996).

[6] 10 Wright et al., § 2672 p.235 (1983)(citing United States v. Chemical Foundation, Inc., 272 U.S. 1 (1926)).

[7] See 14 Wright et al., § 3654 pp.192-193 (1985 & Supp. 1996).

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(1941)). The same is true for awards of attorney's fees against the United States; a party seeking fee against the United States must still have some underlying affirmative Congressional grant of such right in order to proceed under Rule 54. As the Clean Water Act makes no express provision for fees or cost such affirmative grant, if any, must be contained in 28 U.S.C. § 2412, known also as the Equal Acces to Justice Act (EAJA).

As first enacted in 1948, 28 U.S.C. § 2412 was extremely narrow in scope, only allowing fo the taxation of costs against the United States in a few specifically enumerated classes of cases. See 1(Wright et al.§ 2672 p.236 (1983). Otherwise, § 2412 echoed the J.G. Menihan case in its mandate tha any consent by the United States to the taxation of costs had to take the form of an "express . . . Act o Congress." This, as Professor Wright notes, made taxation of costs against the United States the exception, not the rule. 10 Wright et al., § 2672 at 237.

In 1966, seeking to end the disparity in treatment between private parties and the United States concerning the allowance of court costs,[8] Congress amended 28 U.S.C. § 2412 to permit federal courts to tax costs against the United States to the same extent that they, in their discretion,[9] could tax costs against private litigants. See 10 Wright et al., § 2672 at 238. However, the amendment expressly prohibited the award of attorney's fees and expenses against the United States pursuant to that section. See id. at 239 (citations omitted); 14 Wright et al., § 3660 p. 367 (citations omitted).

[8] S. Rep. No. 1329, 89th Cong. 2d Sess. (1966), reprinted in 1966 U.S.C.C.A.N. 2527, 2528.

[9] Id. at 2529.

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Total parity between the United States and private litigants as regards the awarding of fees and costs in litigation was not achieved until 1980, when 28 U.S.C. § 2412 was again amended.[10] The effect of this amendment was to give federal courts the discretionary authority to award attorney's fees against the United States to the same extent that such were available against private litigants, see 10 Wright et al., § 2672 at 241, in addition to the courts' preexisting power to tax costs against the United States

The statute now reads, in relevant part:

> s 2412. Costs and fees
>
> (a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.
>
> * * *
>
> (b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

Thus, 28 U.S.C. § 2412, in its current form, effects a waiver of the United States' sovereign immunity against the imposition of costs and attorney's fees to prevailing parties in civil actions, and exposes the United States to liability for such awards to the same extent that such awards may be imposed against private individuals. The Federal Rules of Civil Procedure subject private litigants to

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[10] P.L. 96-481, § 204, 94 Stat. 2327 et seq., reprinted in 1980 U.S.C.C.A.N. 4984 et seq.

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awards of litigation costs under Rules 54 and 68, among others. However, since the Courts of th United States operate under the American Rule on Attorney's Fees, the Supreme Court has mandate that attorney's fee awards must be made pursuant to one of the few recognized common law exception or one of the many express statutory exceptions to the American Rule. Alyeska Pipeline Service Co v. Wilderness Society, 421 U.S. 240 (1975). One of these common law exceptions is known as the bac faith exception, pursuant to which a court may award fees to a party's opponent to punish the party's vexatious litigation. See part II, infra. The express wording and unequivocal legislative history of § 2412(b) make clear that Congress intended for these exceptions to apply to the United States under the EAJA. H. Rep. No. 96-1418, 96th Cong. 2d Sess. 9 (1980), reprinted in 1980 U.S.C.C.A.N. 4953, 4984, 4987 (applicability of common law and statutory exceptions to United States under EAJA).[11]

II. FEES

To recover fees under § 2412(b) of the EAJA, the Defendants must be "prevailing part[ies]" as defined by that section, and must prove that the United States litigated in bad faith. It is undisputed that Defendant Avatar is a prevailing party; it is not so clear whether Florida Cities is. However, the Court need not determine Florida Cities' status as a prevailing party under 2412(b) given the Court's determination of the issue of Plaintiff's alleged bad faith, as explained below.

---

[11] The Court is cognizant that the EAJA is a waiver of the United States' sovereign immunity, and that therefore construction of any of the provisions of this act must be undertaken carefully. There has been some disagreement among the federal appellate circuits as to how expansively or narrowly the EAJA should be construed, compare NTEA v. NHTSA, 972 F.2d 669 (6th Cir. 1992) (liberal construction) with Estate of Smith, 930 F.2d 1496 (10th Cir. 1991) (narrow construction) and Fenton, 633 F.2d 1119 (5th Cir. 1981) (same). Fenton, decided prior to October 1, 1981, is binding precedent in the Eleventh Circuit. See Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981)(adopting as binding precedent all decisions rendered by the former Fifth Circuit Court of Appeals prior to the close of business on September 30, 1981).

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"[A]ttorney's fees may be awarded to a successful party when his opponent has acted in ba faith, vexatiously, wantonly, or for oppressive reasons." F.D. Rich Co. v. Industrial Lumber Co., 41 U.S. 116, 129 (1974). Bad faith can take various forms. Both specific instances of conduct, and overal patterns of behavior, whether occurring prior to the institution of or during litigation, can constitute ba faith to support an award of attorney's fees under § 2412(b). See Brown v. Sullivan, 916 F.2d 492 (9t Cir. 1990); Fitzgerald v. Hampton, 545 F. Supp. 53 (D.C.D.C. 1982). The Eleventh Circuit has als recognized the bad faith exception in situations in which the losing party has "acted in bad faith vexatiously, wantonly, or for oppressive reasons," Kreager v. Solomon & Flanagan, P.A., 775 F.2c 1541, 1543 (11th Cir. 1985)(citing Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258-59 (1975)), whether such conduct occurred prior to or during litigation, id. The court has directed that "[i]n determining the propriety of a bad faith award, 'the inquiry will focus primarily on the conduct and motive of a party rather than on the validity of the case.' " Id. (citations omitted).[12]

In their motions for attorney's fees, both Defendants posit that the maintenance of claims that are found to be barred by res judicata is bad faith sufficient to merit an award of attorney's fees. The Defendants assert that Plaintiff herein made little or no effort to determine the scope of prior administrative (EPA) dispositions of various claims, instead recklessly relitigating these claims and thereby unnecessarily burdening the Defendants and the Court. Plaintiff counters that there was ample

[12] Both the former Claims Court (now the United States Court of Federal Claims) and the Second Circuit have enunciated similar but distinctive frameworks for analyzing conduct alleged to be bad faith. See, e.g., St. Paul Fire & Marine Ins. Co. v. U.S., 4 Cl. Ct. 762 (Cl. Ct. 1984); New York Housing Authority v. Kemp, 751 F. Supp. 1123 (S.D.N.Y. 1990). However, because these tests place equal emphasis on whether the claims are colorable and the nature of the prosecuting party's motives, they have a slightly different focus than the Eleventh Circuit test, which focuses primarily on the conduct and/or motive of the prosecuting party. Although not relying on them in reaching its result, the Court notes these tests shed significantly more light on the general subject of the bad faith exception than Eleventh Circuit case law, due to the brief treatment of the topic in Kreager and the general lack of Eleventh Circuit case law on the subject, and support the Court's conclusion on the bad faith issue in this case.

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factual and legal support for its assertion of the later-precluded claims, and that it did undertake an investigation into the administrative disposition of those claims before seeking to add them to this case by amendment of the complaint. Plaintiff further maintains that the significant briefing which this Court required of the parties on this issue underscores the opacity of the res judicata issue presented in this case.

This Court is not persuaded that Defendant has adduced sufficient proof of the bad conduct or ill motive of Plaintiff in litigating these claims so as to support a finding of bad faith. Plaintiff's actions and conduct herein are simply not of the character that merits awards under the bad faith exception. Nonetheless, the Court will address the case law specifically cited by both Defendants in support of their assertion that Plaintiff's litigation of the precluded claims constitutes bad faith.

The defendants rely on the cases of United States v. Nesglo, 744 F.2d 887 (1st Cir. 1984), Ellingson v. Burlington Northern, Inc., 653 F.2d 1327 (9 Cir, 1981), and Pallante v. Paine Webber, Jackson & Curtis, Inc., No. 84 CIV 5761, 1985 WL 1360 (S.D.N.Y. May 14, 1985). In each of these cases, whenever the party against whom fees were awarded was met with a defeat, it simply ignored the clearly final adjudication of its claims and filed a new suit asserting the same claim. The Nesglo and Ellingson plaintiffs asserted their particular claims multiple times (three for Nesglo, five for Ellingson), in various forums, with the plaintiff in each case making two intermediate trips to the respective appellate court. The Pallante Plaintiffs were equally defiant, though not as repeatedly. After losing the arbitration of their claim before the American Stock Exchange, they filed a state court lawsuit based on the identical facts and same theory as their original claim instead of moving to challenge the arbitration as they could have done. In each case, despite the rendering of clear rulings against them on all relief sought, the Nesglo, Ellingson, and Pallante plaintiffs returned to court and reasserted the

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identical claims. And thus, in each case, the courts which assessed them attorney's fees for bad fai were able to determine with relative ease that all the claims being asserted were barred by res judicat Such is not the situation in the present case.

In the instant case, those claims which the Court found to be barred by res judicata were not large portion of the Plaintiff's case, much less the totality thereof. Nor, as Plaintiff correctly asserts, wa the applicability of res judicata to those prior claims such a clear-cut issue. In reaching its decision tha certain of Plaintiff's claims were precluded, the Court required much briefing of the issues by th parties, as well as rebriefing upon the Court's grant of reconsideration. Such is quite different from th situation characterizing those cases of bad faith cited by the Defendants, in which parties continuall relitigated their claims after receiving definitive rulings on all those claims.

Although the Defendants herein may have been greatly frustrated by being forced to mount a defense to claims that were later found to be barred by res judicata, the Court notes that such a reactior by the Defendant does not compel the conclusion that the United States litigated in bad faith. Ever when federal courts have determined that a party's prosecution of a claim was unreasonable,[13] or unwise and without great concern for his adversary, so as to greatly frustrate him,[14] they have still found that such behavior is not bad faith, and is not litigation undertaken vexatiously, wantonly, or for oppressive reasons.[15]

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[13] Garcia v. Sullivan, 781 F. Supp. 969, 974 (S.D.N.Y. 1991).

[14] Kominers v. U.S., 9 Cl. Ct. 647, 651 (Cl. Ct. 1986).

[15] Garcia, 781 F. Supp. at 974; Kominers, 9 Cl. Ct. at 651.

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III. COSTS

A. The Defendants' Entitlement to Costs

As Plaintiff has conceded that Defendant Avatar is entitled to costs under 28 U.S.C. § 2412(a) as a "prevailing party," the Court need not address this issue. Plaintiff, however, does contest Defendant Florida Cities' entitlement to costs, arguing that it cannot recover costs against the United States pursuant to a Rule 68 Offer of Judgment because there exists no underlying statute which waives the United States' sovereign immunity in suits, like the present, in which the United States prevails. The United States contends that since a judgment was returned in its favor on its claims against the Defendant Florida Cities, the Florida Cities is thereby precluded from being a § 2412(a) "prevailing party." The Court agrees with Plaintiff's analysis and, grudgingly, with its conclusion. Rule 68 Offers of Judgment, available only to nonprevailing parties under the Rule, operate through Rule 54, which provides that costs against the United States can be imposed only "to the extent permitted by law." Since the Clean Water Act is apparently silent on the award of costs[16] in cases brought by the United States, the EAJA is the only provision ostensibly applicable to Defendant's requests for costs. But since § 2412(a) of the EAJA only grants costs to a "prevailing party," parties seeking costs under Rule 68 are implicitly precluded from the scope of § 2412(a). Thus, although it is against the clear intent of Congress in amending the EAJA in 1966,[17] based upon the principles of sovereign immunity discussed below, this Court concludes that Florida Cities cannot recover costs against the United States under Rule 68, FRCP, because of the bar imposed by the doctrine of sovereign immunity.

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[16] The parties' briefs are silent on this issue.

[17] See, supra, part I.

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The Supreme Court has recently reiterated the "common rule, with which [it] presume[congressional familiarity, that any waiver of the National Government's sovereign immunity must b unequivocal. Waivers of immunity must be construed strictly in favor of the sovereign, and nc enlarge[d] . . . beyond what the language requires. United States Department of Energy v. Ohio, 50 U.S. 607, 615 (1992)(citations omitted)(internal quotation marks omitted). Such a strong statemer cannot be disregarded, as would be necessary in order for this Court to conclude that an award of cost under Rule 68 to a nonprevailing party such as Florida Cities is permitted under the plain language o the EAJA, which only permits such awards to "prevailing parties."

The Court notes that despite the strenuous argument between Defendant Florida Cities anc Plaintiff over whether the United States is subject to the operation of Rule 68 through 28 U.S.C. § 2412(a), neither party is able to cite any case law bearing on this subject. Nor has the Court been able to locate any authority on this point.[18] While the history and purposes of Rule 68 and 28 U.S.C. §

[18] The case of U.S. v. American Commercial Barge Line Co., 988 F.2d 860 (8th Cir. 1993), cited in Defendant's Replies (Dkts. 353 & 355), is inapposite. Inter alia, American Commercial deals with the effect of the U.S.'s rejection of an offer of judgment on its right to prejudgment interest under admiralty law. The Eighth Circuit's recitation of the procedural history of the case, which does not even rise to the level of obiter dictum, merely recounted that the district court therein did award costs to the Defendant based upon the U.S.'s rejection of an offer of judgment which exceeded the final judgment in favor of the United States The Eighth Circuit did not pass on the propriety of that award, as it was not an issue before the court. The opinion of the district court is unpublished and its reasoning is thus unknown.

The case of U.S. v. Trident Seafoods Corp., 92 F.3d 855 (9th Cir. 1996) is equally frustrating in the manner it comes close to addressing, but never does directly address, the issue before this Court. Trident deals with the interplay of Rule 68, the Clean Air Act, and the EAJA. Although an offer of judgment was made by the Trident defendant to the United States in an amount which exceeded the final judgment in favor of the United States, and which apparently formed the basis of the district court's award of costs to the defendant under 2412(a), the correctness of that basis of the award was not at issue on appeal. Rather, the Ninth Circuit addressed the issue of whether a specific provision of the substantive statute at issue (the Clean Air Act) relating to fees and costs preempted the more general provisions of the EAJA. As with American Commercial Barge Line, supra, the Trident lower court opinion is unpublished.

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2412(a) militate strongly for an award of costs to Florida Cities, the procrustean doctrine of sovereign immunity precludes such.[19] Florida Cities' bill of costs must therefore be denied.[20]

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[19] Rule 68 is clearly intended to encourage settlement of cases by forcing parties to take seriously any offers of settlement properly tendered. For if a Plaintiff rejects a Rule 68 offer that is larger than the verdict he ultimately receives, he is then liable to the Defendant for all costs incurred by the Defendant after the offer was made. Rule 68 thus reverses the normal operation of Rule 54, which otherwise would allow a prevailing party to recover his costs, and instead mandates that the offeree pay to the offeror all costs incurred by the offeror after making the offer of judgment, despite the fact that he may have prevailed pursuant to a verdict returned in his favor. As noted by Plaintiff, and stated explicitly by the rule itself, Rule 54 requires that taxation of costs against the United States be made pursuant to some specific grant of that right.

The legislative history of the EAJA, as noted hereinabove in part I, makes absolutely clear that in enacting 2412(a) Congress intended to "provide for uniformity of treatment in the award of costs" between private litigants and the United States, and to do away with any "governmental advantage derived from the principle favoring immunity of the sovereign from suit." S. Rep. No. 1329, 89th Cong. 2d Sess. (1966), reprinted in 1966 U.S.C.C.A.N. 2527, 2528. In making these changes to § 2412, Congress was surely aware of Rule 68, which had been in effect in the same basic form since the adoption of the Federal Rules in 1937. Thus, notwithstanding Plaintiff's argument that Rules Enabling Act, 28 U.S.C. 2072, prohibits the application of the FRCP so as to "abridge, enlarge, or modify any substantive right," the Court believes that Congress intended for the 1966 amendments to § 2412 to submit the United States to the full liability faced by private parties for taxation of costs--including the operation of Rule 68. It is highly unlikely that Congress in its crafting of an Act with the stated purpose of completely equalizing the United States and private litigants in the awarding of costs and attorney's fees could have intended to exclude the United States from the operation of Rule 68.

But the plain language of the EAJA simply does not extend that far, and the doctrine of sovereign immunity precludes any expansive interpretation of that language. Perhaps the Eleventh Circuit will view the issue differently, but the expansion of the EAJA contrary to the Supreme Court's pronouncements regarding sovereign immunity is simply not the province of this Court.

[20] One could also argue, as does Defendant in its Reply briefs, that the term "prevailing party" in 28 U.S.C. § 2412(a) should be construed in line with the construction of that term under 42 U.S.C. § 1988, which provides for awards of attorney's fees to the prevailing party as part of costs, in cases arising under the Civil Rights Act. It is clear that the vast body of case law defining "prevailing party" that has arisen under 42 U.S.C. § 1988 of the Civil Rights Act was intended to apply equally to that term under § 2412(b) the EAJA, see H.R. 96-1148, 96th Cong. 2d Sess. 11, reprinted in 1980 U.S.C.C.A.N. 4984, 4990 ("It is the committee's intention that the interpretation of the term ['prevailing party'] . . . be consistent with the law that has developed under existing statutes."), and that the Supreme Court has approved of the application of case law arising under various statutory fee schemes to any situation in which a fee award is authorized to a prevailing party, Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983)("The standards set forth in this opinion [on the issue of the proper relationship of the results obtained to an award of attorney's fees] are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party' ".); however, it is not so clear that this body of law should be applied to awards of costs under § 2412(a). While this argument is facially logical--sections § 2412(a) & (b) and § 1988 all use identical terminology--such reasoning suffers from at least two significant defects.

First, what is now § 2412(a), and specifically its "prevailing party" terminology, was enacted over a decade before the enactment of the attorney's fees provision in 42 U.S.C. § 1988, upon which rests most, if not all, of the federal statutes dealing with the issue of when a party is considered "prevailing" under the various federal statutes authorizing fee awards to such parties. Second, adoption of such precedent in cases involving § 2412(a) would generally undermine the very purposes of the EAJA, as a defendant's status as a "prevailing party" for purposes of § 1988 depends upon a determination that the plaintiff litigated in bad faith. Sullivan v. School Board of Pinellas County, 773 F.2d 1182, 1188 (11th Cir. 1985)(citing Hughes v. Rowe, 449 U.S. 5, 14 (1980)); Hill v. Longini, 767 F.2d 332, 335 (7th Cir. 1985)("A defendant may be considered a prevailing party under section 1988 if plaintiff's action was 'vexatious, frivolous, or brought to harass or (continued...)

B. Costs awardable

Having concluded that Avatar is entitled to costs under § 2412(a), the Court is unable to make a complete award of costs because of insufficiencies in the Defendant's application for costs. Thus, seeking to avoid making a more piecemeal ruling on this issue, the Court will grant the Defendant Avatar leave to file a bill of costs which this Court can consider. While the form of its submission is helpful to the Court,[21] the necessary substance is lacking. The primary fault of the submitted bill is its lack of specificity and itemization, particularly as regards the expenses listed for photocopying.

As the parties are well aware, 28 U.S.C. § 1920(4) and case law arising thereunder[22] only permit the recovery of costs for photocopies necessary to the maintenance of the suit. At a minimum, Avatar's amended application for costs shall state the nature of the document or item copied, the purpose or necessity for which the cost was incurred, explaining such where it is not plainly obvious. Additionally the length of the document or item and the per page rate should be provided. As for costs claimed under 28 U.S.C. § 1920(2) for reporter/stenographicservices and charges, Avatar should also state the purpose or necessity of these expenses, again explaining such where necessary. Particularly, Avatar shall address

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[20] (...continued)
embarrass the defendant.'")(citing Hensley v. Eckerhart, 461 U.S. 424, 429 n.3 (1983)). Hinging a party's ability to recover costs under § 2412(a) upon a determination of litigation impropriety by the United States would lessen a private party's incentive to litigate its rights, contrary to Congress' desire in enacting the EAJA to "reduce the deterrents and disparity" in contesting government action. Cf. U.S. v. Trident Seafoods Corp., 92 F.3d 855, 863 (9th Cir. 1996)(refusing to import the Clean Air Act § 7413(b) requirement of unreasonable government action for awarding costs and fees into the analysis of an EAJA § 2412(a) cost award). Additionally, adoption of such precedent in cases involving § 2412(a) would clearly prohibit the awarding of costs to Defendants herein, as this Court has already determined that Plaintiff herein did not litigate frivolously, vexatiously, or for an improper purpose. Defendants would thus, presumably, avoid advocacy of such a position.

[21] The Court would note for the Defendant Avatar's benefit that Florida Cities' attachment to its bill of costs was in a form particularly helpful to the Court in ruling on this issue.

[22] See, e.g., DeSisto College v. Town of Howey-in-the-Hills, 718 F. Supp. 906 (M.D. Fla. 1989).

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the issue of costs recoverable for trial transcripts requested at the expedited rate if it intends to asse: a claim for such.

In doing the above, Avatar shall also address the deficiencies alleged by the Plaintiff in it Response (Dkt. 352) where applicable, make relevant reference to the abundant case law arising unde 28 U.S.C. § 1920, and generally provide the maximum relevant detail possible. Failure to address thes deficiencies will result in denial without further notice of those costs inadequately supported. Avatar' amended applications for costs shall be submitted to the Court no later than February 21, 1997. The Plaintiff shall have the normal time frame as set out by the Local and Federal Rules within which tc respond. Chambers copies shall be provided by the parties to this Court's Tampa chambers by the same applicable deadlines.

IV. Defendant Florida Cities' Replies

Finally, there is the matter of the multiple documents filed by Defendant Florida Cities and the United States herein. These pleadings are Defendant Florida Cities' Motion to File Reply Memorandum (Dkt. 353) along with attached Reply Memorandum; Defendant Florida Cities' Notification etc. (Dkt. 354); Defendant Florida Cities' Notice of Substitution of Reply Memorandum (Dkt. 355); and United States' Memorandum in Opposition etc. (Dkt. 356). The parties, of course, are aware of Rule 3.01(b), Local Rules, Middle District of Florida, and its prohibitions. However, it is not inappropriate under Local Rule 3.01(b) for the Defendant to have filed a motion for leave to file a reply and have attached the proposed reply to such motion. The Defendant's motion will be granted.

Upon consideration thereof, it is hereby **ORDERED AND ADJUDGED**:

1. Defendants' Joint Motion to Extend Time in Which to Apply for Costs and Attorney's Fees and for Expedited Consideration (Dkt. 345) is hereby **DENIED as moot.**

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2. Defendant Florida Cities' Verified Motion for Attorneys Fees (Dkt. 347) is **DENIED**.

3. Defendant Avatar Holdings' Application for Attorney Fees (Dkt. 349) is **DENIED**.

4. Defendant Florida Cities' Motion for Bill of Costs (Dkt. 346) is **DENIED.**

5. Defendant Avatar Holdings' Motion for Judgment of Costs (Dkt. 348) is **GRANTED in part**. Pursuant to the Court's instructions above, Defendant shall submit an amended application for costs no later than February 21, 1997. Plaintiffs shall timely respond thereto as provided under the rules. Courtesy copies shall be provided the Court as directed above.

6. Defendant Florida Cities' Motion to File Reply Memorandum (Dkt. 353) is **GRANTED**. The Clerk is **DIRECTED** to file the reply Memorandum attached to Defendant's Motion (Dkt. 353) as well as Defendant's Substituted Reply (Dkt. 355).

DONE AND ORDERED, at Tampa, Florida, this 3rd day of February, 1997.

RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of record
Margaret Costa, Judicial Assistant

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Exhibit_____(GHB-102)

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

96 OCT 18 AM 11:37

CLERK
MIDDLE DISTRICT OF FLORIDA
FT. MYERS, FLORIDA

UNITED STATES OF AMERICA, Plaintiff, v. AVATAR HOLDINGS, INC., and FLORIDA CITIES WATER COMPANY, INC., Defendants.	CIVIL ACTION NO. 93-281-CIV-FTM-21

NOTICE OF APPEAL

Notice is hereby given that the United States, plaintiff in the above-named case, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the final judgment entered in this action on the 20th day of August, 1996.

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

By: _____

Dated: October 17, 1996

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35

10/21/96 15:14 ☎941 332 4194 HENDERSON/FRANK 002

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10/21/96 15:15 ☎941 332 4494 BENDERSON/FRANK 003

Exhibit_____(GHB-103)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

96 NOV -1 PM 3:08

UNITED STATES OF AMERICA, Plaintiff, v. FLORIDA CITIES WATER COMPANY and AVATAR HOLDINGS INC., Defendants.	CIVIL ACTION NO.: 93-281-CIV-FTM-21

Florida Cities Water Company's Notice of Cross-Appeal

Please take notice that the defendant, Florida Cities Water Company, hereby files its Notice of Cross-Appeal to the United States Court of Appeals for the Eleventh Circuit from the final judgment entered on August 20, 1996, and any subsequent amendment or modification to the final judgment.

Respectfully submitted.

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November 1, 1996

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of "Florida Cities Water Company's Notice of Intent to Appeal." has this 1st day of November, 1996, been sent to the following persons by either United States Mail or hand delivery:

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T. Anthony Quinn, Esq. (By Hand)
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Alexander M. Bullock

Exhibit_____(GHB-104)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
AUG 06 1997
MIGUEL J. CORTEZ
CLERK

No. 96-3498

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

FLORIDA CITIES WATER COMPANY, INC.
AVATAR HOLDING, INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

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BEFORE: TJOFLAT and COX, Circuit Judges.

BY THE COURT:

The parties' motion to dismiss the appeal with prejudice is GRANTED.

Pleadings Filed

Date	Description	Pages	Exhibit Pages
October 1, 1993	Complaint filed by US	6	
November 22, 1993	FCWC's Answer to Complaint	17	
November 30, 1993	FCWC's Written Designation and Consent -to-Act	3	
December 15, 1993	US's Motion for Extension of Time in which to File Motion to Strike Affirmative Defenses	4	
December 27, 1993	US's Motion for Extension of Time to Answer (the court's standard interrogatories)	4	
January 26, 1994	US's Answers to Court's Standard Interrogatories	4	
January 27, 1994	Notification of Parties' Rule 26(f) Meeting	3	
February 4, 1994	US's Motion to Strike Affirmative Defenses & Memo	2	16
February 9, 1994	FCWC's Motion for Extension of Time (to respond to U.S.'s Motion to Strike Affirmative Defenses)	2	
February 14, 1994	Parties' Answer to Court's Joint Standard Interrogatories and Joint Report of Parties' Planning Meeting Pursuant to FRCP 26 (f)	8	
February 28, 1994	FCWC's Answers to Court's Standard Interrogatories	8	
February 28, 1994	FCWC's Memorandum in Opposition to Plaintiff's Motion to Strike Affirmative Defenses	20	
April 18, 1994	FCWC's Motion for a Protective Order (limiting discovery to evidence relating to CWA compliance by Waterway Estates) and Memorandum in Support	8	
June 23, 1994	US's Motion for an Order Allowing Ex-Parte Contacts with Former Employees & Memo	12	9
July 15, 1994	FCWC's Memorandum in Opposition to Plaintiff's Motion for an Order Allowing Ex Parte Contacts with Former Employees	17	18
August 5, 1994	US's Motion for Permission to File Reply Memorandum in Support of US's Motion for an Order Allowing Ex-parte Contacts with Former Employees & Memo	6	14
August 17, 1994	FCWC's Memorandum in Opposition to Plaintiff's Motion and Memorandum Regarding Ex Parte Contacts	4	3
October 25, 1994	FCWC's Motion to Disqualify Counsel	16	

Pleadings Filed

Date	Description	Pages	Exhibit Pages
November 9, 1994	FCWC's Notice of Filing Amended Affimation of Gerald S. Allen	6	
November 4, 1994	US's Memorandum in Opposition to FCWC's Motion to Disqualify Counsel	11	16
January 19, 1995	FCWC's Notice of Change of Address (of counsel)	2	
January 26, 1995	FCWC's Request for Oral Argument in Connection with Defendant's Motion to Disqualify Counsel	8	18
February 2, 1995	US's Notice to the Court Regarding Scheduling of Interviews with Former Employees	4	
February 3, 1995	FCWC's Emergency Motion for a Temporary Protective Order	11	8
February 9, 1995	US's Reply to Defendant's Emergency Motion for a Temporary Protective Order and Defendant's Request for an Oral Argument	6	3
February 13, 1995	FCWC's Motion for a Protective Order (to postpone the depositions of Wilcov and Elders, giving them time to obtain separate counsel)	7	
March 10, 1995	US's Notice of Filing Proposed Order (re ex parte contacts)	9	13
March 13, 1995	Response to Court's Order delivered at the February 15, 1995 Hearing re: Laurence Wilkov and James Elder	4	
March 14, 1995	FCWC's Submission of Proposed Order and Memorandum in Support Thereof	24	
March 30, 1995	US's Motion for Leave to Add Party (Avatar Holdings, Inc.) and Memo	7	
March 30, 1995	US's Amended Complaint	12	
April 3, 1995	US's Objections to the Magistrate Judge's Order on the US's Motion for an Order Allowing Ex-parte Contacts with Former Employees	13	12
April 4, 1995	FCWC's Notice of Intention to Oppose Constructive Motion by United States for Leave to File Amended Complaint	4	
April 5, 1995	U.S.'s Notice of Filing Deposition transcript of Jack Tompkins	3	

Pleadings Filed

Date	Description	Pages	Exhibit Pages
April 6, 1995	FCWC's Motion for Extension of Time to File Objections to Magistrate's Order (denying Defendant's Motion to Disqualify Counsel) and Memo	23	13
April 14, 1995	FCWC's Memorandum in Partial Opposition to Plaintiff's Motion for Leave to Amend Complaint	14	
April 14, 1995	FCWC's Answer to Amended Complaint	21	
April 14, 1995	US's Memorandum in Opposition to FCWC's Motion for an Extension of Time to File Objections to Magistrate's Order and Request for Reconsideration of Court's Order Granting that Motion	7	
April 17, 1995	US' Motion for Enlargement of Time (to respond to Defendant's First Interrogatories and Second Request for Production of Documents) and Memo	6	
April 18, 1995	FCWC's Response to US's Motion and Memorandum in Support for Enlargement of Time	4	11
April 19, 1995	FCWC's Opposition to the US's Objections to the Magistrate Judge's Order on the US's Motion to Allow Ex Parte Contacts with Former Employees	21	40
April 26, 1995	FCWC's Motion for Partial Summary Judgment and Memo	21	
May 1, 1995	Errata to US's Memorandum in Support of its Motion for Reconsideration of Court's Order on Amendment of Complaint	3	
May 4, 1995	US's Revised Amended Complaint	14	
May 9, 1995	FCWC's Motion to Strike (the first and second claims for relief in the Revised Amended Complaint)	8	
May 12, 1995	US's Notice of Opposition to FCWC's Motion for Partial Summary Judgment	3	
May 12, 1995	US's Motion for Leave to Enlarge the Number of Depositions	6	
May 12, 1995	US's Motion for Reconsideration of Court's Order on Amendment of Complaint (for portion disallowing claims relating to Barefoot Bay and Carollwood)	24	28
May 17, 1995	FCWC's Motion for Partial Summary Judgment	19	

Pleadings Filed

Date	Description	Pages	Exhibit Pages
May 17, 1995	Errata to US's Memorandum in Support of Its Motion for Reconsideration of Court's Order on Amendment of Complaint	3	
May 19, 1995	US's Motion to Compel (FCWC to respond to interrogatories and to produce documents)	21	
May 20, 1995	FCWC's Answer to Revised Amended Complaint	24	
May 24, 1995	FCWC's Motion for Leave to Amend FCWC's Answer to Revised Amended Complaint	8	
May 24, 1995	FCWC's Amended Answer to Revised Amended Complaint	22	
May 25, 1995	US's Motion to Shorten Time in which Defendants Must Respond to Discovery	7	
May 25, 1995	US's Opposition to FCWC's Motion to Strike (the first and second claims for relief in the Revised Amended Complaint)	5	
May 26, 1995	FCWC's Memorandum in Opposition to Motion for Reconsideration	8	
May 26, 1995	Complaint: FOIA Action (Baise v. US)	3	2
May 26, 1995	FCWC's Response to Plaintiff's Motion to Enlarge the Number of Depositions	5	
June 7, 1995	FCWC's Memorandum in Opposition to Plaintiff's Motion to Compel (production of documents)	9	2
June 7, 1995	US's Opposition to FCWC's Motion for Partial Summary Judgment	10	
June 9, 1995	Baise v. U.S. - Plaintiff's Motion and Memo in Support of Summary Judgment	7	
June 9, 1995	FCWC's Response to US's Motion to Shorten Time in which Defendants must Respond to Discovery	4	5
June 15, 1995	Defendants' Joint Motion to Alter Discovery Schedule Order, Joint Motion to Expedite Court's Consideration, and Memorandum in Support	5	
June 22, 1995	US's Motion and Memorandum to Exceed Page Limit and Request for Oral Argument	3	
June 23, 1995	US's Motion for Partial Summary Judgment	57	152

Pleadings Filed

Date	Description	Pages	Exhibit Pages
June 26, 1995	Motion and Memo for Order Directing Clerk to File Proposed Second Amended Complaint nunc pro tunc	4	
June 26, 1995	US's Second Amended Complaint	11	
June 28, 1995	U.S.'s Notice of Withdrawal of Motion for Summary Judgment	1	
June 29, 1995	US's Answer in Baise v. US	5	
June 30, 1995	FCWC's Answer to Second Amended Complaint	22	
July 6, 1995	Defendants' Joint Motion for a Revised Discovery and Trial Schedule, for an Extension of Time to Respond to Plaintiff's Motion for Summary Judgment, for Leave to Exceed the Page Limitation, and for Expedited Consideration	8	12
July 12, 1995	US's Reply to Defendants' Joint Motion for a Revised Discovery and Trial Schedule	7	
August 14, 1995	US's Memorandum in Support of its Motion for Partial Summary Judgment	40	
August 15, 1995	US's Motion for Protective Order (re deposition of Kenneth Kwan)	6	
August 15, 1995	FCWC's Motion to Compel Kenneth Kwan to Appear at Deposition and Answer Deposition Questions, To Compel Plaintiff's Counsel to Comply with Proper Deposition Procedures, For Costs and Attorneys' Fees and for Expedited Consideration	14	99
August 25, 1995	Stipulation of Dismissal of Baise v. US	7	
September 11, 1995	FCWC's Motion for Partial Summary Judgment and Request for Oral Argument	38	
September 15, 1995	US's Motion and Memorandum for Order Setting Procedures for Expert Witness Discovery	5	5
September 25, 1995	US's Opposition to FCWC's Second Motion for Partial Summary Judgment	22	70
September 27, 1995	Defendants' Joint Memorandum in Opposition to Plaintiff's Motion for Order Setting Procedures for Expert Witness Discovery	5	
October 5, 1995	US's Motion and Memorandum to Exceed Limit of Number of Depositions	6	

Pleadings Filed

Date	Description	Pages	Exhibit Pages
October 24, 1995	FCWC files Notice of Rescheduling of Hearing Before Judge Shwartz	4	
October 27, 1995	U.S.'s Motion and Memo in Support of its Second Motion to Compel	14	
October 30, 1995	FCWC's Notice of Dispositive Authority (Borough of Ridgway)	4	11
October 31, 1995	FCWC's Notice Regarding Borough of Ridgway	3	
November 6, 1995	US's Notice of Filing Of Proposed Order (re: discovery matters discussed at the November 3 hearing	6	
November 8, 1995	Defendants' Joint Comments to Plaintiff's Proposed Order Memorializing the Court's Rulings at the November 3 Motions Hearing	4	12
November 15, 1995	US's Response to FCWC's Notice of Dispositive Authority	7	
November 29, 1995	US's Memorandum in Support of Motion for an Order Permitting Discovery of Defendants' Late-Named Witnesses and for Expedited Consideration	7	
November 30, 1995	US's Memorandum in Support of Affirmation of Magistrate Judge's Order	7	
December 6, 1995	Joint Pre-trial Statement	38	
December 7, 1995	FCWC's Memorandum in Opposition to Plaintiff's Motion for an Order Permitting Discovery of Defendants' Late-Named Witnesses and for Expedited Consideration	5	
December 18, 1995	FCWC's Response to Avatar Holdings' Motion for Clarification (of the Court's November 22, 1995 Order)	3	
December 18, 1995	US's Motion for Expedited Reconsideration of the Court's Ruling on Res Judicata and in Reply to Avatar Holdings' Motion for Clarification of the Court's Order	14	
December 19, 1995	Defendants' Joint Response to Plaintiff's Motion for Continuance of Trial in Light of Lapse in Appropriations	4	

Date	Description	Pages	Exhibit Pages
December 26, 1995	US's Motion to Enforce Discovery Order	7	
December 27, 1995	Defendants' Joint Motion and Memorandum in Support for Extension of Time to File Trial Memoranda and Proposed Findings of Fact and Conclusions of Law	6	2
December 28, 1995	FCWC's Proposed Findings of Fact and Conclusions of Law	30	
December 28, 1995	US's Trial Memorandum; US's Proposed Findings of Fact and Conclusions of Law	38	7
January 2, 1996	FCWC's Pretrial Brief	29	
January 2, 1996	FCWC's Notice of Change of Address (of counsel)	3	
January 3, 1996	FCWC's Notice Regarding Illness of Gerald S. Allen		
January 4, 1996	US's Motion in Support of its Motion in Limine (for Limitation on trial length and limitation on evidence and witnesses)	16	14
January 5, 1996	Defendants' Joint Motion in Limine to Exclude the Testimony and Report of Mark J. Klingenstein	20	37
anuary 4, 1996	Defendants' Unopposed Emergency Joint Motion for a Continuance of Trial Date Because of Sudden and Serious Illness of Defendants' Key Witness and Memorandum in Support and Request for Expedited Consideration	6	
January 16, 1996	Parties' Joint Request for Extension of Time to File Revised Joint Pre-trial Statement (in light of massive blizzard in D.C.)	1	
January _ 1996	Defendants' Joint Motion in Limine to Exclude the Testimony and Report of Eileen Zimmer	24	
January 25, 1996	US's Memorandum in Opposition to Defendants' Motions in Limine	17	1
January 26,1996	Defendants' Joint Memorandum in Opposition to Plaintiff's Motion in Limine (to limit length of trial, to limit evidence and witnesses, to disqualify expert witnesses Douglas Smith and Roger Hartung)	20	20
February 2, 1996	Notice of Change of Address to 815 Conn. Ave.	3	
March 5, 1996	FCWC's Notice of Filing of Certification of License of Douglas G. Smith	4	

Pleadings Filed

Date	Description	Pages	Exhibit Pages
March 25, 1996	FCWC's Witness List & Exhibit List	24	
March 25, 1996	US's Offer of Proof in Lieu of the Testimony of Witnesses who Plead the Fifth Amendment	35	
April 5, 1996	Defendants' Joint Memorandum Addressing the Invocation	15	
April 8, 1996	US's Remaining Designation from the Deposition of Jack Tompkins to be Offered in Evidence	3	
April 10, 1996	US's Memorandum of Law in Support of its Request that the Court Draw Adverse Inferences from the Refusal to Testify by Defendants' Present and Former Officers and Managers	16	
April 16, 1996	FCWC's Motion to Strike the Deposition Testimony of Jack William Tompkins, Objections and Counter-Designations	8	
April 18,1996	Parties' Proposals for Post-trial Submissions	7	
April 25, 1996	US's Opposition to Defendants' Motions to Strike the Deposition Testimony of Jack Tompkins	3	
May 16, 1996	US's Motion for Reconsideration of the Court's Ruling on Adverse Inferences and for Extension of Page Limits for Post-trial Submissions	21	
May 21, 1996	FCWC's Memorandum in Opposition to Plaintiff's Motion for Reconsideration (of Court's May 8, 1996 Orders)	6	
June 5, 1996	US's Post-trial Memorandum	36	
June 6, 1996	FCWC's Proposed Findings of Fact and Conclusions of Law	27	
July 16, 1996	US' Citation of Additional Authority (re: res judicata)	52	
July 19, 1996	Defendants' Joint Response to Plaintiff's Citation of Additional Authority	5	
August 2, 1996	Defendants' Joint Memorandum in Response to the Court's Order of July 23, 1996 (requesting they address the effects of Ridgway and Manning)	15	53
August 1, 1996	US's Memorandum in Support of Reinstatement of the Claims Excluded by the Court on Res Judicata Grounds	14	25

Pleadings Filed

Date	Description	Pages	Exhibit Pages
August 8, 1996	US's Reply Memorandum in Support of Reinstatement of the Claims Excluded by the Court on Res Judicata Grounds	9	
August 9, 1996	Defendants' Joint Response to Plaintiff's Memorandum Seeking Reinstatement of Claims Previously Dismissed in the Grounds of Res Judicata	10	
August 27, 1996	Defendants' Joint Motion to Extend Time in Which to Apply for Costs and Attorneys' Fees and for Expedited Consideration	4	
August 27, 1996	FCWC's Filing of Offer of Judgment	6	
August 28, 1996	Defendant's Joint Motion to Extend the Time in Which to Apply for Costs and Attorneys' Fees for Expedited Consideration	5	
October 18, 1996	US's Notice of Appeal	2	
November 1, 1996	FCWC's Notice of Cross-Appeal	3	
November 19, 1996	FCWC's Citation of Additional Authority (regarding its Petition for Costs and Attorney's Fees)	14	
December 31, 1996	US files Certificate of Interested Persons, Motion for Leave to File Civil Appeal Statement Form Out of Time, Civil Appeal Statement Form, Civil Appeal Information Sheet	10	
TOTALS:		**1566**	**751**

Depositions Taken by FCWC

Deposition	Days	Hours	Pages
John Marlar	5/5/94	6.75	170
Peter McGarry	5/17/94	5	144
Connie Kagey	10/24/94	8	184
Bruce Barrett	10/25/94	5	116
Priscilla Oliver	10/31/94	--	--
John Marlar	5/5/95	6.25	169
James Greenfield	5/18/95 5/19/95	6 2.25	157 250
Roosevelt Childress	5/19/95	3	102
Fritz Wagener	7/24/95	2.25	65
Kenneth Kwan	7/25/95 7/26/95	7 7.75	193 133
Roger Pfaff	7/28/95	7.25	137
Roosevelt Childress	8/14/95	6.25	130
Roy Herwig	8/15/95 8/16/95	6.5 4	267
Roger Pfaff	8/17/95	4	91
Thomas Plouff	8/28/95	7.5	133
Kenneth Kwan	8/29/95 8/30/95	8 6	393
Michael Hom	8/31/95	4	133
Mark Klingenstein	10/23/95	--	143
Bruce Barrett	10/25/95	5	122
Eileen Zimmer	10/26/95	4	152
John Marlar	11/2/95	7.5	180
Bennie Shoemaker	11/8/95	4	91
Totals:		**133.25**	**3655**

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Dennis Getman	5/1/95	.25	13
Larry Wilkov	3/7/95	--	--
John Sladkus	8/24/95	--	--
Paul Bradtmiller	10/3/95	.25	6
Keith Cardey	11/25/95	--	95
Paul H. Bradtmiller	11/21/94	8	193
TOTALS		**120**	**3620**

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Depositions Taken by DOJ

Deposition	Days	Hours	Pages
Peter T. McGarry	5/17/94	5	145
Charles L. McNairy	10/18/95	4.5	108
Michael W. McWeeny	12/13/95	2	71
Jonnie Overton	11/17/94	9	235
Patrick Lehman	10/3/95 10/17/95	3.75 3	111 82
William Sansbury	10/11/94	9	220
Glen Siler	10/12/94	6	151
Douglas G. Smith	10/30/95	7.5	255
Michael E. Murphy	10/19/95	2.5	96
James A. Miller	11/1/95	2	110
Julie Karleskint	4/21/94	7.25	177
Julie Karleskint	10/2/95	6.5	143
Julie Karleskint	10/16/95	5	110
Antone A. Reeves	3/28/95	.75	13
Larry Good	10/10/94	7.75	225
Randall L. Armstrong	10/24/95	3	93
Abdul Ahmadi	10/20/95	2	76
Robert Gordon	5/1/95	.25	12
Gerald Allen	1/13/95	6.5	131
Gerald Allen	12/15/95	9	180
Gerald Allen	3/27/95	1.75	20
Leon Levy	8/24/95	6	110
James Elder	3/6/95	1.5	25
Edwin Jacobson	6/26/95	--	178
Jack W. Tompkins	1/9/95	--	236

Exhibit_____(GHB-107)

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MEMORANDUM

TO: Dennis Getman

FROM: Gary H. Baise

DATE: January 31, 1996

RE: Four-Month Billing Summary

I am faxing to you a summary of actual costs for attorney time worked versus what I ended up billing to Florida Cities. You have asked me on several occasions to be sensitive to costs and attempt to stay within your budget. Since July, I have maintained the records with regard to this case. Prior to August the records are on Ms. Gabeler's computer and I will attempt to obtain those records as well. It was in July that Mr. Miller and I raised serious questions regarding Ms. Gabeler's bookkeeping habits and her handling of firm funds.

From July on you can see how much time I have written off of each bill. In many cases I took substantial amounts of time from Don's and others' efforts and, as I told you, it distressed him greatly because it lowered his income and potential for a bonus. I told him repeatedly we had to look out for the client's interest and overall production for the client, but he deeply resented it. I think you can see from these numbers that I have attempted to keep attorney costs under control.

For example, note the month of August which I considered a light month because of vacation time. I found that the tasks which I had authorized had taken a lot more time than I felt was needed; therefore, knowing that legal efforts for October, November, and December were going to be substantial, I severely reduced what I thought was inefficient expenditures of effort by lawyers and paralegals.

GHB:sp

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GARY H. BAISE

Florida Cities Water Company
Billing Status
(Four-Month Period, August-November 1995)

	Actual Costs	Actual Billed	Differential
August	$159,227.50	$115,459.12	$43,768.38
September	$149,241.00	$108,803.50	$40,437.50
October	$163,980.00	$143,034.03	$20,945.97
November	$191,508.10	$172,934.14	$18,573.96
	$663,956.60	$540,230.79	$123,725.81

August Bill

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Guy Vander Jagt

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°Admitted only in the District of Columbia

October 17, 1995

Dennis Getman, Esq.
Avatar Holdings Company, Inc.
P.O. Box 523000
Miami, FL 33152-0300

Dear Dennis:

Enclosed is our statement for August services. During the month of August, we reviewed expert reports and worked with the expert witnesses; participated in assisting bond counsel on the decisions he needed; prepared for and conducted the difficult depositions involving Ken Kwan, and started the work on the Motion for Partial Summary Judgment and Opposition to the Government's Motion for Summary Judgment. In addition work was undertaken with regard to reviewing various depositions developing privilege logs, and Don participated in the taking of depositions of Avatar officers.

Again for your information you know that on some of the days listed, Don and Lance put in more hours than I show on the bill but as I told you before I believe not every hour is fully billable. I do not bill for just being in place. Given the fact that we have exceeded your budget at this point, I will continue working with you on trying to deal with the high costs involved in this case.

Cordially,

Gary H. Baise

GHB:sp

Enclosure

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GARY H. BAISE

Dec '95

February 5, 1996

Mr. Dennis J. Getman, Esquire
General Counsel, Florida Cities Water Company
Executive Vice President and General Counsel
Avatar Holdings Company, Inc.
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis:

Enclosed is our statement for work for December 1995. My apologies for the delay; however, it has not been easy, given the law firm split, to obtain all of the expenses for the month of December. I believe I now have all of the expenses in terms of copying costs. Also you will note I have lowered legal time significantly. The legal time amounted to over $202,000. I reduced the time where I thought there was duplication and inefficiencies in order to keep the cost under some semblance of control. Don's time for example was approximately 275 hours and I do not believe anyone could be efficient and effective for that number of hours, so I reduced his time accordingly. In addition, I reduced paralegal time as well.

Please give me a call after you receive this and we can discuss it further.

Cordially,

Gary

Gary H. Baise

GHB:sp
Enclosure

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Of Counsel

Jack Pulley
Guy Vander Jagt

March 14, 1996

Dennis Getman, Esq.
General Counsel, Florida Cities Water Company
Executive Vice President and General Counsel, Avatar Holdings, Inc.
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis:

Enclosed please find our statement for the month of February 1996. All of the time involves trial preparation and organization of documents for the trial. As usual, should you have any questions with respect to the activities we undertook on your behalf in February, by all means give me a call.

Also if you want me to review Don's time, I will do so. I've had to caution him on a number of occasions to stop doing duplicate work such as reviewing Leon Levy's deposition which I had told him not to touch because that was Weil, Gotshal's responsibility. I assume he did so, and there have been several other occasions where I felt he was doing things I would not have authorized had he been under my direct supervision.

Cordially,

Gary H. Baise

GHB:sp
Enclosure

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May 7, 1996

Mr. Dennis J. Getman, Esq.
General Counsel, Florida Cities Water Company
Executive Vice President and General Counsel, Avatar Holdings Inc.
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis:

Enclosed is our statement for services rendered during the month March. This statement covers work for my team to handle 15 out of the 18 witnesses and the 5 witnesses called by the government for which we also handled cross-examination. We handled all document preparation and organization for our witnesses. I have tried to avoid as much duplication of effort as possible. In fact, I have written down our time where I thought there was any duplication or little value added by my team.

I shall call you when I return from Illinois next Tuesday, and we will discuss this matter further.

Cordially,

Gary H. Baise

GHB:sp
Enclosure

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June 14, 1996

Mr. Dennis J. Getman, Esq.
General Counsel, Florida Cities Water Company
Executive Vice President and General Counsel, Avatar Holdings Inc.
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis:

Enclosed please find our statement for services for April 1996. This statement covers the last week of trial and incidental matters that Lance and Alex undertook after the trial. Because you were present with us during the trial, I shall not engage in any lengthy description in this letter. Again, you can probably tell from the hours, I have marked down some of our time since many of the days were 10 to 14 hours in total effort.

Cordially,

Gary H. Baise

GHB:sp
Enclosure

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August 14, 1996

Dennis Getman, Esq.
General Counsel, Florida Cities Water Company
Executive Vice President and General Counsel, Avatar Holdings, Inc.
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis:

Enclosed please find our statement for services rendered during the month of July 1996. The month was spent on responding to Jacobs' filing of the Dean Dairy case as additional authority to support his case; preparing a response to the court's order; and handling of the res judicata issue. I have reduced my time because there certainly was duplication in the study of the City of Manning and Ridgway cases. I did not want to charge you for three of us studying and reviewing those two cases.

Cordially,

Gary

Gary H. Baise

GHB:sp
Enclosure

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January 22, 1997

Mr. Dennis J. Getman, Esq.
General Counsel
Florida Cities Water Company
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis:

Enclosed is our statement for the month of December, 1996. I had estimated this bill to be approximately $2,500 for Joe's budget; however, the total amount is somewhat under that estimate. All the time expended was for work on the appeals issue.

We look forward to holding our victory for you in 1997 and certainly appreciate the confidence you bestowed upon us in 1996. I thank you very much for your support.

Cordially,

Gary

Gary H. Baise

FCWC - HOURS BILLED

1993	HOURS WORKED
June	51.75
July	208.25
August	170.75
September	143.00
October	132.50
November	326.50
December	240.00
TOTAL	**1272.75**

1994	HOURS WORKED
January	211.50
February	325.50
March	623.50
April	548.25
May	346.50
June	411.75
July	338.00
August	458.00
September	284.25
October	461.50
November	322.00
December	250.25
TOTAL	**4581.00**

FCWC - HOURS BILLED

1995	HOURS WORKED
January	274.50
February	483.15
March	606.50
April	702.25
May	762.50
June	680.58
July	814.50
August	674.00
September	672.75
October	930.00
November	1108.50
December	1393.25
TOTAL	**9102.50**

1996	HOURS WORKED
January	648.50
February	813.75
March	969.00
April	261.00
May	260.00
June	126.25
July	115.25
August	158.25
September	86.25
October	32.25
November	51.75
December	11.25
TOTAL	**3533.50**

FCWC - HOURS BILLED

1997	HOURS WORKED
January	73.25
February	38.00
March	31.25
April	67.75
May	74.50
June	2.50
July	64.50
TOTAL	**351.75**
GRAND TOTAL	**18,841.50**

Average cost of $164.50.

Exhibit_____(GHB-109)

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Of Counsel:
Guy Vander Jagt

*Admitted also in the District of Columbia

*Admitted only in the District of Columbia

June 21, 1995

May 1995

Mr. Dennis J. Getman, Esq.
Avatar Holdings Company, Inc.
P.O. Box 523000
Miami, FL 33152-3000

Dear Dennis:

Enclosed please find our statement for services rendered during the month of May. During the month, we worked on finishing the defense of the depositions involving the taking of the Fifth Amendment, developed the motion to strike DOJ's amended complaint, engaged in document production and obtaining documents from EPA, prepared and conducted the first 30 (B)(6) depositions against the government in Atlanta, responded to the government's interrogatories and admission request and, as you know, filed a separate lawsuit under the Freedom of Information Act against the Department of Justice.

In addition, we have started legal research on the issue of comparability between Florida's Water Act and the authority. As you may recall, at one time the comparability issue was the only defense David thought available to Florida Cities. At that time, we all agreed it was not a very strong defense. However, in light of Florida being granted delegation under the Clean Water Act, I want the comparability issue reviewed again because I may want to pursue this issue on Florida Cities' behalf.

You will note I really spent no time on settlement issues because of the flurry of activity during the month of May, but as soon as we get the Court's decision on our pending motions, I plan on pursuing that strategy vigorously, assuming things turn out reasonably well, as they have to date.

I continue to appreciate you support and confidence and, as you know, will do everything in my power to bring this matter to a close as quickly and as cost effectively as I can.

Cordially,

Gary H. Baise

GHB/GETMAN/STATEMT.MAY/PM

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February 3, 1995

Mr. Dennis J. Getman
Executive Vice President - General Counsel
Avatar
P.O. Box 523000
Miami, Florida 33152-3000

Dear Dennis:

Enclosed please find our statement for services rendered during the month of January. A couple things I want to note with respect to this bill as compared to the Jenner & Block bill. I have lowered my billing rate from $275.00 down to $250.00/hour. Don's rate remains at $225.00/hour and Steve's rate comes down to $180.00/hour. You will note some new names on the bill in terms of associates. One person we have just hired whose name is not on the letterhead yet is Liz Poliner. She has worked for me on issues in the past and is a very good lawyer. Lance High is one of our excellent associates here at this firm. Ray Battocchi is a senior litigator at this firm with extensive Justice Department experience under his belt.

Dennis, we appreciate your confidence in continuing with Don and me. We realize this is very difficult and trying time for the company, and we continue to be very sensitive to the entire issue.

Again, many thanks.

Sincerely yours,

Gary H. Baise

GHB:km

March 20, 1995

Dennis J. Getman, Esquire
Avatar Holdings Co, Inc.
P. O. Box 523000
Miami, FL 33152-3000

Dear Dennis:

Enclosed is our statement for February, 1995. The month was extremely active as a result of the issues revolving around the Weitzenhoff case, discovery issues, and the effort to put together the motion for summary judgment which will, from what I can tell, will be creating some new law in applying the old common law concept of void ab initio to the Clean Water Act. This motion is my best shot at a "hail Mary pass" to knock out the key claim against Waterway Estates. I should have the draft motion to you within the next ten days.

I am sorry for the mix-up on the January bill. I was waiting for your approval on the new billing rates, and I guess you were waiting for the new statement. I am enclosing the new January, 1995 statement with the one for February.

Cordially,

Gary H. Baise

\Enclosure

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Steven F. Hirsch°
Robin L. Robb+
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Lance W. High

Of Counsel:
Guy Vander Jagt

+Admitted also in the District of Columbia

°Admitted only in the District of Columbia

July 21, 1995

Dennis J. Getman, Esquire
Avatar Holdings, Company, Inc.
P. O. Box 523000
Miami, FL 33152-3000

Dear Dennis:

Enclosed is our statement for services rendered during the month of June, 1995. Because the bill is 29 pages, I will not bore you with a summary since you were involved in virtually all these activities with the exception of the legal research. However, if there is any item on this statement that needs further explanation, please let me know.

Cordially,

Gary

Gary H. Baise

\enclosure

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Of Counsel
Guy Vander Jagt

August 4, 1995

Dennis J. Getman, Esq.
General Counsel
Avatar Holdings Co., Inc.
255 Alhambra Circle - 8th Floor
Miami, FL 33314-7412

Dear Dennis:

Enclosed is our statement for June. I apologize for the earlier statement for June which had numerous errors. I still have not figured out how some of the fractions of time were included in that statement. I had approved an earlier version which had the correct listings, and assumed the copy I sent you reflected the earlier version. I will not make that mistake again. I appreciate your understanding.

Cordially,

Gary H. Baise

GHB:sp

Enclosure

August Bill

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October 17, 1995

Dennis Getman, Esq.
Avatar Holdings Company, Inc.
P.O. Box 523000
Miami, FL 33152-0300

Dear Dennis:

Enclosed is our statement for August services. During the month of August, we reviewed expert reports and worked with the expert witnesses; participated in assisting bond counsel on the decisions he needed; prepared for and conducted the difficult depositions involving Ken Kwan, and started the work on the Motion for Partial Summary Judgment and Opposition to the Government's Motion for Summary Judgment. In addition work was undertaken with regard to reviewing various depositions developing privilege logs, and Don participated in the taking of depositions of Avatar officers.

Again for your information you know that on some of the days listed, Don and Lance put in more hours than I show on the bill but as I told you before I believe not every hour is fully billable. I do not bill for just being in place. Given the fact that we have exceeded your budget at this point, I will continue working with you on trying to deal with the high costs involved in this case.

Cordially,

Gary H. Baise

GHB:sp

Enclosure

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November 15, 1995

Dennis Getman
General Counsel, Florida Cities Water Co.
Avatar Holdings Co., Inc.
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis:

Enclosed please find our statement for services rendered during the month of September 1995. A substantial portion of September's work related to the research, preparation, and production of the Memorandum for Partial Summary Judgment. In addition, we continued our examination of the basis for a possible Rule 11 Motion against Dan Jacobs and the Department. Time was spent on working with the experts and on the preparation of their reports. We had meetings with various witnesses in Florida and helped in preparing declarations for attorneys who previously worked on this matter. We also met and talked to Florida and County regulatory staff as to their recollections on activities involving Barefoot Bay and Carrollwood.

The expenses are high again this month, in part due to the lengthy video deposition of Ken Kwan. Even though it was expensive, I believe it was worthwhile in terms of preserving how this fellow conducted himself and our ability to use it against him in trial.

If there is any item on here which is not completely clear to you, please let me know. In light of our budget problems, I continue working on keeping both attorney and expense costs down as much as possible. Because of my more active involvement as we start preparing for trial, I'll continue to be very sensitive to the budget issue.

Cordially,

Gary

Gary H. Baise

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December 6, 1995

Dennis Getman
General Counsel, Florida Cities Water Co.
Avatar Holdings Co., Inc.
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis:

Enclosed please find our statement for services rendered during the month of October 1995. There were a number of depositions prepared for and taken during October. In addition, there was a sizable effort regarding the preparation of experts and expert reports. We also had a great deal of document production and checking plaintiff's discovery requests in making sure we were in compliance with all of the production orders. The travel costs were high for the month. I believe I have everything identified precisely, but should you have any questions please call me regarding any of these expenses.

With regard to this check, please send it by U.S. Postal Service to Gabeler, Baise & Miller, P.O. Box 455, McLean, Virginia 22101. Many thanks.

Cordially,

Gary

Gary H. Baise

GHB:sp
Enclosure

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December 28, 1995

Dennis Getman
General Counsel, Florida Cities Water Co.
Avatar Holdings Co., Inc.
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis:

Enclosed is our statement for November which is up substantially because of my increased involvement in preparation for the trial. Because there is so much detail in the bill, I do not want to be repetitive so I will check with you next week to see if there is any item in which you have a question.

Best wishes for the new year. I hope my team and I have met your every expectation in beating back the government on this case, and I look forward to our being successful in the trial for you as well.

Thank you for your confidence and support.

Sincerely,

Gary H. Baise

GHB:sp
Enclosure

F

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GARY H. BAISE

D-- '95

February 5, 1996

Mr. Dennis J. Getman, Esquire
General Counsel, Florida Cities Water Company
Executive Vice President and General Counsel
Avatar Holdings Company, Inc.
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis:

Enclosed is our statement for work for December 1995. My apologies for the delay; however, it has not been easy, given the law firm split, to obtain all of the expenses for the month of December. I believe I now have all of the expenses in terms of copying costs. Also you will note I have lowered legal time significantly. The legal time amounted to over $202,000. I reduced the time where I thought there was duplication and inefficiencies in order to keep the cost under some semblance of control. Don's time for example was approximately 275 hours and I do not believe anyone could be efficient and effective for that number of hours, so I reduced his time accordingly. In addition, I reduced paralegal time as well.

Please give me a call after you receive this and we can discuss it further.

Cordially,

Gary

Gary H. Baise

GHB:sp
Enclosure

Jan. 1996
Fin

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jd 5/1/96

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Of Counsel
Jack Pulley
Guy Vander Jagt

February 23, 1996

Dennis Getman, Esq.
General Counsel, Florida Cities Water Company
Executive Vice President and General Counsel, Avatar Holdings, Inc.
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis:

Enclosed please find our much smaller statement for the month of January 1996. A substantial portion of time was spent on dealing with the Motions in Limine, the Joint Pretrial Statement, and preparing the final objection and deposition designation list. The additional work was spent largely on preparing documents for trial and how to deal with Doug Smith's expert testimony.

As usual should you have any questions on any of these activities, please call me.

Cordially,

Gary

Gary H. Baise

GHB:sp
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Of Counsel

Jack Pulley
Guy Vander Jagt

March 14, 1996

Dennis Getman, Esq.
General Counsel, Florida Cities Water Company
Executive Vice President and General Counsel, Avatar Holdings, Inc.
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis:

Enclosed please find our statement for the month of February 1996. All of the time involves trial preparation and organization of documents for the trial. As usual, should you have any questions with respect to the activities we undertook on your behalf in February, by all means give me a call.

Also if you want me to review Don's time, I will do so. I've had to caution him on a number of occasions to stop doing duplicate work such as reviewing Leon Levy's deposition which I had told him not to touch because that was Weil, Gotshal's responsibility. I assume he did so, and there have been several other occasions where I felt he was doing things I would not have authorized had he been under my direct supervision.

Cordially,

Gary H. Baise

GHB:sp
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Of Counsel

Jack Pulley
Guy Vander Jagt

May 7, 1996

Mr. Dennis J. Getman, Esq.
General Counsel, Florida Cities Water Company
Executive Vice President and General Counsel, Avatar Holdings Inc.
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis:

Enclosed is our statement for services rendered during the month March. This statement covers work for my team to handle 15 out of the 18 witnesses and the 5 witnesses called by the government for which we also handled cross-examination. We handled all document preparation and organization for our witnesses. I have tried to avoid as much duplication of effort as possible. In fact, I have written down our time where I thought there was any duplication or little value added by my team.

I shall call you when I return from Illinois next Tuesday, and we will discuss this matter further.

Cordially,

Gary H. Baise

GHB:sp
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Of Counsel

Jack Pulley
Guy Vander Jagt

June 14, 1996

Mr. Dennis J. Getman, Esq.
General Counsel, Florida Cities Water Company
Executive Vice President and General Counsel, Avatar Holdings Inc.
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis:

Enclosed please find our statement for services for April 1996. This statement covers the last week of trial and incidental matters that Lance and Alex undertook after the trial. Because you were present with us during the trial, I shall not engage in any lengthy description in this letter. Again, you can probably tell from the hours, I have marked down some of our time since many of the days were 10 to 14 hours in total effort.

Cordially,

Gary

Gary H. Baise

GHB:sp
Enclosure

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Of Counsel

Jack Pulley
Guy Vander Jagt

July 3, 1996

Mr. Dennis J. Getman, Esq.
General Counsel, Florida Cities Water Company
Executive Vice President and General Counsel, Avatar Holdings Inc.
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis:

Enclosed is our statement for services rendered during May 1996. This month's work is very straightforward, and we worked on preparing the post-trial brief. My plan was for Lance to go through all of the transcripts so that you would not have expensive time expended on this task. Obviously I cannot control Don's time with regard to this task; however, it would be my belief he would have very little effort since Lance did virtually all of the work on findings of fact and conclusions of law research.

I shall be calling you to discuss customer satisfaction issues next week so if you have any thoughts along this line, I would appreciate your view.

Cordially,

Gary

Gary H. Baise

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Of Counsel
Jack Pulley
Guy Vander Jagt

July 19, 1996

Dennis Getman, Esq.
General Counsel, Florida Cities Water Company
Executive Vice President and General Counsel, Avatar Holdings, Inc.
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis:

Enclosed please find our statement for services rendered for June in preparing and finalizing the post-trial brief. This statement is self-explanatory but should there be any questions, please let me know.

Cordially,

Gary

Gary H. Baise

GHB:sp
Enclosure

July 1996

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Jack Pulley
Guy Vander Jagt

August 14, 1996

Dennis Getman, Esq.
General Counsel, Florida Cities Water Company
Executive Vice President and General Counsel, Avatar Holdings, Inc.
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis:

Enclosed please find our statement for services rendered during the month of July 1996. The month was spent on responding to Jacobs' filing of the Dean Dairy case as additional authority to support his case; preparing a response to the court's order; and handling of the res judicata issue. I have reduced my time because there certainly was duplication in the study of the City of Manning and Ridgway cases. I did not want to charge you for three of us studying and reviewing those two cases.

Cordially,

Gary

Gary H. Baise

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Jack Pulley
Guy Vander Jagt

October 2, 1996

Mr. Dennis J. Getman, Esq.
General Counsel, Florida Cities Water Company
Executive Vice President and General Counsel, Avatar Holdings Inc.
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Re: Invoice for August, 1996

Dear Dennis:

Enclosed is our statement for services rendered during the month of August. My apologies for the tardiness; however we are in the middle of filing a massive summary judgement motion in another case, and frankly I am slow in getting the statements in the mail because of this other case.

On this statement you will note a couple of odd entries entitled firm review. All this means is, a lawyer undertook a project on Florida Cities' behalf; however, I have not charged Florida Cities for the time. Please call if you have questions or need more information.

Cordially,

Gary H. Baise

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GARY H. BAISE

November 1, 1996

Dennis J. Getman, Esq.
General Counsel
Florida Cities Water Company
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis:

Enclosed is our statement for the month of September which reflects our efforts with regard to the attorneys' fees and cost issue which carried over from August. In addition, there was work on dealing with DOJ's opposition. As usual, if you have any questions, please call.

Sincerely yours,

Gary

Gary H. Baise

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Of Counsel

Jack Pulley
Guy Vander Jagt

November 22, 1996

Mr. Dennis J. Getman, Esq.
General Counsel
Florida Cities Water Company
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis:

Enclosed is a small statement for the month of October, 1996. There are two matters of interest which involve the Paine-Webber issue and procedural matters relating to the appeal. If you should have any questions concerning this bill, please give me a call.

Cordially,

Gary

Gary H. Baise

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Of Counsel

Jack Pulley
Guy Vander Jagt

January 22, 1997

Mr. Dennis J. Getman, Esq.
General Counsel
Florida Cities Water Company
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis:

Enclosed is our statement for the month of December, 1996. I had estimated this bill to be approximately $2,500 for Joe's budget; however, the total amount is somewhat under that estimate. All the time expended was for work on the appeals issue.

We look forward to holding our victory for you in 1997 and certainly appreciate the confidence you bestowed upon us in 1996. I thank you very much for your support.

Cordially,

Gary

Gary H. Baise

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Of Counsel

Jack Pulley
Guy Vander Jagt

March 24, 1997

Dennis J. Getman, Esq.
General Counsel
Florida Cities Water Company
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis,

Enclosed is a small bill for the month of February, 1997. We are continuing to do some legislative history research during this slow period regarding the Clean Water Act. The rest of the time, as you can see, is fairly insignificant.

I look forward to seeing you folks when you are in Washington.

Cordially,

Gary H. Baise

Enclosure

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Of Counsel

Jack Pulley
Guy Vander Jagt

March 2, 1997

Mr. Dennis J. Getman, Esq.
General Counsel
Florida Cities Water Company
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis:

Enclosed is our statement for the month of January, 1997. As you can see, we started some preliminary efforts towards preparing for the appeal. This included meeting with David, Joanne, and Lance, preparing a plan for the upcoming brief, and starting some initial research on some Clean Water Act legislative history. We look forward to bringing this matter to a successful conclusion for you in 1997.

Cordially,

Gary

Gary H. Baise

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Of Counsel

Jack Pulley
Guy Vander Jagt

April 29, 1997

Dennis J. Getman, Esq.
General Counsel
Florida Cities Water Company
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis,

Enclosed is our statement for services rendered during the month of March, 1997. All of the time basically relates to the appeal and dealing with the settlement issue. I assume we will know very soon as to whether this matter will actually settle or we have to get underway again.

I certainly enjoyed having dinner with you and your wife last week, and look forward to paying off my bet to you very soon in Florida. Also, I really appreciate your confidence with regard to the new case.

Cordially,

Gary

Gary H. Baise

Enclosure

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Of Counsel

Jack Pulley
Guy Vander Jagt

June 13, 1997

Dennis J. Getman, Esq.
General Counsel
Florida Cities Water Company
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis,

Enclosed is our statement for services rendered during the month of April, 1997. As you can see, I continued a low level of effort in anticipation that the Department of Justice would appeal. As you can see, we were doing background work on res judicata in order to be able to move quickly upon receipt of Mr. Ferlo's brief. If you have any questions, please let me know.

Cordially,

Gary

Gary H. Baise

Enclosure

Law Offices

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Jack Pulley
Guy Vander Jagt

July 1, 1997

Dennis J. Getman, Esq.
General Counsel
Florida Cities Water Company
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis,

Enclosed please find our statement for services rendered during the month of May, 1997. Again, the limited research I had undertaken was still assuming the Department of Justice would appeal. I know you are pleased that the Department of Justice has finally exercised good judgment with regard to your case by withdrawing from the appeal. I know I am extremely pleased that Mr. Ferlo has seen the strength of our collective position and the weakness of his client's position.

I look forward to coming to Miami and taking all of you out to dinner to pay off my debt that I owe you. Believe me, it will be my pleasure.

Cordially,

Gary H. Baise

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July 23, 1997

Dennis J. Getman, Esq.
General Counsel
Florida Cities Water Company
255 Alhambra Circle - 8th Floor
Miami, FL 33134-7412

Dear Dennis,

Enclosed please find our statement for services rendered during the month of June, 1997. The statement is quite small but is necessary to keep our records in order.

We continue to work on the time line and, as you might expect, it is enormous. I will send you a copy of a first draft next week.

I thought the dinner was terrific. Ann and I look forward to getting together with you and Lynn in Arizona.

Cordially,

Gary

Gary H. Baise

Enclosure

Exhibit_____(GHB-110)

Law Offices

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*Admitted only in the District of Columbia

February 3, 1995

Mr. Dennis J. Getman
Executive Vice President - General Counsel
Avatar
P.O. Box 523000
Miami, Florida 33152-3000

Dear Dennis:

Enclosed please find our statement for services rendered during the month of January. A couple things I want to note with respect to this bill as compared to the Jenner & Block bill. I have lowered my billing rate from $275.00 down to $250.00/hour. Don's rate remains at $225.00/hour and Steve's rate comes down to $180.00/hour. You will note some new names on the bill in terms of associates. One person we have just hired whose name is not on the letterhead yet is Liz Poliner. She has worked for me on issues in the past and is a very good lawyer. Lance High is one of our excellent associates here at this firm. Ray Battochi is a senior litigator at this firm with extensive Justice Department experience under his belt.

Dennis, we appreciate your confidence in continuing with Don and me. We realize this is very difficult and trying time for the company, and we continue to be very sensitive to the cost issue.

Again, many thanks.

Sincerely yours,

Gary H. Baise

GHB:km

EXHIBIT NO. _____

DOCKET NO.: 971663-WS -- PETITION OF FLORIDA CITIES WATER COMPANY FOR LIMITED PROCEEDING TO RECOVER ENVIRONMENTAL LITIGATION COSTS FOR NORTH AND SOUTH FT. MYERS DIVISIONS IN LEE COUNTY AND BAREFOOT BAY DIVISION IN BREVARD COUNTY.

WITNESS: Gary Baise
DIRECT

ON BEHALF OF: Florida Cities Water Company

DESCRIPTION:
1. Transcript of Deposition of Mr. Gary Baise taken on May 20, 1998
2. Late-filed Deposition of Mr. Gary H. Baise Exhibit No.1
3. Late-filed Deposition of Mr. Gary H. Baise Exhibit No.2
4. Late-filed Deposition of Mr. Gary H. Baise Exhibit No.3

PROFFERING PARTY: STAFF

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663-WS EXHIBIT NO 7
COMPANY/ WITNESS: Staff
DATE: 8-12-98

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Cities Water Company for limited proceeding to recover environmental litigation costs for North and South Ft. Myers Divisions in Lee County and Barefoot Bay Division in Brevard County.	Docket No. 971663-WS

DEPOSITION OF:	GARY H. BAISE, Esquire (Via Telephone)
TAKEN AT THE INSTANCE OF:	The Staff of the Florida Public Service Commission
PLACE:	FPSC Conference Room 362 Gerald L. Gunter Building 2540 Shumard Oak Boulevard Tallahassee, Florida
TIME:	Commenced at 10:00 a.m. Concluded at 1:00 p.m.
DATE:	Wednesday, May 20, 1998
REPORTED BY:	Lisa Girod Jones, RPR, RMR

BUREAU OF REPORTING
RECEIVED 5-27-98

Lisa Girod Jones
REGISTERED MERIT REPORTER
P.O. BOX 10195
TALLAHASSEE, FL 32302-2195
PHONE (850) 894-2277 • FAX (850) 894-0094

APPEARANCES:

B. KENNETH GATLIN, Attorney at Law, Gatlin, Schiefelbein & Cowdery, 3301 Thomasville Road, Tallahassee, Florida 32312; appearing on behalf of Florida Cities Water Company.

ALSO PRESENT: Alex Bullock (via telephone)

HAROLD McLEAN, Esquire, Office of the Public Counsel, 111 West Madison Street, Tallahassee, Florida 32399; appearing on behalf of the Citizens of the State of Florida.

ROSANNE GERVASI, Staff Counsel, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850; appearing on behalf of Staff.

S T I P U L A T I O N S

IT IS STIPULATED that this deposition was taken pursuant to notice in accordance with the applicable Florida Rules of Civil Procedure; that objections, except as to the form of the question, are reserved until hearing in this causes; and that reading and signing was not waived.

IT IS ALSO STIPULATED that any off-the-record conversations are with the consent of the deponent.

DEPOSITION

Whereupon,

GARY H. BAISE

was called as a witness, having first been duly sworn to speak the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

MS. GERVASI: Let's go ahead and go on the record and show that counsel agrees to the usual stipulations, that the witness has already been sworn in.

MR. GATLIN: And we don't waive reading.

MS. GERVASI: Okay. Mr. Baise, Rosanne Gervasi here. I represent the Staff of the Public Service Commission. I have several Staff members here listening to the deposition as well, and we have some questions which pertain to the testimony that you filed in the PSC docket, Docket No. 971663-WS, and please let us know if you need to take a break at anytime. I don't think I've got all that many questions for you. So it shouldn't take too long.

EXAMINATION

BY MS. GERVASI:

Q. Let me start if I could, please, with a reference that you make on Page 7 of your testimony. Do you have a copy of your testimony before you?

A. Yes, I do.

Q. If you could please refer to Page 7.

A. Yes, I have it in front of me.

Q. Starting on Line 12, you state that -- well, you're discussing the December 1986 denial of the NPDES permit by the EPA, and you state that Florida Cities officials immediately started working with the Florida DEP and the EPA to develop a resolution of the matter, correct?

A. That's correct.

Q. Do you know after that December '86 denial, when was the first recorded correspondence between Florida Cities Water Company and the EPA?

A. After the denial?

Q. Correct.

A. I'm not sure I could point to a specific piece of correspondence. It's my recollection that Patrick Lehman testified that after receiving the initial notice that he immediately called and started setting up meetings to start dealing with the problem. And that would have been in probably the -- I want to say August of 1986, I believe the notice from EPA that it was going to deny came down in approximately June or July of 1986. But when there was a piece of correspondence, I do not recall that.

Q. I think the first piece of correspondence that we have that we're privy to is from May of 1987. And so we're wondering, you know, if that's true, how is that an

immediate response? Or is there -- perhaps there's correspondence or documentation that exists showing that the response was indeed immediate.

A. There is certainly testimony to that effect, but I could not recall that kind of specifics at this point.

MR. GATLIN: What's the date you have on yours?

MS. GERVASI: The date that we have is May of 1987.

THE WITNESS: There were meetings that Mr. Lehman testified to and told me about that started occurring, as I said, virtually immediately upon their receiving this notice. There may be some notes referring to telephone conversations that Mr. Lehman and a Mr. Tony Reeves may have had with Florida officials, but if that is something you want us to go back and check on, we certainly can.

MS. GERVASI: If you would please. What I would like to ask for is a late-filed exhibit. We'll label it Late-filed Exhibit No. 1, of any correspondence or documentation showing that you -- that the Company responded to the 1986 permit denial prior to May of 1987.

THE WITNESS: Correct.

MR. GATLIN: Gary, we can work with you and the Company in this regard and we can discuss it later.

THE WITNESS: Thank you.

MS. GERVASI: Correspondence or Documentation Showing Response to 1986 Permit Denial -- to December 1986 Permit Denial. Okay. Thank you.

(Late-filed Exhibit No. 1 identified.)

BY MS. GERVASI:

Q. Mr. Baise, our understanding is that the Company had 90 days from the date of the EPA action to challenge that denial of the permit; is that right?

A. That's what EPA's regulations allowed, correct.

Q. And the Company failed to do that, right?

A. I found nothing in the record that supported their filing an appeal during that period.

Q. Do you have any idea why the Company didn't challenge the permit denial?

A. No, I do not.

Q. Did you ask the utility why they didn't respond to the denial after they retained you?

A. Yes, I did.

Q. What was their reasons that they gave you?

A. I wouldn't say that I asked the utility. I asked various individuals who were still working with the utility, and they did not know.

Q. So you don't know why the utility didn't respond?

A. I spoke to Mr. Tony Reeves, a former employee

about the matter, and he was the only one that had any opinion on this particular issue.

Q. What was his opinion, do you recall?

A. His opinion was, as I recall it, was that they were going to try to work with the EPA and solve the problem as quickly as they could.

Q. Based on your experience with EPA, do you have an opinion as to what the EPA would have done if the Company had responded within the 90 days of the permit denial, if the Company had protested the permit denial?

A. Yes, I have an opinion.

Q. What would your opinion be?

A. My opinion would be that EPA would have forced the issue and the Company would have had to have challenged the permit denial at that point.

Q. On Page 13 of your testimony, starting at Line 3. Let me know when you're there if you would, please.

A. Yes, I'm on Page 13, Line 3.

Q. You state that the Company told the court that the crux of the litigation was the EPA's improper denial of the December 8th, 1986 permit application, to renew the NPDES permit, right?

A. Right.

Q. Would you say that the Company built much of its defense around the fact that the EPA improperly denied the

permit?

A. I would say that was certainly a point, but as we got into the case we found other issues that related to mitigation factors that we built the major part of the defense around.

Q. Do you think that the litigation could have been avoided if the Company had challenged the permit denial?

A. No, I do not.

Q. Could you explain your answer?

A. Yes, I can. EPA officials did not know their own regulations. No one oversaw the activities of Ms. Kagey. Even after we brought the violation of EPA's own regulations to the agency's attention, it continued to resist our efforts. The agency had done something improper, incorrect or not in compliance with its own regulations. You saw that all the way through trial. So it would be my opinion that had this matter been brought to the agency's attention even earlier, they would not have changed their position.

Q. Okay, thank you. Let's go on to the subject of the penalties that the Company was facing. On Page 10 of your testimony, starting at Line 6.

A. Right.

Q. You testify that each of the allegations against the Company was asserted to be a separate -- asserted to be separate and daily violations, and that the Company faced

penalties of up to $25,000 per day per violation?

A. Correct.

Q. Was it your belief at that point in time that the Company would have been fined the full amount, the $25,000 a day per violation?

A. All I know is what the statute says. You start at $25,000 and then the second part of the statute says you look at the mitigation factors to reduce that $25,000 to a reasonable number, or a number. Whether it's reasonable or not is in the eye of the judge, and that's exactly what occurred here. The judge goes through that analysis and states the full amount that we were then subject to, which I think was $53,300,000. Those are the six factors. And reduces to the $10 and $25 per violation. I had asked in court for no more than $13.51 per day, based on mitigation factors, or other court cases similar to this one.

Q. Do you know of any other utilities the size of Florida Cities which have had to pay the full amount of such a fine, the full 25,000 for the level of noncompliance that Florida Cities had been charged with?

A. I do not know of any utility. I am aware of the Smithfield Ham case, where they were fined $12,600,000, and I cannot tell you how many days that was for, or whether it was for the full 25,000. But obviously Smithfield Hams is not a utility. The other case I'm familiar with is Dean

Foods, and they were fined 4.2 million, as I recall. And again, I cannot tell you whether that was up to the 25,000 for the number of days charged or not.

Q. Okay, going back to the Smithfield case, you said it was Smithfield what?

MR. GATLIN: Hams, H-A-M-S. Pork.

MS. GERVASI: I got it. As in the meat.

THE WITNESS: They have several divisions. Gwaltney Hams, but the title of the case I believe is Smithfield Hams or Smithfield Foods case.

BY MS. GERVASI:

Q. Do you recall what the violation was to cause that $12 million fine?

A. Virtually the same violations as here, alleged excess nitrogen discharges, phosphorus discharges, violations of water quality standards, violations of the NPDES permit. And I can't tell whether there's a charge of discharging without a permit, but virtually the same allegations made in that case as here. These are basically cookie cutter complaints the Department of Justice puts together against Clean Water Act permit holders.

Q. Okay, thank you. Do you have an opinion as to how much Florida Cities should have been fined per day per violation?

A. I gave that in argument. I laid out the basis for

that based on the fines which had been assessed to Carrollwood and Barefoot Bay. I used EPA's own numbers. In Barefoot Bay, I think the agency at its administrative level said $73. And for Carrollwood, I believe it was 270 some odd dollars, and that is set forth in our post trial brief.

MR. GATLIN: Per day?

THE WITNESS: No, that was a total fine that was recommended at the administrative level for those two facilities.

Then prior to that, and how I think they came up with that figure was just looking at, again, the six mitigation factors. They looked at economic damage, and they came up with those two numbers. But the number I argued for in court when the agency settled these two cases came up to $13.51, and that's how I developed the argument of how the fine should come out.

BY MS. GERVASI:

Q. Okay. Thank you. I would like to discuss Avatar's role in the litigation a little bit with you. On Page 36 of your testimony, you discuss the amended complaint.

A. I am on Page 36. Which line?

Q. Starting at Line 7.

A. Line 7, yes.

Q. And you're testifying about the fact that Avatar was named as an additional defendant?

A. Correct.

Q. In the litigation. Do you have an opinion as to why the DOJ decided to include Avatar at that point in the litigation?

A. Yes, I do.

Q. What is your opinion?

A. I believe that the Department of Justice was trying to bring additional pressure on Florida Cities to settle. No. 2, it had to bring in the parent because the parent, the government alleged, was in a position that it received, quote, "wrongful profits" or "wrongful benefits" from the actions of Florida Cities, and they made that argument and of course lost.

Q. You also testified that Avatar had retained separate counsel. I guess it was Weil, W-E-I-L, Gotshal, G-O-T-S-H-A-L?

A. Yes, Weil, Gotshal and Manges in New York, although it was their Washington office that handled this case.

Q. Did you represent Avatar at all during any of the DOJ litigation?

A. No, I did not.

Q. Do you know how much time Avatar's attorneys spent

on the case compared to your time? Any idea?

A. Any answer I would give there would be speculation. I don't know.

Q. Could you speculate for us?

A. I really find that hard to speculate on because I did not review their bills. They were submitted separate from mine, although I think I did see a conclusory statement when we filed Rule 54 and 68 requests for fees. But it was -- overall I would say it was small compared to the amount of time and effort that I and my team put in on Florida Cities' defense.

Q. Do you recall what their conclusory statement showed?

A. I do not, not specifically.

Q. How about in terms of trial time, did you -- do you recall how much time they spent at trial actively engaged in questioning as compared to you?

A. Oh, in terms of the number of witnesses and in terms of time actually on the stand, it would be no more than 15 to 20 percent, and maybe close to 10 percent of the actual time in trial. They had a number of witnesses, but those witnesses were on for a short period. I'm thinking of Leon Levy, treasurer of Avatar was on, and a couple of other people towards the end of the trial. In fact, I think it was the last day. My recollection is we ran through about

four of them in no more than about two or three hours. Whereas with regard to Florida Cities we often times had on our witnesses for two, three, four hours at a time. So 80/20 or less, 80 to 90 percent for Florida Cities and 10 to 20 percent trial time for Avatar, if that.

Q. Did you coordinate your efforts with Avatar's counsel, meet with them, or have discussions with them, coordinate your efforts in discovery or during the trial?

A. Yes, very closely.

Q. Do you believe that your expertise in any way benefited Avatar?

A. The Avatar question in many respects was a parent/subsidiary issue. Avatar, of course, is the New York firm's specific area of expertise, so I cannot say anything I did there or my team would have been that helpful.

Avatar was still, possibly, liable for charges under the Clean Water Act. And as a result, as curious as this seems, an anomaly could have developed here that Florida Cities would have been left completely virtually off the hook. And of course what the Justice Department was trying to do was to stick Avatar with almost a $5 million fine on Water Act violations.

With respect to at least working with Weil, Gotshal and making sure that they didn't make any mistakes on the Clean Water Act, yes, Weil, Gotshal benefited from my

efforts and my team's efforts, yes.

Q. Okay. Thank you. Moving on to the subject of legal fees. In several of your exhibits you make reference to a budget.

A. Yes, ma'am.

Q. Do you know if Florida Cities actually established a budget for the EPA/DOJ litigation?

A. It certainly was my impression that they did, because I submitted budgets to Mr. Gatlin. I can only assume that they did, but did I see a Florida Cities' budget or Avatar budget specifically allocated to this, the answer is no.

Q. You didn't ever actually see the budget, did you?

A. I did not, but I can tell you I felt the pressure of the budget. On one occasion the general counsel called me up, and that is Mr. Getman, asking me if I could further reduce our bills, which I think at that point may have gotten into the 125- to 150- or 160,000 a month range, and asked me if I could bring it down closer to $100,000 a month, and I did so.

Q. Mr. Baise, do you know if anybody -- or who at Florida Cities would have knowledge of this budget?

A. I would have to assume Mr. Getman, as the general counsel, would have knowledge of an internal budget, or possibly Mr. Gerald Allen, the president.

MR. GATLIN: Let me volunteer, if I may, that it would be Mr. Allen who would know the budget.

MS. GERVASI: Thank you.

BY MS. GERVASI:

Q. Mr. Baise, you discuss in your testimony and in detail about ex parte contacts with former employees, that DOJ had with former employees?

A. Correct.

Q. Do you have an opinion as to how the customers of Florida Cities could have benefited from that -- from that dispute, the ex parte dispute?

A. Yes. By our being able to cut off the Justice Department's efforts on that, cut down on a sizeable number of depositions, which the Department of Justice probably would have taken of those employees. We submitted a list of all former employees to the Department of Justice. And my recollection is that it numbered maybe 100 or more. The purpose of this, of course, was that the Department of Justice thought that they were going to find a whistle blower who was going to say all sorts of terrible things about Florida Cities and its activities.

And my guess is that -- and actually it's my opinion, not my guess, because I think I can state with reasonable certainty, that the Department of Justice would have sought to have deposed or otherwise contacted these

people, which would have meant we would have had to have contacted the people and maybe to depose them, and therefore an enormous savings in cost resulted as a result of my being able to cut the government's improper effort down at the point that we shut it down.

Q. Okay, thank you. Do you have a copy of your exhibits there with you? I know they're voluminous, but we're -- I would like to ask you about Exhibit 70 if you have it.

A. Yes, I do. Ms. Broadbent has all those under her.

Q. If you would refer then to Exhibit 70, please, at Page 2.

A. This is defendant Florida Cities' Proposed Findings of Fact and Conclusions of Law?

Q. Correct.

A. And turn to Page 2?

Q. Please.

A. I am there.

Q. And then at No. 2.

A. Yes, I am looking at No. 2.

Q. Here it states that Florida Cities -- Florida Cities states that the pending action was born out of a citizens' suit styled North Fort Myers Homeowners Association vs. Florida Cities Water Company.

A. Correct.

Q. Could you please explain -- explain this item, explain the relevance of this to the Florida Cities' litigation?

A. Yes, I can.

Q. Go ahead, please, sir.

A. I was told by Ken Kwan -- Kwan is an EPA employee -- that he had received telephone calls from the homeowners association.

The homeowners association was complaining about Florida Cities being able to discharge without a permit. And the fact is, the homeowners association didn't know the permit had been improperly taken away from Florida Cities. Mr. Kwan, or someone else in EPA, told me that this dispute actually arose out of a racial situation.

Florida Cities was going to accept the wastewater from -- I believe it was a low income housing project. Citizens did not want this low income housing project to be there because I assume -- and I don't know this for a fact, but my recollection is, and my assumption of this is it was an African American group that would be moving into this housing project.

Therefore, certain citizens used that fact, and the fact that we did not have a permit, to bring a lawsuit against Florida Cities. They in turn, of course, talked to EPA about bringing EPA's force to bear against Florida

Cities, and as EPA staff will tell you, they respond to citizen complaints.

And Mr. Kwan specifically, as I recall, made it clear that based on these citizens' complaints, that we didn't have a permit, even though he knew that EPA had taken the permit away. That was one of the bases for bringing the action against Florida Cities in the very first instance, to support the homeowners. If that story is true, I found it despicable. I don't know it all to be true. So much of what I'm telling you is hearsay, but that's why I put into this document that the citizens' suit first brought this matter to EPA's attention, and they therefore acted on it.

Q. Do you happen to have a copy of the complaint that was filed by that homeowners association?

A. I think we probably do somewhere in the bowels of all the files that we have on this case. It clearly was not a major action, and the conversations I'm relaying to you, as I said, are hearsay, in part. But certainly the conversations -- I think I allude to it, in fact I do, that there were contacts between Mr. Kwan and the North Fort Myers Homeowners Association. In fact, that is based on letters or telephone memos to the file prepared by Mr. Kwan, where the North Fort Myers Homeowners Association had directly contacted him. Then later I asked him, either informally before we really got into the shooting match over

the case, or it could have happened while we were deposing him. I'm just not sure where I got all of my information.

MR. GATLIN: Do you want a copy of the complaint?

MS. GERVASI: I don't think we need it. Thank you.

BY MS. GERVASI:

Q. Mr. Baise, if you would please refer to Page 27 of your testimony.

A. Yes, I'm at Page 27.

Q. At the top of that page, starting at Line 1, you're discussing that -- stating that Connie -- is it Kagey, K-A-G-E-Y?

A. That's correct.

Q. The EPA permit writer who denied the waterway permit renewal application made a decision that led the company into being forced to spend millions of dollars which did not improve the water quality of the Caloosahatchie River; is that correct?

A. That is correct.

Q. On what were those millions of dollars spent?

A. In two parts. One for construction, two on legal fees to defend itself.

Q. On construction of what, plant upgrades?

A. Let's start with the plant and the pipe which was moved out to the middle of the Caloosahatchie River.

Q. Okay.

A. As you will recall, one of the charges brought by the Department of Justice was that the Waterway Estates facility was discharging in the wrong location.

Dr. Ahmadi, the DEP representative, later testified, based on many interviews with me and my colleagues, that this facility could still be discharging into the canal to this day. By virtue of Ms. Kagey's mistake for not knowing the law, for not knowing her own agency's regulations, he took the legitimate Clean Water Act permit away from this company, therefore putting them in a position of not having a permit to discharge. No one knew all of the intricacies of EPA at that point and no reason for anyone to have been able to have known them, certainly on the Company's part. But as a result of her action, she then forced the Company to find a new discharge point, which was eventually, I believe, 2600 and some odd feet out into the Caloosahatchie River.

And Dr. Ahmadi testified at trial that they could not discern any water quality violations from the discharge in the canal, nor could he discern or be able to prove that there had been any water quality improvement by putting the discharge point out into the middle of the river.

Therefore, this company, these consumers, were forced to spend millions of dollars over a stupid mistake

made by an EPA employee. That's point one in terms of dollars being spent to put the pipe out in the river, and all the attendant permitting that went along with that.

Q. Before you go on to point 2, are you saying that the cost of upgrading to advanced water treatment and the cost of relocating the outfall line could have been avoided entirely; that those improvements were not necessary under the Clean Water Act?

A. They were not necessary under the Clean Water Act. The reason the Company went to AWT is it decided at that point if it could not discharge at the point where it had been discharging, then it should increase the size of the facility to obviously take on additional recipients. And by doing that, then they triggered the process to go to AWT because of the Grizzle Figg statute, as I recall, in Florida.

And so they enlarged the facility because they were going to have to move the discharge point to a whole host of decisions flowed from her taking the permit away from them improperly, or as I said, legally. But Dr. Ahmadi is someone to ask about this, or more importantly, you can see his testimony, and I think we may have put it in the post trial brief, where it's clear that this facility would be -- if it hadn't increased its size -- would be discharging into that unnamed canal to this day, in

compliance with its Clean Water Act permit and not violating water quality standards in the State of Florida. That was the stunning conclusion of this case.

And part 2 on the millions -- I didn't obviously in my testimony define that. Once I was able through looking at this record, my own area of expertise in the Clean Water Act, explain to the Company that they had not violated the Clean Water Act, and in fact as you have seen in my testimony, there's only four reasons by which the agency can take away your permit, and they're very serious reasons.

The agency, as you can see from the testimony, does not take permits away from people lightly. In fact it's almost never done. That's what puzzled me about this case from the very beginning, once I found out there were no water quality violations, or NPDES permit violations, is why did this happen? It made no sense, because there were no regulations being violated.

At that point the general counsel, Mr. Jacobson, Mr. Allen, Mr. Gordon, were obviously stunned at this, and felt that they should not be forced into a position of paying $5 million in penalties when they had not violated the Clean Water Act. They felt that was just absurd, assuming that my analysis of the case was correct. I showed them the regulations. I showed them the facts as I was

developing them all the way along, and they were the ones that made the final decision to defend the Company and the consumers' interest against this egregious action undertaken by EPA. So that is the reason I say here on Line 2 that FCWC was forced to spend millions of dollars which did not improve the water quality of the Caloosahatchie River. That was the sad thing about this case.

Q. Couldn't those millions of dollars have been saved if the Company had successfully challenged the permit denial in the first place and shown that the EPA improperly denied the NPDES permit?

A. That, of course, is speculation. So I think, given the attitude of the agency, you would have had to have gone through the same types of trials that I had to take them through. And as you can see from the record, we on many occasions shared with the Department of Justice where EPA was incorrect in its interpretation.

In fact, about midway through the case, I thought for sure, after we had taken Mr. Childress's, Mr. Greenfield's and Ms. Kagey's deposition, that the government would settle. The Department of Justice that I used to work for, after it was put on notice an agency had violated the law, would have settled the case.

I served as Acting Deputy Attorney General of the United States Department of Justice. I've had similar

situations come to my attention. The Department of Justice did not engage in such activity. I tried to bring that point to the Department of Justice counsel and EPA counsel, and I was ignored, basically because I think they wanted to seek to punish this company. In fact, on occasion the counsel for the Department of Justice called Florida Cities a renegade corporate polluter. And I think that poisoned the case from the beginning. I never was clear on why he came to that conclusion, particularly after we so clearly, clearly, demonstrated that the agency had, at best, made a mistake in taking the permit away. At worst it was engaged in a cynical activity to justify its previous activity.

Q. Do you have an opinion as to why the DOJ or the EPA had it in for this company?

A. You would have to divine that some other way. All I can do is take the body as I find it and defend the Company to the best of my ability, and when the Company was facing going into trial, almost $10 million in fines, we felt we had no choice in light of the fact that we had not violated, we felt, the Clean Water Act. The agency had clearly violated its own rules in taking the Clean Water Act permit away from us. We had not violated the water quality standards in the State of Florida.

In fact, as you may have seen in some of our documents, the state of Florida has very stringent Clean

Water Act standards. In fact those standards are more stringent than the federal standards. And that was another reason why this Company felt that it could not cave in to this improper kind of pressure. It had taken its environmental obligations very seriously. No one had ever said they violated the water quality standards of the state of Florida, not violated its clean water act permit, except from time to time there will be exceedences of the permit caused by, say, pesticides that have been sprayed and will get into your water system and kill some of your bugs and therefore you will have a problem in your discharge.

But based on its record, it felt that it had not violated the environmental rules, either in actuality or in spirit. Therefore, it decided that it could not accept this pressure brought on it by the Department of Justice. And we could never figure out why they seemed to be so diligent in their pursuit of the Company.

Q. Don't you think it would have been prudent for the Company to have at least attempted to challenge the permit denial at the beginning?

A. That is, again, speculation. You had engineers in the Company were operating in good faith. They thought that the EPA people knew what they were doing. There is evidence in the record from the very beginning, if EPA wanted them to stop discharging, they found that puzzling since it was a

public health facility, but they tried to figure out from EPA and the department what they wanted done. It was naivete on the engineer's part, but they wanted to do the best job possible in protecting the environment. But had they challenged it, as I said before, given what we've found out, given EPA Region 4's attitude with regard to this Company, they would have had to have spent several millions of dollars in defending themselves.

And if you're not familiar with the process, what happens is you challenge the final permit, as you're suggesting, then you go through an adjudicatory hearing or a trial, just exactly what we went through here, with all of the discovery, both written and oral, that's attendant to a U.S. District Court trial. And that's exactly what EPA puts you through on the adjudicatory side.

From a litigation standpoint they would have had to have spent certainly a substantial fund. Would they have had to have spent all that they spent here? I can't answer that question totally, but they would have had to have spent a substantial chunk of what they spent here to defend themselves in the EPA adjudicatory process.

Q. You said earlier that you didn't believe that the water quality was improved by the upgrades; is that right?

A. That is correct.

Q. What's your basis for making this claim?

A. Dr. Ahmadi, and a guy by the name of Randy Armstrong, who testified at trial. Dr. Ahmadi and Armstrong went back and looked at ten years of water quality data. And again, you can look at their testimony. It's exactly what they said, but I'm giving you my recollection. And Dr. Ahmadi said that, again, they could be discharging right where they originally discharged and water quality would not have been improved one wit. It would have been the same. The Company was meeting water quality standards.

Q. Okay, now, it's our understanding that almost seven years passed from the date the EPA denied the Company's NPDES permit application in December of '88 and the time that the DOJ filed suit on behalf of the EPA in 1993, right?

A. That is correct. And I think about 1988 is not correct.

Q. I meant to say '86. I apologize, December of '86 was when the --

A. Yes, I think it was December of '86 they sent the notice, but it did not become effective as a denial until, let's say, January 3rd, 4th or 5th of 1987. And then there was an administrative order entered about May of 1987.

Q. So it was approximately seven years before the DOJ filed suit?

A. That is correct.

Q. During that time, the Company -- is it true that the Company made steady progress towards completion of the upgrades required by the EPA?

A. Absolutely. They were doing everything they could to work, according to the records, with the Florida DEP, which was really the primary regulator.

The way the Clean Water Act operates, generally, is that EPA delegates to the state the authority to grant this permit. In Florida's situation, you still had a dual permit system because EPA in Florida could not agree on the requirements for delegation. You had a company that had to serve two masters for the same item. So by and large, EPA's record has always been, let the state, if it was more strict, regulate the discharge. And that basically is what had happened here.

Therefore, as I mentioned at the beginning of this deposition, Mr. Pat Lehman, as I recall, initiated phone calls virtually immediately after the Company received the first advance notice of those denials, and he made these contacts with the Florida DEP saying, we have this, what are we going to do? We cannot shut this facility down because it's a public health facility.

Q. It's our understanding that the Company completed the upgrades in April of 1992, which was prior to the time that EPA filed suit; is that right?

A. That's roughly correct, yes. I think the pipe was completed first out into the Caloosahatchie, and then because of some equipment delays, as I recall, it took just a few months longer to get the plant up and operating at AWT's data center. And I think that's the date you have just referred to.

Because once they received their permits, and you may have read where I make a stinging attack on the Corps of Engineers, because EPA said we delayed and delayed at Florida Cities in getting the pipe. The Corps of Engineers sat on our application to build the extension out into the river for -- I think it was 363 days, one year, that the federal government itself kept us from building the extension. And my recollection is we built that pipe in six months or less. But that's how quickly the Company could act once it got through the permitting process at the federal and state level.

Because this facility was built on such a small postage stamp sized piece of property, it was incredibly difficult to use the kind of technology they were going to use, keep the facility operating in compliance with the Florida permit, while they were constructing. It was almost literally like running the 100 yard race with one foot, not one hand, tied behind your back.

And as a result of that, and Dr. Ahmadi will tell

you this if you take his deposition, that he was concerned about the type of technology they were going to utilize at this facility. Therefore his office and the state office took quite a period of time, which I can't tell you what it was, but it was I think roughly a year, to review their plans before they could move forward. And of course without the permits they couldn't move forward. And in addition to that they had to obtain the local permits that you have to obtain in any state when you're going to be undertaking construction of that nature. All of these together caused much of the delay. Frankly, once they received the green light to construct, it didn't take them very long to construct the actual facility, or the addition to the facility, and the pipe itself.

Q. Do you have an opinion as to why the EPA decided to file suit at the time that it did, considering the amount of time that had elapsed and considering that the Company had completed all the upgrades at that juncture?

A. This is fairly typical of the Department of Justice, EPA. What you have to realize about EPA and the Department of Justice, when they see just raw numbers of a party allegedly discharging without a permit, it basically only looks at the size of the fine that can be extracted from the Company.

And you bring out the point that it took almost

seven years. First off, it takes a long time for one of these cases to go through the review process. And that's another reason why it's almost impossible to settle these cases, because so many people have looked at the case from the EPA and the Department of Justice.

The Department of Justice has, I think, roughly 180 some odd lawyers over there and they have to keep them busy. And one of the things they want to do is to have cases they can file. And this looked like, initially, a very delicious plum for them to pick on.

And in my opinion they wanted to get a large fine. That's one reason the Department of Justice stuck with the $5 million figure for so long. Once the Department of Justice saw that its case was failing in Waterway Estates, then they started casting about, as you can see from my testimony, for other facilities that the Company had. In fact, there really wasn't hiding of the fact that they wanted to look for other facilities. In fact, Mr. Leon, one of the individuals that we retained to try to help settle this case, was told that the Waterway Estates case had become much less serious, obviously in light of what we had discovered, and Barefoot Bay and Carrollwood were real problems, and the Department of Justice was going to take its focus off of Waterway Estates and focus on Barefoot Bay and Carrollwood.

Again, as demonstrated by our discovery, the Department of Justice did not do its homework, could not get its facts straight. EPA administrative people have already checked on those two facilities, checked with the people of the State of Florida, found out what the problems were, and in fact, I think this is the most telling thing, is that the Department of Justice would not even call those enforcement people to testify in trial, because they had said as far as they were concerned Barefoot Bay and Carrollwood both had been solved.

The fact is, the Department of Justice, because it wanted to count some beans, brought these actions and jacked up the pressure on Florida Cities from 50 some odd million to over 100 million in claims, again, all in an effort to get it settled for this $5 million number.

Q. Okay, thank you. Let me refer you now to your Exhibit GHB-38. It's a copy of the Company's Second Request for Production of Documents to the EPA.

A. Okay. Yes, ma'am. I have it in front of me.

Q. Do you know if any of the documents that the EPA provided in response to this production of document request relate to its litigation or settlement with the City of Cape Coral?

A. May I take a moment just to skim through this?

Q. Certainly.

A. It's been so long since I have looked at this, frankly, I don't recall all of what we asked for. (Pause)

Is there a particular paragraph you're looking at, Ms. Gervasi, that suggests the City of Cape Coral?

Q. No, we're just wondering what they provided, and if what they provided had anything to do with the City of Cape Coral.

A. Certainly at some point we received information on Cape Coral. Whether it derived from this particular request, I cannot tell you. Certainly Cape Coral was on my mind because Cape Coral had been raised by the Department of Justice on several occasions saying, we received $750,000 in fines from Cape Coral. That is a public entity. And as a private entity, you're going to have to pay much more.

I said, well, I knew the fellow who handled the City of Cape Coral case, he was a former associate of mine and he wasn't a litigator, and that maybe he saw that he didn't want to litigate the case and settled it as a result. And, but I said there should not be any distinction -- and certainly the Clean Water Act does not draw any distinction -- between public or private entities, for overrides; that that shouldn't make any difference anyway, because the Clean Water Act says that you look at six mitigation factors, if there is an alleged violation or exceedence of your Clean Water Act permit. So the City of

Cape Coral should not have any bearing on our matter finding larger than the City of Cape Coral.

Q. Do you recall whether the EPA provided copies of the complaint against the City of Cape Coral, or the settlement agreement?

A. That I do not recall.

Q. Could you check to see if you have copies of those documents, and if so, provide them as a late-filed exhibit?

A. Sure.

MR. GATLIN: Let's see, you want the complaint -- excuse me, I'm sorry.

MS. GERVASI: Yes, a copy of the complaint against the City of Cape Coral.

THE WITNESS: I would be surprised if we do not have it, but I cannot specifically recall it. But it played a substantial role in our initial settlement discussions with the Department of Justice and EPA. As I said, because my former associate, Mr. Davis, was involved in the case and my recollection is that I talked to him about these at the time, or if I didn't one of my colleagues did.

MS. GERVASI: If you would please then provide the complaint, as well as if you have a copy of the settlement agreement, we would like that as well, and any correspondence that you may have concerning that

litigation with the City of Cape Coral.

THE WITNESS: Copies I would receive, because I don't think we ever dealt with the City of Cape Coral directly, other than through its counsel.

MS. GERVASI: Correspondence where you may have discussed the Cape Coral situation with DOJ or EPA?

THE WITNESS: No, I wouldn't have any of that. The correspondence I thought you were referring to is just copies of correspondence that we might have involving Cape Coral.

MS. GERVASI: We'll take that too if you have any.

THE WITNESS: Okay. I'll just look at it and see what it is that we have.

(Late-filed Exhibit No. 2 identified.)

BY MS. GERVASI:

Q. Thank you. Mr. Baise, are you familiar with the testimony filed by Mr. Allen in this case on behalf of the utility?

A. I have read through the testimony once, yes.

Q. Mr. Allen testified that he believed that the government brought suit because it was substantially influenced by similar litigation brought against the City of Cape Coral on May -- March 15th of 1991. And he stated that he believed that the US EPA and DOJ felt compelled to

initiate litigation against Florida Cities to avoid the potential for having to defend their decision to lodge complaints against the city, and under somewhat similar circumstances declined to lodge complaints against Florida Cities.

Do you agree that that was the reason the suit was filed?

A. That would be based on Mr. Allen's personal knowledge, and I couldn't comment on that one way or the other. Mr. Allen is president of this Company, has extensive contacts in the utility community in Florida that I do not have. And I base that on his personal knowledge, and I could not comment in response to that.

Q. Attached to Mr. Allen's testimony as Exhibit 6, he provides a letter --

A. Now, I do not have his exhibits. I just have a copy of his testimony in the room here with me today. I may have it at another place, but I just don't have it immediately in front of me. Go ahead.

Q. Let me just try to describe a little bit about the letter to you. It's a letter from a Mr. Lee Dehihns, D-E-H-I-H-N-S, to Mr. Robert Gordon of Avatar Utilities.

A. Yes.

Q. And discussing settlement issues in the potential case with the government?

A. Yes.

Q. In the letter Mr. Dehihns summarized the EPA's complaint by saying that, simply stated, EPA believes taking from January of 1987 to March of 1992 to achieve operational status is unacceptable?

A. That is correct. I recall that letter.

Q. Do you believe that that fairly characterizes why the suit was filed?

A. It's one view of why the suit was filed. I've given you my view of my testimony as to why I think the lawsuit was filed, and that was driven by the North Fort Myers Homeowners Association and the underlying racial issue here. Obviously that could be a part of it. And I could be wrong in my assumptions. Mr. Allen can be correct in what he said and Mr. Dehihns be correct in what he said. I just don't know what all Mr. Dehihns based that on. I can tell you that in the initial basis of our settlement discussions, the Department of Justice did bring up the fact that they thought it had taken us way too long to construct pipeline and the facility, because I also told you earlier, there were reasons for that.

Again, this goes back to my point, the Department of Justice never could get its facts straight; that they knew nothing about the delays and didn't see seem to care about the delays in getting permits that were created by Lee

County, by the State of Florida itself, and most importantly, the Department of Justice.

And I think it's very important to also bring out here that the state set up compliance schedules for Florida Cities to meet. And to my recollection, Florida Cities always met those compliance schedules. They had to change those compliance schedules on more than one occasion because of the delays created by the Lee County Zoning Commission. I didn't put this in the testimony, but I'm pretty sure I got it into the trial testimony through Mr. Acosta. I think you have taken his deposition.

Q. Yes, sir, we have.

A. He's a better one to raise it with. And I believe I counted up at one time that there were 23 or 26 separate permitting decisions that had to be made by either Lee County and the State of Florida, or just Lee County alone, before you were able to get to the federal level. It was an incredible maze.

And we would explain this to the Department of Justice, and they just said too bad, that's your problem. And obviously that was upsetting to us. They had a lack of understanding of the facts as to why it took from, you say January of 1987 when the permit was formally denied, until whatever it was, April of '92, when we had both the pipe and facility operating.

Q. Going back to Mr. Dahihns' letter, he proposed a settlement offer in the amount of $250,000.

A. Correct.

Q. And part of the rationale for the offer was the belief that it was consistent with a comparable $750,000 settlement reached between DOJ and the City of Cape Coral. Do you recall that?

A. I do.

Q. Do you recall whether the $250,000 offer was made in writing to the DOJ?

A. I thought it was made by Mr. Dehihns, and I can't point you to a specific letter. I know the specific letter where Mr. Dehihns talks about the 5 million that the Department of Justice stuck on. But it is my recollection from, I believe Paul Bradtmiller, or Bob Gordon, that such an offer was made. I would have to find the exact piece of paper where that was made, or a document that confirms it was indeed made.

I can tell you in my own case that Mr. Burrs and I told the Department of Justice counsel that our initial review of this case certainly was in conformance with what Mr. Dehihns said. In fact we were a little bit lower, roughly $200,000, because of the facts that we thought we could prove.

So Mr. Dehihns and ourselves, under separate

analyses of the matter, came roughly to the same conclusion, and most importantly -- and that, remember, is just for one facility. And the court, after all of this effort, came to roughly the same conclusion with three facilities.

Q. There was a second settlement offer of $500,000 made, correct?

A. That's correct. I was behind that.

Q. Did either of those settlement offers discuss the EPA's settlement with the City of Cape Coral as being a basis for acceptance of the offers?

A. No. Certainly our $500,000 one did not. The basis of that was an extensive analysis. My team and I went through looking at EPA's then model, the Economic Benefit Model, what's called the gravity or the seriousness of the alleged violations, which we though was obviously very small, because we were in compliance with the NPDES permit.

Of discharging in the wrong location, we felt that where we were discharging was indeed part of the Caloosahatchie River, and EPA's permit had said discharging in the Caloosahatchie River. So made an argument on that point.

We had that situation, plus the other four factors for mitigation under the Clean Water Act, came up with 200,000, and then we added -- I think it was $300,000. If we could settle that now, you would save that much in legal

and trial costs. We did that in an offer of judgment because, again, I was trying to put pressure on the Department of Justice to settle this case, again, based on the fact we felt it should not be going forward. Therefore you say to the other side, I will settle this case now for 500,000. And if you don't accept, obviously you have to run the risk of having to pay our expenses if the case comes in under an amount.

The result was that the Department of Justice counsel, when he was handed this letter, and I'm told this by one of my colleagues, literally looked at it for maybe two to three seconds, and physically threw it back at my colleague, Mr. Scroggin, and said, in essence, this is not even serious, and went ahead with the deposition. So he scorned our good faith offer at that point to settle the case.

Q. In its defense before the court, did Florida Cities argue the similarities of its case to the DOJ's complaint against the City of Cape Coral and the subsequent settlement with Cape Coral?

A. I referred to several cases, I think in my opening statement, various arguments, but I don't believe I ever raised a settlement with Cape Coral. I was always pointing to court reported decisions.

Q. Okay. Thank you. Did you argue that the

government's proposed fines and settlement offer were unreasonable in light of its settlement with the city?

A. I didn't do that because your settlement discussions are obviously subject to Rule 408 and they're supposed to be confidential and all that kind of thing. So I don't believe that I ever said anything about the 500,000. My argument was focused on the $13.51, that I thought it was a fair, equitable number, and the court agreed with me on one point and came down to $10, as you know, per violation, and $25 for other violations. So he sort of split the baby.

Q. Okay. Thank you. Now we have information that the EPA issued an administrative order on May 11th of 1987 that set a deadline of September 30th of 1988 for the utility to meet all requirements. That was attached to Mr. Acosta's testimony as Exhibit MA-8.

A. I am familiar with it. I obviously don't have that exhibit here in front of me.

Q. Do you recall whether the utility failed to meet that September 30, 1988 deadline?

A. It is my recollection that it did not, again, due to having to get involved in these permitting issues, and I believe that order wanted them to cease discharging by that date, did it not? Is that what the administrative order wants as a result, which as a public health facility, the

Company would then have been forced into violating another set of Florida laws, and could not, of course, have shut down its operation, or it would have faced all sorts of property damage lawsuits and negligence lawsuits, had it shut down the facility.

Q. Yes, sir, that's what it was, cease and discharge, you're correct in your recollection.

A. Okay, because that was just another continuing battle we had with the Department of Justice. They had the view that we could just shut this facility down. We thought that was one of the silliest things we had ever heard; that you do not shut down a public health facility. They seemed to believe because we were a private company that we could shut down our manufacturing facility and stop manufacturing widgets. And as you know, that clearly is -- would be a violation of some federal -- or some Florida Statute. I don't know which one it is, but I'm sure you could find it. You could not shut that facility down without violating the law.

Q. Do you recall whether the utility notified the EPA that it was going to have to miss that deadline?

A. Specifically at this moment I can't recall that, but I cannot believe that they did not notify both the state and EPA that they were not going to be able to meet that. There were two or three iterations of that construction

schedule. As Mr. Acosta and others in the Company started working through what they were going to have to do, the schedule had changed, because of this extensive number of permits that they were going to have to obtain before they could do anything out there, including this dredge and fill permit issued by the Corps of Engineers, which took, as I said, I believe 363 days for the Company to obtain.

Q. Could you check to see, please, sir, whether or not you have a copy of a notification from the utility to EPA that it would miss that deadline?

A. Okay.

Q. That would be Late-filed Exhibit 3, Notification that Florida Cities Would Miss Deadline Set by Administrative Order Issued May 11th, 1987?

A. Okay.

Q. Thank you.

(Late-filed Exhibit No. 3 identified.)

BY MS. GERVASI:

Q. Now on Pages 8 and 9 of your testimony.

A. All right.

Q. You're discussing the pretrial meetings that occurred between Florida Cities and the DOJ and the EPA, and the fact that the DOJ, or the EPA, could not be convinced to lower the penalty below the 500,000, or the 5 million?

A. Where are we on Page 8 and 9?

Q. I was just kind of summarizing.

A. All right, fine. I see it now on Page 9, Line 12.

Q. Correct.

A. I have reviewed it.

Q. Why do you think that the DOJ wasn't willing to offer a lower settlement?

A. I -- and this is speculation on my part, you would have to ask the DOJ what their view was, or EPA. All we know is what the result was. I think they believe that, as Mr. Jacobs characterized us on several occasions, we were a renegade corporate polluter. And as a result, he felt -- in fact he did say, on a number of occasions, that this Company must be punished. And we couldn't figure out why.

Q. Okay. Thank you. Now, on Page 50 of your testimony.

A. Yes, I'm on Page 50.

Q. Starting I guess on Line 10, you're discussing the 2.2 million settlement offer, and that that was still unreasonable?

A. Correct.

Q. Why do you believe that was an unreasonable figure?

A. Well, one, the court certainly came to the conclusion that that number would have been unreasonable and

would have been outrageous for us to -- but at this point I was more convinced than ever that EPA had violated the law, violated its own regulations.

Dr. Ahmadi had testified that there were no water quality standards violations, no permit violations. We had reviewed, on a continuing basis because we're always watching these Clean Water Act cases that are tried or settled around the country, that $2 million would not in any way, shape or form be reasonable to settle for, in light of the facts in this case and in light of looking at the six mitigation factors under the Clean Water Act.

There's one really fickle factor, and I'm not sure how familiar you are, probably no reason for you to be familiar with the Clean Water Act. But one of the factors says such other factors as justice may require. That gives the court, obviously, extreme leeway to consider the facts. When you have the state of Florida through its lead officials telling you that they do not understand why EPA and the Department of Justice are bringing this lawsuit -- in fact I believe Dr. Ahmadi will tell you, and this is obviously subject to my recollection, but I believe Dr. Ahmadi told Mr. Jacobs that he didn't understand why Mr. Jacobs was bringing this action.

And he also told Mr. Jacobs -- and I think I may have elicited this testimony in trial -- that he had told

Mr. Jacobs he had no case, and that he shouldn't be proceeding with this case, and that Mr. Baise was correct with regard to his interpretation of the law; that is, this Company had always had a waste load allocation to discharge into the canal; that we were not violating any water quality standards, nor were we violating our Clean Water Act permit.

And as you can see from my testimony and all of the discovery work we did, we couldn't find, I think maybe with the exception of one other permit that had ever been removed from anyone in the history of the Clean Water Act. That's not to say there's not some out there, but we couldn't find it.

And even the lead experts from EPA, this Dr. John Marlar (Phonetic), who was one of the most knowledgable in all of EPA. He was at EPA when I helped put the agency together in 1970 with Bill Ruckelshaus. He said it was an extremely rare event.

Mr. Roger Hartung, who had processed over, I think it was, 19,000 enforcement actions at Region 6, and was a teacher of seminars within EPA, said that he was unaware of when there was ever a case where EPA took a permit away, or fines anywhere close to these numbers. So all of that went into my thinking at the time in advising the Company, it makes no sense for you to give away $2,200,000 of the

consumers' money here, or the ratepayers' money, when the federal government has so egregiously violated the law.

Q. Thank you, sir. Just one more question. And that is, was the utility's decision not to settle based in any part on the utility's belief that the Commission would disallow recovery of fines or penalties, as opposed to legal fees, from its customers?

A. You would have to ask Mr. Allen, and I guess Mr. Gatlin about that. I have no idea. All I advised them on was that they had been improperly sued, in my opinion, with regard to what happened here. They should not have ever had their permit taken away.

The two prior cases, Barefoot Bay and Carrollwood, had been appropriately correctly resolved by Region 4. That was, in my personal opinion, an outrage, that those cases were filed against this company.

I would have to tell you, at that point, in the heat of battle that we were in, in all due deference, and no criticism to you and the Commission, I don't think you ever entered my mind.

Q. I can understand that.

A. In fact, I am not even sure you existed at that point. I had so many fire fights going on, I could hardly keep them straight myself. And so obviously, I did not want to pick a fight with somebody else that I knew nothing

about.

Q. Okay, thank you, sir. That's all I have. I think Mr. McLean has some questions for you. Would you care to take a break, first?

A. Yeah, a five-minute break?

MS. GERVASI: That would be great. Thanks.

(Recess from 11:25 a.m. until 11:30 a.m.)

EXAMINATION

BY MR. McLEAN:

Q. Mr. Baise, it's Harold McLean, representing the Citizens of the State of Florida.

A. Yes, Mr. McLean, how are you?

Q. Doing well, sir. Let me ask you a couple questions. I would like to know your sense of what your function is in this case. Are you being offered as a fact witness, an expert witness or combination?

A. As far as I'm concerned, I am relating to you the facts with regard to my involvement in this litigation. It would be up to you as counsel or other counsel to qualify me as an expert witness, as I assume it would be in any proceeding of this nature. But my personal view is I'm a fact witness that has a great deal of background with regard to environmental statutes, particularly the Clean Water Act.

Q. And you could offer an opinion, and I gather that

THE WITNESS: Leave that up to my counsel, Mr. Gatlin.

MR. GATLIN: That's Mr. Getty, yes. But if you had questions about specific costs of Mr. Baise, I guess --

MR. McLEAN: I'm trying to make sure -- if I know that Mr. Baise's expertise is to be relied upon, I want to explore that expertise. If you're not going to rely on his expertise for the reasonableness of the fee, then obviously there's no need to go into his expertise on that issue.

THE WITNESS: I don't know. I'll leave that --

MR. GATLIN: As to the reasonableness of the fees and the reasonableness of the legal costs, it's Mr. Getty. If there's some costs specifically, regardless of whether the reasonableness of the fee is in question, if you think there's a charge that you want to ask a question about, then of course it's Mr. Baise.

MR. McLEAN: I think I understand.

THE WITNESS: I refer to what I think are the facts, Mr. McLean, on Page 80 of my testimony.

MR. McLEAN: I have that.

THE WITNESS: The steps that we took to keep the costs down. Those are facts I can testify to, but it's

going to be up to the Commission and experts to make the evaluation as to whether or not they were reasonable.

BY MR. McLEAN:

Q. Yes, sir. Now with respect to the amount of legal work which was required by the risk that Florida Cities faced from the various thrusts of the federal government, are you going to say that that was reasonable, or is that to another witness? To whom I should address those questions?

MR. GATLIN: Well, Mr. McLean, if I may, I think that this witness certainly would testify as to his own effort and what -- that that effort was appropriate or not. I don't know that that makes him necessarily have to be an expert.

MR. McLEAN: I agree with that, sure. But is this the witness --

MR. GATLIN: But, Mr. Getty is testifying as to the overall reasonableness of the effort and that what he did was -- what Mr. Baise did is reasonable and the amount charged is reasonable in his opinion, in his expert opinion.

MR. McLEAN: I see. So Mr. Baise will be tendered, more or less, as a fact witness to tell us what happened, what the various facts surrounding the litigation was and why he did what he did?

MR. GATLIN: Yes, and I think it -- in some respects, he will be testifying as an expert that, yes, indeed he did believe in his opinion that this was the correct course of action.

MR. McLEAN: Sure.

MR. GATLIN: And some questions were asked on cross-examination today, or on deposition as to what his beliefs might be. And based on his experience and expertise, I think that he's in a position to offer those opinions when somebody asks him.

MR. McLEAN: Okay.

BY MR. McLEAN:

Q. Let me direct a question to the witness then.

Mr. Baise, do you have experience in the economic regulation of investor-owned water and sewer utilities?

MR. GATLIN: Is he there?

THE WITNESS: Would you repeat that, please?

BY MR. McLEAN:

Q. I'll try to, yes. Do you have experience in the economic regulation of investor-owned water and sewer utilities?

A. Not on the economic regulation, no, sir.

Q. But certainly from an environmental standpoint. And I certainly don't question that. But my question is, have you been in this ratemaking process before, and if so

how much do you know about it?

A. No, I have not been in the ratemaking process before. I've represented public entities. I've represented the City of Fort Wayne. I've represented the state Department of Transportation, New York, Port of Oakland, Port of Indiana, eight entities, but never in a ratemaking context.

Q. Okay. And you understand -- I'm going to tell you what I think this proceeding is about and tell me if you agree with me.

A. Okay.

Q. That the Company has expended sums in its litigation with the federal government, and the question for the Commission in this case, in a macro sense, is to whether to let the Company bear those expenses or whether to let their rate holders bear those expenses. Is that consistent with your understanding?

MR. GATLIN: Did you mean to say shareholders? You said rate holders.

MR. McLEAN: Did I say rate holders?

THE WITNESS: I was going to say, could you repeat that question?

MR. McLEAN: I'll not only repeat it, I'll abandon it.

BY MR. McLEAN:

Q. My understanding, which may be flawed, of what the Commission is going to do in this case, is decide whether to let these expenses expended in connection with this litigation lie with the Company or shift the responsibility for those expenses to ratepayers.

A. I assume that's a fair characterization, but not knowing anything about this field -- I'm sure that's accurate, but it may be -- I'll let me counsel respond to that.

Q. Okay, well actually the question is directed to you, and I think it's your testimony that you don't know about that since you don't deal with the regulatory theatre that much, if at all?

A. Yes, I really cannot answer the question.

Q. And in a question by Ms. Gervasi, she directed a question to you regarding the $2.2 million settlement offer from the government which came down after the summary judgment. Do you recall that question?

A. Yes, I do.

Q. And I think your answer was that you wanted to make sure you were saving ratepayers' money, or that you didn't believe the expenditure of $2.2 million of ratepayers' money. What did you mean when you say ratepayers' money?

A. Because I assumed that this would be money that

ratepayers had paid to the Company and that would have to be paid out in fines. Ratepayers pay in each month, that money goes into the treasury. That's how this company makes its money, so that would have been ratepayers' money going over to pay a fine.

Q. Or expenses associated with the fine, correct?

A. Or expenses associated with the fine, yes.

Q. Now you weren't venturing any opinion as to that's what ought to happen, were you, at that point?

A. No, I was just giving you what my feeling was at the time, that this was an unjustified penalty for the ratepayers and this company. I saw them as one in the same, frankly.

Q. I see. So you didn't get into the question of splitting the responsibility, if any split is in fact to occur, right?

A. No. As I said earlier, in all due deference to you folks, the utility commission was not on my mind very much during that time.

Q. What about those poor souls who advocate before the Public Service Commission, you didn't think about those either, did you?

A. I certainly did. I thought about the ratepayers. I just didn't feel the money they had paid in should go to this kind of improper fine.

Q. Let's go a little bit more close to your testimony. I would like you to illuminate a couple items, if you would, or at least expand on them a little bit. Page 7, Line 14 actually, but the sentence begins at Line 12. Let me know when you have it if you will, please.

A. Page 7, Line 12?

Q. Yes.

A. FCW officials immediately started working the FDEP?

Q. Yes, sir. And Line 14 has a phrase there which interests me. It says, they could not shut down for repairs. I know you expanded on that a little bit in one of your answers to Ms. Gervasi. But I wish you would tell me why you believe that they couldn't shut down.

First of all, let me as an aside say that it was indeed a theory placed on the table at some point by the DOJ that you should shut it down; is that correct? Or that the Company should shut down that operation; is that correct?

A. That's correct.

Q. Why is it that it can't be shut down?

A. Because it would back the sewage up into your toilet.

Q. And it's your testimony that it can't be shut down, right?

A. That was my understanding. If you shut that

unless that pipe was shut off, raw waste would have been discharged into Florida waters. That is clearly a violation of Florida State law. It is clearly a violation of federal law, and if the pipe was shut down and waste backed up into people's toilets, I assume that that would create pretty quickly, as we've seen in some other cases we represent, public health hazards, and it also creates a damage situation. I represent the City of New Albany, Indiana right now where they have had waste backed up into people's homes, and they have to pay out damages for that waste running out on to the floor, damaging carpet, furniture and creating a public health problem. I assume the same situation would apply here.

Q. Those -- any persons -- well, let me ask the question differently. The notion that that facility cannot be shut down -- if I understand your testimony correctly, that's essentially what your saying, right?

MR. GATLIN: I think he also said -- just a minute, Mr. Baise. I think he said unless there was an alternative.

THE WITNESS: Yes, that's what I was just getting ready to say.

MR. GATLIN: I think you said that. Go ahead. I think you already characterized it that you couldn't be shut down without an alternative.

THE WITNESS: That is correct. The time that it would take to come up with an alternative, eventually it could be shut down. I didn't mean to say it could never in the history of time be shut down.

BY MR. McLEAN:

Q. But, anyone who sought to cease treatment and discharge raw sewage would be called to heel in short order by federal authorities and by state authorities as well, wouldn't they?

A. Certainly if they were going to shut the facility down, open up the valves and discharge straight into the water of Florida, and the water of the United States, that is criminal. In fact, the Department of Justice would send you to jail for doing that.

Q. Yes, sir. And part of what the Department of Justice might do is arrange with the approval of the court for someone else to run such a facility and get it back on track; isn't that true?

A. I suppose justice could put a company in receivership, but that's speculation on my part, and I'd rather not get into that.

Q. Let me ask you a little bit about that receivership business. This was essentially -- this litigation that we're dealing with, was essentially, in its essence, an enforcement action against Florida Cities Water

Company, right?

A. That's how it was entitled, correct.

Q. And had they taken a judgment of some size that Florida Cities didn't appear to be likely to be able to pay, can you take us down the road? Do you have the expertise to take us down the road, as to what would happen next? And my focus is, would the marshals sell the utility on the courthouse steps, or what happens in that process?

A. That would call for speculation even beyond my expertise. So I would not feel comfortable answering that question.

Q. Who does handle that sort of expertise -- I'm sorry, that sort of enforcement on behalf of the Department of Justice, if anyone?

A. I don't know, based on my history of the Clean Water Act, where that has ever happened.

Q. Are you aware of any wastewater company going into bankruptcy? And my question is, of course, in the context of a source of pollution. In other words, in your years at the Department of Justice, did you ever deal with a company that went into bankruptcy, and can you say -- can you say with any confidence what the likely scenario is when that occurs?

A. No, I'm not aware, but Gerald Allen would be the person to ask questions about that, in my judgment.

Q. All right. Back to your testimony, Page 13, Line 16, sir, let me know when you have it if you would. I don't know that you really need to reference it. It's a general question. Y'all --

A. Page 13, what line?

Q. I'm sorry, Page 13, Line 16. It deals with affirmative defenses.

A. Yes, sir, have it.

Q. What became of your affirmative defenses? I never found in your testimony what became of them. I see that there was a motion to strike them. What became of them?

A. And you wouldn't find anything in the record on that. The Department of Justice filed that motion to strike. We responded. Then later the Department of Justice filed an amended complaint, then a revised amended complaint. Therefore the court never ruled on that.

Q. In the subsequent -- I assume that you filed answers to both the amended and the revised amended complaints?

A. Correct.

Q. I don't recall whether you asserted affirmative defenses in those. Did you, by any chance?

A. Yes, sir.

Q. What were the affirmative defenses? And I apologize for not going to read it, but can you tell me

briefly?

A. We -- and I'll just summarize them off the top of my head. Impossibility, latches, impossibility -- I don't know if I mentioned that -- the delay caused by outside parties, failure to state a claim.

Q. That would be just a defense, right?

A. Just a defense. I'm just trying to think. Hang on just a second, and I can go through them. Yeah, failure to state a claim. Oh, yeah, here's one, a critical one, goes to Section 309 of the Act, that helped us to get Barefoot Bay and Carrollwood off of the hook. These claims were barred because a judicial action or quasi-judicial action had already taken place, and the fact that we had paid administrative penalties assessed by EPA Region 4 that I referred to earlier.

Q. That's the res judicata issue, correct?

A. You got it.

Q. Upon which you eventually prevailed, I believe, in the summary judgment.

A. We prevailed and set new law on that issue, which is one of the reasons why EPA failed to appeal this case formally, because they saw that as so devastating to their present position. They didn't want to get that locked in by the Eleventh Circuit Court of Appeals.

Q. I thought they did formally appeal, did they not?

A. They formally appealed and dropped it.

Q. Yes, as you did, right?

A. We only did it after they dropped their appeal.

Q. It was the result of mediation, was it?

A. No, it wasn't the result of mediation. It was the result of the Department of Justice realized they couldn't win the case. They also couldn't get us to agree to vacatur of the original opinion. And the Department of Justice asked me specifically to undertake an unethical act. And I refused to do so. The Department of Justice asked that we would go before Judge Nimmons, say to Judge Nimmons that we had agreed to a $309,000 fine, and then we, Florida Cities, would really only have to pay something somewhat less than that, maybe 150,000. And I said, "I think that is unethical, counsel, and I frankly don't want to discuss it anymore."

I refused to do that. And at that point, I would say within 24 hours, the Department of Justice came back to us after several of these mediation telephone conferences that you're referring to, and said they were going to drop the appeal because I refused at the direction of the company to agree to a vacatur of Judge Nimmons' order and opinion.

Q. I see, and that's on that issue of res judicata and to what extent the government is bound?

A. That's correct, on that issue. But back to your

question on the defenses, just going through them, we got hung up on the second one, on res judicata.

Q. Yes, sir.

A. The third defense was we claimed they were barred because of earlier settlement agreements entered into between Florida Cities and EPA.

Q. And that's the issue of whether the consent and judgment is to -- consent and judgment is to be treated the same as any other judgment, right?

A. Right.

Q. And you prevailed on that at -- in the summary judgment, I believe?

A. We also on --

Q. Pardon me, was that correct? You did prevail on the issue of whether the consent order was to be accorded the same stature as an order of court in terms of res judicata?

A. Yes, we did. I'm sorry I was looking at the fourth.

Q. That's okay.

A. We alleged, as we've already discussed, that EPA had illegally, wrongfully and properly denied our permit.

Q. Can I stop you there? Did you ever get an unequivocal ruling on that? I understand that your penalty was mitigated, but did you ever obtain a specific finding on

that issue?

A. Yes, I did.

Q. Where is that? The court found that the EPA illegally denied the permit?

A. No, the court did not find that. The court found that since the Company had not appealed that issue within the 90-day time frame that the other counsel was talking about, that we had waived our right at that point.

Q. I see. Can you hold your thumb where you are there, because I want to ask you a couple questions about that.

A. You bet.

Q. Counsel asked you a number of questions about why y'all didn't, in my words, pursue a direct appeal, or a direct attack, I should say, on that administrative order. Do you recall those questions, that line of questions?

A. I do.

Q. Now, I gathered from the gist of your testimony -- the gist of your testimony, according to my recollection, was that course of action probably would have been as expensive as the one taken; is that right?

A. That is my opinion because EPA would not back off even after we had laid out the facts to them, probably much more so than counsel should do in litigation of this nature. Therefore had the same track been taken, you would

have taken the same set of actions in the adjudicatory hearing up through an appeal, to the Court of Appeals, that basically we took here.

Q. Now, the Department of Justice came -- let me strike that and ask you a little bit differently the same thing. What I'm curious about is -- and I suppose I should know this, but the EPA has the attention of the homeowners association, or whoever, and they press forward with an enforcement action against the utility, and at some point the Department of Justice comes on the scene; is that generally correct?

A. Correct.

Q. Now, what is the triggering mechanism, if any, to bring the Department of Justice into the fray?

A. The triggering mechanism, as we found it, was a handwritten memo from a fellow by the name of Peter McGarry. And McGarry said in this memo, these folks do not have a permit at Florida Cities at the Waterway Estates facility. They are taking too long to build the facility and the pipeline. Refer this to the Department of Justice.

Q. In a general sense, is that somewhat typical of the way the Department of Justice comes in? Does the EPA have some disability in the sense they don't have their own enforcement department, or how does that work? You understand my question?

A. Yes, sir. Let me rephrase it just a little bit. But EPA has an enforcement arm through it's assistant administrator for enforcement. In the 1987 amendments to the Clean Water Act, the EPA was given enforcement authority up to $125,000 for administrative penalties. Then there's a Class 1 and Class 2 under that. So EPA can take enforcement action up to a certain point. Then after that point, the enforcement action is referred, through the enforcement division of the EPA, to the Department of Justice.

Q. Respecting the administrative challenge of the NPDES permit denial that Staff hints that perhaps you should have done, that was long before there was enforcement, or was it? Was that before or after the involvement of the Department of Justice?

A. That was before there was involvement by the Department of Justice. It was that single act by Ms. Kagey that set off this incredible chain of events. And there's testimony by her superiors that she violated EPA's own regulations. That's when I thought the case was settled, is when -- Mr. Roosevelt Childress, I believe, is the fellow who testified to that effect. Mr. Greenfield testified to that effect, and even Ms. Kagey, as difficult as it was to get it out of her, indicated in her deposition that, one, she was unaware of EPA's rules for denying a permit, said she just looked at two pages from a file and denied the

permit on those two pages without ever, one, consulting with anyone else, which was a violation of EPA's internal guidelines, as testified to by her superiors, and one person said it did appear there was nothing in the record that would seem to justify denying this permit holder its renewal application. We thought we had them absolutely cold at that point, and again, the Department of Justice would not settle this case for any reasonable number.

Q. Ms. Kagey is the author of the handwritten note which suggested DOJ should become involved, right?

A. No, Mr. McGarry, Pete McGarry, M-c-G-A-R-R-Y, I believe.

Q. Okay. I'm a little confused, then, on when -- what was Ms. Kagey's role in bringing the DOJ in?

A. You have basically what's called a five-year permit, and Ms. Kagey was reviewing the renewal of the Waterway Estates' permit renewal application, a fairly routine act.

Q. Okay, I'm with you there. Now I understand.

A. That was in, let's say --

Q. '87?

A. -- May or June of 1986, and she sends out a notice sometime, I want to say around July of 1987, that there's going to be a proposed denial. And then in January 3 or 4 of '87, the denial occurs. They have no permit to

discharge, a federal permit. They still have the state permit to discharge. And they start trying to figure out how to solve their problem. Now the Department of Justice is sent a note by Mr. McGarry, in, I would say, probably 1990 or '91. I would have to go back and look at that. It was a handwritten note, so do not hold me to the exact page.

Q. No problem on that. That was, in fact, years --

A. Years after the denial by Ms. Kagey, to get to your question.

Q. And years after the opportunity for the utility to engage in a direct attack upon the permit denial, right?

A. That's correct.

Q. So it's accurate to say that the Department of Justice didn't come into the case until years after that? That's correct too, isn't it? Necessarily?

A. I was not involved -- and you would have to look at Mr. Dehihns' involvement, but I believe that the facility and the pipeline were up and running in 1992, about April of '92. I want to say within six months or so after that, conversations at least start with Mr. Dehihns about a proposed penalty, because it allegedly took the Company so long to bring this facility back into compliance. It was either late '92 or early '93 because I am called June of '93, as I recall, by Mr. Getman, and that's when I get involved.

So there had been extensive conversations, as I understood it, in '92, because I believe Mr. Dehihns' letter is like December of 1992 where the $5 million number comes up.

Q. When the Department of Justice came in, if you'll permit the characterization, it came in with its enforcement hat on, right?

A. Absolutely.

Q. Does the Department of Justice have a hat appropriate for defending the EPA in administrative challenges of its administrative orders, which is a round about way of asking you, is it reasonable to assume that the Department of Justice would have become involved had the Company done a direct attack on the denial of the administrative order?

A. You would have to ask the Department of Justice and EPA about that.

Q. Well, let me ask you this. Does the EPA have the authority to process that attack -- and I'm saying attack. I probably should say challenge -- could the EPA have done that without consultations, or without the direct involvement of the Department of Justice?

A. I do not know how they would have handled that.

Q. But in any case, the serious money began to be spent in this case, in terms of expenses of litigation,

after the Department of Justice became involved, not before; is that correct?

A. That is correct.

Q. Let me turn to some -- well, actually you were holding your thumb on your affirmative defenses there. Are there any more of those?

A. Yes, there are.

Q. Yes, sir. Affirmative defense, by the way, my understanding is, I did what you say I did, but I have this reason, exculpatory reason, if you will. Is that --

A. That's right, it fits in with those six mitigation factors. It also fits in with the statute.

Q. I've got you, okay. You're waiting to tell me about the additional affirmative defenses.

A. I'm just looking here. I think I left on four. The fifth one was another twist on the 309 penalty. We say, plaintiffs' claims are barred because Florida Cities paid penalties assessed by the State of Florida under comparable Florida law. That is another defense.

Q. The res judicata claim?

A. It's in essence a res judicata claim, but it's given to you by the 1987 amendments.

Q. I understand.

A. If you have a comparable state program, the government shouldn't have two bites at your apple is what

that claim is about. Res judicata and collateral estoppel we argued; the Doctrine of Impossibility, I've already talked about; estoppel of the defense I've also raised; delay in issuing permits; enacting zoning exchanges; signing agreements; granting other approvals necessary for FCWC to meet compliance schedules. Tenth defense, improperly seeks duplicative penalties for that same violation. What they tried to do is pile on -- we would say there's a daily violation. Then they would say, well, yeah, that's right, there was a daily violation, but it also violated your monthly discharge, and thirdly, your annual discharge. So for one violation they would get not 25,000, but try to get it up to 75,000. And then finally, we threw in that they had violated our due process rights under the Fifth Amendment.

Q. Okay. Now, one thing that I sense throughout your testimony and other witnesses of the Company is that this company was either overly zealously prosecuted by the Department of Justice and the EPA, or -- I mean, sometimes I see terminology even stronger than that. That's consistent with your feelings about the case, isn't it?

A. There are a couple of points I would like to make with regard to that. One, I think Department of Justice counsel and EPA counsel did not have a good understanding of the Clean Water Act. There is a view, as I said earlier,

that if you have a technical violation, that's worth up to $25,000. So they add up all these numbers, come up with these astronomical numbers, not fully appreciate the mitigation factors.

As I said, the second section of the Clean Water Act mitigation factors, as I recall, were not passed until 1987. It would appear that the Department of Justice discounts those factors substantially. In fact, the Department of Justice tried to, in their motions for limine, eliminate a lot of our testimony on that point and failed.

Q. You testify at Page 82, the very last page of your testimony, that in fact the government was overly zealous, actually you say overzealous, in bringing this litigation against FCWC. That's the general tenor of much of your testimony; is it not?

A. That's right. I certainly made that point because, as pointed out to you and your colleagues, we would point out to the Department of Justice where we had absolute defense, and let me give you one example. One of the claims against, I think it was either Barefoot Bay or Carrollwood, the government said we were using the wrong testing instrument. We found in discovery that we could use this very testing instrument. It took us months to convince EPA to follow its own document. Now eventually they did drop out a claim that was worth about $15 million in the overall

claims.

On the TRC violations, long before we went to trial, we pointed out to them the weakness of their TRC violations; that is, if we used the correct instrument, all we had to report was nondetect. The government forced us to go through trial on that point. They would not drop that claim.

And what I couldn't understand as a lawyer, and as a former of Department of Justice employee, both as a trial lawyer and as an administrator, and also as someone who helped put EPA together, what was going on. Because rationality, rational facts, which we lawyers are supposed to be in pursuit of and then tell our clients what their risks are or are not, did not seem to work in this case.

Q. Let me interrupt just for a moment to ask whether you believe then that that course of conduct, or apparent motives, conduct, whatever, of both the EPA and the Department of Justice, was atypical to the existence as you know the agencies.

A. Actually, the agencies have become much more zealous, to use a term that I have used. I would say starting under the Bush administration and continuing under this administration.

Q. Can you contrast between zealous and reasonable? I mean, one can be zealous and be reasonable, but the clear

tenor of your testimony is that they were both zealous and unreasonable. Isn't that a fair characterization?

A. I would say in this case when you would bring reasonable facts to the attention of counsel on the other side, and those facts -- and the court established virtually everything we said as a fact -- that the Department of Justice was not reacting as a rationale person would or should when these kinds of facts are developed.

Q. And my question, I want to get to the issue of whether you regard that as something of an anomaly, or would you expect the Justice Department, EPA and so forth, in the future to behave more rationally, if you will?

A. No. As I said, this seemed to get started under the Bush administration. And my experience is that you have very young and inexperienced lawyers dealing with these issues, and they see these cases as career making cases, and there is little or no supervision that you can see from some of these cases. And as a result, there is this overly zealous prosecution by the department.

Q. Let me return to your testimony, a couple specific questions. If we're done with the affirmative defenses, I think --

A. That's it. I finished all of them that we have compiled, and I can't -- I think this is the last answer that we filed. Certainly it's typical of most of the

answers we filed. Let me just check here. Yeah, this had to be the last one, because I see we are dealing with a third claim for relief, which is Waterway Estates, which we did indicate that this was the answer for both Barefoot Bay, which became the centerpiece of the government's case until the judge knocked it out of the park on I think it was November 20th, 1995.

Q. All right, sir, there was a effort of the Company to protect -- and I don't mean to assign a whole lot of meaning to that word -- but protect former managerial employees of Florida Cities Water Company. You're familiar with that scenario; are you not?

MR. GATLIN: I don't think there's anything that indicates that Florida Cities tried to protect employees.

MR. McLEAN: That's probably a bad word.

THE WITNESS: I was going to ask you what you meant. My whole job was to protect this company from improper prosecution.

BY MR. McLEAN:

Q. Bad choice of words. What I want to get at is, it seems to me like you objected to the ex parte interviews with those former employees. And I want to get to the issue of whether you objected to the ex parte interviews or whether you objected to depositions where they were

represented by counsel. Did you blanket -- well, let me ask you if you understand my question so far, because I'm not sure I do.

The question is -- let me be more specific.

A. I think it goes back to the other question, but go ahead and rephrase it again.

Q. Yeah, these former managerial employees, you did not want to Mr. Jacobs and his entourage to go down to Australia and talk to them, right?

A. I didn't mind them talking to Mr. French at all. In fact, Mr. Jacobs was less than candid with regard to the French situation. Mr. Scroggin and I had had lunch with Mr. Jacobs, and we had talked about Mr. French being a fairly important witness here. We both agreed that we should depose him.

In fact, Mr. Scroggin and Mr. Jacobs laughed about their traveling together to go down to Australia to take this guy's deposition. And I said, come on fellows, we're not going to get free trips out of this. Let's see if Mr. French is not going to be able to come to the United States.

And within seven days of that conversation, which we didn't know at the time, and no hint, no hint at this lunch that Mr. Jacobs, Mr. Scroggin and I had, did Mr. Jacobs ever tell us that he was going to go off on his

own to meet with Mr. French. But we subsequently found out in a separate lawsuit that I brought against the Department of Justice in getting Mr. Jacobs' travel records, because I felt, frankly, he lied to me.

Q. What I want to get to is, was it the ex parte nature of the interviews with ex-managerial employees to which you objected, or was it the other side talking to them at all under any circumstances including depositions?

A. It was the ex parte portion of it, because we didn't care about them deposing these folks, because we knew that the Department of Justice had certain rules with regard to making ex parte contact, which gave rise to the disqualification issue later.

Q. When Ms. Gervasi asked you --

A. It also violated -- just so we're clear on this, Judge Kovachevich in the Middle District, in which we found ourselves operating, had ruled in previous cases that such conduct by Mr. Jacobs, which certainly we thought it was, was in violation of Florida ethical standards and rules.

Q. When Ms. Gervasi asked you about this general subject area, the fair import of the answer which I heard was that one of the benefits of your resisting producing these people, either for ex parte interviews, for depositions or anything else, was a substantial reduction in cost to the case, right?

A. That's correct.

Q. Now if you didn't object to them being deposed, and presumably the government could have deposed them, how does your resisting the ex parte interviews have anything to do with the expense which the Company incurred at that point?

A. Because that was the practical effect of our shutting down the ex parte contacts. Then Mr. Jacobs decided he didn't any longer want to proceed down that line.

Q. But Mr. Jacobs certainly could have --

A. He certainly could have, sure.

Q. -- deferred, or deposed them?

A. He absolutely could have done that, had he received permission from the court. As you know, under these new Federal Rules of Civil Procedure, you're limited in your first round. I think it's either ten or 15 depositions. But you can go to the court, and on good cause shown, raise that number substantially, which we both did.

Q. So the cost saving may have flowed from Mr. Jacobs as opposed to your resistance of the ex parte nature of the contacts; is that correct?

A. No, I wouldn't characterize it that way at all. I would say by the action I took, I shut Mr. Jacobs' operation down.

Q. But Mr. Jacobs certainly could have deposed him.

We're agreed on that; are we not?

A. He certainly could have noticed them for deposition, yes.

Q. You moved to disqualify Mr. Jacobs, did you?

A. Yes, I did.

Q. How far back do you and Mr. Jacobs go? Have y'all been acquainted before this case?

A. No, we had never met one another until this case.

Q. How did it serve the interests of the Florida Cities Water for you to move to disqualify Mr. Jacobs?

A. It served their interest because here was a fellow that was violating Florida law, violating the Department of Justice's, we thought, own regulations, and also, was a person who did not understand the Clean Water Act, and should -- had we gotten a different attorney, maybe they would have had a better understanding of the Clean Water Act.

Q. So that was really an effort to change attorneys?

A. To make sure that we had someone who would comply with the law.

Q. And you're addressing the law in terms of the ethical requirements that a lawyer has when you interview a party who's already represented, right?

A. Yes. And the whole matter was wrapped up fairly quickly. It wasn't a lengthy proceeding.

Q. But I thought you said that you also wanted a lawyer who understood the Clean Water Act better.

A. That's correct.

Q. And that was part of the reason for that motion, as well?

A. I wouldn't say it was part of it. It was certainly in the back of my mind. The reason I went after Mr. Jacobs is I felt he had violated Judge Kovachevich's clear standing law in the Middle District of Florida.

Q. That judge was sitting as a magistrate in that issue, was he?

MR. GATLIN: She.

BY MR. McLEAN:

Q. She, sorry.

A. Judge Kovachevich is the chief judge of the Middle District of Florida.

Q. Not a matter that comes frequently to my attention. There was an issue in there about, as I recall, you tried -- or at least -- not tried, I think you argued this disqualification issue to a magistrate; is that correct?

A. Judge Swartz. I felt he had just violated the rules, and I thought it was in this client's interest, if we had a lawyer that was violating the rules, that lawyer should no longer be on this case.

Q. And on Page 22, Line 13, you begin -- there's a phrase there which deals with the apparent denial of that motion to disqualify Mr. Jacobs.

A. Line 13.

Q. It actually begins at Line 12, Mr. Baise.

A. Okay.

Q. Way over on the right. In your testimony you say that the court did not see Mr. Jacobs as sufficiently unconscionable --

A. That's correct.

Q. And I stop on that because when I read the order I didn't see that the judge found that Mr. Jacobs had been unconscionable at all. Am I incorrect about that?

A. My recollection of the transcript is that the judge discussed his actions, and whether it met unconscionability. Mr. Jacobs testified that he went to Australia solely for vacation purposes and just decided since he was down there, he would just happen to drop by and see Mr. French. I will tell you, frankly, I didn't believe that, in light of the lunch I referred to earlier.

But the judge did, as I recall, discuss whether Mr. Jacobs' action rose to the level as set forth in Judge Kovachevich's opinion, and determined that if he was indeed down there on vacation and did just happen to go see this fellow, he was going to cut him a break.

Q. My question goes to this issue: You say, "because the court did not see Mr. Jacobs' action as sufficiently unconscionable." And my question is, did the judge find that Mr. Jacobs' action was unconscionable at all?

A. It didn't make a determination that his action was unconscionable, no. What it did do, though, Judge Swartz indicated that Mr. Jacobs could not proceed to contact anyone else without coming through me as counsel. I think there's a quote here somewhere in this paragraph that indicates that he didn't have carte blanche authority to go contact every witness in the case. Therefore, if he wanted to talk to anyone, he talked to me first about it.

Q. I have it.

A. So my view was at that point that I'd won 80 percent of, or 90 percent of, what I had been going after. Obviously I would have preferred having Mr. Jacobs disqualified, but that is a very serious charge to remove a lawyer under a motion to disqualify.

It was not an action taken lightly by me and my team. In fact, we agonized over it for several months, if you look at the time the actions occurred until we first filed our motion to disqualify. We felt his conduct was sufficiently egregious. He had misled us, certainly indirectly if not directly, with regard to deposing Mr. French, and the fact that the law was very clear, we

thought in Florida, with regard to ex parte contacts, that we had a specific obligation to defend this client's rights by making sure Mr. Jacobs complied with the law as we found it under Chief Judge Kovachevich in the Middle District of Florida.

Q. But the judge, when they ruled on your position on that, essentially ordered Mr. Jacobs to do that which he is ethically bound to do anyway, correct?

A. But he did not think he was ethically bound to do that, because he filed papers saying that he had every right to make these ex parte contacts.

Q. But the answer to my question is affirmative, right?

A. For you and I, we would agree that that is correct, but the Department of Justice takes the position it can have ex parte contacts even if a person is represented counsel. That has been ruled against by a couple of U.S. district courts, but the fact is that regulation, known as the Thornberg guidelines, or regulation, is still in effect. Justice thinks it is above the law or the rules of ethics and the canons of ethics in these states by making these ex parte contracts.

Q. In Line 14, can I strike the term "sufficiently" from your testimony without doing violence to the extent to which you accurately represent what the court found?

A. No, I would not agree to "sufficiently." That's exactly what I felt based on my review of -- I would say that's absolutely accurate.

Q. It is absolutely accurate that the court did not see Mr. Jacobs' action as sufficiently unconscionable, which necessarily implies, does it not, that the court found that it was at least somewhat unconscionable, correct?

A. That is my opinion as to --

Q. As to what the judge said.

A. As to what the judge said, and my being in the courtroom when this occurred, because I would say Mr. Jacobs came within a whisker. If he had not said he was there on vacation, in my opinion he would have been disqualified.

Q. The rest of us who weren't there have only the order to read.

A. That's correct. Well there's a transcript of this somewhere.

Q. It's also true, isn't it, that the judge speaks through the order and not through the transcript?

A. Absolutely. But you would have to look at the transcript to get sort of a feel for the order.

Q. Let's look at Page 30, Line 25, if you would, please.

A. Thirty.

Q. Bottom line, yes, sir, Page 30, bottom line. It

wasn't quite clear to me this reference to a negative attitude. I couldn't quite -- that's EPA's negative attitude. Was that -- I can't get a handle on whose negative attitude we're dealing with here.

A. Mr. Bradtmiller.

MR. GATLIN: Not Mr. Bradtmiller's negative attitude?

THE WITNESS: Paul Bradtmiller was an officer at Florida Cities, and he had referred in a memo --

MR. GATLIN: But the testimony doesn't say Mr. Bradtmiller is negative?

THE WITNESS: Yes, that's correct. And all I'm doing is just summarizing Mr. Bradtmiller's testimony, as I recall here.

BY MR. McLEAN:

Q. Was that the -- Mr. Bradtmiller's testimony where?

A. That would have been in his deposition. I believe it was November 21st, 1994, since I have that referred to on Line 21.

Q. Was that reference a characterization by the EPA as bunnyhuggers?

A. I don't think that was the memorandum, no. Mr. Bradtmiller was referring again, I believe, to this Mr. Pete McGarry had been involved in the meeting that Mr. Bradtmiller had attended years previous.

Q. Page 35, Line 5, there's a discussion about the offer of judgment, your Rule 68 offer of judgment?

A. Correct.

Q. Now in that offer of judgment, that's simply an offer to pay the government $500,000, right? That does not involve any admissions of wrongdoing; is that correct?

A. Correct.

Q. It's a matter of curiosity to me, and may have been to you too somehow, that sovereign immunity frustrates that offer of judgment. Could you briefly illuminate that point a little bit because that's essentially what happened in the long run, wasn't it, with respect to your request for costs?

A. The judge was -- I mean you can read his opinion as well as we can. That's how it sort of came out to us. He would like to have given it -- I thought we had a very clear shot at that, but he said since it's not specifically waived, he felt uneasy in doing that. In fact, I think that was one of the issues he invited the appeals court to take a look at.

Q. I'm looking through my notes here, Mr. Baise. I've not abandoned you. Page 41, Line 1. There is in italics up there, the "void ab initio" issue, and I'm a little unclear on what we're talking about there. Is that the res judicata issue?

A. No. That's a way I tried to knock this whole case out as quickly as I could, from the very beginning. Normally in these cases the government files its motion for summary judgment seeking obviously strict liability on the permit discharges, and subsequently the government did do that here. But in an effort to bring this case to a quick and painless end, as rapidly as I could, I had determined after the early depositions and the documents that we had discovered, that, as I said earlier, Ms. Kagey had violated EPA's own regulations, I realized that was a technical problem because the company had not filed its appeal within the 90-day period. But notwithstanding that, as you and I both know, that often times these jurisdictional issues can be overruled if a person was acting without authority of law or under violation of color of law.

So I went back to the common law of void ab initio and said that -- motion for summary judgment, that Ms. Kagey had operated in violation of the law, and therefore any decision that was derived from her action was obviously void ab initio. It was of no effect.

And we cited lots of Indian cases where this theory has worked, where the Indian tribes have signed contracts with the United States government. As we know, the Indian tribes were duped into signing many of these contracts, and as a result, the contract or the action was

voided. So I used those cases, plus marriage cases that I'm sure you're familiar with, where clearly the person is married, and you get married the second time, don't have your first divorce, the action is declared void ab initio.

Q. I'm not familiar with it, but it could happen.

A. It could happen because it's against public policy and you have violated the law. So I tried that in an effort to save this company as quickly as I could to get out of this case. The court basically said, nice try Mr. Baise, but I'm not going to go along with you on that.

Q. I skipped one of my questions here, Page 38 -- actually, Page 37 and 38. This is going to be a simple one. There is in your testimony reference to an order. It's the one that was the result of your moving to restrict what the government -- I think it's the culmination of the ex parte issue, where their complaint was ordered to essentially not include some matter which had been included before. And my Tab 42 deals with that ex parte witness identification thing. I meant to work this out before the deposition, but I would like to have the correct GHB-42. I was kind of wondering if your GHB-42 is the order which restricted that complaint or not.

MR. GATLIN: Let's look and see.

MR. McLEAN: I didn't mean to use deposition time with it, but I didn't have time before.

MR. GATLIN: You think there might be a wrong number?

MR. McLEAN: Yes. I think that's the order which dealt with the ex parte prohibition directed more or less Mr. Jacobs. And my -- the 42 which was referenced was one that kind of controlled what the government could -- there's a restriction on what they could allege because eventually the court ruled in the Company's favor on that res judicata issue.

THE WITNESS: Yes, it did. As you can tell, we had a heck of a dispute over Barefoot Bay and Carrollwood coming in. So that leaves the first amended complaint. I think I filed a rule or something on futility, that we had a defense on Barefoot Bay and Carrollwood, and tried to knock that out. The judge agrees with us initially. Mr. Jacobs and DOJ come back under a contract theory saying that we had signed a deal, but that deal only covered one day.

MR. GATLIN: The question, though, is, is Exhibit 42 the right reference?

THE WITNESS: I don't know if 42 --

MR. GATLIN: Look at 42 and see if it says what we say it says. When may have the wrong order. I don't know. Mr. McLean, we'd be glad to check that and let you know. Let's don't take time here to do it.

MR. McLEAN: That's fine.

THE WITNESS: The court ruled on the motion, and let's see, 42 is what? Our opposition to defend the motion to strike. So that cannot be.

MR. McLEAN: Just work that out and send me the right one.

MR. GATLIN: We can work that out later. Let's go on with the deposition.

BY MR. McLEAN:

Q. Yeah, man. Mr. Baise, I'll work that out with your counsel. I think there may be an error, not a big one, not substantive.

A. But clearly there were lots of disputes over the complaints and the amendments of the complaint going to the agency already deciding Carrollwood and Barefoot Bay, and that's why we moved to knock out his complaint.

Q. No problem with that. Page 41, Line 16, the DOJ exceeded the page limit on their motion for summary judgment, yet the court ruled on that summary judgment. What became of that page limit issue? Not that it's a biggy, but it struck my curiosity.

A. It's my recollection that we won on that, and the Department of Justice was required to go back and refile.

Q. Okay. Page 49, Line 10 of your testimony, you're discussing generally, I think, the results of the summary

judgment.

A. Which summary judgment here are we talking about? Oh, the final one where he knocks out Barefoot Bay and Carrollwood.

Q. To the extent that he did.

A. Yes.

Q. You find that that saved -- eliminated over $15 million in potential penalties. And I want to correlate that somehow.

A. Fifty million.

Q. Fifty million is what I meant to say. At $25,000 a hit, that's 2,000 violations, right? Let me just ask you to tell me where the 50 million came from. How did you come up with that number?

A. That number starts being derived from an interrogatory answered by Mr. Ken Kwan, where he adds up finally, and it took us some time to ever get the EPA to come up with the exact number of charges, and finally in an interrogatory he comes up with something like 104 million some few thousand dollars, and he breaks that out as Barefoot Bay, Carrollwood and Waterway Estates, much like the judge does in his opinion.

Q. Yes, sir.

A. And when you add up the numbers and attach those numbers to the paragraphs in the amended revised complaint,

it added up to roughly this number.

Q. And I think -- are you using $25,000 each?

A. Yes.

Q. Your -- and I'm going to have to skip around here a little bit. I apologize. Page 75, you are discussing the final order there. My arithmetic takes me to -- beginning on Page 75, continuing on to the next page -- 2,132 violations which the court sustained. Is that a valid number?

A. What page are we on? I'm sorry.

Q. Page 75.

A. Yes, I have Page 75.

Q. Reading your testimony there, beginning on Line 21 and continuing through 5, all I did was add up the violations which you mentioned and came up with 2,132 violations which the court found did in fact occur, right?

A. Right.

Q. And actually, you were discussing the final order there. And the final order is the point at which the court assesses fines for those violations, modest though they may be. He found the violations in the summary judgment, correct?

A. That's right. He found the technical violation that there was a violation of a permit.

Q. Now, if you were to take 104 million -- pardon me

for doing this. What I'm trying to figure out is -- and maybe you can tell me -- it appears that 2,132 violations alleged were sustained, and because of your $50 million number, I'm led to the notion that there were 2,000 violations alleged and denied. Is that valid? Is that a valid outlook for me to take?

A. I don't know about your math, but certainly there were a number of alleged violations of discharging without a permit, alleged at Barefoot Bay and Carrollwood. Whether that added up to 2,000, I can't tell you. You can certainly go back and figure it up.

Q. You're saying on Page 49 that that summary judgment essentially let y'all -- I don't want to say let you off, because you'll object to that.

A. Yes, sir.

Q. Exactly --

A. We were never liable for them in the first instance.

Q. Of course not. So you couldn't have been left off. But my point is -- how to phrase it -- the $50 million is fines which you were certain you would not have to pay at the end of the summary judgment, right?

A. Absolutely.

Q. And the 50 million is based upon your calculation of 25,000 per day per violation?

A. That is correct.

Q. Did you agree with my sum of 2,132 violations?

A. I don't know that I agreed with it. I assume your math is roughly correct. My recollection from the trial was that there were about 18- or 1900 violations left, but it's so close to 2,000, it may be correct.

Q. But it would be an ministerial act, but the correct way to perform that ministerial act would be is to look at your testimony on Page 75, add up the violations and come to a sum; is that correct?

A. That's correct. But the point is you would want to go to back to Ken Kwan's interrogatory to get the exact number.

Q. All right, sir. After the summary judgment, the government changed its view somewhat and gave you a less than attractive offer of 2.2 million to settle it, correct?

A. That is correct. As you know under the rules, you have to have a -- sort of a pretrial meeting, and at that point both parties are to walk in with their final and best offer in hand, and the person making that offer has to have the authority to accept on the spot.

Q. Did you avail yourself of the opportunity to throw it back across the table at them by any chance?

A. No, sir.

Q. I think I would have.

A. We are gentlemen. We do not engage in that kind of conduct.

Q. Just kidding.

A. I understand. I understand. But what we did do --

Q. You rejected it?

A. No, I didn't object.

Q. Reject.

A. I'm trying to think of the number that we gave. I assume -- I would have to go check whether we stuck with our 500,000, or we brought it back to the original 200,000. I just don't -- may I consult with Mr. Bullock for a moment on that?

Q. It's not important for me to know whether you countered with a little bit.

A. You don't counter in those situations. Each party comes with what they're willing to, in essence, write a check for within a day or two after.

Q. But at that point surely you can still negotiate on the spot?

A. You could certainly negotiate on the spot.

Q. My real question, which I was certain I would eventually get to, is, did that offer of settlement require FCWC to admit wrongdoing?

MR. GATLIN: We're talking about the 2,200,000 --

MR. McLEAN: Yes, sir.

THE WITNESS: That would depend on how you wrote the consent order, so no, I don't think so.

BY MR. McLEAN:

Q. So when the government said, we will settle for 2.2 million, they did not at that point require you to admit wrongdoing; they just wanted a check for 2.2 million?

A. You would have to ask the government what their position would be on that. Clearly, if one was going to write that kind of check, you are agreeing that you have a technical violation here, and whether or not the government would say, as you've often times see in the antitrust cases, neither side admits or denies anything --

Q. Sure, and that would be the likely language of that order, or can you say?

A. Typically, in consent orders, the ones I'm familiar with, you indicate that you have violated a consent order, but in a case like this, when we're in litigation, I would go back to my original point, you would have to ask the Department of Justice. It was not a condition that was laid on the table that day.

Q. I'm trying to get to the importance of the notion of admitting wrongdoing to FCWC. Was that a particularly important issue to that client, or was the money the principal issue, or how can you apportion the importance, if

you can at all?

A. I would say it was a question of the money being wrongly assessed against the Company and its ratepayers is how I looked at it at the time. The amount sought versus what this company had done and the fact that this company had been in compliance with the law for years just did not justify any kind of fine. They had been, frankly, put into violation of the law by an action of the United States government. And so any payment that would justify the government's wrongdoing here, I just found to be an anathema. I could not recommend that the client sign something that the government had created or caused. This client did not cause it.

Q. Aside from mitigation of the penalty considerations, did the court ever find that the government misbehaved in any way?

A. No, it did not.

Q. Did you have instructions from your client to avoid a finding of wrongdoing -- I don't want to say at all costs, but in conditions which in your judgment were unreasonable? Do you follow that question?

A. Yeah, I think I follow it.

Q. Okay.

A. First of all, that's an attorney/client privileged question, but the fact is, no, I never had any instructions.

Q. What was Chuck Hill -- Chuck Hill is an employee of the Public Service Commission, we're talking about the same one? Actually, I don't think you talked about it. Chuck Hill was a proposed witness.

A. Yes, he was.

Q. What was his proposed role in the case?

A. Actually, Mr. Bullock was going to handle him. He was from the Public Service Commission, or had a Public Service Commission background, and he was, as I recall, going to testify to the effect that the Company had dealt sufficiently with its public commitments in a realistic fashion, as I recall, but I would have to go check on that.

Q. Is it safe to say he wasn't a pivotal witness as far as your strategy was involved?

A. He was our last witness, and frankly, I'm searching desperately to think what it was he was going to testify about, and the court certainly didn't feel that he was pivotal.

Q. Could it have been the issue of whether the company could obtain economic benefit by deferring construction?

A. Keith Cartee (Phonetic) discussed that, but it may have been that we had Hill in there to do that. I'll just have to go back and check. I've lost my memory on that.

Q. You need not go back on my behalf.

A. If I recall correctly, he was a PSC person by background.

Q. And still is.

A. Okay.

Q. Yeah, he's boss of everybody in this room except me and Ken and the court reporter, I think, and the lawyer.

A. So you need to talk to him about what we were going to talk to him about.

Q. That wouldn't do me any good at all.

A. But I assume, and I do remember this, we would not have had him coming down to testify if he had not been helpful to our position.

Q. Sure. I'll settle for that. Page 74, Line 23. Get into this res judicata thing, and I think you -- this is the seventh request for reconsideration about this res judicata business, right?

A. It's not only res judicata. It seems as though every time Mr. Jacobs had a ruling go against him he would, sometimes in violation of the rules, come back and seek to discern the judge's opinion because he lost, I think we say the seventh time, but I think all together he sought nine separate reviews, which obviously drove up the costs for this client, and I think I'm correct on this, he lost every one of them.

Q. The judge reversed himself on the res judicata

issue, didn't he?

A. He did. Not on res judicata. What the judge did, the one time I think he reversed himself, is on those complaints. There are about three complaints. One time when the Justice Department comes back with a motion, the judge agrees with them, but when the judge handed down his opinion in November of '95, the judge came back and agreed with us on Barefoot Bay and Carrollwood that they both should be knocked out, with the exception of the actual permit exceedences.

Q. Refer back, if you would, to Page 41 on Line 4 of your testimony.

A. 41?

Q. Yes, sir, Line 4, the court also reversed its earlier rulings and allowed DOJ to proceed with its causes of actions for discharge without a permit at Barefoot and Carrollwood.

A. That's what I was referring to.

Q. But that's not the res judicata issue? Am I using that term incorrectly there?

A. At this point we're talking about the complaints themselves. Eventually what knocked out both of these -- in the larger sense, you are correct.

Q. Page 81, 21 of your testimony -- getting very near the end of my spiel here -- Page 81, 21, let me know when

you have it.

A. Yes, sir.

Q. FCWC agreed to certain penalties. That caught my eye. At what point did you do that? Are you talking about the settlement offers?

A. What I agreed to, there were a couple of -- a couple of, I think, nitrogen violations at Waterway Estates. They were like a thousand dollars each, and just wasn't worth the time of the client to litigate those things, as I recall.

Q. So that was in the earlier administrative --

A. No, no, this was the amount of the penalties, because when I made the -- I believe in my opening statement, or somewhere along the line, I made the point that there were certainly alleged exceedences that we were just not going to contest.

Q. Okay. Let me change focus entirely.

A. Again, at this point these matters had been mitigated, we felt, sufficiently, and we just didn't want to get into what I thought at that time really was a distraction.

Q. Let me change focus entirely just for a moment and ask you, exclusive of this action, which is before the Commission now, which is -- you've been hired as a witness in this case, when did you last invoice Florida Cities Water

for your services rendered in the EPA and DOJ litigation case?

A. I don't know. I would say -- because there hasn't really been anything going on for the last several months. I would have to go look. I suspect it was shortly after I finished this testimony.

MR. GATLIN: I think Mr. McLean is asking for the last bills relating to the litigation.

MR. McLEAN: Yes, sir, that's correct. Not this case.

THE WITNESS: It would be after the appeal was concluded, and that would have been --

BY MR. McLEAN:

Q. I'll settle for more than two years ago if you think that's correct.

A. I don't know. It would just be a guess on my --

MR. GATLIN: Mr. McLean, in an effort to be helpful, there's an exhibit that shows that.

THE WITNESS: I had not been hired as a witness.

BY MR. McLEAN:

Q. I want to get to the issue of when Mr. Baise believed that his retention for the litigation case was pretty much at an end, and I don't mean in terms of ethical obligation of the Company or anything like that, but when did you believe that that case had pretty much ended,

exclusive, again, of this case which is currently before the Commission? You understand the question?

A. No, I'm just thinking of when all those discussions occurred on the bills. I've got the billing statements here.

Q. Let me draw a distinction for you. And Mr. Gatlin may be right, I probably ought to just look this one up. But I want your impression as to when your duties with respect to litigating this case before the DOJ came to an end.

I would speculate -- of course I don't know, but I would speculate that it was around the time that the appeals were dropped, the final judgment issued, the check paid and so forth. Is that essentially when your retention for this case concluded?

A. Yes. Actually on the check being paid actually occurred sometime after we had heard from the Department of Justice. I would say it was sometime last summer, August, September, October.

Q. When the check was paid?

A. Yes. The check was paid somewhat later, but the actual appeal was dropped May or June of '97.

Q. '97. Okay.

A. And then it took some time, because I know Mr. Bullock talked to the Department of Justice lawyer on

interest. We had several conversations on that, where the check was to be delivered to, by whom, what have you, just sort of little nitpicking procedural items. But in terms of representation, it occurred when I told you about that telephone conversation that I received, that they were going to drop the appeal, and that the papers were obviously being appropriately created by the Department of Justice. We signed off on them.

Q. What was the date of that, give or take?

A. I would have to look at it, but I would say, again, that's May or June period. Might have gone over into July.

Q. Of '97?

A. Roughly the middle of '97.

Q. And you were retained in the case at what point?

A. I was actually retained, and I think the bills show this, the first call I received was from Dennis Getman sometime around the 1st of June, 1993. And I noticed in my bills at the time, I didn't charge him for the telephone call that he made. So I can't give you the exact date. He called me up and asked me to call this other law firm, and I note from my billing, I don't start billing until I guess I get the papers, so I don't have an exact date of when Dennis Getman actually called.

Q. So your involvement in the case was roughly four

years, give or take?

A. June of '93, yes, looks like that's about right.

Q. I think Ms. Gervasi asked you this question in so many words, but let me ask it with my spin on it. Was the court -- can you think of any point at which the court was made aware, if indeed it was, that either the costs or the penalties which might result from this litigation would be passed on to the customers of FCWC?

A. I don't think it ever came up.

Q. It was not discussed at all, for example, in the economic detriment argument? Isn't that what y'all call it?

A. Economic benefit, economic benefit to the Company.

Q. I understand that principle, but what is the opportunity of the Company, if any, to pass along this -- the expenses and the penalty to someone else? Was that ever -- did that ever come up in that discussion? Now you said basically it didn't come up in the entire case, right?

A. In the trial, I'm trying to think back here through the deposition.

Q. Came up in Mr. Allen's deposition, but that was the last that I heard of it.

A. Did it? I'm just not aware. But certainly at trial, I didn't put on anything on those lines, and I don't think the Department of Justice ever said anything about it. We knocked out -- one of their witnesses was going to

talk about economics and what -- whether that person would have done anything, I don't know. But I just don't think it ever came up.

Q. When you had -- let me ask you just a couple last questions here. Mr. Allen was a witness for both you -- you, I'm sorry -- for both FCWC and for Avatar; is that correct?

A. Well, I would call him an FCWC witness because we called him.

Q. He was sponsored -- was he ever sponsored by Mr. Hird? Was he ever sponsored by Avatar?

A. I don't think so. He was called by us, and then he was questioned by Mr. Hird, but he was an FCWC witness. He was called by me.

Q. He was questioned as a witness in Avatar's direct case, was he not? In other words he wasn't cross examined or held to be an adverse witness?

A. That's correct. He obviously would have been asked questions as a direct fact witness and not as a hostile witness, where he had been crossed.

Q. Sure, but Avatar would have to look primarily to Mr. Allen, would they not, to isolate -- if you'll permit the use of the term -- the decisions which were made -- isolate Avatar from the decisions which were made by Florida Cities Water Company, in this case from FCWC; is that right?

A. No, he wasn't the only one.

Q. Was he the principal one?

A. Would he be the principal? I mean, he clearly would be a key part of the equation, but the Department of Justice called the chairman of the board and Mr. Levy in an effort to establish a review that was undertaken, I believe, by not only Mr. Levy but I think Mr. Slapkis, who had also passed away, I think at that point.

Q. Were you at all concerned that Mr. Allen might be faced with divergent interests, i.e., that of Avatar and Florida Cities Water Company, or did you really -- and I guess this is a compound question, so please forgive it, but did you believe that the interests of Avatar and Florida Cities Water Company were essentially the same?

A. I don't know if the question ever arose. Mr. Allen told the truth, and what the decision-making process was. We talked to a number of people through Mr. Hird about what happened at Avatar. So the question just never came up.

Q. One last issue, and maybe just one last question. You told Ms. Gervasi that you didn't bear -- that Avatar dealt with their own defense. You didn't provide any defense for Avatar; you dealt with Florida Cities Water Company, right?

A. That's correct. FCWC hired me, and it was the

fact that this company was the permit holder. And under the Clean Water Act, you go after, quote, "the violator," unquote. So Avatar wasn't ever, in my opinion, one, a holder of the permit.

Q. But DOJ wanted to tie them into it, didn't they?

A. Absolutely. That's the only way they felt they could get the money, because they knew that the type of fine that they were seeking, that they couldn't get that out of Florida Cities, so they wanted to get to the parent's deeper pocket.

Q. Sure. And you began to suspect that, did you not, after the first complaint when they began to depose a number of people who might speak to that issue; is that correct? Or maybe you suspected it before then, but that was certainly some gathering storm clouds with respect to that issue, wasn't it?

A. Gathering storm clouds, I would agree with you.

Q. Now, did Avatar provide those witnesses with the representation during those depositions, or was that held to be your duty?

A. You would have to identify the witnesses. I just don't recall.

Q. Okay. And well, I don't want to refer specifically your testimony, but in general in your testimony you do identify a number of witnesses who were

deposed, and I got the distinct impression that you were saying, looks like they didn't get after Avatar because they are deposing these witnesses who know about that issue.

A. Oh, absolutely. My suspicions were certainly being aroused by discovery, and the fact that we were being successful in showing that the Waterway Estates case wasn't much of a case, if any case at all.

Q. Were there any of those witnesses who you said, wait a minute, this is Avatar's baby, let Avatar represent those witnesses at deposition? Did you ever do that?

A. No, because I think at that point when they first came on we just weren't quite clear where the government was going.

Q. And as it later turned out, the government was indeed -- matter of fact, one of the aspects of the amended complaint was they went after Avatar at that point, right?

A. Absolutely. It finally came out in the open at that point that they were going after Avatar.

Q. And Avatar's liability was not established at summary judgment level; it actually went to trial, didn't it?

A. That's correct.

Q. So looking back to these various --

A. These witnesses, for the most part, without identifying them specifically, I mean could cover the

testimony for both companies, I think at that point.

Q. Sure. But it was clear at the point that you mentioned in your testimony that they were in fact being sought and deposed by the government because they could testify to the Avatar liability issue, correct?

A. It would start out with Florida Cities. I mean, that was always -- and I can't think of -- that's why I was asking you earlier if you can identify which witness, because I'm thinking most of them.

Q. Okay.

A. It was from a Florida Cities' standpoint, even someone like Levy, it would tie back to Florida Cities.

Q. And certainly be relevant to both issues, namely the liability of Florida Cities and of Avatar, but was there any attempt at any point in this case to make -- and by this case I mean the case now before the Commission -- to apportion any expenses related to any of those depositions to Avatar, on the one hand, and Florida Cities on the other, or was the assumption indulged that those witnesses were deposed on behalf, if you'll permit the characterization, of Florida Cities Water Company?

A. Yeah, I would have to say at the time I was looking at them from a Florida Cities' standpoint.

Q. One second, and I think I'm through. There was one other, twice when you mentioned, you said, letting

Carrollwood and Barefoot Bay off the hook. And I certainly agree that the economic penalty was substantially lessened, so I don't want to hear about that, but there was, in fact, violations found at both those facilities, correct?

A. Yes, there were exceedences having to do with phosphorus and nitrogen, because neither facility was set up to meet this AWT standard. And the Carrollwood situation, as you can tell from the record, we were moving -- finally after all the delay caused by Hillsborough County, we moved, or FCWC moved, to shut that facility down. So there was a short period of time where the facility still was not being AWT, but what we pointed out to the court, and one reason you see these fines being insignificant, is that these facilities were operating, and this company operated these facilities at such a high level, they exceeded substantially a secondary treatment plant's levels. And this was testified to by this -- by Dr. Smith.

Q. Those were then actual violations of the permit?

A. They were technical exceedences. I never like to use the word "violation," because under the state of Florida, you're given a period of time to bring yourself into compliance.

Under the Clean Water Act, once you have a permit, and you're not meeting that permit, you don't have any period of time to bring yourself into compliance. It's just

one of the anomalies of the act. So we would say exceedences, yes, but the court saw that those exceedences were so insignificant in light of the good job these folks were doing in operating the facilities. That's why there was virtually no fine in either one of these facilities.

Q. The court didn't show any hesitation in calling them violations, did they -- did he?

A. Well the court has to make that determination just under the statute that these are violations to fit within Section 301.309 of the statute.

Q. Mr. Baise, thank you very much. I have nothing further.

MS. GERVASI: Mr. Gatlin?

MR. GATLIN: I have no questions.

MS. GERVASI: Can we establish a deadline for the three late-filed exhibits? Do you think you can get them in two weeks?

THE WITNESS: That is fine.

MR. GATLIN: Would you give me a memorandum or letter or something to make sure we have the right ones?

MR. McLEAN: Could I throw tab 42 in there along with it? I would like to see what that order says. It's not a big deal.

MR. GATLIN: Yes, I have a note on that. You want

REPORTER'S DEPOSITION CERTIFICATE

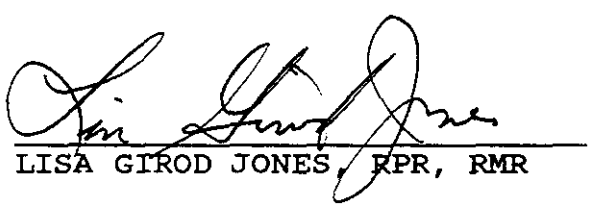
STATE OF FLORIDA)

COUNTY OF LEON)

I, LISA GIROD JONES, Registered Professional Reporter, certify that I was authorized to and did stenographically report the above-styled deposition; that a review of the transcript WAS requested; and that the transcript is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED this 26th day of May 1998.



LISA GIROD JONES, RPR, RMR

an exhibit as to what's supposed to be on 42?

MR. McLEAN: Whatever you intended to put on 42.

I think that just the wrong order was put in there, but I looked through the rest of the material and could not find the right order. Particularly since I have that order, I was reading it and I thought, I've seen this before.

MR. GATLIN: Just skimming it now, looks like we might have put the wrong order in there, but we'll make that determination and let you know.

MR. McLEAN: Thank you, sir.

MS. GERVASI: Mr. Baise, thank you very much and that concludes the deposition.

(Deposition concluded at 1:00 p.m.)

CERTIFICATE OF ADMINISTERING OATH

STATE OF FLORIDA)

COUNTY OF LEON)

I, LISA GIROD JONES, Registered Professional Reporter and Notary Public for the State of Florida;

DO HEREBY CERTIFY that the witness named herein personally appeared before me at the time and place designated and was duly sworn.

WITNESS MY HAND AND SEAL this 26th day of May, 1998, in the County of Leon, State of Florida.

Lisa Girod Jones, RPR, RMR
Notary Public, State of Florida

Lisa Girod Jones
MY COMMISSION # CC639729 EXPIRES
May 11, 2001
BONDED THRU TROY FAIN INSURANCE, INC.

AAR

FLORIDA CITIES WATER COMPANY

No 2

TO: A.A. Reeves III

DATE: August 10, 1986

FROM: P.J. Lehman

SUBJ: Waterway Estates WWTP
DER Meeting July 29, 1986
NPDES/DER Permit Renewals

The above referenced meeting was held at the Ft. Myers DER office at the request of the DER.

Attending:

V. Melee, DER
L. Adair, DER
G. Romeis, DER
P. Lehman, FCWC

The referenced meeting was precipitated by the NPDES denial from the EPA. Waterway Estates WWTP has a valid DER Operating Permit with an expiration date of August 2, 1988. The DER recognizes this fact and will honor the existing Permit.

The local South Florida District DER office has recommended to Tallahassee the following:

1) Compliance with no discharge should be at expiration of current DER Operating Permit, August 2, 1988.

2) There should be no nutrient limits on existing WWTP. All Monitoring should be in accordance with DER regulations plus addition of quarterly monitoring of nutrients.

The attached DER inter-office memo outlines the above DER District Office recommendations.

The purpose of the meeting was to establish a compliance schedule with the DER to meet the August 2, 1988 deadline. Discharge option to the Caloosahatchee River would require a wasteload allocation. There currently is available capacity and if FCWC requests a WLA, the DER should be able to comply within four weeks. Other disposal options are available, i.e., upland spray irrigation or deep well injection, depending on the cost-effectiveness.

FCWC is to respond to the DER with a proposed compliance schedule providing target dates for major tasks completion in order to comply with the August 2, 1988 date to maintain no-discharge to the canal. The DER will formulate a consent agreement to this effect.

FLORIDA CITIES WATER COMPANY
2112 Gulf Gate Drive
P.O. BOX 5846
Sarasota, Florida 34277
813-924-1128

No 2 -

JRU ✓
JDW 10-16-86
FILE: NPDES 3.3.4

FLORIDA CITIES WATER COMPANY

September 16, 1986

Ms. Connie A. Kagey, Environmental Engineer
Water Management Division
U.S. Environmental Protection Agency
Region IV
345 Courtland Street
Atlanta, Georgia 30365

Re: Waterway Estates Wastewater Treatment Plant
NPDES Permit No. FL0030325

Dear Mrs. Kagey:

The following actions have been initiated regarding the information requested in your letter dated July 28, 1986:

1) The proposed compliance schedule is as follows:

	Task	Completion Date
1.	Demographic study and flow projections	10-31-86
2.	Engineering study of treatment and effluent disposal alternatives and process selection	1-31-87
3.	Prepare detailed engineering plans and and specifications	5-30-87
4.	Submit construction permit application to Florida DER	7-15-87
5.	Solicit bids for construction	9-15-87
6.	Award construction contract	11-30-87
7.	Complete construction and start-up	8-1-88
8.	Certify wastewater treatment plant is in compliance	12-31-88

FLORIDA CITIES WATER COMPANY
2112 Gulf Gate Drive
P[illegible] BOX 5846
Sarasota, Florida 34277
813-924-1128

Ms. Connie A. Kagey, Environmental Engineer September 16, 1988
Water Management Division
U.S. Environmental Protection Agency
Region IV

2) The existing DER operating permit No. D036-72569 is valid through August 2, 1988. The DER has stated that there are no problems with the current operation and the existing discharge limitations should remain in effect until expiration of the operating permit in 1988 per chapter 17-3, 17-4 and 17-6 FAC for conventional secondary wastewater treatment. No nutrient (nitrogen and phosphorus) limits should be placed on the discharge until the existing DER permit expires. Meanwhile, Total N and Total P will be monitored for effluent samples on a quarterly basis. All parameters will be monitored in accordance with Chapter 17-19 FAC.

If you have any questions, please do not hesitate to call me at (813) 936-1113.

Sincerely,

Patrick J. Lehman, P.E.
Operations Manager

PJL:jd

cc: Bennie Shoemaker
District NPDES Engineer
Ft. Myers

Gary Baise's Deposition Exhibit 2
1 of 3

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA Plaintiff, v. CITY OF CAPE CORAL, FLORIDA, and THE STATE OF FLORIDA, Defendants.	CIVIL ACTION NO. 91-59-CIV-FTM-15(D)

CONSENT DECREE

Plaintiff, the United States of America ("United States"), on behalf of the United States Environmental Protection Agency ("EPA"), filed a Complaint on March 15, 1991, alleging that Defendant City of Cape Coral ("Cape Coral"), violated the Clean Water Act, 33 U.S.C. § 1251 et seq., and the conditions and limitations of National Pollutant Discharge Elimination System ("NPDES") Permit Number FL0030007.

Defendant owns and operates a publicly-owned treatment works ("POTW") known as the Everest Parkway Water Reclamation Plant, which discharges into the Caloosahatchee River.

The State of Florida has been joined as a Defendant pursuant to Section 309(e) of the Clean Water Act, 33 U.S.C. § 1319(e). Under Section 309(e), the State of Florida shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against Cape Coral, to the

extent that the laws of the State of Florida prevent Cape Coral from raising revenues need to comply with such judgment.

The undersigned parties have consented to the entry of this Decree without trial of any issues, and hereby stipulate to the Court that in order to settle the allegations stated in the United States' Complaint, this Consent Decree should be entered.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

I. JURISDICTION

This Court has jurisdiction over the subject matter of this action and over the parties hereto pursuant to Section 309 of the Act, 33 U.S.C. § 1319, and 28 U.S.C. §§ 1345 and 1355. The Complaint states a claim upon which relief may be granted under Section 309 of the Act, 33 U.S.C. § 1319.

II. BINDING EFFECT

The provisions of this Consent Decree shall apply to and be binding upon the United States and Cape Coral and upon Cape Coral's officers, directors, agents, servants, employees, successors, assigns, and all persons, firms and corporations acting under the control or direction of Cape Coral. No later than thirty (30) days prior to transfer of ownership, operation, or other interest in the facility, Cape Coral shall give written notice of this Consent Decree to any such transferee; Cape Coral shall require, as a condition of the transfer, that the transferee fully comply with all terms and conditions of this Decree. Cape Coral shall also provide a copy of this Decree to

each contractor retained to perform any activity required by this Decree, and shall require any such contractor to fully comply with all terms and conditions of this Decree. Cape Coral shall notify in writing EPA Region IV, and the United States Department of Justice, at least thirty (30) days prior to any such transfer.

III. OBJECTIVES

The express purpose of the undersigned parties in entering into this Consent Decree is to further the objectives of the Clean Water Act, as stated at Section 101 of the Act, 33 U.S.C. § 1251. All plans, studies, construction, remedial maintenance, monitoring programs, and other obligations in this Decree or resulting from the activities required by this Decree shall have the objective of causing Cape Coral to come into and remain in full compliance with the Clean Water Act, including compliance with the terms and conditions of NPDES Permit Number FL00300007, and any renewals, modifications, and amendments to that Permit. It is also the express purpose of this Consent Decree to cause Cape Coral to fully comply with the provisions of all other applicable federal and state laws and regulations governing Cape Coral's operation of its POTW and discharges therefrom, and to minimize to the greatest extent possible the discharge of pollutants into the Caloosahatchee River.

IV. DEFINITIONS

Unless otherwise defined herein, terms used in this Decree shall have the meaning given to those terms in the Clean Water Act, 33 U.S.C. § 1251 et seq., the regulations promulgated

thereunder, and in any applicable NPDES permit.

V. COMPLIANCE WITH NPDES PERMIT

A. Cape Coral shall at all times fully comply with its NPDES Permit and the Clean Water Act.

B. Cape Coral shall take the following measures, and all other measures practicable, in order to ensure to the maximum extent possible that it complies with the effluent toxicity limits of its NPDES Permit:

1. Beginning no later than thirty days after entry of this Decree, and continuing for a period of twelve months, Cape Coral shall conduct monthly short-term mysid shrimp (Mysidopsis bahia) Survival, Growth and Fecundity Tests, and 48-hour mysid shrimp acute static tests on effluent from its POTW, following the procedures for such tests specified in its NPDES permit. Cape Coral shall analyze each sample used in the toxicity tests and a 24-hour composite influent sample (composed approximately one treatment plant detention period prior to composition of the effluent composite sample used for the toxicity tests) for the presence of the pesticide chemical diazinon.

2. If the effluent so tested fails any toxicity test described above in two consecutive months or there are, in the aggregate, four failures of any such test during the twelve month testing period, Cape Coral shall forthwith conduct a Toxicity Identification Evaluation (TIE), in accordance with the procedures contained in EPA publications EPA/600/3-88/034, 035, 036, Methods for Aquatic Toxicity Identification Evaluations.

3. Within thirty (30) days of the completion of the series of tests referred to in subparagraph 1 above, Cape Coral shall submit to EPA a comprehensive report assessing the results of those tests. Within sixty (60) days of the completion of the TIE, if one was required by EPA under subparagraph 2, Cape Coral shall submit to EPA a comprehensive report assessing the results of the TIE.

4. No later than thirty (30) days of its signature of this decree, Cape Coral shall submit to EPA for approval a public awareness plan designed to

reduce the amount of pesticide chemicals which are deposited into its sewer system. Cape Coral shall make any modifications to the plan required by EPA, and shall fully implement the plan, as modified, all within thirty (30) days of notification by EPA.

VI. MONITORING AND REPORTING

A. In addition to the monitoring and reporting requirements contained in its NPDES Permit, and in addition to the reporting requirements set out in Paragraph V(2) of this Decree, beginning with the calendar month in which this Decree is entered, and for every calendar month thereafter, Cape Coral shall submit a written progress report to EPA Region IV. The progress report shall fully describe all matters arising that month which relate to compliance with this Decree and, at a minimum, shall include the following information: (1) the status and progress of compliance measures required by this Decree; (2) sampling, testing, and monitoring results; and (3) a certification of compliance with all aspects of this Decree, or, in the alternative, a full description of each violation of this Decree, together with the reasons therefor and a description of any actions taken to remedy the violation and/or to prevent additional such violations. The progress report shall also include a projection of any compliance measures to be performed pursuant to this Decree during the following twelve (12) month period.

B. Each progress report shall be submitted within the first fifteen (15) days of the month immediately following the month which is the subject of the report. The full report shall

be made available for inspection by any person at Cape Coral's offices.

VII. STIPULATED PENALTIES

A. Effective January 1, 1992, Cape Coral shall pay stipulated civil penalties as follows for (i) each and every failure to comply with any deadline or affirmative requirement imposed under Articles II, V, VI, VII, X or XII of this Decree, and, (ii) for each and every violation of its NPDES permit except as specified in subparagraph B following:

Period of Failure to Comply	Penalty
1st to 30th day	$1,000.00/day per violation
31st to 60th day	$2,000.00/day per violation
After 60 days	$5,000.00/day per violation

B. Effective January 1, 1992, Cape Coral shall pay stipulated civil penalties as follows for each instance of noncompliance with any effluent limitation contained in its NPDES Permit:

Discharge Limitation	Penalty
Weekly Average Limit	$ 3,000 per week
Monthly Average Limit	$10,000 per month
Annual Average Limit	$25,000 per month
Acute Toxicity Limit	$20,000 per violation[1]
Chronic Toxicity Limit	$10,000 per violation[1]
Other effluent Limits	$ 500 per day

C. The stipulated penalties herein shall be in addition to other remedies or sanctions available to the United States by reason of Cape Coral's failure to comply with the requirements of

[1] This stipulated penalty applies only to violations occurring after July 1, 1995.

this Decree, any NPDES Permits, or the Clean Water Act.

D. Cape Coral shall pay stipulated penalties without demand no later than the 28th day of the month following the month in which the violation(s) occurred. Payment shall be made by cashier's check payable to the "Treasurer of the United States," and tendered to the United States Attorney for the Middle District of Florida, together with a letter describing the violation. A copy of the letter and the check shall be sent to the addressees specified in Section XVII herein.

VIII. FUNDING

Compliance with the terms of this Consent Decree by Cape Coral is not conditioned in any way on the receipt of any Federal or State grant funds.

IX. DELAYS OR IMPEDIMENTS TO PERFORMANCE

A. If any event occurs which causes, or Cape Coral reasonably believes is likely to cause it to violate any provision of this Decree, Cape Coral shall notify in writing the Court and the addressees specified in Section XVII herein within ten (10) days of the event. The notice, which shall be signed by an officer of Cape Coral under oath, shall specifically reference this Section of the Decree and describe in detail (1) the nature and duration of the violation; (2) the precise cause or causes of the violation; (3) the remedial measures taken or to be taken by Cape Coral to prevent or minimize the extent of violation, as well as to prevent future such violations; and (4) the timetable for implementation of the remedial measures. Cape Coral shall

adopt all reasonable measures to avoid or minimize any such violation. Failure by Cape Coral to comply with the notice requirement of this Section shall bar Cape Coral from requesting from EPA (1) an extension of time for performance of an obligation under this Decree and (2) a waiver of stipulated penalties.

B. Cape Coral may request from EPA an extension of time and/or a waiver of stipulated penalties for any violation or delay, provided Cape Coral complies with the notice requirement of paragraph A above and submits a sworn statement by its officer to the effect that the violation has been or will be caused entirely by circumstances beyond the control of Cape Coral or any entity controlled by Cape Coral, including Cape Coral's consultants and contractors, and that Cape Coral could not have foreseen and prevented such violation. If EPA agrees with the statement, it may extend the time for performance of a requirement under this Decree, and/or may waive any stipulated penalties. In the event EPA denies Cape Coral's request, Cape Coral may submit the matter to the Court for dispute resolution pursuant to Section XI of this Decree. In any such proceeding, in addition to the burdens imposed by Section XI, Cape Coral shall bear the burden of proving that any delay or violation of any requirement of this Consent Decree was caused entirely by circumstances beyond the control of Cape Coral or any entity controlled by Cape Coral, including its consultants and contractors. Cape Coral shall also bear the burden of proving

the duration and extent of any delay or violation attributable to such circumstances. Pending any decision by EPA and/or the Court, stipulated penalties shall be paid as provided herein.

C. Unanticipated or increased costs or expenses associated with the implementation of this Decree, changed financial circumstances, or technical infeasibility of meeting any NPDES effluent limitations shall not, in any event, serve as a basis for changes in this Decree, waiver of stipulated penalties, or extension of time under this Decree.

D. Compliance with any requirement of this Decree by itself, shall not constitute compliance with any other requirement. An extension of a specified compliance date based on a particular incident does not extend any subsequent compliance date or dates. Cape Coral must make an individual showing of proof regarding each delayed incremental step or other requirement for which an extension is sought.

X. PENALTY FOR PAST VIOLATIONS

Cape Coral shall pay a civil penalty in the amount of $750,000.00, plus interest, in full satisfaction of the United States' civil claims for Cape Coral's violations of its NPDES Permit and the Clean Water Act, as set forth in the Complaint filed herein, through January 1, 1992. Payment shall be made as follows:

(1) Within thirty (30) days of the entry of this Consent Decree, Cape Coral shall pay $375,000.00.

(2) No later than thirteen months after entry of this

Consent Decree, Cape Coral shall pay $375,000.00, plus interest on that amount accrued from the date of entry of this Decree, at the rate provided in 28 U.S.C. § 1961(a). Interest shall be compounded annually.

All payments shall be made by delivering a cashier's check made payable to the "Treasurer of the United States" to the United States Attorney for the Middle District of Florida. A copy of the check and the letter tendering such check shall be mailed to the addressees specified in Section XVII herein. Payments shall not be deductible for federal taxation purposes.

Neither the payment of this penalty nor Cape Coral's consent to this Decree shall constitute an admission of liability.

XI. DISPUTE RESOLUTION

If the parties are unable to agree upon any plan, procedure, standard, requirement, or other matter described herein, or in the event a dispute should arise among the parties regarding the implementation of the requirements of this Decree, Cape Coral shall follow the instructions of the United States unless it seeks a review in this court by appropriate pleading or motion filed within thirty (30) days of receipt of the United States' final written position concerning the dispute. The petition shall set out the nature of the dispute with a proposal for its resolution. The United States shall have thirty (30) days from receipt of the petition to file a response with an alternative proposal. In any such dispute, Cape Coral shall have the burden of proving that EPA's position is arbitrary and capricious and

not in accordance with the objectives of this Decree, and that adoption of Cape Coral's position will achieve compliance with the terms and conditions of its permit and the Clean Water Act in an expeditious manner.

XII. RIGHT OF ENTRY

Until termination of this Consent Decree, EPA and its authorized representatives, contractors, consultants and attorneys, shall have the authority to enter without notice, any facility covered by this Decree, at all times, upon presentation of credentials to a responsibile Cape Coral employee, for the purposes of:

1. monitoring the progress of activities required by this Decree;

2. verifying any data or information submitted to EPA in accordance with the terms of the Decree;

3. obtaining samples, and, upon request, splits of any samples taken by Cape Coral or its contractors and consultants;

4. reviewing, inspecting, and copying records; and

5. otherwise assessing Cape Coral's compliance with this Decree and its NPDES Permit.

This provision in no way affects any other right of entry or inspection that the United States and its agents have under any Federal law or regulation.

XIII. NOT A PERMIT

This Consent Decree is not and shall not be interpreted to be a permit, or a modification of an existing permit, for the discharge of pollutants under Section 402 of the Clean Water Act, 33 U.S.C. § 1342, nor shall it in any way relieve Cape Coral of

its obligation to comply with the requirements of its NPDES Permit and with any other applicable Federal or State law or regulation. The pendency of any proceeding concerning the issuance, reissuance, or modification of an NPDES permit shall neither affect nor postpone Cape Coral's duties and liabilities as set forth in this Consent Decree.

XIV. FAILURE OF COMPLIANCE

The United States by its consent to the entry of this Decree, does not warrant or aver in any manner that Cape Coral's complete compliance with this Decree will result in compliance with the provisions of the Clean Water Act, 33 U.S.C. § 1251 et seq., or its NPDES Permit. Cape Coral shall remain solely responsible for compliance with the terms of the Clean Water Act, this Decree, its NPDES Permit, and all applicable Federal and State laws and regulations, notwithstanding EPA's receipt, review, or approval of any plans or procedures formulated pursuant to this Decree, or any other action.

XV. NON-WAIVER PROVISIONS

A. This Consent Decree in no way affects or relieves Cape Coral of responsibility to comply with any Federal, State, or local law or regulation. Nothing contained in this Decree shall be construed to prevent or limit the United States' rights to obtain penalties or injunctive relief under the Clean Water Act or other Federal statutes or regulations, except as expressly specified herein.

B. The United States expressly reserves all remedies

available to it for violation of the Act not alleged in the Complaint filed in this matter, and all remedies available to enforce the provisions of this Decree.

C. This Consent Decree does not limit or affect the rights of Cape Coral or of the United States as against any third parties, nor does it limit the rights of third parties, not parties to this Consent Decree, against Cape Coral.

D. Nothing herein shall be construed to limit the authority of the United States to undertake any action against any person, including Cape Coral, in response to conditions which may present an imminent and substantial endangerment to the public health, welfare or the environment.

E. Nothing herein shall be construed to limit the authority of the United States under Section 308 of the Act, 33 U.S.C. § 1318.

XVI. COSTS OF SUIT

Each party shall bear its own costs and attorney's fees in this action. Should Cape Coral subsequently be determined to have violated the terms and conditions of this Decree, then Cape Coral shall be liable to the United States for any costs and attorney's fees incurred by the United States, in any action or proceeding against Cape Coral for noncompliance with this Decree.

XVII. FORM OF NOTICE

Except as specified otherwise, when written notification to or communication with the United States and/or EPA is required by the terms of this Consent Decree, it shall be addressed as

follows:

As to the United States and the United States Department of Justice:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7611
Ben Franklin Station
Washington, D.C. 20044
Reference Case NO. DJ 90-5-1-1-3357

As to the United States Attorney:

United States Attorney
Middle District of Florida
500 Zack Street
Suite 400
Tampa, FL 33602

As to EPA

Florida/Mississippi Compliance Section
Facilities Performance Branch
Water Management Division
U.S. Environmental Protection Agency
Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365

XVIII. MODIFICATION

Except as provided for herein, there shall be no modification of this Consent Decree without prior written approval of the parties to this Consent Decree and the Court.

XIX. PUBLIC COMMENT

The parties agree and acknowledge that final approval by the United States and entry of this Decree is subject to the requirements of 28 C.F.R. § 50.7 which provides for notice of the lodging of this Consent Decree in the Federal Register, an opportunity for public comment, and consideration of any comments.

XX. SEVERABILITY

The provisions of this Consent Decree shall be severable, and should any provisions be declared by a court of competent jurisdiction to be unenforceable, the remaining provisions shall remain in full force and effect.

XXI. CONTINUING JURISDICTION OF THE COURT

The Court shall retain jurisdiction to enforce the terms and conditions of this Decree and to resolve disputes arising hereunder as may be necessary or appropriate for the construction or execution of this Decree.

XXII. STATE'S RESERVATION OF RIGHTS

The State of Florida enters this Consent Decree for the limited purpose of facilitating an end to the dispute between the United States and Cape Coral. The State reserves its right to raise all defenses available to it under section 309(e) of the Clean Water Act, 33 U.S.C. § 1319(e), and to the claims raised by the United States in its Complaint. The United States agrees that the State shall have the right in such a dispute to raise all such defenses. Nothing in this Decree shall subject decisions of the State or any of its agencies regarding environmental permitting as provided by state law to modification or review by this Court.

XXIII. TERMINATION

This Decree shall terminate upon Motion of either the United States or Cape Coral, which may only be made once Cape Coral has paid all penalties due, has completed all compliance measures

specified herein, and EPA has certified that Cape Coral has satisfactorily achieved compliance with its NPDES Permit and the Clean Water Act for a period of twelve (12) consecutive months.

Dated and entered this ____ day of _____

_____ _____

DATE UNITED STATES DISTRICT JUDGE

WE HEREBY CONSENT to the entry of this Decree, subject to the public notice requirements of 28 C.F.R. § 50.7.

FOR THE UNITED STATES OF AMERICA:

DATE

BARRY M. HARTMAN
Acting Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

DATE

HERBERT H. TATE, JR.
Assistant Administrator for
Enforcement
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

DATE

DANIEL S. JACOBS
Trial Attorney
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 514-4076

ROBERT W. GEMMAN
United States Attorney
Middle District of Florida

By:

DATE

MICHAEL A. CAULEY
Assistant U.S. Attorney
Middle District of Florida
500 Zack Street, Suite 400
Tampa, Florida 33602

FOR DEFENDANT CITY OF CAPE CORAL

2.20.92
DATE

JOSEPH M. MAZURKIEWICZ, JR.
Mayor
City of Cape Coral
City Hall
815 Nicholas Parkway
Cape Coral, Florida 33990

2.20.92
DATE

By:
RICHARD S. DAVIS
Beveridge & Diamond,P.C.
Suite 700
1350 I Street, N.W.
Washington, DC 20005

FOR DEFENDANT STATE OF FLORIDA

ROBERT A. BUTTERWORTH
Attorney General
State of Florida
State Capitol
Tallahassee, Florida 32399-1050

DATE

By:
MARY E. GREENE
Assistant Attorney General
Department of Legal Affairs
State of Florida
State Capitol, Suite 1501
Tallahassee, FL 32399-1050

OF COUNSEL:

MARY ST. PETER
Attorney-Advisor
Office of Enforcement
U.S. Environmental Procection Agency
Washington, DC

DAVID S. ENGLE
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region IV--Atlanta, GA

(F) 19 Waterway ... FILE COPY

AVATAR UTILITIES INC.

Gary Baise's Deposition Exhibit 2
2 of 3

From: Gerald S. Allen
To: Dennis J. Getman
Subject: Civil Action - US v. City of Cape Coral and State of Florida
Date: May 13, 1992

Encl.: X

Ref: Memorandum - Barton to Allen and Bradtmiller, 5/8/92

CC:

Enclosed herewith is a copy of the above reference with enclosure (consent decree) pertaining to allegations of violations of the Clean Water Act by the City of Cape Coral. Note that the consent decree provides for a civil penalty in the amount of $750,000 for past violations and provides for stiff penalties for future violations.

I suspect this situation, when combined with the Citizens' suit brought against FCWC, may be the principle force behind the USEPA's reluctance to settle the Waterway Estates Wastewater Treatment Plant issue.

Gary Baise's Deposition Exhibit 2
3 of 3

LANDERS & PARSONS

MAY 11 1992

RBG ✓ JLM
GSA ✓ CSJ
JLJ AC
SNM MS

RETURN TO: GSH

MEMORANDUM

To: Gerald Allen
Paul H. Bradtmiller

From: Cindy L. Bartin CLB

Re: Florida Cities Water Company

Date: May 8, 1992

It was suggested in our last conference call that EPA has made an analogy between Florida Cities and the City of Cape Coral. In an effort to determine the status of the Cape Coral case I have made several calls to the Assistant City Attorney and the outside counsel hired to handle the federal suit filed against Cape Coral.

The City of Cape Coral's sewage treatment discharges to the Caloosahatchee River. The plant capacity, initially approximately 4 mgd, has undergone several expansions to approximately 12 mgd, and ultimately is designed for 30+ mgd. Historically the plant had trouble meeting effluent limits and there were apparently several administrative orders entered at both the federal and state levels.

The City of Cape Coral and EPA had extensive enforcement discussions prior to the agency's referral to the Department of Justice (DOJ). In early 1991, the DOJ filed a suit against Cape Coral in the Middle District, alleging multiple violations of the City's NPDES permit (91-59 CIV FTM -15). Apparently, this suit was actually filed over one year after the EPA referred it to the Department of Justice.

According to Richard Davis (special counsel), the City had several settlement negotiation sessions with DOJ and EPA after the suit was filed. The respective negotiators ultimately agreed on the language in the attached **unexecuted** consent decree, which has not made its way through the DOJ and EPA hierarchies for approval and sign-off at the appropriate levels. As the consent decrees shows, the City has agreed to pay penalties of $750,000.00. The suit remains pending until the consent decree is finalized and entered by the District Judge.

****

(3.)

FLORIDA CITIES WATER COMPANY

Gary Baise's Deposition Exhibit 3

No 3

July 22, 1988

Mr. Peter McGarry
U.S. EPA, Region IV
345 Courtland Street
Atlanta, Georgia 30365

RE: Waterway Estates WWTP
NPDES Permit No. FL0030325
Administrative Order No. 87-085(WMGM)

Dear Mr. McGarry:

Enclosed is a copy of the final DER Consent Order agreed upon by DER and Florida Cities Water Company. The schedule for compliance is included in the Consent Order.

At the present time, preliminary engineering has been completed for the construction of an advanced wastewater treatment plant with discharge to the Caloosahatchee River. Various permits for local agencies have been submitted, and the final engineering design is proceeding on schedule. Review of the wasteload allocation by the DER has shown that capacity for the point discharge is available. An NPDES discharge permit application will be submitted based on this allocation discharge requirement.

Florida Cities Water Company requests that the existing Administrative Order be extended to coincide with the schedule contained in the DER Consent Order. If you have any questions, please do not hesitate to call me at (813) 924-1128.

Sincerely,

Patrick J. Lehman, P.E.
Vice President, Operations

PJL/dj

Enclosure

cc: A.A. Reeves III, FCWC
P. Oliver, EPA

FLORIDA CITIES WATER COMPANY
2112 Gulf Gate Drive
P.O. BOX 5846
Sarasota, Florida 34277
813 924-1128

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV

IN THE MATTER OF	)	
FLORIDA CITIES WATER COMPANY	)	
WATERWAY ESTATES	)	Order No. 87-085(wMGM)
FT. MYERS, FL	)	
NPDES PERMIT NO. FL0030325	)	

ORDER PURSUANT TO SECTION 309
CLEAN WATER ACT

Pursuant to the authority of Section 309(a) of the Clean Water Act (the Act), 33 U.S.C. 1319, which has been delegated to me, I hereby make the following Findings of Fact and Violation and Order:

FINDINGS OF FACT

1. Florida Cities Water Company (hereinafter, the Respondent), has submitted an NPDES permit application wherein it is stated that Respondent has a wastewater treatment system (Waterway Estates STP) which periodically discharges pollutants into waters of the United States.

2. The United States Environmental Protection Agency, Region IV (EPA), has denied issuance of a National Pollutant Discharge Elimination System (NPDES) Permit for the above discharge. The permit was denied December 8, 1986.

3. In accordance with Section 301(a) of the Clean Water Act, discharges of pollutants into waters of the United States are unlawful unless permitted by an NPDES permit, or specifically exempted from NPDES requirements. The final effluent limits for this facility to a canal of the Caloosshatchee River are "no discharge." An NPDES permit can not be issued to a facility that is discharging to a no discharge area.

VIOLATION

The Respondent is in violation of Section 301(a) of the Clean Water Act by discharging pollutants into waters of the United States without an NPDES permit.

ORDER

Based on the foregoing Findings of Fact and Violation, and pursuant to the provisions of Section 309(a) of the Act, as amended, it is hereby ordered:

1. That the Respondent cease discharging pollutants to waters of the United States at the earliest date practicable but not later than September 30, 1988. The Respondent shall report on progress toward meeting this compliance date as follows:

Activity	Due Date
Submit Progress Report	July 1, 1987
Submit Progress Report	August 1, 1987
Submit Progress Report	September 30, 1987
Start Construction	October 15, 1987
Submit Progress Report	December 30, 1987
Submit Progress Report	March 30, 1987
Complete Construction	August 1, 1988
Meet Final Requirements by Ceasing Discharge	September 30, 1988

2. This should in no way be considered a permit to discharge, however, if the Respondent does discharge to waters of the United States in violation of the Act, the Respondent's discharge of treated wastewater shall at least comply with the effluent limitations, monitoring schedule and other requirements contained in its previous permit.

3. That monitoring results obtained during each calendar quarter shall be summarized on a Discharge Monitoring Report Form (EPA Form 3320-1). Forms shall be submitted for each month and shall be postmarked no later than the 28th day of the month following the end of the month being reported on. Monitoring required by the State of Florida other than that specifically required by this Order shall be submitted in the same form as to the State but shall be included with Discharge Monitoring Report submissions.

4. If there is any transfer of ownership of this facility prior to completion of all requirements of this Order, then the new owner must be informed of these requirements and shall carry out the provisions. EPA shall be notified of any transfer of ownership.

5. The information required by this Order other than monitoring information shall be sent by registered mail or its equivalent to the following addresses:

Mr. John T. Marlar, Chief
Facilities Performance Branch
Water Management Division
U. S. Environmental Protection Agency
Region IV
345 Courtland Street
Atlanta, GA 30365

Mr. Phillip R. Edwards
Florida Dept. of Environmental Regulation
2269 Bay St.
Ft. Myers, FL 33901

6. Nothing contained in this Order shall be construed to prevent further enforcement of the violations stated herein.

MAY 11 1987
Date

Bruce R. Barrett
Bruce R. Barrett, Director
Water Management Division

Florida Cities Water Company
Docket No._____
Rate Application for Recovery
of Legal Expenses
Exhibits____(MA-1 thru MA-9)
Michael Acosta

13269-97

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663-WS EXHIBIT NO. 9
COMPANY/
WITNESS: Acosta
DATE: 8-12-98

FLORIDA CITIES WATER COMPANY

RATE APPLICATION FOR RECOVERY OF LEGAL EXPENSES

EXHIBITS _____ (MA-1 THRU MA-9) OF

MICHAEL ACOSTA

Exhibit List
Testimony of Michael Acosta
Florida Cities Water Company
Rate Application for Recovery of Legal Expenses

1. NPDES Permit Renewal Application and letter: 5/9/86 - (MA-1).

2. Letter: EPA (Patrick) to FCWC (Reeves) tentative conclusion that NPDES permit should be denied. 7/22/86 - (MA-2).

3. Permit: FDEP operating permit for WWE WWTP expiring 8/2/88. 8/2/83 - (MA-3).

4. Letter: FDEP (Richardson) to EPA (Hyatt) regarding existence of wasteload allocation for WWE WWTP. 5/7/86 - (MA-4).

5. Memorandum: Lehman to Reeves regarding meeting of 8/2/86 with FDEP after tentative denial by EPA of NPDES permit renewal. 8/10/86 - (MA-5).

6. Letter: EPA (Barrett) to FCWC (Reeves) notification of denial of NPDES permit renewal.

7. NPDES Certification worksheet: FDEP to EPA. (MA-7)

8. Letter: EPA (Marlar) to FCWC (Reeves) transmitting Section 309 Order. 5/11/87 - (MA-8)

9. Permit: NPDES Permit No. FL0030325 for Waterway Estates. 9/29/89 - (MA-9)

FLORIDA CITIES WATER COMPANY

May 9, 1986

Ms. Connie A. Kagey
Water Management Division
U.S. Environmental Protection Agency
Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365

Re: Waterway Estates Wastewater Treatment Plant
Permit No. 0030325
NPDES Permit Renewal Application

Dear Ms. Kagey:

Enclosed is the completed NPDES Permit Renewal Application Form for the referenced facility. Also enclosed is a copy of the current FDER Operating Permit.

If you have any questions please call me at (813) 924-1128.

Sincerely,

Patrick J. Lehman, P.E.
Operations Manager

PJL:jd

Enclosures

FLORIDA CITIES WATER COMPANY
P.O. BOX 5846–2112 Gulf Gate Drive
Sarasota, Florida 34277
813 924-1128

Exhibit___MA-1

Form Approved
OMB No. 158-R0096

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
APPLICATION FOR PERMIT TO DISCHARGE - SHORT FORM A

FOR AGENCY USE	APPLICATION NUMBER
	DATE RECEIVED (YEAR / MO. / DAY)

To be filed only by municipal wastewater dischargers (domestic)

Renewal NPDES Permit No. FL0030325

Do not attempt to complete this form before reading the accompanying instructions

Please print or type

1. Name of organization responsible for facility Florida Cities Water Company
2. Address, location, and telephone number of facility producing discharge:
   - A. Name Waterway Estates Wastewater Treatment Plant
   - B. Mailing address: 2112 Gulf Gate Drive
     1. Street address P.O. Box 5846
     2. City Sarasota
     3. County Sarasota
     4. State Florida
     5. ZIP 34277
   - C. Location:
     1. Street 1667 Inlet Drive
     2. City North Fort Myers
     3. County Lee
     4. State Florida
   - D. Telephone No. 813 924-1128 (Area Code)

If all your waste is discharged into a publicly owned waste treatment facility and to the best of your knowledge you are not required to obtain a discharge permit, proceed to item 3. Otherwise proceed directly to item 4.

3. If you meet the condition stated above, check here ☐ and supply the information asked for below. After completing these items, please complete the date, title, and signature blocks below and return this form to the proper reviewing office without completing the remainder of the form.
   - A. Name of organization responsible for receiving waste N/A
   - B. Facility receiving waste:
     1. Name N/A
     2. Street address
     3. City
     4. County
     5. State
     6. ZIP

4. Type of treatment:
   A. ☐ None B. ☐ Primary C. ☐ Intermediate D. ☐ Secondary E. ☐ Advanced
5. Design flow (average daily) of facility 1.08 mgd.
6. Percent BOD removal (actual):
   A. ☐ 0-29.9 B. ☐ 30-64.9 C. ☐ 65-84.9 D. ☒ 85-94.9 E. ☐ 95 or more
7. Population served:
   A. ☐ 1-199 B. ☐ 200-499 C. ☐ 500-999 D. ☐ 1,000-4,999
   E. ☒ 5,000-9,999 F. ☐ 10,000 or more
8. Number of separate discharge points:
   A. ☒ 1 B. ☐ 2 C. ☐ 3 D. ☐ 4 E. ☐ 5 F. ☐ 6 or more

9. Description of waste water discharged to surface waters only (check as applicable).

Discharge per operating day	Flow, MGD (million gallons per operating day)							Volume treated before discharging (percent)				
	0-0.0099 (1)	0.01-0.049 (2)	0.05-0.099 (3)	0.1-0.49 (4)	0.5-0.99 (5)	1.0-4.9 (6)	5 or more (7)	None (8)	0.1-34.9 (9)	35-64.9 (10)	65-94.9 (11)	95-100 (12)
A. Average					X							X
B. Maximum					X							X

10. If any waste water, treated or untreated, is discharged to places other than surface waters, check below as applicable.

Waste water is discharged to	Flow, MGD (million gallons per operating day)						
	0-0.0099 (1)	0.01-0.049 (2)	0.05-0.099 (3)	0.1-0.49 (4)	0.5-0.99 (5)	1.0-4.9 (6)	5 or more (7)
A. Deep well							
B. Evaporation lagoon							
C. Subsurface percolation system							
D. Other, specify:							

11. Is any sludge ultimately returned to a waterway?

A. ☐ yes B. ☒ no

12. a. Do you receive industrial waste?

1. ☐ yes 2. ☒ no

b. If yes, enter approximate number of industrial dischargers into system _____

13. Type of collection sewer system:

A. ☒ Separate sanitary

B. ☐ Combined sanitary and storm

C. ☐ Both separate and combined sewer systems

14. Name of receiving water or waters Caloosahatchee River

15. Does your discharge contain or is it possible for your discharge to contain one or more of the following substances: ammonia, cyanide, aluminum, beryllium, cadmium, chromium, copper, lead, mercury, nickel, selenium, zinc, phenols.

A. ☐ yes B. ☒ no

I certify that I am familiar with the information contained in the application and that to the best of my knowledge and belief such information is true, complete, and accurate.

Patrick J. Lehman, P.E.
Printed Name of Person Signing

Operations Manager
Title

5-9-86
Date Application Signed

Patrick J. Lehman
Signature of Applicant

18 U.S.C. Section 1001 provides that:
Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious, or fraudulent statements or representations; or makes or uses any false writing or document knowing same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

JUL 28 1986

4AEN-PP

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. A.A. Reeves III
Vice President and General Manager
Florida Cities Water Company
P.O. Box 5346-2112 Gulf Gate Drive
Sarasota, Florida 34277

RE: Public Notice - Intent to Deny
Waterway Estates, NPDES Permit No. FL0030325

Dear Mr. Reeves:

The Environmental Protection Agency (EPA), Region IV, has tentatively concluded that your National Pollutant Discharge Elimination System (NPDES) permit application should be denied. In accordance with the Federal Water Pollution Control Act, we have determined that there should be no permitted discharge from your facility to Caloosahatchee River via a canal. The enclosed fact sheet provides the rationale from this decision.

In accordance with 40 Code of Federal Regulations (CFR) 124.10(c)(1)(i), enclosed is the Public Notice pertaining to the Environmental Protection Agency's (EPA) tentative decision on your National Pollutant Discharge Elimination System (NPDES) permit application. All comments and objections to the proposed denial must be submitted to EPA within the time period specified in the Public Notice (refer to 40 CFR 124.13).

We have received your July 9, 1986, letter requesting an additional 90-day extension to evaluate your options and prepare engineering studies. To bring this facility into compliance with the zero discharge, EPA proposed to issue an Administrative Order containing a schedule of actions culminating in cease discharge, and containing a set of interim discharge limitations. This Administrative Order would be forthcoming after all final permit actions have been addressed which will be approximately October 1, 1986, if all proceeds on schedule. The information previously requested for and reiterated again should be received by us no later than September 30, 1986, which will give you approximately eighty (80) days of time extension:

1. A schedule, listing major actions necessary for you to attain a no discharge status, with estimated dates for each action including cessation of discharge;

2. A suggested set of interim effluent limits based on the design capabilities of your existing wastewater treatment facilities.

A state certification has been requested for this permit action.

Exhibit___MA-2

If you have any questions concerning the procedures associated with the permit program, please contact Mrs. Connie Kagey at the above address or by calling 904/347-2156.

Sincerely yours,

James R. Patrick, Jr.
Chief, Permits Section
Water Management Division

Enclosures

cc: Dr. J.P. Subramani, FDER, Tallahassee (w/Public Notice)

KAGEY:sa:7/15/86:6901X

CKagey 7-15

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET
ATLANTA, GEORGIA 30365

Date June 30, 1986

FACT SHEET

APPLICATION FOR
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
PERMIT TO DISCHARGE TREATED WASTEWATER
TO U.S. WATERS

Application No. FL0030325 Application Date May 9, 1986

1. SYNOPSIS OF APPLICATION

a. Name and Address of Applicant

Florida Cities Water Company - Waterway Estates WWTP
2112 Gulf Gate Drive
P.O. Box 5846
Sarasota, Florida 34277

Location of plant: 1667 Inlet Drive, North Fort Myers
Lee County, Florida

b. Type of Facility

Privately owned wastewater treatment plant
SIC Code 4952

c. Design Capacity of Facility

1.08 MGD

d. Applicant's Receiving Water

Caloosahatchee River via a canal (see Attachment A)

e. Description of Wastewater Treatment Facilities

Treatment consists of a 1.08 MGD contact stabilization wastewater facility.

f. Description of Discharges

Outfall Serial No. 001.
Information consists of the average of the daily average and maximum values from Discharge Monitoring Report (DMR) data during the period of January 1985 - April 1986.

Parameter (Units)	Value (daily avg./daily max)
Flow (MGD)	.574/-
BOD_5 (lbs/day)	29.2/67.1
(mg/l)	6.1/13.8
TSS (lbs/day)	47.1/185.9
(mg/l)	11.0/37.9
TKN (lbs/day)	47.4/59.1
(mg/l)	9.7/12.2
Fecal Coliform (N/100ml)	2/5
pH (standard units)	Minimum 6.3, Maximum 7.6

2. PROPOSED EFFLUENT LIMITATIONS

The final effluent limits for this facility to a canal to the Caloosshatchee River are "no discharge."

3. BASIS FOR FINAL EFFLUENT LIMITS AND PERMIT CONDITIONS

The permit denial is based on a no discharge wasteload allocation developed by FDER on January 19, 1981. The terms and schedule for meeting the no discharge wasteload allocation will be set forth in a forthcoming administrative order.

4. REQUESTED VARIANCES OR ALTERNATIVES TO REQUIRED STANDARDS

Not Applicable

5. EFFECTIVE DATE OF PROPOSED EFFLUENT LIMITS AND COMPLIANCE SCHEDULE (IF APPLICABLE)

The permit denial will be effective immediately upon issuance of a final determination. However, EPA's Compliance Section will develop an administrative order which should specify interim limits and a schedule in order to achieve compliance with the no discharge allocation.

6. STATE CERTIFICATION REQUIREMENTS

State Certification was not received with the permit renewal application and will be requested on the permit denial.

7. DISCUSSION OF PREVIOUS NPDES CONDITIONS

The present NPDES permit, which expires September 24, 1986, contains the following limitations.

Parameter (Units)	Discharge Limitations	
	Daily Avg.	Daily Max.
Flow (MGD)	no limit	no limit
BOD_5 (lbs/day)	135	270
(mg/l)	15	30
TSS (lbs/day)	180	360
(mg/l)	20	40
TKN (lbs/day)	135	270
(mg/l)	15	30
Fecal Coliform (N/100ml)	200	400

The pH (standard units) not less than 6.0 nor greater than 8.5.

The BOD_5 and TSS (monthly average) to not exceed 10% of the respective monthly influent concentrations (90% removal).

8. EPA CONTACT

Additional information concerning the permit may be obtained at the address and during the hours noted in Item 9 from:

Ms. Suzanne D. Potter
(404) 347-3004

9. THE ADMINISTRATIVE RECORD, including application, draft permit, fact sheet, public notice (after release), State Certification (after receipt), comments received, and additional information is available by writing the EPA, Region IV, or for review and copying at 345 Courtland Street, N.E., 3rd Floor, Atlanta, Georgia 30365, between the hours of 8:15 A.M. and 4:30 P.M., Monday through Friday. Copies will be provided at a charge of 20¢ per page.

10. PROPOSED SCHEDULE FOR PERMIT ISSUANCE

Fact Sheet to Applicant	June 30, 1986
State Certification Request	June 30, 1986
Public Notice of Permit Denial	July 31, 1986
Permit Denial Issued	August 4, 1986

11. PROCEDURES FOR THE FORMULATION OF FINAL DETERMINATIONS

a. Comment Period

The Environmental Protection Agency proposes to issue an NPDES permit to this applicant subject to the aforementioned effluent limitations and special conditions. These determinations are tentative and open to comment from the public.

Interested persons are invited to submit written comments regarding permit issuance or the proposed permit limitations and conditions to the following address:

Environmental Protection Agency
345 Courtland Street, NE
Atlanta, Georgia 30365
ATTN: Ms. Suzanne D. Potter

All comments received within thirty (30) days following the date of public notice will be considered in the formulation of final determinations with regard to proposed permit issuance.

b. Public Hearing

The EPA Regional Administrator will hold a public hearing if there is a significant degree of public interest in a proposed permit or group of permits, or if he determines that useful information and data may be obtained thereby. Public Notice of such a hearing will be circulated at least thirty days prior to the hearing.

c. Issuance of the Permit

After consideration of all written comments and of the requirements and policies in the Act and appropriate regulations, and, if a public hearing is held, after consideration of all comments, statements and data presented at the hearing, the EPA Regional Administrator will make determinations regarding the permit issuance. If the determinations are substantially unchanged from the tentative determinations outlined above, the Regional Administrator will so notify all persons submitting written comments, and, if a public hearing was held, all persons participating in the hearing. If the determinations are substantially changed, the EPA Regional Administrator will issue a public notice indicating the revised determinations.

Unless a request for an evidentiary hearing is granted, the proposed permit contained in the Regional Administrator's determinations shall become issued and effective and will be the final action of the U. S. Environmental Protection Agency.

d. Evidentiary Hearing

If the determinations are substantially unchanged, any interested person may submit a request for an evidentiary hearing on the permit and its conditions within thirty (30) days of the receipt of the notice described in section c. If the determinations are substantially changed, any interested person may submit a request for an evidentiary hearing within thirty days of the date of the public notice or of the date of becoming aware of the determinations, which ever comes first. Such requests will be within the time period if mailed by Certified Mail within the thirty-day period to the Regional Hearing Clerk, Environmental Protection Agency, 345 Courtland Street, N.E., Atlanta, Georgia 30308. All requests must contain:

(1) The name, mailing address and telephone number of the person making such request;

(2) A clear and concise factual statement of the nature and scope of the interest of the requester;

(3) The names and addresses of all persons whom the requester represents; and

(4) A statement by the requester that, upon motion of any party, or sua sponte by the Presiding Officer and without cost or expense to any other party, the requester shall make available to appear and testify, the following:

(i) The requester;

(ii) All persons represented by the requester, and

(iii) All officers, directors, employees, consultants and agents of the requester and the persons represented by the requester.

(5) Specific references to the contested permit terms and conditions, as well as suggested revised or alternative permit terms and conditions (not excluding permit denial) which, in the judgement of the requester, would be required to implement the purposes and policies of the Act.

(6) In the case of challenges to the application of control or treatment technologies identified in the statement of basis or fact sheet, identification of the basis for the objection, and the alternative technologies or combination of technologies which the requester believes are necessary to meet the requirements of the Act.

(7) Specific identification of each of the discharger's obligations which should be stayed if the request is granted. If the request contests more than one permit term or condition then each obligation which is proposed to be stayed must be referenced to the particular contested term warranting the stay.

The granting of a request will stay only the contested portions of he permit. Uncontested provisions of the permit shall be considered issued and effective and the permittee must comply with such provisions. Except, if the permit is for a new source or new discharge, the applicant will be without a permit for the proposed new source or new discharge, pending final Agency action. The final Agency decision on the permit provisions contested at an evidentiary hearing will be made in accordance with Title 40, Code of Federal Regulations, Subpart H, found at 44 Federal Register 32938, et seq.

e. Panel Hearing

In the case of an "initial license," including the first grant of an NPDES permit, or the first decision on a requested variance, if the Regional Administrator elects to apply the provisions of subpart I and so states in the public notice of the draft permit, any person may request the Regional Administrator to hold a panel hearing on the permit. Such a request must be made within the comment period of the notice described above. Requests will be considered timely if mailed by certified mail within the comment period. All requests must contain:

(1) A brief statement of the interest of the person requesting the hearing;

(2) A statement of any objections to the draft permit;

(3) A statement of the issues which such person proposes to raise for consideration at such hearing;

(4) The name, mailing address and telephone number of the person making such request;

(5) A clear and concise factual statement of the nature and scope of the interest of the requester;

(6) The names and addresses of all persons whom the requester represents; and

(7) A statement by the requester that, upon motion of any party, or sua sponte by the Presiding Officer and without cost or expense to any other party, the requester shall make available to appear and testify, the following:

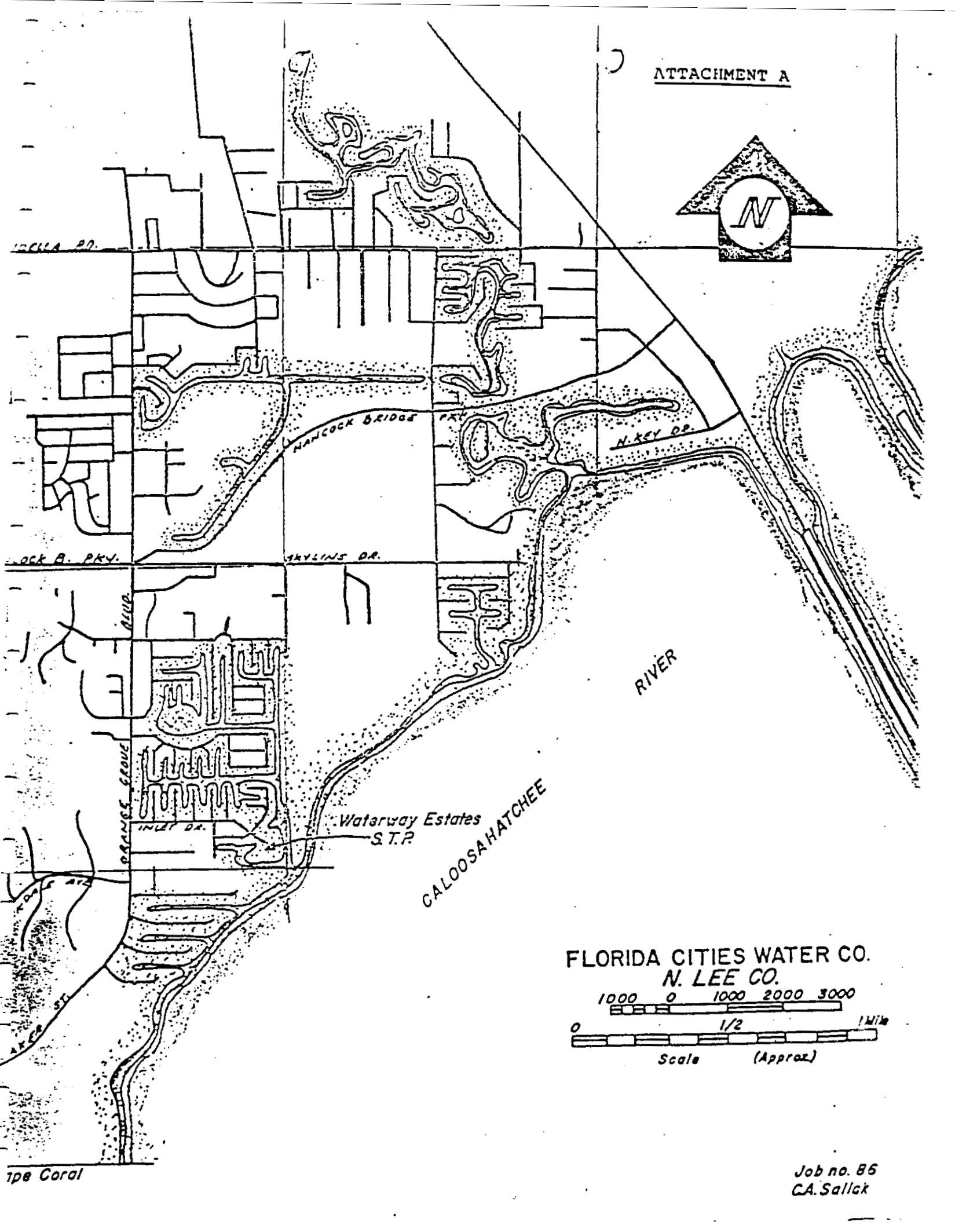
(i) The requester;

(ii) All persons represented by the requester; and

(iii) All officers, directors, employees, consultants and agents of the requester and the persons represented by the requester.

(8) Specific references to the contested permit terms and conditions, as well as suggested revised or alternative permit terms and conditions (not excluding permit denial) which, in the judgment of the requester, would be required to implement the purposes and policies of the Act.

If the permit for which a panel hearing is requested is a new source or new discharge, the applicant will be without a permit for the proposed new source or new discharge, pending final Agency action. Panel hearings will be conducted in accordance with title 40, Code of Federal Regulations, Subpart I, at 44 Federal Register 32944, et seq.


ATTACHMENT A
N
HANCOCK BRIDGE PKY.
N. KEY DR.
SKYLINE DR.
RIVER
CALOOSAHATCHEE
Waterway Estates
S.T.P.
INLET DR.
FLORIDA CITIES WATER CO.
N. LEE CO.
1000 0 1000 2000 3000
0 1/2 1 Mile
Scale (Approx)
Job no. 86
C.A. Sallick

STATE OF FLORIDA

DEPARTMENT OF ENVIRONMENTAL REGULATION

SOUTH FLORIDA
DISTRICT
2269 BAY STREET
FORT MYERS, FLORIDA 33901

BOB GRAHAM
GOVERNOR
VICTORIA J. TSCHINKEL
SECRETARY
PHILIP R. EDWARDS
DISTRICT MANAGER

August 2, 1983

A. A. Reeves III, Vice President
Florida Cities Water Company
Post Office Box 5846
Sarasota, Florida 33579

Re: Lee County - DW
Waterway Estates

Dear Mr. Reeves:

Enclosed is Permit Number D036-72569, dated August 2, 1983

to operate the subject pollution source

issued pursuant to Section(s) 403.087, Florida Statutes.

Should you object to this permit, including any and all of the conditions contained therein, you may file an appropriate petition for administrative hearing. This petition must be filed within fourteen (14) days of the receipt of this letter. Further, the petition must conform to the requirements of Florida Administrative Code Rule 28-5.201 (see reverse side of this letter). The petition must be filed with the Office of General Counsel, Department of Environmental Regulation, Twin Towers Office Building, 2600 Blair Stone Road, Tallahassee, Florida 32301.

If no petition is filed within the prescribed time, you will be deemed to have accepted this permit and waived your right to request an administrative hearing on this matter.

Acceptance of the permit constitutes notice and agreement that the Department will periodically review this permit for compliance, including site inspections where applicable, and may initiate enforcement action for violation of the conditions and requirements thereof.

Sincerely,

Philip R. Edwards

Philip R. Edwards
District Manager

PRE/DGR/jw

Enclosure
cc: J. Richard Voorhees, P.E.

RECEIVED
FLA CITIES
WATER CO.
AUG 4 1983

RULES OF THE ADMINISTRATIVE COMMISSION
MODEL RULES OF PROCEDURE
CHAPTER 28-5
DECISION DETERMINING SUBSTANTIAL INTERESTS

PART II
FORMAL PROCEEDINGS

28-5.201 Initiation of Formal Proceedings.

(1) Initiation of formal proceedings shall be made by petition to the agency responsible for rendering final agency action. The term petition as used herein includes any application or other document which expresses a request for formal proceedings. Each petition should be printed, typewritten or otherwise duplicated in legible form on white paper of standard legal size. Unless printed, the impression shall be on one side of the paper only and lines shall be double-spaced and indented.

(2) All petitions filed under these rules should contain:

(a) The name and address of each agency affected and each agency's file or identification number, if known;

(b) The name and address of the petitioner or petitioners, and an explanation of how his/her substantial interests will be affected by the agency determination;

(c) A statement of when and how petitioner received notice of the agency decision or intent to render a decision;

(d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;

(e) A concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief;

(f) A demand for relief to which the petitioner deems himself entitled; and

(f) Other information which the petitioner contends is material.

****

A petition may be denied if the petitioner does not state adequately a material factual allegation, such as a substantial interest in the agency determination, or if the petition is untimely. (Section 28-5.201(3)(a), FAC)

ER Form 17-1.201(7)
Effective November 30, 1982

STATE OF FLORIDA

DEPARTMENT OF ENVIRONMENTAL REGULATION

H FLORIDA
DISTRICT
169 BAY STREET
FORT MYERS, FLORIDA 33901

BOB GRAHAM
GOVERNOR

VICTORIA J. TSCHINKEL
SECRETARY

PHILIP R. EDWARDS
DISTRICT MANAGER

PERMITTEE: Florida Cities Water Company
Post Office Box 5846
Sarasota, Florida 33579

I.D. Number: 36P01639
Permit/Certification Number: 0036-72569
Date of Issue: August 2, 1983
Expiration Date: August 2, 1988
County: Lee
Latitude/Longitude: 26.38.17/81.54.36
Section/Township/Range: 16/44S/24E
Project: Waterway Estates

This permit is issued under the provisions of Chapter(s) 403, Florida Statutes, and Florida Administrative Code Rule(s) 17-4. The above named permittee is hereby authorized to perform the work or operate the facility shown on the application and approved drawing(s), plans, and other documents attached hereto or on file with the department and made a part hereof and specifically described as follows:

Operation of a 1.08 MGD contact stabilization wastewater treatment facility with effluent discharged to a canal to the Caloosahatchee River, as depicted in drawings and documentation on file in this office. Project is located off Inlet Drive, North Fort Myers.

ITTEE: Florida Cities Water Co.

I.D. Number: 36P01630
Permit/Certification Number: D036-72569
Date of Issue: August 2, 1983
Expiration Date: August 2, 1988

RAL CONDITIONS:

...e terms, conditions, requirements, limitations, and restrictions set forth herein are "Permit Conditions" and as such are binding upon the permittee and enforceable pursuant to the authority of Sections 403.161, 403.727, or 403.859 through 403.861, Florida Statutes. The permittee is hereby placed on notice that the department will review this permit periodically and may initiate enforcement action for any violation of the "Permit Conditions" by the permittee, its agents, employees, servants or representatives.

This permit is valid only for the specific processes and operations applied for and indicated in the approved drawings or exhibits. Any unauthorized deviation from the approved drawings, exhibits, specifications, or conditions of this permit may constitute grounds for revocation and enforcement action by the department.

As provided in Subsections 403.087(6) and 403.722(5), Florida Statutes, the issuance of this permit does not convey any vested rights or any exclusive privileges. Nor does it authorize any injury to public or private property or any invasion of personal rights, nor any infringement of federal, state or local laws or regulations. This permit does not constitute a waiver of or approval of any other department permit that may be required for other aspects of the total project which are not addressed in the permit.

This permit conveys no title to land or water, does not constitute state recognition or acknowledgement of title, and does not constitute authority for the use of submerged lands unless herein provided and the necessary title or leasehold interests have been obtained from the state. Only the Trustees of the Internal Improvement Trust Fund may express state opinion as to title.

This permit does not relieve the permittee from liability for harm or injury to human health or welfare, animal, or aquatic life or property and penalties therefor caused by the construction or operation of this permitted source, nor does it allow the permittee to cause pollution in contravention of Florida Statutes and department rules, unless specifically authorized by an order from the department.

The permittee shall at all times properly operate and maintain the facility and systems of treatment and control (and related appurtenances) that are installed or used by the permittee to achieve compliance with the conditions of this permit, as required by department rules. This provision includes the operation of backup or auxiliary facilities or similar systems when necessary to achieve compliance with the conditions of the permit and when required by department rules.

The permittee, by accepting this permit, specifically agrees to allow authorized department personnel, upon presentation of credentials or other documents as may be required by law, access to the premises, at reasonable times, where the permitted activity is located or conducted for the purpose of:

a. Having access to and copying any records that must be kept under the conditions of the permit;

b. Inspecting the facility, equipment, practices, or operations regulated or required under this permit; and

c. Sampling or monitoring any substances or parameters at any location reasonably necessary to assure compliance with this permit or department rules.

Reasonable time may depend on the nature of the concern being investigated.

If, for any reason, the permittee does not comply with or will be unable to comply with any condition or limitation specified in this permit, the permittee shall immediately notify and provide the department with the following information:

a description of and cause of non-compliance; and

b. the period of noncompliance, including exact dates and times; or, if not corrected, the anticipated time the non-compliance is expected to continue, and steps being taken to reduce, eliminate, and prevent recurrence of the non-compliance.

9. In accepting this permit, the permittee understands and agrees that all records, notes, monitoring data and other information relating to the construction or operation of this permitted source, which are submitted to the department, may be used by the department as evidence in any enforcement case arising under the Florida Statutes or department rules, except where such use is proscribed by Sections 403.73 and 403.111, Florida Statutes.

10. The permittee agrees to comply with changes in department rules and Florida Statutes after a reasonable time for compliance, provided however, the permittee does not waive any other rights granted by Florida Statutes or department rules.

11. This permit is transferable only upon department approval in accordance with Florida Administrative Code Rules 17-4.12 and 17-30.30, as applicable. The permittee shall be liable for any non-compliance of the permitted activity until the transfer is approved by the department.

12. This permit is required to be kept at the work site of the permitted activity during the entire period of construction or operation.

13. This permit also constitutes:

( ) Determination of Best Available Control Technology (BACT)
( ) Determination of Prevention of Significant Deterioration (PSD)
( ) Certification of Compliance with State Water Quality Standards (Section 401, PL 92-500)
( ) Compliance with New Source Performance Standards

14. The permittee shall comply with the following monitoring and record keeping requirements:

a. Upon request, the permittee shall furnish all records and plans required under department rules. The retention period for all records will be extended automatically, unless otherwise stipulated by the department, during the course of any unresolved enforcement action.

b. The permittee shall retain at the facility or other location designated by this permit records of all monitoring information (including all calibration and maintenance records all original strip chart recordings for continuous monitoring instrumentation), copies of all reports required by this permit, and records of all data used to complete the application for this permit. The time period of retention shall be at least three years from the date of the sample, measurement, report or application unless otherwise specified by department rule.

c. Records of monitoring information shall include:

- the date, exact place, and time of sampling or measurements;
- the person responsible for performing the sampling or measurements;
- the date(s) analyses were performed;
- the person responsible for performing the analyses;
- the analytical techniques or methods used; and
- the results of such analyses.

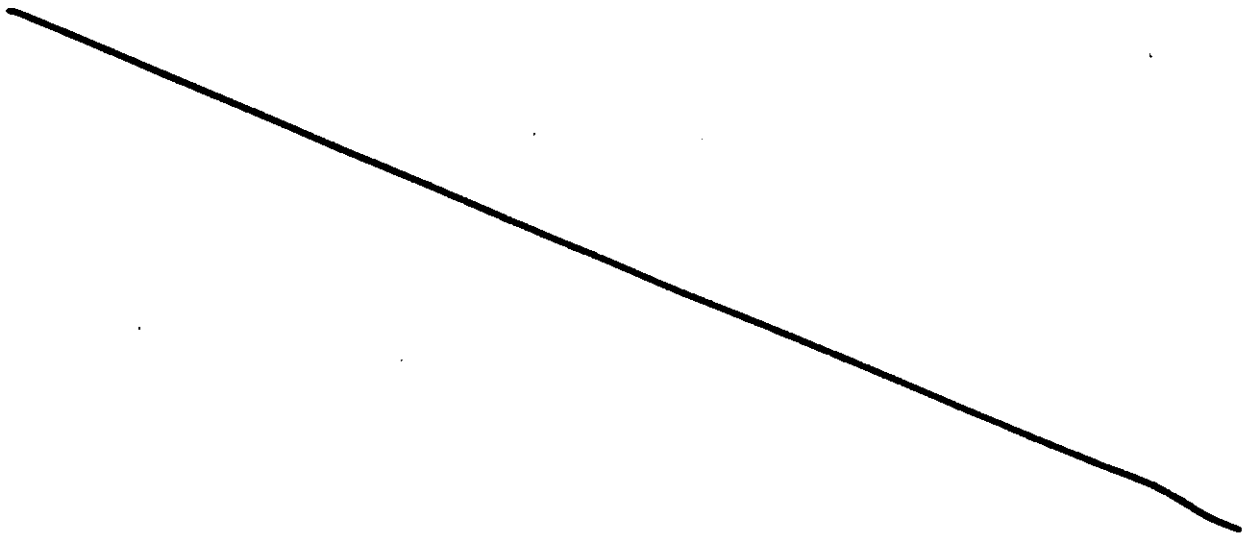
15. When requested by the department, the permittee shall within a reasonable time furnish any information required by law which is needed to determine compliance with the permit. If the permittee becomes aware that relevant facts were not submitted or were incorrect in the permit application or in any report to the department, such facts or information shall be submitted or corrected promptly.

ECIFIC CONDITIONS:

1. Drawings, plans, documents or specifications submitted by the Permittee, not attached hereto, but retained on file at the South Florida District Office, are made a part hereof.

2. The chlorine residual in effluent must be maintained at 0.5 ppm after at least fifteen (15) minutes contact.

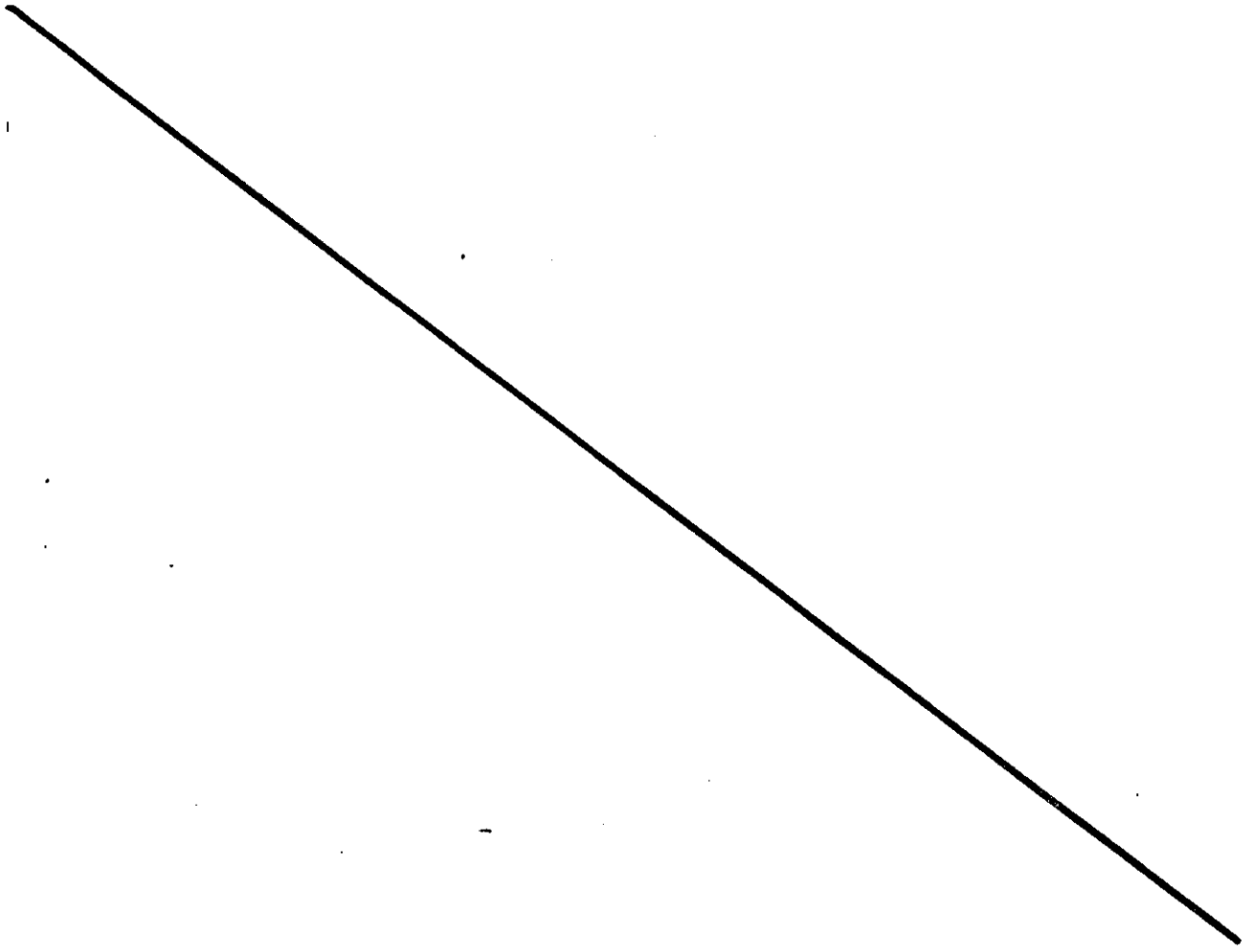
3. Pursuant to Chapter 17-19, the Permittee will follow the sampling schedule provided for the plant described as having a capacity of 1.08 MGD flow and submission of operating reports.



: Florida Cities Water Co.

I.D. Number: 36P01630
Permit/Certification Number: D036-72569
Date of Issue: August 2, 1983
Expiration Date: August 2, 1988

SPECIFIC CONDITIONS:



Issued this 2nd day of August, 1983

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL REGULATION

Philip R. Edwards

PHILIP R. EDWARDS
DISTRICT MANAGER

____Pages attached.

Figure 3

Minimum Sampling Schedules and Parameters for Domestic Wastewater Treatment Plants[1]

Parameters	Design Flow						
	2,000 gpd up to 5,000 gpd	5,000 gpd up to 50,000 gpd	50,000 gpd up to 500,000 gpd	0.5 mgd up to 1 mgd	1 mgd up to 5 mgd	5 mgd up to 15 mgd	15 mgd and above
Flow[2], pH[3], and Chlorine Residual[4]	daily 5/wk	daily 5/wk	daily 5/wk	daily 5/wk	Continuous	Continuous	Continuous
BOD[5], Suspended Solids and for ANT surface discharges, NUTRIENTS[5,6]	quarterly[7]	monthly[7]	every two weeks[7]	weekly	weekly	daily 5/wk	daily 7/wk
Fecal Coliform[8]	quarterly	quarterly	quarterly	monthly	weekly	daily 5/wk	daily 7/wk

1. These frequencies may be increased or decreased by the Secretary or the Secretary's designee on a case by case basis, depending upon local requirements for assessment and maintenance of water quality.
2. Recording flowmeter and totalizer required for 100,000 gpd and greater-flow.
3. Grab sample; pH paper may be used for facilities up to 100,000 gpd flow. Hourly measurements during the period of required operator attendance may be substituted for continuous measurement where such devices are not available.
4. Free chlorine residual for advanced waste treatment facilities; total chlorine residual for all others. Hourly measurements during the period of required operator attendance may be substituted for continuous measurement where such devices are not available.
5. Grab samples may be used for facilities up to 100,000 gpd; other facilities require flow proportioned composite samples. Where Chapter 17-16 FAC requires a Class A, B, or C operator, compositing periods are 24, 16, or 8 hours, respectively.
6. Nutrient analysis is required for advanced waste treatment facilities discharging to surface waters and may be required for other facilities where the Department determines that a potential water quality problem exists.
7. Land disposal facilities which are percolation ponds, spray irrigation, land spreading, drainfields and soakage pits of up to 100,000 gpd may sample at one-half these frequencies. (This reduction does not apply to well, borehole or sinkhole disposal).
8. Grab sample.

Figure 2
Referenced to Approved Procedures (*)

No.	Storet Code	Parameter	Reporting Units	References: Standards Methods	ASTM	EPA Methods
1	00310	BOD_5: Biochemical Oxygen Demand-5 day, 20°c	mg/l as O_2	p.489	--	--
2	00530	TSS: Total suspended (non-filterable) solids	mg/l	p.537	--	p.269
3	50053	FLOW: Flow through a treatment plant: monthly average	mgd	see rule text		
4a	31616	FECAL COLI: Fecal coliform: membrane filter	/100 ml	p.684	--	--
4b	31615	FECAL COLI: Fecal coliform: MPN method	/100 ml	p.669	--	--
5	50060	Cl_2-TOT: Chlorine, total residual	mg/l as Cl_2	p.382	p.223	p. 35
6	00400	pH: Hydrogen ion activity [a]	pH units	p.500	p.248	p.239
7	50064	Cl_2-FREE: Chlorine, free available	mg/l as Cl_2	p.112		
8	00630	NO_2+NO_3: Nitrite plus nitrate [b]	mg/l as N	p.459 p.461	p.124	p.293 p.287,215 p.287
9	00605	ORG-N: Organic Nitrogen (TKN minus NH_3-N) [c]	mg/l as N	p.468 p.469		p.175 p.182
10	00610	NH_3-N: Ammonia Nitrogen	mg/l as N			p.239 p.168
11	70507	ORTHO-P: Ortho-phosphate	mg/l as P	p.532	p. 42	p.287 p.256
12	00665	TOTAL-P: Phosphorus, total [d]	mg/l as P	p.528 p.532	p. 42	p.287 p.256
13	00680	TCC: Total Organic Carbon	mg/l as C	p.257	p.702	p.236
14	00340	COD: Chemical Oxygen Demand	mg/l	p.495	p.219	p. 20
15	00940	Cl: Chloride	mg/l as Cl	p. 96 p. 97	p. 23 p. 21	p. 29 p. 31
16	70300	TDS: Total dissolved (filterable) solids	mg/l	--	--	p.266

* Approved quality control procedures are contained in "Handbook for Analytical Quality Control in Water and Wastewater Laboratories". This publication is available from the U.S. Environmental Protection Agency, Office of Technology Transfer, Cincinnati, Ohio 45268.

(a) pH paper may be used by non-NPDES permittees of less than 100,000 gpd design capacity.
(b) Combined or sum of separate determinations.
(c) Kjeldahl digestion after ammonia distillation.
(d) Persulfate digestion result including ortho-phosphate.

STATE OF FLORIDA

DEPARTMENT OF ENVIRONMENTAL REGULATION

SOUTH FLORIDA
DISTRICT
2269 BAY STREET
FORT MYERS, FLORIDA 33901-2696

BOB GRAHAM
GOVERNOR

VICTORIA J. TSCHINKEL
SECRETARY

PHILIP R. EDWARDS
DISTRICT MANAGER

November 22, 1985

Patrick J. Lehman, P.E.
Operations Manager
Florida Cities Water Company
Post Office Box 5846
Sarasota, Florida 33579

RE: Lee County - DW
Waterway Estates
DO36-72569

Dear Mr. Lehman:

This letter responds to your correspondence dated October 8, 1985 requesting modification of operating permit DO36-72569 and November 20, 1985 requesting decreased staffing requirements for the referenced facility.

Your request to change the mode of operation from contact stabilization to conventional activated sludge for reasons contained in the aforementioned letter is granted and your permit modified accordingly. All conditions of the permit shall remain the same. Furthermore, the Department hereby modifies the staffing requirements pursuant to Florida Administrative Code (FAC) Rule 17-16.375(8) for the Waterway Estates treatment facility, I.D. number 5236P01630 as follows:

> The treatment facility is a category II Class B, which must provide staffing by a Class C or higher operator: 6 hours/day for 5 days/week and one visit on each weekend day. The Lead/Chief Operator must be Class B, or higher.
>
> In the event the Department determines that treatment is not in compliance, the on site operator time will be increased to that specified in FAC Rule 17-16.370(3)(b) Class B.

This letter becomes a part of permit DC36-72569 and must be attached to that permit.

Continued . . . .

AN EQUAL OPPORTUNITY/AFFIRMATIVE ACTION EMPLOYER

COPY

Should you object to this permit, including any and all of the conditions contained therein, you may file an appropriate petition for administrative hearing. This petition must be filed within fourteen (14) days of the receipt of this letter. Further, the petition must conform to the requirements of Section 28-5.201, Florida Administrative Code (copy enclosed). The petition must be filed with the Office of General Counsel, Department of Environmental Regulation, Twin Towers Office Building, 2600 Blair Stone Road, Tallahassee, Florida 32301.

If no petition is filed within the prescribed time, you will be deemed to have accepted this permit and waived your right to request an administrative hearing on this matter.

Acceptance of the permit constitutes notice and agreement that the Department will periodically review this permit for compliance, including site inspections where applicable, and may initiate enforcement action for violation of the conditions and requirements thereof.

Sincerely,

Philip R. Edwards
District Manager

Attachment

PRE/JKB/ls

cc: A. A. Reeves III
Peter R. Campbell

RULES OF THE ADMINISTRATION COMMISSION
MODEL RULES OF PROCEDURE
CHAPTER 28-5
DECISIONS DETERMINING SUBSTANTIAL INTERESTS

PART II
FORMAL PROCEEDINGS

28-5.201 Initiation of Formal Proceedings.

(1) Initiation of formal proceedings shall be made by petition to the agency responsible for rendering final agency action. The term petition as used herein includes any application or other document which expresses a request for formal proceedings. Each petition should be printed, typewritten or otherwise duplicated in legible form on white paper of standard legal size. Unless printed, the impression shall be on one side of the paper only and lines shall be double-spaced and indented.

(2) All petitions filed under these rules should contain:

(a) The name and address of each agency affected and each agency's file or identification number, if known;

(b) The name and address of the petitioner or petitioners, and an explanation of how his/her substantial interests will be affected by the agency determination;

(c) A statement of when and how petitioner received notice of the agency decision or intent to render a decision;

(d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;

(e) A concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief;

(f) A demand for relief to which the petitioner deems himself entitled; and

(g) Other information which the petitioner contends is material.

****

A petition may be denied if the petitioner does not state adequately a material factual allegation, such as a substantial interest in the agency determination, or if the petition is untimely. (Section 28-5.201(3)(a), FAC)

STATE OF FLORIDA

DEPARTMENT OF ENVIRONMENTAL REGULATION

SOUTH FLORIDA
DISTRICT

2269 BAY STREET
FORT MYERS, FLORIDA 33901-2896

BOB GRAHAM
GOVERNOR

VICTORIA J. TSCHINKEL
SECRETARY

PHILIP R. EDWARDS
DISTRICT MANAGER

May 7, 1986

Mr. Marshall Hyatt
Facility Performance Branch
Water Management Division
EPA Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365

RE: Lee County - DW
City of Cape Coral Wasteload Allocation
& NPDES Permit

Dear Mr. Hyatt:

With reference to our several telephone conversations regarding wasteload allocation and NPDES permit for the City of Cape Coral, I have enclosed copies of correspondence from our file relative to this subject.

In summary, Total Nitrogen (N) and Phosphorous (P) loadings to the Caloosahatchee River were established at 1100 lbs/day N and 183 lbs/day P by Florida Department of Environmental Regulation Water Quality Technical Series 2:52 of January 1981. Subsequent to this, computer simulation indicated additional nutrient loadings could be tolerated, and they are now established at 1225 lbs/day N and 204 lbs/day P maximum.

Considering a long term probability of 49 MGD sewage treatment capability in this area, these loadings translate to effluent standards of 3.0 mg/l N and 0.5 mg/l P (advanced treatment).

Current allocations are as follows:

STP	MGD	LBS. N	LBS. P
Ft. Myers Central	11.00	275.2	45.9
Ft. Myers South	12.00	300.2	50.0
Waterway Estates	1.08	27.0	4.5
Fiesta Village	5.00	125.1	20.9
Cape Coral (1988)	7.30	182.6	30.4
Sub Total	36.38	910.1	151.7
Old Bridge Park (proposed)	2.00	50.0	8.3
"Reserve" WLA	10.62	264.9	44.0
Total WLA	49.00	1225.0	204.0

Continued . . . .

Exhibit___MA-4

The "reserve" WLA would be available for some new future discharger or for plant expansion on a "first come - first served" basis. When maximum loading is reached, no additional discharge to the river would be permitted.

Regarding Cape Coral's pending NPDES permit renewal, the effluent limitations of 182.6 lbs/day N and 30.4 lbs/day P would be applicable at some time after completion of construction of their 7.3 AT plant. This was originally expected to occur on July 30, 1987 (reference temporary operating permit DT36-81932, copy enclosed). However, because of problems associated with facility planning activities, changes in consultants, proposed plant design changes, and other State grant related activities, the City will not be able to meet this schedule. Completion of construction is now expected to be "late 1988". Until then, effluent limitations as now specified in FL0030007 would be acceptable to us, and the more stringent limitations effective upon certification of completion of construction.

Regarding Cl_2 residual requirements, I have alerted the City Manager and the consulting engineers of the need to include dechlorination facilities in the plant design, and they are agreeable to this. However, this change in design will have to be approved by City Council and also must be incorporated as an additional cost item in grant related documentation. Consequently, they would appreciate receiving "official" documentation of this requirement as soon as possible, preferably in the form of an advance copy of the NPDES draft permit.

Also, in order to be cost effective, they would request that dechlorination requirements be deferred until the new AT plant goes into operation.

I hope this information will be helpful to you in drafting Cape Coral's new NPDES permit. Please let me know if you need additional information.

Sincerely,

D. G. Richardson
Engineer

Enclosure

DGR/ls

cc: Roxane Dow
Ron Blackburn
Abdul Ahmadi

FLORIDA CITIES WATER COMPANY

TO: A.A. Reeves III

DATE: August 10, 1986

FROM: P.J. Lehman

SUBJ: Waterway Estates WWTP
DER Meeting July 29, 1986
NPDES/DER Permit Renewals

The above referenced meeting was held at the Ft. Myers DER office at the request of the DER.

Attending:

V. Melee, DER
L. Adair, DER
G. Romeis, DER
P. Lehman, FCWC

The referenced meeting was precipitated by the NPDES denial from the EPA. Waterway Estates WWTP has a valid DER Operating Permit with an expiration date of August 2, 1988. The DER recognizes this fact and will honor the existing Permit.

The local South Florida District DER office has recommended to Tallahassee the following:

1) Compliance with no discharge should be at expiration of current DER Operating Permit, August 2, 1988.

2) There should be no nutrient limits on existing WWTP. All Monitoring should be in accordance with DER regulations plus addition of quarterly monitoring of nutrients.

The attached DER inter-office memo outlines the above DER District Office recommendations.

The purpose of the meeting was to establish a compliance schedule with the DER to meet the August 2, 1988 deadline. Discharge option to the Caloosahatchee River would require a wasteload allocation. There currently is available capacity and if FCWC requests a WLA, the DER should be able to comply within four weeks. Other disposal options are available, i.e., upland spray irrigation or deep well injection, depending on the cost-effectiveness.

FCWC is to respond to the DER with a proposed compliance schedule providing target dates for major tasks completion in order to comply with the August 2, 1988 date to maintain no-discharge to the canal. The DER will formulate a consent agreement to this effect.

FLORIDA CITIES WATER COMPANY
2112 Gulf Gate Drive
P.O. BOX 5846
Sarasota, Florida 34277
813-924-1128

Exhibit___MA-5

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET
ATLANTA, GEORGIA 30365

DEC 08 1986

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

REF: 4WM-FP

Mr. A. A. Reeves, III
Vice President & General Manager
Florida Cities Water Company
Post Office Box 5846
2112 Gulf Gate Drive
Sarasota, Florida 34277

RE: Waterway Estates
NPDES Permit No. FL0030325

Dear Mr. Reeves:

You are hereby notified of denial of the National Pollutant Discharge Elimination System (NPDES) permit application for the above referenced facility. This action constitutes the Environmental Protection Agency's (EPA) final permit decision in accordance with 40 CFR 124.15(a). Any person may contest this decision by submitting a timely request for a hearing to the Regional Administrator under 40 CFR 124.74 or 124.114.

This action will be effective thirty days from the date you receive this letter, provided that no request for a hearing is granted by the Agency under 40 C.F.R. 124.75 or 124.114. In the event that such a request is granted:

- For discharge(s) authorized by an NPDES permit, at the time this permit application was filed, the force and effect of this action will be stayed, all provisions(s) of the previous NPDES permit shall be fully enforceable and effective until the administrative review process is completed, as provided by 40 CFR 124.16 and 124.60

- For discharge(s) not authorized by an NPDES permit, at the time this permit application was filed, the Agency's granting of a hearing (requested by you or any other person) does not provide you authorization to discharge. In other words, there will not be an NPDES permit authorizing the discharge(s) and if such a discharge(s) occurs, the discharge(s) will constitute a violation of Section 301 of the Clean Water Act, (33 U.S.C. 1311) for which there is civil and/or criminal liability.

RECEIVED
SARASOTA OFFICE

Exhibit___MA-6

DEC 10 1986

If you wish to request a hearing under 40 CFR 124.74 or 124.114 you must submit a request (an original and two copies) to the Regional Hearing Clerk within thirty (30) days from the receipt of this letter. The request will be timely if mailed by certified mail within the thirty (30) day time period. For the request to be valid, it must conform to the requirements of 40 CFR 124.74. A copy of the requirements of 40 CFR 124.74 is attached.

Since this facility is presently discharging pollutants to waters of the United States, EPA intends to issue an Administrative Order to you for this facility. The Administrative Order will contain a schedule for this facility to cease discharge, and will specify interim discharge limitations. You will be contacted by a separate letter regarding the details of the Administrative Order.

Information on procedures pertaining to the filing of a hearing request or other legal matters may be obtained by contacting Ms. Jacqueline Colson, Assistant Regional Counsel, at (404) 347-3506.

Sincerely yours,

Bruce R. Barrett, Director
Water Management Division

Enclosures (3): Hearing Request Requirements
Amendment to Fact Sheet
Fact Sheet

cc: Florida Department of Environmental Regulation

NPDES CERTIFICATION WORKSHEET
(Municipal and Private S.T.P.'s)

NAME OF FACILITY Waterway Estates W.W.T.P. (Florida Cities Water Company)

NPDES NO. FL0030325

PERMIT NO. DO36-72569 EXPIRATION DATE August 2, 1988

DESIGN FLOW 1.08 MGD

TYPE TREATMENT

Advanced _____ Activated Sludge (other than extended aeration) C.S.

Extended Air _____ Trickling Filter _____

Other (Describe) Contact stabilization process wastewater facility.

OPERATING DATA (past 12 months):

PARAMETER (If Available) Mo.: See enclosed computer print out. Yr.

Flow (mgd)												
BOD5 (ppm)	Inf.											
	Eff.											
	% Rem.											
TSS	(ppm) Inf.											
	Eff.											
	% Rem.											
D.O. (ppm)												
EFF. TKN (ppm)												
EFF. TN (ppm)												
EFF. TP (ppm)												

MONITORING REQUIREMENTS

Does the State Permit or Consent Order Contain Any Monitoring Requirements Which Deviate from Chapter 17-19's Present Minimum Requirements?

N/A

TREATMENT REQUIREMENTS

Does the State Permit or Consent Order Contain any Interim or Final Treatment Requirements? If Yes, please Enumerate:

N/A

COMPLIANCE SCHEDULE IN STATE PERMIT (If Applicable) AND OTHER COMMENTS (Regionalization Plans, Federal Grants Status, Applicable Local Regulations, etc.)

The Department has reviewed the above referenced facility files. This project is a conventional secondary process wastewater treatment plant with an existing operating permit. DO36-72569 which expires August 2, 1988 (copy enclosed).

(Continued on next page.)

SIGNED: _____
District NPDES Engineer

DATE: _____

Exhibit MA-7

NPDES CERTIFICATION WORKSHEET
(Municipal and Private S.T.P.'s)

AME OF FACILITY Waterway Estates W.W.T.P. (Florida Cities Water Company)

The following recommendations were made from staff discussions and opinions. When the current operating permit D036-72569 expires, the facility should be in compliance with ne no discharge status:

(1) This will require either removing the discharge pipe from the canal and relocating it to a six (6) foot contour line in the Caloosahatchee River with WLA limits and AWT for nutrient removal.

(2) Going to a land disposal system.

Meanwhile, this facility should monitor the following additional parameters in their ffluent namely, Total N and Total P on a quarterly basis. Due to the conventional ature of the plant, no nutrient (nitrogen and phosphorus) limits are placed on the discharge until the existing State operating permit expires. All other parameters hould be monitored in accordance with Chapter 17-19, Florida Administrative Code FAC).

The District Environmental Manager for Enforcement has been apprised of all the mentioned recommendations/comments and will initiate correspondence for corrective action which includes informing Florida Cities Water Company of the need for a compliance schedule to meet the no discharge requirement upon the expiration of the xisting permit, D036-72569.

The Department has no other problems with the above mentioned facility as long as hapter 17-3, 17-4 and 17-6, FAC, requirements are being met in the interim for a urface water discharge.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET
ATLANTA, GEORGIA 30365

MAY 11 1987

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

REF: 4WM-FP

Mr. A.A. Reeves, III
Florida Cities Water Co.
2112 Gulf Gate Drive
Sarasota, FL 33581

Re: Florida Cities Water Co., Waterway Estates WWTP - Ft. Myers, FL
Administrative Order No. 87-085(WMGM)
NPDES Permit No. FL0030325

Dear Mr. Reeves:

Pursuant to Section 309(a) of the Clean Water Act, as amended, the Director, Water Management Division, Region IV, United States Environmental Protection Agency, has determined that the above named facility is in violation of the Clean Water Act. As a result, the Director has issued a Section 309 Order which is enclosed.

Any person who violates a Section 309 Order shall be subject to a civil penalty not to exceed $25,000 per day of such violation pursuant to Section 309(d) of the Clean Water Act.

Under Executive Order 11738 and EPA regulations issued thereunder (40 Code of Federal Regulations, Part 15), facilities to be utilized in contracts, grants, and loans must be in full compliance with all standards established pursuant to the Clean Water Act and the Clean Air Act. A violation of the standards outlined in this notification may result in the subject facility becoming ineligible for participation in any work associated with a Federal contract, grant, or loan.

If you have any questions concerning the enclosed Order, please contact Ms. Priscilla Oliver, Water Management Division at 404/347-7428.

Sincerely yours,

John T. Marlar, Chief
Facilities Performance Branch
Water Management Division

Enclosure

cc: FDER, Tallahassee, FL
Bennie T. Shoemaker, FDER, Ft. Myers, FL

Exhibit___MA-8

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV

IN THE MATTER OF FLORIDA CITIES WATER COMPANY WATERWAY ESTATES FT. MYERS, FL NPDES PERMIT NO. FL0030325	)))))	Order No. 87-085(wMG1)

ORDER PURSUANT TO SECTION 309
CLEAN WATER ACT

Pursuant to the authority of Section 309(a) of the Clean Water Act (the Act), 33 U.S.C. 1319, which has been delegated to me, I hereby make the following Findings of Fact and Violation and Order:

FINDINGS OF FACT

1. Florida Cities Water Company (hereinafter, the Respondent), has submitted an NPDES permit application wherein it is stated that Respondent has a wastewater treatment system (Waterway Estates STP) which periodically discharges pollutants into waters of the United States.

2. The United States Environmental Protection Agency, Region IV (EPA), has denied issuance of a National Pollutant Discharge Elimination System (NPDES) Permit for the above discharge. The permit was denied December 8, 1986.

3. In accordance with Section 301(a) of the Clean Water Act, discharges of pollutants into waters of the United States are unlawful unless permitted by an NPDES permit, or specifically exempted from NPDES requirements. The final effluent limits for this facility to a canal of the Caloosshatchee River are "no discharge." An NPDES permit can not be issued to a facility that is discharging to a no discharge area.

VIOLATION

The Respondent is in violation of Section 301(a) of the Clean Water Act by discharging pollutants into waters of the United States without an NPDES permit.

ORDER

Based on the foregoing Findings of Fact and Violation, and pursuant to the provisions of Section 309(a) of the Act, as amended, it is hereby ordered:

1. That the Respondent cease discharging pollutants to waters of the United States at the earliest date practicable but not later than September 30, 1988. The Respondent shall report on progress toward meeting this compliance date as follows:

Activity	Due Date
Submit Progress Report	July 1, 1987
Submit Progress Report	August 1, 1987
Submit Progress Report	September 30, 1987
Start Construction	October 15, 1987
Submit Progress Report	December 30, 1987
Submit Progress Report	March 30, 1987
Complete Construction	August 1, 1988
Meet Final Requirements by Ceasing Discharge	September 30, 1988

2. This should in no way be considered a permit to discharge, however, if the Respondent does discharge to waters of the United States in violation of the Act, the Respondent's discharge of treated wastewater shall at least comply with the effluent limitations, monitoring schedule and other requirements contained in its previous permit.

3. That monitoring results obtained during each calendar quarter shall be summarized on a Discharge Monitoring Report Form (EPA Form 3320-1). Forms shall be submitted for each month and shall be postmarked no later than the 28th day of the month following the end of the month being reported on. Monitoring required by the State of Florida other than that specifically required by this Order shall be submitted in the same form as to the State but shall be included with Discharge Monitoring Report submissions.

4. If there is any transfer of ownership of this facility prior to completion of all requirements of this Order, then the new owner must be informed of these requirements and shall carry out the provisions. EPA shall be notified of any transfer of ownership.

5. The information required by this Order other than monitoring information shall be sent by registered mail or its equivalent to the following addresses:

Mr. John T. Marlar, Chief
Facilities Performance Branch
Water Management Division
U. S. Environmental Protection Agency
Region IV
345 Courtland Street
Atlanta, GA 30365

Mr. Phillip R. Edwards
Florida Dept. of Environmental Regulation
2269 Bay St.
Ft. Myers, FL 33901

6. Nothing contained in this Order shall be construed to prevent further enforcement of the violations stated herein.

MAY 11 1987
Date

Bruce R. Barrett, Director
Water Management Division

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

SEP 29 1989

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

REF: 4WM-FP

Mr. Robert French
Senior Vice President
Florida Cities Water Company
2112 Gulf Gate Drive
Sarasota, Florida 34277

RE: Final Issuance of NPDES Permit No. FL0030325
Waterway Estates WWTP

Dear Mr. French:

Enclosed is the National Pollutant Discharge Elimination System (NPDES) permit for the above referenced facility. This action constitutes the Environmental Protection Agency's final permit decision in accordance with 40 CFR 124.15(a). Any person may contest this decision by submitting a timely request for a hearing to the Regional Administrator under 40 CFR 124.74 or 124.114.

The permit will be effective as specified in the permit, provided that no request for a hearing is granted by the Agency under 40 C.F.R. 124.75 or 124.114. In the event that such a request is granted:

- For discharge(s) previously authorized by an NPDES permit, at the time this permit application was filed, the force and effect of the contested provision(s) of this permit will be stayed, and any comparable provision(s) of the previous NPDES permit as well as all uncontested provision(s) of this permit shall be fully enforceable and effective until the administrative review process is completed, as provided by 40 CFR 124.16 and 124.60.

- For discharge(s) not previously authorized by an NPDES permit, the Agency's granting of a hearing (requested by you or any other person) will result in no authorization to discharge. In other words, there will not be an NPDES permit authorizing the discharge(s) and if such a discharge(s) occurs, the discharge(s) will constitute a violation of Section 301 of the Clean Water Act, (33 U.S.C. 1311) for which there is civil and/or criminal liability.

If you wish to request a hearing under 40 CFR 124.74 or 124.114 you must submit a request (an original and two copies) to the Regional Hearing Clerk within thirty (30) days from the receipt of this letter. The request will be timely if mailed by certified mail within the thirty (30) day time period. For the request to be valid, it must conform to the requirements of 40 CFR 124.74. A copy of the requirements of 40 CFR 124.74 is attached.

Information on procedures pertaining to the filing of a hearing request or other legal matters may be obtained by contacting Ms. Jacqueline F. Colson, Assistant Regional Counsel, at (404) 347-2335.

Sincerely yours,

Al J. Smith, Acting Director
Water Management Division

Enclosures (3): Hearing Request Requirements
Final NPDES Permit
Amendment to Fact Sheet

cc: Florida DER (with Final Permit & Amendment)
Susan Aul; Atlanta, GA

REQUIREMENTS FOR EVIDENTIARY/PANEL HEARING REQUEST

Evidentiary Hearing (40 CFR 124.74)

(a) Within 30 days following service of notice of the Regional Administrator's final permit decision under 124.15 any interested person may submit a request to the Regional Administrator under paragraph (b) of this section for an evidentiary hearing to reconsider or contest that decision. If such a request is submitted by a person other than the permittee, the person shall simultaneously serve a copy of the request on the permittee.

(b) (1) In accordance with 124.76, such requests shall state each legal or factual question alleged to be at issue, and their relevance to the permit decision, together with a designation of the specific factual areas to be adjudicated and the hearing time estimated to be necessary for adjudication. Information supporting the request or other written documents relied upon to support the request shall be submitted as required by 124.73 unless they are already part of the administrative record required by 124.18.

ote: This paragraph allows the submission of requests for evidentiary hearings even though both legal and factual issues may be raised, or only legal issues may be raised. In the latter case, because no factual issues were raised, the Regional Administrator would be required to deny the request. However, on review of the denial the Administrator is authorized by 124.91(a)(1) to review policy or legal conclusions of the Regional Administrator. EPA is requiring an appeal to the Administrator even of purely legal issues involved in a permit decision to ensure that the Administrator will have an opportunity to review any permit before it will be final and subject to judicial review.

(2) Persons requesting an evidentiary hearing on an NPDES permit under this section may also request an evidentiary hearing on a RCRA or UIC permit, PSD permits may never be made part of an evidentiary hearing under Subpart E. This request is subject to all the requirements of paragraph (b)(1) of this section and in addition will be granted only if:

(i) Processing of the RCRA or UIC permit at issue was consolidated with the processing of the NPDES permit as provided in 124.4;

(ii) The standards for granting a hearing on the NPDES permit are met;

(iii) The resolution of the NPDES permit issues is likely to make necessary or appropriate modification of the RCRA or UIC permit; and

(iv) If a PSD permit is involved, a permittee who is eligible for an evidentiary hearing under Subpart E on his or her NPDES permit requests that the formal hearing be conducted under the procedures of Subpart F and the Regional Administrator finds that consolidation is unlikely to delay final permit issuance beyond the PSD one-year statutory deadline.

(c) These requests shall also contain:

(1) The name, mailing address, and telephone number of the person making such request;

(2) A clear and concise factual statement of the nature and scope of the interest of the requester;

(3) The names and addresses of all persons whom the requester represents; and

(4) A statement by the requester that, upon motion of any party granted by the Presiding Officer, or upon order of the Presiding Officer sua sponte without cost or expense to any other party, the requester shall make available to appear and testify, the following:

(i) The requester;
(ii) All persons represented by the requester: and
(iii) All officers, directors, employees, consultants, and agents of the requester and the persons represented by the requester.

(5) Specific references to the contested permit conditions, as well as suggested revised or alternative permit conditions (including permit denials) which, in the judgement of the requester, would be required to implement the purposes and policies of the CWA.

(6) In the case of challenges to the application of control or treatment technologies identified in the statement of basis or fact sheet, identification of the basis for the objection, and the alternative technologies or combination of technologies which the requester believes are necessary to meet the requirements of the CWA.

(7) Identification of the permit obligations that are contested or are inseverable from contested conditions and should be stayed if the request is granted by reference to the particular contested conditions warranting the stay.

(8) Hearing requests also may ask that a formal hearing be held under the procedures set forth in Subpart F. An applicant may make such a request even if the proceeding does not constitute "initial licensing" as defined in 124.111.

(d) If the Regional Administrator grants an evidentiary hearing request in whole or in part, the Regional Administrator shall identify the permit conditions which have been contested by the requester and for which the evidentiary hearing has been granted. Permit conditions which are not contested or for which the Regional Administrator has denied the hearing request shall not be affected by, or considered at, the evidentiary hearing. The Regional Administrator shall specify these conditions in writing in accordance with 124.60(c).

(e) The Regional Administrator must grant or deny all requests for an evidentiary hearing on a particular permit. All requests that are granted for a particular permit shall be combined in a single evidentiary hearing.

(f) The Regional Administrator (upon notice to all persons who have already submitted hearing requests) may extend the time allowed for submitting hearing requests under this section for good cause.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

AMENDMENT TO THE FACT SHEET AT THE TIME OF FINAL PERMIT ISSUANCE

FACILITY: Florida Cities Water - Waterway Estates DATE: SEP 29 1989

APPLICATION NO: FL0030325

PERMIT WRITER: Connie Kagey

1. Changes to Permit from Draft to Final Permit Stage:

For clarification, minor changes were made in Parts I and IV regarding the biomonitoring language. Page I-2, Item 8, was changed to reflect the current FAC reference. Page IV-1, Item 3, an additional sentence was included at the end of the paragraph concerning submittal of QA/QC reference toxicant tests if available.

Public Comment:

One comment dated August 31, 1989, was received from Susan Aul, Atlanta, Georgia. Ms. Aul believed that this facility should have an individual control stategy in reference to the 304(l) list. As noted by EPA's letter of September 12, 1989, this facility was not included on the 304(l) list and thus an individual control strategy is not required.

3. State Certification:

State certification was requested on July 25, 1989, and is hereby deemed waived per 40 CFR Section 124.53(c).

PERMIT NO. FL0030325
Major Non-POTW

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV

AUTHORIZATION TO DISCHARGE UNDER THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the Clean Water Act, as amended (33 U.S.C. 1251 et seq.; the "Act"),

Florida Cities Water Company
2112 Gulf Gate Drive
Sarasota, Florida 34277

is authorized to discharge from a facility located at

Waterway Estates WWTP
1667 Inlet Drive
Lee County
North Fort Myers, Florida

to receiving waters named

Caloosahatchee River

in accordance with effluent limitations, monitoring requirements and other conditions set forth herein. The permit consists of this cover sheet, Part I 4 pages, Part II 16 pages, Part III 1 page, and Part IV 1 page.

This permit shall become effective on November 1, 1989.

This permit and the authorization to discharge shall expire at midnight, September 30, 1994.

SEP 29 1989
Date Signed

Al J. Smith, Acting Director
Water Management Division

PART I

A. EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS - FINAL

1. During the period beginning on the effective date of discharge and lasting through the expiration date of this permit, the permittee is authorized to discharge from outfall 001, sanitary wastewater.

Such discharges shall be limited and monitored by the permittee as specified below:

PARAMETER	DISCHARGE LIMITATIONS			MONITORING REQUIREMENTS		
	Annual Average	Monthly Average	Daily Maximum	Measurement Frequency	Sample Type	Sample Point
Flow, MGD	--	Report	Report	Continuous	Recording Flow Meter & Totalizer	Effluent
Biochemical Oxygen Demand (5 Day)	20.0 mg/l	30.0 mg/l	60.0 mg/l	1/week	16 hr. composite	Effluent
Total Suspended Solids	20.0 mg/l	30.0 mg/l	60.0 mg/l	1/week	16 hr. composite	Effluent
Total Nitrogen, as N	-- --	3.0 mg/l 25.0 lb/day	-- --	1/week	16 hr. composite	Effluent
Total Phosphorus, as P	-- --	0.5 mg/l 4.2 lb/day	-- --	1/week	16 hr. composite	Effluent
Fecal Coliform Bacteria,	200/100ml	--	800/100ml	1/week	Grab	Effluent
Dissolved Oxygen shall not be less than 5.0 mg/l				1/week	Grab	Effluent
pH	See Item 3 on Page I-2			Continuous	Recorder	Effluent

PART I (CONTINUATION)
EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

2. The annual average shall be reported on the discharge monitoring report for each month and shall be submitted as required in Part III. No violations for BOD_5, TSS, and Fecal Coliform will be deemed to have occurred until data have been compiled for the first 12 months after the effective date of the permit.

3. The pH of the effluent shall not be less than 6.0 standard units nor greater than 8.5 standard units. When pH is measured continuously, pH shall not deviate outside the required range more than 1% of the time (7 hours and 26 minutes) in any calendar month and no individual excursion shall exceed 60 minutes. An "excursion" is an unintentional and temporary incident in which the pH value of discharge wastewater exceeds the range set forth in this permit.

4. Any bypass of the treatment facility which is not included in the effluent monitored above is to be monitored for flow and reported on a Discharge Monitoring Report (DMR) Form (3320-1).

5. There shall be no discharge of floating solids or visible foam in other than trace amounts.

6. The effluent shall not cause a visible sheen on the receiving water.

7. The permittee has indicated that ultraviolet disinfection will be used at this facility; therefore, a total residual chlorine (TRC) limitation has not been incorporated into this permit. The permittee shall give notice to the Permit Issuing Authority if chlorine is used at this facility for disinfection. Such notice shall be given at least 60 days prior to the use of chlorine. This paragraph is in addition to that in Part II, Page II-8, Section D, Item 1.b.

8. The effluent (100%) for outfall 001 shall not be lethal to more than 50% of the appropriate test organisms. The testing for this requirement must conform with Part IV of this permit. Lethality to more than 50% of the test organisms in a test of 48 hours duration will constitute a violation of Florida Administrative Code Section 17-4.244(3)(a) and the terms of this permit.

9. Samples taken in compliance with the monitoring requirements specified in this permit shall be taken at the nearest accessible point after final treatment but prior to the actual discharge or mixing with the receiving waters.

B. SLUDGE MANAGEMENT PRACTICES

1. The permittee must sample and analyze the sludge and report to EPA the quantitative data for the 125 priority pollutants listed in 40 CFR 122, Appendix D, Tables II and III. Qualitative data for 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD) must also be submitted if the permittee knows or has reason to believe that TCDD is or may be present in the sludge.

   a. The permittee must submit the above data within 1 year of the effective date of this permit.

2. The permittee must submit within 30 days of the effective date of this permit the sludge production volume (specify if daily or annual; if actual volume is not known, estimate the quantity of sludge being handled and so indicate) and the sludge disposal practice.

3. The permittee shall provide sludge inventory data to the State and EPA, as part of EPA's inventory updates as requested. The data should include, but not be limited to, sludge quantity and characteristics.

4. Reopener. If an applicable "acceptable management practice" or numerical limitation for pollutants in sewage sludge promulgated under Section 405(d)(2) of the Clean Water Act, as amended by the Water Quality Act of 1987, is more stringent than the sludge pollutant limit or acceptable management practice in this permit, or controls a pollutant not limited in this permit, this permit shall be promptly modified or revoked and reissued to conform to the requirements promulgated under Section 405(d)(2). The permittee shall comply with the limitations by no later than the compliance deadline specified in the applicable regulations as required by Section 405(d)(2)(D) of the Clean Water Act.

5. Notice of change in sludge disposal practice. The permittee shall give prior notice to the Regional Administrator of any change planned in the permittee's sludge disposal practice.

6. Cause for modification. 40 CFR 122.62(a)(1) provides that the following is a cause for modification but not revocation and reissuance of permits except when the permittee requests or agrees. (a) Alterations. There are material and substantial changes or additions to the permitted facility or activity which occurred after permit issuance which justify the application of permit conditions that are different or absent in the existing permit.

7. Upon review of information provided by the permittee as required by the above items, or results from an on-site inspection, the permit shall be subject to modification to incorporate appropriate requirements.

C. SCHEDULE OF COMPLIANCE

1. The permittee shall achieve compliance with the effluent limitations specified for discharges in accordance with the following schedule:

Discharge 001:

Operational level attained . . . Effective Date of Permit

2. No later than 14 calendar days following a date identified in the above schedule of compliance, the permittee shall submit either a report of progress or, in the case of specific actions being required by identified dates, a written notice of compliance or noncompliance. In the latter case, the notice shall include the cause of noncompliance, any remedial actions taken, and the probability of meeting the next scheduled requirement.

Part II

STANDARD CONDITIONS FOR NPDES PERMITS

SECTION A. GENERAL CONDITIONS

1. Duty to Comply

The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.

2. Penalties for Violations of Permit Conditions

Any person who violates a permit condition is subject to a civil penalty not to exceed $25,000 per day for each violation. Any person who negligently violates any permit condition is subject to criminal penalties of $2,500 to $25,000 per day of violation, or imprisonment for not more than 1 year, or both. Any person who knowingly violates permit conditions is subject to criminal penalties of $5,000 to $50,000 per day of violation, or imprisonment for not more than 3 years, or both. Also, any person who violates a permit condition may be assessed an administrative penalty not to exceed $10,000 per violation with the maximum amount not to exceed $25,000. [Ref: 40 CFR 122.41(a)]

3. Duty to Mitigate

The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

4. Permit Modification

After notice and opportunity for a hearing, this permit may be modified, terminated, or revoked for cause including, but not limited to, the following:

a. Violation of any terms or conditions of this permit;

b. Obtaining this permit by misrepresentation or failure to disclose fully all relevant facts;

c. A change in any conditions that requires either temporary interruption or elimination of the permitted discharge; or

d. Information newly acquired by the Agency indicating the discharge poses a threat to human health or the environment.

permittee believes that any past or planned activity would be cause ...ification or revoca:..on and reissuance under 40 CFR 122.62, the ...ttee must report such information to the Permit Issuing Authority. submittal of a new application may be required of the permittee. The ing of a request by the permittee for a permit modification, revocation reissuance, or termination, or a notification of planned changes or ipated noncompliance, does not stay any permit condition.

Toxic Pollutants

withstanding Paragraph A-4, above, if a toxic effluent standard or hibition (including any schedule of compliance specified in such ent standard or prohibition) is established under Section 307(a) of Act for a toxic pollutant which is present in the discharge and such ndard or prohibition is more stringent than any limitation of such tant in this permit, this permit shall be modified or revoked and s ued to conform to the toxic effluent standard or prohibition and the mittee so notified.

Civil and Criminal Liability

ent as provided in permit conditions on "Bypassing" Section B, Paragraph , and "Upsets" Section B, Paragraph B-4, nothing in this permit shall be nstrued to relieve the permittee from civil or criminal penalties for ncompliance.

...l and Hazardous Substance Liability

...ing in this permit shall be construed to preclude the institution of legal action or relieve the permittee from any responsibilities, abilities, or penalties to which the permittee is or may be subject under ...ion 311 of the Act.

State Laws

...ing in this permit shall be construed to preclude the institution of legal action or relieve the permittee from any responsibilities, abilities, or penalties established pursuant to any applicable State law egulation under authority preserved by Section 510 of the Act.

Property Rights

...e issuance of this permit does not convey any property rights of any ...rt, or any exclusive privileges, nor does it authorize any injury to ...rivate property or any invasion of personal rights, nor any infringement ...f Federal, State, or local laws or regulations.

. Onshore or Offshore Construction

permit does not authorize or approve the construction of any onshore offshore physical structures or facilities or the undertaking of any rx in any waters of the United States.

.. Severability

e provisions of this permit are severable, and if any provision of this it, or the application of any provision of this permit to any r umstance, is held invalid, the application of such provision to other rcumstances, and the remainder of this permit, shall not be affected ereby.

. Duty to Provide Information

e permittee shall furnish to the Permit Issuing Authority, within a asonable time, any information which the Permit Issuing Authority may quest to determine whether cause exists for modifying, revoking and suing, or terminating this permit or to determine compliance with this it. The permittee shall also furnish to the Permit Issuing Authority on request, copies of records required to be kept by this permit.

CTION B. OPERATION AND MAINTENANCE OF POLLUTION CONTROLS

per Operation and Maintenance

e permittee shall at all times properly operate and maintain all cilities and systems of treatment and control (and related appurtenances) ich are installed or used by the permittee to achieve compliance with the nditions of this permit. Proper operation and maintenance also includes e ate laboratory controls and appropriate quality assurance procedures. provision requires the operation of back-up or auxiliary facilities or milar systems which are installed by a permittee only when the operation ecessary to achieve compliance with the conditions of the permit.

Need to Halt or Reduce not a Defense

shall not be a defense for a permittee in an enforcement action that it uld have been necessary to halt or reduce the permitted activity in order maintain compliance with the condition of this permit.

Bypass of Treatment Facilities

a. Definitions

(1) "Bypass" means the intentional diversion of waste streams from any portion of a treatment facility, which is not a designed or established operating mode for the facility.

(2) "Severe property damage" means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

b. Bypass not exceeding limitations.

The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of Paragraphs c. and d. of this section.

. Notice

(1) Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least ten days before the date of the bypass; including an evaluation of the anticipated quality and effect of the bypass.

(2) Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required in Section D, Paragraph D-8 (24-hour notice).

d. Prohibition of bypass

(1) Bypass is prohibited and the Permit Issuing Authority may take enforcement action against a permittee for bypass, unless:

(a) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(b) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate backup equipment should have been installed in the exercise of reasonable engineering judgement to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and

(c) The permittee submitted notices as required under Paragraph c. of this section.

(2) The Permit Issuing Authority may approve an anticipated bypass, after considering its adverse effects, if the Permit Issuing Authority determines that it will meet the three conditions listed above in Paragraph d.(1) of this section.

Upsets

Up et" means an exceptional incident in which there is unintentional and emporary noncompliance with technology based permit effluent limitations ecause of factors beyond the reasonable control of the permittee. An s t does not include noncompliance to the extent caused by operational r r, improperly designed treatment facilities, lack of preventive intenance, or careless or improper operation. An upset constitutes an f rmative defense to an action brought for non-compliance with such c nology based permit limitation if the requirements of 40 CFR .2.41(n)(3) are met.

Removed Substances

is permit does not authorize discharge of solids, sludge, filter c wash, or other pollutants removed in the course of treatment or control astewaters of the United States unless specifically limited in Part 1.

C ION C. MONITORING AND RECORDS

Representative Sampling

mples and measurements taken as required herein shall be representative the volume and nature of the monitored discharge. All samples shall be k n at the monitoring points specified in this permit and, unless herwise specified, before the effluent joins or is diluted by any other stestream, body of water, or substance. Monitoring points shall not b anged without notification to and the approval of the Permit Issuing thority.

Measurements

r priate flow measurement devices and methods consistent with accepted .entific practices shall be selected and used to insure the accuracy and .iability of measurements of the volume of monitored discharges. The -i es shall be installed, calibrated and maintained to insure that the :u_acy of the measurements are consistent with the accepted capability of :t type of device. Devices selected shall be capable of measuring flows :h a maximum deviation of less than ± 10% from the true discharge rates tc ghout the range of expected discharge volumes. Once-through condenser >ling water flow which is monitored by pump logs, or pump hour meters as ecified in Part I of this permit and based on the manufacture's pump m s shall not be subject to this requirement. Guidance in lection,installation, calibration, and operation of acceptable flow asurement devices can be obtained from the following references:

(1) "A Guide of Methods and Standards for the Measurement of Water Flow", U.S. Department of Commerce, National Bureau of Standards, NBS Special Publication 421, May 1975, 97 pp. (Available from the U.S. Government Printing Office, Washington, D.C. 20402. Order by SD catalog No. C13.10:421.)

(2) "Water Measurement Manual", U.S. Department of Interior, Bureau of Reclamation, Second Edition, Revised Reprint, 1974, 327 pp. (Available from the U.S. Government Printing Office, Washington, D.C. 20402. Order by catalog No. 127.19/2:W29/2, Stock No. S/N 24003-0027.)

(3) "Flow Measurement in Open Channels and Closed Conduits", U.S. Department of Commerce, National Bureau of Standards, NBS Special Publication 484, October 1977, 982 pp. (Available in paper copy or microfiche from National Technical Information Service (NTIS), Springfield, VA 22151. Order by NTIS No.PB-273 535/5ST.)

(4) "NPDES Compliance Flow Measurement Manual", U.S. Environmental Protection Agency, Office of Water Enforcement, Publication MCD-77, September 1981, 135 pp. (Available from the General Services Administration (8BRC), Centralized Mailing Lists Services, Building 41, Denver Federal Center, Denver, CO 80255.)

Monitoring Procedures

onitoring must be conducted according to test procedures approved under 40 FR Part 136, unless other test procedures have been specified in this ermit.

Penalties for Tampering

The Clean Water Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate, any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or imprisonment for not more than 2 years, or both.

Retention of Records

The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least 3 years from the date of the sample, measurement, report, or application. This period may be extended by the Permit Issuing Authority at any time.

Record Contents

Records of monitoring information shall include:

a. The date, exact place, and time of sampling or measurements;

b. The individual(s) who performed the sampling of measurements;

c. The date(s) analyses were performed;

d. The individual(s) who performed the analyses;

e. The analytical techniques or methods used; and

f. The results of such analyses.

Inspection and Entry

The permittee shall allow the Permit Issuing Authority, or an authorized representative, upon the presentation of credentials and other documents as may be required by law, to:

a. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

b. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit.

Inspect at reasonable time any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and

d. Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the Clean Water Act, any substances or parameters at any location.

SECTION D. REPORTING REQUIREMENTS

Change in Discharge

The permittee shall give notice to the Permit Issuing Authority as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is required only when:

a. The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source; or

b. The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants which are subject neither to effluent limitations in the permit, nor to notification requirements under Section D, Paragraph D-10(a).

Anticipated Noncompliance

The permittee shall give advance notice to the Permit Issuing Authority of any planned change in the permitted facility or activity which may result in noncompliance with permit requirements. Any maintenance of facilities, which might necessitate unavoidable interuption of operation and degradation of effluent quality, shall be scheduled during noncritical water quality periods and carried out in a manner approved by the Permit Issuing Authority.

Transfer of Ownership or Control

A permit may be automatically transferred to another if:

a. The permittee notifies the Permit Issuing Authority of the proposed transfer at least 30 days in advance of the proposed transfer date;

b. The notice includes a written agreement between the existing and new permittees containing a specific date for transfer of permit responsibility, coverage, and liability between them; and

The Permit Issuing Authority does not notify the existing permittee of his or her intent to modify or revoke and reissue the permit. If this notice is not received, the transfer is effective on the date specified in the agreement mentioned in paragraph b.

Monitoring Reports

ee Part III of this permit.

Additional Monitoring by the Permittee

f the permittee monitors any pollutant more frequently than required by h s permit, using test procedures approved under 40 CFR 136 or as pecified in this permit, the results of this monitoring shall be included n the calculation and reporting of the data submitted in the Discharge o itoring Report (DMR). Such increased frequency shall also be indicated.

Averaging of Measurements

a culations for limitations which require averaging of measurements shall tilize an arithmetic mean unless otherwise specified by the Permit Issuing uthority in the permit.

Compliance Schedules

s of compliance or noncompliance with, or any progress reports on, m and final requirements contained in any compliance schedule of this ermit shall be submitted no later than 14 days following each schedule a e. Any reports of noncompliance shall include the cause of n compliance, any remedial actions taken, and the probability of meeting he next scheduled requirement.

Twenty-Four Hour Reporting

he permittee shall orally report any noncompliance which may endanger e lth or the environment, within 24 hours from the time the permittee e omes aware of the circumstances. A written submission shall also b rovided within 5 days of the time the permittee becomes aware of the i cumstances. The written submission shall contain a description of the n compliance and its cause, the period of noncompliance, including the xact dates and times; and if the noncompliance has not been corrected, the nticipated time it is expected to continue, and steps taken or planned to e uce, eliminate, and prevent reoccurance of the noncompliance. The ermit Issuing Authority may verbally waive the written report, on a ase-by-case basis, when the oral report is made.

e following violations shall be included in the 24 hour report when they ıdanger health or the environment:

1. An unanticipated bypass which exceeds any effluent limitation in the permit.

2. Any upset which exceeds any effluent limitation in the permit.

Other Noncompliance

e permittee shall report in narrative form, all instances of ncompliance not previously reported under Section D, Paragraphs D-2, 4 — D-7, and D-8 at the time monitoring reports are submitted. The pc rts shall contain the information listed in Paragraph D-8.

Changes in Discharges of Toxic Substances

e permittee shall notify the Permit Issuing Authority as soon as it knows has reason to believe:

1. That any activity has occurred or will occur which would result in the discharge, on a routine or frequent basis, of any toxic substance(s) (listed at 40 CFR 122, Appendix D, Table II and III) which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":

   (1) One hundred micrograms per liter (100 ug/l);

   (2) Two hundred micrograms per liter (200 ug/l) for acrolein and acrylonitrile; five hundred micrograms per liter (500 ug) for 2,4-dinitrophenol and for 2-methyl-4,6-dinitrophenol; and one milligram per liter (1 mg/l) for antimony; or

   (3) Five (5) times the maximum concentration value reported for that pollutant(s) in the application.

2. That any activity has occurred or will occur which would result in any discharge, on a non-routine or infrequent basis, of a toxic pollutant (listed at 40 CFR 122, Appendix D. Table II and III) which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":

   (1) Five hundred micrograms per liter (500 ug/l);

   (2) One milligram per liter (1 mg/l) for antimony; or

   (3) Ten (10) times the maximum concentration value reported for that pollutant(s) in the permit application.

Duty to Reapply

f the permittee wishes to continue an activity regulated by this permit f.er the expiration date of this permit, the permittee must apply for and btain a new permit. The application should be submitted at least 180 days e~ore the expiration date of this permit. The Permit Issuing Authority a grant permission to submit an application less than 180 days in advance ut not later than the permit expiration date.

h re EPA is the Permit Issuing Authority, the terms and conditions of this ermit are automatically continued in accordance with 40 CFR 122.6, only nere the permittee has submitted a timely and complete application for a e ewal permit and the Permit Issuing Authority is unable through no fault f the permittee to issue a new permit before the expiration date.

2 Signatory Requirements

ll applications, reports, or information submitted to the Permit Issuing thority shall be signed and certified.

a. All permit applications shall be signed as follows:

(1) For a corporation: by a responsible corporate officer. For the purpose of this Section, a responsible corporate officer means: (1) a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or (2) the manager of one or more manufacturing production facilities employing more than 250 persons or having gross annual sales or expenditures exceeding 25 million (in second quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

(2) For a partnership or sole proprietorship: by a general partner or the proprietor, respectively; or

(3) For a municipality, State, Federal, or other public agency: by either a principal executive officer or ranking elected official.

b. All reports required by the permit and other information requested by the Permit Issuing Authority shall be signed by a person described above or by a duly authorized representative of that person. A person is a duly authorized representative only if:

(1) The authorization is made in writing by a person described above;

(2) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the company. (A duly authorized representative may thus be either a named individual or any individual occupying a named position.); and

(3) The written authorization is submitted to the Permit Issuing Authority.

c. Certification. Any person signing a document under paragraphs (a) or (b) of this section shall make the following certification:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

. Availability of Reports

cept for data determined to be confidential under 40 CFR Part 2, all p rts prepared in accordance with the terms of this permit shall be a lable for public inspection at the offices of the Permit Issuing thority. As required by the Act, permit applications, permits and fluent data shall not be considered confidential.

. Penalties for Falsification of Reports

e Clean Water Act provides that any person who knowingly makes any false terial statement, representation, or certification in any record or other cument submitted or required to be maintained under this permit, luding monitoring reports or reports of compliance or noncompliance, or knowingly falsifies, tampers with, or renders inaccurate any monitoring evice or method required to be maintained under the Clean Water Act, all, upon conviction, be punished by a fine of not more than $10,000 or y imprisonment for not more than 2 years, or both.

SECTION E. DEFINITIONS

Permit Issuing Authority

The Regional Administrator of EPA Region IV or his designee, unless at some time in the future the State receives authority to administer the NPDES program and assumes jurisdiction over the permit; at which time, the Director of the State program receiving the authorization becomes the issuing authority.

Act

"Act" means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act) Public Law 92-500, as amended by Public Laws 95-217, 95-576, 96-483, 97-117, and 100-4, 33 U.S.C. 1251 et seq.

Mass/Day Measurements

a. The "average monthly discharge" is defined and the total mass of all daily discharges sampled and/or measured during a calendar month on which daily discharges are sampled and measured, divided by the number of daily discharges sampled and/or measured during such month. It is therefore, and arithmetic mean found by adding the weights of the pollutant found each day of the month and then dividing this sum by the number of days the tests were reported. The limitation is identified as "Daily Average" or "Monthly Average" in Part I of the permit and the average monthly discharge value is reported in the "Average" column under "Quantity" on the Discharge Monitoring Report (DMR).

b. The "average weekly discharge" is defined as the total mass of all daily discharges sampled and/or measured during the calendar week on which daily discharges are sampled and measured, divided by the number of daily discharges sampled and/or measured during such week. It is, therefore, an arithmetic mean found by adding the weights of pollutants found each day of the week and then dividing this sum by the number of days the tests were reported. This limitation is identified as "Weekly Average" in Part I of the permit. Enter the highest weekly average of sample measurments obtained during the reporting period in the "Maximum" column under "Quantity" on the DMR.

c. The "maximum daily discharge" is the total mass (weight) of a pollutant discharged during a calendar day. If only one sample is taken during any calendar day the weight of pollutant calculated from it is the "maximum daily discharge". This limitation is identified as "Daily Maximum", in Part I of the permit and the highest such value recorded during the reporting period is reported in the "Maximum" column under "Quantity" on the DMR.

The "average annual discharge" is a rolling average equal to the arithmetic mean of the mass measured in all discharges sampled and/or measured during consecutive reporting periods which comprise one year. For parameters that are measured at least once per month, the annual average shall be computed at the end of each month and is equal to the arithmetic mean of the monthly average of the month being reported and the monthly average of each of the previous eleven months. This limitation is defined as "Annual Average" in Part I of the permit and the average annual discharge value is reported in the "Average" column under "Quantity" on the DMR.

Concentration Measurements

a. The "average monthly concentration", other than for fecal coliform bacteria, is the sum of the concentrations of all daily discharges sampled and/or measured during a calendar month on which daily discharges are sampled and measured, divided by the number of daily discharges sampled and/or measured during such month (arithmetic mean of the daily concentration values). The daily concentration value is equal to the concentration of a composite sample or in the case of grab samples is the arithmetic mean (weighted by flow value) of all the samples collected during that calendar day. This limitation is identified as "Monthly Average" or "Daily Average" under "Other Limits" in Part I of the permit and the average monthly concentration value is reported under the "Average" column under "Quality" of the DMR.

b. The "average weekly concentration", other than for fecal coliform bacteria, is the sum of the concentrations of all daily discharges sampled and/or measured during a calendar week on which daily discharges are sampled and measured divided by the number of daily discharges sampled and/or measured during such week (arithmetic mean of the daily concentration values). The daily concentration value is equal to the concentration of a composite sample or in the the case of grab samples is the arithmetic mean (weighted by flow value) of all the samples collected during that calendar day. This limitation is identified as "Weekly Average" under "Other Limits" in Part I of the permit. Enter the highest weekly average of sample measurments obtained during the reporting period in the "Maximum" column under "Quality" on the DMR.

c. The "maximum daily concentration" is the concentration of a pollutant discharged during a calendar day. It is identified as "Daily Maximum" under "Other Units" in Part I of the permit and the highest such value recorded during the reporting period is reported under the "Maximum" column under "Quality" on the DMR.

d. The "average annual concentration", other than for fecal coliform bacteria, is a rolling average equal to the arithmetic mean of the effluent or influent samples collected during consecutive reporting periods which comprise one year. For parameters that are measured at least once per month, the annual average shall be computed at the end of each month and is equal to the arithmetic mean of the monthly average of the month being reported and the monthly average of each of the previous eleven months. This limitation is identified as "Annual Average" under "Other Limits" in Part I of the permit and the average annual concentration value is reported under the "Average" column under "Quality" on the DMR.

Other Measurements

a. The effluent flow expressed as million gallons per day (MGD) is the 24 hour average flow averaged monthly. It is the arithmetic mean of the total daily flows recorded during the calendar month. Where monitoring requirements for flow are specified in Part I of the permit the flow rate values are reported in the "Average" column under "Quantity" on the DMR.

b. An "instantaneous flow measurement" is a measure of flow taken at the time of sampling, when both the sample and flow will be representative of the total discharge.

c. Where monitoring requirements for pH, dissolved oxygen or fecal coliform bacteria are specified in Part I of the permit, the values are generally reported in the "Quality or Concentration" column on the DMR.

d. The "average annual discharge" for fecal coliform bacteria shall be calculated in the same manner as that for mass limitations (see item II.E.3.d.).

...s of Samples

a. Composite Sample: A "composite sample" is a combination of not less than 8 influent or effluent portions, of at least 100 ml, collected over the full time period specified in Part I.A. The composite sample must be flow proportioned by either time interval between each aliquot or by volume as it relates to effluent flow at the time of sampling or total flow since collection of the previous aliquot. Aliquots may be collected manually or automatically.

b. Grab Sample: A "grab sample" is a single influent or effluent portion which is not a composite sample. The sample(s) shall be collected at the period(s) most representative of the total discharge.

Calculation of Means

a. Arithmetic Mean: The "arithmetic mean" of any set of values is the summation of the individual values divided by the number of individual values.

b. Geometric Mean: The "geometric mean" of any set of values is the N^{th} root of the product of the individual values where N is equal to the number of individual values. The geometric mean is equivalent to the antilog of the arithmetic mean of the logarithms of the individual values. For purposes of calculating the geometric mean, values of zero (0) shall be considered to be one (1).

c. Weighted by Flow Value: "Weighted by flow value" means the summation of each concentration times its respective flow divided by the summation of the respective flows.

Calendar Day

"calendar day" ...s defined as the period from midnight o... one day until ...dnight of the next day. However, for purposes of this permit, any ...secutive 24-hour period that reasonably represents the calendar day may ...e used for sampling.

Hazardous Substance

"hazardous substance" means any substance designated under 40 CFR Part ... pursuant to Section 311 of the Clean Water Act.

...0. Toxic Pollutants

"toxic pollutant" is any pollutant listed as toxic under Se... on ...(a)(1) of the Clean Water Act.

Part III

Other Requirements

A. Reporting of Monitoring Results

Monitoring results obtained for each calendar month shall be summarized for that month and reported on a Discharge Monitoring Report Form (EPA No. 3320-1), postmarked no later than the 28th day of the month following the completed calendar month. (For example, data for January shall be submitted by February 28.) Duplicate signed copies of these, and all other reports required by Section D of Part II, Reporting Requirements, shall be submitted to the Permit Issuing Authority and the State at the following addresses:

Environmental Protection Agency
Region IV
Facilities Performance Branch
Water Management Division
345 Courtland Street, N.E.
Atlanta, GA 30365

Florida Dept. of Environmental Regulation
South District Office
2269 Bay Street
Fort Myers, Florida 33901-2896

B. Reopener Clauses

1. This permit shall be modified, or alternatively, revoked and reissued, to comply with any applicable effluent standard or limitation issued or approved under Sections 301(b)(2)(C) and (D), 307(a)(2), and 405(d)(2)(D) of the Clean Water Act, as amended, if the effluent standard, limitation, or sludge disposal requirement so issued or approved:

   a. Contains different conditions or is otherwise more stringent than any condition in the permit; or

   b. Controls any pollutant or disposal method not addressed in the permit.

   The permit as modified or reissued under this paragraph shall also contain any other requirements of the Act then applicable.

2. This permit shall also be modified, or alternatively, revoked and reissued at the written request of the State to incorporate any more stringent or additional requirements contained in any uncontested State permit for this facility which is issued during the term of this NPDES permit.

Part IV
Biomonitoring Program

In accordance with Part I of this permit, the permittee shall initiate the series of tests described below within 90 days of the effective date of this Part to evaluate wastewater toxicity of the discharge from outfall 001.

1. The permittee shall conduct 48-hour static toxicity tests using the Mysid shrimp (Mysidopsis bahia) and the inland silverside (Menidia beryllina) or any other species approved by EPA. Tests shall be conducted once every two months for a period of one year following the initiation of the tests and once every six months thereafter for the duration of the permit using samples of 100% effluent. Four separate grab samples shall be collected at evenly-spaced (6 hr.) intervals over a 24-hour period and used in four separate tests in order to catch any peaks of toxicity and to account for daily variations in effluent quality. Results of all tests conducted with any species shall be reported according to EPA/600/4-85/013, Section 13, Report Preparation and Data Utilization, and shall be submitted to EPA with the monthly discharge monitoring report.

2. If lethality (less than 50% survival of tests organisms in 100% effluent) is found in any test of final effluent, this will constitute a violation of this permit. The permittee will then be subject to the enforcement provisions of the Clean Water Act. In the event a violation of toxicity limits results in an enforcement action, any different or more stringent monitoring requirements imposed in that enforcement action shall apply in lieu of the requirements of this permit condition for whatever period of time is specified by EPA in the enforcement action.

3. All test organisms, procedures, and quality assurance criteria used shall be in accordance with Methods for Measuring the Acute Toxicity of Effluents to Freshwater and Marine Organisms, EPA-600/4-85-013. A standard reference toxicant quality assurance test shall be conducted concurrently with each set of toxicity tests and its results submitted with the monthly discharge monitoring report. Alternatively, if routine QA/QC reference toxicant tests are available, these tests should be submitted.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

SEP 26 1989

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

REF: 4WM-FP

Mr. A.A. Reeves, III
Florida Cities Water Co.
2112 Gulf Gate Drive
Sarasota, FL 33581

RE: Florida Cities Water Co., Waterway
Estates WWTP-Ft. Myers, FL
Administrative Order No. 89-109
NPDES Permit No. FL0030325

Dear Mr. Reeves:

Pursuant to Section 309(a) of the Clean Water Act, as amended, the Director, Water Management Division, Region IV, United States Environmental Protection Agency, has determined that the above-named facility is in violation of the Clean Water Act. As a result, the Director has issued a Section 309 Order which is enclosed.

Any person who violates a Section 309 Order shall be subject to a civil penalty not to exceed $25,000 per day of such violation pursuant to Section 309(d) of the Clean Water Act.

Under Executive Order 11738 and EPA regulations issued thereunder (40 Code of Federal Regulations, Part 15), facilities to be utilized in contracts, grants, and loans must be in full compliance with all standards established pursuant to the Clean Water Act and the Clean Air Act. A violation of the standards outlined in this notification may result in the subject facility becoming ineligible for participation in any work associated with a Federal contract, grant, or loan.

If you have any questions concerning the enclosed Order, please contact Ms. Priscilla Oliver, Water Management Division at 404/347-7428.

Sincerely yours,

John T. Marlar, Chief
Facilities Performance Branch
Water Management Division

Enclosure

cc: FDER, Tallahassee, FL
Bennie T. Shoemaker, FDER, Ft. Myers, FL

CF: J. Landers 5/14/91

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV

IN THE MATTER OF FLORIDA CITIES WATER COMPANY WATERWAY ESTATES FT. MYERS, FL NPDES PERMIT NO. FL0030325	)	Administrative Order No. 89-109

ORDER PURSUANT TO SECTION 309
CLEAN WATER ACT

Pursuant to the authority of Section 309(a) of the Clean Water Act (the Act), 33 U.S.C. 1319, which has been delegated to me, I hereby make the following Findings of Fact and Violation and Order:

FINDINGS OF FACT

1. Florida Cities Water Company (hereinafter, the Respondent), submitted an NPDES permit application wherein it is stated that Respondent has a wastewater treatment system (Waterway Estates STP) which periodically discharges pollutants into waters of the United States.

2. The United States Environmental Protection Agency, Region IV (EPA), denied issuance of a National Pollutant Discharge Elimination System (NPDES) Permit for the above discharge location on December 8, 1986.

3. EPA issued Administrative Order No. 87-085 (wMGM) on May 11, 1987 ordering the Respondent to cease discharge no later than

September 30, 1988. The Order was amended on August 31, 1988 ordering the Respondent to cease discharge no later than November 1, 1990.

4. The Respondent submitted a new NPDES permit application for discharge at a different location than in the previous permit application.

5. EPA drafted an NPDES permit for the new discharge location on July 19, 1989.

6. The Respondent has submitted plans and specifications to the Florida Department of Environmental Regulation for improvements to the treatment facility and for discharge to the new location.

7. The Respondent continues to discharge pollutants at a location without an NPDES Permit. In accordance with Section 301(a) of the Clean Water Act, discharges of pollutants into waters of the United States are unlawful unless permitted by an NPDES permit, or specifically exempted from NPDES requirements.

8. Actual construction is dependant upon issuance of a State permit which can be delayed by administrative proceedings.

VIOLATION

The Respondent is in violation of Section 301(a) of the Clean Water Act by discharging pollutants into waters of the United States without an NPDES permit.

ORDER

Based on the foregoing Findings of Fact and Violation, and pursuant to the provisions of Section 309(a) of the Act, as amended, it is hereby ordered:

1. That the Respondent start construction to cease discharging pollutants to waters of the United States at the existing location at the earliest date practicable, and meet NPDES requirements in accordance with the schedule below. The Respondent shall report monthly on progress toward meeting this schedule. If any administrative challange is raised to issuance of a construction permit, the monthly reports shall detail all efforts to resolve such a challange.

Activity	Due Date
Start Construction	May 1, 1990
Complete Construction and Ceas Discharge at the Current Location	August 1, 1991
Comply with NPDES requirements at permitted location	October 1, 1991

2. This should in no way be considered a permit to discharge, however, if the Respondent does discharge to waters of the United States in violation of the Act, the Respondent's discharge of treated wastewater shall at least comply with the effluent limitations, monitoring schedule and other requirements contained in its previous permit.

3. That monitoring results obtained during each calendar month shall be summarized on a Discharge Monitoring Report Form (EPA Form 3320-1). Forms shall be submitted for each month and shall be ostmarked no later than the 28th day of the month following the end of the month being reported on. Monitoring required by the State of Florida other than that specifically required by this Order shall be submitted in the same form as to the State but shall be included with Discharge Monitoring Report submissions.

4. If there is any transfer of ownership of this facility prior to completion of all requirements of this Order, then the new owner must be informed of these requirements and shall carry out the provisions. EPA shall be notified of any transfer of ownership.

COMPOSITE EXHIBIT NO. _____

DOCKET NO.: 971663-WS -- PETITION OF FLORIDA CITIES WATER COMPANY FOR LIMITED PROCEEDING TO RECOVER ENVIRONMENTAL LITIGATION COSTS FOR NORTH AND SOUTH FT. MYERS DIVISIONS IN LEE COUNTY AND BAREFOOT BAY DIVISION IN BREVARD COUNTY.

WITNESS: ACOSTA
DIRECT

ON BEHALF OF: FCWC

DESCRIPTION:

1. Transcript of deposition of Micheal Acosta taken on May 6, 1998.
2. FCWC Response to Staff POD 1 - 4/2/91 Amended DER Consent Order
3. FCWC Response to Staff POD 1 - 12/11/90 letter from FCWC to EPA
4. FCWC Response to Staff Interrogatory 1
5. FCWC Response to Staff POD 4
6. FCWC Response to Staff POD 5

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663-WS EXHIBIT NO. 10
COMPANY/ WITNESS: Acosta - Staff
DATE: 5-12-98

PROFFERING PARTY: STAFF

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Cities Water Company for limited proceeding to recover environmental litigation costs for North and South Ft. Myers Divisions in Lee County and Barefoot Bay division in Brevard County.

DOCKET No. 971663-WS
DATED: April 29, 1998

ORIGINAL

DEPOSITION OF: **Michael Acosta**

PURSUANT To: Notice of Taking Deposition by Counsel for Florida Public Service Commission

DATE: Wednesday, May 6, 1998

TIME: 2:30 p.m. to 3:07 p.m.

PLACE: 4837 Swift Road
Suite 100
Sarasota, Florida 34231

BEFORE: GAYL HARDEMAN, RPR, RMR, RDR
NOTARY PUBLIC, STATE OF FLORIDA

(Pages 1 - 30)

BUREAU OF REPORTING

RECEIVED 5-11-98

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I N D E X:

TESTIMONY OF MICHAEL ACOSTA

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P R O C E E D I N G S

THEREUPON:

MICHAEL ACOSTA,

having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. GERVASI:

Q. Mr. Costa, what positions have you held with Florida Cities?

A. Do you really want all of them?

Q. Wait. Before you answer that, would you please state your name and business address for the record?

A. Sure. Michael Acosta, 4837 Swift Road, Suite 100, Sarasota, Florida.

Q. Okay.

A. Positions I have held with the company. Started as the division engineer in Lee County in late '85. At some point, transitioned to regional engineer somewhere in the '89 time frame, still located in Lee County. In 1992, I came to Sarasota as manager of engineering and construction, and in 1995, became vice president of engineering and operations.

Q. And that's your current position?

A. Yes, that's my current position.

Q. What are your current responsibilities in that

position?

A. I'm responsible for all the management regarding the operations and engineering of the facilities throughout Florida Cities and Poinciana Utilities, including the operations budget, the capital improvement budget, and all the associated personnel issues therewith.

Q. Okay. Thank you. Let me refer you to your Exhibit 2 that's attached to your testimony. This is on the facts sheet for the Waterway state notification.

A. Yes.

MR. GATLIN: Excuse me?

MS. GERVASI: This is Exhibit 2 attached to his testimony, filed with his pre-filed testimony, page two of Exhibit 2.

THE WITNESS: Once you pass the letter?

MS. GERVASI: Yes, where it says state certification requirements.

BY MS. GERVASI:

Q. It says the state certification was not received with the permit renewal application and will be requested on the permit denial.

A. Uh-hmm.

Q. Did the DER waive state certification by not responding to the EPA within a certain time period?

A. I don't know if that's the procedure that is used, that there is a time limit used by the state agency to respond. I don't know that answer.

Q. Do you know when the DER submitted its MPDES certification worksheet for Waterway's May 1996 EPA permit application?

A. I would have to flip to my Exhibit 7, which is that certification worksheet itself, and see if there are any dates associated with that one.

Q. Take your time. Evidently there was a date at the bottom, but we can't make it out.

A. Yeah. If you can read that, I mean --

Q. Is your copy any better than mine?

A. No, I don't think so. I think you can probably guesstimate that that's an eight, the second to the last digit, but -- and that might be a six on the back side, but pure guessing there.

Q. Concerning the DER order to upgrade to advanced water treatment and relocate the outfall, is it correct that DER did in fact order the company to upgrade Waterway to advanced wastewater treatment standards?

A. It was their recommendation in the certification worksheet that that be done, and I think ultimately that became part of a consent order, that

that's what the company would do upon -- and that was involved with the renewal of the permit application that was to expire in '88.

Q. Okay. And also to relocate the outfall from the canal to the middle of the river?

A. To the six-foot contour, that's right.

Q. When did DER order the company to do this?

A. I don't know exactly when the consent order was executed, or that there was a consent order. In their original facts sheet, in the original certification, they were talking about at the time when the permit expires, which would have been in August of '88.

Q. Do you know why they ordered that?

A. As to the six-foot contour, only what I have read and seen in regards to this case and what Mr. Allen presented this morning. That's all I know about the six-foot contour. Pretty standard, if you are going to have a surface water discharge at the time, that you are going to meet advanced wastewater treatment standards. In fact, that is what the waste load allocation is based on, is the limits that would be created by advanced wastewater treatment.

Q. And this was agreed upon in a consent order? Is that right?

A. I don't know. I'm using that term loosely here, because I don't know for sure that that was in a consent order or a direction or as part of the permit that they were going to reissue in '88. I'm not a hundred percent exactly sure how it was going to be demanded by DEP that those two items be completed.

Q. Let me direct your attention to the company's response to Staff Interrogatory No. 34. In this response you say, a utility must timely submit its application for a DES permit renewal, and "timely" means usually no later than 180 days before the current permit expires. Is that correct?

A. Correct.

Q. Is it correct that Florida Cities submitted its MPDES permit renewal application for Waterway on May 9th, 1986, which was 139 days before the current permit expired on September 24th of '86? Are you aware of that?

A. I know that the application was submitted on May 9th. That was one of my exhibits. As to the actual permit expiration date, no, I do not know exactly when that was.

Q. Do you know whether it was late, whether the company was late in submitting the application?

A. No, to answer your question. I don't know if

the regulations at the time required a 180-day-in-advance. I answered the interrogatory as I am aware of the permit requirements today.

Q. Okay. Now, on page two of your testimony, you testified that the permit was issued on September 24th of '81, and you tell us it expired on September 24th of '86.

A. Maybe I knew that.

Q. But you don't know whether that was a late submission?

A. I have read nothing in my review of the record that EPA characterized in that manner at all, no. So I don't know that they viewed it as a late submission.

Q. Do you know whether before July 22 of 1986 the company owned and operated an advanced wastewater treatment plant?

A. July -- say that date again?

Q. 22nd of '86?

A. I believe Fiesta Village had -- Fiesta Village had just cranked up its operation in its advanced wastewater treatment mode in the beginning of '86. That was the first one in Lee County. Sarasota plants had had advanced wastewater treatment, albeit different treatment processes, for a long time before that, ten years or so before that.

Q. That was the city?

A. No, Sarasota County, our facilities here in Sarasota County.

Q. Okay. Were these plants secondary treatment plants before they became advanced wastewater treatment facilities?

A. Fiesta Village and Waterway Estates certainly both were. I don't know about Sarasota.

Q. Do you know how long it took the company to upgrade these plants to advanced standards?

A. I know Waterway Estates really well. Fiesta Village was -- I don't know the exact time when it started, no. It was a completely different type of project from a construction standpoint than Waterway Estates was, permitting and all that stuff. It was all different. As far as construction, I never reviewed it. I came on board just as it was finishing up.

Q. How about the Sarasota ones?

A. Sarasota ones were completed in the mid-'70s, so I have no knowledge of their construction, time frame, permitting, et cetera, et cetera.

Q. Did these plants dispose of their effluent by surface water discharge into waters of the United States?

A. Fiesta Village discharges effluent, yes, and

plants in Sarasota County discharge to creeks that ultimately go to Sarasota Bay. I don't know if the creeks are designated as waters of the U.S. or not. But certainly, ultimately they ended up as waterways of the U.S., yes.

Q. Do you know what the waste load allocation is?

A. For Fiesta Village, the waste load allocation is 5 MGD, million gallons per day. For the two Sarasota plants, they discharge to bodies of water that I don't believe have established waste load allocations, as such. And I don't know whether Sarasota Bay, Roberts Bay, here in Sarasota, have waste load allocations established or not. This is not something we have had to deal with, in my term of dealing with Sarasota plants.

Q. I want to discuss the September '86 compliance schedule a little bit. In the trial transcript of Patrick Lehman, he discussed his compliance schedule as being extremely optimistic. Are you familiar with that, with the proposed compliance schedule that was submitted back in September of '86 to the EPA?

A. I think I have seen it, but I don't have any recollection of beginning-to-end time frame, as I sit here this minute.

Q. Do you know whether, when submitting proposed

compliance schedules like that to regulatory agencies, it is standard procedure to have the vice president of engineering or operations approve the schedules?

A. Since I have been vice president, we haven't had to submit the compliance schedule, because we have been in compliance.

Q. That's good.

A. But you know, just from a company standpoint, both today and at the time, those big-picture issues were generally dealt with at the vice president or at that particular level, yes. There was no schedule that was dealt with on a local level, local being from our division levels. Beyond that, I don't know. I was not up here in Sarasota at the time.

Q. So you don't know whether that particular one was approved?

A. No.

Q. Do you have any idea why the company submitted a proposed compliance schedule which Mr. Lehman described at trial as being extremely optimistic?

A. No.

Q. Is it true that the company knew as of July 1986 that the discharge option required the company to request a waste load allocation?

A. I don't know exactly that that was the case.

You know, now, based on my review of the documents today, the waste load allocation already existed. Whether Mr. Lehman knew that -- the date, July 22nd of 1986 -- I don't know.

Q. And the engineering study of Waterway effluent disposal options was completed, we noted, on August 8th of 1997. Right? We gleaned that date from a production document request. I didn't bring them all with me.

A. I believe that was in my testimony, as well, but I just can't find it. Here it is.

On November 10th, we solicited engineering proposals for the preparation of the engineering report. That was November 10th of 1986.

Q. We're wondering why the company didn't request a waste load allocation prior to December of '87 for Waterway. Do you know?

A. No. And I have reviewed that letter that went in '87, and again, I'm not sure that that letter is requesting a waste load allocation for the 1 MGD. I think that what may have been the intent -- more likely the intent -- is the 1.5 MGD ultimate disposal capacity, which is in that letter. The letter is vague on that subject.

Q. Do you know when DER issued the company a waste load allocation?

A. Based on my review of the records now, the waste load allocation for Waterway Estates has been in place, documentable, since -- it's one of my exhibits, the letter from DEP to EPA -- since May 7th, 1986, that identifies Waterway Estates as a current allocation, as 1.08. So certainly on May 7th, 1986, DEP believed that there was a waste load allocation. The initial waste load allocation study was done, I believe, in the late '70s, early '80s.

Q. Are you referring to the letter that was part of your Exhibit 4?

A. Yes.

Q. That's regarding the City of Cape Coral waste load allocation. Correct?

A. Correct. Keep reading down, though. There's a little box in there that identifies current waste load.

Q. Okay.

A. See where it says current allocations are as follows. Waterway Estates was listed there as 1.08, which was the plant capacity at the time, and Fiesta Village is listed below at 5.

Q. Okay, thank you. Is it correct that the development order exemption for Waterway's outfall and advanced wastewater treatment plant was denied initially

because Lee County stated initially there was over 2500 square feet of impervious area and the impervious calculations weren't complete?

A. I believe that's correct, from review of my testimony.

Q. Why did the company not recognize the over 2500 square feet of the additional impervious area? Do you know?

A. Yes, because they didn't exist. These were open-top tanks, and the county didn't recognize that water that fell in them via rainfall would stay in those tanks and not run off. The county just didn't understand that, and once we were able to meet and tell them about that, they backed off of that.

Q. Did you have to do calculations or anything about that?

A. No. Once you take the tankage out of the picture, you fall below the criteria, and you don't have to do the impervious surface calculations. That's why they weren't done.

Q. Okay. Were there any other reasons why this exemption request was initially denied?

A. In my view, there is nothing I can point to as to a document and says the zoning issue, but the zoning issue took a while to resolve itself out. That was

certainly a -- not necessarily a denial point, but a hold-up point, until that was resolved. If the zoning didn't change, they certainly were not going to approve a development order that showed the tanks up against the property line and the zoning says you can't do that.

Q. Do you know when the exemption request was initially denied?

A. I believe that was initially denied in late summer of -- I believe we are dealing with 1988.

Q. Were there any subsequent denials after that?

A. No, not to my knowledge; no, nothing that I can find in the record, and nothing that I was involved with at the time.

Q. Okay. At the bottom of page 13 of your testimony, you were testifying about the zoning variance denial for Waterway's outfall in August of '88?

THE WITNESS: Hey, Ken, I need to get your copy of the testimony. My page 13, I am down here talking about building permits. On the bottom of 13?

MS. GERVASI: Bottom of 13 is where it states and you are talking about, you are saying that questions were raised by members of the board of adjustments and the general public.

BY MS. GERVASI:

Q. What specific questions did they raise? Do you recall?

A. I was not present at the time. This is again going back on -- based on my record, the records the company has and the records that the attorneys who were handling the zoning variance at the time had, and that was all that was in the record. My understanding was, from speaking with the attorney, that we were talking about -- we were literally putting some of these buildings on top of, within two feet of, the property line -- a very unusual circumstance -- and there was a marina next door on one side who was concerned in that regard, as to noise and all the other associated wonderful things with a wastewater treatment plant. And the board at that point did not believe that they had enough to approve.

Q. Do you know what additional information the company submitted to Lee County in response to those questions that were raised?

A. I believe that there was some vegetation stuff that was put into the site plans, and landscaping, fence line, that kind of stuff. That was about it, all we could do.

Q. With regard to Waterway's DER permit application for relocating the outfall or upgrading to

the advanced standards, why did it take the company six months to submit all the additional information that the DER was requesting?

A. The DER came back several different times during that course. It was not a matter of they gave us a list of 35 items upon the initial application, and then we submitted those 35 items over a six-month period.

What typically happens is they will send you a letter, you have to have it back in 30 days, you submit that, it generates more questions, you got another 30 days, et cetera, et cetera. They were concerned in regard to the process that they wanted more guarantees, that the process would, in fact, meet AWT standards.

They wanted some of what was infamously termed "reasonable assurance" that that was going to happen, and they weren't reasonably assured until that final date.

Q. Okay. One last thing I would like to request of you, if possible. We notice there are certain days of the EPA trial transcript that are missing from what's been pre-filed, and I wonder if we could ask you to provide a copy of the March 26th, 1996, transcript. We don't have that.

A. I think we as a company can do that. I can't

personally do it.

Q. I am asking you because I forgot to ask Mr. Allen.

A. That's fine.

MR. GATLIN: There are some dates, some weeks, that we didn't hold hearings.

MS. GERVASI: Okay, if there was --

MR. GATLIN: That may be one of the days.

MS. GERVASI: It could be. It could be. But we are missing March 26th of '96, April 2nd of 96, and April 4th of '96, starting with page 110 on that date.

MR. GATLIN: 110 on --

MS. GERVASI: On April 4th, right.

THE WITNESS: Are you missing pages, or --

MS. GERVASI: We are missing the entire day for the 26th and the 2nd of April.

THE WITNESS: Mr. Gatlin may be exactly right. There were breaks in the trial that spanned days.

MS. GERVASI: Okay. Let me go ahead and label this as Late-filed Exhibit 1 for you. And that's EPA trial transcripts.

MR. GATLIN: March 26th, April 2nd.

MS. GERVASI: Of '96. For those entire days. And for April 4th, '96, starting from page 110.

MR. GATLIN: Okay.

MS. GERVASI: Okay, one more request for another Late-filed exhibit.

THE WITNESS: Okay.

MS. GERVASI: In your Exhibit 2 that you submitted with your testimony, you refer to -- let's see, what page is this? Did you number these?

THE WITNESS: Well, I numbered the exhibits, but not the pages of the exhibit.

MS. GERVASI: Okay. Well, it's the first page of Exhibit 2. You refer to a July 9th, '86 letter in the third paragraph.

MR. GATLIN: He doesn't refer to it.

MS. GERVASI: Well, Mr. Reeves does, then; whoever wrote the letter.

THE WITNESS: Are we talking about the same exhibit?

MS. GERVASI: Exhibit 2.

MR. GATLIN: July 28, 1986 letter?

MS. GERVASI: Yes. Reference is made to a July 9th, '86, letter.

THE WITNESS: Yes, I see what you are saying.

MS. GERVASI: Do you have a copy of that letter?

THE WITNESS: I do not know. We can look.

MS. GERVASI: Okay. Let's label that as Late-filed No. 2. And if you have a copy of it, we'd like a copy of the July 9th, '86 letter requesting the 90-day extension. And if you don't mind, we will add those to the other ten that we asked for by the 18th, if you can do it.

MR. GATLIN: Sure.

MS. GERVASI: Thank you. That's all the questions I have.

CROSS EXAMINATION

BY MR. McLEAN:

Q. Mr. Acosta, I am here to represent the citizens of the State of Florida. We have intervened in the docket, as I think you know. Did you testify in the federal case?

A. I did.

Q. What was your role there? What kind of information did you bring to the Court?

A. Basically, the same information in my testimony regarding the permitting process, of getting from point A to point B -- as far as you are here today with no plant; you are here at point B with a fully constructed and in-compliance plant.

Q. So in the federal court, you are again in the

posture of again looking back on the company's records and saying what happened?

A. To the extent that that process dated back from the time that we started initiating, soliciting engineering proposals for the design of Waterway Estates, that's correct. From that point forward, I was involved to some extent -- not in the design, but in touring some folks around. That was my initial involvement at the plant.

Q. I see. Okay. And in this proceeding, your role is pretty much "I have looked and seen what the company did, and I believe they have acted prudently with respect to the engineering issues." Is that a fair summary of what you said?

A. From that point backward in time, that's correct.

Q. And from that point forward, you are saying, essentially, from an engineering perspective, what you did was reasonable.

A. That's right.

Q. Okay. And you will be tendered as an engineering expert, ready to give your opinion about those things? By the way, we would happily concede all of your qualifications.

A. Everybody always does.

Q. Sure, who wants to mess with that? You are an expert in sanitary engineering. Is that what they call it these days?

A. Sure, environmental.

Q. Environmental, right. That's the new term, right? Sanitary is the old term?

A. Yes.

Q. Are you going to bring any testimony forward about who pays or who should pay, and so forth?

A. Not to my knowledge.

Q. Unless I ask you something like that.

A. Right.

Q. The evidence that you give in this case -- I think this is a little repetitive, so I apologize, but the evidence you are bringing forth in this case was presented to Judge Nimmons, and presumably he ruled upon it?

A. To a great extent; to a great extent, yes.

Q. When you say "to a great extent," are you saying you kind of disagree with Judge Nimmons, or are you saying there are some he didn't rule on at all?

A. I believe there are some things in here that were not presented by me to Judge Nimmons; i.e., the waste load allocation stuff. I did not do that in federal court.

Q. Are you aware that Judge Nimmons found that the company had engaged in a number of violations? Is that right?

A. "Violations" to me is a legal term that gets me in trouble, so I steer away from that word. But in regards to certain items, yeah.

Q. In your testimony -- this is a difficult question to ask -- does your testimony form the basis, for, at least to some extent, the order that came out of federal court?

A. I don't know. My testimony is directed at the time periods in between milestones, if you will, that carried this process from concept to completion of construction.

Q. I see. One thing I am a little confused on is, you have been on the board of Florida Cities since when? A good while?

A. Late '85.

Q. Why is it you are in the position of having to review records to determine whether they are prudent? Is it because you were not in charge during that time?

A. That is correct. During the period of -- well, prior to 1982, I was located in the Lee County division office and these -- the federal permitting and permit preparation in general, as it is today, was

generally handled out of the corporate office in Sarasota.

Q. And you just said '82, and I think you may have meant '92.

A. Right. I was still in college then.

Q. Who was in the position -- the position you hold now, assuming it was filled during that time, who was in that position?

A. In what time frame? Because it changes.

Q. Can you take me through the succession?

A. Sure. In 1985, when I came on board, the position that I have today did not exist. There was a vice president of engineering that was one person and a vice president of operation that was another person. Those two people, through the course of four years, left the company. Those two positions reverted to managers of, respectively, engineering and operations. And at some point, there was a senior vice president position that was created and filled by a Mr. French at the time. That position has evolved into what my position today is, which is vice president of engineering and operations.

Q. Did Mr. French leave the company, or did he go to some other position at Avatar Holdings?

A. Mr. French left the company.

Q. And you took over immediately after Mr. French left?

A. No. There was a Mr. Bratmiller who came after Mr. French, with some time gap in between, obviously. And following Mr. Bratmiller's promotion, that position was filled by Mr. Overton. And Mr. Overton moved to a sister company. And after some time period, I was plugged into that position.

Q. Have you been asked to provide a summary of your testimony at any point in time?

A. No.

Q. Do you plan to provide a summary of your testimony?

A. That was not my plan as of when I came in this morning, no. It's going to be, frankly speaking, difficult to summarize the dates without getting somewhat lengthy.

Q. Without going through the whole thing?

A. Right.

Q. So you join me in the observation that sometimes the summary is longer than the testimony?

A. No.

Q. About two thirds of the time?

A. I was going to do a mathematical analogy to that.

MR. McLEAN: Let's don't. That's all I have, Mr. Acosta. Thank you.

MS. GERVASI: Mr. Gatlin, do you have any questions?

MR. GATLIN: No questions, and we would like to read.

MS. GERVASI: That concludes the deposition. Thank you.

THE WITNESS: Thank you.

(Deposition ended at 3:07 o'clock p.m.)

* * * * *

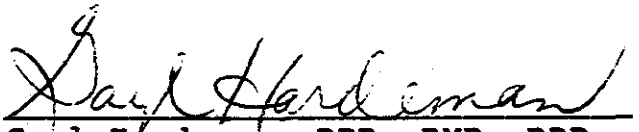
CERTIFICATE OF OATH

STATE OF FLORIDA)

COUNTY OF SARASOTA)

I, the undersigned authority, certify that MICHAEL ACOSTA personally appeared before me and was duly sworn.

Witness my hand and official seal this 8th day of May, 1998.



Gayl Hardeman, RPR, RMR, RDR
Notary Public - State of Florida
My Commission No. CC459875
Expires: May 4, 1999

DEPOSITION CERTIFICATE

STATE OF FLORIDA

COUNTY OF SARASOTA

I, GAYL HARDEMAN, being a Registered Professional Reporter, certify that I was authorized to and did stenographically report the foregoing deposition; and that the transcript is a true record of the testimony given by the witness.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 8th day of May, 1998.

Gayl Hardeman

GAYL HARDEMAN, RPR, RMR, RDR

ERRATA SHEET

TO BE ATTACHED TO DEPOSITION OF WITNESS: MICHAEL ACOSTA IN DOCKET NO. 971663-WS, FLORIDA PUBLIC SERVICE COMMISSION, DATED APRIL 29, 1998

Instructions: Please read the transcript of your deposition and make note of any errors in transcription on this page. Do Not mark on the transcript itself. Sign and date this sheet. Then return both this sheet and the transcript to the court reporter. Thank you. (Counsel: Please attach to your copy of transcript.)

PAGE	LINE	ERROR OR AMENDMENT
6	4	NPDES sb NPDES
8	12	DES sb NPDES
9	15	NPDES sb NPDES
12	5	the sb a
17	4	on sb The
~~24~~	~~22~~	~~from sb the~~

I have read the original transcript and, except for the corrections noted above, I hereby subscribe to the transcript as an accurate record of the statements made by me.

Date 5/13/98 _____ Deponent

STATE OF FLORIDA)
COUNTY OF SARASOTA)

Subscribed before me this 13th day of May, 1998.

ANITA J. CHUBBUCK
State of Florida
My Comm. Exp. Aug. 18, 1998
Comm. # CC 451386
PERSONALLY KNOWN BY ME
PRODUCED I.D. _____

_____
Notary Public

My Commission Expires: 8/18/98

2

FLORIDA CITIES WATER COMPANY

April 2, 1991

Philip R. Edwards
Deputy Assistant Secretary
South Florida District Office
2269 Bay Street
Fort Myers, Florida 33901-2896

Re: Florida Cities Water Company - Waterway Estates
Wastewater Treatment Plant - Amended Consent Order
with Florida Department of Environmental Regulation

Dear Mr. Edwards:

Enclosed is the Amended Consent Order which was prepared by Francine Ffolkes at FDER - Tallahassee, which I have executed on behalf of Florida Cities Water Company (FCWC).

The principal changes set forth in this amended order are that paragraph 8 of the original order has been substantially modified and that paragraph 9 has been deleted. With the execution of this amended order, we will have removed the basis for the pending administrative proceeding. Ms. Ffolkes has advised our attorney that Dr. Ahmadi is aware of this action.

FCWC appreciates the cooperation of the FDER in this matter. If you have any questions, please telephone me.

Sincerely,

Tony

A.A. Reeves, III
Executive Vice President
& Chief Operating Officer

AAR/jms

Enclosure

cc: D.J. Getman
R.A. Lotspeich
R.B. Ytterberg
P.H. Bradtmiller

FLORIDA CITIES WATER COMPANY
4837 Swift Road, Suite 100
Sarasota, Florida 34231
P.O. Box 21119 (34276-4119)
Telephone 813/925-3088

BEFORE THE STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL REGULATION

IN THE OFFICE OF THE
SOUTH FLORIDA DISTRICT

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL REGULATION,

Complainant

OGC CASE NO.: 90-1747

vs.

FLORIDA CITIES WATER COMPANY
(WATERWAY ESTATES WASTEWATER
TREATMENT PLANT),

Respondent.

_____/

AMENDED CONSENT ORDER

This Consent Order is entered into between the State of Florida, Department of Environmental Regulation (hereinafter "Department") and Florida Cities Water Company (Waterway Estates Wastewater Treatment Plant) (hereinafter "Respondent").

The Department finds and Respondent neither denies nor admits the following:

1. The Department of Environmental Regulation is the administrative agency of the State of Florida charged with the authority to administer and enforce Chapter 403, Florida Statutes (F.S.), and the rules promulgated thereunder in Florida Administrative Code (F.A.C.) Title 17.

2. Respondent owns, operates, and maintains a 1.0 MGD wastewater treatment plant (activated sludge process) servicing

certain portions of North Fort Myers. This plant is located off of Inlet Drive, North Fort Myers, Lee County, Florida.

3. Respondent was authorized to operate the facility under Temporary Operating Permit DT36-152486, issued September 23, 1988 with expiration on November 1, 1990.

4. Respondent was issued a construction permit DC36-165119, issued March 1, 1990 with expiration on November 1, 1990.. The construction permit was extended on October 30, 1990 until September 1, 1992.

DT36-188171

5. A Temporary Operating Permit (TOP) ~~5236P01630~~, was issued to Respondent on January 22, 1991 with an expiration date of June 1, 1993.

6. On July 15, 1988 Respondent signed and entered into a Consent Agreement, OGC Case No. 88-0384 with the Department in order to resolve violations of Florida Administrative Code Rules: 17-600.750(1), 17-7.040, 17-600.740(1)(b)1.d and 17-601.500(1).

7. Respondent failed to comply with paragraph ten of OGC-Case NO. 88-0384, which required the construction of the wastewater treatment plant be complete and certified in compliance with all F.A.C. Rules and Florida Statutes regulating wastewater treatment facilities by November 1, 1990.

The Department and Respondent having met to discuss the above, have reached a mutually agreeable settlement of the above referenced matters pursuant to F.A.C. Rule 17-103.110(3), it is therefore

AGREED AND ORDERED:

8. Respondent shall make modifications to the treatment plant to ensure that it will consistently meet all applicable State standards. Respondent shall comply with the schedule DT36-188171 outlined in T.O.P. ~~S236P01630~~ as follows:

	ACTION	DUE DATE
a.	Substantial completion	September 1, 1992
b.	Facilities certified in compliance	June 1, 1993

9. Respondent's wastewater treatment facilities shall be in full compliance with all permits, F.A.C. Rules and Florida Statutes regulating wastewater treatment facilities and the provisions of this Consent Order no later than June 1, 1993. Failure to meet this Compliance deadline will result in a stipulated penalty of $200.00 per day until compliance is achieved. Acts of God and other delays due to circumstances beyond the reasonable control of the Respondent shall extend the compliance date one day for each day of delay.

Respondent shall notify the Department by telephone within seventy-two (72) hours and follow up in writing within seven (7) days of any "acts of God and/or other delays due to circumstances beyond the reasonable control of the Respondent", that would result in Respondent not meeting the compliance deadline of June 1, 1993.

10. Under current regulations, additional collection system connections cannot be allowed under a General Permit. However, the Department will process an Application to Construct Domestic

Wastewater Collection/Transmission systems [DER Form 17-1.205(2)] if Respondent takes additional measures to ensure that the total quantity of pollutants entering the Caloosahatchee River does not exceed the stipulated limits in the Temporary Operating Permit (T.O.P.). Based upon satisfaction of the Department's permitting requirements, the proposed Palm Island and Barrett Park projects may be allowed to connect to the Waterway Estates wastewater treatment system. Meeting the aforementioned effluent limits as outlined in the T.O.P. shall be considered a part of the Department's permitting requirements.

11. Respondent shall notify the Department by telephone within twenty-four (24) hours, and follow up in writing within seventy-two (72) hours of any non-compliance with any permit condition, F.A.C. Rule or Florida Statute with the following information:

a. A description of the cause of non-compliance; and

b. The period of non-compliance, including exact dates and times; or, if not corrected, the anticipated time the non-compliance is expected to continue, and steps being taken to reduce, eliminate, and prevent recurrence of the non-compliance. Violation of this provision will result in further enforcement action by the Department.

12. Respondent shall make payment of **$15,000.00** to the Department of Environmental Regulation in order to settle the issues raised in the Consent Order. The amount shall be made payable to the "State of Florida Department of Environmental

Regulation" and shall be submitted to 2269 Bay Street, Fort Myers, Florida 33901-2896, within twenty days of the entry of this Consent Order. For and in consideration of the complete and timely performance by Respondent of the obligations agreed to in this Consent Order, the Department hereby waives its right to seek judicial imposition of additional civil penalties concerning the issues resolved by this Consent Order.

13. Persons not parties to this Consent Order whose substantial interests are affected by this Consent Order have a right, pursuant to Section 120.57, F.S., to petition for an administrative determination (hearing) on it. The petition must conform to the requirements of Chapter 17-103 and 28-5, F.A.C., and must be filed (received) in the Department's Office of General Counsel, 2600 Blair Stone Road, Tallahassee, Florida 32399-2400, within 21 days of receipt of this notice. Failure to file petition within the 21 days constitute a waiver of any right such person has to an administrative determination (hearing) pursuant to Section 120.57, F.S.

14. Respondent waives its right to an administrative hearing on the terms of this Consent Order under Section 120.57, F.S., and its right to appeal this Consent Order pursuant to Section 120.68, F.S.

15. Entry of this Consent Order does not relieve Respondent of the need to comply with all applicable federal, state or local laws, regulations, or ordinances.

16. The terms and conditions set forth in this Consent Order may be enforced in a court of competent jurisdiction pursuant to Sections 120.69 and 403.121, F.S. Failure to comply with the terms of this Consent Order shall constitute a violation of Section 403.161(1)(b), F.S.

17. Respondent is fully aware that a violation of the terms of this Consent Order may subject Respondent to judicial imposition of damages and civil penalties of up to $10,000 per offense.

18. Respondent shall allow all authorized representatives of the Department access to the property at reasonable times for the purpose of determining compliance with the terms of this Consent Order and the rules of the Department.

19. The Department hereby expressly reserves the right to initiate appropriate legal action to prevent or prohibit future violations of applicable statutes or the rules promulgated thereunder not covered by the terms of this Consent Order.

20. No modification of the terms of this Consent Order shall be effective until reduced to writing and executed by both the Respondent and the Department.

21. All reports, plans, and data required by this Consent Order to be submitted to the Department should be sent to the Deputy Assistant Secretary, 2269 Bay Street, Fort Myers, Florida 33901-2896.

22. This Consent Order is final agency action of the Department pursuant to Section 120.69, F.S., and F.A.C. Rule

17-103.110(3), and it is final and effective on the date filed with the Clerk of the Department unless a Petition for Administrative Hearing is filed in accordance with Chapter 120, F.S.

Upon the timely filing of a petition this Consent Order will not be effective until further order of the Department.

FOR THE RESPONDENT:

A.A. Reeves, III
Executive Vice President
4837 Swift Road, Suite 100
Sarasota, Florida 34231

DONE AND ORDERED this 3RD day of April, 1991, in Fort Myers, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL REGULATION

Philip R. Edwards
District Manager
South Florida District
2269 Bay Street
Fort Myers, FL 33901-2896
Telephone: (813) 332-6975

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by regular U.S. Mail to Rick Lotspeich, Esq., Landers & Parsons, attorneys for Respondent, P. O. Box 271, Tallahassee, Florida 32302 on this 4th day of April, 1991.

FILING AND ACKNOWLEDGEMENT
FILED, on this date, pursuant to S120.52 Florida Statutes, with the designated Department Clerk, receipt of which is hereby acknowledged.

Mary L. Wilson 4-4-91
Clerk Date

FRANCINE M. FFOLKES
Assistant General Counsel

FLORIDA CITIES WATER COMPANY

3

Certified Mail

December 11, 1990

John T. Marlar, Chief
Facilities Performance Branch
Water Management Division
US Environmental Protection Agency
345 Courtland Street
Atlanta, GA 30365

RE: NPDES Permit #FL0030325, EPA Administrative Order #89-109

Dear Mr. Marlar:

Florida Cities Water Company is currently operating under the referenced NPDES Permit and Administrative Order. Due to delays with the construction of our Advanced Wastewater Treatment Facility, Florida Cities Water Company entered into negotiations with the Florida Department of Environmental Regulation in order to arrive at mutually agreed upon dates for completion of this construction. As a result of these negotiations Florida Cities Water Company and the FDER have recently concluded and executed an agreed order which provides for certain completion dates for the subject facility. Enclosed is a copy of this agreement.

Florida Cities Water Company respectfully requests that EPA Administrative Order #89-109 be modified to reflect these agreed dates. Specifically, we request that paragraph 1 of the order be changed to indicate that substantial completion will be achieved September 1, 1992, and that the facilities will comply with the NPDES Permit requirements at the permitted location on November 1, 1992.

Should you have any questions concerning this request, please do not hesitate to contact us.

Sincerely,

Jack W. Tompkins, P.E.
Operations Manager

JWT/agw

cc: Roger Ytterberg

FLORIDA CITIES WATER COMPANY
4837 Swift Road, Suite 100
Sarasota, Florida 34231
P.O. Box 21119 (34276-4119)
Telephone 813/925-3088

jwt\marlar

COMMISSION STAFF'S FIRST SET OF INTERROGATORIES TO
FLORIDA CITIES WATER COMPANY
DOCKET NO. 971663-WS

INTERROGATORIES

1. Please provide a time line of events relating to the denial of the NPDES permit, beginning in 1986 when the permit was first denied and continuing to date.

   Response: (MA)

   See the APPENDIX for a time line of events associated with the NPDES permit at Waterway.

APPENDIX

COMMISSION STAFF'S FIRST SET OF INTERROGATORIES TO
FLORIDA CITIES WATER COMPANY
DOCKET NO. 971663-WS

APPENDIX

Reference Interrogatory #1.

DATE	EVENT/ACTION
4-7-86	Notification of expiration date of NPDES Permit. Letter - USEPA -IV to FCWC.
5-7-86	FDEP notifies USEPA-IV of current waste load allocations to Caloosahatchee River where Waterway Estates WWTP discharges via a canal. Waterway Estates WWTP shown to have allocation of 1.08 MGD. Letter - FDEP (Richardson) to USEPA-IV (Hyatt).
5-09-86	Renewal application for WWE NPDES permit application submitted.
5-21-86	Acknowledgment of application for renewal of NPDES permit. Letter - USEPA -IV to FCWC.
7-22-86	Conclusion by USEPA -IV that the NPDES permit for Waterway Estates WWTP should be denied. Letter - USEPA-IV(Patrick) to FCWC (Reeves).
8-10-86	Recap of meeting with FDEP on 7/29/86 in their Ft. Myers office regarding the denial of NPDES Permit. Memo - FCWC (Lehman) to FCWC (Reeves).
9-16-86	Schedule of compliance action requested by USEPA submitted by FCWC. Letter - FCWC (Lehman) to USEPA (Kagey).
11-10-86	Requests for Fee Proposals for Engineering Study of WWE-WWTP by 12-3-86. Letters - FCWC (Lehman) to Post Buckley Schuh & Jernigan and others.
12-8-86	NPDES permit denial for WWE - WWTP. Letter - USEPA-IV (Barrett) to FCWC (Reeves).

3-27-87	FCWC and ESE enter into Agreement for engineering study of alternative treatment and disposal methods for WWE.
5-11-87	USEPA-IV issues Section 309 Administrative Order 87-085 setting forth schedule for ceasing discharge by 9-30-88. Letter - USEPA-IV(Marlar) to FCWC (Reeves).
8-87	Preliminary Engineering Draft Report submitted by ESE setting forth treatment and disposal options.
12-1-87	FCWC requested 1.5 MGD Wasteload Allocation to Caloosahatchee River. Letter - FCWC (Lehman) to FDEP-Ft. Myers (Blackburn).
12-14-87	FCWC request for proposals for engineering services to design upgrade of WWE WWTP. Generic letter - FCWC (French).
12-24-87	Answer to FCWC request for water quality based effluent limits for the WWE-WWTP. Memo - FDEP (DeGrove) to FDEP-SW (Blackburn).
1-26-88	Status update submitted to USEPA on WWE-WWTP expansion. Letter - FCWC (Lehman) to EPA (McGarry).
2-29-88	Executed Agreement for Engineering Services transmitted to Source, Inc. Letter - FCWC (French) to Source (Elliott).
3-1-88	Proposed compliance schedule for project submitted to FDEP-SW. Letter - FCWC (Lehman) to FDEP-SW (Romeis).
3-10-88	Status update submitted to USEPA on WWE-WWTP expansion. Letter - FCWC (Lehman) to EPA (Oliver).
5-7-~~86~~ 87 5-7-86	Information regarding wasteload allocation. Letter - FDEP-SW (Richardson) to USEPA -IV (Hyatt).

6-6-88	Report of meeting with Ahmadi and Mele of FDER to discuss plant requirements. Letter - Source (Harrop) to FCWC (French).
6-15-88	Final revised FDEP Consent Order transmitted by FDEP-SW. Letter - FDEP (Barbaccia) to FCWC (Reeves).
6-22-88	Summary of June 9, 1988 Show Cause Meeting at EPA regarding Gulf Gate, South Gate, Carrollwood and WWE-WWTP. Letter - Gatlin, Woods, Carlson & Cowdery (Cowdery) to FCWC (Lehman).
7-1-88	Request for information on current status of FCWC request for a wasteload allocation submitted to FDEP-SW. Letter - FCWC (Lehman) to FDEP-SW (Edwards).
7-15-88	Transmittal of FDEP Consent Order signed by both parties. Letter - FDEP-SW (Edwards) to FCWC (Reeves).
7-22-88	Transmittal of signed FDEP Consent Order copy and update on progress of project. Letter - FCWC (Lehman) to USEPA -IV (McGarry).
7-22-88	Transmittal of signed TOP application forms and filing fee. Letter - FCWC (Lehman) to FDEP- SW (Edwards).
7-26-88	Advisement that the modeling and allocations for the Caloosahatchee River system should be completed in October 1988. Memo - FDEP (DeGrove) to FDEP-SW (Mele).
8-04-88	FCWC notified (through counsel) that application to Lee County for Exemption from Development Standards Ordinance cannot be approved. Letter - Lee County (Hollingsworth) to Pavese, Garner et al (Montgomery).
8-8-88	Transmittal of Lee County exemption denial. Letter - Pavese, Shields, Garner et al (Montgomery.) to FCWC (French).

8-16-88	Summary of meeting with FDEP-SW (Blackburn) discussing the updated wasteload allocation study. Memo - FCWC (French) to File.
8-18-88	Appeal to Board of Zoning Adjustments of Board of County Commissioners for reconsideration of denial of exemption from Development Standards Ordinance.
8-19-88	Receipt of appeal submitted to Lee County Zoning. FAX - Pavese, Shields, Garner et al, Attorneys (Montgomery) to FCWC (French).
8-31-88	Amendment to Administrative Order 87-085 amending ceasing discharge date to 11-1-90 transmitted by USEPA-IV. Letter - USEPA -IV (Barrett) to FCWC (Reeves).
9-23-88	Temporary Operating Permit No. DT36-152486 issued by FDEP-SW. Letter - FDER (Edwards) to FCWC (Reeves).
9-27-88	Discussion of "reasonable assurance" requested by DER regarding the application for upgrading WWE-WWTP to an advanced wastewater treatment facility. Letter - FCWC (French) to FDEP-SW (Ahmadi).
11-1-88	Transmittal of Barth Tec, Inc.'s report and addressing items contained in Ahmadi's letter of 10/11/88. Letter - FCWC (French) to FDEP-SW (Ahmadi).
11-11-88	Submittal of a development order for WWE-WWTP to Lee County. Letter - Pavese, Shields, Garner et al (Montgomery).
1-17-89	Request for permit exemption submitted to SFWMD
2-7-89	Permit exemption #36-01008-S issued by SFWMD. Letter - SFWMD (Pemble) to Lee County Engineer (Brown).

3-17-89	Information regarding a call received from Donna Seadler of USEPA -IV inquiring as to whether construction on project had begun on 2/1/89 as per the compliance schedule in the Admin. Order & requesting written update of project.. Memo - FCWC (Lehman) to (French).
3-29-89	Application to Army Corps of Engineers for construction permit for outfall line. Project Summary Cover Sheet - W. Dexter Bender & Assoc.
3-30-89	Notice from USEPA-IV of noncompliance and requesting information. Letter - USEPA-IV (Barrett) to FCWC (Reeves).
3-30-89	Advisement alleging "continuing noncompliance with the CWA and Administrative Order 87-085 and requesting certain information. Letter - USEPA-IV(Barrett) to FCWC (Reeves).
4-7-89	FDEP/US Army Application for Activities in Florida Waters (new outfall) submitted by FCWC.
4-19-89	Notification to FDEP-SW of "circumstances beyond our control" and outlining new compliance schedule. Letter - FCWC (French) to FDEP-SW (Edwards).
4-24-89	Transmittal of information requested by USEPA-IV (3-30-89) including Preliminary Engineering Draft Report by ESE, and assuring USEPA -IV that every possible effort had been made to construct facility as outlined in the Consent Order. At this time, still anticipated compliance with Consent Order schedule. Letter - FCWC (Reeves) to USEPA -IV (Barrett).

5-15-89	Received notice that FDEP-SW has no problem with proposed adjustment to the compliance schedule as outlined in FCWC letter of 4/19/89. Letter - FDEP-SW (Edwards) to FCWC (French).
5-16-89	Notice of Violation of NPDES permit (TSS) transmitted by USEPA -IV. Letter - USEPA-IV to FCWC (Reeves).
5-17-89	Transmittal of construction permit application to upgrade WWE-WWTP transmitted to FDEP-SW.. Letter - Source (Harrop) to FDEP-SW (Edwards).
6-12-89	EPA Application Forms 1 and 2E transmitted to Source, Inc. for submittal to USEPA. Letter - FCWC (French) to Source, Inc.
6-12-89	US Corp of Engineers outfall application complete and submitted.
6-16-89	Acknowledgment of receipt of application for construction permit by FDEP-SW and requesting additional information. Letter - FDEP-SW (Edwards) to FCWC (French).
6-29-89	Bid from Kelly Brothers for outfall sewer line received by FCWC.
7-11-89	Acknowledgment of receipt of NPDES permit application by USEPA-IV. Application considered complete. Letter - USEPA - IV(Childress) to FCWC (French).
7-14-89	Public Notice from Army Corps of Engineers regarding construction application for outfall line issued by Army Corps of Engineers.
7-14-89	Response to USEPA-IV letter of 6/21/89, verifying that FCWC has applied for all construction permits plus NPDES permit and has received bids for construction of facility. Letter - FCWC (French) to USEPA -IV (Oliver).

7-14-89	Transmittal of requested operating statistics for WWE-WWTP and verification that all construction permits had been applied for and construction bids had been received. Letter - FCWC (French) to USEPA -IV (Barrett).
7-17-89	Resolution from City of Fort Myers granting easement for use of River Bottom.
7-19-89	Receipt of USEPA-IV Intent to Issue of NPDES permit for WWE WWTP; limited the facility to 1.0 MGD. Letter - USEPA -IV (Kagey) to FCWC (French).
8-3-89	Meeting between FCWC and FDEP regarding permit concerns.
8-15-89	FCWC meeting notes FDEP-SW (Ahmadi and Shoemaker) to discuss pending construction application. Memo - FCWC (Tompkins) to file.
9-6-89	FDEP outfall permit issued.
9-15-89	Explanation of the delay in review of FCWC outfall line application. Letter - Southwest Florida Regional Planning Council (Heath) to Army Corps of Engineers (Zattau).
9-26-89	Allegations by USEPA-IV that WWE-WWTP is in violation of the CWA and issuance of Section 309 Administrative Order 89-109 setting forth schedule for relocation of the outfall (8-1-91) in order to meet NPDES requirements (10-1-91). Letter -USEPA-IV (Marlar) to FCWC (Reeves).
9-26-89	Administrative Order 89-109 issued by USEPA - IV with Notice of Violation. Letter - USEPA-IV (Marlar) to FCWC (Reeves).
9-29-89	Final Issuance of NPDES Permit NO. FL0030325 by USEPA -IV for WWE-WWTP. Letter - USEPA-IV (Smith) to FCWC (Reeves).

10-3-89	Receipt of results of their review of the outfall line application. Letter - SW FL Regional Planning Council (Daltry) to U.S.Army Corps of Engineers (Zattau)
10-11-89	Request for compliance with Antidegradation Rule. Letter - FDEP-SW (Edwards) to FCWC (French).
11-17-89	Notice that Construction Permit application is still incomplete until compliance with Antidegradation Rule is satisfied. Letter - FDEP-SW (Edwards) to FCWC (French).
12-14-89	Transmittal of Technical and Economic Evaluation Report for Reclaimed Water at WWE WWTP to satisfy the anti-degradation requirements of the FAC. Letter - FCWC (Elder) to FDEP-SW (Edwards).
12-22-89	Request for a determination of adequacy of information supplied and status of the construction permit application. Letter - FCWC (Williamson) to FDEP-SW (Edwards).
1-19-90	FDEP issues Notice of Intent to Issue Construction Permit for WWE-WWTP outfall and upgrade.
1-22-90	Lee County Construction Board Findings of Fact, Conclusions of Law and Order regarding FCWC appeal of requirement for new 12-inch water main to provide fire protection for WWE-WWTP. Appeal granted.
1-24-90	Lee County Board of County Commissioners directed legal staff to review the FCWC Waterway Estates WWTP project and request an Administrative Hearing if appropriate.
1-31-90	Lee County Attorney issues opinion to County Commissioners regarding County's standing in challenging WWE-WWTP construction permit.

1-31-90	FDEP-SW notified FCWC that construction permit application was deemed complete and the Notice of Intent was issued on 1/19/90. Letter - FDEP-SW (Edwards) to FCWC (Williamson).
2-1-90	Notification that monitoring must be done and new permit parameters met; request reports as to schedule compliance. USEPA -IV (McGarry) to FCWC (Reeves).
2-20-90	Response to USEPA-IV letter of 2/1/90, which was not received until 2/13/90, advising USEPA -IV that FCWC will begin discharge monitoring at new location on 3/1/90, and that anticipated construction permit issuance date was 2/22/90. Letter - FCWC (Tompkins) to USEPA -IV (McGarry).
2-23-90	Received affidavit of Publication of Intent to Issue dated 1/25/90 and copy of Lee County Agenda Item Summary showing that Board decided not to intervene at that time. Letter - FCWC (Williamson) to FDEP-SW (Edwards).
2-23-90	Submittal of progress report for January 1990. Letter - FCWC (Williamson) to USEPA -IV (Marlar).
3-1-90	Construction permit for upgrading WWE-WWTP issued by FDEP-SW. Letter - FDEP-SW to FCWC (French).
4-4-90	FCWC submitted February 1990 progress report to FDEP-SW. Letter - FCWC (Williamson) to FDEP-SW (Edwards).
4-4-90	FCWC submitted February 1990 progress report to USEPA-IV. Letter - FCWC (Williamson) to USEPA-IV (Marlar).
4-11-90	Army Corps of Engineers construction permit for outfall line issued.

4-18-90	Results of the bid opening for the construction in connection with upgrading WWE-WWTP. Memo - FCWC (Elder) to FCWC (French).
4-19-90	Report on review of Construction and Process Plans by Dr. Edwin Barth submitted. Letter - Barth Engineering (Barth) to FCWC (Elder).
4-23-90	Submission of March 1990 progress report to FDEP-SW. Letter - FCWC (Williamson) to FDEP-SW (Edwards).
5-10-90	Submission of April 1990 progress report to USEPA-IV. Letter - FCWC (Williamson) to USEPA -IV (Marlar)
5-10-90	Submission of April 1990 progress report to FDEP-SW. Letter - FCWC (Williamson) to FDEP-SW (Edwards).
5-17-90	Submittal to FDEP-SW of proposed modification of compliance schedule within TOP #DT36-152486. Letter - FCWC (Elder) to FDEP-SW (Edwards).
5-17-90	Submittal to USEPA-IV proposing several modifications to the compliance schedule outlined in the Administrative Order, based on the fact that it took until March 1, 1990 to acquire the FDEP and Army Corps of Engineers permits. Letter - FCWC (Elder) to USEPA -IV (Marlar).
5-21-90	FDEP-SW response to 5/14/90 request for modification to Compliance Schedule and request for meeting 5/29/90. Letter - FDEP (Edwards) to FCWC (Elder).
6-1-90	Meeting FCWC and FDEP-SW regarding alternatives for modifications to the Consent Order Compliance Schedule. (See 6-6-90 summary).

6-5-90	Summary of meeting of 6/1/90 to discuss Consent Order transmitted by FDEP-SW. Letter - FDEP-SW (Edwards) to FCWC (French).
6-25-90	Response to letter of 6/21/90 concerning earlier request of 5/17/90 for modifications to Consent Order and permit applications; references to meeting of 6/1/90 and cites letter of 6/5/90 as FDEP's response to these requests. Letter - FDEP-SW (Edwards) to FCWC (Williamson).
7-3-90	FCWC submitted explanation for failure to meet 5-1-90 construction start date for WWE-WWTP upgrade. Letter - FCWC (Elder) to USEPA-IV (Kwan).
7-24-90	Amended USEPA -IV Administrative Order showing 8/1/90 as the "Begin Construction" date transmitted by USEPA-IV. Letter - USEPA -IV to FCWC (Tompkins).
8-2-90	FCWC served notice of contract award for upgrading Waterway Estates WWTP. Letter - FCWC (Elder) to Cardinal (McDevitt).
8-6-90	FCWC acknowledgment of receipt of approval of the modification of the Administrative Order construction start date, and transmitting a copy of the Notice of Award to Cardinal. Letter - FCWC (Tompkins) to USEPA -IV (Cunningham).
8-24-90	Notice to Proceed issued by FCWC to Cardinal (start construction of WWE-WWTP upgrade). Letter - FCWC (Elder) to Cardinal (McDevitt).
8-24-90	Cardinal transmitted executed contracts, bonds and insurance for project and payment bond to be recorded with Lee County, per mechanic's lien law. Letter - Cardinal (McDevitt) to FCWC (Elder).

8-30-90	FCWC transmitted schedule of major activities, preliminary schedule submitted by Cardinal and notification that Stone & Webster taking over as engineer of record. Letter - FCWC (Reeves) to FDEP-SW (Edwards).
9-5-90	Cardinal advises that they had begun the process of applying for the building permit. They stated that Lee County Concurrency Management Div. advised them that they would not process a building permit application without a concurrency.
9-24-90	FCWC submitted progress reports for August and September 1990 to USEPA-IV. Letter - FCWC (Griggs) to USEPA-IV (Marlar).
9-24-90	FCWC submitted progress reports for August and September 1990 to FDEP-SW. Letter - FCWC (Griggs) to FDEP-SW (Edwards).
9-26-90	Transmission of copy of SFWMD exemption to Lee County Department of Concurrency Management. Letter - FCWC (Elder) to Lee County Dept of Concurrency Management (McAlister).
10-1-90	FDEP-SW notifies FCWC that the information supplied them was not adequate to detail what circumstances were beyond the control of FCWC, and that the compliance date of 11/1/90 in the Consent Order would remain effective. Letter - FDEP-SW (Edwards) to FCWC (Reeves).
10-12-90	Transmittal of the "detail" by FCWC to FDEP-SW of information desired by FDEP to evaluate the circumstances that were beyond the control of FCWC leading to the project delays. Letter - FCWC (Reeves) to FDEP-SW (Edwards).
10-17-90	FCWC requested that Lee County explain delays in Lee County approval of WWE-WWTP upgrade and requested prompt attention to resolving problems. Letter - FCWC (French) to Concurrency Management Division (Carroll).

10-19-90	FCWC submitted application for a TOP to FDEP-SW. Letter - FCWC (Reeves) to FDEP-SW (Edwards).
10-22-90	FCWC submitted progress report for October 1990 to USEPA-IV. Letter - FCWC (Griggs) to USEPA -IV (Marlar).
10-25-90	FCWC submitted request to extend the expiration date of the FDEP construction permit from 11/1/90 to 9/1/92. Letter - FCWC (Reeves) to FDEP-SW (Edwards).
10-30-90	FDEP-SW approves extension of expiration date on the FDEP construction permit to 9/1/92. Letter - FDEP-SW (Edwards) to FCWC (Reeves).
11-5-90	FCWC transmitted executed contract between FCWC & Kelly Brothers, Inc. To Stone & Webster. Letter - FCWC (Elder) to Stone & Webster (Haumann).
11-21-90	FDEP-SW submits Consent Order for signature to resolve violations. FDEP- SW (Edwards) to FCWC (Reeves).
11-26-90	Updated construction schedule prepared.
12-4-90	FDEP-SW submits executed revised Consent Order. Letter - FDEP-SW (Edwards) to FCWC (Reeves).
12-11-90	FCWC request amendment to Administrative Order 89-109 to reflect substantial completion of facilities by 9-1-92 and compliance with NPDES permit by 11-1-92. Letter - FCWC (Tompkins) to USEPA -IV (Marlar).
12-12-90	FDEP-SW issues Intent to Issue TOP.
12-17-90	FCWC issued Notice to Proceed to Kelly Brothers, Inc. (outfall line). Letter - FCWC (Elder) to Kelly Brothers (Danny Kelly).

1-21-91	Application for Exemption of Lee Co. Ordinance.
1-22-91	FDEP-SW issued TOP for WWE-WWTP. Letter - FDEP-SW (Edwards) to FCWC (Reeves).
1-22-91	FCWC submitted progress report to USEPA-IV for November 1990 . Letter - FCWC (Griggs) to USEPA -IV (Marlar).
2-21-91	FCWC submitted progress report to USEPA-IV. Letter - FCWC (Tompkins) to USEPA -IV (Marlar).
3-1-91	FCWC transmitted chronology for WWE WWTP project to USEPA-IV. Letter - FCWC (Tompkins) to USEPA -IV (Kwan).
3-19-91	Review of conversation with USEPA -IV (Kwan) regarding a tentative meeting with USEPA -IV on 3/28/91. Kwan stated that USEPA -IV may have attorneys present due to the possibility of enforcement action. Memo - FCWC (Tompkins) to file.
4-2-91	Transmittal of Amended Consent Order and brief changes. Letter - FCWC (Reeves) to FDEP (Edwards).
4-3-91	FDEP-SW issued Amended Consent Order (90-1747).
4-8-91	Details of meeting with USEPA -IV in Atlanta on 4/4/91 including explanations given for the project being delayed. Memo - FCWC (Tompkins) to File.
4-10-91	Details outlining call from USEPA -IV (Kwan) who indicated that USEPA -IV has determined that FCWC (WWE) has been in non-compliance since 1987 and may institute fines in six-figure range, but may reduce amount for circumstances beyond our control. Memo - FCWC (Tompkins) to FCWC (Bradtmiller and Reeves).

4-12-91	FCWC submitted progress report to USEPA-IV recitation of status of key processes. Letter - FCWC (Bradtmiller) to USEPA -IV (Marlar).
4-29-91	USEPA-IV transmitted allegations that the Waterway Estates WWTP was in violation of the CWA citing discharge of effluent at an unpermitted location and sets Show Cause Meeting for 6-12-91 at USEPA -IV offices. Letter - USEPA-IV (Pfaff) to FCWC (Bradtmiller).
5-9-91	USEPA-IV request for information pertaining to WWE-WWTP. Letter - USEPA -IV to FCWC (Bradtmiller).
5-23-91	FCWC submitted progress report to USEPA-IV. Letter - FCWC (Elder) to USEPA -IV (Marlar).
6-12-91	Show Cause Hearing held in USEPA-IV Offices in Atlanta. Meeting summary memorialized by Allen memorandum to files dated 6-19-91.
6-24-91	FCWC submitted additional items required by USEPA -IV during the meeting of 6/12/91. Letter - FCWC (Bradtmiller) to USEPA -IV (McGarry).
6-24-91	Transmission of construction update. Letter - FCWC (Bradtmiller) to USEPA -IV (Marlar).
7-9-91	Transmission of copy of engineer's certification of new outfall line with request that FDEP place it into service. Letter - FCWC (Bradtmiller) to USEPA -IV (McGarry).
7-17-91	FCWC notified USEPA-IV that authorization to place new effluent outfall main from Waterway Estates WWTP in service had been granted by FDEP-SW. Letter - FCWC (Bradtmiller) to USEPA-IV (McGarry).

7-24-91	Transmission of DMR with construction update. Letter - FCWC (Bradtmiller) to USEPA -IV (Marlar).
8-2-91	FCWC transmitted response to telephone call from USEPA-IV (Kwan) on 7/31/91. Letter - FCWC (Bradtmiller) to USEPA -IV (Kwan).
8-12-91	Reminder to FCWC that since the plant has begun to discharge from the new outfall line, biomonitoring/toxicity testing must commence immediately as per the permit. FCWC was also instructed to dechlorinate final effluent samples before running required bioassays. Letter - USEPA -IV (Lankford) to FCWC (Bradtmiller).
8-22-91	Transmission of construction update. Letter - FCWC (Bradtmiller) to USEPA -IV (Marlar).
9-16-91	FCWC transmitted additional information to USEPA-IV as requested on 9-13-91. Letter - FCWC (Bradtmiller) to USEPA -IV (Kwan).
9-25-91	Transmission of construction update, DMR and toxicity report. Letter - FCWC (Bradtmiller) to USEPA -IV (Marlar).
10-24-91	Transmission of construction update, DMR and toxicity report. Letter - FCWC (Bradtmiller) to USEPA -IV (Marlar).
11-5-91	FCWC notified USEPA-IV that the denitrification filters and UV disinfection systems were in place and in partial use in accordance with FDEP letter dated 11/1/91. Letter - FCWC (Bradtmiller) to USEPA -IV (Kwan) .
11-14-91	FDEP requesting capacity analysis report to be submitted by 1/1/92 because three-month flows exceeded permitted capacity. Letter - FDEP-SW (Edwards) to FCWC (Bradtmiller).

11-27-91	Transmission of DMR with construction update. Letter - FCWC (Bradtmiller) to USEPA -IV (Marlar).
12-1-91	Transmission of DMR with construction update. Letter - FCWC (Bradtmiller) to USEPA -IV (Marlar).
1-8-92	FCWC notified FDEP that FCWC was ready to begin feeding methanol to denite filters and bring plant into compliance with AO. Letter - FCWC (Ytterberg) to FDEP- SW (Young).
1-13-92	FCWC notified USEPA-IV that denitrification filters and UV system were in place and a temporary feed system for methanol is being utilized as of 1/13/92. Addition of methanol should bring plant into compliance with USEPA -IV AO and NPDES permit. Letter - FCWC (Bradtmiller) to USEPA -IV (Kwan).
1-24-92	FCWC submitted construction update and transmittal of DMR and toxicity report. Letter - FCWC (Bradtmiller) to USEPA -IV (Marlar).
2-19-92	Transmittal of updated O&M costs. Fax - FCWC (Karleskint) to USEPA -IV (Kwan).
2-20-92	FCWC transmitted copies of the FDEP Amended CO and Final Order and discussed FDEP fine to USEPA-IV. Discussed revisited O&M costs; and temporary methanol feed system put into place 1/13/92. Letter - FCWC (Karleskint) to USEPA -IV (Kwan).
2-28-92	FCWC submitted status report to USEPA-IV. Received permits for underground storage tank installation. Outfall construction complete, certified and put into service on 7/11/91. Letter - FCWC (Bradtmiller) to USEPA -IV (Marlar).

3-27-92	FCWC submitted status report to USEPA-IV. BTU #2 placed into service 3/16/92. Letter - FCWC (Bradtmiller) to USEPA -IV (Marlar).
4-21-92	FCWC notified USEPA-IV that BTU No. 2 was placed into service on 3/16/92. Monitoring for total nitrogen as of 4/3/92 indicates that the plant is consistently meeting the NPDES effluent nitrogen limitations. Letter - FCWC (Karleskint) to USEPA -IV (Kwan).
4-28-92	FCWC submitted construction update and DMR to USEPA-IV. Monthly avg for total nitrogen exceeded limitation, but as noted in letter to USEPA -IV (Kwan) on 4/20/92, the plant is meeting nitrogen limitations as of 4/3/92 and all other limitations within the NPDES permit. Unit key processes to meet effluent limitations are now in service or ready to place into service upon inspection by Lee County. Letter -FCWC (Bradtmiller) to USEPA - IV (Marlar).
5-20-92	FCWC submits through its counsel the factual background information pertaining to the Waterway Estates WWTP discharge and upgrade. Letter - Alston & Bird (DeHihns) to USEPA -IV (Eason).
5-27-92	FCWC submitted construction update, DMR and toxicity report to USEPA-IV. Primary unit processes key to meeting the effluent limitations have been placed into service. Facility met total effluent nitrogen limitations for April. Letter - FCWC (Bradtmiller) to USEPA -IV (Scarborough).
6-9-92	FCWC and legal counsel met with USEPA-IV. Meeting attendance list.

6-10-92	FCWC transmitted list of documents to USEPA - IV at 6/9/92 meeting and submitted further information requested by USEPA -IV at that meeting. Letter - FCWC (Karleskint) to Alston & Bird (DeHihns).
6-12-92	FCWC, through its legal counsel forwarded additional info requested by USEPA -IV at meeting on 6/9/92. Letter - Alston & Bird (DeHihns) to USEPA -IV (Eason).
6-25-92	FCWC submitted construction update and DMR to USEPA-IV. FCWC accepted project as substantially complete on June 5, 1992. Letter - FCWC (Bradtmiller) to USEPA -IV (Scarborough).
7-27-92	FCWC transmitted DMR and toxicity report to USEPA-IV. Letter - FCWC (Overton) to USEPA - IV (Scarborough).
8-17-92	FCWC notifies FDEP-SW that construction of WWE was substantially complete on 6/5/92, and that certification would be forthcoming. Letter - FCWC (Acosta) to FDEP-SW (Young).
9-16-92	FCWC received Notice of Violation and issuance of AO No. 92-093 for toxicity from USEPA-IV. Letter - USEPA -IV (Herndon) to FCWC (Bradtmiller).
9-25-92	FCWC responded to Notice of Violation dated 9/16/92 and the draft AO No. 92-903. FCWC does not believe continued monitoring of toxicity is necessary. Requests modification of existing permit rather than issuance of AO. Also request a mixing zone at terminus of outfall line. Letter - FCWC (Bradtmiller) to USEPA -IV (Herndon).

10-12-92	FCWC notified USEPA-IV that BTU #1 was put into service on 9/17/92, and became fully operational on 10/6/92. Plan to commence toxicity testing the week of 10/19/92 to comply with AO. Letter - FCWC (Karleskint) to USEPA -IV (Kwan).
10-13-92	FDEP-SW transmitted notice advising that recent discussions occurred with FCWC (Karleskint) regarding toxicity. Letter - FDEP-SW (Edwards) to FCWC (Bradtmiller).
11-9-92	FDEP-SW transmitted summary of action items to be implemented by FCWC. Letter - FDEP (Edwards) to FCWC (Overton).
11-16-92	USEPA directed FCWC to test for toxicity monthly beginning 10/92 in order to shorten the period of the AO from one year to six months. Letter - USEPA -IV (Herndon) to FCWC (Bradtmiller).
11-20-92	FCWC submitted NPDES Toxicity Test Report to USEPA-IV showing no toxicity. Letter - FCWC (Overton) to USEPA -IV (Scarborough).
11-24-92	FCWC requested a mixing zone for discharge from WWE AWTP and requested toxicity testing requirements from FDEP be similar to those required by USEPA -IV to avoid duplicate testing. Letter - FCWC (Karleskint) to FDEP-SW (Edwards)
11-24-92	NPDES DMR transmitted indicating toxicity being performed monthly on an accelerated basis in accordance with 11/13/92 letter by A. Herndon of USEPA -IV. Letter - FCWC (Overton) to USEPA -IV (Scarborough).
12-9-92	USDOJ notifies FCWC through its legal counsel that USEPA-IV had formally requested DOJ to file suit against FCWC. Letter - DOJ (Jacobs)to Alston & Bird (DeHihns).

12-11-92	USDOJ submitted BEN analysis to FCWC counsel showing resulting penalty calculations ($15,104,385). Letter - USDOJ (Jacobs) to Alston & Bird (DeHihns).
12-16-92	Meeting between FCWC, USEPA-IV and USDOJ to discuss allegations of violations of CWA at WWE-WWTP and settlement model. Meeting memorialized by memorandum, Allen to Files, 12-22-92. The settlement model indicated a settlement amount of $5,024,724.
12-16-92	Transmittal of four originals of FDEP Notification that a Domestic Wastewater Facility Will Be Placed Into Operation and one set of signed and sealed set of Record Drawings to FDEP Ft. Myers office. Letter - FCWC (Overton) to FDEP (Young).
12-18-92	FCWC counsel submits settlement issues in potential case US v. FCWC set forth in enclosed letter dated 12-9-92 from Jacobs offering settlement of $5,000,000. Letter - Alston & Bird (DeHihns) to AUI (Gordon).
12-22-92	Meeting between FCWC, USEPA-IV and USDOJ memorialized. Memorandum - Allen to Files.
4-14-93	USEPA-IV advised that AO No. 92-093 has been placed in an inactive status. Letter - EPA (Cunningham) to FCWC (Bradtmiller).
5-5-93	Draft response to USEPA allegations against FCWC. Memo to File (Barnette, Weil, Gotshal & Manges) received by FCWC via FAX.
10-1-93	USDOJ filed complaint in the U. S. District Court for the Middle District of Florida styled U.S.A. v. FCWC alleging violations of the CWA at WWE-WWTP.
3-31-94	NPDES permit application filed.
9-30-94	NPDES permit issued, became effective 1-1-95

3-30-95	USDOJ filed amended complaint expanding suit to include Carrollwood and Barefoot Bay and adding AHI as an additional defendant.
5-17-95	NPDES permit combined with operations permit with delegation to FDEP.
2-13-97	Permit application (combination NPDES and operations) submitted to FDEP to increase discharge to the Caloosahatchee River to 1.25 mgd.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET
ATLANTA, GEORGIA 30365

DEC 08 1986

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

REF: 4WM-FP

Mr. A. A. Reeves, III
Vice President & General Manager
Florida Cities Water Company
Post Office Box 5846
2112 Gulf Gate Drive
Sarasota, Florida 34277

RE: Waterway Estates
NPDES Permit No. FL0030325

Dear Mr. Reeves:

You are hereby notified of denial of the National Pollutant Discharge Elimination System (NPDES) permit application for the above referenced facility. This action constitutes the Environmental Protection Agency's (EPA) final permit decision in accordance with 40 CFR 124.15(a). Any person may contest this decision by submitting a timely request for a hearing to the Regional Administrator under 40 CFR 124.74 or 124.114.

This action will be effective thirty days from the date you receive this letter, provided that no request for a hearing is granted by the Agency under 40 C.F.R. 124.75 or 124.114. In the event that such a request is granted:

- For discharge(s) authorized by an NPDES permit, at the time this permit application was filed, the force and effect of this action will be stayed, all provisions(s) of the previous NPDES permit shall be fully enforceable and effective until the administrative review process is completed, as provided by 40 CFR 124.16 and 124.60

- For discharge(s) not authorized by an NPDES permit, at the time this permit application was filed, the Agency's granting of a hearing (requested by you or any other person) does not provide you authorization to discharge. In other words, there will not be an NPDES permit authorizing the discharge(s) and if such a discharge(s) occurs, the discharge(s) will constitute a violation of Section 301 of the Clean Water Act, (33 U.S.C. 1311) for which there is civil and/or criminal liability.

RECEIVED
SARASOTA OFFICE

DEFENDANT'S EXHIBIT
Kagey 33
9/24/99

DEC 10 1986

If you wish to request a hearing under 40 CFR 124.74 or 124.114 you must submit a request (an original and two copies) to the Regional Hearing Clerk within thirty (30) days from the receipt of this letter. The request will be timely if mailed by certified mail within the thirty (30) day time period. For the request to be valid, it must conform to the requirements of 40 CFR 124.74. A copy of the requirements of 40 CFR 124.74 is attached.

Since this facility is presently discharging pollutants to waters of the United States, EPA intends to issue an Administrative Order to you for this facility. The Administrative Order will contain a schedule for this facility to cease discharge, and will specify interim discharge limitations. You will be contacted by a separate letter regarding the details of the Administrative Order.

Information on procedures pertaining to the filing of a hearing request or other legal matters may be obtained by contacting Ms. Jacqueline Colson, Assistant Regional Counsel, at (404) 347-3506.

Sincerely yours,

Bruce R. Barrett, Director
Water Management Division

Enclosures (3): Hearing Request Requirements
Amendment to Fact Sheet
Fact Sheet

cc: Florida Department of Environmental Regulation

REQUIREMENTS FOR EVIDENTIARY/PANEL
HEARING REQUEST

Evidentiary Hearing (40 CFR 124.74)

(a) Within 30 days following service of notice of the Regional Administrator's final permit decision under 124.15 any interested person may submit a request to the Regional Administrator under paragraph (b) of this section for an evidentiary hearing to reconsider or contest that decision. If such a request is submitted by a person other than the permittee, the person shall simultaneously serve a copy of the request on the permittee.

(b)(1) In accordance with 124.76, such requests shall state each legal or factual question alleged to be at issue, and their relevance to the permit decision, together with a designation of the specific factual areas to be adjudicated and the hearing time estimated to be necessary for adjudication. Information supporting the request or other written documents relied upon to support the request shall be submitted as required by 124.73 unless they are already part of the administrative record required by 124.18.

Note: This paragraph allows the submission of requests for evidentiary hearings even though both legal and factual issues may be raised, or only legal issues may be raised. In the latter case, because no factual issues were raised, the Regional Administrator would be required to deny the request. However, on review of the denial the Administrator is authorized by 124.91(a)(1) to review policy or legal conclusions of the Regional Adminstrator. EPA is requiring an appeal to the Administrator even of purely legal issues involved in a permit decision to ensure that the Administrator will have an opportunity to review any permit before it will be final and subject to judicial review.

(2) Persons requesting an evidentiary hearing on an NPDES permit under this section may also request an evidentiary hearing on a RCRA or UIC permit, PSD permits may never be made part of an evidentiary hearing under Subpart E. This request is subject to all the requirements of paragraph (b)(1) of this section and in addition will be granted only if:

(i) Processing of the RCRA or UIC permit at issue was consolidated with the processing of the NPDES permit as provided in 124.4;

(ii) The standards for granting a hearing on the NPDES permit are met;

(iii) The resolution of the NPDES permit issues is likely to make necessary or appropriate modification of the RCRA or UIC permit; and

(iv) If a PSD permit is involved, a permittee who is eligible for an evidentiary hearing under Subpart E on his or her NPDES permit requests that the formal hearing be conducted under the procedures of Subpart F and the Regional Administrator finds that consolidation is unlikely to delay final permit issuance beyond the PSD one-year statutory deadline.

(c) These requests shall also contain:

(1) The name, mailing address, and telephone number of the person making such request;

(2) A clear and concise factual statement of the nature and scope of the interest of the requester;

(3) The names and addresses of all persons whom the requester represents; and

4) A statement by the requester that, upon motion of any party granted by the Presiding Officer, or upon order of the Presiding Officer sua sponte without cost or expense to any other party, the requester shall make available to appear and testify, the following:

(i) The requester;
(ii) All persons represented by the requester; and
(iii) All officers, directors, employees, consultants, and agents of the requester and the persons represented by the requester.

(5) Specific references to the contested permit conditions, as well as suggested revised or alternative permit conditions (including permit denials) which, in the judgement of the requester, would be required to implement the purposes and policies of the CWA.

(6) In the case of challenges to the application of control or treatment technologies identifed in the statement of basis or fact sheet, identification of the basis for the objection, and the alternative technologies or combination of technologies which the requester believes are necessary to meet the requirements of the CWA.

(7) Identification of the permit obligations that are contested or are inseverable from contested conditions and should be stayed if the request is granted by reference to the particular contested conditions warranting the stay.

(8) Hearing requests also may ask that a formal hearing be held under the procedures set forth in Subpart F. An applicant may make such a request even if the proceeding does not constitute "initial licensing" as defined in 124.111.

(d) If the Regional Administrator grants an evidentiary hearing request in whole or in part, the Regional Administrator shall identify the permit conditions which have been contested by the requester and for which the evidentiary hearing has been granted. Permit conditions which are not contested or for which the Regional Administrator has denied the hearing request shall not be affected by, or considered at, the evidentiary hearing. The Regional Administrator shall specify these conditions in writing in accordance with 124.60(c).

(e) The Regional Administrator must grant or deny all requests for an evidentiary hearing on a particular permit. All requests that are granted for a particular permit shall be combined in a single evidentiary hearing.

(f) The Regional Administrator (upon notice to all persons who have already submitted hearing requests) may extend the time allowed for submitting hearing requests under this section for good cause.

AMENDMENT TO THE FACT SHEET AT THE TIME OF FINAL DENIAL

NPDES Permit Number: FL0030325

Name of Applicant: Florida Cities Water Company - Waterway Estates

1) Changes to permit from Intent to Deny to Final Denial State:

None.

2) Public Comments:

The Company submitted a letter (dated September 16, 1986) proposing alternative disposal to be completed by December 31, 1988.

3) State Certification:

Waived per 40 CFR 124.53(c)

December 4, 1986
Date

C A Kaaen
Permit Writer

6

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Cities Water Company for limited proceeding to recover environmental litigation costs for North and South Ft. Myers Divisions in Lee County and Barefoot Bay Division in Brevard County.	]]]]]	DOCKET NO. 971663-WS

COMMISSION STAFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO FLORIDA CITIES WATER COMPANY

The Staff .....

5. .....copy of referenced enclosures to Exhibit No. M-6 attached to Michael Acosta's direct testimony is a letter dated December 89. 1988, from Bruce R. Barrett of the EPA to Mr. A. A. Reeves of FCWC, specifically the Hearing Request Requirements, the Amendment to the Fact Sheet, and the Fact Sheet.

No amended fact sheet found.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET
ATLANTA, GEORGIA 30365

Date June 30, 1986

FACT SHEET

APPLICATION FOR NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT TO DISCHARGE TREATED WASTEWATER TO U.S. WATERS

Application No. FL0030325 Application Date May 9, 1986

1. SYNOPSIS OF APPLICATION

a. Name and Address of Applicant

Florida Cities Water Company - Waterway Estates WWTP
2112 Gulf Gate Drive
P.O. Box 5046
Sarasota, Florida 34277

Location of plant: 1667 Inlet Drive, North Fort Myers
Lee County, Florida

b. Type of Facility

Privately owned wastewater treatment plant
SIC Code 4952

c. Design Capacity of Facility

1.08 MGD

d. Applicant's Receiving Water

Caloosahatchee River via a canal (see Attachment A)

e. Description of Wastewater Treatment Facilities

Treatment consists of a 1.08 MGD contact stabilization wastewater facility.

f. Description of Discharges

Outfall Serial No. 001.
Information consists of the average of the daily average and maximum values from Discharge Monitoring Report (DMR) data during the period of January 1985 - April 1986.

Parameter (Units)	Value (daily avg./daily max)
Flow (MGD)	.574/-
BOD_5 (lbs/day)	29.2/67.1
(mg/l)	6.1/13.8
TSS (lbs/day)	47.1/185.9
(mg/l)	11.0/37.9
TKN (lbs/day)	47.4/59.1
(mg/l)	9.7/12.2
Fecal Coliform (N/100ml)	2/5
pH (standard units)	Minimum 6.3, Maximum 7.6

2. PROPOSED EFFLUENT LIMITATIONS

The final effluent limits for this facility to a canal to the Caloosshatchee River are "no discharge."

3. BASIS FOR FINAL EFFLUENT LIMITS AND PERMIT CONDITIONS

The permit denial is based on a no discharge wasteload allocation developed by FDER on January 19, 1981. The terms and schedule for meeting the no discharge wasteload allocation will be set forth in a forthcoming administrative order.

4. REQUESTED VARIANCES OR ALTERNATIVES TO REQUIRED STANDARDS

Not Applicable

5. EFFECTIVE DATE OF PROPOSED EFFLUENT LIMITS AND COMPLIANCE SCHEDULE (IF APPLICABLE)

The permit denial will be effective immediately upon issuance of a final determination. However, EPA's Compliance Section will develop an administrative order which should specify interim limits and a schedule in order to achieve compliance with the no discharge allocation.

6. STATE CERTIFICATION REQUIREMENTS

State Certification was not received with the permit renewal application and will be requested on the permit denial.

7. DISCUSSION OF PREVIOUS NPDES CONDITIONS

The present NPDES permit, which expires September 24, 1986, contains the following limitations.

Parameter (Units)	Discharge Limitations	
	Daily Avg.	Daily Max.
Flow (MGD)	no limit	no limit
BOD_5 (lbs/day)	135	270
(mg/l)	15	30
TSS (lbs/day)	180	360
(mg/l)	20	40
TKN (lbs/day)	135	270
(mg/l)	15	30
Fecal Coliform (N/100ml)	200	400

The pH (standard units) not less than 6.0 nor greater than 8.5.

The BOD_5 and TSS (monthly average) to not exceed 10% of the respective monthly influent concentrations (90% removal).

8. EPA CONTACT

Additional information concerning the permit may be obtained at the address and during the hours noted in Item 9 from:

Ms. Suzanne D. Potter
(404) 347-3004

9. THE ADMINISTRATIVE RECORD, including application, draft permit, fact sheet, public notice (after release), State Certification (after receipt), comments received, and additional information is available by writing the EPA, Region IV, or for review and copying at 345 Courtland Street, N.E., 3rd Floor, Atlanta, Georgia 30365, between the hours of 8:15 A.M. and 4:30 P.M., Monday through Friday. Copies will be provided at a charge of 20¢ per page.

10. PROPOSED SCHEDULE FOR PERMIT ISSUANCE

Fact Sheet to Applicant	June 30, 1986
State Certification Request	June 30, 1986
Public Notice of Permit Denial	July 31, 1986
Permit Denial Issued	August 4, 1986

11. PROCEDURES FOR THE FORMULATION OF FINAL DETERMINATIONS

a. Comment Period

The Environmental Protection Agency proposes to issue an NPDES permit to this applicant subject to the aforementioned effluent limitations and special conditions. These determinations are tentative and open to comment from the public.

Interested persons are invited to submit written comments regarding permit issuance or the proposed permit limitations and conditions to the following address:

Environmental Protection Agency
345 Courtland Street, NE
Atlanta, Georgia 30365
ATTN: Ms. Suzanne D. Potter

All comments received within thirty (30) days following the date of public notice will be considered in the formulation of final determinations with regard to proposed permit issuance.

b. Public Hearing

The EPA Regional Administrator will hold a public hearing if there is a significant degree of public interest in a proposed permit or group of permits, or if he determines that useful information and data may be obtained thereby. Public Notice of such a hearing will be circulated at least thirty days prior to the hearing.

c. Issuance of the Permit

After consideration of all written comments and of the requirements and policies in the Act and appropriate regulations, and, if a public hearing is held, after consideration of all comments, statements and data presented at the hearing, the EPA Regional Administrator will make determinations regarding the permit issuance. If the determinations are substantially unchanged from the tentative determinations outlined above, the Regional Administrator will so notify all persons submitting written comments, and, if a public hearing was held, all persons participating in the hearing. If the determinations are substantially changed, the EPA Regional Administrator will issue a public notice indicating the revised determinations.

Unless a request for an evidentiary hearing is granted, the proposed permit contained in the Regional Administrator's determinations shall become issued and effective and will be the final action of the U. S. Environmental Protection Agency.

d. Evidentiary Hearing

If the determinations are substantially unchanged, any interested person may submit a request for an evidentiary hearing on the permit and its conditions within thirty (30) days of the receipt of the notice described in section c. If the determinations are substantially changed, any interested person may submit a request for an evidentiary hearing within thirty days of the date of the public notice or of the date of becoming aware of the determinations, which ever comes first. Such requests will be within the time period if mailed by Certified Mail within the thirty-day period to the Regional Hearing Clerk, Environmental Protection Agency, 345 Courtland Street, N.E., Atlanta, Georgia 30308. All requests must contain:

(1) The name, mailing address and telephone number of the person making such request;

(2) A clear and concise factual statement of the nature and scope of the interest of the requester;

(3) The names and addresses of all persons whom the requester represents; and

(4) A statement by the requester that, upon motion of any party, or sua sponte by the Presiding Officer and without cost or expense to any other party, the requester shall make available to appear and testify, the following:

(i) The requester;

(ii) All persons represented by the requester, and

(iii) All officers, directors, employees, consultants and agents of the requester and the persons represented by the requester.

(5) Specific references to the contested permit terms and conditions, as well as suggested revised or alternative permit terms and conditions (not excluding permit denial) which, in the judgement of the requester, would be required to implement the purposes and policies of the Act.

(6) In the case of challenges to the application of control or treatment technologies identified in the statement of basis or fact sheet, identification of the basis for the objection, and the alternative technologies or combination of technologies which the requester believes are necessary to meet the requirements of the Act.

(7) Specific identification of each of the discharger's obligations which should be stayed if the request is granted. If the request contests more than one permit term or condition then each obligation which is proposed to be stayed must be referenced to the particular contested term warranting the stay.

The granting of a request will stay only the contested portions of the permit. Uncontested provisions of the permit shall be considered issued and effective and the permittee must comply with such provisions. Except, if the permit is for a new source or new discharge, the applicant will be without a permit for the proposed new source or new discharge, pending final Agency action. The final Agency decision on the permit provisions contested at an evidentiary hearing will be made in accordance with Title 40, Code of Federal Regulations, Subpart H, found at 44 Federal Register 32938, et seq.

e. Panel Hearing

In the case of an "initial license," including the first grant of an NPDES permit, or the first decision on a requested variance, if the Regional Administrator elects to apply the provisions of subpart I and so states in the public notice of the draft permit, any person may request the Regional Administrator to hold a panel hearing on the permit. Such a request must be made within the comment period of the notice described above. Requests will be considered timely if mailed by certified mail within the comment period. All requests must contain:

(1) A brief statement of the interest of the person requesting the hearing;

(2) A statement of any objections to the draft permit;

(3) A statement of the issues which such person proposes to raise for consideration at such hearing;

(4) The name, mailing address and telephone number of the person making such request;

(5) A clear and concise factual statement of the nature and scope of the interest of the requester;

(6) The names and addresses of all persons whom the requester represents; and

(7) A statement by the requester that, upon motion of any party, or sua sponte by the Presiding Officer and without cost or expense to any other party, the requester shall make available to appear and testify, the following:

(i) The requester;

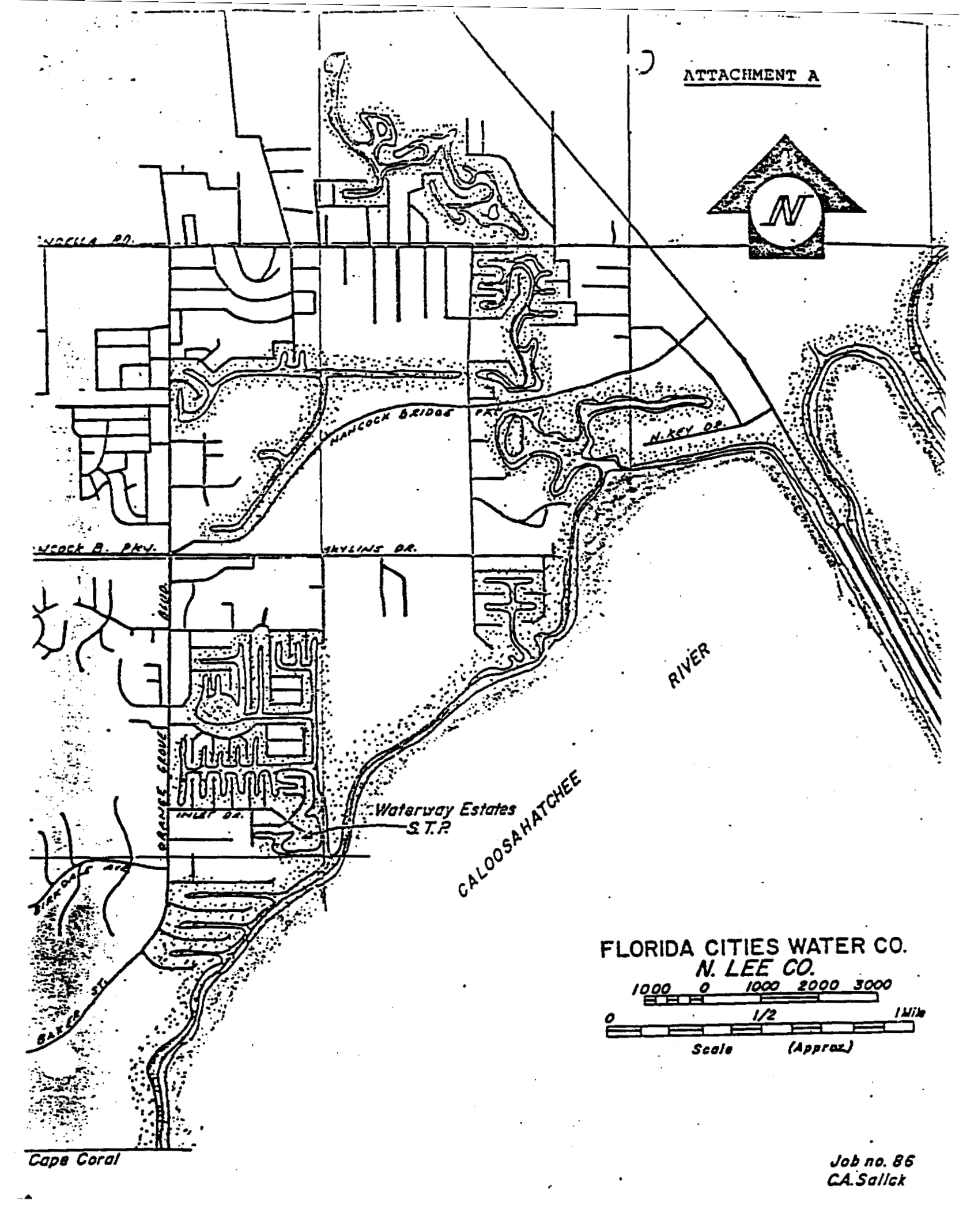
(ii) All persons represented by the requester; and

(iii) All officers, directors, employees, consultants and agents of the requester and the persons represented by the requester.

(8) Specific references to the contested permit terms and conditions, as well as suggested revised or alternative permit terms and conditions (not excluding permit denial) which, in the judgment of the requester, would be required to implement the purposes and policies of the Act.

If the permit for which a panel hearing is requested is a new source or new discharge, the applicant will be without a permit for the proposed new source or new discharge, pending final Agency action. Panel hearings will be conducted in accordance with title 40, Code of Federal Regulations, Subpart I, at 44 Federal Register 32944, et seq.

ATTACHMENT A



FLORIDA CITIES WATER CO.
N. LEE CO.

1000 0 1000 2000 3000

0 1/2 1 Mile

Scale (Approx.)

Job no. 86
CA. Sallick

Florida Cities Water Company
Docket No._____
Rate Application for Recovery
of Legal Expenses
Exhibits____(MM-1 thru MM-4)
Michael Murphy

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663-WS EXHIBIT NO. 11
COMPANY/
WITNESS: Murphy
DATE: 8-28-98

1327297

FLORIDA CITIES WATER COMPANY

RATE APPLICATION FOR RECOVERY OF LEGAL EXPENSES

EXHIBITS_____(MM-1 THRU MM-4)

MICHAEL MURPHY

Exhibit List
Testimony of Michael Murphy
Florida Cities Water Company
Water & Wastewater Operations

1. Resume of Michael Murphy:
   Exhibit_____(MM-1).

2. Legal Expenses Schedule:
   Exhibit_____(MM-2).

3. Rate Case Expense Recovery
   Schedule: Exhibit_____(MM-3).

4. Rate Schedule:
   Exhibit_____(MM-4).

Exhibit_____(MM-1)

MICHAEL E. MURPHY

Florida Cities Water Company/Poinciana Utilities Inc. 1994 to present

Vice-President and Chief Financial Officer

Six division privately held water and wastewater utility. Oversee accounting, financial and regulatory reporting, rate making and regulation, budgeting, and Federal and state income tax compliance. Responsible for bank and bond lending activities.

Markborough Florida, Inc. 1992 to 1993

Vice-President Finance and Administration

Real estate developer. Oversaw accounting, financial and management reporting, budgeting and information systems. Formulated financial and administrative controls. Handled business planning, bank relations, and office/human resources administration.

The J.L. Mason Group, Inc. 1985 to 1992

Vice-President Controller (1991-1992)

A multi-state real estate developer/homebuilder with annual revenues of $90 million. Responsible for all accounting, tax and administrative matters.

Corporate Accounting Mgr. / Asst. V.P. (1989-1990)

Formulated all corporate and divisional accounting policies and procedures. Handled annual consolidated audit and Federal and state tax return preparation. Coordinated annual budgeting process.

Division Vice-President Controller (1987-1989)

Handled financial, tax and investor reporting for 10+ real estate general and limited partnerships.

Corporate Director of Accounting (1985-1986)

Oversaw the preparation, analysis and presentation of monthly results of operations and financial position. Prepared the annual report for outside CPA review. Compiled the necessary information for the Federal and state income tax returns.

KPMG Peat Marwick CPA's 1976-1985

Staff Accountant to Senior Manager

Private business practice of a Big Six Accounting Firm. Achieved successive management responsibilities, from staff auditor to in-charge accountant to senior manager.

University of Kentucky; B.S. in Accounting; M.S. in Accounting
CPA, Missouri 1977, No. 5248; Missouri Society of CPA's, 1978; AICPA, 1979

FLORIDA CITIES WATER COMPANY
LEGAL EXPENSES - (Sorted by Vendor)

Date Paid	FCWC Check No.	Invoice/ Ref. No.	Description	Total Payment	Attorneys Fees & Expenses	Expert Witness Fees & Exp.	Fact Witness Fees & Exp.
6/30/92	84562	75819	Alston & Bird	4,628	4,628		
1/07/93	88964	12-1	Alston & Bird-10/27/92-11/25/92 Svcs	1,457	1,457		
2/08/93	89560	12-31	Alston & Bird-12/1/92-12/22/92 Svcs	12,709	12,709		
3/08/93	90139	2-1	Alston & Bird-12/23/92-1/27/93 Svcs	1,880	1,880		
3/31/93	90732	3-1	Alston & Bird-2/13/93-2/16/93 Svcs	589	589		
5/10/93	91565	4-1	Alston & Bird-2/16/93-3/11/93 Svcs	679	679		
6/25/93	92559	6-14	Alston & Bird -5/18/93	76	76		
07/25/94	103464	6-24	Alston & Bird	1,207	1,207		
10/31/94	106092	9-20	Alston & Bird	2,212	2,212		
11/08/94	106286	10-21	Alston & Bird	83	83		
12/08/94	107014	11-15	Alston & Bird	277	277		
12/29/94	107486	12-13	Alston & Bird	402	402		
06/30/95	112287	6-20	Alston & Bird - Svcs 5/4/95-5/19/95	1,085	1,085		
08/31/95	113944	8-15	Alston & Bird- 7/14/95-7/18/95	594	594		
09/29/95	114708	9-18	Alston & Bird- 8/14/95-8/31/95	358	358		
1/5/96	117073	75819	Alston & Bird- 8/28/95 Messenger Service	13	13		
			Subtotal	$28,246			
1/16/96	117160	10401	Baise & Miller-11/95	172,934	172,934		
3/15/96	118570	10399	Baise & Miller-Dec. 1995	204,311	204,311		
4/18/96	119374	10400	Baise & Miller-January 1996	78,931	78,931		
5/7/96	119903	10400	Baise & Miller-February 1996	98,500	98,500		
5/24/96	120418	10401	Baise & Miller-March 1996	172,439	172,439		
7/19/96	121739	10426	Baise & Miller-May 1996	35,660	35,660		
7/19/96	121739	10412	Baise & Miller-April 1996	41,406	41,406		
8/30/96	123017	10426	Baise & Miller-June 1996	17,147	17,147		
9/23/96	123608	10000	Baise & Miller-July 1996	17,445	17,445		
11/11/96	124853	10002	Baise & Miller-August 1996	25,415	25,415		
11/19/96	125084	10009	Baise & Miller-September 1996	15,491	15,491		
12/31/96			Baise & Miller-Refund Unused Portion of Airline Ticket	(132)	(132)		
1/22/97	127337	10009	Baise & Miller-November 1996	8,481	8,481		
2/20/97	127878	10009	Baise & Miller-December 1996	2,001	2,001		
2/24/97	128098	10009	Baise & Miller-December 1996	5,523	5,523		
4/30/97	129655	10009	Baise & Miller-January 1997 / February 1997	13,641	13,641		
5/30/97	130413	10009	Baise & Miller-March 1997	4,344	4,344		
6/30/97	131139	10009	Baise & Miller-April 1997	10,671	10,671		
7/23/97	132096	10009	Baise & Miller-May 1997	12,217	12,217		
			Subtotal	$936,423			
05/16/95	110879	301552	Baker & Hostetler-Svcs thru 1/31/95	13,539	13,539		
04/28/95	110575	306650	Baker & Hostetler-Svcs thru 2/28/95	10,275	10,275		
06/19/95	111770	310575	Baker & Hostetler-Svcs thru 3/31/95	7,126	7,126		
			Subtotal	$30,941			
11/30/95	116244	11568	Black & Veatch - Inv 8/21/95	34,720		34,720	
11/30/95	116244	13197	Black & Veatch - Inv 9/13/95	3,810		3,810	
1/5/96	117074	16641	Black & Veatch - Inv 11/2/95 Billed thru 10/20	10,288		10,288	
1/5/96	117074	18428	Black & Veatch - Inv 11/30/95 Billed thru 11/17/95	3,664		3,664	
1/5/96	117074	15281	Black & Veatch - Inv 10/13/95 Billed thru 9/22/95	4,276		4,276	
5/7/96	119962	25844	Black & Veatch-Inv. 3/21/96 billed thru 3/8/96	1,202		1,202	
5/7/96	119962	22844	Black & Veatch-Inv. 2/6/96 billed thru 1/12/96	4,216		4,216	
5/7/96	119962	22843	Black & Veatch-Inv. 2/6/96 billed thru 1/12/96	1,165		1,165	
7/9/96	121612	27871	Black & Veatch-Inv. 4/24/96 billed thru 4/5/96	6,265		6,265	
11/11/96	124985	37535	Black & Veatch	190		190	
			Subtotal	$69,797			
03/20/95	109452	11-18	Bruce Barrett & Assoc. - Deposed for EPA Case	1,086			1,086
3/31/97	128932	166-A0450	Ernst & Young	1,532		1,532	
04/24/95	110453	3-20	Gabeler, Baise & Miller - 1/95	52,265	44,737	7,528	

FLORIDA CITIES WATER COMPANY
LEGAL EXPENSES - (Sorted by Vendor)

Date Paid	FCWC Check No.	Invoice/ Ref. No.	Description		Total Payment	Attorneys Fees & Expenses	Expert Witness Fees & Exp.	Fact Witness Fees & Exp.
05/16/95	110909	4-19	Gabeler, Baise & Miller - 3/95		105,743	105,743		
06/19/95	111806	3-20	Gabeler, Baise & Miller - 2/95		85,564	85,564		
06/30/95	112229	5-25	Gabeler, Baise & Miller - 4/95		132,691	132,691		
08/15/95	113192	10375	Gabeler, Baise & Miller - 5/95		135,379	135,379		
08/31/95	113881	10387	Gabeler, Baise & Miller-6/95		109,392	109,392		
10/9/95	114771	10399	Gabeler, Baise & Miller-July 1995		132,704	132,704		
11/27/95	116061	10399	Gabeler, Baise & miller-Aug 1995		115,459	115,459		
12/13/95	116431	10401	Gabeler, Baise & Miller-Sep 1995		114,091	114,091		
1/5/96	117007	10401	Gabeler, Baise & Miller-Oct 1995		143,034	143,034		
			Subtotal		$1,126,320			
3/15/96	118572	196	Gabeler, Rattocchi & Griggs-January 1996		45,931	45,931		
5/21/96	120369	0396	Gabeler, Battocchi & Griggs-March 1996		77,145	77,145		
5/28/96	120374	0296	Gabeler, Battocchi & Griggs-February 1996		39,325	39,325		
7/19/96	121791	0596	Gabeler, Battocchi & Griggs-May 1996		16,680	16,680		
7/19/96	121791	0496	Gabeler, Battocchi & Griggs-April 1996		26,525	26,525		
7/31/96	122143	0696	Gabeler, Battocchi & Griggs-June 1996		7,980	7,980		
8/19/96	122684	0796	Gabeler, Battocchi & Griggs-July 1996		11,564	11,564		
9/30/96	123873	0896	Gabeler, Battocchi & Griggs-August 1996		15,626	15,626		
11/11/96	124900	0996	Gabeler, Battocchi & Griggs-September 1996		10,322	10,322		
1/22/97	127372	1096	Gabeler, Rattocchi & Griggs-October 1996		1,646	1,646		
2/28/97	128165	1296	Gabeler, Rattocchi & Griggs-January 1997		44	44		
			Subtotal		$252,787			
02/07/94	97823	144836	Henderson, Franklin		700	700		
03/21/94	98933	2-23	Henderson, Franklin		1,406	1,406		
05/23/94	101093	152245	Henderson, Franklin		781	781		
07/29/94	103621	155854	Henderson, Franklin		296	296		
09/19/94	104916	157583	Henderson, Franklin		458	458		
10/24/94	105871	161067	Henderson, Franklin		1,776	1,776		
11/16/94	106437	162932	Henderson, Franklin		2,159	2,159		
12/08/94	106951	159263	Henderson, Franklin		2,146	2,146		
1/31/95	108229	167458	Henderson, Franklin 10/19-12/19/94		836	836		
03/31/95	109876	171045	Henderson, Franklin - 12/19/94-2/16/95		3,438	3,438		
04/24/95	110456	173123	Henderson, Franklin-Services 1/23/95-3/15/95		1,534	1,534		
06/12/95	111567	InterCo	Henderson, Franklin-Services 3/14/95-4/18/95	(1)	1,144	1,144		
06/19/95	111814	176591	Henderson, Franklin-Services 4/14/95-5/16/95	(1)	1,371	1,371		
08/21/95	113490	178784	Henderson, Franklin-Services Inv. 6/23/95	(1)	713	713		
08/21/95	113490	180866	Henderson, Franklin-Services Inv. 7/25/95	(1)	877	877		
09/29/95	114655	182869	Henderson, Franklin-Services 7/11-8/16	(1)	746	746		
11/7/95	115675	184960	Henderson, Franklin-Services 8/15/95-9/15/95	(1)	764	764		
12/13/95	116446	187432	Henderson, Franklin-Services 9/5/95-10/13/95	(1)	719	719		
1/5/96	117015	189900	Henderson, Franklin-Services 10/11/95-11/18/95	(1)	3,171	3,171		
2/29/96	118190	191912	Henderson, Franklin-Services 11/15/95-1/12/96	(1)	5,156	5,156		
4/18/96	119443	194333	Henderson, Franklin-Services 1/12/96-2/1/96	(1)	398	398		
5/24/96	120463	197146	Henderson, Franklin-Svcs 2/26/96-3/28/96	(1)	652	652		
7/19/96	121805	200713	Henderson, Franklin-Svcs. 4/16/96-6/6/96	(1)	884	884		
9/30/96	123881	204478	Henderson, Franklin Starnes-Svcs. 6/17/96-7/24/9	(1)	202	202		
10/14/96	124221	206219	Henderson, Franklin Starnes-Svcs. 8/19/96-9/3/96	(1)	747	747		
11/19/96	125128	207667	Henderson, Franklin Starnes-Svcs. 9/18/96-9/30/9	(1)	771	771		
1/22/97	127381	209305	Henderson, Franklin Starnes-Svcs. 10/21/96-11/4/	(1)	444	444		
4/30/97	129706	213323	Henderson, Franklin Starnes-Svcs. 11/19/96-12/2/	(1)	120	120		
7/16/97	131876	219041	Henderson, Franklin Starnes-Svcs. 4/3-5/28/97	(1)	227	227		
					(9,553)	(9,553)		
			Subtotal		$25,082			
12/13/95	116447	114-085	Hopping, Green Sams & Smith-Inv. 10/7/95		1,983	1,983		
3/18/96	118644	114-091 GP	Hopping, Green, Sams & Smith-Services 1/23-1/26/96		1,687	1,687		
5/16/96	120121	001-079	Hopping, Green, Sams & Smith- Inv. 3/29/96 billed thru		240	240		
5/16/96	120121	106-069	Hopping, Green, Sams & Smith- Inv. 4/12/96 billed thru		201	201		
			Subtotal		$4,111			

FLORIDA CITIES WATER COMPANY
LEGAL EXPENSES - (Sorted by Vendor)

Date Paid	FCWC Check No.	Invoice/ Ref. No.	Description	Total Payment	Attorneys Fees & Expenses	Expert Witness Fees & Exp.	Fact Witness Fees & Exp.
8/31/93	93999	8484228	Jenner & Block 06/93 Svcs	10,025	10,025		
11/15/93	95862	8492211	Jenner & Block 08/93 Svcs	33,310	33,310		
12/08/93	96348	8495016	Jenner & Block - 9/93 Svcs	30,903	30,903		
01/31/94	97648	8496856	Jenner & Block - 10/93 Svcs	27,627	27,627		
02/07/94	97790	8501265	Jenner & Block - 11/93 Svcs	74,137	74,137		
03/28/94	99076	8503050	Jenner & Block - 12/93 Svcs	53,679	53,679		
03/28/94	99076	8487745	Jenner & Block - 7/93 Svcs	46,507	46,507		
05/09/94	100178	8507041	Jenner & Block - 1/94 Svcs	46,152	46,152		
05/23/94	101058	8510810	Jenner & Block - 2/94 Svcs	63,160	63,160		
07/19/94	103213	8517167	Jenner & Block - 03/94 Svcs	98,483	98,483		
08/08/94	103783	8520035	Jenner & Block - 04/94 Svcs	109,147	109,147		
08/31/94	104438	8521941	Jenner & Block - 05/94 Svcs	80,697	80,697		
09/30/94	105254	8524971	Jenner & Block - 06/94 Svcs	75,053	75,053		
10/17/94	105634	8526566	Jenner & Block - 07/94 Svcs	71,979	71,979		
10/31/94	106006	8529507	Jenner & Block - 08/94 Svcs	80,728	80,728		
11/30/94	106675	8531402	Jenner & Block - 09/94 Svcs	52,760	52,760		
1/31/95	108190	8534723	Jenner & Block - 10/94	74,907	74,907		
1/31/95	108190	8539276	Jenner & Block - 11/94	66,532	64,952	1,580	
04/17/95	110201	8541475	Jenner & Block - 12/94	62,200	62,200		
04/24/95	110422	8549999	Jenner & Block - 1/95 & 2/95	2,269	2,269		
			Subtotal	$1,160,255			
11/30/95	116168	20673 #1&2	Johnson Engineering-Inv. #1&2 5/31/95 & 6/29/95	2,362		2,362	
5/16/96	120064	4-24	Keith R. Cardey-DOJ Case Services-March & April 199	3,773		3,773	
1/5/96	116976	11-1	Keith R. Cardey-Svcs Apr thru Jul 1995, Aug, Sep, Oct	35,468		35,468	
			Subtotal	$39,241			
6/3/91	76861	402-08M	Landers & Parsons	658	658		
7/29/91	77925	402-08M	Landers & Parsons	951	951		
9/16/91	78954	402-07M	Landers & Parsons	407	407		
4/13/92	83056	402-08M	Landers & Parsons	926	926		
11/30/95	116170	402-04M	Landers & Parsons - 9/12/95 Inv#402-04M	1,700	1,700		
4/8/96	119209	21	Landers & Parsons-1/12/96 Charges	13	13		
5/7/96	119934	403-00D	Landers & Parsons-Invoice Dated 3/1/96	750	750		
			Subtotal	$5,404			
09/30/94	105298	1011586	Merrill Corp. - Copies Produced	17,170	17,170		
09/30/94	105298	1011829	Merrill Corp. - Copies Produced	11,588	11,588		
			Subtotal	$28,759			
11/30/95	116174	10922	Phoenix Environmental GP Inc. - July-Aug '95	188		188	
11/30/95	116174	10814	Phoenix Environmental GP Inc. - May-Jun '95	2,587		2,587	
1/5/96	117026	10758	Phoenix Enviornmental GP Inc. - Inv. 5/31/95	58		58	
1/5/96	117026	10979	Phoenix Environmental GP Inc. - Inv. 9/28/95	149		149	
1/5/96	117026	11031	Phoenix Environmental GP Inc. - Inv. 10/31/95	3,754		3,754	
1/5/96	117026	10870	Phoenix Environmental GP Inc. - Inv. 7/31/95	4,717		4,717	
1/5/96	117026	11088	Phoenix Environmental GP Inc. - Inv. 11/30/95	9		9	
5/7/96	119936	11296	Phoenix Environmental GP.Inc. Svcs. 2/25/96-3/23/96	3,148		3,148	
7/9/96	121576	11349	Phoenix Environmental GP. Inc. Svcs. 3/24/96-4/27/96	10,248		10,248	
8/30/96	123018	8-30	Phoenix Environmental-5/26/96-6/22/96	10,073		10,073	
			Subtotal	$34,931			
4/18/96	119441	4-4	Roger C. Hartung-3/10/96-4/2/96 Services	15,362		15,362	
3/15/96	118571	3-15	Roger C. Hartung-January 1996 Services	4,889		4,889	
			Subtotal	$20,251			
1/13/97	126817	425342	Roy F. Weston, Inc.	13,093		13,093	
5/7/96	119944	50-01-96-1	Source, Inc.-Invoice Dated 3/5/96	340			340

FLORIDA CITIES WATER COMPANY
LEGAL EXPENSES - (Sorted by Vendor)

Date Paid	FCWC Check No.	Invoice/ Ref. No.	Description	Total Payment	Attorneys Fees & Expenses	Expert Witness Fees & Exp.	Fact Witness Fees & Exp.
03/21/95	109613	InterCo	Weil, Gotshall & Manges - 11/94 & 12/94 billings	18,017	18,017		
05/22/95	111018	InterCo	Weil, Gotshall & Manges - 2/95, 4/95, Inter-Co	15,826	15,826		
06/20/95	111736	InterCo	Weil, Gotshall & Manges - 3/95 Chgs, 5/95, Inter-Co	5,338	5,338		
11/20/95	116050	InterCo	Weil, Gotshall & Manges - Jun '93 Chgs on Oct '95 Inte	6,069	6,069		
			Subtotal	$45,250			
Grand Total				**$3,826,210**	**$3,634,470**	**$190,314**	**$1,426**

(1) - Henderson, Franklin billings after 4/1/95 are being reduced by 50% because this firm provided services as a local counsel to Avatar Holdings Inc. (AHI), as well as FCWC, after AHI was named a defendant in the Amended Complaint filed on 3/30/95.

FLORIDA CITIES WATER COMPANY
LEGAL EXPENSES - (Sorted by Date)

Date Paid	FCWC Check No.	Invoice/ Ref. No.	Description	Total Payment	Attorneys Fees & Expenses	Expert Witness Fees & Exp.	Fact Witness Fees & Exp.
6/3/91	76861	402-08M	Landers & Parsons	658	658		
7/29/91	77925	402-08M	Landers & Parsons	951	951		
9/16/91	78954	402-07M	Landers & Parsons	407	407		
4/13/92	83056	402-08M	Landers & Parsons	926	926		
6/30/92	84562	75819	Alston & Bird	4,628	4,628		
1991-1992 Total				**7,569**			
1/07/93	88964	12-1	Alston & Bird-10/27/92-11/25/92 Svcs	1,457	1,457		
2/08/93	89560	12-31	Alston & Bird-12/1/92-12/22/92 Svcs	12,709	12,709		
3/08/93	90139	2-1	Alston & Bird-12/23/92-1/27/93 Svcs	1,880	1,880		
3/31/93	90732	3-1	Alston & Bird-2/13/93-2/16/93 Svcs	589	589		
5/10/93	91565	4-1	Alston & Bird-2/16/93-3/11/93 Svcs	679	679		
6/25/93	92559	6-14	Alston & Bird -5/18/93	76	76		
8/31/93	93999	8484228	Jenner & Block 06/93 Svcs	10,025	10,025		
11/15/93	95862	8492211	Jenner & Block 08/93 Svcs	33,310	33,310		
12/08/93	96348	8495016	Jenner & Block - 9/93 Svcs	30,903	30,903		
1993 Total				**91,628**			
01/31/94	97648	8496856	Jenner & Block - 10/93 Svcs	27,627	27,627		
02/07/94	97790	8501265	Jenner & Block - 11/93 Svcs	74,137	74,137		
02/07/94	97823	144836	Henderson, Franklin	700	700		
03/21/94	98933	2-23	Henderson, Franklin	1,406	1,406		
03/28/94	99076	8487745	Jenner & Block - 7/93 Svcs	46,507	46,507		
03/28/94	99076	8503050	Jenner & Block - 12/93 Svcs	53,679	53,679		
05/09/94	100178	8507041	Jenner & Block - 1/94 Svcs	46,152	46,152		
05/23/94	101058	8510810	Jenner & Block - 2/94 Svcs	63,160	63,160		
05/23/94	101093	152245	Henderson, Franklin	781	781		
07/19/94	103213	8517167	Jenner & Block - 03/94 Svcs	98,483	98,483		
07/25/94	103464	6-24	Alston & Bird	1,207	1,207		
07/29/94	103621	155854	Henderson, Franklin	296	296		
08/08/94	103783	8520035	Jenner & Block - 04/94 Svcs	109,147	109,147		
08/31/94	104438	8521941	Jenner & Block - 05/94 Svcs	80,697	80,697		
09/19/94	104916	157583	Henderson, Franklin	458	458		
09/30/94	105254	8524971	Jenner & Block - 06/94 Svcs	75,053	75,053		
09/30/94	105298	1011829	Merrill Corp. - Copies Produced	11,588	11,588		
09/30/94	105298	1011586	Merrill Corp. - Copies Produced	17,170	17,170		
10/17/94	105634	8526566	Jenner & Block - 07/94 Svcs	71,979	71,979		
10/24/94	105871	161067	Henderson, Franklin	1,776	1,776		
10/31/94	106006	8529507	Jenner & Block - 08/94 Svcs	80,728	80,728		
10/31/94	106092	9-20	Alston & Bird	2,212	2,212		
11/08/94	106286	10-21	Alston & Bird	83	83		
11/16/94	106437	162932	Henderson, Franklin	2,159	2,159		
11/30/94	106675	8531402	Jenner & Block - 09/94 Svcs	52,760	52,760		
12/08/94	106951	159263	Henderson, Franklin	2,146	2,146		
12/08/94	107014	11-15	Alston & Bird	277	277		
12/29/94	107486	12-13	Alston & Bird	402	402		
1994 Total				**922,768**			
1/31/95	108190	8539276	Jenner & Block - 11/94	66,532	64,952	1,580	
1/31/95	108190	8534723	Jenner & Block - 10/94	74,907	74,907		
1/31/95	108229	167458	Henderson, Franklin 10/19-12/19/94	836	836		
03/20/95	109452	11-18	Bruce Barrett & Assoc. - Deposed for EPA Case	1,086			1,086
03/21/95	109613	InterCo	Weil, Gotshall & Manges - 11/94 & 12/94 billings	18,017	18,017		
03/31/95	109876	171045	Henderson, Franklin - 12/19/94-2/16/95	3,438	3,438		
04/17/95	110201	8541475	Jenner & Block - 12/94	62,200	62,200		
04/24/95	110422	8549999	Jenner & Block - 1/95 & 2/95	2,269	2,269		
04/24/95	110453	3-20	Gabeler, Baise & Miller - 1/95	52,265	44,737	7,528	
04/24/95	110456	173123	Henderson, Franklin-Services 1/23/95-3/15/95	1,534	1,534		
04/28/95	110575	306650	Baker & Hostetler-Svcs thru 2/28/95	10,275	10,275		

FLORIDA CITIES WATER COMPANY
LEGAL EXPENSES - (Sorted by Date)

Date Paid	FCWC Check No.	Invoice/ Ref. No.	Description		Total Payment	Attorneys Fees & Expenses	Expert Witness Fees & Exp.	Fact Witness Fees & Exp.
05/16/95	110879	301552	Baker & Hostetler-Svcs thru 1/31/95		13,539	13,539		
05/16/95	110909	4-19	Gabeler, Baise & Miller - 3/95		105,743	105,743		
05/22/95	111018	InterCo	Weil, Gotshall & Manges - 2/95, 4/95, Inter-Co		15,826	15,826		
06/12/95	111567	InterCo	Henderson, Franklin-Services 3/14/95-4/18/95	(1)	1,144	1,144		
06/20/95	111736	InterCo	Weil, Gotshall & Manges - 3/95 Chgs, 5/95, Inter-Co		5,338	5,338		
06/19/95	111770	310575	Baker & Hostetler-Svcs thru 3/31/95		7,126	7,126		
06/19/95	111806	3-20	Gabeler, Baise & Miller - 2/95		85,564	85,564		
06/19/95	111814	176591	Henderson, Franklin-Services 4/14/95-5/16/95	(1)	1,371	1,371		
06/30/95	112229	5-25	Gabeler, Baise & Miller - 4/95		132,691	132,691		
06/30/95	112287	6-20	Alston & Bird - Svcs 5/4/95-5/19/95		1,085	1,085		
08/15/95	113192	10375	Gabeler, Baise & Miller - 5/95		135,379	135,379		
08/21/95	113490	180866	Henderson, Franklin-Services Inv. 7/25/95	(1)	877	877		
08/21/95	113490	178784	Henderson, Franklin-Services Inv. 6/23/95	(1)	713	713		
08/31/95	113881	10387	Gabeler, Baise & Miller-6/95		109,392	109,392		
08/31/95	113944	8-15	Alston & Bird- 7/14/95-7/18/95		594	594		
09/29/95	114655	182869	Henderson, Franklin-Services 7/11-8/16	(1)	746	746		
09/29/95	114708	9-18	Alston & Bird- 8/14/95-8/31/95		358	358		
10/9/95	114771	10399	Gabeler, Baise & Miller-July 1995		132,704	132,704		
11/7/95	115675	184960	Henderson, Franklin-Services 8/15/95-9/15/95	(1)	764	764		
11/20/95	116050	InterCo	Weil, Gotshall & Manges - Jun '93 Chgs on Oct '95 Int		6,069	6,069		
11/27/95	116061	10399	Gabeler, Baise & miller-Aug 1995		115,459	115,459		
11/30/95	116168	20673 #1&	Johnson Engineering-Inv. #1&2 5/31/95 & 6/29/95		2,362		2,362	
11/30/95	116170	402-04M	Landers & Parsons - 9/12/95 Inv#402-04M		1,700	1,700		
11/30/95	116174	10922	Phoenix Environmental GP Inc. - July-Aug '95		188		188	
11/30/95	116174	10814	Phoenix Environmental GP Inc. - May-Jun '95		2,587		2,587	
11/30/95	116244	13197	Black & Veatch - Inv 9/13/95		3,810		3,810	
11/30/95	116244	11568	Black & Veatch - Inv 8/21/95		34,720		34,720	
12/13/95	116431	10401	Gabeler, Baise & Miller-Sep 1995		114,091	114,091		
12/13/95	116446	187432	Henderson, Franklin-Services 9/5/95-10/13/95	(1)	719	719		
12/13/95	116447	114-085	Hopping, Green Sams & Smith-Inv. 10/7/95		1,983	1,983		
1995 Total					**1,327,999**			
1/5/96	116976	11-1	Keith R. Cardey-Svcs Apr thru Jul 1995, Aug, Sep, Oc		35,468		35,468	
1/5/96	117007	10401	Gabeler, Baise & Miller-Oct 1995		143,034	143,034		
1/5/96	117015	189900	Henderson, Franklin-Services 10/11/95-11/18/95	(1)	3,171	3,171		
1/5/96	117026	10758	Phoenix Enviornmental GP Inc. - Inv. 5/31/95		58		58	
1/5/96	117026	10870	Phoenix Environmental GP Inc. - Inv. 7/31/95		4,717		4,717	
1/5/96	117026	10979	Phoenix Environmental GP Inc. - Inv. 9/28/95		149		149	
1/5/96	117026	11031	Phoenix Environmental GP Inc. - Inv. 10/31/95		3,754		3,754	
1/5/96	117026	11088	Phoenix Environmental GP Inc. - Inv. 11/30/95		9		9	
1/5/96	117073	75819	Alston & Bird- 8/28/95 Messenger Service		13	13		
1/5/96	117074	16641	Black & Veatch - Inv 11/2/95 Billed thru 10/20		10,288		10,288	
1/5/96	117074	15281	Black & Veatch - Inv 10/13/95 Billed thru 9/22/95		4,276		4,276	
1/5/96	117074	18428	Black & Veatch - Inv 11/30/95 Billed thru 11/17/95		3,664		3,664	
1/16/96	117160	10401	Baise & Miller-11/95		172,934	172,934		
2/29/96	118190	191912	Henderson, Franklin-Services 11/15/95-1/12/96	(1)	5,156	5,156		
3/15/96	118570	10399	Baise & Miller-Dec. 1995		204,311	204,311		
3/15/96	118571	3-15	Roger C. Hartung-January 1996 Services		4,889		4,889	
3/15/96	118572	196	Gabeler, Rattocchi & Griggs-January 1996		45,931	45,931		
3/18/96	118644	114-091 G	Hopping, Green, Sams & Smith-Services 1/23-1/26/96		1,687	1,687		
4/8/96	119209	21	Landers & Parsons-1/12/96 Charges		13	13		
4/18/96	119374	10400	Baise & Miller-January 1996		78,931	78,931		
4/18/96	119441	4-4	Roger C. Hartung-3/10/96-4/2/96 Services		15,362		15,362	
4/18/96	119443	194333	Henderson, Franklin-Services 1/12/96-2/1/96	(1)	398	398		
5/7/96	119903	10400	Baise & Miller-February 1996		98,500	98,500		
5/7/96	119934	403-00D	Landers & Parsons-Invoice Dated 3/1/96		750	750		
5/7/96	119936	11296	Phoenix Environmental GP.Inc. Svcs. 2/25/96-3/23/96		3,148		3,148	
5/7/96	119944	50-01-96-1	Source, Inc.-Invoice Dated 3/5/96		340			340
5/7/96	119962	25844	Black & Veatch-Inv. 3/21/96 billed thru 3/8/96		1,202		1,202	

FLORIDA CITIES WATER COMPANY
LEGAL EXPENSES - (Sorted by Date)

Date Paid	FCWC Check No.	Invoice/ Ref. No.	Description	Total Payment	Attorneys Fees & Expenses	Expert Witness Fees & Exp.	Fact Witness Fees & Exp.
5/7/96	119962	22843	Black & Veatch-Inv. 2/6/96 billed thru 1/12/96	1,165		1,165	
5/7/96	119962	22844	Black & Veatch-Inv. 2/6/96 billed thru 1/12/96	4,216		4,216	
5/16/96	120064	4-24	Keith R. Cardey-DOJ Case Services-March & April 19	3,773		3,773	
5/16/96	120121	106-069	Hopping, Green, Sams & Smith- Inv. 4/12/96 billed thr	201	201		
5/16/96	120121	001-079	Hopping, Green, Sams & Smith- Inv. 3/29/96 billed thr	240	240		
5/21/96	120369	0396	Gabeler, Battocchi & Griggs-March 1996	77,145	77,145		
5/28/96	120374	0296	Gabeler, Battocchi & Griggs-February 1996	39,325	39,325		
5/24/96	120418	10401	Baise & Miller-March 1996	172,439	172,439		
5/24/96	120463	197146	Henderson, Franklin-Svcs 2/26/96-3/28/96 (1)	652	652		
7/9/96	121576	11349	Phoenix Environmental GP. Inc. Svcs. 3/24/96-4/27/9	10,248		10,248	
7/9/96	121612	27871	Black & Veatch-Inv. 4/24/96 billed thru 4/5/96	6,265		6,265	
7/19/96	121739	10426	Baise & Miller-May 1996	35,660	35,660		
7/19/96	121739	10412	Baise & Miller-April 1996	41,406	41,406		
7/19/96	121791	0496	Gabeler, Battocchi & Griggs-April 1996	26,525	26,525		
7/19/96	121791	0596	Gabeler, Battocchi & Griggs-May 1996	16,680	16,680		
7/19/96	121805	200713	Henderson, Franklin-Svcs. 4/16/96-6/6/96 (1)	884	884		
7/31/96	122143	0696	Gabeler, Battocchi & Griggs-June 1996	7,980	7,980		
8/19/96	122684	0796	Gabeler, Battocchi & Griggs-July 1996	11,564	11,564		
8/30/96	123017	10426	Baise & Miller-June 1996	17,147	17,147		
8/30/96	123018	8-30	Phoenix Environmental-5/26/96-6/22/96	10,073		10,073	
9/23/96	123608	10000	Baise & Miller-July 1996	17,445	17,445		
9/30/96	123873	0896	Gabeler, Battocchi & Griggs-August 1996	15,626	15,626		
9/30/96	123881	204478	Henderson, Franklin Starnes-Svcs. 6/17/96-7/24/9 (1)	202	202		
10/14/96	124221	206219	Henderson, Franklin Starnes-Svcs. 8/19/96-9/3/96 (1)	747	747		
11/11/96	124853	10002	Baise & Miller-August 1996	25,415	25,415		
11/11/96	124900	0996	Gabeler, Battocchi & Griggs-September 1996	10,322	10,322		
11/11/96	124985	37535	Black & Veatch	190		190	
11/19/96	125084	10009	Baise & Miller-September 1996	15,491	15,491		
11/19/96	125128	207667	Henderson, Franklin Starnes-Svcs. 9/18/96-9/30/9 (1)	771	771		
12/31/96			Baise & Miller-Refund Unused Portion of Airline Ticket	(132)	(132)		
1996 Total				**1,411,817**			
1/13/97	126817	425342	Roy F. Weston, Inc.	13,093		13,093	
1/22/97	127337	10009	Baise & Miller-November 1996	8,481	8,481		
1/22/97	127372	1096	Gabeler, Rattocchi & Griggs-October 1996	1,646	1,646		
1/22/97	127381	209305	Henderson, Franklin Starnes-Svcs. 10/21/96-11/4/ (1)	444	444		
2/20/97	127878	10009	Baise & Miller-December 1996	2,001	2,001		
2/24/97	128098	10009	Baise & Miller-December 1996	5,523	5,523		
2/28/97	128165	1296	Gabeler, Rattocchi & Griggs-January 1997	44	44		
3/31/97	128932	166-A0450	Ernst & Young	1,532		1,532	
4/30/97	129655	10009	Baise & Miller-January 1997 / February 1997	13,641	13,641		
4/30/97	129706	213323	Henderson, Franklin Starnes-Svcs. 11/19/96-12/2/ (1)	120	120		
5/30/97	130413	10009	Baise & Miller-March 1997	4,344	4,344		
6/30/97	131139	10009	Baise & Miller-April 1997	10,671	10,671		
7/16/97	131876	219041	Henderson, Franklin Starnes-Svcs. 4/3-5/28/97 (1)	227	227		
7/23/97	132096	10009	Baise & Miller-May 1997	12,217	12,217		
1997 Total				**73,982**			
			(1)	(9,553)	(9,553)		
Grand Total				**3,826,210**	**3,634,470**	**190,314**	**1,426**

(1) - Henderson, Franklin billings after 4/1/95 are being reduced by 50% because this firm provided services as a local counsel to Avatar Holdings Inc. (AHI), as well as FCWC, after AHI was named a defendant in the Amended Complaint filed on 3/30/95.

FLORIDA CITIES WATER COMPANY Exhibit _____(MM-3)
RECOVERY OF LEGAL EXPENSES

RATE CASE EXPENSE RECOVERY SCHEDULE

Estimates:

These estimates assume a Limited Proceeding filing with two hearings, one in each PSC jurisdiction.
These estimated amounts will be updated with actual amounts as the proceeding develops.

Last Name	Function	Estimate
Gatlin	Rate Case Attorney	$90,000
McClellan	Rate Consultant	38,650
Gray Geddie	Attorney - Expenses	45,650
.....	Other	25,700
	Total Original Est.	$200,000

FLORIDA CITIES WATER COMPANY
RECOVERY OF LEGAL EXPENSES & RATE CASE EXPENSES
PROPOSED SURCHARGE RATES & REVENUES SCHEDULE

Line No.	DESCRIPTION	LEGAL EXPENSES	RATE CASE EXPENSES	TOTAL	
1	**NET LEGAL EXPENSES**	$3,589,368			
2	**% ALLOCATED TO PSC CUSTOMERS**	**63.13%**			
3	**REVENUE (Expense Recovery) REQUESTED:**	**$2,265,833**	**$200,000**	**$2,465,833**	
4	**AMORTIZATION PERIOD (YEARS):**	10	10	10	
5	**AMORTIZATION PERIOD (MONTHS):**	120	120	120	
6	**TOTAL REVENUE (Expense Recovery) (ANNUALLY):**	$226,583	$20,000	$246,583	
7	**TOTAL REVENUE (Expense Recovery) (MONTHLY):**	18,882	1,667	20,549	
8	**TOTAL WEIGHTED PSC CUSTOMERS**	49,443	49,443	49,443	
9					
10	**MONTHLY SURCHARGE RATE (5/8"Meter) PSC**	$0.382	$0.034	$0.42	Rounded
11					
12	***SUMMARY.....***				
13					

Line No.	DIVISION/OPERATIONS CUSTOMER CLASS/	NO. OF CUSTOMERS @ 9/30/97	WEIGHTED CUSTOMERS @ 9/30/97
14			
15	**PSC JURISDICTIONS.....**		
16	**NORTH & SOUTH FT MYERS**		
17	WATER	19,105	27,524
18	**NORTH FT MYERS**		
19	WASTEWATER	2,701	3,307
20	**SOUTH FT MYERS**		
21	WASTEWATER	6,296	9,294
22	TOTAL	28,102	40,124
23			
24	**BAREFOOT BAY**		
25	WATER	4,603	4,690
26	WASTEWATER	4,583	4,630
27	TOTAL	9,186	9,320
28			
29	**PSC TOTAL**	37,288	49,443
30			
31	**PSC % OF TOTAL**		**63.13%**
32			
33	**NON-PSC JURISDICTIONS.....**		
34	**GOLDEN GATE**		
35	WATER	2,882	3,734
36	WASTEWATER	2,002	2,773
37	TOTAL	4,884	6,507
38			
39	**CARROLLWOOD**		
40	WATER	1,203	1,569
41	WASTEWATER	1,132	1,409
42	TOTAL	2,335	2,978
43			
44	**SARASOTA**		
45	WATER	5,609	8,099
46	WASTEWATER	8,878	11,298
47	TOTAL	14,487	19,397
48			
49	**NON-PSC TOTAL**	21,706	28,881
50			
51	**NON-PSC % OF TOTAL**		**36.87%**
52			
53	**FCWC TOTAL**	58,994	78,324
54			
55	**FCWC % OF TOTAL**		**100.00%**
56			
57			
58			
59			

FLORIDA CITIES WATER COMPANY
RECOVERY OF LEGAL EXPENSES & RATE CASE EXPENSES
PROPOSED SURCHARGE RATES & REVENUES SCHEDULE

Line No.	Meter Size	AWWA Factors	Monthly Surcharge Rate By Meter Size
1			
2			
3			
4	5/8"	1.0	$0.42
5	1"	2.5	1.05
6	1-1/2"	5.0	2.10
7	2"	8.0	3.36
8	3"	16.0	6.72
9	4"	25.0	10.50
10	6"	50.0	21.00
11	8"	100.0	42.00

EXHIBIT NO. _____

DOCKET NO.: 971663-WS -- PETITION OF FLORIDA CITIES WATER COMPANY FOR LIMITED PROCEEDING TO RECOVER ENVIRONMENTAL LITIGATION COSTS FOR NORTH AND SOUTH FT. MYERS DIVISIONS IN LEE COUNTY AND BAREFOOT BAY DIVISION IN BREVARD COUNTY.

WITNESS: MICHAEL MURPHY-DIRECT

ON BEHALF OF: Florida Cities Water Company

DESCRIPTION:
1. Transcript of Deposition of Mr. Michael Murphy taken on May 6, 1998.
2. Responses to staff's first set of interrogatories Nos. 3,5,13-17,24,28.

PROFFERING PARTY: STAFF

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663-WS EXHIBIT NO. 12
COMPANY/ WITNESS: Staff
DATE: 8-12-98

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Cities Water Company for limited proceeding to recover environmental litigation costs for North and South Ft. Myers Divisions in Lee County and Barefoot Bay division in Brevard County.

DOCKET No. 971663-WS
DATED: April 29, 1998

ORIGINAL

DEPOSITION OF: **Michael E. Murphy**

PURSUANT To: Notice of Taking Deposition by Counsel for Florida Public Service Commission

DATE: Wednesday, May 6, 1998

TIME: 3:11 p.m. to 4:08 p.m.

PLACE: 4837 Swift Road
Suite 100
Sarasota, Florida 34231

BEFORE: GAYL HARDEMAN, RPR, RMR, RDR
NOTARY PUBLIC, STATE OF FLORIDA

(Pages 1 - 47)

BUREAU OF REPORTING
RECEIVED 5-11-98

AMERICAPTION, INC.
5714 Monte Rosso Road
Sarasota, Florida 34243
(941) 359-8100

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(850) 413-6199
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HAROLD A. McLEAN, ESQUIRE
DEPUTY PUBLIC COUNSEL
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Tallahassee, Florida 32312-2007
REPRESENTING THE CITIZENS OF THE STATE OF FLORIDA

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REPRESENTING THE FLORIDA CITIES WATER COMPANY

OF COUNSEL, FLORIDA PUBLIC SERVICE COMMISSION:
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STANLEY RIEGER, ESQUIRE
NEIL BETHEA, ESQUIRE
SALLY MONIZ, ATTORNEY AT LAW
PATRICIA MERCHANT, ATTORNEY AT LAW
BART FLETCHER, ESQUIRE

I N D E X:

TESTIMONY OF MICHAEL E. MURPHY
DIRECT CROSS

BY MS. GERVASI 4

BY MR. McLEAN 25

CERTIFICATE OF OATH 45

ERRATA SHEET 47

E X H I B I T S

Late-filed 1 20
(Detail concerning Mr. McClellan's hours, October 1st bill)

Late-filed 2 20
(Detail concerning Mr. McClellan's hours from November 19th, 1997, bill)

Late-filed 3 21
(Update of rate-case expenses including supporting documents)

P R O C E E D I N G S

THEREUPON:

Michael E. Murphy,

having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. GERVASI:

Q. Mr. Murphy, my name is Rosanne Gervasi, and I will be asking you some questions today on behalf of the Commission staff in the docket that you filed, number 971663-WS. Let me know if something I ask is unclear, and I will rephrase. Also, if you need a break, let us know and we will do that.

A. Okay.

Q. Could you please state your full name and business address for the record?

A. Michael E. Murphy, 4837 Swift Road, Sarasota, Florida, 34231.

Q. In your testimony, you state that you testified in the Barefoot Bay Docket No. 951258-WS. Correct?

A. That's correct, ma'am.

Q. Have you testified in any other dockets before the Public Service Commission?

A. Not to my current recollection.

Q. Have you testified before any other regulatory

body?

A. No, ma'am, not to my recollection.

Q. Do you recall if you were accepted as an expert in the prior docket that you testified in before the Commission?

A. I do not know if I was recognized as an expert or not.

Q. Do you consider yourself an expert in rate-setting matters?

A. No, ma'am, I do not.

Q. If you would please take a look at page four of your direct testimony, you testified that the financial penalties requested by the DOJ were so substantial that Florida Cities wouldn't have been able to fund the claims and would have probably been forced into bankruptcy. Correct? Starting at line 16.

A. That's my testimony, yes, it is.

Q. How did you come to the conclusion that the company would not have been able to fund the claims?

A. That conclusion is based upon the penalties, the claims, I believe, through the second phase of this case, and they exceeded, I believe, $105 million.

Q. And those were the facts that you used as your basis for this conclusion?

A. Yes, ma'am.

Q. On page five, you testify that you don't believe the company's lenders, banks or insurance companies were interested in financing non-cash-flow activities. Correct? Top of page five.

A. That's my belief, ma'am, yes.

Q. How did you come to that conclusion?

A. That conclusion is reached over approximately twenty years being a CPA, as well as working in industry and several years in the utility practice.

Q. Did the utility make inquiries or applications with any lending institutions about the possibility of borrowing funds to pay these penalties?

A. No, ma'am; I did not.

Q. So you made that assumption based on --

A. Just my general business knowledge over twenty years.

Q. Do you know who made the decision to decline the $5 million settlement offer made by the DOJ's trial attorney?

A. No, ma'am, I do not.

Q. Do you know who would know?

A. I believe Mr. Allen would know. Let me rephrase that. I would defer that question to Mr. Allen. I'm not clear as to that point, and I would defer that question to Mr. Allen, since I was not

involved in any of the negotiations or settlement discussions.

Q. So you don't know why the company decided not to accept the offer.

A. Me directly, no.

Q. Is it your belief that the company would have declared bankruptcy if it had been forced to pay a $5 million amount, settlement amount, by DOJ to settle?

A. I haven't formed any conclusion about a $5 million settlement amount, no.

Q. Do you have any opinion as to whether the utility wouldn't have been able to recover these costs from its customers, whether that fact entered into the decision not to accept the settlement offer?

A. I don't know anything to that nature, no.

Q. Now your Exhibit 2, MM-2, that you filed to your testimony on page five --

A. Can you give me a -- oh, page five. My page number is not the same as yours.

Q. Oh, okay. Do you have a schedule, though, before you?

A. I do have a schedule. I just have to get the right page.

Q. Okay.

A. I'm on that page.

Q. Can we tell from this schedule the litigation cost up to the date of the $5 million settlement offer?

A. If you give me that date, I can approximate it. I don't know that it's -- it's not -- it may not be readily apparent from this schedule, since that date was not a date of significance. This date was -- this schedule was put together with annual amounts, just calendar year, so...

Q. Okay. I guess the settlement offer was made sometime in '91. What we are trying to establish is that it appears the majority of the costs were incurred after the offer was made. Is that right?

A. I'm not really familiar with the settlement offer you are discussing, but if you are telling me it is after 1991, obviously, most of the costs in this exhibit are subsequent to 1991-1992.

Q. Are you aware that in the November 1995 pre-trial meeting, the DOJ made another settlement offer of $2.2 million?

A. Only aware of that because -- through the possibility of reading other persons' testimonies in this case. I wasn't at that meeting, so, or settlement talk.

Q. Are you aware that that offer was also declined by the company?

A. I'm not aware it was declined in so many terms.

Q. Do you have any idea why it wasn't accepted, or who made the decision to turn the offer down?

A. No, I don't.

Q. Again, would you defer to Mr. Allen on that?

A. Yes, I would defer to Mr. Allen in that regard.

Q. How much had Florida Cities incurred in legal costs up to the time that DOJ made the $2.2 million settlement offer? Do you know?

A. You would have to, again, give me a date, since the schedule was prepared in date order.

Q. That was in November of '95. Looking at page six of your pre-filed Exhibit 2, judging from the date on that schedule, it looks like the utility spent approximately $1.7 million. Is that right?

A. Umm, yeah, without having a calculator in here. I see from 1995, the utility spent 1.3 million. And for 1994, the utility spent 992,000. And for 1993, the utility spent 91,000. And for the years 1991, 1992, the utility spent 7,000. So that would exceed $2 million through the end of 1995.

Q. Okay, thank you. On page seven of your direct testimony, you state that all the customers were in

peril of being adversely affected by the litigation. Correct? Starting at line six.

A. Starting at line four, I say, the future viability of the entire company, including its water systems, was at stake. All customers were in peril of being adversely impacted by the litigation.

Q. Okay. Other than the chance that Florida Cities might have had to declare bankruptcy if it had been required to pay a large penalty, in what other ways were all of Florida Cities' customers affected?

A. I believe, obviously, bankruptcy is certainly one major peril of the penalties that we were -- claims that were being assessed against the company. Whether there was bankruptcy or not, the dollar amounts were of such significant impact that it would have probably precluded the company from conducting its normal business operations, plus making its normal -- its required capital additions.

Q. Was there anything else besides the possibility of bankruptcy?

A. Well, as I indicated, I think -- bankruptcy aside -- there may not have been funds to pay that significant an amount. I'm indicating that bankruptcy would not be required.

Q. Since the company chose to allocate its legal

costs to all of its systems, why wasn't Poinciana included in the allocation?

A. Poinciana is a subsidiary of Avatar Utilities, Inc., and we were dealing with Florida Cities Water Company.

Q. Okay. Now, the utility has requested its rates for this case through a surcharge. Right?

A. That's the terminology. Surcharge is the terminology that I used in my testimony.

Q. And then on page eight of your testimony, you discuss the surcharge rate that the company is proposing.

A. Yes, ma'am.

Q. What other methods of spreading the legal costs were discussed by Florida Cities besides using a surcharge rate?

A. Other methods considered? I don't know if it was to the extent of a discussion, but it would have been, obviously, charged to just a regular rate increase, either to a base facility charge or maybe a consumption charge, that was considered. We also considered the possibility of recording this as a regulatory asset, and then recovering that through future rate cases. But that, again, would have been through the possibility of an increase to the base

facility charge or consumption charges.

Q. And why did the company finally decide on the surcharge rate request?

A. As indicated, I think, in my interrogatory responses, ease of tracking the amount. Specifically because the number of customers will most likely increase over this ten-year recovery period, this surcharge could be stopped when the amount of litigation expenses has been recovered. It would have been easier, it was felt, to identify that, to track it, and then to cease that charge when the expenses were recovered.

Q. Okay. Could you explain the mechanics of the surcharge rate that the utility is requesting?

A. Can you be a little more specific? Can you refer to my testimony, please? Would that be under the, like, the rate schedule on page 11 of my testimony, where I refer to my Exhibit MM-4? Or do you just want me to ad lib?

Q. Yes.

A. Okay, ad lib in my own words.

Q. What is the company proposing?

A. Well, the proposal is to recover net legal expenses of $3.589 million, allocated, in this hearing, to Public Service Commission customers, an amount of $2.652 million plus rate-case expenses estimated at

$200,000, over a period of 120 months, or ten years.

The net legal expenses of $3.589 million is not the full amount of legal expenses, but has been reduced by an amount -- I believe Mr. Allen addressed that in his testimony. The methodology, then, is to take the expenses, net legal expenses to be recovered from the Public Service Commission customers and rate-case expense, divided by the net weighted Public Service Commission customers, both water and wastewater.

Q. Okay. Thank you. Who made the decision to use the surcharge rate?

A. That would have been a joint management decision. Myself would have been involved. Gerald Allen would have been involved, and we had a consultant who was also involved in that decision -- not decision, but helping to develop an accounting method. It would be Mr. McClellan.

Q. Do you believe that the use of a surcharge is the most appropriate way for the company to recover the legal cost?

A. Yes, I do.

Q. Why was ten years chosen as the recovery period?

A. I believe I indicated in my testimony, and I believe Mr. McClellan also indicates, that a ten-year

recovery period would not be overly burdensome to its customers, which we are mindful of. It would also allow Florida Cities to recover these legal expenses over a reasonable time period. Certainly five years would be more reasonable, but ten years is keeping in mind the impact upon our customers.

Q. So do you believe it's appropriate to spread the recovery over future periods?

A. In the context here, yes, I believe it's appropriate to recover it over future years.

Q. Why is that?

A. Why is that?

Q. Yes.

A. If we don't spread it over future years, obviously, the company doesn't have an opportunity to recover it, since our expenditures have been incurred from 1991 through 1996-1997. So these are past expenditures, much like other major expenditures which are deferred and amortized into the future. It's my belief that these are expenditures that should be deferred and recovered into the future.

Q. Okay. Why were the number of ERC's rather than the number of customers used for assessing the monthly charge?

A. I believe, as I indicate in my testimony, the

number of ERC's as converted, using a conversion, AWA conversion, more adequately reflects the number of total customers out there. We have -- we count as a customer maybe one apartment complex, which might have 80 or 100 individual rental units in it, or commercial accounts, maybe one customer in which you might have one, two, ten, or any number of commercial accounts.

The AWA factor is a normal convention that is used in rate-making and gets us to a base, a better base, over which to allocate the cost, rather than the customers, because "customers" doesn't, I guess, imply the actual number of customers involved.

Q. Thank you. Switching gears to the subject of regulatory assessment fees, if you would please refer to page 14 of your testimony. You state on line 16 that the costs were not grossed up for regulatory assessment fees. Right?

A. That's correct.

Q. Can you explain why the company did not include regulatory assessment fees in its proposal?

A. As I indicate here in my testimony, the company does not know if the commission will consider the surcharge subject to its fee. Since this was my calculation and I'm not an expert in regulatory assessment fees, I left it out of this calculation. I

thought, if it needs to be collected, it will be added on as part of the rate proceeding.

Q. What is your understanding of when regulatory assessment fees are due and what revenues are subject to them?

A. I would expect most revenues, general service and residential fees, are subject to a regulatory assessment fee. I do not know whether something like a surcharge is subject to a regulatory assessment fee.

Q. Do you know when they're due?

A. When they're due?

Q. Yes.

A. March 31st, I believe.

Q. Would you agree that this is revenue for the utility and, therefore, would be subject to regulatory assessment fees, if your proposal were to be granted?

A. If the PSC deemed it to be revenues, then it certainly would be subject to a regulatory assessment fee.

Q. Let me ask you some questions about legal fees incurred by Florida Cities. In several of your exhibits attached to the testimony of Gary Baise, he makes reference to a budget established for the DOT litigation. Do you know when that budget was established? Are you familiar with that budget at all?

A. No, I'm not familiar with that budget. If you have it, I will take a look at it. I wasn't involved in any -- in developing any budgets in connection with these legal expenditures.

Q. Okay. Do you have any knowledge as to how Florida Cities chose each of its lead attorneys in that litigation?

A. No, I do not, ma'am.

Q. Okay. Let's move on, then, to rate-case expense. Do you know how each of the witnesses who pre-filed testimony in this case were picked to testify?

A. You would be referring to my Exhibit MM-3, where we have rate-case expenses associated with Mr. Gatlin and Mr. McClellan and Mr. Gray Geddie?

Q. Yes.

A. Well, Mr. Gatlin is our principal rate attorney here in the state of Florida. I believe Mr. Allen was involved in discussion with Gray as an attorney, Gray Geddie -- I'm looking at this and I am wondering if I misspelled it. That is why I am hesitating.

MR. McLEAN: Maybe it is a descriptive term. Maybe Mr. Gray is gray.

THE WITNESS: And Mr. McClellan -- I believe the discussion -- I believe we may have involved

Mr. Gatlin in that discussion -- "we" being Mr. Allen and myself and Mr. Gatlin -- considering possible consultants that were deemed experts in accounting for rate-making, in accounting for utilities. And his name was brought up.

I contacted him, and he was available to do consulting work for us. Does that answer your question?

BY MS. GERVASI:

Q. Yes. Thank you. Let me move on and refer you to your response to production of document request No. 3. Do you have a copy of that?

MR. GATLIN: I don't think so.

BY MS. GERVASI:

Q. Here is a portion of it that I would like you to draw your attention to. You provided copies of supporting documents and invoices for rate-case expense, including two bills from Mr. Gatlin's firm, one from his firm for charges from, was it Deloitte & Touche?

A. Yes.

Q. Referring to the October 1st, 1997, bill for the Gatlin firm, can you please explain the charges that are shown on this bill?

A. These are the charges, I believe, as it indicates here, rendered by Mr. John McClellan, who is a

principal -- he may be a partner; a principal, at least -- with Deloitte & Touche, a CPA firm out of Washington, D.C., I believe, though this bill says Atlanta as their billing address.

I believe Deloitte & Touche billed Mr. Gatlin, who in turn billed Florida Cities Water Company, because I believe Mr. -- I believe Deloitte & Touche was retained by Mr. Gatlin's firm, and the hours involved on that bill, October 1st bill, indicate time that Mr. McClellan discussed the particulars -- we discussed the particulars of this case with him and discussed the particulars of accounting issues, different methodologies.

Certainly the use of the surcharge was developed based on his recommendations during -- I think we had a meeting and a subsequent phone call -- conversations and follow-ups. That's the primary focus of his work.

Q. Okay. If you will look on page two -- the second page of your response to that POD request -- just flip one page over, or maybe you are on the right page.

A. I am already on the second page.

Q. Okay. That's the right page, then. Where you have Mr. McClellan's name listed for 56 hours, you say, "The detail is provided separately." I don't think we

ever got that detail. Could you provide that?

A. I would be happy to provide that in a Late-filed exhibit.

Q. Okay. Let's go ahead and label it, Late-filed Exhibit 1, detail concerning Mr. McClellan's hours.

A. That would be the October 1st, 1997, bill.

Q. Right.

A. That would be correct.

Q. Also on the last page of that POD, the same question of Mr. McClellan there, you also state the detail of the November 19th, 1997, bill is provided separately, and we didn't receive that yet. So if you would, please, sir, provide that information to us as Late-filed Exhibit 2?

A. I will be happy to provide that information.

MS. GERVASI: Thank you, and we will label it "Detail concerning Mr. McClellan's hours from the November 19th, 1997, bill."

THE WITNESS: I apologize for not providing that.

MS. GERVASI: That's fine.

BY MS. GERVASI:

Q. Mr. Murphy, if the utility does not prevail in its request for recovery of its legal fees, do you believe rate-case expense associated with this docket

should be allowed anyway?

A. I haven't formed an opinion on that.

Q. Are you familiar with Mr. McClellan's testimony that rate-case expense should be spread over ten years?

A. Yes, I am.

Q. Do you agree with that?

A. Yes, I believe Mr. McClellan and I discussed that together, and as I indicated in my testimony, I realize that the statutes only allow four years, but it just seemed simpler to also recover that over the same ten-year period of time.

Q. Okay. As a final Late-filed exhibit request, could you provide us an update of rate-case expense as of today?

A. I certainly can.

Q. We will call that Late-filed Exhibit 3.

A. That would be an update of rate-case expenses?

Q. To date, right. Okay, and if you would please include all supporting documents as well as an estimate to complete the case through the final agenda. So rate-case expense including supporting documents, and an estimate to complete.

A. I will do my best on that estimate.

Q. Okay, thank you.

MS. GERVASI: Can we take a short break?

MR. GATLIN: Sure.

MS. GERVASI: I want to confer with staff just a minute.

MR. GATLIN: Sure.

MS. GERVASI: Thank you.

(Recess taken from 3:46 p.m. to 3:55 p.m.)

BY MS. GERVASI:

Q. Mr. Murphy, you said that you didn't consider yourself to be an expert in rate-setting matters. Is that right?

A. Only from the standpoint that -- could you define "expert"?

Q. Do you think that you would be qualified to give opinion evidence on the matter?

A. I'm a CPA. I have a Master's in accounting. I worked eight and a half years in public accounting at Peat Marwick in St. Louis, Missouri. I have been in industry since 1985, so I know accounting pretty well. I have only worked in the utility industry since I first came here in May of 1994. I have attended the eastern rate-making school --

Q. NARUC?

A. -- course. I have attended other courses. I have been involved in several rate cases. Florida

Cities has been involved in several rate cases since that point in time. I'm on an AWA committee, rates and charges.

I will be honest with you. I don't understand municipal rate-making cost of service at all, so from that standpoint, I'm certainly not a cost-of-service expert. I have a good understanding of rate-making, I think, for private industry, but I would -- I don't believe I would want to hold myself out as an expert.

Q. Doesn't Florida Cities prepare all of its MFR's for rate cases in-house?

A. Yes, and there is a rate manager, and I direct his activities. In the course of rate-making, we will defer, I think, to experts such as Mr. McClellan in this case, our auditors Ernst & Young, or other auditors such as Touche Ross or Arthur Andersen, who would hold themselves out and be considered experts. But in other rate cases, we would call the Public Service Commission staff, talk to them about matters.

So I believe we do a reasonable job of our MFR's, and we are certainly capable, I believe, of preparing our own filings, but I don't know about it. I don't have a business card that says, "Expert in rate-case filings," if that's -- that's a long way to answer, you know. When I go to cocktail parties, I

don't say "expert in rate-cases." I say "bookkeeper."

Q. Did the company consider having an in-house person testify on the surcharge issue, such as Larry Coel, for instance, as opposed to hiring an outside consultant for that purpose?

A. When we looked at this case, we certainly felt that -- I direct Larry, and I don't think that Larry has this expertise that was involved in this, so we felt an outside expert was certainly somebody that -- let's put it this way -- knew more than we did, should be involved in this case.

Q. So did you consider the issue of a surcharge to be of such a magnitude that you would need an outside consultant for that?

A. Just the general accounting -- not only the surcharge, but other accounting issues, as I have discussed in my testimony, of how to handle the legal fees, once granted, and how to record them on the books. These are issues that I think are not within Larry's domain, because he has learned his business pretty much here in Florida Cities, and we certainly haven't done anything of this size or magnitude.

MS. GERVASI: Thank you. That's all I have.

THE WITNESS: Thank you.

MR. McLEAN: Anybody need a break?

THE WITNESS: No, just had one.

CROSS EXAMINATION

BY MR. McLEAN:

Q. We will go to Harold McLean, who is representing the citizens of the State of Florida, who is intervening in this particular docket. I was looking, Mr. McClellan was your witness who essentially links more than rates, doesn't he? He more or less links the liability to the customers, doesn't he, as opposed to --

A. You might want to question him on that. He's the expert.

Q. Okay. He addresses regulatory principles in general, I think.

A. Yes, you are right. He addresses regulatory principles, and I think he has a good background in that area.

Q. You mentioned in your answers to Ms. Gervasi -- is that right?

MS. GERVASI: Close enough.

BY MR. McLEAN:

Q. -- something about a regulatory asset, if I remember. My understanding of what you will do is you will simply carry this on the books somehow. I don't thoroughly understand. But at such time as you have a

rate case that unrecovered, the aggregate of the unrecovered expenses would be included in rate base at that time -- is that correct -- as a regulatory asset?

A. You understand it just as well as I do.

Q. Good. That's very good news, actually. What's the rationale for keeping it out of rate base until such time -- it seems to me it makes sense to keep it out or to put it in, but not first one and then the other. Can you explain the rationale?

A. Well, as it currently stands, now those expenses were expensed below line in the years incurred, '91 through '96/'97. So they need to be reestablished onto the books through some proceedings such as the limited proceeding we are doing here right now. So those expenditures do not exist on the balance sheet right now. So we can't go to a balance sheet and make that part of rate-making. Well, to my knowledge you can't, but I'm not an expert.

Q. You could have at this point petitioned the Commission to do so. Couldn't you?

A. Certainly we could, yes. Certainly we could add them to rate base, as regulatory asset, and then obviously, I don't know what the proceeding would be.

Q. What I'm getting at is, I don't quite understand the rationale for not including it as a

regulatory asset now. As a result -- I am not asking you to do so, but I am a little unclear on why you have not asked them to do that now but it is your intention to ask them to do that later.

A. Would you be proposing that that they be recorded as a rate-base item now, as part of this limited proceeding, that a full-rate case be opened up, and that we would then would include that as part of an overall general rate-making process? Is that what you are proposing?

Q. No, sir. I'm not proposing anything. My question is to discover why it is that you are not asking for it as a regulatory asset now, but sometime later you will ask for it as a regulatory asset, when there's a full-blown rate case.

A. I think, as indicated in my testimony, the surcharge -- if you want to use that term, just because I don't know what else to call this -- is very simple to calculate. There aren't a whole lot of papers in here with numbers on them, very simple to administer and watch, and doesn't require a lot of additional calculations.

I indicated in my testimony that if the Public Service Commission was of such a mind that they wouldn't want to include this in a regulatory asset or rate base,

as long as we got the same effect, we wouldn't mind them being figured into the surcharge in and of itself, which would then give the same effect. The long and the short of that is, you know, just simplicity. It makes it an easier -- I mean for the customers to understand. I would not say I understand, but it is easier from that perspective, and it just makes the numbers a lot easier to work with, for everybody concerned.

Q. I understand the import of your answer if it is addressing surcharges, if it is included in the basis, as opposed to the gallon surcharge, things like that.

My question is a little different. Let me make sure I understand the mechanics. At the conclusion of this case, there would be a surcharge, specifically designed to recover the legal expenses that we have all talked about, in the rate case in this proceeding. Correct?

A. Correct.

Q. And that is the only thing that surcharge would be designed to recover.

A. That's correct.

Q. And there would be no carrying charges, if you can accept that phrase, on the unpaid balance.

A. That would be correct, too.

Q. Now, at some point in time, presumably whenever the next rate case comes along, the unrecovered expenses would be added to rate base distinctly, and presumably separately. One could still pick it out, but it would be added as a regulatory asset. Correct?

A. That would be correct, and handled --

Q. And the surcharge would survive? There would still be a surcharge?

A. There would still be a surcharge. The regulatory asset would be the net unamortized.

Q. Yes.

A. Presumably, if there was never a rate case in ten years, then the regulatory asset would not be picked up and included in rate-making. Now, let me add, though, that for purposes of determining over-earnings, you know, we would be looking to this to be a part of rate base, so that, you know -- I don't know what the magnitude might be, but it would be the same as a rate-base component, as a utility plant and service. It would be on the books. It would be considered as part of the rate base. But yes, in theory, if there never was a rate case in a particular division, then there would be no request for that carrying charge.

Q. Well, the simplicity that you identified as the virtue in an earlier question I asked, does it

somehow go away when that rate case comes along?

A. Yes. The accounting as discussed here would amortize that regulatory asset over a ten-year period of time. So at the end of ten years, that regulatory asset would no longer exist, whether there be, you know -- it just wouldn't exist any more. It wouldn't be there as part of the rate base.

Q. Are you testifying, then, that it is simplicity considerations that caused the company to decline to ask the Commission to include the unamortized balance in rate-base as a regulatory asset at the conclusion of this proceeding?

A. Well, I might want to think about that in a lot more detail, but right now, yeah, as part of this, its one major factor is simplicity, including that. If there's a rate case, then we will pick up the balance.

Q. I didn't quite mean to get into this in such detail, but it's getting more interesting. Four years down the road, there will be some unamortized balance, presumably, if you don't experience tremendous customer growth between now and then; there will be some unamortized balance. And at that point in time, you will want the Commission to include that regulatory asset and pay some return on that. Will it be apportioned between debt and equity, probably?

A. Correct.

Q. So you will earn a return on that, beginning four years down the road?

A. Beginning four years down the road.

Q. That will add to the surcharge, will it? You know, the surcharge will not be affected.

A. I don't know. If the PSC so deemed it, it could be added to that surcharge for that division, or I guess in normal rate-making, it would be included in the general service --

Q. So you will get -- I'm sorry?

A. -- the base facility charge or the consumption charge. Now, ten years out, and as long as those rates were in effect, then that amount would be included in the rates, even though the balance might continue to dissipate. Much like any utility plant service, the rates are designed based on the gross, as it were, utility plant service, as of the date of the rate case. Twenty years from now, when those assets are fully amortized or depleted, the rates would still reflect that full cost.

Q. Sure.

A. Now, certainly other things happen in those periods of time that, hopefully, you are either over-earning or have other expenditures that have offset

that depleting rate base that doesn't require a rate of decrease. But yeah.

Q. So the surcharge is almost a surrogate for depreciation expense on this regulatory asset.

A. As it were, yes.

Q. Now, what I can't figure out is four years down the road, you will still be collecting surcharge, but at that time, if you have a rate case, you will be adding to the burden that the customers carry -- or to the revenue -- a return on that regulatory asset. Is that correct?

A. That's correct.

Q. I don't understand why you are willing to forego that last component at the conclusion of this case. I'm not suggesting that you amend your filing to do so, but I'm confused as to why it's easy to forego it now. If rationale supports foregoing it now, why doesn't it support continuing to forego it?

A. We'd like to amend our rate case.

(Laughter).

THE WITNESS: Thank you, Harold, for the opportunity to increase the charge.

No, I'm not suggesting that we forego it in the future. That's not -- and I can see that may confuse you. I'm not suggesting that at all. I

believe that the accounting we have asked for is that it be included as a rate-base component, as a regulatory asset, and until such time that I have a rate case, I would like to include it in that rate filing so we can earn a return on it at that time. I'm not asking to forego it in the future, but I don't -- you know, unless I get it on my books, unless I get it in my rates, I never have the opportunity to earn on it.

BY MR. McLEAN:

Q. You will, in this scenario?

A. In this scenario, I will have an opportunity to earn on it if I have a rate case.

Q. But until?

A. Not until. That is, quite simply, all I am asking for.

Q. Did you participate in the decision not to ask for it as a regulatory asset now?

A. Yes, I did.

Q. I want to advance two potential reasons and ask you to respond to them. The first is: if you don't ask for recovery, rate of return on a regulatory asset at this point in time, it makes the entire scenario more palatable to the Commission. Was that a consideration?

A. I don't know, "palatable." I hate to fall

back on "easier." It's just easier to isolate this one particular instance. You know, I'm not proposing that I'm trying to hide the fact that there's more -- there's more than just the surcharge. Okay? But I would deal with that one when we have another rate case, when there are other issues to be considered. What you would be proposing is more complex rate cases at two, three separate locations, which would increase rate-case expenses quite a bit more than they are, to do that.

Now, if the PSC staff feels that -- and maybe they would like to -- Florida Cities ought to be allowed a reasonable rate of return on these invested moneys. And I'm not saying we shouldn't, okay? In my heart, I firmly believe that these expenditures should also be allowed a rate of return. That could be figured into the surcharge. And it, too, would go away in ten years. It could be handled in that manner just as easily. The method was selected as the method principally because of ease of calculation and monitoring.

Q. Second proposal on my part, to suggest a reason to you why you might have done it that way: if the company were in an over-earnings posture today, or, say, at the conclusion of its case, then they wouldn't be permitted to earn any return -- any additional return? Let me start over.

If the comparison were in an over-earnings posture today, then the Commission would not approve any return on that regulatory asset. Would it?

A. I don't know. I don't think I could answer that question. I'm not a Public Service Commission staff member, and I'm not the Commission.

Q. Well, you wouldn't recommend the Commission grant a return on a regulatory asset above and beyond a reasonable return, such that it would exacerbate an over-earnings posture, would you?

A. Well, certainly as outlined earlier, on some future rate case, we are only going to be allowed to earn up to our allowed rate of return, so that earnings on the regulatory asset is limited by whatever the rate-of-return range is. So, yeah. I mean your point is correct, but in the future, you know, there's also -- there would be a built-in limitation to start out with that -- to the extent there was any over-earnings in anything else, that we wouldn't be getting a total return on that particular asset.

Q. But for some reason, the company is willing to forego at this point in time a return on that regulatory asset until such time as you have a rate case?

A. Yes. I proposed to you that that reason is as simple as ease of consideration. I think I responded to

the Public Service Commission attorney and indicated there were other methods, and certainly we did consider other methods, including rate base, and then putting it into consumption fee and base facility charge; and to me it was a real complicated process.

Q. Sure. That, of course, is responsive to a question which would go to surcharge versus rolling it into base rates somehow, or something like that?

A. That would be responsive to the amortization, as well as the return on the unamortized asset.

Q. Okay. I want to ask you a couple of general questions about your testimony. You are going to be tendered as an expert in regulatory accounting, do you think?

A. I am tendered as the vice president of finance of Florida Cities Water Company -- chief financial officer.

Q. And your testimony says, essentially, our expenses were "X," our rate case expense is "Y," here's how you should allocate it, and it is an amount of money which is sufficient to put the company at risk, the amount of money -- let me start over. Sorry.

Your testimony says that our legal expenses associated with this endeavor were "X." Is that correct, whatever the number?

A. Yes.

Q. And your rate case expense is "X."

A. Correct.

Q. And we should be allowed to recover those by means of a surcharge and maybe some day by a regulatory asset and so forth. And you rely upon your expertise as an accountant to offer that evidence to the Commission. Correct?

A. Yes, if you say so.

Q. I would rather that you say so.

A. You know, I am the chief financial officer for the company. I don't propose to be an expert.

Q. Okay. And that gives you confidence to say that had that $104 million or $54 million, whatever it was, been assessed against the company, the company would have been at financial risk. Correct?

A. I believe that's a pretty obvious conclusion, yes.

Q. What's not quite so obvious to me -- and it is a fair conclusion to draw -- is that the customers would have been at risk, or perhaps their quality of service would have been at risk. You do draw that conclusion in your testimony. Right?

A. I believe I do. I draw that conclusion -- yes.

Q. Upon what expertise do you rely to offer that opinion evidence to the Commission?

A. Again, just a general twenty years of business experience, deriving upon that. Well, let me back up. I believe my testimony says, and I will paraphrase, that a financially stable company provides just better service for its customers.

Q. Okay.

A. That's just kind of a known element. I don't draw that from any particular document.

Q. Okay.

A. Certainly in this situation, you know, if we were, you know, I guess, maybe -- well, you know, I don't know if my testimony goes a whole lot to the financial risk of the company, but I think it's important to understand that my testimony goes more towards this financial risk than the allocation area. I think that it indicates that we're dealing with such large dollars involved here, that this should spread upon the general population.

That's really the sense of my testimony.

Q. In fact, you have to rely upon that to get to the water customers, in a sense, right? You have to say that in order to charge these water customers for things that occurred on the sewer side, it appears to us that

the company would have failed, had the DOJ been successful in getting a huge judgment. Is that fair?

A. Failed, or could have been put in financial peril, could not have been able to fulfill its duties as, you know, required by the Public Service Commission, or Hillsborough County, or Collier County, or Sarasota County.

Q. Lots of people want you to provide service. No question about that.

A. Yes.

Q. Lots of regulatory agencies. You even go so far as to suggest that bankruptcy might have been a result of a huge recovery or attempted recovery by the government. Correct?

A. It certainly could. It's a possibility.

Q. Do you have the expertise to take me down the road to show me what happens to customers if bankruptcy occurs?

A. No, I don't believe I do.

Q. Okay. You couldn't say, for example, whether creditors would regard -- you couldn't say whether creditors would insist to the Bankruptcy Court that Florida Cities Water remain as a going entity and comply with all regulatory requirements. Could you?

A. No, I don't know that I could. I think that,

you know, I have certainly been involved in bankruptcy situations, and non-utility concerns, and sometimes those businesses stay in business. Sometimes they close the door and leave the keys hanging on the door, and when they -- I personally have been involved in situations where companies have left the key in the door.

Q. Sure.

A. And it's a pretty bad dilemma for the customers, who may have been expecting a product, or a vendor, who may have been expecting a payment of a bill. It's a tough situation. Sometimes business goes on. Depends on which class of bankruptcy is involved.

Q. Are you suggesting Chapter 11, Chapter 13, something like that, would have been a likely result?

A. I cannot say.

Q. All right. In those areas where you have had experience, were the companies who went bankrupt in a pervasively regulated business, such as disposal of sewerage?

A. No, I wouldn't say they were pervasively regulated.

Q. From your experience as a CPA, can you generally say it may be difficult -- let me come up with a hypothetical utility which does in fact go bankrupt,

and say that you are advising the trustee in bankruptcy, or something like that. Would you suggest that the government have its utilities pipes be hauled off on trucks or maintained as a going concern? Which of those two scenarios would more likely be advantageous to creditors?

A. Certainly creditors would want to see that the -- well, depends on which bankruptcy proceeding you were under. In one of those, the existing creditors are out of luck. They have lost their money. They may not be willing to provide service to that company, if it remains in business. That company may be required to go out and find new vendors, if it could do that. In many situations -- and my experience is not broad upon utilities -- a company may file protection in bankruptcy that would allow it to continue business. But because it is bankrupt, it may not be able to continue in business. It's pretty hard to find a loan, pretty hard to find creditors to give you what you need to continue business, unless it is cash on demand, COD.

Q. Is there any testimony or expertise you will bring to the Commission that says, had the government recovered the $104 million judgment against Florida Cities Water Company, that service to customers would have terminated?

A. No, there is nothing in my testimony that indicates that.

Q. You do seem to hint at the notion that service would have deteriorated?

A. It's my general feeling, like I said. It's a very hypothetical thing we are talking about here.

Q. Sure, yes.

A. I don't know, you know. If this company went out of business today, it's my general feeling that customers certainly would have a deprivation in quality of service.

Q. Is there any reason to believe that whoever took over the entity, they would want different personnel to run it?

A. Yeah.

Q. There is a possibility the same people would run it. Isn't there?

A. It is possible. It could be the same possibility. I don't know how long that would take. I have never really been through that situation before. It may take days, weeks. It may even take years before, you know, an appropriate management team could be in there.

Certainly there's a lot that goes on in this company, from not only a day-to-day operational process,

but also the continuing repairs and maintenance of the existing lines, as well as the requirements to build and construct new plants, to meet increasing demands that not only the existing customers but the customers that might come on tomorrow and want new capacity, and down the line, down the road.

Q. Do you have any reason to believe that any successor in interest might not honor those obligations?

A. I wouldn't know whether they would or would not.

Q. Sure. Oh, at the end of your testimony -- let's see, page 15, line 21, you make me nervous with some language about you might modify your testimony eventually.

A. Well --

Q. Now, accountants like to modify their testimony in terms of arithmetic and things like that. I can accept things like that. But are you suggesting that you are going to change anything about the import of your testimony?

A. No. It just indicates that if I have a number wrong, I'm going to let you know about it.

Q. Sure, good. Have you prepared a summary of your testimony?

A. Summary?

Q. Yes, sir.

A. No.

Q. Have you prepared a written summary of your testimony?

A. No, my testimony is fifteen pages long and it's sitting right in front of me.

Q. So you wouldn't see the need to summarize it?

A. If somebody wanted me to summarize it, I would be happy to.

Q. What if somebody didn't want you to?

A. If somebody didn't want me to summarize it?

Q. It would depend on who they were?

A. I'm not familiar with your terminology, "summary of testimony."

Q. Good.

A. I have never done that before.

MR. McLEAN: That's all the questions I have. Thank you very much.

MS. GERVASI: Mr. Gatlin? Do you want him to read and sign?

MR. GATLIN: Yes. No questions.

MS. GERVASI: Okay. That concludes the deposition.

(Deposition ended at 4:08 p.m.)

* * * * *

CERTIFICATE OF OATH

STATE OF FLORIDA)

COUNTY OF SARASOTA)

I, the undersigned authority, certify that MICHAEL E. MURPHY personally appeared before me and was duly sworn.

Witness my hand and official seal this 8th day of May, 1998.

Gayl Hardeman, RPR, RMR, RDR
Notary Public - State of Florida
My Commission No. CC459875
Expires: May 4, 1999

DEPOSITION CERTIFICATE

STATE OF FLORIDA

COUNTY OF SARASOTA

I, GAYL HARDEMAN, being a Registered Professional Reporter, certify that I was authorized to and did stenographically report the foregoing deposition; and that the transcript is a true record of the testimony given by the witness.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 8th day of May, 1998.

Gayl Hardeman

GAYL HARDEMAN, RPR, RMR, RDR

ERRATA SHEET

TO BE ATTACHED TO DEPOSITION OF WITNESS: MICHAEL MURPHY IN DOCKET NO. 971663-WS, FLORIDA PUBLIC SERVICE COMMISSION, DATED APRIL 29, 1998

Instructions: Please read the transcript of your deposition and make note of any errors in transcription on this page. **Do Not** mark on the transcript itself. Sign and date this sheet. Then return both this sheet and the transcript to the court reporter. Thank you. (Counsel: Please attach to your copy of transcript.)

PAGE	LINE	ERROR OR AMENDMENT
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I have read the original transcript and, except for the corrections noted above, I hereby subscribe to the transcript as an accurate record of the statements made by me.

Date_____ _____Deponent

STATE OF FLORIDA)
COUNTY OF SARASOTA)

Subscribed before me this _____day of _____, 1998.

_____
Notary Public

My Commission Expires:_____

EXHIBIT NO. _____

DOCKET NO.: 971663-WS -- PETITION OF FLORIDA CITIES WATER COMPANY FOR LIMITED PROCEEDING TO RECOVER ENVIRONMENTAL LITIGATION COSTS FOR NORTH AND SOUTH FT. MYERS DIVISIONS IN LEE COUNTY AND BAREFOOT BAY DIVISION IN BREVARD COUNTY.

WITNESS: MICHAEL MURPHY-DIRECT

ON BEHALF OF: Florida Cities Water Company

DESCRIPTION:
1. Transcript of Deposition of Mr. Michael Murphy taken on May 6, 1998.
2. Responses to staff's first set of interrogatories Nos. 3,5,13-17,24,28.

PROFFERING PARTY: STAFF

ERRATA SHEET
TO BE ATTACHED TO DEPOSITION OF WITNESS: MICHAEL MURPHY IN DOCKET NO. 971663-WS, FLORIDA PUBLIC SERVICE COMMISSION, DATED APRIL 29, 1998.

Instructions: Please read the transcript of your deposition and make note of any errors in transcription on this page. **Do Not** mark on the transcript itself. Sign and date this sheet. Then return both this sheet and the transcript to the court reporter. Thank you.
(Counsel: Please attach to your copy of transcript.)

PAGE	LINE	ERROR OR ADJUSTMENT
26	18	~~but I'm not an expert~~
28	1	~~mind them~~ change to "object to a return"
28	6	~~I~~
29	10	add to that line "amount of legal expenses."
29	19	~~and~~ change to "in"
31	16	utility plant "in" service
38	17	~~than~~ change to "in"
41	14	~~broad~~ change to "based"

I have read the original transcript and, except for the corrections noted above, I hereby subscribe to the transcript as an accurate record of the statements made by me.

Date 5-14-98 Michael C. Murphy Deponent

STATE OF FLORIDA)
COUNTY OF SARASOTA)

Subscribed before me this 14th day of May, 1998.

ANITA J. CHUBBUCK
State of Florida
My Comm. Exp. Aug. 18, 1998
Comm. # CC 481998
☒ PERSONALLY KNOWN BY ME
☐ PRODUCED I.D. _____

Notary Public
My Commission Expires: 8-18-98

ERRATA SHEET
TO BE ATTACHED TO DEPOSITION OF WITNESS: MICHAEL MURPHY IN DOCKET NO. 971663-WS, FLORIDA PUBLIC SERVICE COMMISSION, DATED APRIL 29, 1998.

Instructions: Please read the transcript of your deposition and make note of any errors in transcription on this page. **Do Not** mark on the transcript itself. Sign and date this sheet. Then return both this sheet and the transcript to the court reporter. Thank you.
(Counsel: Please attach to your copy of transcript.)

PAGE	LINE	ERROR OR ADJUSTMENT
5	10	~~No, ma'am, I do not.~~ Change to "Yes."
10	23	Add ", but most likely necessary."
13	13	~~myself~~ change to "I"
15	11	~~, I guess,~~
22	12	~~A. Only from the standpoint that -- could you define "expert"?~~ Change to "A. I believe I am an expert in rate-setting matters."
22	16	Add "Yes" following A.
23	8	~~but I would, I don't believe I would want to hold myself out as an expert.~~
23	22-25	after the word "filings" strike out lines 22-25
24	1	strike out line 1.

I have read the original transcript and, except for the corrections noted above, I hereby subscribe to the transcript as an accurate record of the statements made by me.

Date 5-14-98 Michael E. Murphy Deponent

STATE OF FLORIDA)
COUNTY OF SARASOTA)

Subscribed before me this 14th day of May, 1998.

ANITA J. CHUBBUCK
State of Florida
My Comm. Exp. Aug. 18, 1999
Comm. # CC 401399
PERSONALLY KNOWN BY ME
PRODUCED I.D.

Anita J. Chubbuck Notary Public
My Commission Expires: 8-18-99

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Cities Water Company for limited proceeding to recover environmental litigation costs for North and South Ft. Myers Divisions in Lee County and Barefoot Bay Division in Brevard County.	DOCKET NO. 971663-WS PSC Due Date 3/13/98 Fri. File:G:\FCSURCH\INTER\PSCINTR1.FCW

COMMISSION STAFF'S FIRST SET OF INTERROGATORIES (1-39) TO FLORIDA CITIES WATER COMPANY (FCWC) AND FCWC'S RESPONSES

The Staff of the Florida Public Service Commission, by and through its undersigned attorney, hereby propounds the following interrogatories, numbered 1 through 39, to Florida Cities Water Company (FCWC or utility), pursuant to Rule 1.340, Florida Rules of Civil Procedure. These interrogatories shall be answered under oath by the utility or its agent who is qualified to answer and who shall be fully identified, within thirty (30) days.

INSTRUCTIONS

A. FCWC shall answer these interrogatories to the fullest extent possible and shall furnish all information which is reasonably available to the utility, its principals, agents, attorneys, affiliates or other representatives. The utility may respond to an interrogatory by indicating that the requested information is reported on a specific schedule in the minimum filing requirements.

B. If the utility cannot answer a particular interrogatory in full, after exercising due diligence to secure the information to do so, it should state the answer to the extent possible and specify why it is unable to answer the remainder. In addition, the utility shall state whatever information or knowledge that it has concerning the unanswered portion.

C. If the requested information is not applicable, that response should be reported as well as the reason why. If the requested information is not available, that response should be reported as well as the reason why.

3. John McClellan testifies that if the utility had included the carrying costs in its request for recovery of legal fees, the costs would have accumulated to over $4.5 million. Why did the utility not request recovery of its carrying costs in this proceeding?

Response: (MM)

FCWC deemed recovery of the legal fees and potential to recovery a rate of return on unamortized regulatory asset in future rate cases to be sufficient. The shareholders are absorbing the carrying costs until the legal fees are included as a regulatory asset, included in rate base and included as part of some future rate case.

5. Has FCWC paid all the legal expenses included in this filing? If not, please provide a synopsis showing the amount paid and the balance due.

Response: (MM)

All the legal expense included in this filing have been paid by FCWC.

13. Referring to interrogatory no. 12, above, why was this policy changed?

Response: (MM)

There has been no change in policy. The legal fees related to the charges and litigation were segregated below the line once it was determined that the charges were an on going matter.

14. Referring to interrogatory no. 12, above, have any of these costs been included for recovery in any prior rate proceedings for FCWC?

Response: (MM)

No. Legal expenses were initially charged to the North Ft. Myers wastewater treatment plant expansion during 1992, 1993 and part of 1994. During 1994 FCWC began expensing legal fees associated with the charges and litigation below the line. During the course of the audit in connection with the 1995 North Ft. Myers wastewater rate case, the FPSC staff auditors brought to the attention of FCWC that certain costs were included in UPIS. FCWC agreed with the FPSC auditor and FCWC reclassified those costs out of UPIS to below the line legal expenses.

15. Why does FCWC believe that the litigation expenses should be booked as a regulatory asset?

Response: (MM)

Referring back to testimony MM _ page 15, line 8;

Q. Do you have a recommended accounting treatment ?
A. Yes. We recommend that the total legal expenses to be recovered be recorded as a regulatory asset and included in Rate Base. This regulatory asset would then be amortized over a ten year period. As the Surcharge is collected it would be recorded as a revenue which would be off-set by the amortization of the regulatory asset. Only the unamortized regulatory asset would remain in rate base.

The establishment of the regulatory asset reflects the fact that the actual Surcharges will be received over a ten year period yet establishes for inclusion in rate base the unamortized legal fees (deferred amount of the regulatory asset). See interrogatory no. 16, below.

16. Why has FCWC not asked for a rate of return on the deferred amount of the regulatory asset?

Response: (MM)

FCWC is requesting that the FPSC deem that the regulatory asset be included in rate base. As FCWC proceeds to have future rate cases, a rate of return on the unamortized regulatory asset would be included in the composition of rates. The surcharge would remain unaffected by rate of return. If the PSC felt that it was more correct to include in the surcharge an amount representing the rate of return on the regulatory asset, FCWC would not object.

17. Does the utility intend to include any of the remaining unamortized balance as a regulatory asset in rate base in any future rate proceedings?

Response: (MM)

Yes, see interrogatory no. 16, above. As FCWC proceeds to have future rate cases, a rate of return on the unamortized regulatory asset would be included in the composition of rates.

24. Why did the utility request that rate case expense for this proceeding be amortized over ten years instead of four, as is set forth in Section 367.0816, Florida Statutes?

Response: (MM)

By amortizing the rate case expense over a longer period of time, such as ten years, FCWC is extending the recovery of these costs, over more years, and thus lowering the impact to its customers.

Additionally, FCWC believes it will be administratively easier, less costly, and less confusing to the customers to have one rate decrease in ten years than have rate decreases after four and another six years later.

The typical 5/8" meter rate increases per water and wastewater service would be as follows:

Based on Four Amortization:

	Rates	Amortization Period
Rate Case Expense	$0.084	4 years
Surcharge Rate	$0.382	10 years
Total Rate	$0.47	Rounded

Based on Ten Year Amortization:

	Rates	
Rate Case Expense	$0.034	10 years
Surcharge Rate	$0.382	10 years
Total Rate	$0.42	Rounded

Initial Rate decrease	$0.05	Per service

28. If a surcharge is deemed appropriate, how should the charge be described on the customers' bills?

Response: (MM)

As a separate line item on the customer's monthly bill, stated as "surcharge" or another term the FPSC deems appropriate.

Composite **EXHIBIT NO. _____**

DOCKET NO.: 971663-WS -- PETITION OF FLORIDA CITIES WATER COMPANY FOR LIMITED PROCEEDING TO RECOVER ENVIRONMENTAL LITIGATION COSTS FOR NORTH AND SOUTH FT. MYERS DIVISIONS IN LEE COUNTY AND BAREFOOT BAY DIVISION IN BREVARD COUNTY.

WITNESS: John D. McClellan - Direct

ON BEHALF OF: Florida Cities Water Company

DESCRIPTION:

1. Transcript of Deposition of John D. McClellan taken on May 15, 1998 and Deposition Errata sheet dated June 4, 1998.
2. Responses to staff's first request for interrogatories Nos. 29 and 32.
3. Responses to staff's first request for POD's No. 6.
4. Late-filed Deposition Exhibits Nos. 1 and 2 from Deposition of John McClellan taken May 15, 1998.

PROFFERING PARTY: STAFF

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663-WS EXHIBIT NO. 13
COMPANY/ WITNESS: Staff
DATE: 8-12-98

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of	**DOCKET NO. 971663-WS**
Petition of Florida Cities Water Company for limited proceeding to recover environmental litigation costs for North and South Ft. Myers Divisions in Lee County and Barefoot Bay Division in Brevard County.	

DEPOSITION OF: **JOHN D. McCLELLAN**

TAKEN AT THE INSTANCE OF: The Staff of the Florida Public Service Commission

PLACE: Gerald L. Gunter Building
2540 Shumard Oak Boulevard
Room 390A
Tallahassee, Florida

TIME: Commenced at 1:00 p.m.
Concluded at 2:40 p.m.

DATE: Friday, May 15, 1998

REPORTED BY: H. RUTHE POTAMI, CSR, RPR
Official Commission Reporter

APPEARANCES:

B. KENNETH GATLIN, Gatlin, Schiefelbein and Cowdery, 3301 Thomasville Road, Suite 300, Tallahassee, Florida 32312, appearing on behalf of **Florida Cities Water Company.**

HAROLD McLEAN, Associate Public Counsel, Office of Public Counsel, 111 West Madison Street, Room 812, Tallahassee, Florida 32399-1400, appearing on behalf of the **Citizens of the State of Florida.**

ROSANNE GERVASI, Florida Public Service Commission, Division of Legal Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0870, appearing on behalf of the **Commission Staff.**

I N D E X

MISCELLANEOUS

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WITNESS

JOHN D. McCLELLAN	PAGE NO.
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Examination By Mr. McLean	41

S T I P U L A T I O N

IT IS STIPULATED that this deposition was taken pursuant to notice in accordance with the applicable Florida Rules of Civil Procedure; that objections, except as to the form of the question, are reserved until hearing in this cause; and that reading and signing was not waived.

IT IS ALSO STIPULATED that any off-the-record conversations are with the consent of the deponent.

MS. GERVASI: Before we get started, do we agree to the usual stipulations; again, which are that the deposition was taken pursuant to notice in accordance with the civil procedure rules; that counsel present stipulate that the witness is the person he has identified himself as -- I guess he's personally known to many -- that objections except as to the form the question are reserved until hearing, and any off-the-record conversations would be with the consent of the deponent.

MR. GATLIN: We stipulate.

MS. GERVASI: Thank you.

JOHN D. McCLELLAN

appeared as a witness and, after being duly sworn by the court reporter, testified as follows:

EXAMINATION

BY MS. GERVASI:

Q Mr. McClellan, I'm Rosanne Gervasi, and I will be asking you some questions today on behalf of the Commission Staff concerning the testimony that you filed in Docket 971663-WS.

If you would, please, sir, let me know if any of my questions are unclear to you, and I'll try to rephrase them as necessary. Also, if you need to take a break at any time, let us know and we'll be

happy to accommodate that.

A Thank you.

Q With that, would you please state your full name and address for the record?

A John D. McClellan, 555 12th Street Northwest, Suite 500, Washington, D.C. 20004.

Q Concerning the recovery methods that the utility is requesting in this docket, if you would, please, sir, refer to your prefiled testimony, Page 7. At Lines 1 through 10, you're stating your opinion of the method used by Mr. Allen in arriving at the $3,589,368, correct?

A Yes.

Q And you state that Mr. Allen's approach recognizes that costs would have been absorbed by Florida Cities had an early settlement been successful and the litigation process avoided.

A That's correct.

Q Then you go on to state that in assessing the utility's responsibility for a portion of these costs, that he correlated the DOJ's original offer of settlement, which was in the amount of $5 million, with the Court's final determination of a civil penalty of 300,000 and some odd dollars; correct?

A Correct.

Q Now, that early settlement amount did not occur, right? There never was a settlement?

A There was an offer, but no settlement; that is correct.

Q How is the recognition of Florida Cities absorbing an early settlement amount when there never was a settlement amount relevant in determining what the shareholders' burden of the litigation costs should be?

A That's a "what-if" situation. Had another action been taken, something different would have happened in this evaluation.

Q How is the correlation of the DOJ's $5 million settlement offer with the $300,000 civil penalty relevant in determining the company's shareholders' burden of the litigation costs?

A It establishes a correlation which the company chose to view as being an appropriate way to reduce the amounts assessed. I didn't necessarily agree with that, but that's their view; and to me it was a very conservative approach.

And I don't challenge it. I don't see it as being necessary, but they preferred it, so I didn't challenge it. But it's a way simply to recognize that there is some cost involved here that they avoided

$5 million, by not settling for 5 million.

However, they ended up paying 300,000. By drawing a ratio between those two, they draw a correlation between the amount expended in getting there as being maybe something they should absorb; and that's the way that's computed it.

It's not something I see as necessary, but I didn't challenge it. I don't think it's wrong. I just didn't see it as being something that was really needed to protect anybody. To me, it was overly conservative.

Q Do you have a better approach in mind?

A Oh, yes. To me, actually the better answer would be to assess the 3.8 million. That was the cost incurred. They did not incur 3.6, and to adjust it downward I thought was probably going -- bending over too far, or further than my reason -- my reasoning required; but then I couldn't say it's wrong.

It's certainly not improper, but it probably is more -- what's the right word? Generous is not a good word. It's probably more than I would have recommended on the front side. I would have recommended going after the cost you incurred. They chose not to do that, and I accept it as a way to do it.

Q Thank you. Did you look at, or do you know if the utility relied on any Florida Public Service Commission orders or decisions made by any other state commissions in arriving at this methodology?

A The ratio methodology?

Q Yes.

A I don't know. I actually -- I will volunteer that I doubt it, because I'm not sure there is such a thing. I've never seen such a thing.

Q Also on Page 7 of your testimony beginning at Line 21, you state that Mr. Allen also established a second recovery amount using a different measure, and that in this measure the litigation expenses of 3.8 million were reduced by the difference between the $500,000 settlement offer that presumably would have settled the issue, and then the final judgment of the 300 some odd thousand dollars imposed by the Court; right?

A Right.

Q In what way is the residual of the civil penalty from the $500,000 settlement offer relevant in determining the company's shareholders' burden of the litigation costs?

A It's a mechanical way to test some kind of sharing process. And as I observed in the earlier

answer, I'm not convinced that the sharing process is necessary; but the company chose to do it and this was one of the ways they chose to do it.

I would -- to reiterate, I -- in my view, the recovery of the $3.8 million -- or request for that would have been perfectly appropriate. They chose to reduce it by these measures.

Q Do you know if the company relied on any Public Service Commission order or decision in arriving at this conclusion?

A To my knowledge, they did not.

Q Did you consider any other methods for determining the company's shareholders' burden of the litigation costs?

A Yes, I did. I considered the cost incurred as the method. Now, whether the company considered that or not, I don't know. I assume they did, and they chose to reduce it by this ratioing method, but that is an assumption.

I considered the alternative an assessment of cost. They chose to allocate those costs. I'm not sure that's necessary or the right way, but that was the way they chose.

Q Did you consider any other methods besides that?

A [redacted]

Q Do you know why the company chose not to go with the method that you preferred?

A I don't know. I kind of wondered. I think they were trying to be fair in every way, trying to go to some extra degree to be fair. I'm not sure it was necessary. They thought it was.

Q And who made the decision to use the methodology that was presented?

A I don't know. I will observe this. When they came to me with the proposal to address the issue, this is what they planned to do.

Q If you will refer now to Page 10 of your testimony starting at Line 21, you testified that the company's litigation with the DOJ preserved the company from calamitous financial burdens and that the actions taken by the company clearly benefited all Florida Cities' customers; right?

A Correct.

Q Did the 3.8 million in litigation costs and the $300,000 civil penalty assessed cause any specific adverse impact to the quality of the Utility's service that you're aware of?

A I'm not -- I can't identify any of them. It has to. It's just the economics of the -- the nature

of the transaction has to have an effect, but I can't tell you what that effect was. You can't spend $4 million in a fairly small company and not have some effect.

Q But you're not able to provide any specific instances or --

A No.

Q -- examples of that?

A No. Someone else would have to address that.

Q Do you know if the penalty and costs incurred caused any delay in any scheduled or required plant improvements?

A I do not know. I could only surmise, but I don't know.

Q What specific benefits did all of Florida Cities' water and wastewater customers receive from the company's incurrence of these litigation costs?

A [redacted] -- depends on the [redacted] award -- a very severe, possibly financial burden placed on the system, which has to affect customers.

You can't operate a healthy system when you're crushed by financial pressure, and you can't provide great service with a crushed financial system,

so it feeds down.

The pressures, financial pressures, on the system, if extensive, would necessarily affect the quality of service provided by the system. It can't be avoided.

Q Isn't it correct that the DOJ's amended complaint encompassed only the company's Waterway Estates, Barefoot Bay and Carollwood wasterwater plants?

A That's correct.

Q And so those were the only wastewater plants that were the subject of the Florida Cities' litigation costs, right?

A That's correct.

Q The litigation costs and the penalty incurred didn't cause calamitous financial burdens, did they?

A I don't know. It did not put the company out of business, and it didn't cause financial burdens that were so obvious that they're apparent to me. But I don't know the answer.

And let me qualify. Calamitous is relative. I guess I would interpret calamitous to mean something that's obvious to everybody. And given that interpretation, no, it did not cause calamitous

results.

Q Then why, in your opinion, should all of the water and other systems' wastewater customers be burdened with these litigation costs?

A Because they avoided -- they were expended to avoid calamitous results.

Q To the entire --

A To the entire system, yes. If the company suffers severe financial pressures, penalties, burdens, then the entire system suffers.

Q Okay. Thank you. Have you had the opportunity to read Mr. Murphy's testimony that was filed in this case?

A Yes.

Q He testified -- and I don't know if you have a copy of his testimony with you -- but he testified --

MR. GATLIN: I don't think you do.

MS. GERVASI: I've got a copy here that you can look at.

Q **(By Ms. Gervasi)** On Page 4 of Mr. Murphy's testimony starting at Line 7, he testifies that the penalties requested by the DOJ were of such a financial magnitude that the financial integrity of the company was in jeopardy. Do you see

where I am?

A Yes, I see that.

Q He further states that the penalties requested by the DOJ were so substantial that Florida Cities would not have been able to fund the claims and would have probably been forced into bankruptcy.

Do you agree with these conclusions set forth by Mr. Murphy?

A I can certainly accept it as a rational expression. Would they have been forced into bankruptcy? I don't know. I would think with a $100 million assessment, they probably would. I don't know how it could be avoided.

With the $30 million, probably so. I don't know where it would have occurred, but I think it's a rational statement.

Whether bankruptcy occurred or not, the financial pressures would have been extreme, probably leading -- at some level leading to bankruptcy, yes.

Q If you would assume for a moment hypothetically that since 1993, the shareholders of Florida Cities had a capital investment of upwards of $30 million in the company, and based on this assumption, if the Court had found the company liable for the penalty amounts claimed by the DOJ,

specifically the 32 million sought in the original complaint and then the 104 million sought in the amended complaint, and if the company had gone into bankruptcy, would you agree that the shareholders would have lost their entire capital investment in the company?

A Yes. It would have been wiped out more or less, but effectively wiped out.

Q So that now given that the company was not forced into bankruptcy and the shareholders' capital investment remained intact, wouldn't it be fair to say that the shareholders benefited considerably more than the $236,842 incurred from the litigation efforts?

A I'm not sure I would characterize it that way. I would certainly agree that both benefited. More -- it depends. I don't know.

If you take all of my money and leave, I'm hurt. If you provide me service and you cut up my service -- off, if that should happen, am I am hurt more? I don't know. I'm hurt.

Both benefited. I will go that far.

Q But you haven't put a price tag on how much the company has benefited as opposed to the customers?

A No. I could not put a price tag on either. I don't know how much either benefited. I know that

the charges were -- that the claims imposed, or the assessments sought were extreme, and that the company attempted to avoid those assessments and was largely successful, and that was -- turned out to be a good action.

On the front side you don't know whether it will be or not, but you have to do it. Both parties, I think, benefited in the process. It is a cost of doing business, and in the cost of service approach it -- to me, it's a legitimate recoverable cost. It's a cost of doing business.

Q If you will look, please, sir, on Page 11 of your testimony starting at Line 18, you state -- you're talking about the surcharge and say that although there are alternative ways in which the costs may be assessed, the use of a surcharge has the clear advantage of providing for the recovery of a specific level of costs since the recovery process will terminate when the identified costs have been recovered; right?

A Yes. That's one of the positives of the surcharge.

Q Did you rely on any Commission orders or decisions made by other state commissions to arrive at this conclusion that the surcharge is an appropriate

vehicle by which to recover the litigation expenses?

A Generally, yes. Commissions have for a long time allowed certain costs to be recovered through a surcharge. They've allowed them to be recovered in other means, and it's one of the ways that it's allowed; and I rely on that as background.

There are a number of ways -- I will add to my statement -- there are a number of ways of recovering costs. This is one of them, and it seems to be an appropriate way to do it for a number of reasons; one of which is it is -- it's precise.

You measure the cost incurred, you recover the cost incurred, and it stops; plus, it starts. You start with a specific amount and you continue. So it's controlled. That's one of the positives.

Q Can you cite us to any of the orders that you relied on? Did you rely on any specific ones.

A No, just a lot of cases over the years where cost recovery has been permitted here and in other states and in various ways. This is one of the ways.

Q With respect to the recovery of rate case expense for this proceeding, on Page 16 now of your testimony, you state that the intent of the utility is to recover the rate case expense over the next 10 years; correct?

A Yes.

Q As well as the litigation expenses?

A Yes.

Q Both over 10 years.

A Yes, that's correct.

Q Are you aware that under Section 367.081(6) of the Florida Statutes that the recovery period for rate case expense in Florida is four years?

A Yes.

Q Are you aware of any cases where the Florida Public Service Commission has deviated from this statutory four-year recovery period since that section has been in effect?

A No.

Q Do you agree with this methodology?

A Well, I think it's a good method. Now, whether it can be done or not under the statutory provisions is another question, and I don't know. It sounds like it can't, but I'm giving you a layman's response there.

Q Okay. Thank you. Let's go on to the accounting treatment on Page 15 now of your testimony at Line 2. I'm sorry. This is Mr. Murphy's testimony again. On Page 15 of his testimony at Line 2, he testifies that the legal expenses were expensed below

the line. Are you aware of that?

A Based on his advice, yes.

Q And then according to Mr. Murphy, also on Page 15, starting at Line 9 of his testimony, Florida Cities' requested accounting treatment to recover the litigation costs is to record these costs as a regulatory asset which should be included in rate base and amortized over a 10-year period; right?

A Right.

Q Now, if the Commission grants recovery of these litigation costs, what is the accounting entry going to be? Do you know?

A I can give you the most probable. I would think that the company would record a regulatory asset at the moment that it was economically justified to be representing a cost to be recovered in the future by debiting a regular asset.

I presume they would have to run it through their surplus account initially to -- now, I don't want to get into the refined accounting. It may go through some revenue account, but into the surplus account. But the point would be to get that asset recognized. It exists -- given the Commission's approval. You would measure it, record it, and then start to amortize it as you recover the cost through

the amortization process and the surcharge that goes with it.

Q Would it be recorded as deferred revenue, do you think?

A No, no.

Q It wouldn't be --

A It would be recorded as an asset, a regulatory asset.

Q Would it be --

A Just like -- just -- it would have the same characteristics as a piece of plant and for ratemaking purposes at least.

Q So it wouldn't be called deferred revenue?

A You could call it that. I probably would not recommend it, but there's nothing wrong with that. That may be the label you apply to it.

When I say regulatory asset, I really was -- my thinking was too focused. That could be the regulatory asset label used.

Q Would the deferred revenue be the credit?

A No. The credit would go into surplus. You create an asset, your ownership interest just went up in the process.

Q You said you wouldn't prefer to call it deferred revenue. How would you prefer that it be

handled?

A Let me give you -- tell you something on the front side of this. I have not even looked at this issue, so any answers I'm giving you are right off the top of the head. If I thought about it for two hours or two days or something, I might decide -- but -- so I'll go -- but I'll give you some of my immediate answers.

I would think that you would create an asset representing a recoverable economic value, and you would put that on your records as "this is my asset". Now, you could, I suppose -- let me think about this, because I do have to think this through. This deferred revenue kind of leaves me a little off balance.

I guess you could credit some deferred revenue account, and then as you recovered the revenues, you would write down the asset, because you would be reducing its recoverable amount. I don't know what you would do with that deferred revenue account at that point. I guess you would reverse it into -- I don't know. I'd have to think that one through. I simply don't know.

And, by the way, I don't want to be unfair here. It may be whoever came up with that has a great

idea that I haven't thought through. Right now it strikes me as awkward. So I don't know.

Q Okay. You mentioned that there was a surplus, a surplus account. What would the surplus --

A It's an owner's equity. If I have an asset, I have an asset, and I own that asset. So I have equity.

Now, if it went into the deferred revenue account that we were talking about, it would end up there. It just wouldn't go there until it -- over the period. Because one way, you would feed it in slowly through revenues recovered into an equity holding that would be represented over cash by time over -- by cash over time.

The other way, you would set it up as an equity account now and revenues due over time. Technically it's the -- or in reality it's the same thing. It's a matter of mechanical handling.

I don't think, by the way, that any way you do it in the way of labels would be necessarily wrong. It's which is the best from purely an accounting perspective. From a ratemaking perspective, it kind of fades.

The one thing that's critical in the ratemaking perspective is that the asset can be

recognized as a legitimate investment, if you will, on which there is a time value, and you should get some kind of recognition of that time value given a rate case.

Now, that's the hitch here, and I'm probably wandering on some other stuff you want to talk about, so I'm going to stop.

Q No. Go right ahead. I don't want to stop you.

A Well, I will continue very briefly.

Q Okay.

A The way the recovery is structured, the original cost as though recovered today, as opposed to any time value add-on, the original cost will be recovered through the surcharge approach. I have $100. I'm going to recover $10 a year over the next 10 years, and I get $100.

Now, because I'm getting it over 10 years, I lose value because of time value. To recover that value, I need to get a return each year on that $10. The way this is structured, the company will have a regulatory asset, which they are requesting at least, be recognized as a rate base allowance in a ratemaking process. So it's sitting there. Just like plant.

If a rate case comes along in two years or

five years or eight years, it will be recognized, and they will get a time value on it. Between now and then they won't get anything added.

However, I assume the company files annual earnings reports and measures rate of return. When they file an annual earnings report, it will be in the rate base, and it will measure the earned rate of return. So it will have an immediate benefit.

If they're, for example, on a marginal earnings basis now, like they're earning 10.1% and they're authorized 10% so they're on the edge, and they drop this into the picture, it may pull them down to 9.5% and avoid a rate reduction.

The rate base has a real meaning from today forward because it will be used to measure rate of return. It may not generate additional revenues or it may. It depends on a rate case or the avoidance of a rate case. So it does have value, but it doesn't trigger immediate recovery of a cost from a time value perspective.

I will add one other for the thought of that to kind of round it out. Another way to have approached this -- and the company chose not to, and I've talked to them about this -- would be to bill into the assessment itself, the surcharge, a time

value measure so that rather than 3.8 million over 10 years, they would collect -- and that would be probably another million and a half dollars that's -- they would collect more, because a surcharge would be designed just like a mortgage; give you a levelized recovery including interest.

They chose not to do that. That's fine with me. That would have been one way to do it. The way they chose is to run that time value through the rate base. However, that's contingent in part upon having a rate case.

So it's -- to me it was a -- it's a way to do it. If you are trying to maximize cost recovery, it would not be the best way to do it. Now, if you're trying to do something else, it may be the -- a great way to do it. It's -- a lot of variables here.

I think that there's a fundamental principle that I'll fall back to. A cost has been incurred. It appears perfectly legitimate and avoided some serious problems. The cost turned out to be fairly large. Now the company is seeking recovery of those costs as a cost of doing business. They're seeking it in this manner, and this is one way to do it. There are other ways that it could be done, some better, some worse maybe. It depends on what you're trying to do.

Q I am going to ask you some more about that in a little bit. But I want to take you back for a minute to calling the recovery of these litigation costs deferred revenue.

Would it be appropriate, if the company were to do that, to put a deferred revenue account in the capital structure?

A If they did, then you'd be back to my position. That would be an equity account by special label. So that would be doing what I started off saying. And, no, there's nothing wrong with that. I say there's nothing wrong. It's kind of an odd accounting approach, but I don't -- it was not something that I see as offensive.

However, it does sound like you're kind of describing what I started off with, but with a carved out identification. And I have seen, by the way. Not here, not in this state, but I've seen that where they've -- carved out identification has been maintained.

Q If the deferred revenue account went into capital structure, wouldn't any of the cost rates that I'm going to tell you, would any of them be appropriate? All of them we think would be appropriate, and I want to know if you would agree.

A All right.

Q A zero cost, a commercial paper rate, or the overall rate of return.

A I'm not sure. Let me give you a kind of a hedging answer. I would first, if I had to make that decision, try to determine the real nature of those funds and the real cost related thereto.

First question, they are truly equity funds, but that does -- would not necessarily lead me to a conclusion that it had a true equity cost. It would go back to more of an identification of the nature of the expenditure of the funds and how that burden was imposed, and does this replace those funds; and if there was some kind of mix of debt and equity capital, I might impose like a rate of return on them.

If I concluded there was no mix, that these came out of equity from the front side, and now in effect we're putting them back in equity, they're pure equity, and then I would recommend an equity return. But I'd have to look at it for a while to give you an answer as to what I might conclude.

Q Do you know which of the three would be more appropriate? I mean, do you have an opinion as to which of the three would be?

A Depends on how the funds traced out. I'll

give you an example of my suspicion. I suspect -- and this is guesswork because I haven't looked at any numbers -- but I suspect the costs themselves when incurred hit the bottom line and hit the equity account; hit net income, reduced net income, flowed into equity.

None of those costs were deferred, so that's a rational conclusion. If equity was depressed in that process, now equity is being reinstated by this recoverability, I suspect my conclusion would be that an equity return would apply.

Q Okay. Thank you. The company is asking to recover prior years' expenses. Wouldn't it be reasonable, since these are prior year expenses, to use a zero cost rate rather than to require the ratepayers to pay a return on the unamortized balance since recovery is provided through the amortization?

A Not if you're trying to provide cost recovery, because the cost of the company is the cost -- the moneys expended plus any time value, that's true cost. And if you're trying to recover true cost, then the answer is, no, time value should be considered.

Q If the Commission grants recovery of these litigation costs, what specific monthly or annual

accounting entry or entries would the company record to account for the amortization of the proposed regulatory asset? Do you know?

A I haven't tried to think it through. I could do so right now if you want me to try it.

Q Maybe as a late-filed exhibit could you provide us an example of what the journal entries would look like?

A Well, I don't want to -- I can -- would it be okay for me to work with the company to do that?

Q Sure.

A Because I don't want to put entries into their mouth.

Q Certainly?

A I'll be happy to file it, but I would want them to concur that that made sense in their case.

Q Certainly.

A Yes; yes, I can do it.

Q Okay. Let's go ahead and label that as Late-filed Exhibit No. 1 and --

A Now, what we're talking about are the entries that would occur at the recorded -- let's do it this way. I'm going to add to my load some, and I know that's not the normal thing, but I'd rather have it complete.

Let's set up the initial entry, and that would touch on something like this deferred revenue account, if that's all right, and it may be. But let's set up the initial entry, if approved, and then the entry that would be recorded as recovery occurred; and that's a slight expansion of what we were talking about, but I'd feel better to have them both in the picture.

Q That would be great. Thank you.

Now, the company expensed these litigation costs in the past for both book and tax purposes, right?

A I think that's correct. I'm sure it is. I don't know that as a fact, but I would make a bet on it.

Q Do you know whether the amounts expensed for book purposes were the same as the amounts expensed for tax purposes in each year?

A I don't know, but my guess is that it would be; but I don't know.

Q Can we get another late-filed exhibit, please, showing the book amount expensed each year, the tax amount expensed each year, the current balance of deferred taxes, if any. And, again, feel free --

A There would be no deferred taxes. I can tell you that. Because they would have incurred an expense and claimed it for tax purposes. So deferred taxes -- if they have had deferred taxes, I'll be the first to ask why. So the answer is no on that one.

Q Okay.

A The other questions as to the annual cost expensed and recorded for tax purposes --

MR. GATLIN: And what you're asking for is how the Commission did it? I mean, how the company did it?

MS. GERVASI: Correct.

WITNESS McCLELLAN: Yeah, how they recorded it.

MR. GATLIN: And what?

MS. GERVASI: The book amount expensed each year and the tax amount expensed each year.

MR. GATLIN: And the way he'll furnish that information is to check with the company and do that.

WITNESS McCLELLAN: Yes, that's the one I'd have to get from them.

MS. GERVASI: Certainly.

WITNESS McCLELLAN: The other one, I could create some interest for you, but I'd rather do it in conjunction with them. This one I couldn't do without

their directly providing information.

MS. GERVASI: Very good. Thank you, sir.

WITNESS McCLELLAN: By the way, I will do this, too, because I wouldn't want to be -- I would want to be safe on it.

I will include in the request an identification of any deferred taxes which may have been created. I'll make a bet that none are there, but I think it would be good to verify that.

MS. GERVASI: Thank you. If there are any, we'd like to know about it.

WITNESS McCLELLAN: All right. I'll throw that one as a freebie, because I feel pretty safe on that one.

MS. GERVASI: Thank you.

Q (By Ms. Gervasi) What would be the tax impact if there were to be a rate of return on the regulatory asset? Do you know?

A It would be fully taxable. You would have to gross it up for tax purposes. That would be no matter -- yeah. No matter how you measured it, whatever was allowed would be fully taxable.

Q Going back to the company's requested rate of return on the proposed regulatory asset. On Page 9 of your testimony, Lines 15 -- starting at Line 15,

you state that recovery of the prior period costs is being requested for only the direct portion of the costs; right?

A Right.

Q No request is being made for recovery of the related prior years' carrying costs.

A Correct.

Q Now, we sent out some interrogatories to the company. I don't know if you've seen any of those, but in Interrogatory No. 3 -- and we have a copy of that, too, if you'd like to see it.

A Okay.

Q In Interrogatory 3 Staff asked why the utility did not request recovery of its carrying costs in this proceeding, and the company responded -- I believe it was Mr. Murphy on behalf of the company -- that Florida Cities deemed recovery of the legal fees and potential to recover a rate of return on the unamortized regulatory asset in future rate cases to be sufficient.

Is it the company's intent to forego now only the prior years' carrying costs?

A Yes. That's what the proposal is all about, yes. Yes, because the carrying costs in the early years were absorbed, and one of the ways to measure

full cost recovery would have been to accumulate those, compound them with interest, whatever the right rate is, and get a full cost to date. They didn't do that.

They took the hard cost, the dollars spent, out-of-pocket dollars, and rolled forward with that, and that's what this is all about. That's one of the points I challenged them on also is to why didn't they try to recover the entire cost, and this was the response they gave me.

Q Is it the Company's intent, then, to request future carrying costs in its individual divisions' rate proceedings as they're filed in the future? Do you know?

A That's my understanding, yes.

Q Since we're addressing all of the issues surrounding these litigation costs in this current proceeding as well as considering rate case costs for this proceeding, do you believe it's prudent to put off this issue to future rate cases?

A Prudent is a tough word. Do I believe it's necessary? No. I think we could bill those carrying costs right into the assessed -- to the surcharge and get them without a rate case.

Is it prudent to treat them as a rate base

asset and get them through rate case recovery? Yeah, that's an alternative way to do it. It's not as sure. It doesn't lock it in in the same way, but it -- it's certainly a way that many costs are recovered. That's the way your entire investment is recovered, through future cases.

You put a -- I'll give you an example, a parallel. You can put a huge plant in service today fully operational, but it does not push your rate of return below an acceptable level, so you live with that shortfall. If it doesn't build back up, you file a rate case. You don't get a nickel of carrying charges until you file a rate case. It's just the way regulation works, and that's what they chose to do.

Q Do you think it would have been preferable for the company to have requested all of that up front now, all of the carrying costs?

A It would have created more dollars, yes. Preferable would have to be evaluated in terms of everything else.

Would it have provided a more direct cost recovery? Yes, it would have.

MR. McLEAN: Be careful, Rosanne. I almost talked Mr. Murphy into doing that, you know.

(Laughter)

WITNESS McCLELLAN: I tried to. He wouldn't listen to me either. (Laughter)

Q (By Ms. Gervasi) Now, the request for the legal fees is in and of itself a controversial issue, wouldn't you say?

A It has -- it does create controversy. I don't really see the -- I don't see it as being controversial. If it's a cost of doing business and a prudent and legitimately incurred cost, then to me the controversy is over. Now, if it doesn't meet those two standards, yeah, you've got a real controversy.

Q Well, wouldn't you presume that if the prospective carrying cost issue is left out of this proceeding and included in future proceedings, that in those future cases the cost of litigating any or all of these EPA litigation costs again would ultimately increase future rate case costs?

A I'm not sure I understood the question. Let me see -- let me rephrase it. I think I heard two questions. I think I heard, question one: If it's not addressed now, included in the rate base in some way, won't it create future questions. And the answer is I don't know. I think the Commission should -- and let's assume the Commission approves the cost recovery.

I think in the process they would inherently and should directly approve the rate case rate base inclusion or it wouldn't make sense; say, yeah, you can have the dollars back, but we're not going to put it in the rate base. You could do it, but I would presume that they would take care of both issues right now.

If you had future situations like this where future lawsuits came up, then you've got a brand new situation. So whether that would affect current -- or future costs or not depends on how they were handled.

Would the Commission's action in this case affect future cost in any way? Yes. Starting the end of this year when the company files an earnings report, it could affect the cost, because it would have a rate base component in that did not exist last year. It would affect the reported rate of return in a way that it wasn't affected last year.

Could that have an impact on rates? Yes, it could have.

Q Don't you think it would be more costly to put off these carrying costs until later because, in effect, you'd have to be relitigating the EPA litigation costs all over again when we're doing it right now?

A No. In fact, it would be cheaper, if you're talking about the customer. Here's the reason: Given the company's proposition, the Commission, let's presume, approves basically what the company is asking for and gives the company a cost recovery through a surcharge of 3.6, or whatever, million dollars, recognizes that's this is a legitimate cost to be recovered and is a regulatory asset that should be in rate base, ball game is over for this case.

If the company files a case in the next year or year after next, five years from now, the decision has been made; this is part of the case.

Could somebody come in then and challenge both the rate base amount and the ongoing surcharge at that point? Of course they could. You can't -- I don't know how you stop that. But if the Commission has already resolved the issue now, I don't know how it -- necessarily becomes a future cost.

The issue should be resolved in this case fully, one way or the other, so we're not waiting for some event to resolve the issue. I think the Commission has all of the facts before it. I think the Commission would be wise to make a full decision covering all issues right now.

Q So you want --

A Now, that issue, by the way, includes recognition of a legitimate asset. We don't have a rate case, so we don't have a rate base to put it in today, but if they recognize it as a legitimate rate base investment, the issue is settled.

Q Are you saying that you think the Commission ought to determine now whether it will approve in a future case what those carrying costs will be and whether they should be --

A No, no, not what the cost should be, but the fact that it is entitled to recover the carrying cost associated with it. What they are? We don't know what the carrying cost on anything is going to be a year from now, because it's a mix, and it will change on everything. No, they can't determine that.

They can determine now -- and I think they should and I think they probably will -- but they should determine whether or not this is a legitimate investment for a rate base treatment.

Now, what the cost of that rate of return is is something that would have to be determined whenever you have a rate case.

MS. GERVASI: Thank you. That's all the questions that we have for you, Mr. McClellan. Thank you. We'll turn it over to Mr. McLean.

EXAMINATION

BY MR. McLEAN:

Q Mr. McClellan, I'm Harold McLean, Office of Public Counsel. I represent the citizens of the state of Florida.

You told Ms. -- as I understand it, the company is willing to forego the carrying charges from the conclusion of this case, whenever that maybe. It may be even before; until such time as there's a rate base out there somewhere.

A Well, foregoing the sense of generating specific recovery --

Q Yes.

A -- yes.

Q Agreed, and I stand corrected. Now, you told Ms. Gervasi that you challenged Mr. Murphy on that point. You challenged the company in general --

A Yes, I questioned why do you want to do this, why not try to recover the full costs through the surcharge.

Q What was their answer?

A They preferred to do it the other way, and so I let it go. It's their money. If they want --

Q At the point that you challenged them on that issue, was there any discussion about their

current earnings posture at that point?

A I don't think so. I don't recall any.

Q Now -- and I appreciate the correction you just made, and I want to ask you about that, because it seemed to me that you said that during the time presumably from the conclusion of this case until that rate case, that that asset -- there will be something akin to a regulatory asset carried on the books of the company although perhaps below the line; is that right?

A That's correct. Let me qualify that last "perhaps". There will be a regulatory asset recorded as an asset on the books which presumably will be permitted or recognized as a legitimate rate base addition.

Q I see. And there won't be any revenue component associated with that until the rate case comes on.

A Well, not unless it avoids a rate case by avoiding an overearnings. The answer, the simple answer, is no, there will not be.

Q It could also avoid an under -- an overearnings situation. In other words, for surveillance purposes that particular asset will be part of rate base.

A Absolutely.

Q And --

A And it could avoid an overearnings rate reduction; that's correct.

Q But it probably really won't do either one if the company is in the mid-range and so forth --

A If they're in the mid-range, it would probably have zero effect.

Q Okay. You mentioned that you've testified numerous times in Florida, and I'd like to know if you have testified in a situation analogous to this; in other words, where litigation expenses incurred in resisting a regulatory agency have been recovered.

A I don't recall. I may have. I just don't recall. I've testified on recovery of costs in a given period of an excessive nature from various causes, and I don't recall if litigation was one of those causes in those issues or not -- cases or not.

Q Nothing to do with an NRC, nuclear regulatory commission, or anything like that in this jurisdiction?

A Not in this jurisdiction, no.

Q In any jurisdiction?

A I was trying to recall. I did some work in North Carolina on an NRC issue, but it dealt with some

legislation that was being handled. I don't think it dealt with cost recovery except in the -- in a conceptual sense as opposed to actual dollars --

Q Your posture in this case is consultant to Florida Cities Water Company, right?

A That's correct.

Q And you don't do recurring -- for example Ms. Gervasi asked you for some late-filed exhibits that seemed to me like they would be generated from the company. You don't on a routine basis advise this company with respect to accounting issues, do you?

A That's correct.

Q So you have come into this case to testify about these issues?

A That's correct.

Q And I heard you say that -- something with which I totally agree -- that this case -- if this case determines that these expenses were a cost of providing water and sewer service to the public and were prudently incurred --

A Yes.

Q -- that they should be allowed.

A Yes, that's kind of the general test of recoverable costs.

Q Does your testimony reach to both of those

points?

A I do not expressly support them as being prudent or as being necessary. My reading is yes, but I haven't dealt with it as a point. My reading is assuming those conditions, and cost recovery is appropriate and this is an appropriate fashion in which to do so.

Q Okay. I want to get to that, because I want to make sure I'm asking the right questions to the right witness.

You say to the Commission that this, in fact, is an expense incurred in the production of water and sewer service to the public.

A Oh absolutely. I have no question about that. It's a cost incurred by this company in conducting its business, which is providing water and sewer service.

Q And you take it from other witnesses that it was -- the magnitude and all was prudent?

A That's correct, from -- yes, that's correct.

Q The basic theory of the case, if I understand, is that the company was faced with penalties from the Environmental Protection Agency and then from the Department of Justice which were of such magnitude as to seriously threaten -- you fill in the

blank, if you will, please.

A Their financial health, their financial stability; to impose a severe financial burden upon them that would lead to some consequences less than desirable.

Q Okay. Now, that's where my interest comes in, because I represent all those folks. Are you a witness who can quantify those less than desirable results?

A No.

Q You testified earlier in the deposition that you believed, I think, that there would be some deterioration of service.

A Well, there has to be. You can't strip away a company's financial base and let -- and it will operate the same way. That would be the strangest economic development in history.

Q And maybe even to the point of bankruptcy.

A Quite possible.

Q And I hate to be repetitive, but I want to know how it is that you know those things. Just because of your experience because when a company is financially strapped it can't continue to produce its product, or because you've been down that road?

A I've been down the road personally, yes. I

have seen other companies under the same pressures.

I know, for example, to put it on a personal level, that if someone brought a suit against me today for $5 million and I saw any hope of their winning -- well, then let's say they won that suit -- do I know what that would do to me? Yes, I know exactly what that would do to me. It would financially ruin me. Would it bankrupt me? Yes, it would bankrupt me. I can tell you that without a question.

Now, would that have -- would $100 million have bankrupted that water company, I don't know, but I'd make a heavy bet on it. Would 30 million have done it? I would probably bet on that. Would 5 million have done it? Probably not.

Q In that scenario where you were bankrupt, would accounting services still be available to the general public from other sources?

A Unless I had a monopoly on them, yes. Now, if I had an area that was mine and no one could touch it, the answer would be no. If Arizona is my territory and it was illegal for you to come into it and I couldn't provide the service, they'd be hurting.

Q Well, let's go through that bankrupt scenario to see if that's true. I'd like to know your view of -- well, I want to follow that bankruptcy.

What would happen in that process? As the company became more and more financially strapped, are you saying that the level of service would deteriorate along that path?

A It has to. If you cannot do the normal things in running your business, the normal repairs, the normal upkeep, the normal services, the normal dealing with customers because you have no money to send anybody out to do it, and you tell me the service is going to stay the same, I'm going to go look for answers from someone else, because I'm not going to believe a word you're saying. It has to happen.

Now, if you're asking me to quantify the degree to which it happens at a given level of penalty, I can't do that. All I can tell you is that it will have an effect. I know that from everything I know about business.

Q Okay. This is a -- you would agree with me, wouldn't you, that this is a pervasively regulated industry, among the most?

A Oh, I'll agree with that, yes.

Q Do you know any device by which -- and you'd agree with me that those regulatory agencies, EPA, Florida Department of Environmental Regulation -- did I get that right -- Environmental Protection -- and

the Public Service Commission each demand some level of service from the utilites --

A They --

Q -- all services --

A They can demand it, but they can't get it if it's not there. They have demanded it in a lot of cases, more than is given. When I was on the Commission I saw the Commission demanded -- demanding greater levels of service. Demanding doesn't get the job done. It's a nice concept, but it doesn't get a nickel's worth of water out to somebody.

Q So in your view, then, the EPA would simply stand back and watch this utility -- watch service decline -- well, would you accept that it is likely as service declines that the utility may be more of a pollution source than it otherwise would be?

A I would assume it would be, yes.

Q Are you suggesting that the EPA would simply ignore that or would --

A No. No. No, I'm not. I'm saying they would demand the company do better.

Q Okay. Isn't it rational to assume --

A And for whatever good that is --

Q Well, it might do some good because if the company --

A Right.

Q -- doesn't do that, they might get a $104 million judgment against them. They might --

A They might, and things might get worse.

Q Now --

A The EPA would have done nothing but made a bad situation worse.

Q Good.

A We're talking in hypotheticals, by the way.

Q Obviously not --

A This is so vague. All I can tell you as an absolute is that financial penalties, burdens on any system, water or otherwise, creates problems for the system in its basic service pattern.

Q Sure. And you're right, it's hypothetical. I just want to make sure the people I represent have a dog in the hunt, and I want you to tell me how that's the case.

A Okay.

Q Because isn't it reasonable if this utility went into bankruptcy that creditors would demand, among other things, that this utility be maintained as a going concern?

A Oh, certainly they would demand it. Now, again, what would happen I don't know. You're talking

about what people demand. Demanding and doing it are two different things.

Q Well, is it likely that they'd go out and pick up pipes, or is it likely that a bankruptcy trustee or a bankruptcy court would appoint a receiver?

A I would expect a receivership, yes.

Q And wouldn't that receiver be accountable to all those regulatory agencies?

A Yes.

Q Would that receiver have to generate rates that -- would that receiver have to charge rates that generate a return on the equity component on the present capital structure of the company?

A That receiver would have to generate revenues, either through rates or through accessing the markets, to run the business. That is where the rub comes in.

To run the business, if you're going to do anything, you have to access funds. You're either going to charge the customers up front to get the funds, or you're going out into the capital markets to get the funds.

If you are a receiver in a bankrupt business, the capital market is not going to be

beating your door down to loan you money on the best terms. You're going to pay more for it.

You're not going to pay a nickel more for it; your customers are going to pay for it for the next hundred years. There is a financial penalty in having financial pressure that cuts off your access to funds. That's just an economic financial truism. How much? That's another question. How long? I don't know. A long time.

Does it have an effect? Absolutely it has an effect. My credit rating affects my ability to borrow money at a good rate.

Q Sure.

A I may can borrow all the money in the world at 18%.

Q And all of these things inevitably, in your mind, result in a deterioration or perhaps even a curtailment of service?

A Oh, absolutely. I have no question about that.

Q Okay. So --

A If we're talking about $100 million or $30 million on a company this size or $5 million on me, I don't have any question about it.

Q I want to make sure we're talking about the

same thing. The EPA comes in within a $104 million fine, sues out the lien; somebody takes possession of the utility, and the water shuts off?

A I didn't say the water shuts off.

Q Well, I'm trying to find out if that's the case.

A I don't know. If it shuts off, I'm sure it will come back. The question is at what cost, at what level of service. I think the service would come back, but now you have to worry about the quality of the service, the level of pollutants, the rates to be charged, the borrowing rates and all of the things attendant with running an efficient business.

The efficiency has been grossly damaged by the lawsuit, by the bankruptcy. Don't point to me a company -- and I'm being a little facetious here -- that's in bankruptcy as an example of an efficient company. I just won't buy it.

Q Chrysler maybe?

A I beg your pardon?

Q Chrysler Perhaps. Was Chrysler --

A They were not bankrupt.

Q Were they close?

A Yes, but they weren't efficient either. They are not, but they changed it.

Q Were they able to price their misfortunes out the door, or did they have to participate in a free marketplace?

A They were in a competitive market. They had to deal with that competitive market.

Q Isn't this agency -- doesn't it exist to operate as a surrogate for that very marketplace?

A No. It sets prices. That term is used quite often. It doesn't impute, introduce, bring about competitive conditions. It simply sets prices that a competitive market would set if it were in place.

But as a surrogate -- you've got to be careful with that word. I've been -- I've resented it for years because it overplays the role of the competitor, the regulator. The regulator sets prices. It acts in the place of a competitor -- of a competitive market, and in that sense it replaces, but, it does not bring all of the competitive conditions with it.

Q I would certainly agree with that. I was hoping that it might.

A Well, we're prime in doing this in some other areas in the industry, I suppose, or in the electric industry at least.

Q Now, there's quite a bit of -- you testified at some length about apportionment in -- and trip me up here if I state it incorrectly -- about the apportionment of these expenses which you believe should be paid -- maybe perhaps I should say that the company believes, because I think you didn't quite agree with them -- but apportionment of the expenses for which the stockholders should be liable as opposed to the ratepayers. And again I'm not sure I understand the apportionment.

It sounds to me -- and I'm a layperson when it comes to accounting -- like you're putting the fine eventually paid over the amount demanded, multiplying that, the expenses, and then apportioning them to the shareholders' share and the customers' share; is that roughly correct?

A I think you described it correctly, yes --

Q And I think there was some adjustment to the denominator, because if I remember correctly, you described this to Ms. Gervasi, but you backed away from the $5 million. I think you said you disagreed with that. Do you understand what I'm asking?

A I think that was the alternative test they made where they reduced the $500,000 number by the $309,000 penalty and got $190,000 and used that to

reduce it and so on. It's a mechanical thing.

To me, I did not see it as a needed adjustment at all. The company wanted to share in this thing and they chose that way to do it, and I said, fine, it's your money, share it.

Q And my concern isn't too much on the fine-tuning, but basically the fine received -- the fine achieved, perhaps I should say -- over the fine demanded, and that led to an apportionment.

A And that kind -- I think that's a reasonable description.

Q Sure. And you testified to Ms. Gervasi, I think, that you didn't consider any other method.

A No. In fact, I didn't consider those as --

Q That's --

A I certainly didn't look for an additional method of something I didn't think was needed to start with.

Q Right; because you essentially would say that since it's cost of doing business, it does not matter that some of that fine might be somehow tied -- I'm sorry -- some of the expense be tied somehow to the fine and, thus, the shareholders' responsibility.

A That was my view. It's the cost of doing business.

Q With respect to your allocation method, that is allocating between shareholders on the one hand and ratepayers on the other, did you -- I'd like you to criticize a possible methodology, even though even the first one was not yours; but let me get your criticism on it.

Suppose the Commission were to compare -- instead of using the fraction that we talked about, suppose they were to use a fraction which represents -- let's see if I can get the numerator and the denominator right -- the number of violations alleged over the number of violations sustained. Would that make sense?

A No. Even if the principle was good, that wouldn't make any sense, because one violation might be worth $2 and one might be worth $20,000 and you give them the same weighting. If you would weigh them --

Q Yeah.

A It might make some sense, yeah.

Q Made them -- weight them -- well, that would get right back to the original fraction, though, wouldn't it?

A Oh, I don't know. I've never even heard your suggestion. But I'm just telling you if you took

numbers of violations, I wouldn't buy that even if I was all for sharing the cost with somebody, because to me that would grossly distort it one way or the other. I don't even know which way.

Q Why is that so?

A I just get -- told you. One violation might be a $2 violation, one might be a $2 million violation and you split it evenly because you've got one and one. That doesn't make any sense.

Q Well, assuming that you weight it.

A Well that would make more sense.

Q That would make more sense.

A Yes.

Q Weight it according to the magnitude of the fine associated --

A That would make more sense. I'm not saying it would make good sense, but it would make more sense.

Q More sense than --

A Than one and one, yes.

Q Not more sense that this methodology, right?

A No. Actually, these methods are fine if you want to do something like that. My challenge was these are cost incurred; why do you want to share them at all.

Q Well, let me ask a question about that. And we went down that bankruptcy scenario. I don't quite want to do that again. But in that scenario shareholders' equity would have been essentially eliminated, I think you said.

A Oh, yes, certainly at $100 million, probably at any of those levels, but --

Q It's like a scale that goes --

A In essence it would have been --

Q And this --

A -- it would have been severely crippled, if not killed.

Q And this litigation, at least -- if not completely -- but at least protected the shareholders' interests in that equity, didn't it?

A Oh, absolutely.

Q Is that a valuable service?

A Absolutely. That's part of running a business.

Q So what value did the stockholders give up to receive that value, if any?

A The same value they give up to pay someone to go out and do the job. If I pay you $1,000 a month to go keep the water going, what value does the shareholder get out of that? Gets an ongoing business

value out of it.

That's why, do I recover that $1,000 in my rates? Absolutely. That's the cost of doing business. I see this as no different. It's a cost of doing business. How does a shareholder benefit? The shareholder benefits by having a continuing financially viable business. It's that simple.

Q Had this litigation not -- had they not ensued -- I'm sorry -- had they not incurred these expenses, two things would have happened, if I hear your testimony correctly. Customers would have suffered.

A Both parties would have suffered, absolutely.

Q Yes, I heard you say that. But only the customers will pay for the litigation expenses, correct, under the --

A Yes, only the customers pay for all other costs of doing business, or at least in theory.

Q So, again, it turns on the issue of whether it is a legitimate cost of doing business --

A Oh, I have no problem with that obligation.

Q And it must necessarily follow that you believe that protecting the equity of a business is a necessary part of providing water and sewer service to

these customers.

A Protecting the financial viability of the business is. If that means protecting the equity, yes. If that means protecting the debt, yes. If that means doing some repair job, yes.

Q Let me ask you to take a real stretch on a hypothetical and assume that there are ready and willing persons, entities, individuals, whatever, who are willing to take up this business in the aftermath of a bankruptcy.

A Okay. A good Samaritan, I think you're about to describe. Go ahead.

Q Well, actually, trustee, receiver --

A Someone who is paid to do a job; all right.

Q There we go, yes. I think I've lost the train of my thought. Well, Let me ask you this, because --

A The question is, could they do it. The answer is, yes, they would do it in some form or fashion. Then the ultimate answer is, what would it do to the price of the good and the quality of the service. And I would have to conclude that if you're in a crippled situation, one or both are going to suffer.

If it doesn't, then our whole business

scheme across the spectrum is totally off balance. We need to be working in crisis, not -- we'd need to be working serving flat on our backs, not standing up strong, handing out service.

It doesn't make sense for me to conclude that to cripple a business financially will lead to a continued efficient well-run business. If that happens, we are really off base in our business approaches.

Q So if the Public Service Commission had a string of cases in which they decided that a financially strapped utility which is taken over by a financially healthy utility is better off, would you disagree with that?

A Let me rephrase and make sure I understood it. If there's a financially strapped utility taken over by a financially healthy utility, is a strapped operation better off?

Q Yes.

A Sure should be.

Q Sure. So what we do know, or you seem to say, is there will necessarily be a period of the reduction of quality of service. You're certain of that?

A I don't know how you would avoid it. If you

go into bankruptcy and you continue the same service at the same price, you're a magician, you're not a business --

Q When you say "your," are you presuming somehow that the same equity holders will be running the --

A I don't really care who runs it. Someone is going to incur cost of doing it. The current owners may get blasted, may get beat to death financially and walk away all bruised up; but the next time you go out to get an investor, he's going to look at that beat-up, bruised part of his over there with bandages all over it and says, I don't want any of that. I'm going to charge you 18% rather than 8% to avoid a beating like that. That's the nature of the lending business.

Q Now --

A If you could do it without -- if you could run a business without excessing funds, what difference does it make.

Q People who walk away bandaged and so forth are out of the new scenario, are they not?

A Absolutely not. Do you think investors are absolutely blind, they don't look at history?

Q No --

A Investors look at -- hard at history.

Q I think --

A They look hard --

Q I think you misunderstood --

A -- at financial --

Q Pardon me, sir. I think you misunderstood my question. You told me before that the stockholders' equity would be wiped out in a bankruptcy scenario.

A I presume so, yes.

Q Now, those stockholders don't have any continuing interest in that --

A They're over there lying on the stretchers, blood all over them.

Q They're gone. Might be some new guys running the company.

A Yeah.

Q One of those --

A If they can't do it without financial access -- or access to financial funds, they may be all right, but if they come to me looking for money, I'm going to look at that guy on the couch over there on the --

Q See what --

A -- bed over there, there's blood all over

him, and decide I don't want any of that, guys, goodbye.

Q Will you look to see maybe they're running a city on the side?

MR. GATLIN: Running the what?

MR. McLEAN: Running a city or a county on the side.

Q One --

A If they have enough money to back me up so I don't suffer any risk and I'd lose -- you know, I don't really care then.

Q So what you're saying is --

A If the State of Florida took over that operation, yeah. I'd loan them money on the State of Florida, absolutely.

Q Do you know that that's not a likely scenario?

A I don't know whether it is or --

Q Do you know --

A -- not. It sounds pretty wild, but --

Q Basically when we get to the point of bankruptcy, you don't know what happens after that?

A I have no idea. I'm not even sure there would be bankruptcy. All I know is there would be financial pressure, which may lead to bankruptcy. I

know financial pressure brings cost with it. I know that. How much I can't --

Q And the way --

A -- tell you.

Q The way you reach people like the water customers who had no part of this pollution, the way you reach people like that, the way your theory reaches to their pocketbooks is to say that service would deteriorate.

A No, absolutely not. You led into that. I'm saying I reach it by the very simple, regulatory -- established regulatory principle that if I am regulated, my prices are set to recover my cost of service, and I incur a cost of maintaining my business, and I have to incur it as prudent -- I don't do it badly, or don't do it improperly, or don't hire my brother-in-law to do it for my when he can't even spell his name, I'm entitled to recover my cost.

These are some of those costs. If I'm not entitled to recover my cost of defending my business from disaster, why should I be entitled to recover the cost of a truck I'm driving out to provide service and the man I'm putting in it?

If both maintain my business, both are cost of service, and under the regulatory principle, I'm

entitled to recover cost of service. I really do not understand why I have to carve up the pieces of doing cost of service, and because one is a lawsuit and one is a truck driver, I can't recover cost of service. I just violated the rule I set up.

Q Isn't the fine a cost of service?

A I'm sorry?

Q I'm sorry. Did you understand my question?

A No, I didn't.

Q Is the fine not a cost of service? The penalty which they paid in this case, three --

A Yes, I think that should be recovered, also. It probably isn't, but that's probably -- it's -- I'll give you a parallel to that.

There are some types of expenditures in utilities traditionally I'm not allowed to recover. And some -- for example, if an electric belongs to the EEI, some of the costs are disallowed. I disagree with that, but that's the regulatory posture, and I live with it.

Q You disagree with the charitable -- disallowance of charitable contributions?

A Not charitable, per se. Those don't bother me too much. I'm talking about the cost of running a business where you have to belong to organizations to

keep your finger in the economic pot.

There are a lot of things that regulators do I don't agree with but I accept. But, now, when we're talking about recovering cost of doing business that encompassed defending my company, if the regulator tells me I can't defend my company, then I will quit fighting lawsuits, and my customers are going to be -- I'm going to hurt. My customers are going to hurt. I don't know who is served by that.

Q But it is your testimony that you would recommend to the Commission that, if requested, that they permit a recovery of the fine as well the penalty?

A Probably. This is a case where the Commission's rationale would be probably -- and I'm not sure of a good argument against it -- that that's -- something like that, the penalty reflects a bad management move or bad management action, and we're going to stick the ratepayer -- or the equity holders with that; and, you know, my argument gets a little weak there.

So recognize that it -- it's a fairly weak argument. It's one I might even back off on.

Q If the company were found to have engaged in more than 1,300 violations of the Clean Water Act, do

you regard that as a prudent action taken to --

A You have to define the -- I don't know. You might be talking about 1,300 drops of water. I don't know. I don't know.

Q Do you know whether the court defined it?

A All I know is that the court came up with a finding that there were some things that should have been done differently, and there was a $300,000 fine in the face of the $30 million claim, and -- I don't know. It seemed to be a pretty big difference --

Q Was it a $30 million claim?

A That was -- 32 million was the last number I saw.

Q Okay. Do you know --

A I'm sorry. 32 was the first one. It was 104 was the --

Q 104. Do you recall whether the Government put on any testimony as to how much the company could afford?

A No, but the Court said something about it in the decision. I remember reading something about that. As a matter of fact, I think I had something in my testimony about that.

Q Did you testify in the federal trial?

A No.

Q Is there any aspect of the -- first of all, I guess I should ask you this question to which there is an obvious answer.

Do you have familiarity with the NARUC system of accounts?

A Yes.

Q Did you write them? (Laughter)

A I don't think so.

Q Is there anything in the NARUC system of accounts that suggests to you whether this is a cost of doing business?

Let me ask the question differently. Do you intend to rely upon the NARUC system of accounts as support for the position that you've taken in the case --

A Oh, no.

Q -- with respect to --

A That's an accounting system --

Q It really doesn't tell us how they --

A It doesn't tell -- for example --

(Court reporter asked for clarification.)

A To repeat the answer to the basic question is I'm not relying on the uniform system for my conclusion in this case. The uniform system may or may not support it. I'm sure it would, but that's not

the reason that I think it's legitimate.

Q With respect to the surcharge, the revenue generated by surcharge, do you regard -- are those likely -- is that revenue, if I've stated it correctly, likely taxable?

A I would assume so. I don't know of any reason that it would not be.

Q You said that that, the regulatory asset, if and when it's booked, should be booked as pure equity, I think.

A It will end up in the equity account, and I would just run it through equity. Now, would I carve out equity and call it something like a --

Q You --

A -- deferred revenue, I don't see that as a problem. To me, it's kind of -- it's a way to maintain identification of something that I don't know of any real reason to do, but I don't see anything wrong with it.

Q Is it at all possible that the Internal Revenue Service might regard the surcharge as recovery of that capital and, thus, not taxable?

A I doubt it, but I can't speak with authority on it. I'll tell you one reason that would reinforce what I just said. I presume -- I think we're going to

find this to be the case -- that when the legal costs were expended, they were deducted for tax purposes, and now that they're being recovered, I am quite sure that the IRS would want them taxed for tax purposes.

Regardless of what kind of conceptual support you might come up with that these aren't really revenues, they're really something else, you'd have a hard time with that one.

Q I agree. So were it a sort of standard revenue component of a rate case, it would have to be grossed up for taxes, right? Or it should be.

A Probably not.

Q Why so?

A Because of the tax benefits that came through with the recovery -- with the expenditure of the cost. I think if we were doing this in a rate case, we would have to take a close look at the tax implications to these revenues, and probably -- now, again, this is the first time I've looked at this, so I'm able to change my mind -- but my immediate reaction is that if we were doing this in a case as of right now putting these revenues into the case in some form or fashion, that we would have to exclude these revenues from the tax gross-up application because we should not gross these up, because we've already

gotten tax advantages out of them on the company side.

We don't want to now gross up and avoid the tax penalty, because that would be inappropriate. So I think we would have to do this very carefully in a rate case. It a mechanic to be done, but we would have to give it some kind of special treatment.

Q Let's think -- for the moment accept that it would need to be grossed -- I understand your answer and I seem to concur with it -- but assume for just a moment for the purposes of this question that it would need to be grossed up.

Is there any component of this case that asks for any portion of the gross-up which is foregone until the next rate case?

A I think the answer is no. I'm not sure I understand your question, but I think the answer has to be no.

Q In fact, I think, as we've discussed before, this case does not seek any recovery of the carrying charges between the conclusion of this case and the next rate case, whenever that may be.

A Right. Now -- right. And I will add this to this situation. The carrying charges will be taxable. They should be grossed up, because we're not now taking -- we're not offsetting some previous

deductible thing. This is a new revenue on the carrying charge side because it's a new cost.

Q There's nothing in your -- I was distressed when I saw that said that -- I believe you said in your testimony that the company was faced with the demand for $104 million.

A Yes.

Q You would agree with me that that is a maximum worst case or best case -- depending on whether you work for the DOJ or the company -- that is a maximum which they face. The fact is that they probably faced a maximum fine of somewhere in the neighborhood of $7 million maximum. Is that about right?

A I have no idea about the 7 million. From what I've seen, 104 is the maximum, and that's the most it was asked, and I can't believe the court would have given someone more than that in this kind of --

Q Nothing in this case, however, is directly geared to that 104; it's more or less geared to the 5 million in terms of demands, right?

A No. As I understand this case, it's all geared to having fought off the claims and incurring cost and recovering those costs.

Q I was more or less having reference to that

division of responsibility that we discussed before. It's 309 -- .309 million over 5 million.

A Well, that's not my creation, and while it's -- I can accept it, I really don't think it's necessary.

Q Your fraction would have been $309 different on the numerator -- $309,000 --

A Well, my --

Q Essentially --

(Simultaneous conversation.)

A No. My position --

Q -- go for the whole thing.

A No. My position -- that's the whole thing. My position would be you guys incurred 3.8 million costs in defending yourself; I think you're entitled to recover all of it.

Next question: How about the 309 of penalty? Well, I understand the Commission doesn't allow those things, so that's not a big number. My advice would have been probably, let's go with the 3.8 million, regardless of what I may think of the 309.

Q Have you testified in an actual federal bankruptcy proceeding?

A No.

Q Have you prepared a summary of your

testimony?

A No.

Q Did you hire Tom Voorhees or was that --

(Laughter)

A I hired Tom Voorhees. (Laughter)

MR. McLEAN: Thank you. That's all the questions I have.

MS. GERVASI: Mr. Gatlin?

MR. GATLIN: No questions, and we would prefer to read.

MS. GERVASI: Before we go off the record, let me just establish a deadline for the late-filed exhibits. Two weeks; is that enough time?

MR. GATLIN: Maybe we can go off the record.

MS. GERVASI: Sure.

(Discussion off the record.)

MS. GERVASI: Let's go back on the record very quickly to establish the deadline of May 29th for the two exhibits. That's two weeks from today.

(Deposition concluded at 2:40 p.m.)

- - - - -

ERRATA SHEET

DOCKET NO. 971663-WS
NAME: JOHN D. McCLELLAN
DATE: May 15, 1998

Page	Line	

AFFIDAVIT OF DEPONENT

This is to certify that I, JOHN D. McCLELLAN, have read the foregoing transcription of my testimony, Page 1 through 76, given on May 15, 1998, 1998, in Docket No. 971663-WS, and find the same to be true and correct, with the exceptions, and/or corrections, if any, as shown on the errata sheet attached hereto.

_____
JOHN D. McCLELLAN

Sworn to and subscribed before me
this_____ day of _____, 19_____

_____
NOTARY PUBLIC

State of _____.

Personally known to me ____ or produced identification___.

Type of identification produced_____

F L O R I D A)
:
COUNTY OF LEON)

CERTIFICATE OF OATH

I, the undersigned authority, certify that JOHN D. McCLELLAN personally appeared before me and was duly sworn.

WITNESS my hand and official seal this 22nd day of May, 1998.

H. RUTHE POTAMI
Notary Public - State of Florida

STATE OF FLORIDA)
: CERTIFICATE OF REPORTER
COUNTY OF LEON)

I, H. RUTHE POTAMI, CSR, RPR, Official Commission Reporter,

DO HEREBY CERTIFY that I was authorized to and did stenographically report the foregoing deposition of JOHN D. McCLELLAN.

I FURTHER CERTIFY that this transcript, consisting of 79 pages, constitutes a true record of the testimony given by the witness.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED this 22nd day of May, 1998.

H. RUTHE POTAMI, CSR, RPR
Official Commission Reporter
Telephone No. (904) 413-6734

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June 4, 1998

Rosanne Gervasi
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

HAND DELIVERY

RE: Docket No. 971663-WS
Petition of Florida Cities Water Company for limited proceeding to recover environmental litigation costs for North and South Ft. Myers Division in Lee County and Barefoot Bay Division in Brevard County.

Dear Ms. Gervasi:

Enclosed is the original Affidavit of Deponent and Errata Sheet of John D. McClellan for his deposition taken on May 15, 1998.

If you have any questions please give me a call.

Sincerely,

B. Kenneth Gatlin

BKG/ldv
Enclosure

cc: Harold McLean, Esq.

Florida Pub... Commission
RECEIVED
JUN 4 1998
LEGAL DIV...

AFFIDAVIT OF DEPONENT

This is to certify that I, JOHN D. McCLELLAN, have read the foregoing transcription of my testimony, Page 1 through 76, given on May 15, 1998, 1998, in Docket No. 971663-WS, and find the same to be true and correct, with the exceptions, and/or corrections, if any, as shown on the errata sheet attached hereto.

John D. McClellan
JOHN D. McCLELLAN

Sworn to and subscribed before me
this 29 day of May, 1998

Marsha Walker
NOTARY PUBLIC

OFFICIAL SEAL
MARSHA WALKER
Notary Public - State of Arizona
MARICOPA COUNTY
My Comm. Expires July 2, 2001

State of Arizona

Personally known to me ____ or produced identification ___.

Type of identification produced AZ DR Li

ERRATA SHEET

Deposition of John McClellan

Florida Cities Water Company Rate Case

Docket No. 971663-WS

Page & Line	
10 , 20	Eliminate the word "an"
10 , 21	Change the phrase "of cost" to "of total costs"
16 , 14	Change the answer to: "Yes. The benefits to the shareholders of the avoided penalties appear to be greater than $236,842. Both the shareholders and the customers benefited from the Company's active defense against the complaint. I do not know which benefited the most, the shareholders or the customers."
17 , 11	Add the following at the end of the sentence: "and that is the real issue. Who benefited the most may be an interesting point, but it should not dictate the recoverability of costs prudently incurred in maintaining a financially healthy system."
20 , 15	Insert, at the beginning of the line, the phrase "by debiting a regulatory asset" and delete the same phrase at the end of the sentence.
21 , 11	Strike the word "and"
22 , 16	Change the first three sentences of the paragraph, through the middle of line 22, to: "I guess you could identify a portion of the credit balance in the earned surplus account as originating from deferred revenues. As these revenues are recovered, both the regulatory asset and the "deferred revenue" component of equity capital would be reduced. I do not know if such a separation of equity components would be necessary."
25 , 21	Strike the words "for the" and "of that"
25 , 24	Change "bill" to " build"
32 , 24	Change the word "interest" to " entries"
53 , 25	Change the word "not" to "now"
58 , 24	Change "cost" to "costs"
60 , 22	Change "obligation" to "observation"
63 , 19	Change "excessing" to "accessing"

COMMISSION STAFF'S FIRST SET OF INTERROGATORIES TO
FLORIDA CITIES WATER COMPANY
DOCKET NO. 971663-WS

29. Did the EPA notify FCWC of any other reasons why Waterway Estates' (Waterway) 1986 NPDES permit application was denied other than stating that Waterway had no discharge wasteload allocation?

Response: (MA)

No, based on a review of Company records the no wasteload allocation was the only basis for the permit denial. As shown on Exhibit ___ MA-2 Page #2 of the Fact Sheet:

"3. BASIS FOR FINAL EFFLUENT LIMITS AND PERMIT CONDITIONS

The permit denial is based on a no discharge wasteload allocation developed by FDER on January 19, 1981. The terms and schedule for meeting the no discharge wasteload allocation will be set forth in a forthcoming administrative order."

COMMISSION STAFF'S FIRST SET OF INTERROGATORIES TO
FLORIDA CITIES WATER COMPANY
DOCKET NO. 971663-WS

32. Referring to interrogatory no. 31, above, did FCWC carry out any of these procedures to challenge either the July 22, 1986 tentative denial of Waterway's NPDES permit or the December 8, 1986 final denial of Waterway's NPDES permit?

Response: (MA)

No, FCWC did not.

COMMISSION STAFF'S FIRST SET OF PRODUCTION OF DOCUMENTS
TO FLORIDA CITIES WATER COMPANY
DOCKET NO. 971663-WS

6. Please provide the workpapers supporting John McClellan's calculations of the carrying cost of the legal fees.

Response: (JM,MM)

See Attached.

FLORIDA CITIES WATER COMPANY
Accumulated Carrying Costs of Litigation

	Annual Legal Expenses	Annual Carrying Costs *						Legal Expenses and Carrying Costs
		1992	1993	1994	1995	1996	1997	
1992	$7,569	$0	$757	$833	$916	$1,008	$1,108	$12,191
1993	91,628		0	9,163	10,079	11,087	12,196	134,153
1994	922,768			0	92,277	101,505	111,655	1,228,205
1995	1,327,999				0	132,800	146,080	1,606,879
1996	1,411,817					0	141,182	1,552,999
1997	64,429						0	64,429
								0
	$3,826,210	$0	$757	$9,996	$103,272	$246,400	$412,221	$4,598,856

There is no carrying charge calculated in the year the legal fees are incurred.
The interest rate used for this calculation is:
Rated used 10.0%
in first year 0.0%
* - amounts are compunded.

No. 3 Page 2 of 2

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June 4, 1998

JUN 4 1998
LEGAL DIVISION

HAND DELIVERY

Rosanne Gervasi
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

RE: Docket No. 971663-WS
Petition of Florida Cities Water Company for limited proceeding to recover environmental litigation costs for North and South Ft. Myers Division in Lee County and Barefoot Bay Division in Brevard County.

Dear Ms. Gervasi:

At the deposition of John D. McClellan, you asked for Deposition Exhibits. Please find enclosed:

1. an exhibit showing the accounting for recovery of legal expenses; and

2. an exhibit showing the accounting for treatment of legal expenses as incurred.

Please let me know if you need further information.

Very truly yours,

B. Kenneth Gatlin

BKG/ldv
Enclosure

cc: Harold McLean, Esq.

Florida Cities Water Company
Accounting Treatment for Recovery of Legal Expenses
971663-WS

(1) Legal expenses approved by the Commission would be recorded as a debit to the Company's balance sheet "Regulatory Asset" NARUC account 186.3 and a credit to the Company's income statement "Other Income and Expense" NARUC account 421.

(2) Subsequently, the approved Surcharge is received over the recovery period (ten years) and is recorded as a credit to the Company's income statement "Other Revenue" NARUC accounts 474 (water) and 536 (wastewater).

(3) The Regulatory Asset would amortize annually in an amount equal to the Surcharge received for that year. The amortization would be reflected as a debit to the Company's income statement "Misc. Expense G&A " NARUC accounts 675 and 775 and a credit to the balance sheet Regulatory Asset.

(4) When all the legal expenses have been received through the Surcharge, presumably within ten years or less, the Regulatory Asset will be fully amortized and have a -0- balance on the Company's balance sheet. The collection of the Surcharge will also be discontinued.

(5) There is a tax effect to the above, "Deferred Taxes" NARUC account 283 will be credited for the tax effect of Other Income and Expense because taxes will not be paid until the Surcharge is collected. As the Surcharge is collected Deferred Taxes will be debited and Current Taxes Payable will be credited.

In the following ten year example, the Company recovers the legal expenses of $2,265,833 through the Surcharge. Taxes are paid based upon the collection of the Surcharge and not the initial recording of the Regulatory Asset. The receipt of the Surcharge is offset, above the line, so that the Company's operating income remains the same, however the Company recovers the legal expenses. The Regulatory Asset becomes a part of rate base and the Deferred Taxes a component of the Cost of Capital. If the Company has a rate case and if the Company is earning below its allowed rate of return, then the Regulatory Asset would be allowed as a component of rate base and the Deferred Taxes would figure into the calculation of the Cost of Capital.

Florida Cities Water Company
Accounting Treatment for Legal Expenses as Incurred
971663-WS

(1) Beginning in 1993 the Company began accruing legal fees, costs and ultimately the penalty as a credit to the Company's balance sheet "Misc. Accrued Liabilities" NARUC account 241 and a debit to the Company's income statement "Misc. Expenses" NARUC account 426. Misc. Expense is a Below The Line (BTL) expense.

(2) Subsequently, payments for legal fees, costs and ultimately the penalty were debited to Misc. Accrued Liabilities.

(3) There is a tax effect to the above. "Deferred Taxes" NARUC account 410.2 and "Income Taxes" NARUC account 409.2 were used to reflect the tax effect of the book and tax expense, respectively. These accounts are BTL income tax expense accounts. Deferred taxes, initially established in 1995, created a debit in the balance sheet deferred tax account because the amount deducted for tax expenses was less than the amount deducted for book expense. This deferral reversed out as payments were made. At December 31, 1997 there was a small balance left in this account.

(4) The following worksheet shows the amount of expense recorded for book purposes and tax purposes for each year. The worksheet also shows the balance in the deferred tax account (in this case a prepaid) at the end of each year. The book expense exceeds the tax expense because the penalty of $309,710 is not tax deductible and because there was more book expense accrued than has currently been expensed for tax purposes. This results in a small deferred (prepaid) tax balance at December 31, 1997.

John D. McClellan's Deposition Exhibit 2
Page 2 of 2

Florida Cities Water Company
Accounting Treatment for Legal Expenses as Incurred
971663-WS

	1993	1994	1995	1996	1997
Book Expense (1)	500,000	1,534,348	1,460,733	850,000	0
Tax Expense	500,000	1,534,348	554,809	1,207,132	149,995
Balance of Deferred (Prepaid) Taxes	0	0	(340,900)	(90,200)	(33,866)

(1) - Amounts are reflected BTL in Misc. Expense.

Florida Cities Water Company
Accounting Treatment for Recovery of Legal Expenses
971663-WS

	Year 1 (a)	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10	Year 11
Annual Results With Surcharge											
Operating Revenues	17,330,101	17,330,101	17,330,101	17,330,101	17,330,101	17,330,101	17,330,101	17,330,101	17,330,101	17,330,101	17,330,101
Surcharge (1)		226,583	226,583	226,583	226,583	226,583	226,583	226,583	226,583	226,583	226,583
Adjusted Revenues	17,330,101	17,556,684	17,556,684	17,556,684	17,556,684	17,556,684	17,556,684	17,556,684	17,556,684	17,556,684	17,556,684
Operating Expenses	13,052,613	13,052,613	13,052,613	13,052,613	13,052,613	13,052,613	13,052,613	13,052,613	13,052,613	13,052,613	13,052,613
Amortization of Reg. Asset (1)(2)		226,583	226,583	226,583	226,583	226,583	226,583	226,583	226,583	226,583	226,583
Adjusted Operating Expenses	13,052,613	13,279,196	13,279,196	13,279,196	13,279,196	13,279,196	13,279,196	13,279,196	13,279,196	13,279,196	13,279,196
Operating Income	4,277,488	4,277,488	4,277,488	4,277,488	4,277,488	4,277,488	4,277,488	4,277,488	4,277,488	4,277,488	4,277,488
Other Income (3)	2,265,833										
Tax Effect on Other Income (3)	(852,633)										
Net Income	5,690,688	4,277,488	4,277,488	4,277,488	4,277,488	4,277,488	4,277,488	4,277,488	4,277,488	4,277,488	4,277,488
Balance Sheet Accounts											
Balance at End of Year											
Debit / (Credit)											
Regulatory Asset	2,265,833	2,039,250	1,812,666	1,586,083	1,359,500	1,132,917	906,333	679,750	453,167	226,583	0
Deferred Taxes	(852,633)	(767,370)	(682,106)	(596,843)	(511,580)	(426,316)	(341,053)	(255,790)	(170,527)	(85,263)	0
Accounting Entries											
Debit / (Credit)											
Regulatory Asset	2,265,833	(226,583)	(226,583)	(226,583)	(226,583)	(226,583)	(226,583)	(226,583)	(226,583)	(226,583)	(226,583)
Amortization of Reg. Asset		226,583	226,583	226,583	226,583	226,583	226,583	226,583	226,583	226,583	226,583
Other Income	(2,265,833)										
Cash		226,583	226,583	226,583	226,583	226,583	226,583	226,583	226,583	226,583	226,583
Surcharge		(226,583)	(226,583)	(226,583)	(226,583)	(226,583)	(226,583)	(226,583)	(226,583)	(226,583)	(226,583)
Deferred Tax Expense (Credit)	852,633	(85,263)	(85,263)	(85,263)	(85,263)	(85,263)	(85,263)	(85,263)	(85,263)	(85,263)	(85,263)
Current Tax Expense (Credit)		85,263	85,263	85,263	85,263	85,263	85,263	85,263	85,263	85,263	85,263
Current Taxes(Payable) Rec.	0	(85,263)	(85,263)	(85,263)	(85,263)	(85,263)	(85,263)	(85,263)	(85,263)	(85,263)	(85,263)
(Deferred) Prepaid Taxes	(852,633)	85,263	85,263	85,263	85,263	85,263	85,263	85,263	85,263	85,263	85,263

Notes:

(a) Results are for the FCWC PSC divisions for the year ended 12/31/97.
(1) Surcharge is billed and collected and the Regulatory Asset is amortized over the same period, 10 years.
(2) If Surcharge is treated as an 'above the line '(ABV) item then the amortization is treated ABV.
(3) Regulatory Asset (the net legal expenses requested and allowed) are recorded as a one time income item.
The credit to income is tax effected. The tax effect is recorded as a deferred tax expenses, because the tax is paid only as the surcharge is received.

Florida Cities Water Company
Docket No._____
Rate Application for Recovery
of Legal Expenses
Exhibits____(ABA-1 thru ABA-2)
Dr. Abdul B. Ahmadi

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663-WS EXHIBIT NO. 4
COMPANY/ WITNESS: Ahmadi
DATE: 8-12-98

13274-97

FLORIDA CITIES WATER COMPANY

TESTIMONY OF DR. ABDUL B. AHMADI

Q. Please state your name and business address.

A. Dr. Abdul B. Ahmadi. My business is 2295 Victoria Avenue, Suite 364, Ft. Myers, Florida.

Q. Are you employed by the Florida Department of Environmental Protection (FDEP)?

A. Yes.

Q. What is your position with FDEP?

A. Program Administrator of Water Facilities

Q. What are your duties?

A. My duties include permitting, compliance, enforcement with regard to wastewater treatment facilities, industrial wastewater facilities, groundwater monitoring associated with those facilities, underground injection control facilities, and surface water discharges.

Q. Are you familiar with the history of permits pertaining to the Florida Cities Water Company's (FCWC) Waterway Estates wastewater treatment plant (Waterway) which was the subject of litigation brought in the U.S. District Court, Middle District of Florida, in October 1993, styled United States of American v. Florida Cities Water Company?

A. Yes.

Q. Did you give a deposition and testify at trial in that case?

A. Yes.

Q. Are Exhibits ____(ABA-1) and ____(ABA-2) a copy of the transcript of your deposition and testimony at trial respectively, in that litigation?

A. Yes.

Q. Have you reviewed the transcripts of your testimony of your deposition (Exhibit ___(ABA-1) and trial (Exhibit ____(ABA-2)?

A. Yes.

Q. Are there any changes or corrections you wish to make to these transcripts?

A. No. Except the middle initial as noted.

MR. McLEAN: The Citizens move the testimony of Hugh Larkin, Jr. into the record as though read, and that would include his appendix. Mr. Larkin has no exhibits.

CHAIRMAN JOHNSON: Okay. The testimony will be inserted as though read. Staff?

MS. GERVASI: Staff would like to identify as an exhibit the transcript of Mr. Larkin's deposition as well as late-filed Deposition Exhibit 1.

CHAIRMAN JOHNSON: It will be identified as Composite 16.

MS. GERVASI: Thank you.

(Exhibit 16 marked for identification.)

DIRECT TESTIMONY

OF

HUGH LARKIN, JR.

ON BEHALF OF THE CITIZENS OF FLORIDA

BEFORE THE

FLORIDA PUBLIC SERVICE COMMISSION

REGARDING THE RECOVERY OF LITIGATION COSTS

INTRODUCTION

Q. PLEASE STATE YOUR NAME, OCCUPATION, AND BUSINESS ADDRESS.

A. My name is Hugh Larkin, Jr. I am a Certified Public Accountant licensed in the states of Florida and Michigan and the senior partner in the firm of Larkin & Associates, Certified Public Accountants, with offices at 15728 Farmington Road, Livonia, Michigan 48154.

Q. HAVE YOU PREPARED AN APPENDIX WHICH DESCRIBES YOUR QUALIFICATIONS AND EXPERIENCE?

A. Yes. I have attached Appendix I which is a summary of my experience and qualifications.

Q. ON WHOSE BEHALF ARE YOU APPEARING?

A. Larkin & Associates was employed by The Florida Office of Public Counsel ("OPC") to provide testimony regarding the recovery of litigation costs from certain water and wastewater customers of the Florida Cities Water Company (FCWC) who are subject to the jurisdiction of the Florida Public Service Commission.

Summary of Recommendations and Conclusions

Q. WOULD YOU PLEASE SUMMARIZE THE RECOMMENDATIONS AND CONCLUSIONS YOU HAVE REACHED REGARDING THE RECOVERY OF LITIGATION COST FROM FLORIDA CITIES WATER COMPANY'S (FCWC) RATEPAYERS SUBJECT TO THE JURISDICTION OF THE FLORIDA PUBLIC SERVICE COMMISSION?

A. I am recommending that the Florida Public Service Commission not authorize the recovery of litigation costs from those ratepayers subject to its jurisdiction. I have reached this recommendation based on my conclusion that if the Commission were to authorize the recovery of these legal fees it would be retroactive ratemaking. Additionally, the litigation costs incurred primarily benefitted the stockholders and debtholders of FCWC. Also, to establish a precedent of this nature in the State of Florida would place ratepayers in a position of guaranteeing or being the payer of last resort for any and all litigation undertaken by regulated public utilities in the State of Florida.

Q. HOW WILL YOUR TESTIMONY BE ORGANIZED?

A. My testimony will be organized in the following headings:

a. Company's Proposal is Retroactive Ratemaking

b. Ratepayers Not Responsible for Fines, Penalties and Related Costs

c. Financial Integrity

d. Legal Expenses in this Instance are Atypical

e. Criminal Legal Fees

f. Inclusion of Unrecovered Legal Fees in Rate Base

g. Alternative Allocation of Legal Fees

Company's Proposal is Retroactive Ratemaking

Q. IS THERE ANY RATEMAKING BASIS FOR THE COMPANY TO REQUEST THE LEGAL FEES UNDER CONSIDERATION IN THIS CASE?

A. No, there is not. Clearly, what the Company is requesting is retroactive ratemaking. The Company did not and does not have an accounting order authorizing them to defer any of the expenses associated with the legal fees in question. In fact, the Company did not defer any of the legal expenses requested in this case. In each accounting year 1991 - 1997 the Company booked, "below the line" the legal fees according to Mr. Murphy's testimony. Thus, each year the Company recorded as expense the legal fees incurred. Since the Company has no accounting order allowing it to defer the expense and the expenses were incurred throughout the period 1991 - 1997, the Company cannot accumulate those expenses and then ask the ratepayers to compensate the Company at some future point. This is clearly retroactive ratemaking and is not authorized, either by the Florida Public Service Commission or generally accepted ratemaking principles. The Company has expensed the incurrence of the legal fees in each of the years 1991 - 1997. If the Company had a basis to recover these expenses, it was to file a rate case at the time the expenses were being incurred and ask for the recovery as part of a rate case, or to come before the Commission and ask for an Accounting Order allowing for the deferral of the legal fees to be considered in a single issue rate case. The Company has not done so, and has merely decided to retroactively attempt to recover these expenses from ratepayers. Thus, it appears to me that the Company should not prevail on this issue based on the fact that it had no authority to defer the expense and no authority to retroactively collect it

from ratepayers.

Ratepayers Not Responsible for Fines, Penalties and Related Costs

Q. UNDER RATE MAKING PRINCIPLES ARE RATEPAYERS HELD RESPONSIBLE FOR FINES, PENALTIES AND RELATED COSTS?

A. As a general rule, ratepayers are not responsible for fines and penalties or any related costs. Generally, rate making principles have concluded that fines and penalties are violations by management of laws that they knew or should have known existed, and that any violation of law is the responsibility of management, who work directly for stockholders. Thus, ratepayers in utility rate making cases are generally not held responsible for the payment of fines and penalties. Since the underlying principle of utility rate making is that the fines and penalties are the responsibility of management, who work directly for the stockholders, then any related expense, such as legal fees, should be treated in the same manner as the fine or penalty. Clearly, the Florida Public Service Commission has recognized that the fines and penalties incurred by utilities in their operations, regardless of whether those fines and penalties are assessed by a local jurisdiction, the state or a federal agency, should not be collected in rates from ratepayers. It is also reasonable that any associated expense, such as legal fees, interest or cost associated with correcting violations, should not be collected from ratepayers if these costs would not have been incurred absent the fine or penalty.

The reasoning underlying this basic principle is that management must be held responsible for its actions. It must be aware of the requirements of the law, and it must follow those laws regardless of their conclusion as to the fairness or economic reasonableness of the requirements of the law. If regulation allowed the recovery of

fines and penalties and/or any related costs from ratepayers, clearly, management and stockholders would be shielded from the affects of their actions. They could operate with impunity knowing that as a general principle they could recover any penalty or fine and related costs from ratepayers. Clearly, in a competitive environment they would not recover such costs. To the extent that the Commission shifts the costs of the violations - whether penalty or legal fees incurred in litigation over penalties - from the Company to the ratepayers, it holds the Company harmless from such violations and frustrates the purpose of the Clean Water Act.

Q. SHOULD THE FLORIDA PUBLIC SERVICE COMMISSION ENSURE THAT ITS ACTIONS ARE CONSISTENT WITH THE INTENT OF FEDERAL AND STATE REGULATORY AGENCIES?

A. Yes. This case provides an excellent example of how passing to the customers the expenses associated with a utility's violation of federal law would insulate the utility management from compliance with the CWA. It is worthy of note that neither the EPA, DOJ, nor the federal Judge was ever aware that the Company might shift the expenses of litigation its customers.

In fact, the contrary was indicated. In FCWC President Mr. Allen's November 13, 1995 Deposition, taken by the DOJ, he testified as follows:

> Q. (By DOJ Attorney Jacobs) Mr. Allen, are you involved in rate making proceedings for Florida Cities Water Company?
>
> A. Yes.
>
> Q. You mentioned that approximately $2 million had been set aside for purposes of this litigation. Do you know whether any of that money has been

included in the rate base?

A. No, it has not.

Q. And do you have plans to include any of that money in the rate base?

A. Highly doubtful.

Q. Why?

A. Well, I probably do not have the expertise from an accounting perspective to really address this, but -- and maybe I was presumptuous when I said probably not. The answer is, frankly, I don't know.

Q. Actually, you said highly doubtful, not probably not.

A. Well --

Q. On what did you base that answer? What made you think it was highly doubtful?

A. We.., it depends on -- depends on a number of factors. Quite frankly, the reason I said highly doubtful is I think the commission will look at this expense with -- when I say commission, I'm talking about the public service commission -- without a lot of inclination to include it in a rate base.

Q. Why do you say that?

A. Just based on my past experience with the commission.

Q. As we sit here today, is it your intention, as the president of Florida Cities Water Company, to include in any submission to the public service commission any of these funds that have been set aside for use in this litigation; that is to say, for purposes of rate-base calculations?

A. I don't know.

Q. Well, who will make that decision?

A. Well, I think the -- first, the decision will not be made until --even to

consider whether or not to seek rate base or any other treatment of these expenses until the outcome of the case is resolved.

Thus, Mr. Allen indicated that FCWC's seeking to include expenses associated with this litigation was "highly unlikely." While Mr. Allen hastened to add that he was no expert regarding whether the expenses could be recovered through the rate making process, the matter was apparently not raised again. It is reasonable to conclude that the DOJ and the Federal Judge were under the reasonable impression that the violator - FCWC - like any other violator - would be liable for whatever penalty and expenses arose from this litigation. It is also reasonable to assume that the Court and the DOJ were aware that the Company was incurring substantial litigation expenses, and that its ability to pay any penalty would be lessened to that extent

Q. HAS THE FLORIDA PUBLIC SERVICE COMMISSION ALLOWED THE RECOVERY OF FINES AND PENALTIES IN THE RATE MAKING PROCESS?

A. To my knowledge, they have not.

Q. HAS THE FLORIDA PUBLIC SERVICE COMMISSION ALLOWED THE RECOVERY OF LEGAL FEES AND RELATED COSTS ASSOCIATED WITH FINES AND PENALTIES?

A. I am aware of two cases in which the Commission dealt with a utility's legal expenses incurred in dealing with the Department of Environmental Regulation (DER) and the Environmental Protection Agency (EPA). The first of these cases involved Lehigh Utilities, Inc., in Docket No. 911188-WS, Order No. PSC-93-0301-FOF-WS, issued February 25, 1993.

In that Order, at page 21, the Commission stated the following:

> Test Year Legal Expenses
>
> In the MFRs, a portion of the allocated A&G expenses included non-rate case related legal expenses. OPC offered no testimony in support of its position that this amount should be reduced by the amount allocated for defense of DER and Environmental Protection Agency (EPA) fines.
>
> Utility witness Ludsen testified that Lehigh should pay its allocated share of legal expenses incurred in defending SSU systems from the various governmental entities that levy fines. Witness Ludsen further testified that negotiations which may avoid or reduce fines, or eliminate or postpone large improvements to systems, are included in this expense. He also testified that allocation of legal expenses maintains stable cost assignments to systems on a year-to-year basis.
>
> Based on the foregoing, we find it appropriate to allow the utility to recover its legal expenses relating to permitting and compliance. Accordingly, no adjustment to legal expenses has been made.

It is not clear from the above quoted Order what the extent of the legal fees were, or whether they related directly to fines and penalties imposed by the Environmental Protection Agency. The last paragraph in the quoted Order which discuss this issue states, in part, that the Commission is allowing "...legal expenses relating to permitting and compliance." This description does not appear to be the same as

defending the utility in an action where the Company has been fined for violation of a requirement of the law. Obtaining permits and complying with regulations would be a normal event in the course of operations and would not be the same as legal fees incurred to defend the Company's management and stockholders against violations of statutes or regulations. Additionally, it would appear that whatever legal fees were involved in the Lehigh Utilities case were probably de minimus, since the fine involved was only $7,500. The $7,500 fine was removed as part of a stipulation as shown on page 4, Item 4 of the Order.

Q. PLEASE DISCUSS THE SECOND CASE YOU ARE AWARE OF.

A. The second case is Docket No. 960451-WS, Order No. PSC-97-0618-FOF-WS, issued May 30, 1997. I was a witness in that docket, and I recommended that the Commission remove legal fees incurred to defend EPA and DEP violations. The amount of legal fees associated with my recommendation was $453. Needless to say, there was not extensive litigation of this issue. The Commission accepted the conclusion that "...the legal expenses incurred for defending fines from DEP and EPA could facilitate avoided or a reduced amount of fines." The full discussion of the issue in the Order is as follows:

> Legal Costs for Defense of EPA or DEP Violations
>
> OPC witness Larkin identified expenses included in the base year related to legal fees incurred to defend EPA and DEP violations. He testified that the utility's ratepayers should not be required to finance such violations, as these expenses are unrelated to the provision of water and wastewater service. As such, Mr. Larkin proposed adjustments to remove these expenses from the test year. By applying the 1996 and 1997 inflation factors to the base year

amount of $431, he proposed to reduce water operations by $163 and wastewater operations by $290.

In its brief, UWF argued that the utility has a good record of compliance with environmental rules and regulations. In support of this statement, the utility referred to the testimony of an employee of the Department of Health and Rehabilitative Services (HRS) and two employees of DEP, who appeared on behalf of staff in this proceeding. In further support of UWF's position that these legal expenses should be allowed, in its brief, the utility referenced Order No. PSC-93-0301-FOF-WS. By that Order, the Commission determined that it was appropriate to allow legal expenses incurred for defense of DER (now DEP) and EPA fines, as these costs could serve to avoid or reduce fines, or eliminate or postpone large system improvements.

Although we find that fines associated with violations of DEP and EPA should be borne by the shareholders of the utility, we believe it is reasonable for UWF to recover the costs of defending such fines. As the commission previously concluded, the legal expenses incurred for defending fines from DEP and EPA could facilitate avoided or a reduced amount of fines. Therefore, we find that no such adjustments are necessary to test year expenses.

As I previously indicated, the amount of legal fees were small, only $453. I do not believe that the Order in Docket No. 960451-WS represents a precedent by the Commission, nor does it focus on the relationship between the fines and penalties and legal fees. Moreover, it is doubtful that the commission should or did there intend to establish precedent in a $453 issue which would control a multi-million dollar issue in

a later case.

It is also worthy of note that in each of the cases, the expenses were test year expenses, unlike the instant case.

It is fair to say that at least in terms of materiality, this is a case of first impression before the Florida Pubic Service Commission.

Q. WHAT DO YOU MEAN BY FOCUS ON THE RELATIONSHIP BETWEEN THE FINES AND PENALTIES AND LEGAL FEES?

A. If an expense, whether it be a fine or a penalty, is not recoverable in rates because it does not meet the standard of a necessary and prudent expense incurred in the provision of water and wastewater service, then any related expense, such as legal fees, should not be included in rates. The associated legal expense must take on the same character as the fines and penalties. To do otherwise would cause the ratepayers to be responsible for an expense associated with the primary expense which the Commission has already found ratepayers not to be responsible.

Q. IS IT NOT TRUE THAT THE LEGAL FEES MAY SERVE TO REDUCE THE FINES AND PENALTIES?

A. That may be true. However, since the fines and penalties are the responsibility of the stockholder, only the stockholder would benefit from the reductions of the fine or penalty. Consequently, the stockholders should bear the cost related to the fine or penalty. As an example, if the Commission were to find that a particular item of plant constructed by a utility should not be added to rate base because it is not used or

useful or was not prudently incurred, the Commission would not add depreciation expense to rates in order to allow the Company to recover the costs of such plant. If stockholders were not entitled to earn a rate of return on the plant, they also would not be entitled to recover their investment through depreciation expense. The depreciation expense would follow the treatment of the plant. If the plant was eliminated from the cost of service, the depreciation expense would also be removed because the two are inter-related. The same is true with EPA fines and penalties. If the fines and penalties are eliminated from the cost of service, then legal fees associated with those fines and penalties should also be eliminated from the cost of service.

Q. I NOTE IN THE ORDER YOU QUOTED FROM DOCKET NO. 960451-WS, AN ARGUMENT WAS ADVANCED BY THE COMPANY IN ITS BRIEF THAT THE LEGAL FEES COULD ELIMINATE OR POSTPONE LARGE SYSTEM IMPROVEMENTS. ALTHOUGH THE COMMISSION DID NOT ADOPT THAT PORTION OF THE COMPANY'S ARGUMENT IN APPROVING THE $453 IN LEGAL FEES, WOULD YOU PLEASE COMMENT ON THAT PROPOSITION?

A. It is my understanding that neither the DEP nor the EPA orders companies to add large system improvements. It is my understanding that these two regulatory agencies find that companies are in violation of the law and that the company itself must determine how to eliminate the violation and comply with the law. The elimination of the violation may require the addition of system improvements, it may require repair, or it may require the connection of the wastewater system to another plant. The environmental agencies either find the utility is or is not in compliance with the requirements of the law. If these agencies are mistaken as to whether a

particular utility's wastewater treatment facilities comply with the law, then normally the company's own engineers can prove the company's compliance with the requirements of the law. No legal expense would be incurred, since it would be a matter of testing to determine whether the utility complies or does not comply with the environmental requirements. Consequently, I do not see how the incurrence of legal expenses could change the requirements of the law so that a utility would not have to comply with the environmental requirements. If there are alternatives that are less costly, clearly, that is within the prerogative of the utility to make those least cost plant additions, as long as they meet the standard required by the law.

A very similar argument was advanced by the Company in its litigation. In fact, it appears that the Company scheduled the testimony of Charles Hill, of the Commission staff to make the point. Essentially, the company argued that there could be no economic advantage to the company by deferring investment. As the argument goes, the ratemaking process permits the company a return only upon investment actually made, thus investment deferred or avoided can provide no economic benefit to the company. Implicit in this argument is the notion that deferring investment inures to the benefit of the customers rather than the utility.

Q. DID THE FEDERAL COURT ADDRESS THIS ARGUMENT.

A. Indeed it did. The Court rejected the argument finding that "...the Court disagrees with Florida Cities' contention that it can only realize an economic benefit from investing, not deferring investment. [Exhibit 6 (GHB-97, p16) memorandum order dated August 20, 1996] Thus while the company may champion the customer's interest in low rates, it is clear that the company also serves its own economic

interests by deferring construction which is sometimes later found to bring about violations of laws such as the CWA.

Q. IS IT YOUR UNDERSTANDING THAT FLORIDA CITIES WATER COMPANY WAS FOUND TO BE IN VIOLATION OF THE CLEAN WATER ACT?

A. It is my understanding, based on my review of the judgement issued by the United States District Court, that Florida Cities Water Company was found to violate the National Pollutant Discharge System (NPDES), violations were at Barefoot Bay and Carrolwood, and there were claims for unpermitted discharges, discharges to an unpermitted location and NPDES violations at Waterway Estates. The Court's Order indicates that there were 269 Clean Water Act violations at Barefoot Bay, 234 Clean Water Act violations at Carrolwood, and 1,038 Clean Water Act violations at Waterway Estates. None of the Court's findings appear to deal with how Florida Cities Water Company should or might have complied with the Clean Water Act, and it does not appear to me to have been part of the litigation before the court.

In fact, it is clear that the court was faced with two issues during the trial: 1) The amount of the penalty to be assessed against FCWC, and 2) the liability of Avatar, if any. FCWC's violations of the CWA were established by summary judgement.

Q. THROUGHOUT THE COMPANY'S FILING IN THIS CASE, THE COMPANY APPEARED TO BE ARGUING THAT THE JUSTICE DEPARTMENT REPRESENTING THE ENVIRONMENTAL PROTECTION AGENCY WAS UNREASONABLE AND COULD HAVE, AND SHOULD HAVE, SETTLED THIS SUIT EARLY ON WHEN LESS LITIGATION COST WOULD HAVE

BEEN INCURRED. WOULD YOU PLEASE COMMENT?

A. The Company's filing clearly indicates that they feel that the Justice Department was unreasonable and that significant legal fees were incurred as a result of the actions of the Justice Department. Neither I, nor the Commission, has any conclusive basis as to whether the Company is right or wrong in this contention. The Federal court had adequate opportunity to agree with the Company on this point. When the company sought to recover its attorney's and costs from the federal governments, the court found that the Company "[had] not adduced sufficient proof of the bad conduct or ill motive of [the Government] in litigating these claims so as to support a finding of bad faith. [The] Government's actions and conduct herein are simply not of the character that merits awards under the bad faith exception." [Exhibit 6 (GHB-101, p9)]

To react to the Company's allegations regarding the zeal of the government's prosecution of this case is to cast the Commission in the position of djudging the quality and motives of the Government's case. This is neither a legally sanctioned nor desirable role of the Florida Commission.

Even if assuming for the sake of argument that the Company is correct and that the Justice Department's pursuit of this case was extremely aggressive, there would be no basis to ask ratepayers to pay the legal cost. Clearly, the ratepayer is not and should not be the payer of last resort. The ratepayer should not be held to pay each and every cost that the Company feels it incurs as a result of over-zealous litigation on the part of the Federal Government. Ratepayers were not in charge of the Company's system. They did not plan it, they did not operate it, and they were not responsible for the analysis, application and violation of the Clean Water Act. Therefore, the

ratepayers should not be held responsible for these legal fees on the basis of the Company's argument of over- zealous prosecution. The theory that over-zealous prosecution shifts the burden of responsibility for these legal fees from stockholders to ratepayers is not reasonable.

Financial Integrity

Q. WHAT IS YOUR UNDERSTANDING OF FLORIDA CITIES WATER COMPANY'S ARGUMENT FOR PLACING THE RESPONSIBILITY FOR THE LEGAL FEES EXPENDED BY THE COMPANY TO DEFEND THE STOCKHOLDERS ON RATEPAYERS?

A. Two of the Company's witnesses, Mr. Murphy and Mr. McClellan, advance the theory that even though the Company realizes they cannot collect the penalty from ratepayers and that the penalty is the responsibility of the stockholders, any legal fees incurred in defending the stockholders from the incurrence of the penalty is the responsibility of the ratepayer. The underlying theory of both witnesses is that, had the Company not defended the stockholders from the payment of the settlement demanded by the Justice Department, the Company would have suffered financially, even to the extent that a bankruptcy filing might have been required. Had a bankruptcy filing been required, according to the Company's witnesses, the ratepayers would have suffered, and this, therefore, justifies requiring the ratepayers to reimburse the Company for defending its stockholders.

Q. DO YOU BELIEVE THAT THE COMPANY FILING FOR CHAPTER 11 BANKRUPTCY WOULD HAVE AFFECTED THE SERVICE RECEIVED BY RATEPAYERS?

A. No, I do not. When filing for Chapter 11 Bankruptcy, the normal procedure is that the payment of liabilities of the bankrupt company are held in abeyance and the company continues to operate in the hands of the debtor (the current owners of the company). The bankruptcy court would then decide which of the debts of the entity will be discharged and whether the entity should be sold in order to discharge debts of the bankrupt firm or reorganized with a restructuring of outstanding obligations. The bankruptcy court attempts to continue to operate businesses where feasible, since an operating entity is essentially more valuable than an entity which has discontinued operations. Additionally, in a situation where health, safety and welfare are part of the responsibility of the company in bankruptcy, the court would be vigilant to ensure that the public was not adversely affected by the bankruptcy filing. Thus, the Company's argument that a bankruptcy filing would have eliminated or affected the quality of service received by ratepayers is not realistic. The primary group which would have been affected detrimentally by a bankruptcy filing would have been the Company's investors (debtholders and stockholders). The stockholders' equity would have been in jeopardy. The satisfaction of any obligation that the court found could not be satisfied through liquid assets available in the bankrupt company would have been satisfied through sale of the Company. The court would have offered the bankrupt company for sale as an operating entity both to protect the health and safety of the public and to receive the highest value from the assets. Common sense would dictate that buried pipe, which does not provide service, is of no value even if the health and safety issues related to the operation of a water and wastewater utility could be set aside. It is probable that other water and wastewater companies in the area would have taken over these facilities in a bankruptcy sale.

Whereas the company presents a worst case scenario, i.e., that bankruptcy would have occasioned a severance or termination of service, it is as reasonable for the Commission to consider an offsetting best case scenario: that the utility (albeit not the shareholders) could have emerged from the bankruptcy proceedings, debts discharged and stockholder interests extinguished. With neither debt to retire, nor equity to service, utility rates might have seen a significant lessening.

The Company's dire predictions regarding a severe deterioration or cessation of service should be seen as an extreme and unlikely scenario.

Q. COULD FCWC JUST HAVE CURTAILED SERVICE WITHOUT DECLARING BANKRUPTCY, THUS HARMING RATEPAYERS?

A. I would think not. The Florida Department of Environmental Protection is charged with the responsibility of ensuring that health and safety standards are maintained at water and wastewater facilities. If operators are not operating these systems to protect the public interest, this agency has the responsibility to take action to ensure that they do. I would conclude that the curtailment of service would not be an option to a pervasively regulated industry.

In fact, one of the Company's own witnesses, Gary H. Baise, states exactly the opposite of Company witnesses Murphy and McClellan. On page 7, of his Direct Testimony, lines 12-14 he states, "FCWC officials immediately started working with the FDEP and EPA to develop a resolution of the matter because this was a public health facility and, unlike a manufacturing facility, could not shut down for repairs or cease operation." Mr. Baise recognized that the scenario set forth by Messrs.

Murphy and McClellan was not a realistic alternative and apparently neither did the FCWC officials whom Mr. Baise stated immediately started working on a solution. Clearly, the bankruptcy curtailment of service scenario is a strawman set up by the Company to attempt to paint the ratepayer as receiving benefits from FCWC's incurrence of legal fees.

Q. IS IT POSSIBLE THAT THERE IS SOME LEVEL OF SERVICE THE COMPANY COULD HAVE CURTAILED WITHOUT JEOPARDIZING HEALTH AND SAFETY?

A. Yes. It is possible that there are repair services that could have been delayed, minor amounts that could have been saved by not responding quickly to customer complaints, etc. However, the main beneficiary of the expenses incurred to fight the fines and penalties imposed by the Environmental Protection Agency was the stockholders, not the ratepayers. Had any substantial penalty been assessed against the Company, that penalty would purportedly have required the Company to file bankruptcy, thus eliminating or placing in jeopardy the equity interest of stockholders and debtholders. A continuation of service to customers would still have gone forward, regardless of whether the current stockholders and debtholders interest would have survived. The substantial benefit of the litigation was to the stockholders.

Q. WHAT EXPERIENCE HAS LARKIN & ASSOCIATES HAD WITH BANKRUPTCY FILINGS?

A. Larkin & Associates have been accountants for the trustee in bankruptcy of Michigan Interstate Railway Company, d/b/a/ Ann Arbor Railroad System, which was in

Chapter 11 before the United States Bankruptcy Court for the Eastern District of Michigan for approximately eight years. During that time as accountants for the trustee, we issued financial statements which were filed with the bankruptcy court. At no time during the period that Michigan Interstate Railway Company was in bankruptcy did the trustee attempt to eliminate services. During the approximate eight years that the trustee was in charge of the railroad system, the process was to reorganize the operation, such that it became profitable. It was eventually sold with debtors receiving some percentage of their outstanding obligation, while stockholders received a minor return of their investment. At no time did the trustee attempt to sell-off portions of the assets, which were essential to the operation of the railroad.

In addition to our direct involvement with the above identified bankruptcy, we have participated before public utility commissions where utilities either were in bankruptcy or were experiencing financial difficulties and contemplating bankruptcy. These utilities were the El Paso Electric Company, which did go into bankruptcy, Consumer Power Company (now Consumer Energy) and Gulf States Utilities. We are currently involved in the State of Connecticut on behalf of the Office of Consumer Counsel in cases involving Connecticut Light & Power Company, a subsidiary of Northeast Utilities. This company is currently experiencing financial difficulties as a result of the failure of its nuclear units to operate. It has been our experience that even utilities under financial stress do not attempt to curtail costs which might affect the quality of service to current ratepayers. The difficulty is always involved in maintaining bond payments to debt holders on an on-going basis. Any cash flow normally is used to maintain the level of service to current ratepayers. Thus, I do not believe that a utility experiencing financial difficulty would jeopardize its operation by curtailing service to

ratepayers.

Our bankruptcy experience aside, it is a matter of general knowledge that the trustee in bankruptcy has a fiduciary duty to creditors to conserve the assets of the bankrupt's estate. It would be a serious breach of that duty to permit a utility such as Florida Cities to simply shut down to the extent that its value was reduced to salvage value. The greatest value of Florida Cities to creditors is that of a going concern; it is entirely reasonable to assume that a trustee in bankruptcy would, on behalf of creditors, ensure that Florida Cities continued to achieve a revenue stream through the routine provision of service and the continued compliance with regulatory authorities. In other words, the Company's theory concerning a decline in service, and possible cessation flies in the face

of what we know the likely result of bankruptcy to be, and ought to be rejected for that reason.

Legal Expenses in this Instance are Atypical

Q. IN MR. ALLEN'S TESTIMONY, AT PAGE 46, HE ATTEMPTS TO CHARACTERIZE THE LEGAL EXPENSES INCURRED AS NORMAL, RUN OF THE MILL, REASONABLY AND PRUDENTLY INCURRED EXPENSES. DO YOU AGREE WITH THAT CHARACTERIZATION?

A. No, I do not. Clearly, these expenses are atypical. The way the Company has asked to recover the costs, the length of time the Company has asked to recover them over, and the fact that this is a single issue rate case clearly shows that they are not typical expenses. The expenses incurred were not incurred fulfilling the Company's

obligation to provide service. They were incurred in protecting the Company's stockholders from fines and penalties, resulting from established violations of federal law, which would have affected the stockholder's equity interest.

Q. MR. ALLEN ALSO CHARACTERIZES THESE LEGAL FEES AS THE SAME AS INCURRED BY THE COMPANY IN OTHER SETTLEMENT DEMANDS BY CLAIMANTS, INCLUDING REGULATORY AGENCIES. WOULD YOU PLEASE COMMENT?

A. Mr. Allen does not give specific details of what types of claimants and what regulatory agencies the Company incurs legal fees in relationship to. However, if the legal fees incurred are the result of defending management or the Company's stockholders against violations of laws which management failed to comply with, or against tort liability in which company management was expressly found to have breached a civil duty, then they would be of the same nature as those at issue in this case and should be excluded from recovery. One cannot place a broad description over legal settlements or legal fees as the Company has attempted and state that these are of the same nature, and therefore, ought to be recovered from ratepayers. In any instance where it is discovered that a violation occurred because management failed in its responsibilities, those legal fees should not be the responsibility of ratepayers.

Criminal Legal Fees

Q. IS IT YOUR UNDERSTANDING THAT SOME OF THE LEGAL FEES INCURRED MAY HAVE BEEN FOR THE CRIMINAL DEFENSE OF SOME OF THE COMPANY'S EMPLOYEES?

A. It is not clear whether the Company has removed from the total expenses legal fees

incurred for the possible criminal prosecution of some of the Company's management. To the extent that the Company incurred legal fees for criminal defense, and those fees are included within the expenses incurred, clearly that has no benefit to ratepayers and should be removed prior to the consideration of the Commission of any recovery.

Inclusion of Unrecovered Legal Fees in Rate Base

Q. SOME OF THE COMPANY'S WITNESSES SUGGEST THAT THE UNRECOVERED LEGAL FEES THAT ARE BEING AMORTIZED OUGHT TO BE INCLUDED IN RATE BASE IN THE COMPANY'S NEXT RATE CASE FILING. DO YOU AGREE?

A. No, I do not. The recovery of the legal fees, in my opinion, is not justified, it provides no benefit to the ratepayer and was incurred to protect the stockholders' interests. To allow the Company to earn a return on these illegitimate expenses would add insult to injury. If the Commission were to decide to allow the recovery of these expenses (if it can get around the retroactive recovery issue), that is all that the Company should recover. Anything above that amount is not justified.

Q. DOES THAT CONCLUDE YOUR TESTIMONY?

A. Yes, it does.

QUALIFICATIONS OF HUGH LARKIN, JR.

Q. WHAT IS YOUR OCCUPATION?

A. I am a certified public accountant and a partner in the firm of Larkin & Associates, Certified Public Accountants, with offices at 15728 Farmington Road, Livonia, Michigan.

Q. PLEASE DESCRIBE YOUR EDUCATION AND EXPERIENCE.

A. I graduated from Michigan State University in 1960. During 1961 and 1962, I fulfilled my military obligations as an officer in the United States Army.

In 1963 I was employed by the certified public accounting firm of Peat, Marwick, Mitchell & Co., as a junior accountant. I became a certified public accountant in 1966.

In 1968 I was promoted to the supervisory level at Peat, Marwick, Mitchell & Co. As such, my duties included the direction and review of audits of various types of business organizations, including manufacturing, service, sales and regulated companies.

Through my education and auditing experience of manufacturing operations, I obtained an extensive background of theoretical and practical cost accounting.

I have audited companies having job cost systems and those having process cost systems, utilizing both historical and standard costs.

I have a working knowledge of cost control, budgets and reports, the accumulation of overheads and the application of same to products on the various recognized methods.

Additionally, I designed and installed a job cost system for an automotive parts manufacturer.

I gained experience in the audit of regulated companies as the supervisor in charge of all railroad audits for the Detroit office of Peat, Marwick, including audits of the Detroit, Toledo and Ironton Railroad, the Ann Arbor Railroad, and portions of the Penn Central Railroad Company. In 1967, I was the supervisory senior accountant in charge of the audit of the Michigan State Highway Department, for which Peat, Marwick was employed by the State Auditor General and the Attorney General.

In October of 1969, I left Peat, Marwick to become a partner in the public accounting firm of Tischler & Lipson of Detroit. In April of 1970, I left the latter firm to form the certified public accounting firm of Larkin, Chapski & Company. In September 1982 I re-organized the firm into Larkin & Associates, a certified public accounting firm. The firm of Larkin & Associates performs a wide variety of auditing and accounting services, but concentrates in the area of utility regulation and ratemaking. I am a member of the Michigan Association of Certified Public Accountants and the American Institute of Certified Public Accountants. I testified before the Michigan Public Service Commission and in other states in the following cases:

U-3749	Consumers Power Company - Electric Michigan Public Service Commission
U-3910	Detroit Edison Company Michigan Public Service Commission

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

U-4331	Consumers Power Company - Gas Michigan Public Service Commission
U-4332	Consumers Power Company - Electric Michigan Public Service Commission
U-4293	Michigan Bell Telephone Company Michigan Public Service Commission
U-4498	Michigan Consolidated Gas sale to Consumers Power Company Michigan Public Service Commission
U-4576	Consumers Power Company - Electric Michigan Public Service Commission
U-4575	Michigan Bell Telephone Company Michigan Public Service Commission
U-4331R	Consumers Power Company - Gas - Rehearing Michigan Public Service Commission
6813	Chesapeake and Potomac Telephone Company of Maryland, Public Service Commission, State of Maryland
Formal Case No. 2090	New England Telephone and Telegraph Co. State of Maine Public Utilities Commission
Dockets 574, 575, 576	Sierra Pacific Power Company, Public Service Commission, State of Nevada
U-5131	Michigan Power Company Michigan Public Service Commission
U-5125	Michigan Bell Telephone Company Michigan Public Service Commission
R-4840 & U-4621	Consumers Power Company Michigan Public Service Commission
U-4835	Hickory Telephone Company Michigan Public Service Commission
36626	Sierra Pacific Power Company v. Public Service Commission, et al, First Judicial District Court of the State of Nevada
American Arbitration Assoc.	City of Wyoming v. General Electric Cable TV
760842-TP	Southern Bell Telephone and Telegraph Company, Florida Public Service Commission

U-5331	Consumers Power Company Michigan Public Service Commission
U-5125R	Michigan Bell Telephone Company Michigan Public Service Commission
770491-TP	Winter Park Telephone Company, Florida Public Service Commission
77-554-EL-AIR	Ohio Edison Co., Public Utility Commission of Ohio
78-284-EL-AEM	Dayton Power and Light Co., Public Utility Commission of Ohio
0R78-1	Trans Alaska Pipeline, Federal Energy Regulatory Commission (FERC)
78-622-EL-FAC	Ohio Edison Co., Public Utility Commission of Ohio
U-5732	Consumers Power Company - Gas, Michigan Public Service Commission
77-1249-EL-AIR, et al	Ohio Edison Co., Public Utility Commission of Ohio
78-677-EL-AIR	Cleveland Electric Illuminating Co., Public Utility Commission of Ohio
U-5979	Consumers Power Company, Michigan Public Service Commission
790084-TP	General Telephone Company of Florida, Florida Public Service Commission
79-11-EL-AIR	Cincinnati Gas and Electric Co., Public Utilities Commission of Ohio
790316-WS	Jacksonville Suburban Utilities Corp., Florida Public Service Commission
790317-WS	Southern Utility Company, Florida Public Service Commission
U-1345	Arizona Public Service Company, Arizona Corporation Commission
79-537-EL-AIR	Cleveland Electric Illuminating Co., Public Utilities Commission of Ohio
800011-EU	Tampa Electric Company, Florida Public Service Commission

800001-EU	Gulf Power Company, Florida Public Service Commission
U-5979-R	Consumers Power Company, Michigan Public Service Commission
800119-EU	Florida Power Corporation, Florida Public Service Commission
810035-TP	Southern Bell Telephone and Telegraph Company, Florida Public Service Commission
800367-WS	General Development Utilities, Inc., Port Malabar, Florida Public Service Commission
TR-81-208**	Southwestern Bell Telephone Company, Missouri Public Service Commission
810095-TP	General Telephone Company of Florida, Florida Public Service Commission
U-6794	Michigan Consolidated Gas Company, 16 refunds Michigan Public Service Commission
U-6798	Cogeneration and Small Power Production -PURPA, Michigan Public Service Commission
810136-EU	Gulf Power Company, Florida Public Service Commission
E-002/GR-81-342	Northern State Power Company Minnesota Public Utilities Commission
820001-EU	General Investigation of Fuel Cost Recovery Clauses, Florida Public Service Commission
810210-TP	Florida Telephone Corporation, Florida Public Service Commission
810211-TP	United Telephone Co. of Florida, Florida Public Service Commission
810251-TP	Quincy Telephone Company, Florida Public Service Commission
810252-TP	Orange City Telephone Company, Florida Public Service Commission
8400	East Kentucky Power Cooperative, Inc., Kentucky Public Service Commission

U-6949	Detroit Edison Company - Partial and Immediate Rate Increase Michigan Public Service Commission
18328	Alabama Gas Corporation, Alabama Public Service Commission
U-6949	Detroit Edison Company - Final Rate Recommendation Michigan Public Service Commission
820007-EU	Tampa Electric Company, Florida Public Service Commission
820097-EU	Florida Power & Light Company, Florida Public Service Commission
820150-EU	Gulf Power Company, Florida Public Service Commission
18416	Alabama Power Company, Public Service Commission of Alabama
820100-EU	Florida Power Corporation, Florida Public Service Commission
U-7236	Detroit Edison-Burlington Northern Refund Michigan Public Service Commission
U-6633-R	Detroit Edison - MRCS Program, Michigan Public Service Commission
U-6797-R	Consumers Power Company - MRCS Program, Michigan Public Service Commission
82-267-EFC	Dayton Power & Light Company, Public Utility Commission of Ohio
U-5510-R	Consumers Power Company - Energy Conservation Finance Program, Michigan Public Service Commission
82-240-E	South Carolina Electric & Gas Company, South Carolina Public Service Commission
8624	Kentucky Utilities, Kentucky Public Service Commission
8648	East Kentucky Power Cooperative, Inc., Kentucky Public Service Commission
U-7065	The Detroit Edison Company (Fermi II), Michigan Public Service Commission
U-7350	Generic Working Capital Requirements, Michigan Public Service Commission

820294-TP	Southern Bell Telephone Company, Florida Public Service Commission
Order RH-1-83	Westcoast Gas Transmission Company, Ltd., Canadian National Energy Board
8738	Columbia Gas of Kentucky, Inc., Kentucky Public Service Commission
82-168-EL-EFC	Cleveland Electric Illuminating Company, Public Utility Commission of Ohio
6714	Michigan Consolidated Gas Company Phase II, Michigan Public Service Commission
82-165-EL-EFC	Toledo Edison Company, Public Utility Commission of Ohio
830012-EU	Tampa Electric Company, Florida Public Service Commission
ER-83-206**	Arkansas Power & Light Company, Missouri Public Service Commission
U-4758	The Detroit Edison Company - (Refunds), Michigan Public Service Commission
8836	Kentucky American Water Company, Kentucky Public Service Commission
8839	Western Kentucky Gas Company, Kentucky Public Service Commission
83-07-15	Connecticut Light & Power Company, Department of Utility Control State of Connecticut
81-0485-WS	Palm Coast Utility Corporation, Florida Public Service Commission
U-7650	Consumers Power Company - (Partial and Immediate), Michigan Public Service Commission
83-662**	Continental Telephone Company, Nevada Public Service Commission
U-7650	Consumers Power Company - Final Michigan Public Service Commission
U-6488-R	Detroit Edison Co. (FAC & PIPAC Reconciliation), Michigan Public Service Commission
Docket No. 15684	Louisiana Power & Light Company, Public Service Commission of the State of Louisiana

U-7650 Reopened	Consumers Power Company (Reopened Hearings) Michigan Public Service Commission
38-1039**	CP National Telephone Corporation Nevada Public Service Commission
83-1226	Sierra Pacific Power Company (Re application to form holding company), Nevada Public Service Commission
U-7395 & U-7397	Campaign Ballot Proposals Michigan Public Service Commission
820013-WS	Seacoast Utilities Florida Public Service Commission
U-7660	Detroit Edison Company Michigan Public Service Commission
U-7802	Michigan Gas Utilities Company Michigan Public Service Commission
830465-EI	Florida Power & Light Company Florida Public Service Commission
U-7777	Michigan Consolidated Gas Company Michigan Public Service Commission
U-7779	Consumers Power Company Michigan Public Service Commission
U-7480-R	Michigan Consolidated Gas Company Michigan Public Service Commission
U-7488-R	Consumers Power Company - Gas Michigan Public Service Commission
U-7484-R	Michigan Gas Utilities Company Michigan Public Service Commission
U-7550-R	Detroit Edison Company Michigan Public Service Commission
U-7477-R	Indiana & Michigan Electric Company Michigan Public Service Commission
U-7512-R	Consumers Power Company - Electric Michigan Public Service Commission
18978	Continental Telephone Company of the South - Alabama, Alabama Public Service Commission

9003	Columbia Gas of Kentucky, Inc. Kentucky Public Service Commission
R-842583	Duquesne Light Company Pennsylvania Public Utility Commission
9006*	Big Rivers Electric Corporation Kentucky Public Service Commission *Company withdrew filing
U-7830	Consumers Power Company - Electric (Partial and Immediate) Michigan Public Service Commission
7675	Consumers Power Company - Customer Refunds Michigan Public Service Commission
5779	Houston Lighting & Power Company Texas Public Utility Commission
U-7830	Consumers Power Company - Electric - "Financial Stabilization" Michigan Public Service Commission
U-4620	Mississippi Power & Light Company (Interim) Mississippi Public Service Commission
U-16091	Louisiana Power & Light Company Louisiana Public Service Commission
9163	Big Rivers Electric Corporation Kentucky Public Service Commission
U-7830	Consumers Power Company - Electric - (Final) Michigan Public Service Commission
U-4620	Mississippi Power & Light Company - (Final) Mississippi Public Service Commission
76-18788AA & 76-18793AA	Detroit Edison (Refund - Appeal of U-4807) Ingham County Circuit Court Michigan Public Service Commission
U-6633-R	Detroit Edison (MRCS Program Reconciliation) Michigan Public Service Commission
19297	Continental Telephone Company of the South - Alabama, Alabama Public Service Commission
9283	Kentucky American Water Company Kentucky Public Service Commission
850050-EI	Tampa Electric Company Florida Public Service Commission

R-850021	Duquesne Light Company Pennsylvania Public Service Commission
TR-85-179**	United Telephone Company of Missouri Missouri Public Service Commission
6350	El Paso Electric Company The Public Utility Board of the City of El Paso
6350	El Paso Electric Company Public Utility Commission of Texas
85-53476AA & 85-534855AA	Detroit Edison-refund-Appeal of U-4758 Ingham County Circuit Court Michigan Public Service Commission
U-8091/ U-8239	Consumers Power Company-Gas Michigan Public Service Commission
9230	Leslie County Telephone Company, Inc. Kentucky Public Service Commission
85-212	Central Maine Power Company Maine Public Service Commission
850782-EI & 850783-EI	Florida Power & Light Company Florida Public Service Commission
ER-85646001 & ER-85647001	New England Power Company Federal Energy Regulatory Commission
Civil Action * No. 2:85-0652	Allegheny & Western Energy Corporation, Plaintiff, - against - The Columbia Gas System, Inc., Defendant
Docket No. 850031-WS	Orange Osceola Utilities, Inc. Before the Florida Public Service Commission
Docket No. 840419-SU	Florida Cities Water Company South Ft. Myers Sewer Operations Before the Florida Public Service Commission
R-860378	Duquesne Light Company Pennsylvania Public Service Commission
R-850267	Pennsylvania Power Company Pennsylvania Public Service Commission
R-860378	Duquesne Light Company - Surrebuttal Testimony - OCA Statement No. 2D Pennsylvania Public Service Commission

Docket No. 850151	Marco Island Utility Company Before the Florida Public Service Commission
Docket No. 7195 (Interim)	Gulf States Utilities Company Public Utility Commission of Texas
R-850267 Reopened	Pennsylvania Power Company Pennsylvania Public Service Commission
Docket No. 87-01-03	Connecticut Natural Gas Corporation Connecticut Department of Public Utility Control
Docket No. 5740	Hawaiian Electric Company Hawaii Public Utilities Commission
1345-85-367	Arizona Public Service Company Arizona Corporation Commission
Docket 011 No. 86-11-019	Tax Reform Act of 1986 - California Generic California Public Utilities Commission
Case No. 29484	Long Island Lighting Company New York Department of Public Service
Docket No. 7460	El Paso Electric Company Public Utility Commission of Texas
Docket No. 870092-WS*	Citrus Springs Utilities Before the Florida Public Service Commission
Case No. 9892	Dickerson Lumber EP Company - Complainant vs. Farmers Rural Electric Cooperative and East Kentucky Power Cooperative - Defendants Before the Kentucky Public Service Commission
Docket No. 3673-U	Georgia Power Company Before the Georgia Public Service Commission
Docket No. U-8747	Anchorage Water and Wastewater Utility Report on Management Audit
Docket No. 861564-WS	Century Utilities Before the Florida Public Service Commission
Docket No. FA86-19-001	Systems Energy Resources, Inc. Federal Energy Regulatory Commission
Docket No. 870347-TI	AT&T Communications of the Southern States, Inc. Florida Public Service Commission

Docket No. 870980-WS	St. Augustine Shores Utilities Inc. Florida Public Service Commission
Docket No. 870654-WS*	North Naples Utilities, Inc. Florida Public Service Commission
Docket No. 870853	Pennsylvania Gas & Water Company Pennsylvania Public Utility Commission
Civil Action* No. 87-0446-R	Reynolds Metals Company, Plaintiff, v. The Columbia Gas System, Inc., Commonwealth Gas Services, Inc., Commonwealth Gas Pipeline Corporation, Columbia Gas Transmission Corporation, Columbia Gulf Transmission Company, Defendants - In the United States District Court for the Eastern District of Virginia - Richmond Division
Docket No. E-2, Sub 537	Carolina Power & Light Company North Carolina Utilities Commission
Case No. U-7830	*Consumers Power Company - Step 2 Reopened* Michigan Public Service Commission
Docket No. 880069-TL	Southern Bell Telephone & Telegraph Florida Public Service Commission
Case No. U-7830	Consumers Power Company - Step 3B Michigan Public Service Commission
Docket No. 880355-EI	Florida Power & Light Company Florida Public Service Commission
Docket No. 880360-EI	Gulf Power Company Florida Public Service Commission
Docket No. FA86-19-002	System Energy Resources, Inc. Federal Energy Regulatory Commission
Docket Nos. 83-0537-Remand & 84-0555-Remand	Commonwealth Edison Company Illinois Commerce Commission
Docket Nos. 83-0537-Remand & 84-0555-Remand	*Commonwealth Edison Company -Surrebuttal* Illinois Commerce Commission
Docket No. 880537-SU	Key Haven Utility Corporation Florida Public Service Commission
Docket No. 881167-EI***	Gulf Power Company Florida Public Service Commission

Docket No. 881503-WS	Poinciana Utilities, Inc. Florida Public Service Commission
Cause No. U-89-2688-T	Puget Sound Power & Light Company Washington Utilities & Transportation Committee
Docket No. 89-68	Central Maine Power Company Maine Public Utilities Commission
Docket No. 861190-PU	Proposal to Amend Rule 25-14.003, F.A.C. Florida Public Service Commission
Docket No. 89-08-11	The United Illuminating Company State of Connecticut, Department of Public Utility Control
Docket No. R-891364	The Philadelphia Electric Company Pennsylvania Public Utility Commission
Formal Case No. 889	Potomac Electric Power Company Public Service Company of the District of Columbia
Case No. 88/546*	Niagara Mohawk Power Corporation, et al Plaintiffs, v. Gulf+Western, Inc. et al, defendants (In the Supreme Court County of Onondaga, State of New York)
Case No. 87-11628*	Duquesne Light Company, et al, plaintiffs, against Gulf + Western, Inc. et al, defendants (In the Court of the Common Pleas of Allegheny County, Pennsylvania Civil Division)
Case No. 89-640-G-42T*	Mountaineer Gas Company West Virginia Public Service Commission
Docket No. 890319-EI	Florida Power & Light Company Florida Public Service Commission
Docket No. EM-89110888	Jersey Central Power & Light Company Board of Public Utilities Commissioners
Docket No. 891345-EI	Gulf Power Company Florida Public Service Commission
BPU Docket No. ER 8811 0912J	Jersey Central Power & Light Company Board of Public Utilities Commissioners
Docket No. 6531	Hawaiian Electric Company Hawaii Public Utilities Commissioners
Docket No. 890509-WU	Florida Cities Water Company, Golden Gate Division Florida Public Service Commission

Docket No. 880069-TL	Southern Bell Telephone Company Florida Public Service Commission
Docket Nos. F-3848, F-3849, and F-3850	Northwestern Bell Telephone Company South Dakota Public Utilities Commission
Docket Nos. ER89-* 678-000 & EL90-16-000	System Energy Resources, Inc. Federal Energy Regulatory Commission
Docket No. 5428	Green Mountain Power Corporation Vermont Department of Public Service
Docket No. 90-10	Artesian Water Company, Inc. Delaware Public Service Commission
Case No. 90-243-E-42T*	Wheeling Power Company West Virginia Public Service Commission
Docket No. 900329-WS	Southern States Utilities, Inc. Florida Public Service Commission
Docket Nos. ER89-* 678-000 & EL90-16-000	System Energy Resources, Inc. (Surrebuttal) Federal Energy Regulatory Commission
Application No. 90-12-018	Southern California Edison Company California Public Utilities Commission
Docket No. 90-0127	Central Illinois Lighting Company Illinois Commerce Commission
Docket No. FA-89-28-000	System Energy Resources, Inc. Federal Energy Regulatory Commission
Docket No. U-1551-90-322	Southwest Gas Corporation Before the Arizona Corporation Commission
Docket No. R-911966	Pennsylvania Gas & Water Company The Pennsylvania Public Utility Commission
Docket No. 176-717-U	United Cities Gas Company Kansas Corporation Commission
Docket No. 860001-EI-G	Florida Power Corporation Florida Public Service Commission
Docket No. 6720-TI-102	Wisconsin Bell, Inc. Wisconsin Citizens' Utility Board
(No Docket No.)	Southern Union Gas Company Before the Public Utility Regulation Board of the City of El Paso
Docket No. 6998	Hawaiian Electric Company, Inc.

	Before the Public Utilities Commission of the State of Hawaii
Docket No. TC91-040A	In the Matter of the Investigation into the Adoption of a Uniform Access Methodology Before the Public Utilities Commission of the State of South Dakota
Docket Nos. 911030-WS & 911067-WS	General Development Utilities, Inc. Before the Florida Public Service Commission
Docket No. 910890-EI	Florida Power Corporation Before the Florida Public Service Commission
Docket No. 910890-EI	Florida Power Corporation, Supplemental Before the Florida Public Service Commission
Case No. 3L-74159	Idaho Power Company, an Idaho corporation In the District Court of the Fourth Judicial District of the State of Idaho, In and For the County of Ada - Magistrate Division
Cause No. 39353*	Indiana Gas Company Before the Indiana Utility Regulatory Commission
Docket No. 90-0169 (Remand)	Commonwealth Edison Company Before the Illinois Commerce Commission
Docket No. 92-06-05	The United Illuminating Company State of Connecticut, Department of Public Utility Control
Cause No. 39498	PSI Energy, Inc. Before the State of Indiana - Indiana Utility Regulatory Commission
Cause No. 39498	PSI Energy, Inc. - Surrebuttal testimony Before the State of Indiana - Indiana Utility Regulatory Commission
Docket No. 7287	Public Utilities Commission - Instituting a Proceeding to Examine the Gross-up of CIAC Before the Public Utilities Commission of the State of Hawaii
Docket No. 92-227-TC	US West Communications, Inc. Before the State Corporation Commission of the State of New Mexico
Docket No. 92-47	Diamond State Telephone Company Before the Public Service Commission of the State of Delaware
Docket Nos. 920733-WS	General Development Utilities, Inc. & 920734-WS Before the Florida Public Service Commission
Docket No. 92-11-11	Connecticut Light & Power Company State of Connecticut, Department of Public Utility Control
Docket Nos.EC92-21-000	Entergy Corporation

& ER92-806-000	Before the Federal Energy Regulatory Commission
Docket No. 930405-EI	Florida Power & Light Company Before the Florida Public Service Commission
Docket No. UE-92-1262	Puget Sound Power & Light Company Before the Washington Utilities & Transportation Commission
Docket No. 93-02-04	Connecticut Natural Gas Corporation State of Connecticut, Department of Public Utility Control
Docket No. 93-02-04	Connecticut Natural Gas Corporation Supplemental State of Connecticut, Department of Public Utility Control
Docket No. 93-057-01	Mountain Fuel Supply Company Before the Utah Public Service Commission
Cause No. 39353 (Phase II)	Indiana Gas Company Before the Indiana Utility Regulatory Commission
PU-314-92-1060	US West Communications, Inc. Before the North Dakota Public Service Commission
Cause No. 39713	Indianapolis Water Company Before the Indiana Utility Regulatory Commission
93-UA-0301*	Mississippi Power & Light Company Before the Mississippi Public Service Commission
Docket No. 93-08-06	SNET America, Inc. State of Connecticut, Department of Public Utility Control
Docket No. 93-057-01	Mountain Fuel Supply Company - Rehearing on Unbilled Revenues - Before the Utah Public Service Commission
Case No. 78-T119-0013-94	Guam Power Authority vs. U.S. Navy Public Works Center, Guam - Assisting the Department of Defense in the investigation of a billing dispute. Before the American Arbitration Association
Application No. 93-12-025 - Phase I	Southern California Edison Company (Before the California Public Utilities Commission)
Case No. 94-0027-E-42T	Potomac Edison Company (Before the Public Service Commission of West Virginia)
Case No. 94-0035-E-42T	Monongahela Power Company (Before the Public Service Commission of West Virginia)
Docket No. 930204-WS**	Jacksonville Suburban Utilities Corporation (Before the Florida Public Service Commission)

Docket No. 5258-U	Southern Bell Telephone and Telegraph Company (Before the Georgia Public Service Commission)
Case No. 95-0011-G-42T*	Mountaineer Gas Company (Before the West Virginia Public Service Commission)
Case No. 95-0003-G-42T*	Hope Gas, Inc. (Before the West Virginia Public Service Commission)
Docket No. 95-02-07	Connecticut Natural Gas Corporation State of Connecticut, Department of Public Utility Control
Docket No. 95-057-02*	Mountain Fuel Supply Before the Utah Public Service Commission
Docket No. 95-03-01	Southern New England Telephone Company State of Connecticut, Department of Public Utility Control
BRC Docket No. EX93060255 OAL Docket PUC96734-94	Generic Proceeding Regarding Recovery of Capacity Costs Associated with Electric Utility Power Purchases from Cogenerators and Small Power Producers Before the New Jersey Board of Public Utilities
Docket No. U-1933-95-317	Tucson Electric Power Before the Arizona Corporation Commission
Docket No. 950495-WS	Southern States Utilities Before the Florida Public Service Commission
Docket No. 960409-EI	Prudence Review to Determine Regulatory Treatment of Tampa Electric Company's Polk Unit 1
Docket No. 960451-WS	United Water Florida Before the Florida Public Service Commission
Docket No. 96-UA-389	Generic Docket to Consider Competition in the Provision of Retail Electric Service Before the Public Service Commission of the State of Mississippi

*Case Settled
**Issues Stipulated
***Company withdrew case

Additionally, I performed an investigation and analysis of Michigan Consolidated Gas Company and participated in the discussion which led to the settlement of Michigan Consolidated rate case which was culminated in Rate Order U-4166.

From April 28, 1975, to March 15, 1976, I was under contract to the Michigan House of Representatives as Technical Staff Director of a Special House Committee to study and evaluate the effectiveness of the Michigan Public Service Commission and the rates and service of public utilities. As Technical Staff Director, I supervised personnel loaned to the Committee from the State Auditor General's Office. The reports to that Committee prepared by myself and Allen Briggs, an attorney, to revise utility regulation, were adopted in virtually all material respects in its final report and recommendations and served as a basis of numerous bills introduced in the 1976 and 1977 sessions of the legislature. The Staff of the Committee, under my direction, investigated and reported to the Committee on numerous regulatory issues, including ratepayer participation in utility regulation, fuel cost adjustment clauses, purchased gas adjustment

clauses, comparative electric, gas and telephone rates, treatment of subsidiaries of utilities in ratemaking, research and planning capabilities of the Michigan Public Service Commission, utility advertising, regulatory oversight of utility management, deferred taxes in ratemaking and the organizational structure and functions of the Michigan Public Service Commission.

In the course of my work as a certified public accountant, I advise clients concerning the obtaining of capital funds, and have worked with banking institutions in obtaining loans. I have participated in negotiating the sale and purchase of businesses for clients, in connection with which I have valued the physical assets of various business firms, and also determined the value of present and future earnings measured by market rates of return. I have participated in acquisition audits on behalf of large national companies interested in acquiring smaller companies.

My testimony in utility rate cases has been sponsored by state Attorney Generals, groups of municipalities, a district attorney, Peoples' Counsel, Public Counsel, a ratepayers' committee, and I have also worked as a Staff Consultant to the Arizona Corporation Commission.

In November 1985, with two members of the firm, I presented a seminar on utility accounting for the Legal Services *Regional Utilities Task Force in Atlanta, Georgia.*

In September, 1988, with two members of the firm, I presented a seminar on utility accounting for the Office of Consumer Advocate, Attorney General's Office, State of Pennsylvania. Individuals from that division as well as Commission Staff members attended.

MS. GERVASI: Staff would like to at this time have the prefiled direct testimony of Ms. Patricia W. Merchant inserted into the record as though read.

CHAIRMAN JOHNSON: It will be so inserted.

MS. GERVASI: And she has no prefiled exhibits.

CHAIRMAN JOHNSON: Okay.

MR. GATLIN: I would like to offer for identification the deposition of Pat W. Merchant for the record.

CHAIRMAN JOHNSON: We'll mark that Exhibit 17, short titled "Deposition transcript of Merchant."

(Exhibit 17 marked for identification.)

TLG

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DOCKET NO.: 971663-WS - Florida Cities Water Company

WITNESS: **Direct Testimony of Patricia W. Merchant,** Appearing on Behalf of Staff

DATE FILED: JUNE 19, 1998

DOCUMENT NUMBER-DATE
06535 JUN 19 98
FPSC-RECORDS/REPORTING

DIRECT PREFILED TESTIMONY OF PATRICIA W. MERCHANT

Q. Please state your name and professional address.

A. My name is Patricia W. Merchant and my business address is 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850.

Q. By whom are you employed and in what capacity?

A. I am employed by the Florida Public Service Commission as a Public Utilities Supervisor in the Division of Water and Wastewater.

Q. How long have you been employed by the Commission?

A. I started working at the Commission in September 1981.

Q. Would you state your educational background and experience?

A. I received a Bachelor of Science degree with a major in accounting from Florida State University in August 1981. Upon graduation, I was employed by the Commission as a Public Utilities Auditor in what is now the Division of Auditing and Financial Analysis. My primary responsibility in that capacity was to perform audits on the books and records of electric, gas, telephone, water and wastewater public utilities. In August 1983, I joined what is now the Division of Water and Wastewater as a Regulatory Analyst in the Bureau of Accounting. In May 1989, I became a Regulatory Analyst Supervisor in what is now the Accounting Section of the Bureau of Economic Regulation, in which capacity I am currently employed. I have attended various regulatory seminars and Commission in-house training and professional development meetings concerning regulatory matters.

Q. Are you a Certified Public Accountant?

A. Yes, I am. In September 1983, I received a certificate and a license to practice in the State of Florida by the Florida Board of Accountancy.

Q. Are you a member of any professional associations?

A. Yes. I am a member in good standing of the American Institute of Certified Public Accountants and the Florida Institute of Certified Public Accountants (FICPA). I am a former member of the Board of Governors of the FICPA and was the President of the Tallahassee Chapter of the FICPA for the year ended June 30, 1994. I currently am the Vice Chair of the Florida State University Accounting Conference Committee of the FICPA.

Q. Have you ever testified before the Florida Public Service Commission?

A. Yes, in Docket No. 840047-WS, Application of Poinciana Utilities, Inc. for increased water and wastewater rates; in Docket No. 850031-WS, Application of Orange/Osceola Utilities, Inc. for increased water and wastewater rates; in Docket No. 850151-WS, Application of Marco Island Utilities for increased water and wastewater rates; in Docket No. 881030-WU, Investigation of Sunshine Utilities rates for possible over earnings; in Docket No. 940847-WS, Application of Ortega Utility Company for increased water and wastewater rates; and in Docket No. 911082-WS, Water and Wastewater Rule Revisions to Chapter 25-30, Florida Administrative Code.

Q. Were you accepted as an expert in regulatory accounting?

A. Yes, I was.

Q. Have you ever testified before any other tribunals as an expert in regulatory accounting?

A. Yes. I testified before the Division of Administrative Hearings, Case No. 97-2485RU, Aloha Utilities, Inc., and Florida Waterworks Association, Inc., Petitioners, vs. Public Service Commission, Respondent, and Citizens of the State of Florida, Office of Public Counsel, Intervenors.

Q. Would you explain what your general responsibilities are as a Public Utilities Supervisor in the Accounting Section of the Bureau of Economic Regulation?

A. I am responsible for the supervision of five professional accountants in the accounting section. This section is responsible for the financial, accounting and rates review and evaluation of complex formal rate proceedings before the Commission. This specifically includes the analysis of file and suspend rate cases, overearnings investigations and limited proceedings of Class A and B water and wastewater utilities under the jurisdiction of the Florida Public Service Commission. The accounting section is also responsible for the review of smaller filings of Class A and B utilities, such as allowance for funds used during construction (AFUDC), allowance for funds prudently invested (AFPI), service availability applications, and tariff filings. This section coordinates, prepares and presents staff recommendations before the Commission on the above type cases. This section is also responsible for preparing testimony, testifying and writing cross-examination questions for hearings involving complex accounting and financial issues.

Q. Can you summarize the issues to which you are providing testimony?

A. I am testifying about Florida Cities Water Company's (FCWC) requested method of allocating litigation fees incurred to all FCWC water and wastewater customers. I am also providing opinion testimony regarding when or if environmental legal fees should be recovered by a utility's customers. Further, I address the accounting classification of any revenues which may be collected from the customers.

Q. Please explain your testimony regarding the allocation to all FCWC customers.

A. FCWC has requested that all of its water and wastewater customers reimburse the company for litigation expenses incurred in FCWC's defense against the U.S. Department of Justice (DOJ) and the U.S. Environmental Protection Agency (EPA). FCWC claims that the DOJ proposed penalties were of such magnitude, that any payment of these penalties would have severely damaged the financial integrity of FCWC. According to FCWC, by litigating these actions, FCWC preserved all systems from such calamity, thus benefitting all FCWC customers.

Q. Was FCWC ultimately required to pay the maximum penalty sought by the DOJ?

A. No. FCWC was fined a total of $309,710 for violations of the Clean Water Act (CWA). This was made up of $289,425 for the Waterway Estates Wastewater Treatment Plant (North Ft. Myers), $14,675 for the Carrollwood Wastewater Treatment Plant (Hillsborough County), and $5,610 for the Barefoot Bay Wastewater Treatment Plant (Brevard County). The utility incurred a total of $3,826,210 for legal fees in defense of its violations of the CWA.

Q. How did the utility account for these legal fees on its books?

A. During the early years the utility capitalized some portion of these costs for the expansion of the North Ft. Myers wastewater treatment plant. During 1994, FCWC began expensing these legal fees below the line for rate setting purposes. FCWC had written off all of these costs prior to 1997.

Q. Did the write-off of the penalties and legal fees cause any severe financial damages to FCWC?

A. No, in my opinion, they did not. FCWC has not filed bankruptcy or documented any direct financial harm caused by the write-off of these costs.

Q. In your opinion, should the threat of severe financial harm to FCWC resulting from the DOJ proposed penalties be considered the burden of all FCWC's water and wastewater customers?

A. No, it should not. These costs were incurred because of violations at specific wastewater facilities of FCWC. As Commission witness Moniz testifies, FCWC's rates for all but two systems have been set on a system-specific basis and are not uniform. The only facilities that have uniform rates are the North and South Ft. Myers water systems. To assume that the legal fees incurred for three wastewater systems found in violation of the CWA are the shared burden of all water and non-involved wastewater customers is inappropriate. These legal fees are not a cost of providing water service, nor are they a cost of wastewater service to any of the other FCWC wastewater facilities not penalized.

Q. Do you have an opinion regarding when or if environmental legal fees should be recovered by a utility's customers?

A. Yes. In general, legal costs prudently incurred by a utility for maintaining environmental compliance or bringing a utility into compliance with new environmental regulations should be considered a normal cost of doing business. If a utility can show that legal fees incurred for environmental compliance were prudent and sufficiently documented, then those costs should be recovered from the ratepayers. In a circumstance when an environmental agency claims that a utility is in non-compliance with environmental standards and a utility disputes this and ultimately is found to be in compliance, then

the Commission should look at the specifics in each case to decide whether the utility prudently incurred legal fees in its defense of these claims. It is also common for utilities to incur legal fees in conjunction with a penalty or a consent order. I do not believe that just because penalties were incurred that the associated legal fees should always be disallowed. If a utility can show that the legal fees in such a case minimized or avoided increased plant or operational costs to provide service, then such costs could be considered beneficial to the customers and this should be considered on a case by case basis. As long as the utility sufficiently justifies that the legal fees incurred were prudent and not excessive, then the legal fees, exclusive of the penalty, should be recovered through rates.

Q. What are some circumstances when environmental legal fees should not be recovered by the customers?

A. First, if a utility fails to provide sufficient documentation supporting its requested expenses or the amounts are deemed excessive or imprudent, then those costs should be disallowed. It is the utility's burden to show that its requested expenses are prudent and reasonable. Further, if the utility fails to show that it acted prudently to maintain compliance with environmental requirements, or that its defense mitigated other costs that might have otherwise been incurred in connection with violations, then the associated legal fees should be borne by the shareholders. The mere fact that a utility incurs legal fees associated with a penalty does not automatically require that those fees should be borne by the customers.

Q. Has the Commission addressed some of these issues in prior cases?

A. Yes. In Order No. PSC-97-1547-FOF-WS, (issued December 12, 1997, in

Docket No. 970521-WS, Betmar Utilities, Inc.), the Commission denied $1,245 in legal fees associated with contesting allegations of a Florida Department of Environmental Protection (DEP) consent order. The utility stated that the legal fees incurred were legitimate utility expenses in connection with a DEP consent order and as such, should be recovered. The Commission found that even if the legal fees were found to be prudent, the utility failed to meet its burden by its failure to provide supporting documentation to support its legal fees. In Order No. PSC-93-0423-FOF-WS (issued March 22, 1993, in Docket No. 920199-WS, Southern States Utilities, Inc.), the Commission allowed legal fees associated with environmental fines because the evidence supported that the ratepayers benefitted from the utility's defending itself in regulatory proceedings. If the utility succeeds, rate base or other expenses may be lower. In Order No. PSC-93-1070-FOF-WS (issued July 23, 1993, in Docket No. 920655-WS, Southern States Utilities, Inc. - Marco Island), the Commission found that the suggestion that legal fees be disallowed because they were incurred to defend the utility against alleged violations presupposes that the utility should acquiesce in all cases, whether or not fault exists. Litigation may be appropriate even when imposition of a fine is a possibility, when compliance with a disputed regulation will create adverse economic consequences. On other occasions, payment of a fine pursuant to a consent order, even when "guilt" is not admitted, may result in avoidance of further litigation costs that would be detrimental to a utility's financial condition. The Commission found that an absolute prohibition against recovery of legal fees in any proceeding where a fine may be imposed would be impractical. In that docket, the Commission was addressing test year legal fees of $20,738,

not all of which related to contesting environmental compliance with the EPA and DEP.

Q. How was this issued addressed by the Commission for other industries?

A. In Order No. PSC-97-1047-FOF-EI (issued September 5, 1997, in Docket No. 970007-EI, Investor-Owned Electric Utilities), the Commission accepted a stipulation that legal expenses directly associated with environmental compliance activities approved by the Commission incurred in order to comply with environmental laws or regulations should be recovered. However, the Commission stated that those costs will continue to be examined on a case-by-case basis in order to determine the prudence of its recovery. In Order No. 20162 (issued October 13, 1988, in Docket No. 880069-TL, Southern Bell), the Commission denied recovery of expenses incurred in the settlement of antitrust cases. The Commission found that Southern Bell had not shown that the expenses were reasonable or to the benefit of Florida ratepayers.

Q. Are you testifying to the issue of whether or not any costs should be recovered by the FCWC customers?

A. No, I am not recommending specifically as to whether or not any costs incurred by FCWC should be recovered through customer rates. If the Commission finds that FCWC has shown that the legal fees were reasonable and prudent and were incurred to maintain compliance, or to minimize or avoid other increased plant or operational costs to provide service, then it may be appropriate for some amount of legal fees associated with this litigation to be recovered by FCWC's customers. I am not testifying as to whether FCWC has met this burden in this case, or what amount, if any, should be considered prudent or reasonable.

Q. If the Commission does allow some costs to be recovered by the customers, how should they be allocated?

A. Any allowed costs should only be recovered from the North Ft. Myers, Barefoot Bay and Carrollwood wastewater customers. The fees should be allocated between these customers based on the evidence in the record that shows what costs were incurred to maintain compliance or how FCWC minimized or avoided other increased plant or operational costs.

Q. Please describe the accounting treatment for any amounts collected from the customers associated with these legal fees.

A. Any amounts collected from the customers to reimburse the utility for litigation costs incurred would be considered utility operating revenues and as such regulatory assessment fees are required to be collected on those amounts. These revenues should be recorded in Account No. 536, Other Wastewater Revenues. According to Section 367.145, Florida Statutes, regulatory assessment fees are based on 4.5 percent of gross revenues of the utility derived from intrastate business. The only exemption in the statute is for sales for resale made to a regulated company.

Q. Does this conclude your testimony?

A. Yes, it does.

MS. GERVASI: Staff would like to have the prefiled direct testimony of Ms. Sally H. Moniz inserted into the record as though read.

CHAIRMAN JOHNSON: It will be so inserted.

MS. GERVASI: Thank you.

DOCKET NO.: 971663-WS - Florida Cities Water Company

WITNESS: **Direct Testimony of Sarah (Sally) H. Moniz,** Appearing on Behalf of Staff

DATE FILED: JUNE 19, 1998

DOCUMENT NUMBER-DATE
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FPSC-RECORDS/REPORTING

DIRECT PREFILED TESTIMONY OF SARAH (SALLY) H. MONIZ

Q. Please state your name and professional address.

A. My name is Sarah (Sally) H. Moniz and my business address is 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0873.

Q. By whom are you employed and in what capacity?

A. I am employed by the Florida Public Service Commission (FPSC) as a Professional Accountant Specialist in the Division of Water and Wastewater.

Q. How long have you been employed by the Commission?

A. Since June, 1990.

Q. Please state your educational background.

A. I received a Bachelor of Business Administration degree with a Major in Accounting from Valdosta State College, which is now Valdosta State University, in August, 1981.

Q. Please describe your employment history and experience in the field of regulatory accounting.

A. In June of 1990, I began my employment with the Florida Public Service Commission, in the Division of Water and Wastewater. While employed with the Commission I have held the following positions: Regulatory Analyst II from June 1990 to November 1991; Regulatory Analyst III from November 1991 until October 1, 1994; and Regulatory Analyst IV from October 1994 until October 1996. In October of 1996, I was promoted to my present position as a Professional Accountant Specialist in the Bureau of Economic Regulation. Since my employment with the FPSC, I have attended various regulatory seminars and Commission in-house training and professional development meetings concerning regulatory matters. Additionally, I have participated in numerous

rate proceedings on behalf of Commission staff.

Q. Please explain your duties as a Professional Accountant Specialist in the Accounting Section of the Bureau of Economic Regulation.

A. As a professional accountant, I am responsible for financial, accounting and rate reviews and evaluations of complex formal rate proceedings before the Commission. This specifically includes the analysis of file and suspend rate cases, overearnings investigations and limited proceedings of Class A and B water and wastewater utilities under the jurisdiction of the FPSC. I am also responsible for reviewing smaller filings of Class A and B utilities, such as allowance for funds used during construction (AFUDC), allowance for funds prudently invested (AFPI), service availability applications and tariff filings. I coordinate, prepare, and present staff recommendations before the Commission on the above type cases. In addition, I am responsible for preparing testimony, testifying and writing deposition and cross-examination questions for hearings involving complex accounting and financial issues.

Q. Please describe your employment history in other areas of accounting.

A. Prior to my employment with the Commission, I held the following positions: Budget Specialist in the Office of Planning and Budget with the Florida Department of General Services, from May 1989 until June 1990; Accounting Supervisor in the Comptroller's office of the Florida Department of Transportation from October 1988 until May 1989; Accountant with the Georgia Department of Family and Children Services from September 1986 through October 1988; Staff Accountant with Callahan and Company, C.P.A.'s in Donalsonville, Georgia, from April 1986 until September 1986; Staff Accountant with Burke-Burke and Company, C.P.A.'s, Donalsonville, Georgia, from January

1985 until April 1986; Accounting Instructor, Gordon Junior College, Barnsville, Georgia, January 1984 until June 1984; Retail Cost Accountant Gold Kist, Inc., South East Division, Moultrie, Georgia, February 1982 until August 1983.

Q. What is the purpose of your testimony?

A. To discuss the regulatory treatment utilized by the Commission or reflected in prior Commission orders relating to Florida Cities Water Company's (FCWC or utility) defense to the Environmental Protection Agency/Department of Justice (EPA/DOJ) litigation. I am also testifying to the approved regulatory treatment of FCWC's facilities in past rate cases.

Q. When FCWC first began incurring legal costs related to EPA/DOJ litigation costs, how were these costs treated on the utility's books?

A. In the North Ft. Myers wastewater rate case (Docket No. 950387-SU), the Commission found that during 1992, 1993 and 1994, the utility capitalized EPA litigation legal fees as part of an expansion project to the North Ft. Myers wastewater treatment plant.

Q. Did the utility continue to capitalize the litigation expenses?

A. No. During 1994, the utility began expensing all additional legal fees pertaining to the lawsuit and reporting them below the line.

Q. How were the litigation expenses treated in the North Ft. Myers rate case?

A. By Order No. PSC-96-1133-FOF-SU, issued September 10, 1996, the Commission accepted a stipulation to remove the legal fees from rate base. The record did not reflect why these fees were capitalized for more than two years and then expensed below the line. Since the legal fees were not

included in the customer's rates, the Commission did not address the appropriateness of reporting the litigation fees above the line or the accounting treatment.

Q. Did the utility continue to expense these costs below the line?

A. Yes. According to Order No. PSC-96-1133-FOF-SU, all the legal costs were "expensed below the line".

Q. Concerning your other area of testimony, the approved regulatory treatment of FCWC's facilities in past rate cases, do any of FCWC's facilities have uniform rates?

A. Yes, pursuant to Order No. 16768 (Docket No. 851007-WU), the Commission approved uniform water rates for the North and South Ft. Myers' systems. However, all the other systems have separate rates for each facility.

Q. What cost components are shared among FCWC's water and wastewater facilities?

A. FCWC is a consolidated entity with six operating divisions, three of which are under the jurisdiction of the FPSC. As such, it has one set of financial statements and one consolidated balance sheet. The utility is required to use the balance sheet method to calculate its working components, as required by Rule 25-30.433(2), Florida Administrative Code. Therefore, working capital is allocated to all of the utility's facilities. FCWC also has one consolidated capital structure which is allocated based on rate base to each water and wastewater system. However, the Commission establishes a separate rate of return on equity for each facility. The utility's general plant is also allocated to each system.

Q. Does this conclude your testimony?

A: Yes, it does.

MR. GATLIN: May I inquire of Staff, was the deposition of Mr. Larkin that was identified as an exhibit, was that his complete deposition and exhibit?

MS. GERVASI: Do you mean was that the entire transcript of the deposition?

MR. GATLIN: Yes, right; the complete transcript of the deposition and the exhibit that he had. It looks to me like it was, but I wanted to make sure.

MS. GERVASI: Yes, sir, it is the complete transcript.

I guess we're on to the rebuttal.

CHAIRMAN JOHNSON: I guess I said for Ms. Moniz for that to be inserted into the record as though read, and there were no exhibits.

MS. GERVASI: No exhibits, correct.

MR. McLEAN: And no depositions, as I recall.

MS. GERVASI: Correct.

CHAIRMAN JOHNSON: Yes. We're on rebuttal.

MR. GATLIN: What was the number of Ms. Merchant's deposition?

CHAIRMAN JOHNSON: 17.

MR. GATLIN: I would like to offer the rebuttal testimony of Mr. Gerald S. Allen to be

inserted as though read.

CHAIRMAN JOHNSON: It will be inserted.

MR. GATLIN: I would like to offer the rebuttal testimony of Mr. Gary --

MS. GERVASI: Before we go on to that, did Mr. Allen not have any prefiled exhibits, Mr. Gatlin?

MR. GATLIN: None.

MS. GERVASI: Then at this point we'd like to identify as Exhibit No. 18 the deposition transcript for Mr. Allen taken on July 30th of 1998.

CHAIRMAN JOHNSON: It will be marked as 18.

(Exhibit 18 marked for identification.)

FLORIDA CITIES WATER COMPANY

RATE APPLICATION FOR RECOVERY OF LEGAL EXPENSES

REBUTTAL TESTIMONY OF GERALD S. ALLEN

TO DIRECT TESTIMONY OF

HUGH LARKIN, JR. AND PATRICIA W. MERCHANT

DOCKET NO. 971663-WS

Q. Please state your name and business address.

A. Gerald S. Allen, 4837 Swift Road, Suite 100, Sarasota, Florida 34231.

Q. By whom are you employed and in what capacity?

A. I am the President of Florida Cities Water Company(FCWC).

Q. Did you prepare prefiled testimony in this case?

A. Yes.

Q. What is the purpose of your rebuttal testimony?

A. The purpose of my testimony is to rebut certain parts of the direct testimony of Hugh Larkin, Jr. prefiled on behalf of the Florida Office of Public Counsel, and Patricia W. Merchant on behalf of the Public Service Commission.

Q. Beginning at line 18, page 3 of his prefiled testimony, Mr. Larkin states, "[I]f the Company had a basis to recover these expenses, it was to file a rate case at the time the expenses were being incurred and as for the recovery as part of a rate

case, or to come before the Commission and ask for an Accounting Order allowing for the deferral of the legal fee to be considered in a single issue rate case." Why didn't FCWC take one of actions suggested by Mr. Larkin?

A. Until the Court issued its Judgement and Memorandum Order on August 20, 1996 ((Exhibit 4 (GSA-24)), FCWC had no solid basis for predicting the outcome of the litigation and therefore did not have a basis for seeking recovery. In fact this outcome did not become final until the U.S. Court of Appeals for the Eleventh Circuit dismissed the respective appeals of the parties at their request on August 6, 1997. See Exhibit 6 (GHB-104).

Q. In your opinion, would the Commission have considered multiple rate applications as the legal expenses occurred?

A. No. I don't believe the Commission would have considered recovery until the outcome of the litigation had been finally decided. The litigation was very dynamic and was fraught with ancillary issues primarily as a result of the overzealous prosecution by the DOJ. A snapshot at any given point would significantly differ from a snapshot a few weeks later and this situation existed for

almost four years. Therefore, it was not possible to accurately predict the additional legal expenses from any given point to the conclusion of the case.

Q. Referring to page 5 of Mr. Larkin's testimony beginning at line 10, Mr. Larkin states, "[T]hat this case provides an excellent example of how passing to the customers the expenses associated with the utility's violation of federal law would insulate the utility management from compliance with the CWA. It is worthy of note that neither the EPA, DOJ, nor the federal Judge was ever aware that the Company might shift the expenses of litigation [to]its customers." How do you interpret this question and response?

A. First, I believe Mr. Larkin is stating that if utilities are allowed to recover expenses associated with defending themselves against alleged violations of the Clean Water Act (CWA),it would remove incentives to comply. Second, he concludes or at least implies that the Court's final decision would have been influenced had it known that the Company might seek recovery of legal expenses sustained in defending itself. Third, Mr. Larkin concluded that the excerpt from my testimony at deposition on November 13, 1995 concealed the Company's intent to

later seek recovery of said expenses.

Q. Do you agree with Mr. Larkin that if utilities are allowed to recover expenses associated with defending themselves against alleged violations of the Clean Water Act (CWA),it would remove incentives to comply?

A. No. First, I became involved in water and wastewater utility management before the enactment of the Clean Water Act (CWA), the Safe Drinking Water Act and many other laws governing water and wastewater utilities and have first hand experience with their evolution. I have witnessed the conflicting interpretations of these laws and the evolution of a new legal specialty. Compliance has always been a top priority personally and I have consistently promoted strict compliance as always being in the best interests of my employer and its utility customers. Those to whom I have reported since employment by Avatar Utilities Inc. and its subsidiaries, including Florida Cities Water Company, have strongly supported this position. The reasons include, but are not limited to, a demonstration of good environmental stewardship and corporate citizenship, avoidance of economic sanctions, maintaining productive relationships with

regulatory agencies and fostering professional pride throughout the company. To imply that the ability to recover a part of the Company's legal expenses in connection with defending itself against grossly overstated allegations of violations of the law represents a disincentive to comply borders on insult.

At $25,000 per day per violation as provided by the CWA, the greatest financial peril virtually always faced by alleged violators are penalties, not legal expenses. In the instant case, the Company faced potential penalties up to $104 million which is forty-six times the legal expenses it seeks to recover in this docket. The Company has never attempted to recover fines or penalties nor is it seeking to do so in this case. To adopt Mr. Larkin's conclusion, one would have to also conclude that the public defender act, which provides legal defense to those who cannot afford it, removes all perils associated with criminal acts and therefore is a disincentive to comply with the law. It is nonsense to conclude that recovery of legal expenses is a disincentive to comply with the CWA or any other law or rule.

Q. Do you agree with Mr. Larkin's conclusion that the

excerpt from your testimony at deposition on November 13, 1995 concealed the Company's intent to later seek recovery of said expenses?

A. No. My responses at deposition were based on the facts before me at that time when the Company faced penalties up to $104 million. The recovery of legal expenses through rates was an issue that I had given little thought to at that time. Furthermore, I did not have the benefit of knowing that the Court would dismiss almost half of the allegations in summary judgement and ten months later find penalties in the amount of $309,710 which was but a small fraction of the legal expenses sustained by the Company. I initially stated that I doubted that the Company would expect to include the expenses in rate base but upon immediate reflection indicated that I didn't know and that a decision would not be made to seek rate base treatment or any other treatment of the legal expenses until the outcome of the case was resolved. It is important to note that the DOJ had ample opportunity to bring the issue up at trial but did not do so. The DOJ trial counsel did not examine me, Mr. Cardy, the Company's rate making expert, any other Company witness, or the DOJ's financial expert regarding rate treatment of

penalties or legal expenses at trial in this case. To conclude that my testimony at deposition, which was not introduced into evidence at trial and presumably was never viewed by the Court, misled both the DOJ and the Court, and influenced the Courts decision is clearly without factual basis.

Q. Do you agree with Mr. Larkin's conclusion that the Court's final decision would have been influenced had it known that the Company might seek recovery of legal expenses sustained in defending itself.

A. No. Legal expenses sustained by defendants in CWA litigation and the source of funds to pay same are not among the factors set forth in the Act for determining the validity of allegations or the amount of penalties as will be discussed by Mr. Baise in his rebuttal testimony.

Q. Under the same circumstances and limiting the facts to those known to you at the time, would your responses to questions by the DOJ regarding recovery of expenses through rates been different?

A. No.

Q. Beginning at line 24, page 12 of Mr. Larkin's prefiled testimony, he states, "[T}he environmental agencies either find the utility is or is not in compliance with the requirements of the law. If

these agencies are mistaken as to whether a particular utility's wastewater treatment facilities comply with the law, then normally the company's own engineers can prove the company's compliance with the requirements of the law. No legal expenses would be incurred, since it would be a matter of testing to determine whether the utility complies or does not comply with the environmental requirements."

Q. Was this the approach that FCWC initially took in 1986 after the USEPA notified FCWC that it intended to deny renewal of the NPDES permit for the Waterway Estates Wastewater Treatment Plant and for several years thereafter in dealing with the EPA and DEP?

A. Yes. In fact, FCWC's engineers immediately opened communications with both agencies and started developing an action plan which FCWC believed would resolve the issues. There was never a dispute regarding the action which was necessary to satisfy the demands of the EPA and DEP. The EPA's dissatisfaction arose over the timeliness of completing the work set forth in the action plan. There was no legal counsel involvement until this dissatisfaction surfaced and little from that point in time until the DOJ entered the picture. The DOJ

was making demands on FCWC of a magnitude which could have placed the Company in serious jeopardy and it was prudent that the Company engage legal counsel in a more assertive manner.

Q. Had FCWC challenged the USEPA on its denial of renewal of the NPDES permit for the Waterway Estates Wastewater Treatment Plant in 1986, do you believe the ultimate outcome would have been different?

A. No, I don't believe the outcome would have been significantly different. It is my opinion that had FCWC challenged the denial and prevailed, the USEPA would have issued an administrative order mandating the upgrading of the treatment plant and relocation of the outfall initially instead of an order calling for the elimination of the discharge[1]. Since such initial order would not have altered FCWC's action plans, I conclude that the schedule would not have been altered. Therefore, the outcome would have not been altered.

Q. Beginning at line 21, page 22 of his prefiled testimony, Mr. Larking refers to "the criminal defense of some of the Company's employees." Were criminal charges brought against any past or current

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1. See prefiled direct testimony, Gerald S. Allen, page 10, line 6 through p. 11, line 2.

Company employees by the United States or the State of Florida or to the best of your knowledge were criminal investigations ever undertaken by the United States or the State of Florida with respect to any matter surrounding or arising from the litigation in this docket?

A. No current or former employees were charged or, to be best of my knowledge, investigated. So, there was no need for "criminal defense." I can't explain Mr. Larkin's characterization other than another example of conclusions without factual basis.

Q. Did the Company retain, on behalf of certain current and former employees, legal counsel to represent their personal interest?

A. Yes, on a limited basis in view of the case, Weitzenhoff v. United States, cited at page 32 of my prefiled direct testimony. However, this matter is not relevant in this docket since the Company is not seeking recovery through rates any of the expenses associated with such legal services.

Q. What is your interpretation of Ms. Merchant's prefiled direct testimony with regard to the recovery of the legal expenses sought by FCWC in this docket?

A. Ms. Merchant seems to be presenting her personal

opinion regarding the criteria which the Commission should apply in arriving at its decision regarding recovery. She presents no opinion regarding whether or not recover should be allowed or the amount thereof, if any. However, she is firm in stating that recovery, if allowed, should be through rates applicable to N. Ft. Myers, Barefoot Bay and Carrollwood wastewater customers only.

Q. What criteria should the Commission apply in arriving at its decision.

A. The fundamental foundation governing the recovery of expenses through rates is the "reasonable and prudent" criteria and it should be applied by the Commission in arriving at a decision in this case. The Commission should consider the decisions of the Company regarding its legal defense of the allegations of the DOJ and the "reasonableness and prudence" of these decisions in light of the facts available to the Company at the time they were made. Of course, important to the "reasonable and prudent" test is evaluating the ultimate results of these decisions which was the Federal Court's judgement following the trial: penalties of less than one percent of the maximum penalty claimed in the Original Complaint, less than one-half percent of

the maximum penalty claimed in the Amended Complaint and slightly over six percent of the settlement offer rendered by the DOJ prior to the Original Complaint.

Q. Does this conclude your rebuttal testimony.

A. Yes.

MR. GATLIN: I offer the testimony of Mr. Gary H. Baise to be inserted into the record.

CHAIRMAN JOHNSON: Mr. Baise's testimony will be inserted as though read.

MR. GATLIN: And he has no exhibits.

CHAIRMAN JOHNSON: Staff?

MS. GERVASI: Staff would identify the transcript of Mr. Baise's August 5th, 1998 deposition.

CHAIRMAN JOHNSON: It will be identified as 19.

MS. GERVASI: Thank you.

(Exhibit 19 marked for identification.)

FLORIDA CITIES WATER COMPANY

FT. MYERS & BAREFOOT BAY DIVISIONS

WATER AND WASTEWATER OPERATIONS

REBUTTAL TESTIMONY OF GARY BAISE

TO

DIRECT TESTIMONY

OF

Hugh Larkin, Jr. and Patricia W. Merchant

DOCKET NO. 971663-WS

Q: Please state your name and business address.

A: Gary H. Baise, Baise, Miller & Freer, P.C., 815 Connecticut Avenue, N.W., Suite 620, Washington, D.C. 20006-4004.

Q: By whom are you employed and in what capacity?

A: I am a partner in the law firm of Baise, Miller & Freer, P.C.

Q. Have you filed testimony in this case?

A. Yes. I filed direct testimony in this case.

Q. What is the purpose of this rebuttal testimony?

A. The purpose of this testimony is to refute certain positions of OPC witness Hugh Larkin, Jr. and Patricia W. Merchant, PSC witness.

Q. On page 4, line 22 of his testimony, Mr. Larkin is discussing his position that legal costs should not be recovered from rate payers, testifying as follows:

"The reasoning underlying this basic principle is that management must be held responsible for its actions. It must follow those laws regardless of their conclusion as to the fairness or economic reasonableness of the requirements of the law. If regulation allowed the recovery of fines and penalties and/or any related costs from ratepayers, clearly, management and stockholders would be shielded from the affects of their actions. They could operate with impunity knowing that as a general principle they could recover any penalty or fine and related costs from ratepayers. Clearly, in a competitive environment they would not recover such costs. To the extent that the Commission shifts the costs of the violations - whether penalty or legal fees incurred in litigation over penalties - from the Company to the ratepayers, it holds the Company harmless from such violations frustrates the purpose of the Clean Water Act." Is Mr. Larkin correct, please explain?

A. Mr. Larkin concludes that if FCWC can shift the cost of violations in terms of legal fees to the rate payers, that holds the company harmless from such violation, which frustrates the purpose of the Clean Water Act. The amount of attorneys' fees would not be admissible as evidence in a CWA enforcement action;

Accordingly, the Court would have no authority to consider legal costs. The CWA does not address the issue of whether penalties or legal fees are to be paid by shareholders or ratepayers. Therefore, under the CWA there is no basis to support Mr. Larkin's policy argument that the purpose of the CWA is frustrated by shifting legal fees to ratepayers. It is apparent that Mr. Larkin does not understand the framework of the Clean Water Act (CWA) nor has he studied the many court cases involving the CWA. At $25,000 per day per violation and criminal sanctions of many years imprisonment, violators of the CWA are subject to some of the most severe civil and criminal penalties imposed by federal environmental laws. Clearly, violations of the CWA can result in the financial ruin of companies and individuals and the imprisonment of a company's officers and employees. Generally, in civil cases such as that brought against FCWC under the CWA, the legal expenses are very small compared to the potential liability associated with the allegations. To conclude, as Mr. Larkin apparently has, that the prospect of recovery of legal expenses associated with the defense of allegations of violations of the CWA represents a disincentive to comply is without basis and is not consistent with the

history of enforcement of the CWA. Until the Court ruled in this case there was never any consideration on my part that FCWC would be in a position to seek recovery of its legal fees in its rates.

Q. On page 5 of his testimony, starting with the answer on line 15 - Mr. Larkin says "... that neither the EPA, DOJ or the federal Judge was ever aware that the company might shift the expenses of litigation to its customers" Mr. Larkin then quotes from the deposition transcript of FCWC President, Mr. Allen, dated November 13, 1995. He concludes his answer on page 7, lines four through twelve are as follows: "Thus, Mr. Allen indicated that FCWC's seeking to include expenses associated with this litigation was "highly unlikely." While Mr. Allen hastened to add that he was no expert regarding whether the expenses could be recovered through the rate making process, the matter was apparently not raised again. It is reasonable to conclude that the DOJ and the federal Judge were under the reasonable impression that the violator - FCWC - like any other violator - would be liable for whatever penalty and expenses arose from this litigation. It is also reasonable to assume that the Court and the DOJ were aware that the Company was incurring substantial litigation expenses, and that its ability

to pay any penalty would be lessened to that extent." Would you please respond to Mr. Larkin's answer?

A. Mr. Larkin is simply incorrect and apparently has not thoroughly reviewed the record nor does he understand the provision of the CWA which sets forth the factors courts are to consider in assessing penalties. First, at deposition, neither Mr. Gerald Allen, FCWC's President nor Mr. Bradtmiller, FCWC's Executive Vice President, ruled out the prospect of attempting to recover legal expenses through rates. Second, if the department of Justice had wanted to bring this matter to the Court's attention it could have done so through its direct examination of Mr. Gerald Allen, but it did not choose to do so or through testimony presented by any other FCWC witness. Third, the matter of how FCWC proposed to recover part or all of the legal expenses associated with its defense (even if it knew at the time) was not a matter included in the six factors which the CWA specifies for consideration by courts in assessing penalties. Therefore, the matter was not relevant to the Court's deliberations or findings in FCWC's case.

Q. Mr. Larkin's answer starting on line 18, page 12 and ending on line 18, page 13 sets forth his understanding of environmental law and regulation by

the EPA and DEP. Is his understanding correct? Please explain.

A. Mr. Larkin indicates that it is his "understanding" that neither the DEP nor EPA orders companies to add large system improvements. Again, Mr. Larkin is incorrect. The agencies take an active role in regulating wastewater treatment works. The CWA gives the EPA ample authority to specify remedial action and it often does so in the form of consent orders and permit conditions. It is true the company may decide what type of equipment or what brand of equipment to put into place but the fact is the requirement is such that EPA or DEP is ordering the company through the permit and the administrative order process to install the improvements. An example is EPA Administrative Order No. 89-109 and NPDES certification worksheet ((see Exhibit 9 (MA-9) and Exhibit 9 (MA-7)) which directed FCWC to construct the treatment and other facilities necessary to relocate the effluent outfall and meet specific water quality standards. In addition, EPA has a tool that may order companies to construct supplemental environmental projects in order not to be subjected to additional fines. Therefore it is not accurate to suggest that all EPA does is to determine whether the company is or is not in

compliance with the law.

The CWA is a complex law subject to multiple interpretations and to conclude, as Mr. Larkin has, that it is a simple matter of the regulatory agency finding "the utility is or is not in compliance with the requirements of the law" is an oversimplification. It is indeed true that the agencies may allege that a company is in violation of the law and penalties therefor. It is up to courts to determine indeed whether there is a violation of the law. In many cases there may be a "technical" violation of the law and the courts may find penalties as low as $1 a day or slightly more as in the case of FCWC where many of the fines were only $10 a day compared to the agency's ability to charge or attempt to obtain $25,000 a day.

Mr. Larkin implies that the company's own engineers can work out any differences regarding compliance. FCWC pursued such course. With respect to all three wastewater facilities for which the DOJ ultimately alleged violations, the first step FCWC took was to have its engineers engage the DEP and EPA in an effort to assure that these facilities were in compliance and if not in compliance, to take the action necessary to bring them into compliance. In fact, all issues pertaining to both Barefoot Bay and

Carrollwood were satisfactorily resolved with both the EPA and DEP and the issues pertaining to Waterway Estates were satisfactorily resolved with the DEP, prior to the DOJ's allegations. It was not until the EPA wanted to pursue the Waterway Estates issue, notwithstanding the DEP's satisfaction with FCWC's action and the outcomes, and referred the matter to the DOJ was any appreciable legal work necessary. Furthermore, the amount of legal work necessary was increased substantially when the DOJ initiated an investigation of all of FCWC's wastewater facilities and finally amended its complaint in March 1995 to include the Carrollwood and Barefoot Bay facilities.

Q. Beginning at line 21, page 13 and ending at line 19, page 14, Mr. Larkin purports to explain certain aspects of the litigation and the Court's findings and the penalties imposed. Are his characterizations complete and accurate?

A. No. First, Mr. Larkin does not discuss the Original and Amended Complaints, the numerous motions and rulings of the Court prior to trial, the factors considered by the Court, and the penalties imposed relative to the penalties claimed by the DOJ at various stages of the proceedings leading up to the trial. Through these omissions Mr. Larkin brings into

focus only a few small parts of the total picture, including the following:

(1) In its original complaint, the DOJ was claiming penalties to $32,375,000 later amended claiming penalties to $104,325,000. After pre-trial rulings by the Court throwing out almost half of the alleged violations, the DOJ claimed penalties during the first day of trial to $53,450,000. These rulings were in response to motions filed by FCWC. In its post-trial memorandum, the DOJ proposed penalties in the amount of $4,861,500 for FCWC and a similar amount for Avatar. In its final ruling, the Court found penalties in the amount of $309,710. To put all of these claims into perspective, the penalties imposed by the Court were less than one percent of the maximum amount claimed under the Original Complaint, less than one-half percent of the maximum amount claimed under the Amended Complaint, slightly over one-half percent of the maximum amount claimed at the beginning of the trial and 6.37% of the penalty amount suggested in the DOJ's post-trial memorandum.

(2) It is virtually impossible to avoid a liability determination under the Clean Water Act inasmuch as it is called a strict liability statute. Therefore, every exceedance of a CWA permit is a violation. An

example would be any time you are running 56 mph in a 55 mph speed limit zone you are in violation of the law and should therefore be technically fined. If you're running more than 20 mph over a 55 mph speed limit, you may even be charged with reckless driving. The fact is, both policy and courts exercise a great deal of discretion. The same is true with the Clean Water Act. It was clear in this case that the Court found that even though there were technical violations, the mitigating factors set forth in the Clean Water Act (including the fact that none of the violations had resulted in environmental harm) were applied fully supported the conclusion that the penalty should be minuscule.

Q. Beginning on page 15 and concluding on page 16, line 4, Mr. Larkin sets forth his interpretation of the nature of the DOJ prosecution and FCWC's demand of recovery of legal costs from the government. Do you agree with Mr. Larkin's interpretation? Please explain.

A. No. First, regarding the nature of the DOJ prosecution, I firmly believe that anyone who thoroughly studies the record in this case will conclude that the prosecution was without merit. This conclusion is based on my twenty-eight years

experience as a practicing attorney in the area of federal environmental law. In fact, I believe the case would have been settled before the trial and before significant legals costs had been sustained by FCWC had proper supervision been afforded by a person with sufficient experience in the CWA.

Second, notwithstanding the Court's ruling regarding recovery of legal expenses by FCWC from the DOJ, it is appropriate to review the Court's Order (Exhibit ____ (GHB-101)). The "bad faith" standard is extremely confining. To prevail, it must be shown that the government undertook the litigation "vexatiously, wantonly, or for oppressive reasons." The fact that the government's action was unreasonable, without merit, or unwise is not in itself adequate to demonstrate bad faith as defined by the law. It is implicit in the Court's language in its ruling against FCWC regarding FCWC's contention that it was a "prevailing party" that the Court agreed with FCWC from a fundamental perspective but was bound by case law. The Court said, "[T]he United States contends that since a judgement was returned in its favor on its claims against the Defendant Florida Cities, [that] Florida Cities is hereby precluded from being a Sec. 2412(a) `prevailing party'. The Court

agrees with Plaintiff's analysis and, grudgingly (emphasis added), with its conclusion." See page 11, Exhibit ____ (GHB-101). Another noteworthy conclusion of the Court can be found on pages 12 and 13 of this exhibit, "[W]hile the history and purpose of Rule 68 and 28 U.S.C. Sec. 2412(a) militate strongly for an award of costs to Florida Cities, the Procrustean doctrine of sovereign immunity precludes such." It is my opinion that the relationship between the penalties sought by the DOJ and those imposed by the Court (cited above) when combined with the Court's language in its order pertaining to the recovery of costs by FCWC clearly supports the proposition that many of the DOJ's actions in this case were without merit.

Q. Beginning at line 3, page 10, of the prefiled testimony of Patricia W. Merchant, she states that "[A]ny allowed costs should only be recovered from the North Ft. Myers, Barefoot Bay and Carrollwood customers." Were the legal efforts, and accordingly legal expenses, associated with FCWC's defense limited to these wastewater systems?

A. No. Following the filing of the Original Complaint, the DOJ launched an investigation of all of FCWC's wastewater systems and considerable effort was devoted during the period beginning in early 1994 and the

filing of the Amended Complaint on March 30,1995 to this investigation and the discovery associated therewith. FCWC's wastewater systems are located in Collier, Lee, Brevard, Sarasota and Hillsborough Counties.

Q. Does this conclude your testimony?

A. Yes.

MR. GATLIN: And I offer the testimony of Mr. Michael Acosta to be inserted into the record.

CHAIRMAN JOHNSON: It will be so inserted.

MS. GERVASI: Staff would identify Staff's Second Request for Interrogatory No. 44 to be entered into the record.

CHAIRMAN JOHNSON: It will be marked as 20, Staff Exhibit 20, Acosta's Second Request for Interrogatories -- or Staff's Second Request for Interrogatories.

MS. GERVASI: Thank you.

(Exhibit 20 marked for identification.)

FLORIDA CITIES WATER COMPANY

RATE APPLICATION FOR RECOVERY OF LEGAL EXPENSES

REBUTTAL TESTIMONY OF MICHAEL ACOSTA

TO DIRECT TESTIMONY OF

HUGH LARKIN, JR.

DOCKET NO. 971663-WS

Q. Please state your name.

A. Michael Acosta.

Q. Have you previously provided testimony in this Docket?

A. Yes.

Q. What is the purpose of your rebuttal testimony?

A. The purpose of my testimony is to rebut certain aspects of the direct testimony of Hugh Larkin, Jr., appearing on behalf of the Citizens of the State of Florida.

Q. Specifically which part of Witness Larkin's testimony will you rebut?

A. I will rebut Witness Larkin's testimony regarding his assertion that the Department of Environmental Protection and Untied States Environmental Protection Agency only "find companies are in violation of the law and that the company itself must determine how to eliminate the violation and comply with the law."

Q. Is Witness Larkin's assertion as stated above accurate?

A. In this case, the assertion is not accurate.

Q. Please explain.

A. In 1986, the Waterway Estates Wastewater Treatment Plant (Waterway) was a secondary plant discharging into a canal that leads to the Caloosahatchee River with all the appropriate permits to do so. FDEP had established a wasteload allocation for the Caloosahatchee River that envisioned that all surface water discharges would ultimately meet advanced wastewater treatment (AWT) standards. It is clear from the NPDES Certification worksheet Exhibit 9 MA-7 that FDEP would be seeking the upgrade of Waterway to AWT and the relocation of the outfall to the six foot contour line in the Caloosahatchee River upon the expiration of the then current operating permit DO36-72569 if Waterway was going to continue discharging to surface waters. While FDEP did not design the facility it did require reasonable assurance that the facilities as designed would meet the stated water quality limits and not result in water quality violations. In this case, FDEP was not just requiring compliance but also requiring a specific upgrade to a treatment facility in order to achieve compliance with the wasteload allocation limits.

Q. Does this conclude your rebuttal testimony?

A. Yes.

MR. GATLIN: I offer the testimony of Mr. John D. McClellan, the rebuttal testimony, to be inserted into the record as though read.

CHAIRMAN JOHNSON: It will be so inserted.

MR. GATLIN: There are no exhibits.

MS. GERVASI: Staff offers the transcript of Mr. McClellan's July 30th, 1998 deposition as an exhibit.

CHAIRMAN JOHNSON: It will be marked as Exhibit 21.

(Exhibit 21 marked for identification.)

FLORIDA CITIES WATER COMPANY
RATE APPLICATION FOR RECOVERY OF LEGAL EXPENSES
REBUTTAL TESTIMONY OF JOHN D. MCCLELLAN
TO DIRECT TESTIMONY OF
HUGH LARKIN, JR. AND PATRICIA W. MERCHANT
DOCKET NO. 971663-WS

Q. PLEASE STATE YOUR NAME AND ADDRESS.

A. John D. McClellan, Deloitte & Touche LLP, 555 12th Street N.W., Washington D.C., 20004.

Q. ARE YOU THE SAME JOHN D. MCCLELLAN THAT FILED DIRECT TESTIMONY IN THIS CASE?

A. Yes.

Q. WHAT IS THE PURPOSE OF THIS REBUTTAL TESTIMONY?

A. Florida Cities Water Company ("FCWC" or the "Company") requested that I review and respond to the direct testimony filed by Mr. Hugh Larkin, Jr., who is appearing as a witness for the Florida Office of Public Counsel ("OPC").

Q. HAVE YOU REVIEWED MR. LARKIN'S TESTIMONY AND ARE YOU PREPARED TO RESPOND TO THE OBSERVATIONS CONTAINED THEREIN?

A. Yes.

Q. PLEASE PROCEED WITH YOUR RESPONSES.

A. As indicated on page two of Mr. Larkin's testimony, he is recommending that the Company

be denied recovery of any portion of the $3.8 million of costs incurred in defending itself against the litigation resulting from claims filed and penalties sought by the Department of Justice (DOJ). He states that his recommendation is based upon the following assumptions:

- Recovery of the costs would reflect retroactive ratemaking
- The owners and creditors of the Company were the primary beneficiaries of the significant results achieved in the defense efforts and should therefore bear the costs
- The allowance by the Commission of the recovery of these costs would result in putting ratepayers in the position of "guaranteeing...[the costs of] any and all litigation undertaken by regulated public utilities..." in Florida.

Each of these assumptions upon which Mr. Larkin has based his recommendation is erroneous.

Q. WHAT IS THE BASIC CHARACTER OF RETROACTIVE RATEMAKING?

A. Retroactive ratemaking generally refers to the

application of current rates to recover from current ratepayers (or return to current ratepayers) revenues that should have been recovered (or not recovered) in rates of prior periods to cover costs of ordinary events effects were limited to those periods. For example, if it is determined that 1997 rates did not produce an adequate level of earnings (i.e., the cost of equity capital in 1997) and 1999 rates are adjusted to recover the 1997 rate shortfall (or excess), this could give rise to a legitimate claim of retroactive ratemaking. At the same time, regulators commonly allow the recovery in current or future periods of explicitly identified non recurring or extraordinary costs incurred in prior periods.

Q. IS RECOVERY OF NON-RECURRING OR EXTRAORDINARY COSTS OF PRIOR PERIODS CONSIDERED TO BE RETROACTIVE RATEMAKING?

A. No. Regulators have long practiced the spreading of costs incurred in one period over subsequent periods and do not consider the practice to embrace retroactive ratemaking. Generally, the spreading of costs is applied either to avoid the dramatic rate impact that

would result if rates were adjusted to recover the costs currently or to recognize the longer term benefits of the costs (or both). This spreading of cost recovery is precisely what FCWC is seeking. Along with avoiding complications in anticipating and providing for costs that were being incurred each year that the litigation continued, delaying recovery and spreading the litigation costs over future periods avoids any dramatic rate impact and gives credence to the fact that there are ongoing benefits to avoiding the penalties sought by the DOJ. The recovery of the litigation expenses as proposed by FCWC in this proceeding does not constitute retractive ratemaking.

Q. MR. LARKIN OBSERVES ON PAGE THREE OF HIS TESTIMONY THAT THERE IS NO ACCOUNTING ORDER THAT PROVIDED FOR DEFERRING THE EXPENSES AS INCURRED. BASED ON THIS CONDITION, HE CONCLUDES THAT RECOVERY CANNOT BE PERMITTED. WOULD YOU RESPOND?

A. Extraordinary cost conditions are often recognized as the costs are being incurred and cost deferral is approved as the expenditures are made. In such instances, the future regulatory treatment of the

cost accumulations is reserved for determination at the next rate proceeding. In other instances the extent, impact and timing of the costs are not subject to determination, and accounting cost deferral may not be or can not be obtained in advance. In these instances, the request for deferral and recovery will not arise until a rate filing occurs. In either case, cost recovery provisions will not be determined in the absence of a rate proceeding. The advance accounting approval does not assure ultimate rate recovery. Neither does the absence of such advance approval prohibit ultimate rate recovery.

Q. WHAT WERE THE CONDITIONS RELATING TO COST DETERMINATION AND ULTIMATE OUTCOME THAT CONFRONTED FCWC IN THE LITIGATION PROCESS?

A. First, costs were incurred over a number of years. During this period FCWC did not know how long the process would continue. Second, FCWC simply did not know how much cost would be incurred in the process. There was no way to estimate these costs in advance. Finally, there was no way for FCWC to accurately predict the ultimate outcome of the litigation process.

Q. WHY DID FCWC NOT GO BEFORE THE COMMISSION AND

REQUEST, IN ADVANCE, AN ACCOUNTING ORDER?

A. For the reasons stated above FCWC simply did not have sufficient data and information to go before the Commission until the litigation process was completed.

Q. DOES REGULATORY APPROVAL TO DEFER THE RECORDING OF AN INCURRED COST CONCURRENTLY ESTABLISH APPROVAL OF THE RATEMAKING TREATMENT OF THAT COST?

A. No. In many instances the accounting order will explicitly state that the approval is limited to accounting measures and that the ratemaking treatment of the costs will be established in subsequent rate proceedings. Where not explicitly stated, this condition is normally implied. Accordingly, approval of a delay in reporting costs does not establish the subsequent ratemaking treatment.

Q. DO GENERALLY ACCEPTED ACCOUNTING PRINCIPLES ("GAAP") REQUIRE THAT AN ACCOUNTING ORDER EXIST FOR A REGULATED UTILITY TO DEFER A CURRENT COST ASSUMED TO BE RECOVERABLE IN FUTURE RATES?

A. No. GAAP directives for regulated systems are expressed in Financial Accounting Standards Board Statement No. 71 : Accounting for the Effects of

Certain Types of Regulation ("FASB 71") issued in 1982. As stated at Paragraph 9 of FASB 71, for accounting purposes a regulated utility shall capitalize (i.e., defer) an incurred cost that would otherwise be charged to expenses if both of the following criteria are met:

a. It is probable that future revenue in an amount at least equal to the capitalized cost will result from inclusion of that cost in allowable costs for rate-making purposes, and

b. Based on available evidence, the future revenue will be provided to permit recovery of the previously incurred cost rather than to provide for expected levels of similar future costs. If the revenue will be provided through an automatic rate-adjustment clause, this criterion requires that the regulator's intent clearly be to permit recovery of the previously incurred cost.

This provision provides that costs normally expensed under GAAP standards shall be deferred if "it is probable" (i.e., can reasonably be expected or believed on the basis of available evidence or

logic) that future revenues will be produced through rates provided to recover the costs. Otherwise, the costs must be expensed for financial reporting purposes. The deferral conditions address recoverability issues and accounting orders are not even mentioned.

Q. DOES THE ISSUANCE OF AN ACCOUNTING ORDER BY A REGULATOR SATISFY THE GAAP REQUIREMENTS FOR COST DEFERRAL?

A. No. As observed, the issue is cost recoverability. As expressed at Paragraph 4 of the Introduction to FASB 71, accounting orders may be imposed by regulators that do not conform with GAAP. Under these conditions, the issuance of the order does not provide a basis for capitalizing and amortizing the cost. This situation will arise when an accounting order is not accompanied by cost recovery probability, and in such instances the utility is not permitted to defer the costs for financial reporting purposes. Paragraph 4 of FASB 71 includes the following language:

> "...a regulatory authority may order an enterprise to capitalize and amortize a cost that would be charged to income currently by

an unregulated enterprise. Unless capitalization of that cost is appropriate under this Statement, generally accepted accounting principles require the regulated enterprise to charge the cost to income currently."

Q. IS AN ACCOUNTING ORDER NECESSARY FOR THE SUBSEQUENT RECOVERY OF A PRUDENTLY INCURRED PRIOR PERIOD COST?

A. No. An accounting order may be useful in supporting the conclusion that rate recovery can reasonably be expected, i.e., that it is "probable". However, as previously observed and clearly evidenced by regulatory decisions, the existence of an accounting order does not establish prospective cost recovery, and the absence of an accounting order does not prohibit prospective cost recovery.

Q. IF FCWC OBTAINS A RATEMAKING ORDER THAT PROVIDES FOR THE RECOVERY OF LITIGATION COSTS, WILL FCWC BE ABLE TO CURRENTLY RECORD THOSE COSTS INCURRED IN PRIOR YEARS?

A. Yes.

Q. DID THE OWNERS AND/OR CREDITORS OF THE COMPANY BENEFIT FROM THE LITIGATION EFFORTS?

A. Yes. Had the claimed penalties of tens of millions of dollars been applied, the owners certainly would have been adversely affected. The creditors may or may not have been.

Q. DID THE RATEPAYERS ALSO BENEFIT FROM THOSE EFFORTS?

A. Yes. As has been expressed in the Company's direct testimony, the financial pressures that would have been produced by the levels of penalties sought by the DOJ would have created severe problems. The financial impact of these problems is not quantifiable, but it follows that a financially healthy company can perform more efficiently and at less costs than can a financially crippled system. Any losses in efficiency and increases in costs that result from financial crises will necessarily impact customer rates or service, or both.

Q. IS THE RELATIVE DEGREE TO WHICH THE COMPANY OR ITS RATEPAYERS MAY HAVE BENEFITED A LEGITIMATE ISSUE IN DETERMINING THE PROPRIETY OF COST RECOVERY?

A. No. The issue is the right of recovery of costs prudently incurred in operating and maintaining the system. Under the Cost of Service standard, a regulated utility is entitled to an opportunity

to recover all costs prudently and legitimately incurred in providing efficient and reliable service, and in maintaining a financially healthy system. There does not appear to be any reasonable challenge to the position that had the Company not mounted a defense against the DOJ claims that (1) the financial consequences would have been extremely serious, (2) a financially healthy system would not have emerged and (3) rates and/or services could have been negatively impacted. Accordingly, it is appropriate to conclude that the litigation costs were necessarily and prudently incurred. Consequently, it is appropriate that cost recovery be permitted.

Q. IS THERE ANY MERIT TO MR. LARKIN'S CLAIM THAT THE COMMISSION'S ALLOWING THE COMPANY TO RECOVER THESE COSTS WILL PROVIDE A "GUARANTEE" THAT FLORIDA UTILITIES WILL RECOVER "ANY AND ALL LITIGATION" COSTS IN THE FUTURE?

A. No. There simply is no basis for such a claim.

Q. AT PAGE 4, MR. LARKIN OBSERVES THAT RATEPAYERS ARE NOT GENERALLY RESPONSIBLE FOR FINES, PENALTIES OR COSTS RELATED THERETO. HAS THE COMPANY REQUEST ELIMINATED BOTH THE PENALTY AND THE RELATED LITIGATION COSTS?

A. Yes. As has been observed elsewhere, the Company is not requesting recovery of the penalty imposed by the decision of the court and is not requesting the full amount of litigation costs incurred. The request for recovery of litigation costs is at a level that relieves ratepayers of the portion of the costs that may be associated with the penalty. In the request, the litigation costs have been reduced by the ratio of the $5 million penalty that would have been absorbed, had a settlement been made, to the $309,000 penalty imposed by the court. The result is consistent with the position advocated by Mr. Larkin

Q. BEGINNING AT PAGE 7, LINE 18, MR. LARKIN DISCUSSES TWO CASES ADDRESSING LEGAL FEES. WOULD YOU COMMENT ON THE DECISIONS RENDERED IN THESE CASES?

A. Yes. In the first instance it is noted that the OPC had taken the position that legal expenses "...should be reduced by the amount allocated for defense of fines."(Larkin testimony page 8, line 6) The Commission concluded that it would be appropriate to allow recovery of legal expenses relating to permitting and compliance and "Accordingly, no adjustment to legal expenses has been made." (Larkin testimony page 8, line 18)

This clearly shows that the OPC position relating to the disallowance of legal expenses "...allocated for defense of DER and Environmental Protection Agency (EPA) fines" was rejected. That decision fully supports the allowance of the litigation costs in this proceeding.

In the second case referenced (Larkin testimony page 9, line 11), the Commission again issued a decision that supports the Company request in this case. Specifically, the Commission concluded that although the fines imposed due to violations of DEP and EPA requirements should be borne by the shareholders, that it was "...reasonable for UWF to recover the costs of defending such fines." Mr. Larkin then rejects the Commission's adopted principle on the grounds that the amounts were insignificant. It is of note that the finding addressed the principle. It did not in any way condition the recognition of legal fees on the significance of the fees in question.

Q. IN THE ANSWER AT PAGE 15, LINE 2, MR. LARKIN OBSERVES THAT THE COMPANY PERCEIVES THE DOJ CLAIMS TO HAVE BEEN UNREASONABLE, RESULTING IN SIGNIFICANT LEGAL FEES, AND THAT THERE IS NO BASIS

ON WHICH THE COMMISSION MAY CONCUR WITH THIS COMPANY VIEW. WOULD YOU COMMENT?

A. I disagree. The DOJ was seeking damages exceeding $100,000,000. Ultimately, the court established damages at less than $310, 000, or about 0.3% of the penalty sought by the DOJ. Even if compared to the DOJ's early settlement offer of $5.0 million, the court imposed only about 6.0% of the DOJ amount. This appears to fully support the perception that the DOJ action was unreasonable.

Q. MR. LARKIN FURTHER OBSERVES AT THAT POINT THAT THE COMMISSION IS PUT IN THE POSITION OF JUDGING THE QUALITY AND MOTIVE OF THE DOJ AND THAT SUCH IS NOT THE COMMISSION'S ROLE. WOULD YOU COMMENT?

A. I agree that such judgement is not a responsibility of the Commission and would observe that no such judgement is needed. The court has already judged both the quality and the motive of the DOJ. It is abundantly clear that the court's decision imposing a $300,000 fine in a case claiming $100 million of amounts due from the Company has already judged the quality of the DOJ position as being grossly excessive. The Court clearly indicated its opinion as to DOJ's motive by saying, "[T]he United States contends that

since a judgement was returned in its favor on its claims against the Defendant Florida Cities, [that] Florida Cities is hereby precluded from being a Sec. 2412(a) `prevailing party'. The Court agrees with Plaintiff's analysis and, grudgingly (emphasis added), with its conclusion." See page 11, Exhibit 6 (GHB-101).

Q. IN RESPONSE TO A QUESTION AT PAGE 16, LINE 23, MR. LARKIN OBSERVES THAT HE DOES NOT BELIEVE THAT BANKRUPTCY WOULD HAVE AFFECTED THE SERVICE TO RATEPAYERS. WOULD YOU COMMENT?

A. Mr. Larkin's view of the impact of bankruptcy is quite interesting. He argues that service would not be affected and then observes that FCWC would have emerged from the bankruptcy with debts discharged and stockholder interests extinguished. He concludes with the observation that under these conditions that "...utility rates might have seen a significant lessening." From these comments, it could be rationally concluded that the bankruptcy actually would have been the best of all worlds for the ratepayers.

I have a problem with this conclusion. To me, it stretches the credulity of finance and economic theory to conclude that a utility that

goes through a bankruptcy proceeding will be able to maintain the same quality of service, and at lower rate levels, than was maintained by the utility operating from a healthy financial position. I am convinced that such conditions would result in undesirable consequences to ratepayers.

Q. IS BANKRUPTCY, OR THE POTENTIAL THEREOF, THE REAL ISSUE IN THIS PROCEEDING?

A. No. The issue is the ability to recover reasonable costs that were prudently incurred in defending against the proposed imposition of large penalties by the DOJ; penalties that subsequently were found by the court to be inappropriate.

Q. EVEN IF SERVICE LEVELS AND RATES WOULD NOT HAVE BEEN ADVERSELY AFFECTED BY A LARGE PENALTY, IS THAT JUSTIFICATION FOR DENYING RECOVERY OF THE COSTS INCURRED IN AVOIDING THE PENALTY?

A. No. As has been observed, the Company surely has a right, if not an obligation, to defend itself against claims that appear to be unwarranted or excessive. In doing so costs will be incurred, and to the extent that such costs are reasonable and the Company actions are prudent, the costs should be recoverable in the application of cost

of service ratemaking principles.

Q. AT PAGE 23 MR. LARKIN RECOMMENDS DISALLOWANCE OF A RETURN TO MEASURE THE IMPACT OF DELAYED RECOVERY OF THE LITIGATION COSTS. WOULD YOU COMMENT?

A. Yes. Mr. Larkin has avidly argued against recovery of the costs in any form or manner. At this point, he appears to be building a fall-back position that will gain a partial victory in the event that cost recovery is found to be appropriate. As I have stated, both in my direct testimony and in this rebuttal testimony, I believe that accepted cost recovery principles fully support the recovery of these costs. If these costs have been legitimately incurred in maintaining the system (and no one has challenged that), cost recovery opportunity clearly should be provided. Since a part of the total cost of litigation is the cost of recovery delay, the costs associated with the delay should also be recovered.

To spread recovery out over a ten year period results in adding time value costs to the amounts initially expended. Accordingly, assuming that cost recovery is found to be appropriate, the rate base inclusion is unavoidable if full cost

recovery is to be made possible.

Q. DOES THAT COMPLETE YOUR REBUTTAL TESTIMONY?

A. Yes.

MR. GATLIN: I offer the testimony, the rebuttal testimony, of Mr. Michael E. Murphy to be inserted into the record as though read.

CHAIRMAN JOHNSON: It will be so inserted.

MS. GERVASI: And Staff would offer Responses to Staff's Second Request for Production of Documents No. 9 and Second Request for Interrogatories No. 40 and 47.

CHAIRMAN JOHNSON: It will be so marked and, it's Exhibit 22.

(Exhibit 22 marked for identification.)

FLORIDA CITIES WATER COMPANY

FT. MYERS & BAREFOOT BAY DIVISIONS

WATER AND WASTEWATER OPERATIONS

REBUTTAL TESTIMONY OF MICHAEL E. MURPHY

TO

DIRECT TESTIMONY

OF

HUGH LARKIN, JR. AND PATRICIA MERCHANT

DOCKET NO. 971663-WS

Q. Please state your name.

A. Michael E. Murphy, 4837 Swift Rd., Ste. 100, Sarasota, FL 34231.

Q. What is your position with Florida Cities Water Company(FCWC)?

A. I am Vice President and Chief Financial Officer.

Q. Have you offered direct testimony in this proceeding on behalf of FCWC?

A. Yes.

TESTIMONY OF HUGH LARKIN:

Q. On page 22, line 22, of the direct testimony of Mr. Hugh Larkin Jr., he brings up a point concerning legal fees incurred for the defense of some of FCWC's employees. Did you present exhibit MM-2, Legal Expense Schedule, which is a complete listing of legal expenses and costs for which FCWC is seeking to

recover in this case?

A. Yes I did.

Q. Did you exclude any and all legal expenses incurred for personal legal counsel for FCWC's employees in exhibit MM-2?

A. Yes. To the best of my knowledge, there are no legal expenses incurred for personal legal counsel for any FCWC employee included in MM-2.

TESTIMONY OF PATRICIA MERCHANT:

Q. On page 5, line 24, of the direct testimony of Ms. Patricia Merchant, she brings up a point concerning whether the penalties and legal fees caused severe financial damage to FCWC, would you please respond to her point?

A. In my prefiled direct testimony (beginning on page 4, line 6) I pointed out that over $100 million in penalties requested by the DOJ were of such magnitude as to constitute a possible financial calamity to FCWC. I never indicated that FCWC would be placed in financial calamity because of the legal expenses incurred by FCWC or penalty imposed by the Court.

Q. Has there been any financial harm to FCWC caused by the legal expenses incurred by FCWC or penalty imposed by the Court?

A. Financial harm is rather strong language. Certainly

the Company would be better off financially if it had not incurred over $4.0 million in legal expenses and penalties in connection with this litigation. Obviously the Company has less cash to pay operating and capital outlays and the Company has reduced equity and reduced financial ratios which are important when it comes time to borrow additional funds from outside sources.

Q. On page 6, line 6 Ms. Merchant indicates these costs were incurred because of violations at specific wastewater divisions. Is this correct?

A. No. Legal expenses were incurred for all FCWC wastewater divisions. As indicated in Mr. Allen's prefiled direct testimony (beginning on page 40, line 12), the DOJ was conducting discovery at all FCWC wastewater divisions until the Amended Complaint was filed in March 1995.

Q. On page 10, line 3 Ms. Merchant indicates that allowed costs should only be recovered from North Ft. Myers, Barefoot Bay and Carrollwood wastewater customers. How would this effect the Company's current proposal of collecting $.42 per water and wastewater customer per month?

A. That amount of $.42 per month would need to be increased to $3.44 per month for wastewater customers

in the North Ft. Myers, Barefoot Bay and Carrollwood divisions only. If somehow the Commission determined that an appropriate allocation method might be a ratio of the amount of penalty incurred by division, then North Ft. Myers wastewater customers would be charged $9.11 per month. Barefoot Bay and Carrollwood wastewater customers would be charged $.57 and $2.49 per month, respectively. All of these options assume a recovery period of 10 years.

Q. Does this conclude your testimony?

A. Yes.

MR. GATLIN: I believe that's all we have, Madam Chairman.

CHAIRMAN JOHNSON: Is that it, Staff, for you?

MS. GERVASI: Yes, ma'am.

CHAIRMAN JOHNSON: Public Counsel?

MR. McLEAN: Nothing further, Commissioner.

CHAIRMAN JOHNSON: Show all of those exhibits admitted, then, without objection.

MS. GERVASI: Thank you.

MR. GATLIN: Thank you.

(Exhibits 1-22 received in evidence.)

CHAIRMAN JOHNSON: Any other matters?

MS. GERVASI: The only other thing, Commissioner, if I may, just as a reminder, announce when briefs are due. And they are due on September the 14th, with Staff recommendation going to the Commission's regular Agenda Conference on November the 3rd.

CHAIRMAN JOHNSON: Any other questions, Commissioners, or parties?

Seeing none, is that it?

MS. GERVASI: Yes, ma'am.

CHAIRMAN JOHNSON: Okay. This hearing is adjourned.

MS. GERVASI: Thank you.

CHAIRMAN JOHNSON: Thank you.

MR. McLEAN: Thank you, Commissioners.

(Thereupon, the hearing concluded at 11:00 a.m.)

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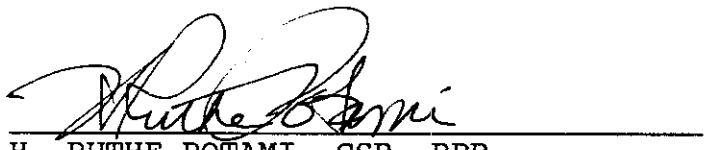
STATE OF FLORIDA)
: CERTIFICATE OF REPORTER
COUNTY OF LEON)

I, H. RUTHE POTAMI, CSR, RPR Official Commission Reporter,

DO HEREBY CERTIFY that the Hearing in Docket No. 971663-WS was heard by the Florida Public Service Commission at the time and place herein stated; it is further

CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript, consisting of 376 pages, Volumes 1 and 2 constitutes a true transcription of my notes of said proceedings and the insertion of the prescribed prefiled testimony of the witness.

DATED this 14th day of August, 1998.



H. RUTHE POTAMI, CSR, RPR
Official Commission Reporter
(904) 413-6732

FLORIDA CITIES WATER COMPANY

EXHIBITS _____ (ABA-1 THRU ABA-2) OF

DR. ABDUL B. AHMADI

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATE OF AMERICA, Plaintiff, vs. AVATAR HOLDINGS, INC. and FLORIDA CITIES WATER COMPANY, INC., Defendants.	)	CASE NO. 93-281-CIV-FTM-21

COPY

DEPOSITION OF ABDUL DAQI AHMADI

Upon oral examination taken by counsel for the Plaintiff on October 20, 1995, commencing at 9:45 a.m. at the office of the U.S. Attorney, 2000 Main Street, Suite 701, Fort Myers, Florida before Rose Marie Cychmistruk, RPR, Notary Public, State of Florida at Large.

APPEARANCES:

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I N D E X

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Thereupon,

ABDUL DAQI AHMADI,

the deponent herein, after having been first duly sworn, upon his oath, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. QUINN:

Q Dr. Ahmadi, would you please tell us your full name?

A My full name is Abdul Daqi Ahmadi; A-b-d-u-l, D-a-q-i, A-h-m-a-d-i.

Q I know that people refer to you as Dr. Ahmadi. What is your degree in, sir?

A I went to the University of Florida and obtained my Ph.D. in environmental engineering sciences.

Q And when did you do that, sir?

A This was in 1981.

Q Sir, have you ever had your deposition taken before?

A Yes, I have.

Q Okay. How many times?

A Many times.

Q Let me go over a couple of the rules or ground rules if I could. Do you understand that the court reporter is here to write down the words that you say so you should speak in words and not gestures. Do you

understand that?

A Yes.

Q Do you also understand that the oath you took is similar to an oath you would take in court? Do you understand that?

A Yes.

Q Because the court reporter is transcribing things as we speak, it's important we don't try to talk over each other, so I'll try to finish all my questions and I'll try not to overlap if you would do the same.

If you don't understand a question I've asked, let me know and I will try to rephrase it or repeat it. Okay?

A Yes.

Q If you don't understand a word I've used or a definition of a word I've used or the definition you think might be different, there might be some ambiguity and you recognize it, please let me know and I'll try to correct that right away. Okay?

A Okay.

Q Also, if you need a break at any time, please let me know and we'll take a break. Okay?

A Okay.

Q As I told both Miss Schaffner and you before we started today, I do not anticipate going very long with

you today, certainly no longer than lunch.

I'd like to get right into the areas of questioning that I have for you, sir.

Can you please give me an idea of your job duties currently?

A I am currently in charge of the -- all water facilities functions. It encompasses permitting, compliance, enforcement with regard to sewage treatment facilities, industrial wastewater facilities, groundwater monitoring associated with those facilities, underground injection control facilities. That includes surface water discharges as well as groundwater discharges.

Q Do you deal with this acquisition of potable water?

A I'm also dealing with, yes, drinking water facilities, permitting, compliance and enforcement.

Q And treatment of drinking water as well?

A Right.

Q Okay. What is your current job title, sir?

A I'm a water facilities administrator. I'm a Professional Engineer Administrator. That's the official title.

Q And do you hold a professional license in the State of Florida?

A Yes, I do. I'm a registered engineer with the

State of Florida since 1984 in sanitary engineering.

Q Sanitary?

A Uh-huh.

Q How long have you been with the Florida Department of Environmental Protection?

A I started with the Department -- our previous name was DER -- Environmental Regulation. It was changed to DEP two years ago in 1981, September of 1981.

Q During -- since 1981, have you been involved in water issues?

A I started as a staff engineer in 1981 primarily in permitting of domestic resource facilities, collection systems and then in 1984 was promoted to the district engineer after I obtained my professional engineer registration. And then at that time I was heading all district functions. I was a PE in addition to one other staff PE in the district.

Q PE is professional engineer?

A Yes.

Q Since 1981, have you had involvement with the Florida Cities Water Company, Incorporated?

A Off and on whenever an application came in or if there was a meeting or any other issue that involved a response just like with any other facility. I was involved to that extent.

Q How many facilities -- withdrawn.

How many privately owned wastewater treatment facilities are within your jurisdiction in your district?

A I have not counted exactly how many private as opposed to publicly owned treatment works but we have roughly 700 domestic resorted facilities in our district and most of those are private. We have some city, some county and some even Federal and state agencies, departments.

Q Tell me again, please, when you became your most recent job title with FDEP?

A The water facilities administrator, we have been going through reorganizations several times of the agency. In 1988 was the current title.

Q Okay.

A Prior to that, I was a program -- water program administrator which included all of the things we mentioned earlier. All state included division infringement activity.

Q It included industrial users and wastewater treatment, groundwater monitoring, underground injection control and surface water issues?

A Drinking water and regional fill prior to 1988. But since '88, it's only those facilities that I mentioned and you mentioned also.

Q Sir, you had mentioned that you were involved in three aspects with regard to those issues; permitting, compliance and enforcement; is that correct?

A Yes.

Q Okay. At any given -- well, at any given time, how many permit applications are pending for wastewater treatment plants?

A That's hard to really ascertain and see the exact number but I keep a manual log since I started the job back in 1981 for each year. The minimum we had is probably in the last two years which was close to a thousand permits per year. So far this year, we have over 900 permits, applications received in my section.

Q So, you're ahead of schedule this year.

A Compared to the last two years, we're doing a little better this year.

Q Okay. At any given time, how many enforcement actions are pending against wastewater treatment plants?

A Again, I do not count how many per year, but if -- we have an ongoing inspection of all the facilities. Some are scheduled, prescheduled on a five-year basis, others are unannounced schedules that if you go and if you find noncompliance, we bring them down.

So, I -- I don't have any figure on that but it's probably in the tens.

Q In the tens?

A Uh-huh; ten, 20, 30.

Q You talked about compliance inspections. Did you include the ten to 30 enforcement actions? Within that, did you include compliance inspections?

A No. Compliance inspections are one of the functions of the agency that is probably one of the better functions that we go and ascertain how the facility is visually, is it in compliance with the permit conditions, are the individual components working?

We inspect the records. Are they maintained? Sometimes we go in and inspect their lab operation while they perform the tests, make sure they are using standard methods, approved methods and also make sure they are using the approved equipment and that the chemicals are standardized, the equipment is standardized, quality assurance is there.

So, that's the personal inspection and then occasionally if he feels that the facility is not meeting the standards, our inspectors are trained to carry with them some chemicals and bottles and equipment where they would take a sample and run it to the laboratory of the state and then we analyze in our own lab the results and then we compare that with them.

Sometimes we split the samples while they're

there and tell them you analyze. We analyze, we'll compare the results and we'll determine whether you are in compliance or not.

So, that's a subject function which basically gives the assurance that the facility is in compliance with the state rules.

Q In a given year, if you can estimate for me, about how many compliance inspections occur in your district?

A We have over 300 drinking water facilities, over a hundred industrial, over 700 domestic resource facilities, over 700 injection wells in the outfall district. We'll like to get to those at least once a year on all of them.

Q With regard to the wastewater treatment plant or the domestic sewage plants -- and I'm going to use those two terms interchangeably -- out of the 700, can you tell me approximately how many were inspected, have been inspected thus far this year?

A We have about two and a half months left. I would say close to 70, 75 percent. We have one vacancy in the compliance section that -- that may throw off the numbers a little bit but generally you would like to keep this an ongoing business.

And we have a policy if there is a complaint,

always go to it. So, there are situations where a facility may be inspected five, six times a year and a lot more than others if there is a complaint or noncompliance.

Q In your staff of engineers, approximately how many people are -- withdrawn.

How many -- how is your staff of inspectors organized?

A We have in the domestic wastewater section a section manager who's also a professional engineer. He is in charge of the domestic wastewater section activities that includes again permitting, compliance and enforcement.

That section is subdivided into two groups; the permitting side and the compliance enforcement section. The permitting has primarily permitting engineers. We have one other professional engineer that works for him and then we have several other staff engineers who have been there for many years.

They basically review and process permit applications. Those are the construction permits, operation permits. We used to have temporary permits. Not any more since May. We delegated the permits program by the EPA, collection systems.

And then we have the compliance enforcement section which also reports to the section manager and

their main function is compliance and enforcement.

Q And how many people are in the compliance and enforcement section?

A In compliance and enforcement are five people. And then we have a section manager there who is an environmental manager and then several environmental specialists and one engineer.

Q So, if we break it out, each inspector inspects about 140 wastewater treatment facilities a year?

A The -- the permitting engineering also are doing some inspections and the groundwater technical support staff is also helping in that function.

Roughly, you will see about 120, 40. I go in and inspect occasionally the plants.

Q Have you ever inspected the Florida Cities Waterway Estates wastewater treatment plant?

A Yes, I have.

Q And how many times have you inspected it?

A Probably a couple of times.

Q When was the most recent time?

A Sometime this year. I don't recall the exact dates but sometime this year.

Q And was it in an enforcement or compliance inspection?

A This was just a reconnaissance inspection where

I wanted to get a feel of how they were doing.

Q Okay. Why did you go there?

A We were getting some complaints from the -- the people that -- nearby there is a restaurant. There was odor there. So, I asked the staff to go there and then one day I went on my own to verify their findings.

Q Was the finding that there was an odor coming from the wastewater treatment plant?

A The staff said there was none. And then when I went there, I noticed -- I went through the entire plant with the operator. I found nothing there.

Q Other than the complaints about odor, were there any other complaints regarding the Florida Cities Waterway Estates wastewater treatment plant this year? This year.

A This year, no. That's the only one complaint I got.

Q And was the only complaint from the restaurant?

A Yes.

Q Have you gone -- other than to do reconnaissance with regard to the odor issue, have you been to the Florida Cities Waterway Estates wastewater treatment plant on any other occasions this year?

A No.

Q Other than do the reconnaissance during your visit to the wastewater treatment plant, did you do

anything else other than determine if there was an odor problem?

A Basically looked at the overall operation which is -- will tell us if there is an operation problem with the facility that's causing the odors. Normally in a sewage plant, air is inadequate in the treatment process or a mechanical or an electric component is down or not functioning well. Basically the operator is not paying attention or the sludge is not withdrawn, a lot of things, and that kind of activity leads to odors. And I was looking for those signs but I couldn't find any.

Q Did you prepare a written report based upon your inspection, sir?

A No. I just told the staff that I went there and the plant seems to be in compliance from what I observed.

Q Based upon your recent inspection, what is your overall impression of Florida Cities Water Company's operations at the Waterway Estates wastewater treatment plant?

A They seem to be in compliance with our rules.

Q Would you say that they -- that Florida Cities Water Company operations at the Waterway Estates wastewater treatment plant are exemplary?

A They are trying hard to -- they understand they're in the middle of a relatively high class area.

And they're trying hard to make sure that the public is happy and that they are in compliance with the state rules.

Q Do you know -- can you tell me whether they're trying hard to make sure they're in compliance with the Federal?

A I see no reason why they shouldn't. If they want to try to be in compliance with the state rules, they should definitely be in compliance with the Federal rules.

Q You say they're trying hard to make sure the public is content or happy. Was there a point in time when they were not trying hard in your opinion?

A That's hard for me to say whether they were trying or not. There were times where there were more complaints in the past years.

Q Does -- withdrawn.

What does the fact that there are complaints about a wastewater treatment facility indicate to you?

A Could be a number of things. In fact, I got calls this last week from a lady who was very upset with the Reed (phonetic) case that was before the Public Service Commission in Tallahassee for this very plant we are talking about.

As you may know, that's a public service related facility in the State of Florida. They are obligated or

they are allowed under state rules to recover reasonable costs and fees and expenditures. Anything we impose as a state agency on them or as a county government or even Federal government is a consequence of our rules and that expense is passed on to the customers.

And in this case, this one customer is saying that they are paying close to a hundred dollars a month for one or two people and that's a lot of money and here that's not enough, they're asking for more. When they're asked why, they say it's the state and the Federals who are making them do this thing and do that thing. We have no choice.

So, then they call us; is that the case? We told them something, yes. We told them, you take this six-foot contour. We told them, you expand the plant to meet AWT. We told them, your expanding will not allow you even to go to the river and all these kind of things.

Q Are you familiar with the rate case that is going on now regarding Waterway Estates?

A Only that there is a case pending before the Public Service Commission. We do not get involved in the economic or financial aspects of it other than if you're asked, our staff provides them what we have in our files with regard to our dealings with them in compliance with the rules.

Q Have you supplied anything to the Public Service Commission with regard to your dealings with the wastewater treatment plant at Waterway Estates?

A I'm not sure on that. If they're in contact, yes, I believe we have. We have a very good working relation with the PC.

Q Can you tell me -- and you might not be able to answer this and that's okay -- whether a privately owned wastewater treatment plant is able to pass on costs of litigation to the rate payers?

A I'm not sure. I think the Public Service Commission probably will be able to tell that. My feeling is that they may find that we were -- this is -- this is doing cost of business and it should be passed on.

Q How about do you know whether a civil penalty for failure to comply with environmental regulations can be passed on to rate payers?

A That's in the same line. I'm not sure. If -- if there is a legal way, I'm sure they will find that way and implement it so that is passed on to the customers.

Q You'd mentioned two aspects of work done at the Waterway Estates plant; one was movement of the outfall and the second was upgrade to advanced wastewater treatment. Is that correct?

A Yes.

Q Okay. Are you familiar with any other modifications with the Waterway Estates plant?

A Yes, I am.

Q Okay. What else?

A We asked them to provide us a capacity analysis report back in 1991-'92, in that time, to value with their facility to find out how many people out there are being served, how many people is projected to be served in the future and how is their plant capable of providing service for those future connections.

In that line, they provide us a report and in their report they indicate that -- well, we found out that they really didn't have much reserve capacity for any future service and connections. And unless the area is fully developed and they do not intend to provide service to the future citizens, in those cases that's the end of that capacity and as the area is fully developed, no more expansion.

In their case, there are some future prospects for growth and development and we told them that they need to expand the plant. And that's mandatory by our rules if they expand the plant based on the capacity analysis report, then that cost is passable to the residents.

Q You talked about the capacity analysis report. Is that part of a master plan?

A No. It's a Florida Administrative Code requirement and it's specific to each entity in each private or public facility.

Q Are there any civil penalties that are -- that may be imposed as a result of a privately owned wastewater treatment plant having inadequate capacity for future growth?

A It is possible if we've issued them permits and they say that they have the capacity and then we find out that when those systems are built and certified and connected to the facility and the facility gets overloaded, yes, it is possible that they lead to noncompliance, that we will impose several penalties.

Q Now, with regard to movement of the outfall from the canal to the Caloosahatchee River, are you familiar with the events surrounding that?

A Yes.

Q Okay. Can you please tell me what first initiated the -- what was the first thing that was done to initiate the movement of the outfall from the canal to the river?

A Sometime around 1988, the department decided, if nothing else, for consistency purposes that we implement the AWT requirements on all surface water discharges to the river.

And we have the City of Fort Myers that has two plants that are discharging; one is north of us, I guess east of us that way, and then one is south of us that way, southwest. And then Florida Cities also owns another facility on the south side and they discharge in the same river on this side and then they own this plant on the north side, which is that way, and then the City of Cape Coral.

All of the facilities on the southern side of the river had AWT permits. In fact, prior to 1981 when I came here, they all had obtained AWT permits and were in operation or just being completed and all of the plants which were on the north there over by the AWT plants there. One other is the North Fort Myers utility, which is that way, and then Waterways is in the middle and Cape Coral is further down.

None of those had AWT and they were involved into a regional planning on the north side to have several facilities constructed and supported by the county and the city through a co-op and also the private folks will be merged with that and -- and either have a discharge or eliminate the discharges all together.

And that was in my opinion one reason based on my discussion with the staff -- I wasn't at the time when these things happened -- that that was the reason that led

to kind of a situation where the City of Cape Coral and North Fort Myers utility, the Waterways Estates Plant, all of them remained discharge to the river without obtaining the AWT sooner.

Q Was the modification to bring the plants to AWT imposed by the Grizzle-Figg law?

A No. Not in our case. The Grizzle-Figg law is specific only to two areas; one is Charlotte Harbor which is a subject ecosystem and one is Tampa Bay which is also.

This is facts specific where we determine that -- that everyone needs to be protected from pollution and a study was done and it was determined that up to 48 million or 49 million gallons a day could be discharged to the river without any detrimental impact.

And currently there is approximately two million gallons being discharged to the river. So, there's still some reserve capacity of 17 million that's left there.

Q Was there a point in time when the Waterway Estates wastewater treatment plant was assigned a zero waste load allocation for the Caloosahatchee River?

A Based on the planning documents that were in the initial stages that North Fort Myers Utility, Waterway Estates and the City of Cape Coral would all construct and operate two plants in the northern part and there may be land applying their effluent disposal. On that situation,

they may not be able to discharge.

Q Okay.

A It was just on a planning document. And that plan did not materialize and they were forced to discharge and continued to discharge.

Q When you say they were forced to discharge, do you mean forced to discharge to a surface water?

A Yes.

Q Okay. When --

A They continued to discharge because that's what they were doing.

Q They were discharging to the river at a point in time; is that correct?

A All along.

Q Okay.

A They've been discharging from the very beginning, the City of Cape Coral and Waterway Estates, to surface waters. And in that planning document, my understanding is they were planning to go to land application. If that plan would have been implemented, they should have not been discharged from Waterway Estates or the City of Cape Coral plants.

Q Do you know -- you said that the -- withdrawn.

The land application did not materialize. What -- what does that -- what do you mean by that? Can

you give me a little more insight?

A The plan did not get implemented all together. The City of Cape Coral went on its own, the county withdrew. Waterway Estates being a very minor player in this entire thing had a plant that was discharging. It continued to discharge and it did have permits from the state and to my understanding from agencies where most of their -- most of the time.

Q Are you aware that Waterway Estates did not have a Federal permit for at least some of the period of time?

A For some period of time, they may not have.

Q You also said that Waterway Estates was a very minor facility. Can you tell me what you mean by that?

A Compared to the other discharges, it's just about one million gallons a day which is minor in capacity and volume. The City of Fort Myers has 23 million gallons so that's in relation to that or Cape Coral has 14 million gallons. Their volume and discharge capacity is very small.

Q Can you tell me whether FDEP considers discharges to surface water as a more or less favorable alternative to land application of effluent?

A The DEP has a water policy which, believe it or not, in this area we have a lot of rain but even though the rain stops here in the south for two weeks, the

drought kicks in. So, we do have severe water problems here, water supply problems.

From that perspective, it's the state's position that we would encourage land use applications for most of the water sewage facilities and that's our official policy.

There are, of course, situations where the land is not available or it's not feasible if it's available. It's too costly. Then the rule does allow surface water discharges on the ground and all of that.

Q So I'm sure I understand this, you said that FDEP's water policy encourages land use. Does that mean FDEP's water policy discourages effluent discharge to water bodies?

A There are provisions in the rules. If reuse is feasible, our rule says that reuse should be taken but that decision is left to the utilities to make. If it's financially attractive to discharge surface waters to them and there are public interests involved in terms of, you know, the users and customers, then in those situations the -- the surface water discharge is allowable under our state rules.

Q Is feasible -- the term "feasible" defined within those rules by some specific formula?

A Feasible is a -- that decision really is left to

the utility to make. They have to present alternatives. Let's say they have three alternatives or four alternatives. Out of those, they have told us the cost of each and then if reuse is the most expensive of all, then obviously it's not practical because cost is passed to the customers.

Q Is feasible in terms of this rule equated with cost effective?

A To some degree it is related to the cost. I'm not sure if it's just equivalent to that but the utility makes that decision and if they give us those figures, we review them and then we take them to the case water.

Q You -- you do not independently investigate a utilities decision on whether land application is feasible or not feasible?

A To the extent possible, we check on that from our own knowledge but we don't have any staff to go in or accomplish where they would go in and investigate thoroughly

Q Do you know -- do you know whether any investigation into Florida Cities Water Company's determination -- determinations regarding land use were feasible or not feasible?

A Their situations really are a little different. They have been discharging since I've been with the

agency, so this policy became effective just in the past several years. So, it really didn't have a firm policy on that. And it applies only to new facilities or to expansion of existing facilities.

So, in their case I'm not even sure that that would apply because they were discharging.

Q At the time you -- you joined FDEP, do you know whether the Waterway Estates outfall was located in the middle of the Caloosahatchee River roughly or in a canal adjacent to the Caloosahatchee River?

A At the time I started with the DEP, the first year I have no idea if we even had a facility called Waterway Estates.

Q How about subsequent to your first year?

A After I get heavily involved, I found out there is such a facility in the north and they are discharging to the Caloosahatchee through a river -- through a canal.

Q Okay. Can you tell me a little bit about the flow that existed at the time in that canal leading to the Caloosahatchee?

A What do you mean "flow"?

Q Was the flow in the canal the same as the flow in the middle of the Caloosahatchee River?

A To the best of my knowledge, that canal is connected tidally to the river and for all practical

purposes they are both classified as Class III waters of the state. There's a definition for that. And, so, there's no distinction really in the qualities of the water or the standards that are applied to both of them.

Q My question was really more with regard to the flow. You'd said that the canal was tidally influenced. My question dealt not so much with the level of the water in the canal but, rather, the rate at which water flows through the canal. Can you shed any light on that?

A We had no information on the actual flows in the river to my knowledge or to the canal. The only thing we have knowledge is the discharge itself.

Q And what -- when you have only information about the discharge itself, can you tell me what you mean by that?

A The sewage plant discharged, which is the one million gallons per day capacity.

Q Can you tell me whether -- can you tell me whether or not the only flow in the river -- I'm sorry. Withdraw it.

Can you tell me whether or not the only flow to the canal was that which was added from the discharge of the wastewater treatment plant?

A The only extraneous flow would be that -- let's assume we totally eliminate the Waterway Estates plant, go

to land disposal, let's say, a hundred percent. That canal will still be as it is today when they are discharging so there is -- there's going to be flow, whatever amount of flow is in the river.

Q At the time Waterway Estates was discharging into the canal, can you tell me whether or not you would have gone swimming in that river -- I mean in that canal?

A Some people are swimming here and there in areas where there is no swimming and they jump in right here in fact on this canal -- Centennial Park.

And, personally, I don't even know how to swim unfortunately.

Q Would you have let your children swim in the canal that leads to the way the -- near where the Waterway Estates canal was discharging?

A I'd probably advise them not to swim in and around any sewage pond.

Q Okay. Why not?

A For one thing, there may be some viruses in there, in the effluent. And the viruses are not regulated by us but there is an indication and situation where they have advised.

Q Do your children swim in the middle of the Caloosahatchee River?

A They've gone boating in the middle of the river

and occasionally maybe some water splashed on them.

Q Have they gone waterskiing out there in the middle of the Caloosahatchee River?

A I don't think it's right in the middle but anywhere in the river they have -- I've seen sometimes where my kids have gone there and I've permitted them to go in.

Q Are you concerned about the viruses in the middle of the Caloosahatchee River?

A There is a chance for even known from sources, unregulated sources, there may be viruses and other pollutants and contaminants that may not be good and we've seen some in areas where there's no discharge and yet there have been positive incidences of high fecal chloroforms, that swimming has been prohibited by the HRS.

Q Is fecal chloroform an indicator of the presence of sewage, isn't it?

A It's an indicator of organism that shows they are of human origin or of warm blooded animals origin waste. It's not limited only to sewage facilities but that is most of the time a contributing factor.

Q Can you tell me whether the -- we're talking a little bit about the presence of or the potential presence of viruses or pathogens in the Caloosahatchee River. Can you tell me whether in your opinion there is a greater

chance of the presence of pollutants in the middle of the Caloosahatchee River than there was in the canal when Waterway Estates was discharging to it? Can you tell me whether there was more likelihood or not?

A The facilities are required to meet certain standards before the discharge by the state permits and as long as they meet those standards -- that standard is much lower than the standard for chloroforms for swimming waters.

Q Okay. You say that the canal was also a Class III water body. Is that correct?

A Yes.

Q Back when Waterway Estates was discharging to it, was it also a Class III water body?

A Yes, sir.

Q Class III water bodies have to meet certain measurements with regard to the presence of certain items. Is that correct?

A Yes, sir. All -- all water of the state are classified into a class from one to five.

Q And Class III allows human use; is that correct?

A Class III are classified as recreational waters primarily.

Q Class III is recreational waters?

A Uh-huh.

Q What are Class I?

A Class I are potable waters.

Q And Class V are?

A Industrial and navigational waters.

Q Since you've come aboard with FDEP, has the classification of the Caloosahatchee River changed?

A Not to my knowledge.

Q Can you tell me whether the condition of the Caloosahatchee River, the water -- withdrawn.

Can you tell me whether the water quality of the Caloosahatchee River has improved or been degraded since you came on board with FDEP?

A We have not documented any degradation of the water since I've been with the agency. It has remained the same.

There are occasional -- there are occasions that say in the summer months where you get an excessively high -- several days high temperatures and temperature in the water goes up, the water normally is affected by the temperature and so the dispersion of the natural aeration is less and so there have been some instances, but aside from the natural phenomenon, the water has stayed -- or has improved, stayed the same or has improved regardless of all the discharges.

Q Okay. Can you tell me why Florida Cities Water

Company moved the outfall from the canal to the river?

A Yes. We told them that they need to expand their plant or upgrade their plant to advance wastewater treatment and also to relocate their discharge point to the middle of the river.

Q Why -- why did FDEP require that the outfall be moved to the middle of the river?

A One thing is to become consistent with all the other discharges.

Q Okay. Any other reasons?

A The other would be that would be the area where there would be maximum dispersion.

Q And what do you mean by maximum dispersion?

A More mixing.

Q So, is it -- is it accurate to say that there was less mixing or less dispersion within the canal than there would be in the middle of the river?

A That probably is true.

Q Do you know that for a fact or is it just an assumption?

A That's what our experts told us that there would be better mixing in there and then we'd relieve mixing.

Q If there would be better dispersion in the middle of the water body, why did FDEP wait until 1988 to require the movement of the outfall?

A We haven't seen an impact on the receiving waters and, again, this was a very small facility.

Q When you say you haven't seen an impact on the receiving waters, what do you mean?

A Any degradation, fish kills, complaints.

Q Well, then why move the -- why require Florida Cities move the effluent?

A That was a puzzling question why we would do this. Basically for consistency. The Florida Cities have a plant on the south, had gone to AWT prior to 1981 and was discharging in the middle of the river on the southern side of Lee County and, so, the City of Fort Myers was doing the same thing.

The City of Cape Coral was on the north. They were in the same boat as the Waterway Estates plant and at about the same time we told both of them to go to the river at that point, at that time also.

Q Was Florida -- FDEP's order to simultaneously upgrade to AWT from secondary and to relocate the outfall?

A Could you repeat that?

Q Sure. Absolutely.

Did FDEP's order require that Waterway Estates upgrade to AWT and relocate the outfall?

A Yes. We did the same thing with one permit, both of them.

Q Wouldn't upgrading to AWT result in less pollutants being discharged to the canal even if the outfall had stayed the same?

A The --- the main thing with regard to AWT as opposed to the secondary treatment that they were achieving as the nutrients only. In fact, from the studies that were done by us, it was determined that the only limiting factor in the Caloosahatchee system is the phosphorus.

And if somehow we reduce or eliminate that, they could even go secondary treatment and the river will not be impacted. Because of that nutrient reduction requirement, we imposed the entire aid of utiliments (sic) on BUD sawdust or phosphorus and nitrogen. And that standard is a lot stricter than -- than the one that's on the books for the grade effect.

Q With regard to the nutrients, if -- the secondary treatment allows more nutrients in an advanced wastewater treatment than it does in an effluent; is that correct?

A Yes, sir. There is no reduction other than what's incidental to the treatment but you cannot for sure say what percentage was reduced.

Q Okay. And a discharge to the canal adjacent to Waterway Estates had less dispersion than a discharge to

the middle of the river; is that correct?

A At times if it's quiet and not too much wave action, wind action, less --

Q Okay. And the outfall at Waterway Estates is adjacent to, I believe, mangroves or other flora; is that correct?

A The current?

Q The -- the one in the canal.

A The one in the canal. There is some vegetation, yes.

Q And wouldn't the nutrients that were discharged when Waterway Estates was using secondary treatment affect the flora that was in that canal?

A It may in some cases may be beneficial, in other cases may be otherwise. So, we had no indication one way or the other.

Q Was any examination done one way or the other prior to requiring Florida Cities to move the outfall to the middle of the Caloosahatchee River?

A Not other than the worst allegations that is.

Q Was there any consideration given to just having Florida Cities Water Company upgrade to AWT and retain the outfall at its current location in the Caloosa -- in the canal?

A No. That was basically decided that anybody who

would discharge to the river, they would all go to either the six-foot contour line or they receive discharge.

Q And why?

A For consistency purposes and also for the long-term use of the river for surface water discharges.

As I say, an allocation of 49 million gallons was established and the river could take, let's say, a maximum number of pounds of pollutants and as long as that maximum is not exceeded, the river will function and should continue to function as a healthy ecosystem.

Our assessment is that even if Florida Cities and Cape Coral had continued with the secondary treatment, they would not have exceeded the pondage limit established for this body of water. So, that's one reason why there was not an impact or rush to get these folks to the six-foot county line.

This is for future plans that in case we do get into a 49 million gallons growth and development potential for the entire region, then in that case it will be crucial that we maintain the limits on that nutrients.

Q Is discharge of effluent to the Caloosahatchee River below the six-foot contour line preferable to discharge of effluent to canals leading into the Caloosahatchee River?

A That's a tough question really to answer. The

Caloosahatchee River, as I said, along with all its tributaries come out as Class III waters. And it has to maintain and meet the standard.

There is an assumption that if it's taken to the middle of the river -- that six-foot contour line, by the way, is a dredge canal. That is a man-made canal in the middle of the river from here to Lake Okeechobee is primarily for shipping and barging and things like that.

It was assumed that if it gets there, there would be more mixing, rapid mixing, and minimal impact. We have no evidence or data that if it was discharged to the shores that there would be more impact, I guess, but that is a perception or an assumption that was done.

Q Because the six-foot contour line is in the shipping channel -- is the six-foot contour line within the shipping channel?

A Uh-huh.

Q Because the six-foot contour line is in the shipping channel and because ships go up and down that, would there be more dispersion in that area than in those areas closer to shore?

A Again, we cannot count on ships that would be coming regularly, every five minutes. Sometimes there is one or two a day, sometimes one a week. But generally it was understood if it's taken to the middle of the river,

that's the deepest area and there will be better mixing.

Q Okay. Because of the better mixing in the middle of river, would it discharge to a place where there's better mixing be preferable to a discharge to a place where there is not such good mixing?

A Yes. There would be -- if you have given the amount of pollutants, if you want them mixed better than if you concentrate them in one area.

Q Okay. And why? Why is that better?

A If the pollutant is really a bad pollutant, it may have localized impacts, such as it would cause fish kills. And if there is a toxicant, it's a -- had an immediate impact or we have not seen from any of our facilities discharging Caloosahatchee any -- any impact such as fish kills, not to my knowledge.

Q About -- are you familiar with when Florida Cities Water Company finally did move the discharge point to the six-foot contour?

A Yes. We gave them a permit and told them to have prepared a plan to AWT and also continue expanded discharge to the six-foot contour.

Q And did they do that within the time limits initially set forth in the permit?

A Not in the initial permit.

Q Did they do it -- was -- withdrawn.

Was the permit modified in any way?

A Yes. I believe we extended the permit and gave them another temporary permit.

Q Okay. Did they come in -- did they meet the terms of the second permit which you call the temporary permit?

A I believe they did.

Q Okay. Do you know how much longer that second or temporary permit allowed them the primary first permit?

A I'm not positive. It may have been at least a year because they had some difficulties obtaining permits from other state and Federal agencies and local agencies.

We gave them a permit to go ahead, expand the plant and do all the work that we thought was necessary. And then when they went to the Army Corps of Engineers and to the county, they were telling them they're not going to get a permit to do this thing, so that was the reason that was indicated to us that they needed more time.

Q Is your office at FDEP involved at all with determining what the waste load allocation was for the Caloosahatchee River?

A We have basically a Level I and Level II study. Level I is where we do that in the district. We make a determination through historical data for reviews on any past; that is, information that is submitted to us each

month. If they are in compliance, then that's done and then we take care of the permits and price.

It's a Level II study that's more sophisticated, requires models and scientists were trained in that. And that's done in conjunction with our combination, done by our staff in Tallahassee.

Q Are you familiar with the point in time when the Waterway Estates facility was assigned a zero waste load allocation?

A In certain planning documents, that was assumed that there would be no discharge when they go to regional facilities in the north side.

Q And was that -- in those planning documents, did -- withdrawn.

Can you tell me whether those planning documents considered the point of discharge for the wastewater treatment plant in assigning a zero waste load allocation?

A I don't know what they -- what do you mean by it.

Q Okay. We talked -- we've been talking a little bit about the dispersion rate at various locations in the Caloosahatchee River and we had -- you'd indicated to me, I believe, that dispersion at the six-foot contour is greater than dispersion in tributary canals usually; is that correct?

A Yeah. That would be a true statement.

Q And that discharge -- excuse me. Withdrawn.

That the dispersion at the six-foot contour line was greater than the dispersion rate in the canal adjacent to the Waterway Estates facility; is that correct?

A Yes.

Q Okay. Can you tell me whether any consideration was given to that fact in the difference of the dispersion rates between the six-foot contour line location and the canal when in the planning documents a zero waste load allocation was assigned to the Waterway Estates facility?

A No. I believe the -- the entire premise there was that there would be regional facilities that will eliminate Waterway Estates and the City of Cape Coral and the North Fort Myers utilities plant all together. And then if that plant was to be implemented, there would be no discharge. So, on that basis, there was no discharge assigned to them.

Q So, the planning document assumed that the Waterway Estates plant would be put out of service.

A Dismantled. It would be dismantled as well as the City of Cape Coral and the North Fort Myers utility plants. The North Fort Myers utility plant was given allocation. They still have that in fact but they decided not to go to the river and instead go to the land

application and injection.

And the City of Cape Coral and Waterway Estates continued to discharge to the -- because of the lack of the planning or implementation of the plant.

Q Are you -- the document -- the planning document you're referring to, was that waste load allocation prepared by Mr. Bruce DeGrove (phonetic)?

I could show it to you if you'd like, if that will help.

A It was a planning document by the -- the county on the original and then our waste load allocation basically took the -- what the county wanted for the entire Lee County. And on the basis of that information, it was included in our waste load allocation document that it would be zero discharge for Cape Coral and Waterway Estates.

Q Was that zero waste load allocation for Waterway Estates ever changed?

A I'm not sure if it was changed in the WLA but it was a public knowledge that they were a surface water discharges and they had permits from us and we all along knew that.

Q Okay. When you say it was public knowledge, how did it become public knowledge?

A Public knowledge meaning that there was a plant

that was permitted by the state to discharge to tha where they were discharging all these years. And every time there is an expansion, it's advertised and everybody knows about it.

Q Did FDEP ever notify the United States Environmental Protectional Agency about a change in the waste load allocation for Waterway Estates from zero to something greater than zero?

A I'm not sure if he specifically sent a letter but EPA should have known because they had conducted a joint inspection with the DEP and they knew where the plant was, where the discharge was all these years, as I understand it.

Q I think -- I'm a little confused because of the fact that there was in fact a discharge doesn't mean that that discharge would have been permitted with regard to waste load allocations. Is that a correct statement?

A We -- to my knowledge, we've shared the information with the EPA and we conducted a joint inspection with EPA staff at the site and we've given ther reports and it should have been known to them as it was to us that, yes, there was a facility of this size and that was discharging to that point with these kinds of standards.

And those reports, they are very elaborate and

detailed, that we go through the labs and through the different procedures. They are six, seven pages. And this was rated satisfactory, that was unsatisfactory, this was excellent. And that report was signed and distributed to the utility and to the city -- I mean to the -- to the state and to the Federal government, so it shouldn't have been a surprise to us or to them that there was no discharge despite that one before that says they were assigned us discharging in one document.

Q So, it should not have been a surprise that there was in fact a discharge even though there was a no discharge waste load allocation.

A Yes. There shouldn't have been any doubt that there was a discharge.

Q When -- okay. When do you think EPA should have known that the zero waste load allocation was not being followed?

A Any time that they wanted to know, they should have known that because in their files it should have been clear that they were discharging and they all along had permits except maybe for that one period that -- that they didn't have a permit. But if there was a permit, the EPA should have known that the permit was for the discharge.

Q Do you know whether or not FDEP was obligated to let EPA know about a change waste load allocation?

Withdraw. Let me withdraw that.

Do you know whether or not EPA -- withdrawn.

Do you know whether FDEP had any obligation to change or request a change in the waste load allocation because Florida Cities Water Company was discharging to surface water bodies and therefore had greater than a zero waste load emission or discharge?

A We had, as I say, no problem with where the facility was in general. They were discharging. As far as I'm concerned, they could have continued with secondary treatment and I probably wouldn't see any impact on the receiving waters even at the point it was.

But there were a lot of factors such, as I say, a consistency with the other dischargers and also future growth in mind. That was the -- the basis why they were all forced to go to the six-foot contour line.

Q Is the fact that the outfall from the Waterway Estates plant is located at the six-foot contour line and that the treatment at the Waterway Estates plant advance wastewater treatment, is that in any way better than what it used to be at secondary in the outfall in the canal?

A Only in one thing and that's that phosphorus concentration and nitrogen concentration which we don't think is -- is essential but from my understanding that the phosphorus was an important parameter in the

ecosystem.

In order to limit that, they have to go to AWT and with that comes a lot of incidental advantages such as reduction of EUD and solids, nitrogen at the same time in order to achieve that phosphorus concentration.

Q There's also better dispersion at the six-foot contour line.

A The six-foot contour, there's better mixing and with the AWT there is less pollutants.

Q So, the fact that there is an outfall at the six-foot contour line means that there is better mixing and dispersion of the pollutants that are discharged; is that correct?

A That was the premise.

Q Okay. And the fact that there was AWT rather than secondary treatment means that there are less pollutants being discharged; is that correct?

A Yes.

Q Does the fact that there are less pollutants being discharged and that those pollutants are being better mixed, does that make the location and the treatment at Waterway Estates better today than it was when it was only secondary treatment in discharging to the canal?

A With respect to that one particular permit,

yeah, that's better. With regard to others, we have no evidence that they were really critical in any way or manner.

Q So, it's not better?

A What I'm saying is that I'm not sure if -- if nitrogen was an issue at all, whether its discharge was secondary standards at that point or with advanced standards at the six-foot contour.

Presumably that's better because of this perceived assumption of better mixing. But whether it was really that bad at that point without mixing and with that standard that's debatable because we really have no data and information to show that this is better than that. But only one thing which was the phosphorus concentration dictated the AWT limits.

Q There is no evidence or no data regarding the effect of the effluent being discharged into the canal; is that correct?

A Not much. In terms of water quality impacts or fish kills, things of that kind.

Q Were there any studies done on the effect of the discharge of pollutants into the canal from Waterway Estates?

A Not much.

Q Were there any?

A Not to my knowledge.

Q Okay. So, there were no studies?

A Other than that routine once every ten years or eight years, the WLA study that was done. We have no other studies.

Q Okay. What about any other evidence regarding any either positive effect or detrimental effect of the discharge of pollutants into the canal from the Waterway Estates plant?

A Probably not as long as they met what was in their permit in terms of the secondary standards the fecal chloroform, Ph and that -- that was assumed that there shouldn't be any effect on receiving waters.

Q So, there's no evidence that the discharge of pollutants was either beneficial or detrimental to your knowledge?

A Yes. On the basis of the maintenance of the standards for that class of water, we feel that there was no detrimental impact that could be pointed out that there is damage happening as a result of the discharge.

Q Can you point out that there was any beneficial impact as a result of their discharge to the canal?

A Probably not. Again, we -- we have no evidence to -- to show one way or the other but it was assumed if they had met the standards based on their permits at the

time that -- that there shouldn't be any impact on their water.

Q Do you know whether there was any obligation upon Florida Cities Water Company to apply for a waste load allocation to change the zero waste load allocation that they had earlier had?

A I'm not sure if it was known to them that -- that they had the zero discharge allocation because they were discharging knowingly and they had permits from us and from the Federal Government most of the time.

Q Did there come a point in time when Florida Cities Water Company did apply to have the waste load allocation for Waterway Estates changed from zero to something else?

A I thought it was the other way around. We told them that they had to go to AWT.

Q And you told them they had to go to AWT --

A Yes.

Q -- but what about the zero waste load allocation issue?

A I have no knowledge of whether they -- they knew that they had no allocation or not.

Q But do you know whether or not -- there was at some point in time a change in the waste load allocation for Waterway Estates; is that right?

A As far as I know, it has always been assumed that they -- well, a discharger with the exception of that one document. And they were discharging all those years, so I don't know if they for sure knew that they had zero allocation and they continued to discharge. I'm not --

Q Let me ask -- I'm going to ask you a question by analogy. For instance, I know that the speed limit on a given highway is 55 and I may choose to go 65 even though I know I'm only allowed to go 55.

A Uh-huh.

Q Using that analogy, can you tell me whether Florida Cities Water Company knew that it had a zero waste load allocation and knowingly continued to discharge even though it knew it should have discharged zero?

A I can't speak for them really. I have no idea.

Q Do you know what the waste load allocation for Waterway Estates is as we sit here today?

A Yes. They are given, I believe, a waste load allocation for up to one and a half million or two million gallons. I'm not sure of the exact figure but it's more than one for AWT and 49 million gallons for allocation.

Q When did they get that waste load allocation?

A When?

Q When.

A This is in the last revision of the waste

allocation, the last study that was done by the state.

Q Was that in 1991, do you think?

A 1991. Somewhere in that. It may have been a little earlier but by the time it got published, that was the date that was put on.

Q Prior to that recent modification by the state, was the Waterway Estates waste load allocation zero?

A No, except in that one very original document which said that there would be no Waterway Estates if that original plan was implemented. Then my feeling or understanding is that there was physically a plan that was discharging and that was given an allocation.

Q But there was no modification to the state waste load allocation document to saying that Waterway Estates had a greater than zero waste load allocation; is that correct?

A No. There was probably no need for that.

Q Okay. Why do you say there was no need for that?

A Because we know there was a plant and they were discharging to the river. If -- if -- let's say we assume there was a zero discharge, we will have told them, hey, you will not -- you have no allocation, you have no business to discharge. You should get out right away but that wasn't the case.

Q FDEP knew that they were in fact discharging; is that correct?

A Yes. We gave them permits all along and in fact my feeling is that EPA knew about the same thing, that there was a discharge and that where the discharge was exactly, they knew that also and how much the discharge was.

Q Do you know for a fact that -- I'm sorry. Do you know for a fact that EPA knew that they were in fact the discharger?

A Based on our documents and their documents, their permits, they should have known, yeah, that there was, otherwise they wouldn't have given them a permit.

Q You say they should have known, but do you know in fact whether EPA permit writers in fact did know that there was a discharge occuring from the Waterway Estates plan?

A If the -- my assumption is if they jointly went to the plant for inspection with us and -- and -- and we told them this is subsoil, it wouldn't be any of his business to come in and inspect the groundwater systems in the ground. They cannot do their subsoil discharge and I would know that that was in the back of their mind they're doing there because it's a subsoil discharge.

MR. QUINN: Can we go off the record for a

second?

(An Affirmation of ABdul B. Ahmadi, Ph.D., P.E. was marked for identification as Plaintiff's Exhibit Number 853.)

MR. QUINN: Let's go back on the record, please.

BY MR. QUINN:

Q Mr. Ahmadi, I've handed you what we've marked as Deposition 853 which is an Affirmation of Abdul B. Ahmadi, Ph.D., P.E. I'd like you to take a look at that, sir.

My first question is, have you ever seen this before, sir?

A Yes.

Q Okay. When?

A Well, I did this on that -- signed 11/18/94.

Q Okay. Is that your signature over on the right-hand side of Page 4?

A Yes, sir.

Q Do you recall the circumstances surrounding the preparation of this affirmation?

A Yeah. It was with regard to the Federal suit filed against the Waterway Estates facility and our involvement from the state's side based on our records and files and dealing with the permitting issues.

Q Who asked you to prepare this affirmation?

A Mr. Don Scroggin came to our office several

times to review the files and asked us a question with regard to our involvement with the facility.

Q Did your office type this affirmation or did Mr. Scroggin's office?

A I believe Mr. Scroggin's office did this.

Q Did Mr. Scroggin give you any reason why he wanted you to swear out an affidavit or an affirmation?

A No, other than the -- the suit primarily based on my knowledge of the facility and my information about the facts of the case.

Q Okay. Did Ms. Schaffner assist you in the preparation of this affirmation?

A No. I believe she wasn't even working with the DEP at the time, right?

MR. QUINN: You don't know.

MS. SCHAFFNER: I can't --

MR. QUINN: No. Don't ask her.

BY MR. QUINN:

Q Did another attorney from your office assist you in the preparation of this?

A No.

Q Did you consult with any attorneys prior to the preparation of this affirmation other than Mr. Scroggin?

A No.

I may have called an attorney in Tallahassee

that I have this affidavit and he said if you feel comfortable with the facts contained therein, then there's no problem.

Q I'd like to turn your attention to Paragraph 11 if we could, please, on Page 3.

A Okay.

Q The second sentence states, "This canal was considered part of the Caloosahatchee River." Do you see that, sir?

A Yes.

Q Can you tell me whether that is FDEP's position, that the canal was considered part of the Caloosahatchee River?

A That's my understanding, that the canal is a part of the Caloosahatchee River. And I mentioned earlier that the two works are closely -- they are contiguous to one another.

Q Okay. But we had also that the dispersion rate in the Caloosahatchee River is greater than the dispersion rate in the canal; is that correct?

A That was the assumption, that we required the Florida Cities to construct a line to the six-foot contour in the middle of the river.

Q And you also advised -- you also stated that you would advise your children not to swim in the canal. Is

that correct?

A I said in any canal that there is a sewage plant. That's my personal opinion.

Q And the reason for that was because of the risk of viruses or pathogens?

A The reason there may be some viruses and pathogens unknown to us that are not regulated and they may be there.

Q Now, are you familiar with -- I'm going to turn your attention to Paragraph 12, please, on Page 4. Reference is made to two permits; one April 1, 1981 and one August 2, 1993. Do you see those two?

A 1983, you mean?

Q Yes. I'm sorry. 1983. I apologize.

A Yes.

Q Okay. This paragraph states that the discharge locations or the outfalls was to a canal to the Caloosahatchee River. Do you see that?

A Yes.

Q Okay. Subsequent to 1983, there was another permit issued; is that correct?

A Uh-huh.

Q And that was on September 23rd, '88?

A Yes.

Q And that permit required a location of the

outfall to the six-foot contour line; is that correct?

A Yes.

Q And it also required upgrading of the facility to advance wastewater treatment; is that correct?

A Yes.

Q Are you familiar with a permit denial by the United States EPA for the Waterway Estates plant?

A Yes. Sometime there in that time there was a permit denial by the U.S. EPA.

Q Do you know the reasons around that permit denial?

A No. That's something I didn't get into, the details.

Q On Paragraph 8 on Page 2, please. I think you talked about this a little bit before but I'd like to just make sure I'm clear on it. The statement says, "FDEP does not grant discharge operation permits to any facility when FDEP has evidence that water quality standards are being violated by the discharge from that facility."

Do you see that part, sir?

A Yes, sir.

Q Okay. What -- what water quality standards are referenced in that sentence?

A For sewage treatment plants, we required that they meet a minimum standard for -- by a chemical oxygen

demand simply known as BOD, suspended solids.

Q TSS, total suspended solids?

A Right. Total suspended solids.

We have a proven residual requirement for this infection of the organisms, microorganisms. And then we have PH requirements and we require other tests, fecal chloroforms, as a standard. And we also required in time as for residuals, sludge, for metals and --

Q And how about --

A -- contaminants.

Q How about acute toxicity?

A We require dissolved oxygen. Acute toxicity in the early eighties was not done by the state until about maybe five, six years ago we had routinely contained that in the permits.

Q I'm sorry. I think I interrupted you. You also said you also require testing for DO?

A Dissolved oxygen, yes.

Q So, we've got BOD, dissolved oxygen, TSS, chlorine, PH, fecal and residuals?

A Uh-huh. Those are the things that we routinely monitor for most of the plants. Occasionally we may require other chemicals depending on such specific information and situations.

Q So, if a wastewater treatment plant is violating

any one of those parameters, FDEP will not grant a discharge operating permit?

A If those parameters are violated to an extent that it's consistently discharging substandard effluent to the river, then in those situations -- and you also see that the river is being impacted either through fish kills or other measurable impacts, then we do not give a regular state permit for that facility.

Q Is one of the purposes of requiring limitations on the amount of pollutants that can be sent into a river to prevent occurrences such as fish kills?

A The main thing is really to limit the discharge of pollutants to the river to maintain water quality. That's the main premise or the objective of the permits to reduce pollution, make sure that public health is ensured.

Q Aren't there indicators short of fish kills that water quality has been degraded?

A In general, as I said, that the -- the assurance of public health and the reduction of pollution to the water but fish kill is one symptom of, I guess, excessive pollution.

Q Aren't there other symptoms that could be detected through testing as opposed to waiting for fish to die?

A They're always where -- if he has reasons to

believe that pollution is occurring, yes, we go in and on our own we analyze the effluent after the treatment before the discharge to the river and we analyze the -- the waters upstream, downstream of the discharge and then compare that with the permit and the limitations that are contained in our rules.

Q When was the last fish kill that occurred in the Caloosahatchee River?

A I don't know exactly the -- the date but there was one around the Orange River maybe three, four years ago.

Q What would -- do you know what the cause was in general terms?

A Primarily, very high temperature and some fish were basically cooked.

Q Temperature is a -- change in temperature is considered a pollutant? Is that correct?

A For certain industry, yeah, that is the only pollutant. Thermal discharges like from power plants and we do have the power plant on the Caloosahatchee River. And this was a little bit in the vicinity of the plant in fact where this happened.

Q Now, you told me that discharge operation permits may be denied. But during -- withdrawn.

Even though a temper -- even though a discharge

operation permit may be denied, a temporary operation permit may be granted; is that correct?

A Yes.

Q Are there any other -- are there any conditions under which temporary operating permits will be not allowed?

A That will be extremely difficult. There may be a situation where we may deny all together if they are not doing anything which would be in total violation of the state rules. But under most conditions, if he have an existing sewage treatment facility, if, let's say, they are not in compliance with a specific portion of the rule, then they need some reasonable amount of time for planning, for permitting, for construction to get ready and that test is recognized in our rules through the temporary permit process.

The alternative is shutting down the facility which really is not an alternative because that indicates a public held situation and a lot of other problems.

Q Has -- to your knowledge -- withdrawn.

To your knowledge, has FDEP, this district, ever denied temporary operating permits to domestic wastewater treatment plants?

A Not to my knowledge. We've always given them temporary permits with a reasonable amount of time and in

most cases we've extended that time if it was not adequate due to reasons beyond their circumstances and control.

Q To your knowledge, has FDEP in this district ever shut down a domestic wastewater treatment plant?

A We'll require them through consent orders that either you cease discharge by a given date or you do alternatively corrective measures and correct the noncompliance problems by a given date.

We did not specifically say that you cannot operate the facility. We told them you either correct and comply with the rules or you find alternatives such as connection to another facility or whatever they want to do. And we left the alternative to them.

Q I'd like to go down to Paragraph 9 on Page 3, please. Paragraph 9 references something we were talking about a little while ago which was waste load allocations. My question is did FDEP consider the 1981 waste load allocation document which granted Waterway Estates a zero discharge to be binding?

A Not to my knowledge. At the time I wasn't with the agency and really didn't know about the practice but based on my discussion with the staff and others who were there dealing with these kind of things, they said this was primarily a planning document and for future goals and orientations and unless the permittee was told in writing

that this is what we plan and we intend to do, it was not considered mandatory.

And in this case definitely we did not tell the Waterway Estates that they must go to AWT based on this information by a given date until later in the 1988 time or so.

Q I'd like to turn your attention to Page 4, Paragraph 13. The last sentence of Paragraph 13 says, "Discharge from this facility is currently permitted by FDEP and is substantially in compliance with the permit."

What do you mean -- what do you mean by substantially in compliance with the permit?

A Substantially means that in general mostly in compliance.

Q Based upon the approximately 700 other wastewater treatment plants within your jurisdiction, approximately how many are substantially in compliance?

A Well, substantially in compliance basically means that they are in full compliance with our rules with the exception if you go with the microscope and may find something there very minor and inconsequential. We probably have, I would say, 90 percent of the facilities substantially in compliance.

Q And ten percent are substantially out of compliance? Is that what that means?

A Ten percent are having, yes, severe problems.

Q Are any of the 700 always in compliance?

A All?

Q Always in compliance?

A The whole?

Q I'm sorry. Let me withdraw that question and start over again.

Are any of the 90 percent always in compliance with the requirements of the FDEP permits?

A No. Things may change from facility to facility. A facility may be in full compliance for one, two, three years and may be out of compliance on the fourth year of the permit.

Q Are you familiar with the term of "significant noncompliance" as used in the Clean Water Act?

A I've heard but --

Q Does -- I'm sorry. Go ahead.

A Yeah. I've heard the terminology "significant noncomplied" also.

Q Does FDEP maintain a list of any facilities which are chronically out of compliance?

A No. We don't have a separate list but we require a permit from all the facilities at all times that they have a valid permit from us either in the form of regular permits -- that means they are in total

compliance -- or an operation permit. Now we have other mechanisms.

And we don't have a separate list where this facility is not in compliance but we keep -- each month we review their self-monitoring reports and determine whether they are in compliance or not. And we respond to each content by the substance. And then that's one mechanism where we find out and go through the file and through the records, through the MOR's to the past history and also a physical inspection of the facility with the operator.

And if you find noncompliance, then we have a mechanism how to correct it through enforcement.

Q Is there some threshold number of violations or instances of noncompliance that will initiate a more -- more scrutiny?

A Generally there is a pattern of some science; they give us sloppy monthly operation reports, inadequately completed, executed, the numbers may look suspect, we may get them late.

So -- and then we have complaints also from the citizens in the vicinity of the plant. We have a good feel for which facility has a good operation and really working hard and which ones don't.

Q In your -- in your office, is failure -- withdrawn.

What do you consider failure to report at all to be in terms of severity?

A What do you mean failure to report at all? Like don't communicate with the agency at all?

Q Let me give you an example. If a facility fails to turn in self-monitoring reports or discharge monitoring reports on a regular basis --

A Uh-huh.

Q -- to FDEP, is that considered severe, a severe violation?

A That would probably in the category of minor, moderate, major be in the middle somewhere.

Q Moderate?

A Moderate.

And then what we do is we -- if they miss one report, we call them right away that we didn't get your report, perhaps it's lost in the mail or maybe you didn't submit it to us or what happened. And they bring it.

There is one facility, believe it or not, they bring theirs, always two copies, and then with self-addressed and stamped envelopes and wants us to stamp it that we received it because one time we wrote them a letter that you didn't submit and this was a private utility. For the past three years they've been doing that each month. So, they are so particular about it.

And there are others that to them it doesn't matter. As long as it comes, it doesn't matter if it's a week late.

Q On the scale of -- that you gave me; severe, moderate and minor, I believe. Were those the --

A Minor, moderate and major.

Q Okay. On that scale, what would you consider -- withdrawn.

On that scale, how would you classify failure to obtain a permit?

A Based on state rules, failure to obtain a permit will be major itself.

Q Based on that scale of minor, moderate and major, how would you classify discharge of pollutants from an outfall other than the permitted outfall?

A Discharge of pollutants, if it has a major impact on the environment, would be considered major. If it's discharge of pollutant with minor impact, it would probably be moderate.

Q But that is a case-by-case analysis?

A Yes. We do have some guidance on that where we've outlined what is major, what's moderate, what's minor, all kinds of things.

Q Are you aware that you've been listed as a witness to testify in this action?

A Yes, sir.

Q What are you going to talk about at trial?

A Whatever I'm asked with regard to the facts of the case that -- to the extent that I'm involved from the state side and perspective and from what's evident in the files.

Q Did Mr. Scroggin talk to you about what you're going to talk about in trial?

A Not anything specific.

Q In general, what are you going to talk about?

A Whatever I'm asked. Like in this deposition if I'm given -- asked a question that's within the -- the rules are within the type of things that I'm doing with the facility, my involvement, then I'll be able to answer. If there's something beyond my knowledge, then I'll say I don't know.

Q You said that you talked with Mr. Scroggin on some occasions; is that correct?

A Yes. Mr. Scroggin and his associates came to our office several times in the past several years.

Q Did they ever tell you what they wanted you to talk about at trial?

A Not to my knowledge. They asked me to prepare this affidavit solely based on my knowledge of the facts from the file.

Q Did you bring any documents today to give to Mr. Scroggin?

A No. I just brought a copy of this from my personal use.

Q When was the last time you sent documents to Mr. Scroggin's office?

A The last time was several weeks ago where he left, I guess, this notice of the hearing or notice of depositions in our office and then I have to call his office and ask where should I send this. That was the piece.

But as far as any state documents, they came to our office. We provided them all our files and we did the same to the folks in EPA.

Q Prior to today, when was the last time you talked to Mr. Scroggin's office, Mr. Scroggin or anybody from his office?

A Really I believe I spoke yesterday with one of his associates who called me about today whether it was 9:00 o'clock or 10:00 o'clock.

Q Prior to that, when was the last time?

A The day before that on the same issue whether it's 9:00 o'clock or 10:00 o'clock.

Q Any other thing you talked about?

A No, nothing else.

Q Prior to that, when was the last time you talked?

A Prior to that it was with regard again to this hearing that Mr. Scroggin came with his associate and told me that I would be deposed in such and such date.

Q What did he talk about during that meeting?

A Basically the same issues with regard to -- most of the same issues you asked with regard to waste allocation in the FDEP's practice, our involvement in coordination with the EPA.

Q All right. How long did you talk with him?

A I didn't check the time but in a matter of probably an hour or so.

Q Was Miss Schaffner there with you?

A No, she wasn't.

We may have touched upon things such as I really don't understand why this is such a big case because the City of Cape Coral was a city which essentially they had the same circumstances. They were bogged down in the same planning process. They were forced to discharge secondary into the same river five times, six times more than the Waterway Estates. They were sued by the EPA. They settled for a nominal amount. We sued them also through a consent order and it came and went by and resolved.

In this situation, why is it so emotional where

it's a small facility, provides service to five, six thousand people, no more than that, and they're being sued for, you know, a nominal amount of fines or fees that has not hurt? That's positive to ask our staff or director in fact.

Q Are you aware that Florida Cities Water Company manages privately owned wastewater treatment facilities throughout the State of Florida?

A Yeah. It's a -- it's a utility company that has facilities elsewhere, I understand, in the state.

Q How many wastewater treatment plants does Cape Coral have?

A Cape Coral has two wastewater plants, a total of 14 million gallons and it's a city, so it's a government entity.

Q So, it's a not-for-profit organization; is that correct?

A Yes.

Q Do you have any opinion as to whether there's any synergistic effect to the fact that there -- that an entity which has more than one wastewater treatment facility is out of compliance on a continuous basis at the other three where that makes it a more or less severe action?

A If the utility owns, let's say, ten facilities

and all ten of them are not in compliance, that would be a good sign to say that this facility is really not paying much attention.

But if there are -- in our district we have three facilities that are domestic facilities that are operated by the Waterway Estates. One of them is one of the top sewage plants in our district. That's the south plant. The other one is about the average. It does have a little problem here and there and it doesn't -- and the other one is Waterway Estates.

Q And where does that rank?

A Waterway Estates, probably average just like any other facility.

Q Somewhere in the middle 700?

A Yeah. There are times where they are in full compliance. There are times they're not just like any other facility.

Q Shouldn't -- in your opinion, shouldn't the Waterway Estates plants strive to be more like its top performer?

A Every one of them, that's our expectation, they should whether it's private or public. In terms of private and public, we don't make a distinction that the state or a city or a Federal agency should not be meeting the rules. In fact, they should be setting examples for

others for the private entities.

Q The fact that Florida Cities Water Company, one of their facilities, is at the top as a top performer in your wastewater treatments plants, doesn't that indicate to you that Waterway Estates should also be a better performer than it is?

A It does. And they say that if it weren't for the intervention of the government and the planning process, they will have done that a long time ago.

Q So, if it weren't for the intervention of which government?

A The local governments, the state government and even the Federal government. That's what I hear.

Q That's what they tell you?

A That's what the perception of some of the staff is in our office, that if it wasn't that lack of planning on the part of the county, that the Florida Cities should have had an AWT permit just like in the south a long time back. But because of that uncertainty of the government, particularly the county, the commission, they were unable to make up their mind and got in trouble with the EPA and occasionally with us. We had considerable trouble with them and fined them when they were not in compliance.

MR. QUINN: Dr. Ahmadi, I want to thank you for your time here today. I have no more questions of

you.

Mr. Scroggin, do you have any questions?

CROSS-EXAMINATION

BY MR. SCROGGIN:

Q Dr. Ahmadi, it has been said that Florida Cities is such a bad company regarding its environmental compliance that it needs to be sent a message in the form of a high penalty in this case. Is that consistent with your experience since 1981 with facilities owned and operated by Florida Cities?

MR. QUINN: Objection.

Go ahead.

THE WITNESS: In general, that's very much inconsistent. In fact they have two water plants in our district, three sewage plants in our district and they are most of the time in compliance just like anybody else.

And the Waterway Estates is the only plant that they had some noncompliance around 1988-'89. And we took care of that with a consent order and temporary permits and the problem was corrected.

BY MR. SCROGGIN:

Q Dr. Ahmadi, are all of the facilities over which you have jurisdiction that are owned and operated by Florida Cities currently to the best of your knowledge in

substantial compliance with their regulatory requirements?

A Yes, all of them.

MR. SCROGGIN: I have no further questions of Dr. Ahmadi.

MR. QUINN: Just two questions to follow up.

REDIRECT EXAMINATION

BY MR. QUINN:

Q Are you familiar with the Barefoot Bay facility, which is owned by Florida Cities Water Company?

A No, not that well.

Q Are you familiar with the Caroway (phonetic) facility which was a facility owned and operated by Florida Cities Water Company?

A No. I've heard the names but that's it.

MR. QUINN: Okay. Dr. Ahmadi, I have no more questions again. Mr. Scroggin, I don't believe, has any more questions.

Miss Schaffner? Okay.

Sir, when the court reporter finishes transcribing this, you'll have an opportunity to read to make sure there's an accurate recitation of what happened here today and the deposition transcript will be forwarded to Miss Schaffner for you to look at.

THE WITNESS: Very good.

MR. QUINN: Okay. That being said, I'll conclude this deposition by saying thank you very much for your time and --

THE WITNESS: You're most welcome.

MR. QUINN: Thank you. The deposition is concluded.

(The deposition concluded at 11:43 a.m.)

STATE OF FLORIDA)
COUNTY OF COLLIER)

I, the undersigned authority, certify that Abdul Daqi Ahmadi, personally appeared before me and was duly sworn.

WITNESS my hand and official seal this 26 day of December, 1995.

Rose Marie Cychmistruk

OFFICIAL NOTARY SEAL
ROSE MARIE CYCHMISTRUK
NOTARY PUBLIC STATE OF FLORIDA
COMMISSION NO. CC234197
MY COMMISSION EXP. OCT. 20,1996

STATE OF FLORIDA)
COUNTY OF COLLIER)

I, Rose Marie Cychmistruk, Registered Professional Reporter, certify that I was authorized to and did stenographically report the deposition of Abdul Daqi Ahmadi; that a review of the transcript was requested; and the transcript is a true record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, of counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED this 26 day of December, 1995.

Rose Marie Cychmistruk, RPR

THE COURT: All *right*. You may call your next witness, Mr. Baise.

MR. BAISE: Yes, Your Honor.

Defendant Florida Cities calls Dr. Abdul Ahmadi.

THE CLERK: Raise your right hand.

Thereupon,

ABDUL B. AHMADI,

having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Take a seat in the witness box, please.

State your name and spell the last for the record, please.

THE WITNESS: My name, Abdul B. Ahmadi, A-B-M-A-D-I.

DIRECT EXAMINATION

BY MR. BAISE:

Q. Good afternoon, Dr. Ahmadi.

A. Good afternoon, Mr. Baise.

Q. What is your occupation?

A. I'm a professional engineer in charge of the domestic wastewater, drinking water, industrial wastewater facilities for the State of Florida, South District.

Q. How long have you held that position?

A. I held that position since 1990.

Q. What positions have you held before 1990?

A. Prior to that, I was working with the same agency and I was in charge of the water program, which did include the domestic wastewater facilities.

Q. What is your education background, if any, post high school, Dr. Ahmadi?

A. I have a Bachelors of Science in Civil Engineering from the University of Kabul, Afghanistan. I have a Masters in Civil and Sanitary Engineering from the University of Cincinnati and a Ph.D in Environmental Engineering Sciences from the University of Florida.

Q. What are your responsibilities in your present position with the State of Florida?

A. Currently, I'm in charge of the permitting compliance and enforcement of State Rules as they apply to water facilities, which includes wastewater facilities, domestic, industrial and drinking water, surface waters and ground waters.

Q. Do you have additional training beyond your formal training in the field of environmental engineering?

A. I have attended several professional seminars, several dozen and attend one or two every year.

Q. What is your experience in interpreting State water law requirements?

A. I have extensive experience in that regard.

In 1981, upon graduation from the University of Florida, I joined the Department of Environmental Regulation as a Staff Engineer and my work primarily involved review of permit application for domestic wastewater and drinking water.

I remained in that position until 1983. At that time I passed the Professional Engineers Exam in the State of Florida and became a Registered Engineer and was promoted to the Chief of Permitting for the District.

In 1988 — I remained there until 1988, at that position, and in 1988, we had a reorganization and I was given some more responsibilities. And then in 19 — in addition to what I had. And then in 1990, we had yet another reorganization and I was given the current responsibilities.

Q. Could you speak just a little more slowly for the Court Reporter?

A. I certainly could. Thank you.

Q. Thank you.

Any additional current licenses or certifications you hold Dr. Ahmadi?

A. Yes, basically, the professional engineer's, and I do give lectures to the universities, professional groups, the DEP Staff on a statewide basis.

Q. How many people work for you, Dr. Ahmadi?

A. Currently, I have 33 people working for me, which comprises professional engineers, chemists, biologists, environmental scientists and managers.

Q. How is your office organized in terms of departments?

A. The State of Florida basically has divided the entire State into six districts and we are one of the six districts and it has seven counties. And we are located in Lee County, we have two branch offices, one in Marathon that handles Monroe County, the Florida Keys and one in northern part of Charlotte County, which handles the Charlotte Harbor area.

Q. Is Waterway Estates located in one of those counties?

A. Waterway Estates is located in Lee County, Florida.

Q. How is your personal office organized? If I'm not using the correct word — sections or department?

A. Yes, we have different sections in the Division of Water Facilities and we have a Domestic Wastewater Section, which is headed by a profession engineer who reports directly to me, and I have two professional engineers in that section and four engineers and five or six chemists, biologists-type people, inspectors.

And then we have an Industrial Wastewater Section that is the smallest in our district. We have three people there: two professional engineers, in fact, and one

Exh.— (ABA-2)

secretary.

And then I have a Drinking Water Section with five staff professional engineers and two non-professional engineers and two environmental specialists and one secretary.

And then an Ambient Surface Water Section. And then have I some people in the fields that report to us on compliance issues.

Q. What is an Ambient Water Section, I believe you said?

A. Those are the surface water monitorings on strategic locations periodically to see how the waters are doing.

Q. Is this to determine water quality?

A. Basically to determine water quality and they produce a biannual report to see how the waters have maintained their quality, whether they degraded or they got better or they remained the same.

Q. Do you publish a biannual report on the Caloosahatchee River?

A. Not on the Caloosahatchee River. They are primarily — the resources are limited for the State as is the case with most Governmental agencies. They are prioritizing other bodies of water which has more ecological significance and importance than the Caloosahatchee River water.

Primarily our points are in Charlotte County, in the

Charlotte Harbor area, and in the Marco Island area, Naples — Naples way. We do not have any monetary stations on the Caloosahatchee River.

Q. Again, speak slowly for the reporter, please.

Have you had an opportunity to teach any courses in environmental engineering or science or the area that you are —

A. Yes, I have. I graduated from the college, I was an Assistant Professor, prior to coming to the United States, and then I attended the University of Cincinnati for two years. Upon return back to Afghanistan, I taught there at the University in Kabul, Afghanistan until 1975.

I taught Public Health-Engineering, Wastewater Engineering, *Drinking Water Engineering* courses.

Then I came back to the United States for pursuing further studies and graduate studies at the University of Florida.

Q. Have you had an opportunity to publish in the field of environmental engineering?

A. Yes, I have several publications.

Q. Could you describe at least two or three of them for the Court, please?

A. My Master Thesis at the University of Cincinnati was on — included demands on natural and polluted waters. My Dissertation at the University of Florida was Aqueous

Activity of Metals and Corrosion Control, and secondly, two or three papers I coauthored on that subject.

I've given lectures at the Water Management Districts on ground water issues and have given lectures at the University of Florida this year, in fact, twice, on Wastewater and Drinking Water State-of-the-Art Technology.

Q. And Dr. Ahmadi, in the testimony we have had a Florida Statute mentioned on several occasion by the name of Grizzle-Figg. Are you familiar with what Grizzle-Figg is?

A. Yes. It's a legislative act that was passed in the State of Florida for a specific area. Generally when a rule is passed, it's statewide. In certain cases the resources demand that because of ecological significance and importance of a given body of water, the usual rules may not be sufficient, so they design specific rules for the specific geographical area.

The Grizzle-Figg Rule established the Tampa Bay and the Charlotte Harbor area, designated those two as the waters that need to be protected above and beyond what the rules apply to all other waters in the State. And any wastewater discharging to those two bodies of water must meet the highest standards before they discharge to those bodies of waters.

Q. Another Act that has been mentioned is the Indian River Lagoon Act. What is that?

A. That is parallel to the Grizzle-Figg Act, primarily in the Orlando area where the Indian River Lagoon is located. Because of the importance of that body of water, they created specific rules for the protection of that body of water. They are geographic specific, it applies from what point to what point, in which directions. If you're outside those limits, it does not have any relevance.

Q. When did you become familiar with the facility known as Waterway Estates discharging into a canal into the Caloosahatchee River, Dr. Ahmadi?

A. I guess since my starting with the DEP, maybe in the first year or so.

That was in 1981.

Q. Dr. Ahmadi, I would direct your attention to Florida Cities Exhibit Number 15.

Now, Dr. Ahmadi what is the State classification of the Caloosahatchee River in the vicinity of the Waterway Estates wastewater treatment plant?

A. The water there is classified as a class 3 body of water.

Q. What does that mean?

A. Basically all waters of the State are classified into five groups, class 1, class 2, class 3, class 4, and class 5. 1 is considered the most important water in terms of its use and that's considered potable water classification,

water used for drinking purposes. Now, it would be used as a source of drinking water, that's class 1.

Class 2 are the next higher class of water, which is used for propagation of shell fish and recreational uses.

Class 3 are generally all other waters that are not classified as 1 and 2. So, it's an intermediate in terms of quality.

Class 4 is agricultural waters, which the quality is really not that important, as long as there are no salts in them for agricultural uses.

Class 5 is industrial and a navigation waters.

Q. When you say class 4, agricultural, is that like agricultural canals?

A. Agricultural canals, irrigation water, yes, for growing plants and vegetables and trees and nurseries and so forth.

Q. Directing your attention to the exhibit I've had put in front of you, are you familiar with this document?

A. Yes, I am.

Q. What is this document?

A. This is the Lower Florida River Basin Water Quality Management Plan that DER created and published in December 1975.

Q. Have you read this document before?

A. I believe I've seen certain sections of it. Read

certain sections.

Q. Is this a State of Florida official publication?

A. Yes, it is.

MR. BAISE: Your Honor, I would move this document into evidence.

MR. QUINN: Your Honor, we had listed an objection of relevance in that this is a 1975 document. For that reason, we maintain that objection of relevance.

THE COURT: Okay.

MR. BAISE: May I speak to that, Your Honor?

THE COURT: Yes, sir.

MR. BAISE: Your Honor, this is the beginning of the story.

This is the document that lays out the beginning wasteload allocation for Waterway Estates.

It also describes that wasteload allocation, which was carried over into Federal permits, so it is clearly relevant to the background of there being a wasteload allocation in this case, and the fact that there never was a termination of the wasteload allocation, so we think it is quite relevant.

THE COURT: I'll overrule the objection.

It will be received.

BY MR. BAISE:

Q. Dr. Ahmadi, I would direct your attention to page

Roman Numeral I-18 entitled, Implications of Basin Plans for Local Units of Government.

Do you see that page with that title?

A. Yes.

Q. Directing your attention further down to the last paragraph on that page, do you see that paragraph, sir?

A. Yes. The one starts with, "in contrast"?

Q. Yes.

And directing your attention further down to the sixth line that begins on the right hand side, "in some cases," would you read that into the record, please?

A. In some cases water quality may be so sensitive to pollution that any discharge may result in a violation of State requirements for water quality. In these extreme cases, no discharge of pollutants to surface waters will be allowed and wastewater treatment plants which are currently discharging to surface waters will eventually be required to convert to a form of non-surface disposal such as land spreading.

Q. Thank you, Dr. Ahmadi.

I direct your attention further toward the back of the document to a page entitled, Roman Numeral III-242, entitled, Effluent Limitations-Load Allocations.

A. Yes.

Q. Do you find that page, Dr. Ahmadi?

A. Yes. Table 20.2 AA-12.

Q. Would you describe what this table means, Dr. Ahmadi?

A. This is a summary of the wasteload allocation or effluent limitations for five facilities that are contained on this table.

Q. And is Waterway Estates one of those facilities in 1975?

A. Yes, Waterway Estates is listed as the fourth facility.

Q. And what is the receiving water for the Waterway Estates in 1975?

A. The receiving water is designated as the Caloosahatchee River.

Q. And what are the load allocations for Waterway Estates in 1975?

A. The design capacity is 1.08 million gallons per day.

Q. What does "UCD" mean? Because that is a term that has not been defined in the Court, Dr. Ahmadi.

A. That's the ultimate oxygen demand, which is a pollution load, actually.

Q. Would that be I equivalent to biological oxygen demand today?

MR. QUINN: Objection, leading.

MR. BAISE: I was just seeking a clarification for the Court.

THE COURT: I'll overrule the objection.

Do you know?

BY MR. BAISE:

Q. Do you know, Dr. Ahmadi?

A. No, it's different.

THE COURT: Yes, sir.

MR. QUINN: Also, object that this witness is not an expert. He's not been qualified as an expert. This seems to require a little bit of expertise to answer that question, too, sir.

MR. BAISE: If he can't answer the question, that's fine.

MR. QUINN: Yes, sir.

Well, whether he can answer the question or not, he hasn't been qualified as an expert and this requires an expert opinion.

In order to be — a lay witness can't testify to expert opinions unless they're rationally based under Rule 701, and we haven't laid a foundation for him to give any of this stuff, sir.

THE COURT: Well, I don't know that it takes an expert opinion to testify as to whether UOD is a term that is equivalent to today's term or subsequent term of BOD.

Is that the question? Do you know that, sir?

THE WITNESS: It is defined on the bottom of this

page, Your Honor. UOD pounds per day equals the design flow of the plant times the —

THE COURT: It's your witness and your question, so —

MR. BAISE: Let's just — I'll drop the question. I was just doing it for the Court's clarification, since BOD and CBOD had been such a point of contention.

BY MR. BAISE:

Q. Dr. Ahmadi, in the second column it is noted that the Caloosahatchee River is the receiving water for Waterway Estates; is that correct?

A. Yes.

Q. Dr. Ahmadi, I would direct your attention to Roman Numeral III-227, please. I'm sorry. It's 229. My copy is barely —

A. Okay.

Q. It's entitled, 7, Load Allocations and Effluent Limitations. Do you see that page?

A. Yes, sir.

Q. And that's Roman III-229?

A. Yes.

Q. Dr. Ahmadi, would you read the paragraph beginning with the two words, "this segment"?

A. This segment contains the Caloosahatchee River from the W.P. Franklin Lock and Dam at Olga to its mouth at San

Carlos Bay, a distance of approximately 30 miles. Five wastewater treatment facilities (WTF) discharge directly to the river in the vicinity of Fort Myers and seven other facilities discharge to tributaries, as listed in Table 28.2 AA-6. The locations of the discharges are shown in figure 28.2 AA-4.

Q. So there are five facilities discharging directly to the Caloosahatchee; is that correct?

A. Right.

Q. Would you turn to page Roman III-207, please?

Do you see that page, Dr. Ahmadi?

A. Roman III-207?

Q. Yes.

A. Yes.

Q. Describe what that page represents, Dr. Ahmadi.

A. It is a Waste Source Inventory.

Q. And does it name Waterway Estates in one column?

A. Yes, Waterway Estates is listed here and is the fourth facility.

Q. And what is the receiving discharge point for the Caloosahatchee River?

A. The discharge point is listed as the Caloosahatchee River.

Q. I direct your attention down to the J. Colin English School. What is the discharge point for that facility?

A. Says canal to Powell Creek.

Q. Thank you.

Since you've worked for the Federal Department of Environmental Protection, Dr. Ahmadi, has the water quality of Caloosahatchee River improved or been degraded?

A. I've been working with the State of Florida and since I've been with the agency we have not documented any degradation in the water quality in the Caloosahatchee River.

Q. Are water quality standards met in the Caloosahatchee River in the area of the discharge of the Waterway Estates facility, Dr. Ahmadi?

A. Yes, sir.

Q. Dr. Ahmadi, I direct your attention to Defendant's Exhibit 16.

And it's Plaintiff's 349, also, in evidence, Your Honor, depending on which notebook you have.

THE COURT: I've got it in the form of Defendant's Exhibit.

BY MR. BAISE:

Q. Dr. Ahmadi, what is a 208 Plan?

A. It is a facility's planning which will list what to be done with a facility in terms of treatment, expansion, design, future plans, effluent disposal.

Q. How do 208 Plans and regional facilities connect

together?
A. Generally with the passage of the Clean Water Act back in the early 70's, a lot of money became available to local facilities, particularly governmental entities, cities, counties and so fourth, to come up with a facilities plan and try to improve their wastewater treatment practices and operations and either eliminate discharges or improve treatment so they could lessen the impact on receiving waters under the NPDES Program.

A lot of money was available and in those 10 to 15 years some 50 billion dollars of Federal money was spent on that program. So this is in relation to that.

Q. Is this document prepared in part for a 201 Plan for a regional facility?

A. Yes.

Q. What regional facility was this document prepared for, Dr. Ahmadi?

MR. QUINN: Objection.

THE COURT: Just a moment.

MR. QUINN: Objection, sir.

I believe this goes beyond the actual personal knowledge. We've been talking about it for a while and it has not been offensive to the United States, but goes beyond the personal knowledge of Dr. Ahmadi.

He testified that he came to work — I believe he

testified that he came to work for the State in 1981, and this document was worked on before that.

I don't believe that he's testifying from his own personal knowledge, and he lacks personal knowledge to talk about it.

If what he's testifying about is an opinion, then it's an expert opinion and he hasn't been qualified to talk about that.

In addition, he can't even give an opinion on it because he does not have a personal perception of it at the time that it was done, sir.

MR. BAISE: May I respond?

THE COURT: Yes, sir.

BY MR. BAISE:

Q. Dr. Ahmadi, are you familiar with this document?

A. Yes, I am.

Q. Do you use this document in your work at — in your present position?

A. Yes, we do.

Q. Any reason to believe that this document is not a trustworthy document?

A. No, I have no doubt about it.

We work closely with our section in Tallahassee in production of these documents.

THE COURT: I'll overrule the objection.

It will be received.

BY MR. BAISE:

Q. Is this what is known as a planning document, Dr. Ahmadi?

THE COURT: It's already received.

You were objecting to his testimony?

MR. QUINN: Yes, sir.

THE COURT: I'll overrule the objection.

BY MR. BAISE:

Q. You may answer.

A. Yes, sir, it's a planning document.

Q. Are there any requirements in this document?

A. There are certain steps and plans for the future of the Lee County — the Waterway Estates plant is located on the northern side of Lee County. There are several facilities that were on the southern side. There was another plant on the north side, which was the Cape Coral — City of Cape Coral. The county at that time was planning to have a regional one or two facilities for the entire northern part and that plan did not become implemented.

Q. Dr. Ahmadi, I direct your attention to Florida Cities Exhibit 198.

Are you familiar with this document, Dr. Ahmadi?

A. Yes, I am.

Q. What is this document?

A. It's a letter that's written by the United States Environmental Protection Agency, Region IV, dated January 22, 1981, and signed by William Cloward, Chief of Permits Section.

Q. Who is CC'd on the document, Dr. Ahmadi?

A. Mr. Mickey Bryant of the Florida DER.

Q. Is that Florida DER your office?

A. Yes, the State DER, our predecessor agency of the DEP.

Q. Turning to page 2, with respect to this document, does it indicate what the receiving waters are to this —

MR. QUINN: Objection. I don't believe this document is in evidence, Your Honor, and I have AN objection as to this witness' competence to talk about this document.

THE COURT: All right.

MR. BAISE: May I comment on it?

THE COURT: Yes.

MR. BAISE: This is the permit from the United States. It is a document that has attached to it a reference to one of the documents we have just referred to, the 1975 study, which is the '75 study that gives the wasteload allocation, and I will get to that in just a moment. But he says he is familiar with this document, his office received it, he is —

THE COURT: Well, at this point are you offering it in evidence? Is that what you're going to do?

MR. BAISE: I'm going to get ready to offer it in evidence, Your Honor.

BY MR. BAISE:

Q. Dr. Ahmadi, have you read this document before?

A. Yes, I have.

Q. Have you read documents similar to this before?

A. Yes, in almost all surface water discharge cases.

Q. Do you review Federal NPDES draft permits and final permits in the normal course of your work?

A. Yes, if we are copied and receive a copy we review that.

THE COURT: Say again, please, sir.

THE WITNESS: Yes, if we are copied and it's sent to us, we review those documents.

MR. BAISE: I would move this into evidence, since it is a United States Environmental Protection Agency document, Your Honor. It's the draft permits into Florida Cities in 1981, on January 22nd, it has attached to it the draft EPA NPDES Permit, the permit limitations, and attached to that, of course, is the wasteload allocation. So, it is certainly an official document of the US EPA, to the best of our ability to determine it, and it was, to my knowledge, produced by EPA in our request for production of documents.

MR. QUINN: I have an objection to the introduction of the document through this witness.

This witness does not have personal knowledge of this particular document. He might have seen documents like this before.

My objection as stated in our earlier filings was relevance and I would renew that objection, as well.

THE COURT: Let me ask you this: Have you registered an objection regarding the authentication of this document?

MR. QUINN: No, sir, we did not, because we did not because we didn't know it was going to come in —

THE COURT: Excuse me?

MR. QUINN: If this came in through the proper witness — it's an authentic document, sir. We have no objection to its authenticity. We have an objection to using the document with this witness.

THE COURT: Well, the document — all right — and the objection that you have listed in your objections is relevancy?

MR. QUINN: Yes, sir.

THE COURT: All right.

MR. BAISE: My objection — excuse me, Your Honor.

THE COURT: Let me hear you on your objection regarding relevancy independent of this witness' testimony.

MR. QUINN: The relevance objection deals with the fact this is a 1981 draft document and our violations in

this case are talking about 1986, for this facility, sir.

THE COURT: Okay. Mr. Baise.

MR. BAISE: I find that somewhat disingenuous, Your Honor, whether or not the Government has gone back to —

THE COURT: Never mind whether you find it disingenuous, but tell me what your response is.

MR. BAISE: My response is, Your Honor, that this document is the only document the Government produced to us with respect to wasteload allocations in 1981, so you can track that 1981 wasteload allocation through '83, '86 and into the 90's.

And with regard to the actual permit that is given to the discharger, EPA does not attach the fact sheet to their final permit, and this particular fact sheet is the one that points out the wasteload allocation given to this facility in 1981, comes from the 1975 document. So, there is a history step-by-step of where the wasteload allocation comes from, and how it's incorporated into both the Federal and State permits. So, that's why it is relevant, Your Honor.

MR. EIRD: Your Honor, may I say something in support of Mr. Baise's position?

THE COURT: Yes, sir.

MR. EIRD: On the first day of trial we objected

to the introduction of the numerous Government documents that predated the violations at issue, and over objection I think hundreds of documents were admitted into evidence.

I think the Defendants should have the right to introduce historical documents that explain mitigation or lack of viability, and for those reasons, I would support Mr. Baise's position.

THE COURT: Okay. Anything further?

MR. QUINN: Nothing further, sir.

THE COURT: All right. I'll overrule the objection.

I'll receive the document in as 198.

BY MR. BAISE:

Q. Dr. Ahmadi, I direct your attention to page 12 — I'm sorry, it is a not numbered on your document, but count 12 pages to the page of the draft EPA permit dated January 22, 1981. The page is entitled, Final Effluent Limitations. And do you find that page?

A. Yes, sir.

Q. Do you find that page?

A. Yes, sir.

Q. Directing your attention to paragraph 5, would you read paragraph 5 into the record, please?

A. It says number 5: Final effluent limitations were derived from wasteload allocation given in Lower Florida

River Basin Water Quality Management Plan, page III-242.
Q. Is that the same Roman III-242 that you referred to in the 1975 document?
A. Yes, sir.
Q. Is this the wasteload allocation for the Florida Cities Waterway Estates facility located on the canal discharging into the Caloosahatchee River in 1981?
A. Yes, sir.
Q. Dr. Ahmadi, I direct your attention to Florida Cities Trial Exhibit Number 17.
This is already in evidence, Your Honor.
Do you have that document in front of you, Dr. Ahmadi?
A. Yes, sir.
Q. What is this document?
A. This is a State permit for the Waterway Estates to operate their facility and discharge their effluent to the Caloosahatchee River.
Q. Is there any zero discharge limitation in this permit, Dr. Ahmadi?
A. No, it authorized them to discharge.
Q. Would you turn to page 1 of 4? It would be the fourth page in on this document.
A. Yes, sir.
Q. Do you see that page?
A. Yes, sir.

Q. Department of Environmental Regulation letterhead?
A. Yes, sir.
Q. Would you read that paragraph starting with, "to operate" into the record?
THE COURT: Just a minute
MR. BAISE: Hold on, Dr. Ahmadi.
THE COURT: What page?
THE WITNESS: Page 1 of 4.
MR. BAISE: 1 of 4, but the fourth page in, Your Honor.
THE COURT: Okay.
BY MR. BAISE:
Q. Would you read that paragraph?
A. Yes, sir.
Q. Up to where it says, "location of the project." That's not necessary.
A. To operate a 1.080 million gallons per day contact stabilization process wastewater treatment facility with effluent to canal to the Caloosahatchee River located off project site.
Q. Is there anything in this document that says there's a zero discharge for this project into the canal to the Caloosahatchee River on April 2, 1981, Dr. Ahmadi?
A. No. This is their authorization to discharge to the river.

Q. Does this mean there's a wasteload allocation for this discharger to discharge into the canal, Dr. Ahmadi?
A. Yes, sir.
Q. Turning your attention to Defendant's Exhibit Number 2, Dr. Ahmadi.
By the way, did EPA ever challenge that permit that was issued in 1981?
A. No.
Q. EPA ever comment on that permit issued in 1981?
A. No.
Q. Turning your attention to Defendant's Exhibit Number 2, what is this document, Dr. Ahmadi?
And this is, also, in evidence, Your Honor.
A. Yes, this is State of Florida letter that's written and signed by Terry Cole, who was the assistant secretary at the time to Mr. Charles Jeter of the EPA.
Q. Are you familiar with this document?
A. Yes, I am.
Q. You worked with this document?
A. Yes.
Q. I direct your attention to page 9 of this document, Dr. Ahmadi. Page 9, Roman Numeral IV.
A. Okay.
Q. Would you read that first paragraph into the record, Dr. Ahmadi?

A. Roman Numeral IV: Approval of Wasteload Allocations. The EPA is required by 303 (d) of the Clean Water Act to review and approve/disapprove the allowable wasteload established by the State within 30 days after submission. An additional 30 days is allowed to make necessary revisions to disapprove identifications and loads. All final approvals of wasteload allocations are to be incorporated by the States into the water quality management plans through the continuing planning process required under 303 (e) of the Act.
Q. Do you have any knowledge as to whether or not the '81 wasteload allocations suggested by the planning document for the Caloosahatchee River was ever approved under this paragraph?
A. No, I don't. I think it was not approved.
Q. Thank you.
Turning to Defendant's Exhibit number 20, Dr. Ahmadi.
This, too, is in evidence, Your Honor.
Do you have number 20 in front of you?
A. Yes, sir.
Q. What is this document?
A. This is a State of Florida permit to operate the Waterway Estates facility.
Q. Is there any no discharge wasteload allocation in this document, Dr. Ahmadi?

A. No. Basically this says that the utility is allowed to discharge to the river, and this was issued on August 2, 1983.
Q. And what was the expiration date of this permit, Dr. Ahmadi?
A. It was the maximum five years to August 2, 1988.
Q. Did Waterway Estates have a wasteload allocation to discharge into the canal of the Caloosahatchee River in 1983?
A. Yes, the permit was for a 1.08 MGD contact stabilization process, wastewater treatment facility with effluent discharge to a canal to the Caloosahatchee River as depicted in drawings and documentation on file in this office.
Q. Did the Waterway Estates facility have a wasteload allocation discharge into the canal in 1984?
A. Yes, sir.
Q. In 1985?
A. Yes, sir, through this permit.
Q. 1986?
A. Yes, sir.
Q. 1987?
A. Yes, sir.
Q. 1988?
A. Till August of 2, 1988, yes, sir.

Q. Did the EPA comment on this permit?
A. No.
Q. Did EPA challenge this permit?
A. No.
Q. Did EPA work with the State of Florida on joint inspections of this facility?
A. Yes, sir.
Q. Did EPA ever raise this issue of not having a wasteload allocation to you or any of your staff?
A. No.
Q. Was this facility meeting water quality standards in 1983?
MR. QUINN: Objection.
THE WITNESS: Yes, sir.
THE COURT: Wait a minute.
MR. QUINN: I think that calls for an expert opinion.
THE COURT: Okay. It sounds like it to me.
MR. BAISE: May I comment?
THE COURT: Yes, sir.
MR. BAISE: The State of Florida and this office and this gentleman had the responsibility, Your Honor, for maintaining and achieving water quality standards. They developed data. He has individuals who develop data. They have to make conclusions all the time with regard to whether

or not each and every facility meets water quality standards.
If they do not need water quality standards, that's how you get into what we've been discussing, wasteload allocations. So, it's mean a fact question for him, not an expert opinion.
It is a situation that's clearly covered by 701, where a lay person has to have certain facts at his fingertips and disposal to come to conclusions. Clearly this data allows him to determine whether water quality standards are met.
THE COURT: Yes, sir.
MR. QUINN: I'm just saying, sir, this is an expert opinion. I still maintain it's an expert opinion. If they wanted to list him as an expert they could have done it. He's not an expert before the Court.
Whether something satisfies water quality standards or not is — the United States' position is that requires an expert opinion and for that reason we object.
THE COURT: Okay. Well, I'll overrule the objection.
You can answer the question.
THE WITNESS: The State of Florida —
BY MR. BAISE:
Q. I think you answered, but would you repeat your

answer, please?
A. The State of Florida is, through Chapter 403, Florida Statute, is required to deny a permit if they do not meet any water quality standards for any reasons. We are requiring all facilities to submit to us monthly operation reports —
THE COURT: What was your question "yes"?
THE WITNESS: Yes, the question is they have complied with the Rule and not —
THE COURT: You've answered the question, sir.
MR. BAISE: Thank you.
BY MR. BAISE:
Q. I'll repeat this question: Was the facility meeting water quality standards in 1984?
A. Yes, sir.
Q. '85?
A. Yes, sir.
Q. '86?
A. Yes, sir.
Q. '87?
A. Yes, sir.
Q. And '88?
A. Yes, sir.
Q. Thank you.
MR. QUINN: I just object to all that and move to

strike.

THE COURT: The same ruling. Deny the motion to strike.

BY MR. BAISE:

Q. Dr. Ahmadi, why did Florida DEP require in 1988 the Waterway Estates facility to move its discharge point to the middle of the Caloosahatchee River?

THE COURT: Did you say why?

MR. BAISE: Yes.

THE WITNESS: BY that time it became evident to the State that the planning is not going to be implemented for regional facility on the north side of the county, which included the Waterway Estates plant, and, also, because of the consistency and uniformity with other facilities, we requested that Waterway Estates' facility be upgraded to the advanced waste treatment and, also, relocate their discharge point.

Q. So you asked Waterway Estates to move its discharge point for consistency reasons?

THE WITNESS: Yes, sir.

MR. QUINN: Objection, leading.

THE COURT: Sustained.

MR. QUINN: Move to strike.

THE COURT: Granted.

BY MR. BAISE:

Q. Dr. Ahmadi, I direct your attention to Defendant's Exhibit Number 3.

Do you have that document in front of you, Dr. Ahmadi?

A. Yes, sir.

Q. This document is already in evidence, Your Honor.

Dr. Ahmadi, I'd like to draw your attention — first off, are you familiar with this document?

A. Yes, sir.

Q. I'd like to draw your attention to the fourth line of that document and have you read starting with the word "according."

A. According —

Q. Go ahead. I'll tell you when to stop.

A. According to this decision, EPA has authority, indeed a duty under section 301 (b) (1) (c), to interpret State Law and apply those limitations and conditions which it deems necessary to satisfy the requirements of State law. This is true in the absence of state certification; this is also true where EPA determines that the State has committed clear error in the certification, for example, where a State overlooks applicable State water quality standards.

Q. You can skip citing OGC and start with "however."

A. However, where there is no indication that the State has overlooked the standards or otherwise committed clear error, EPA must give deference to the State.

Q. Continue.

A. In short, if EPA and the State arrive at two different, but equally persuasive, interpretations of a standard, EPA should defer to the State's interpretation when included in a State certification.

Q. You can stop there and got to the last paragraph starting with the two words, "the question," please.

A. The question then arises as to what interpretation the Region should write into permits when there is no certification, but the State has expressed its interpretation in a State-issued permit.

Q. Continue.

A. This question arises because of Region IV's agreement with the State of Florida to consider State-issued permits as interpretation of the State Law in view of certifications.

Q. Would you turn to page 2 of this document dated December 26, 1985?

I'm not sure what the first word is on my copy. The printing is blotted out and I assume it's the same with Your Honor. I assume it means, the agreement. Mine is unclear.

Can you tell, Dr. Ahmadi?

A. The same with this, only the "e" is there. I assume it's "t-h."

The agreement should only be construed to require EPA

to impose in its permits the interpretation of State Law which the State has embodied in permits it has issued unless those State interpretations are clearly erroneous or EPA has a strong scientific or technological support for a different interpretation, such that EPA's interpretation is more persuasive than that of the State.

Q. Does this memorandum represent your understanding of the relationship between your office and Region IV EPA on handling permits?

A. Yes, sir.

Q. Dr. Ahmadi, I direct your attention to Defendant's Exhibit Number 23.

This, too, is in evidence, Your Honor.

Dr. Ahmadi, what is this document dated June 30, 1986?

A. This is a notification of the NPDES Permit denial by EPA for the Waterway Estates.

Q. Are you familiar with this document?

A. Yes, sir.

Q. Have you seen this document before?

A. Yes, sir.

Q. Do you recall seeing it in 1986?

A. Yes, sir.

Q. Now, Dr. Ahmadi, I direct your attention to page 2 of the attached fact sheet. Go over to the fourth page. Do you see the page where it is numbered 2, 3, 4, 5, and 6?

A. Yes, sir.
Q. I direct your attention to paragraph 2, Proposed Effluent Limitations. Would you read those into the record please?
A. Number 2: Proposed Effluent Limitations. The final effluent limits for this facility to a canal to the Caloosahatchee River are no discharge.
Q. Paragraph 3, please.
A. Basis for Denial Effluent Limitations and Permit Conditions. The permit denial is based on a no discharge wasteload allocation developed by FDER on January 19, 1981. The terms and schedule for meeting the no discharge wasteload allocation will be set forth in the forthcoming administrative order.
Q. On June 30, 1986, Dr. Ahmadi, did the State of Florida have a no discharge allocation requirement for this project discharging into the canal into the Caloosahatchee River?
A. No, the State didn't have a no discharge. They were authorized to discharge by permit.
Q. Are these two paragraphs incorrect, Dr. Ahmadi?
MR. QUINN: Objection.
THE WITNESS: Yes —
THE COURT: Wait a minute. Wait a minute, sir.
MR. QUINN: Objection. That calls for an opinion. Calls for a legal conclusion and calls for an opinion from a

lay witness.
THE COURT: Well, I'll sustain the objection.
Go ahead.
Proceed.
BY MR. BAISE:
Q. Dr. Ahmadi, I direct your attention — well, strike that.
Dr. Ahmadi, in June of 1986, was the effluent from the Waterway Estates facility meeting State water quality standards?
A. Yes.
Q. Was it meeting Federal water quality standards?
A. It should have. Generally, the State requirements are stringent than the Federal.
Q. I beg your pardon. More stringent did you say?
A. Generally.
Q. Was this discharger, Waterway Estates, meeting its effluent limitations in June of 1986?
A. Yes, they were.
MR. QUINN: I object as to the qualification as to referencing State or Federal effluent limitations.
MR. BAISE: State.
THE COURT: State.
Same answer?
THE WITNESS: Yes, sir, State.

BY MR. BAISE:
Q. Would the Federal effluent limitations have been any different?
A. Generally, as I say, the Federals are less stringent than the State, in most cases.
Q. Federal standards are less stringent than the State's?
A. Yes, sir.
Q. Dr. Ahmadi, I direct your attention to Defendant's Exhibit Number 32.
Do you have that in front of you?
A. Yes, sir.
Q. Did there come a time when the State of Florida did request Waterway Estates to move its discharge from the canal to the Caloosahatchee River 6-foot contour line?
A. Yes, sir.
Q. Did Waterway Estates eventually move their discharge to the 6-foot contour line?
A. Yes, they did.
Q. What did they have to do in order to move their discharge to that contour line?
A. By Florida Statutes, they are required to obtain a permit from the State for upgrading the treatment and, also, extending the line from the point of discharge from the canal to the middle of the river.
Q. So, once they are ordered to move their discharge

pipe, they cannot just immediately start construction, even if they wanted to do so?
A. No, they can't.
Q. Directing your attention to this Exhibit 32, are you familiar with this document?
A. Yes, I am.
Q. Are you the Dr. Ahmadi referred to in the first paragraph?
A. Yes, sir.
Q. What discussions were you holding in approximately September of 19 with Mr. William Barrop and any other individuals regarding this project, Dr. Ahmadi, if you recall?
A. Yes, they were — Barrop was retained as the consultant for the Waterway Estates facility and the Florida Statutes require that for design of a facility a professional engineer, who is registered in the State, must apply for the permit, and we were discussing the operating of the plant to AWT.
Q. What role does your office or do you, personally, play with respect to approving a project for construction such as the one at Waterway Estates, Dr. Ahmadi?
A. The State Statutes clearly require application to the State and then, also, requires a timely review by the State of Florida DEP.

Q. What is a timely review?
A. The timely review is we are obligated to review the application within the first 30 days and then generate a letter for additional information.
Q. Do you routinely grant permission to start these projects within 30 days?
A. No. It's almost impossible in most cases, if there is a necessity for explanations or omissions and clarifications and so forth.
Q. Why is it next to impossible?
A. Because it's a complicated process. The design of a facility, the treatment units, the choice of the chemicals, the equipment, and all this has to be in compliance with the Rule and we should have been given reasonable assurances that that would work once it's constructed.
In order to reach that point, we have to correspond several times back and forth, until such time that we are satisfied that what's proposed is going to meet the intent of the Rule.
Q. You reviewed the plans and specifications for this project, Dr. Ahmadi?
A. I did review certain parts of the application, yes, sir.
Q. Can you give us some idea —
MR. QUINN: Withdrawn.

BY MR. BAISE:
Q. Can you describe the nature of this particular project?
A. Yes. The project is located in the middle of a residential area on a relatively tight site. There is not much room really to design and place structures.
Q. Why is that important?
A. It's important from the point of view of expanding the facility from the conventional treatment which was there to an advanced wastewater treatment. They were building more units, more capacity, more volumes, more pumps and they required a permit not only from us, but from other governmental entities, as well.
But as far as the DEP's responsibility is concerned, we are to make sure what they are proposing will achieve the end result.
Q. Did Florida Cities or its engineering consultants provide you the information you needed to make your decision on a timely basis?
A. Most of the time they did, yes, sir.
Q. Any time they did not?
A. No.
Q. Can you describe or do you know, Dr. Ahmadi, looking at the second paragraph of this letter, what options and alternatives are being discussed by Mr. Harrop in this

letter to Mr. French as a result of this conversation with you in, say, roughly September of 1988?
A. This the September 14, 1988 letter?
Q. Yes, it is.
A. Bill Harrop writes to Robert French of the Florida Cities Water Company and says, it is apparent from our recent discussion —
Q. You can't read. I was just asking you with regard to paragraph 2 about the options and alternatives that might have related to the conversation you had with these gentlemen.
A. The options were that they had to consider some other alternatives for the plant design. We were questioning that certain units were very similar to a conventional treatment and that necessitated an advanced waste treatment process design.
Q. Thank you, Dr. Ahmadi.
I direct your attention to a letter dated October 11th, 1988, Defendant's Exhibit Number 34, please.
A. Number 34?
Q. Yes. Defendant's Exhibit 34.
A. Goes from 32 to 53.
Q. Defendant's Exhibit, Trial Exhibit Number 34.
A. Sorry for that.
Q. Would you please identify this letter, Dr. Ahmadi?

A. Yes, sir. This is a letter written by the DEP to Robert French of Waterway Estates Utility by me and copied the consulting engineer and Tony Reeves, the vice-president.
Q. Can you summarize —
Your Honor, I would move this letter into evidence.
THE COURT: It will be received.
BY MR. BAISE:
Q. Could you summarize your concerns that were raised during your meeting with the Florida Cities official, Mr. French?
A. Primarily after consulting with our engineers, some ten issues that were relevant to this project, including irrigation/production, reliability, chambers, and flow equalization, and we told them those needed to be addressed before we could issue a permit.
Q. Can Florida Cities' engineer develop final plans and specifications until these ten items were specified?
A. No, they cannot.
Q. Why not?
A. Because they would be wasted. If we are not satisfied to give them a permit, they cannot do that. And if we object to it or if we deny their permit, it's a waste of resources and time.
Q. So Florida Cities and its engineer had to satisfy each and every one of these items?

THE COURT: Sir?

MR. QUINN: No. Sorry, sir.

BY MR. BAISE:

Q. How long did it take Florida Cities and its engineer to satisfy FDER's concerns, Dr. Ahmadi?

A. I believe from the time they applied for the permit until we issued, was close to nine months.

And that's not an unusually high time for these kind of projects.

Q. Dr. Ahmadi, I draw your attention to a letter dated November 1st, 1988, Florida Cities Exhibit Number 35.

A. Yes, sir.

Q. Are you familiar with this letter, Dr. Ahmadi?

A. Yes. This is a letter in response to the previous letter that we wrote to Florida Cities. Mr. French responded.

Q. And you're the Dr. Ahmadi in the addressee block?

A. Yes, sir.

MR. BAISE: Your Honor, I would move this Florida Cities Exhibit Number 35 into evidence.

THE COURT: It will be received.

BY MR. BAISE:

Q. In the interest of time, Dr. Ahmadi, could you summarize this document for the Court?

A. Mr. French indicated in this letter that they have

retained Mr. Barth, who is a well-known authority on wastewater process, that he would be reviewing their process.

Q. Who is Mr. Barth and why was he retained?

MR. QUINN: Objection.

BY MR. BAISE:

Q. Who is Mr. Barth?

A. He was a wastewater treatment processing engineer expert.

Q. Did you request Mr. Barth be retained?

A. No, we didn't. We, basically, told the utility that we need those ten concerns that are addressed in our letter adequately responded to, and their response was that they could hire a different consultant to review that aspect of the application.

Q. Was there anything Florida Cities or its consultant could do to speed up your review process, Dr. Ahmadi?

A. Could you repeat that?

Q. Was there anything Florida Cities or its consultant could have done to have speeded up your review process?

A. For a project of that size, that particular process, probably not.

Q. Dr. Ahmadi, did your office ever order Waterway Estates to cease discharging into the canal into the Caloosahatchee River?

A. No, we didn't.

Q. Why not?

A. There was several reasons. One, the Caloosahatchee River was studied by the State a couple of times and it maintained its quality. And second, the facilities that are currently discharging up to this date are well below their permitted design capacity, so they are -- the river is receiving half of its wasteload, actually, and that's another reason. And third, there was really no alternative.

Q. I direct your attention to Defendant's Exhibit Number 36.

Do you have that in front of you, Dr. Ahmadi?

A. Yes, sir.

Q. Please describe this document for the record, doctor.

A. This is also a letter that is written by Bob French of Florida Cities Water Company to the District Manager Phil Edwards on April 19, 1989.

Q. Who was Phil Edwards?

A. My supervisor and the district manager of the South District.

Q. Have you seen this letter before?

A. Yes, sir.

Q. Did you see it in April of 1989?

A. Yes, sir.

MR. BAISE: I move this into evidence, Your Honor.

MR. QUINN: Objection. We say this document is hearsay and hearsay within hearsay as to the attachments. We talked about this the other day.

The sequence of events and the proposed compliance schedule contain hearsay and hearsay within hearsay and the cover letter itself dated to Mr. Edwards contains hearsay.

MR. BAISE: May I respond?

THE COURT: Did I sustain your objection?

MR. BAISE: Yes, you did, and I withdraw the document because this is the one that had on it the stamp received and there was some concern about whether Mr. Acosta had gotten it out of Florida Cities' files, and the issue went off on the fact that this was stamped received April 21, 1989, South Florida District. And since Dr. Ahmadi said he saw it at the time it came in, he worked for Mr. Edwards, he reviewed the document at the time, and certainly represents the events as they were occurring at the time accurately and honestly.

MR. QUINN: I object to the characterization of how this letter sets out the events accurately and honestly. It does what it does and we think it's hearsay.

THE COURT: Okay. Well, let's talk about it a minute.

MR. BAISE: I would move, Your Honor, it comes in under 803-6.

THE COURT: As an exception to the hearsay rule?

MR. BAISE: Correct. Particularly in light of his testimony.

THE COURT: Well, do you want to tell me how this qualifies under the requirements of the rule as a business record?

MR. BAISE: It's certainly a memorandum or a record, it's acts and events that were made at or near the time, and information transmitted by a person with knowledge, who would have been Mr. French. The document was kept in the course of regular conducted business by the Florida DER office a indicated by the stamp, April 21, 1989, and the only thing Dr. Ahmadi has not testified to is whether or not it was the regular practice of that business to make a memorandum or report of this sort and keep it within the custodian of a qualified witness.

THE COURT: Well, how about that?

MR. BAISE: Dr. Ahmadi, are these records kept by a qualified custodian in your offices?

THE WITNESS: Yes, they are. In fact, we are required by Florida Statutes to permanently keep all permitting letter — documents.

THE COURT: Well, who does that? That is, who keeps the records?

THE WITNESS: The records are kept by the — we

have a file clark, Your Honor.

MR. BAISE: Five or file clark?

THE WITNESS: Uh-huh.

MR. BAISE: Excuse me.

MR. QUINN: We still submit that the exceptions requirements have not been met.

The recording of the acts, events, conditions, opinions or diagnoses have to be made at or near the time. You know, we don't know what Mr. French was talking about here, sir. Mr. French isn't here. That's why it's hearsay.

Dr. Ahmadi said file clarks, and if they wanted to get the document in as a business record, they could have brought the file clarks in.

We're not submitting that it's not authentic, we're just submitting that they haven't met the requirements under this aspect of the exception to the hearsay rule.

MR. BAISE: Your Honor, we were told about Judge Swartz we did not have to bring custodians forward to authenticate these documents and maintain — and to assure that they were maintained in the ordinary course of business at the offices, so seems to me that Judge Swartz has dealt with that issue.

MR. QUINN: I'm not objecting to authenticity, sir. They're probably authentic.

THE COURT: Just a moment.

MR. BAISE: Your Honor, there's an 11th Circuit case called Beech Aircraft where it's stated that the United States bear the burden of showing there's a lack of trustworthiness with regard to this document —

THE COURT: Now, that case deals with public records and reports under subsection 8, doesn't it?

MR. BAISE: I've just been given a note from someone who is looking and trying to provide me information, Your Honor.

THE COURT: Well, give me just a moment here.

Okay. I'm referring to the pretrial conference before Magistrate Judge Swartz on December 29th, 1995, referring to the list of custodian of records.

He says: I want those witnesses eliminated and I want any documents that they were to authenticate approved for the purpose of authentication and I need a supplement to this, and I will give you ten days to get it supplemented.

Mr. Bullock: Would Your Honor also consider that for any EPA documents?

The Court: That's both ways.

Mr. Bullock: Thank you.

The Court: All exhibits have got to be examined and this Court is going to get a supplement to this that says there's are no objections to authenticity unless there is a document that you absolutely contend is not a true

document.

So, the Court led counsel to believe that there would be no need to bring in a custodian of records.

We've been talking about a requirement of the business records as evidence, provision of 803, which requires a custodian of records to properly establish the document's authenticity and, of course, a custodian of records would be expected to satisfy some of the requirements of the business records as evidence provisions of 803 Sub 6.

Do you want to be heard on that?

MR. QUINN: No, sir. For purposes of this document, the United States will concede as to what the Court read about authenticity.

However, I will address some of the points of 803-6 and other hurdles that have to met. It has to be established that the document was made at or near the time, by or from information transmitted by a person with knowledge. We don't have anything here today, sir, about Mr. French's personal knowledge.

MR. BAISE: This would, also, qualify as a public record, as well, given the fact it's got this stamp on it and would qualify as an exception to hearsay under 8.

MR. QUINN: May I be heard on that?

THE COURT: Wait a minute. This — I think I

mentioned the other day that I don't think that this is the kind of a record that is contemplated under 8. This isn't a public record that can report -- just a moment, let me read this again.

(Pause.)

Subsection 8, public records and reports. Records, reports, statements or data compilations in any form of public offices or agencies setting forth, A, the activities of the office or agency, or, B, matters observed pursuant to duty imposed by law as to which matters there was a duty to report excluding, however, in criminal cases, matters observed by police officers and other law enforcement personnel, or, C, in civil actions and proceeding, and against the Government in criminal cases. Factual findings resulting from an investigation made pursuant to authority granted by law, and thus the sources of information or other circumstances indicate lack of trustworthiness.

MR. BAISE: B., Your Honor, I was referring to.

THE COURT: Sir?

MR. BAISE: B., matters observed pursuant to his duty imposed by law.

THE COURT: No, I don't believe that subparagraph 8 is applicable here. I disagree with you.

MR. BAISE: Okay.

THE COURT: And I don't believe that this record has been adequately qualified as a business record, so I'll sustain the objection.

BY MR. BAISE:

Q. Dr. Ahmadi, I drew your attention to Defendant's Exhibit Number 33.

A. Yes, sir.

Q. Do you have that document in front of you?

A. Yes, sir.

Q. This, too, is in evidence, Your Honor.

Please describe this document for the record, Dr. Ahmadi.

A. This is a September 14, 1988 letter that's written by William Harrop, Jr., P.E. of Source, Incorporated to Bob French with copy to Tony Reeves.

Q. And what is attached to this letter?

MR. QUINN: Can I have a clarification as to what document?

THE COURT: This is Exhibit 33.

MR. BAISE: Defendant's Trial Exhibit 33, State of Florida Permit, dated September 2th, 1988.

THE WITNESS: I'm sorry. I read the 32.

MR. QUINN: Thank you.

THE COURT: He was describing another document.

THE WITNESS: I was reading it erroneously.

BY MR. BAISE:

Q. What is attached to the letter sent by Mr. Phil Edwards?

A. I'm sorry. For the number 33 is State of Florida document dated September 29, 1983.

Q. Is it '88? It's hard to see.

A. Hard to read.

Q. What is attached to this letter of September 29th, 1988, Dr. Ahmadi?

A. The temporary permit, six pages.

Q. And could you please look to page 2 and describe what Florida Cities is to undertake, starting with paragraph or line 1 at the bottom of the page of 1 of 6?

A. Starting with 1, date?

Q. Yes.

Please summarize that for the record.

A. Date when planning is expect to be complete. It says completed.

Date when engineering will be complete. September 23, 1988.

Source of funds. Invested-owned utility.

Number 4, Date construction application will be submitted to upgrade or eliminate the existing plant. October 8, 1988,

Number 5, Date construction contract will be let.

January 9, 1989,

Number 6, Date construction will commence. February 1, 1989.

Number 7, Date construction is to be complete and so certified. May 1, 1990.

Number 8, Date that wastewater facilities will be certified "in compliance" with your permit. November 1, 1990.

Q. To your knowledge, was Florida Cities able to meet this November 1, 1990, deadline, Dr. Ahmadi?

A. Yes.

Q. Are you aware of any additional delays that Florida Cities met with regard to meeting this date of November 1, 1990?

A. There were some delays from zoning from Lee County and permitting from the Army Corps of Engineers.

Q. Is there any order to cease discharge from the Waterway Estates in this permit issued on September 29, 1988, from the State of Florida?

A. No.

Q. Turning your attention to the exhibit for the Defendant, Number 51.

Do you see this document of October 30, 1990?

A. Yes, sir.

Q. This, too, is in evidence, Your Honor.

Dr. Ahmadi, please look to paragraph 2 of this letter to Mr. Reeves, and please read that paragraph into the record.

A. The letter is signed by Mr. Phillip Edwards, Deputy Assistant Secretary, to A. A. Reeves. Please be advised that the subject permit is extended until September 1, 1992.

Q. Why was that necessary for this particular facility, Dr. Ahmadi?

A. This was necessary due to the delays that were beyond the control of the utility due to permitting and involvement of the different governmental entities.

MR. QUINN: Objection, move to strike, calls for opinion and goes beyond the actual personal knowledge of the witness, goes to opinion and expert opinion, as well, sir.

MR. BAISE: Do you have personal —

THE COURT: Well, I'll sustain the objection.

BY MR. BAISE:

Q. Do you have personal knowledge of this date, Dr. Ahmadi?

A. Yes, sir.

Q. And do you have personal knowledge as to why it was extended?

A. Yes. It was reasonable that there were delays that obviously they could not go ahead with construction without a permit from the appropriate agency, otherwise they get in

trouble for violation of the permit, or the activities that they engage in.

Q. And did Waterway Estates still have a wasteload allocation to discharge in the canal on October 30th, 1990?

A. Yes, sir, through this permit. Through the earlier permit.

Q. Dr. Ahmadi, did this discharge cause any environmental harm as they were discharging into the canal in the Caloosahatchee River in 1990?

A. No measurable harm.

MR. QUINN: Move to strike again.

THE COURT: Just a moment.

MR. QUINN: Objection, move to strike, that environmental harm calls for an expert opinion.

THE COURT: Sustained. And it will be stricken.

BY MR. BAISE:

Q. If this facility had remained discharging into the canal leading into the Caloosahatchee River, could it still be discharging and meeting water quality standards, State of Florida?

A. In my opinion, due to the other —

THE COURT: Wait a minute. Wait a minute.

Yes, sir.

MR. QUINN: Objection. He said, in his opinion, and that will elicit an expert response.

THE COURT: Read the question back to me, again, please.

MR. BAISE: I can rephrase the question, Your Honor, to speed it up.

THE COURT: All right.

BY MR. BAISE:

Q. Dr. Ahmadi, do you have any facts or any data that would suggest that Waterway Estates could still be discharging into the canal without causing water quality standards violations?

THE COURT: Yes or no? Do you have any facts?

THE WITNESS: No. We don't have any facts that — could you repeat that?

BY MR. BAISE:

Q. Do you have any facts showing any water quality harm in the canal in 1990?

A. No, we do not have any facts.

Q. Do you have any facts showing any environmental benefit by moving the pipe to the Caloosahatchee River in 1990?

A. No, we don't have that.

Q. In 1991?

A. No.

Q. 1992?

A. No.

Q. Therefore, could the facility still be discharging into the canal without violating water quality standards?

A. Yes.

MR. QUINN: Objection, move to strike. First, it calls for speculation, and second, speculation of an expert.

THE COURT: All right. Read the question back.

(Thereupon, the above-referred to portion of the testimony was read back by the Court Reporter as above recorded.)

THE COURT: I'll sustain the objection.

BY MR. BAISE:

Q. Did EPA comment on the permit that was issued by the State of Florida in 1988, Dr. Ahmadi?

A. No.

Q. Did EPA ever challenge that permit issued in 1988?

A. No, nobody did.

Q. And the Waterway Estates facility had a wasteload allocation to discharge in the canal up until it moved its pipe in 1991?

THE COURT: Don't lead the witness. This is your witness.

BY MR. BAISE:

Q. Dr. Ahmadi, was there ever a time that Waterway Estates did not have a wasteload allocation to discharge into the canal?

A. No, not from the State. All the time they did.

MR. BAISE: Thank you.

THE COURT: Is that all, Mr. Baise?

MR. BAISE: Yes, sir.

MR. HIRD: I have no questions for this witness.

THE COURT: Mr. Quinn.

CROSS-EXAMINATION

BY MR. QUINN:

Q. Good afternoon, Dr. Ahmadi. My name is Tony Quinn. I represent the United States.

A. Good afternoon.

Q. Sir, when did you first start with the Florida Department of Environmental Regulation?

A. That's the first place where I applied for a position and was interviewed. There were two positions and I was offered both of them.

Q. And what year — what date was that?

A. That was in September 1981.

Q. So when did you start work for FDER?

A. In September of 1981.

MR. QUINN: Your Honor, at this time the United States would move to strike all the testimony of Dr. Ahmadi which relates to his personal observations made on or before the date he started work in September of '81.

THE COURT: Motion denied.

BY MR. QUINN:

Q. Sir, prior to the delegation to Florida, NPDES Permits and State permits were different requirements, weren't they?

A. It was a parallel program, yes.

Q. But they were requirements that were separately enforcement, weren't they?

A. Yes.

Q. And prior to the delegation of the NPDES Program to Florida, a facility discharging pollutants to a surface water required both a State permit and a Federal NPDES Permit; is that correct?

A. Yes.

Q. Sir, in Florida, do permittees have a right to appeal a State permit denial?

A. Yes, they do.

Q. Are you familiar, now that Florida has been delegated the NPDES Program, are you aware whether permittees have a right to appeal permit denials?

A. Yes, we give them the point of entry, and on receipt of the permit they have certain amount of days to appeal for a permit, object to it if they dislike any of the conditions.

Q. So it's a permit appeal process; is that correct?

A. Yes.

Q. Sir, prior to the delegation of the NPDES Program to

the State of Florida, do you know whether permittees had the opportunity to appeal permit denials of NPDES Permits?

A. My understanding is that they would have.

Q. So, if a permittee thought that a permit was wrongfully denied, it could have appealed; is that correct?

A. Yes.

Q. Sir, you mentioned during your discussion with Mr. Baise the Cape Coral facility. My question deals with that facility.

Doesn't the Cape Coral facility currently have one hundred percent use of its effluent on land application?

A. No, it doesn't.

Q. Does it have any surface water discharge?

A. Yes, they do.

Q. Only during wet weather; isn't that correct?

A. Yes.

Q. Other than only during the wet weather discharge, Cape Coral has land application for its effluent in entirety; is that correct?

A. Yes. About three years ago the city, after several years of referendums and a lot of pros and cons, the citizens decided they are going to embark on a project that will deliver water to each home —

MR. QUINN: Objection. Move to strike everything after 'yes.'

THE COURT: All right. Stricken.

BY MR. QUINN:

Q. Sir, can you tell me what is the wet weather discharge storm event that allows the wet weather discharge?

A. Any time the land cannot accept effluent due to excessive rainfalls, such as this last year we had close to 75 inches of rain in our area, our part of the State, they are authorized to discharge their entire effluent or portion of to it the river.

Q. What is the trigger that allows them — withdrawn.

What is the triggering event or the triggering amount of rainfall that authorizes a surface water discharge from the Cape Coral facility, if you know?

A. We have an application rate of 2 inches per week. Anything above and beyond that will soak the land and the land will not accept it and create surface water runoff.

Q. Sir, is it the State of Florida's position — withdrawn.

Does the State of Florida encourage land use application for wastewater facilities?

A. Yes, we do.

Q. And does the State of Florida discourage surface water discharges?

A. Where we use as feasible, yes.

Q. Why does the State of Florida discourage surface water

discharges?
A. For two reasons: One is the conservation of the resource, it eliminates the need for additional potable water or ground water of high quality, and that's normally used for irrigation, it would be safe to be used for other purposes, and second, it will not be a direct discharge to a surface quarter stream.
Q. Because a direct discharge of pollutants to the water might have an environmental impact?
A. Well, it does — in fact, it could be debated both ways. If ground water is contaminated, it is extremely difficult to clean up that water. If surface water gets contaminated, due to the natural reactions, currents, and so forth, it is easier to get cleaned up.
Q. Do pollutants — withdrawn.
Does pollutants discharge to a surface water body have a tendency or a possibility of impacting environmentally on that water body?
A. It would, depending on what the pollutants are and what concentrations are.
The State Rules, all of them, allow certain amount of pollutants to be discharged to the ground water or to the surface waters.
Q. Thank you.
Sir, we talked a little bit about the 1981

Caloosahatchee Wasteload Allocation document. I'm not going to ask you any specifics about them, I'm just going to ask you in general about it.
You didn't write the 1981 Wasteload Allocation document, did you?
A. No, I didn't. We have a separate section in Tallahassee, which is the technical department and they do it for the entire state and they are headquartered in Tallahassee and we work closely with them.
MR. QUINN: Objection, move to strike everything after, "no, I did not."
THE COURT: I'll deny the motion to strike.
Go ahead.
BY MR. QUINN:
Q. Sir, all your knowledge about the purpose of the wasteload allocation document came after it was written; isn't that a fact?
A. After I joined the DEP, that was part of my job requirement, to review the Statutes and the Rules, Administrative Codes and implement those in the permitting process.
Q. So people told you about the wasteload allocation document at that time; is that right?
A. That was part of my job, as I said.
Q. Okay. Sir, does the Florida Department — withdrawn.

The Florida Department of Environmental Protection or the Florida Department of Environmental Regulation, I'm not sure exactly which one it's going to be based on the time, but either FDEP or FDER required that the Waterway Estates' outfall be moved to the 6-foot contour line because there was more dispersion of pollutants at that location; isn't that correct?
A. That was the premise for all of them, for all of the dischargers to that body of water.
Q. So we talked about a little bit about wasteload allocations, and we talked a little bit about permits on your direct examination.
A wasteload allocation is different than a permit, isn't it?
A. A permit is the authority to discharge and in that it contains certain conditions and under what conditions.
Q. And the wasteload allocation is a condition which is enforcible through a permit; isn't that correct?
A. If it has been determined that a facility is granted a specific wasteload, then that is contained in the permit and only enforcible if it's in the permit.
Q. So a wasteload allocation which is not in a permit is not enforceable; is that correct?
A. Right.
MR. QUINN: Excuse me, one moment, sir.

(Pause.)
BY MR. QUINN:
Q. I'd like to turn your attention, please, if I may, to Florida Cities Water Company Exhibit Number 32.
This was the document between Source and Mr. French that Dr. Ahmadi talked about a little bit, Your Honor.
Do you have the document in front of you, Dr. Ahmadi?
A. You said 34 or —
Q. I'm sorry. 32 is the one I'm talking about.
A. Yes, sir.
Q. Okay. Sir, with regard to your conversations with Florida Cities Water Company and Source Engineering, isn't it true that the Florida Department of Environmental Regulation needed to make requests — withdrawn.
Isn't it true the Florida Department of Environmental Regulation needed to make four requests for additional information regarding this project?
A. I'm not sure of the exact number, but there was several requests back and forth.
Q. On direct testimony you said, I believe in response to a question, that you didn't think there was anything that could be done to have sped up the review process; isn't that correct?
A. Yes, I said that it took approximately nine months and that's not an unusually long time.

Q. Sir, wouldn't submission of a complete and accurate application have speeded up the review process?

MR. BAISE: Objection to the characterization of accurate application. There's been no suggestion that there was an inaccurate application submitted here; only an application which, as he pointed out, there are always questions with regard to any application such as this, that is as complicated as this project was.

MR. QUINN: I'll rephrase the question, sir.

THE COURT: All right. I'm not requiring you to, but go ahead.

MR. QUINN: I think I will, just to save a little time.

BY MR. QUINN:

Q. Sir, wouldn't submission of a complete application the first time have speeded up the application review process?

A. It would, but it's not customary. As I said, in 99 percent of cases there is need for additional information in all such cases.

MR. QUINN: Objection, move to strike everything after "it would" as non-responsive.

THE COURT: Read it back to me, please.

(Thereupon, the above-referred to portion of the testimony was read back by the Court Reporter as above recorded.)

THE COURT: Denied.

BY MR. QUINN:

Q. Sir, in 99 percent of the cases are four additional information requests usually sent?

A. Yes, sir.

Q. Four times it is --

A. Four or more.

Q. Has the Department of Environmental Regulation ever requested that applicants do a better job in submitting applications the first time?

MR. BAISE: Objection. That's outside the scope of my direct.

THE COURT: Well, I don't know. I'm kind of curious, myself.

THE WITNESS: Well, the application on the very top says, in fact, that it should be fully executed and supporting documents given to us. But, there are a lot of factors to be considered; chemical, biological, process, equipment, and others, layout. Unless we are satisfied that the process they proposed will give us that degree of confidence that they will meet the standards, we will not be able really to decide on the merits of what has been proposed, and that's, as I said, customary in all such treatment process.

BY MR. QUINN:

Q. One final line of questions for you, Dr. Ahmadi.

Sir, are you familiar with something called the Anti-degradation Rule?

A. Yes, sir.

Q. Sir, if a wastewater treatment plant had a complete construction permit application with FDER before the effective date of the Anti-degradation Rule, isn't it a fact the required treatment levels set forth the Anti-degradation Rule would not be required?

MR. BAISE: Objection.

THE COURT: Wait, wait.

MR. BAISE: I certainly didn't bring the Anti-degradation Rule on direct, Your Honor.

MR. QUINN: He did not, but this goes to knowledge about the delays we've been talking about, so I believe it is within the scope.

In addition, the Anti-degradation Rule came up in earlier testimony as one of the mitigating factors.

THE COURT: I'll overrule the objection.

Do you remember the question, sir?

THE WITNESS: Yes. The Anti-degradation Rule, when it was passed, had a cut-off date. It was only applicable to future projects and expansion only. The expanded portion. This facility did not expand. The expansion that took place -- actually, there was an

expansion, but it was through reuse of land application. The facility was downgraded, in fact, as to discharge. It was 1.08 and came to 1.0 for the surface water discharge. The balance of that, which is 1.5, goes to land application and reuse.

BY MR. QUINN:

Q. So if the application for the upgrade of the Waterway Estates' treatment plant had been submitted and been deemed complete prior to the effective date of the Anti-degradation Rule, none of those requirements would have been applicable to that construction project; is that correct?

A. What requirements?

Q. The requirements of the Anti-degradation Rule.

A. There are no additional requirements under the anti-degradation that will be retroactively applied to a facility. Only to expansion or new construction.

Q. So my question goes to that, though, sir. If the application had been submitted after that cut-off date, then the Anti-degradation Rule could not have been applied retroactively to it; is that correct?

A. Yes. The anti-degradation is not an issue at all here because they did not expand the facility to discharge surface waters. The expansion is to land application reuse site.

MR. QUINN: Thank you.

I have no more questions, Dr. Ahmadi, sir.

THE WITNESS: Thank you.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. BAISE:

Q. Dr. Ahmadi, in talking about the Cape Coral facility, did I hear you correctly in saying it could discharge over if two inches of rain was received within a certain time period?

A. No, I said the rate of application of effluent on land for irrigation purposes is two inches per week. If we get, let's say, two or three inches per week of rain, then the land cannot accept any additional water.

Q. How frequently does this area receive two to three inches of rain per week?

A. In our part of the State, beginning in late May to October, it's 7, 8, 10 inches a week.

Q. How frequently, then, does Cape Coral discharge into the Caloosahatchee River?

A. As soon as the rain hits, they're partially starting discharge and sometimes one hundred percent discharge.

Q. I'm sorry. One hundred percent?

A. Right, of what they produce is discharged.

Q. How many gallons is that?

A. Currently they have to two facilities. They are

permitted for close to 14 million gallons.

Q. 14 million?

A. Yes, sir.

Q. How many gallons is Waterway Estates' discharge?

A. Waterway Estates discharge is limited to one million gallons, so it would be one over 14th of that or 7 percent.

Q. Regarding wasteload allocations, are those included in the Florida permits when they are issued, Dr. Ahmadi?

A. Yes. When the permits are issued, it lays out all the conditions, what they can and what they cannot do and what type of treatment they need to achieve.

Q. What other ways, if any, besides an operating permit, does FDER use to authorize discharges to surface waters?

MR. QUINN: Judge, I think this is beyond the scope of my cross examination.

THE COURT: Read the question back to me.

(Thereupon, the above-referred to portion of the testimony was read back by the Court Reporter as above recorded.)

THE COURT: Mr. Baise.

MR. BAISE: I was just going back to the Cape Coral situation, which has struck me as interesting when counsel drew out that Cape Coral could be discharging into the Caloosahatchee River --

THE COURT: I'll overrule it.

MR. BAISE: -- These enormous amounts --

THE COURT: I'll overrule it.

Go ahead

BY MR. BAISE:

Q. Do you understand the question, Dr. Ahmadi?

A. No, there's no other way, other than the permits.

Q. Dr. Ahmadi, how many private waste treatment companies or facilities do you work with?

A. Close to 700 in our district.

Q. Could you compare those facilities' performance with Waterway Estates' performance?

A. I not compare one to the other, but I have a generalized feeling --

THE COURT: I think this is beyond the scope.

MR. BAISE: I'll withdraw the question, Your Honor.

BY MR. BAISE:

Q. How many permit applications does your office review in a year's time, Dr. Ahmadi?

A. Only the facilities which I log in personally, and then assign it to the engineers. Close to one thousand per year.

Q. How many of those permit applications are granted upon the first application submitted to your office?

A. Some applications which are on the -- not the

process -- like the distribution system or collection system or pump station, those are simple. They could be complete, we could deny them right away or we could issue them right away. There's a different time limit of 30 days. So, if you exclude those, the others all of them would require, and some of them 1, 2, 3 years, in fact, to finalize.

MR. BAISE: Thank you very much.

THE COURT: All right.

We'll take a 15-minute recess.

(Thereupon, a brief recess was taken after which the following proceedings were had:)

COMPOSITE EXHIBIT NO. _____

DOCKET NO.: 971663-WS -- PETITION OF FLORIDA CITIES WATER COMPANY FOR LIMITED PROCEEDING TO RECOVER ENVIRONMENTAL LITIGATION COSTS FOR NORTH AND SOUTH FT. MYERS DIVISIONS IN LEE COUNTY AND BAREFOOT BAY DIVISION IN BREVARD COUNTY.

WITNESS: AHMADI
DIRECT

ON BEHALF OF: FCWC

DESCRIPTION:

1. Transcript of Deposition of Abdul Baqi Ahmadi taken on May 27, 1998
2. FCWC Response to Staff POD 1 - 10/12/90 letter from FCWC to FDER
3. FCWC Response to Staff POD 1 - 10/1/90 letter from FDER to FCWC
4. FCWC Response to Staff POD 1 - 6/5/90 letter from FDER to FCWC
5. FCWC Response to Staff POD 1 - 5/21/90 letter from FDER to FCWC
6. Ahmadi Late-filed depo Exhibit 3 from May 27, 1998 deposition
7. FCWC Response to Staff POD 1 - 4/1/81 FDER Waterway operating permit
8. Ahmadi Late-filed depo Exhibit 2 from May 27, 1998 deposition

PROFFERING PARTY: STAFF

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663-W EXHIBIT NO. 15
COMPANY/ WITNESS: Ahmadi - Staff
DATE: 8-12-98

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Cities Water Company for limited proceeding to recover environmental litigation costs for North and South Ft. Myers Divisions in Lee County and Barefoot Bay Division in Brevard County.	)	Docket No. 971663-WS

DEPOSITION OF:	ABDUL BAQI AHMADI (Via Telephone)
TAKEN AT THE INSTANCE OF:	The Staff of the Florida Public Service Commission
PLACE:	FPSC Conference Room 362 Gerald L. Gunter Building 2540 Shumard Oak Boulevard Tallahassee, Florida
TIME:	Commenced at 1:05 p.m. Concluded at 2:05 p.m.
DATE:	Wednesday, May 27, 1998
REPORTED BY:	Lisa Girod Jones, RPR, RMR

RECEIVED
FLORIDA PUBLIC SERVICE COMMISSION
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Also Present: NONA SCHAFFNER, Esquire (Via Telephone)
State of Florida
Department of Environmental Protection

ROSANNE GERVASI, Staff Counsel, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850; appearing on behalf of Staff.

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S T I P U L A T I O N S

IT IS STIPULATED that this deposition was taken pursuant to notice in accordance with the applicable Florida Rules of Civil Procedure; that objections, except as to the form of the question, are reserved until hearing in this causes; and that reading and signing was not waived.

IT IS ALSO STIPULATED that any off-the-record conversations are with the consent of the deponent.

DEPOSITION

Whereupon,

ABDUL B. AHMADI

was called as a witness, having first been duly sworn to speak the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

MR. GATLIN: He's sworn.

MS. GERVASI: Mr. Gatlin, can we agree to the usual stipulations for the purposes this deposition?

MR. GATLIN: Yes.

DIRECT EXAMINATION

BY MS. GERVASI:

Q. Dr. Ahmadi, hi, I'm Rosanne Gervasi and I'm an attorney representing the Staff of the Florida Public Service Commission.

Would you please state your full name and business address for the record?

A. My name is Abdul Baqi Ahmadi, and I'm at 2295 Victoria Avenue, Fort Myers, Florida 33901.

Q. And Dr. Ahmadi, you have filed or caused to be filed some testimony and exhibits in the Public Service Commission docket concerning Florida Cities Water Company's petition to recover certain environmental litigation costs, correct?

A. Yes.

Q. I would like to ask you some questions on behalf of the Commission Staff relating to the testimony that you filed in that docket. If I ask you something that's unclear to you, would you please let me know, and I'll do what I can to rephrase the question to make it understandable. And if you need a break at any time, let me know, and we can go ahead and take a break whenever you need one.

Do you have with you a copy of your testimony and the prefiled exhibits that you filed in the docket?

MR. GATLIN: Yes, he does. I handed him one. He has a copy of the deposition.

THE WITNESS: Yes.

BY MS. GERVASI:

Q. Okay, and also the trial transcript that he prefiled?

A. Yes, he has that too.

Q. Great. Thank you. And you also have copies, or faxed copies that we just faxed to you of a couple of other documents that I'll be referring you to, Dr. Ahmadi, a little bit further on.

Let me first refer you, please, sir to Page 32 of your Exhibit ABA-1, your deposition transcript.

A. Okay.

Q. And beginning on Line 2, you state that DEP required the utility to expand or upgrade the Waterway

Estates plant to advanced wastewater treatment, correct?

A. Yes.

Q. And to move the outflow line to the middle of the Caloosahatchie River?

A. Right.

Q. When was that required? Do you know? Or do you recall?

A. I don't recall exactly. There was -- with the location down on the river, and it was decided many years prior to that, that any discharges that -- existing or will be expanding will be required to go to advanced waste treatment. And also to relocate -- if they are not discharging to the middle of the river, they are to relocate the discharge pipe.

Q. Was that sometime back in the -- would you say early eighties? Is that roughly the right time?

A. I don't have the exact date. You know, those dates kind of -- but they were much prior to when the actual work was done.

Q. Okay. Thank you.

A. You're welcome.

Q. Do you know whether DEP's requirement in that situation influenced in any way -- was influenced in any way by the EPA's 1986 denial of the utility's NPDES permit?

A. The DEP's requirement, no, it was independent of

the EPA's.

Q. Thank you.

A. You're welcome.

Q. Was the DEP's 1988 requirement to upgrade the plant and move the outflow line based in any way on any EPA compliance requirements?

A. No, that was the state, DEP's requirement, DER at the time.

THE REPORTER: I'm sorry, I didn't understand you.

THE WITNESS: I say that was the state requirement, the DEP. At that time we had DER, at that time, a different name.

BY MS. GERVASI:

Q. Thank you.

A. You're welcome.

Q. Now, if an NPDES permit had been granted for Waterway Estates in 1986, would the DEP still have required the utility to upgrade the -- to the advanced wastewater treatment and to relocate the outflow line?

A. Yeah, regardless of the NPDES, we were independently requiring surface water discharge permit from each facility discharging to the river. The decision was made for the AWT for all the discharges, and I believe there were two plants that were not at that time meeting the AWT standards, and the Waterway Estates plant was one of them.

Q. What was one of them, I'm sorry?

A. The Waterway Estates plant, the plant in question, I guess, the Florida Cities Water Company plant, was one of those two plants.

Q. Thank you.

A. You're welcome.

Q. Do you know if an NPDES permit had been granted for the utility in 1986, how long that permit would have been good for?

A. Generally I believe they are good for five years, unless it's shortened by the EPA, which they have that authority to do. And we have the same thing, we have a five-year permit maximum, but we can shorten the duration, depending on circumstances, to anything between six months, a year, or two years.

Q. Now if the NPDES permit had been granted in 1986, to your knowledge what would the EPA's involvement have been in the plant upgrading and outflow line relocation projects?

A. Could you state that once more?

Q. Sure. Assuming that -- if an NPDES permit had been granted in 1986 by the EPA, what would the EPA's involvement have been in the plant upgrading and outflow line relocation projects?

A. Generally when we issue a permit, we run that permit by them and provide them the copies. And when they

issue a permit, they share the information with us and ask if what they're including in the permit is okay with us.

Q. Would they have any -- would the EPA have any input in what the DEP's decision was in terms of the upgrade and the relocation of the line?

A. We have open communications, basically, with the federal government on issues of mutual interest and make sure that what we do does not conflict with their rules and what they do does not conflict with our rules. So the end result is the same.

MR. GATLIN: Rosanne, may I interrupt just a minute? The notary had a question that she thinks she needs to go back on the oath and ask a question about. Could we interrupt just a second and get that done?

MS. GERVASI: Sure, sure we can.

THE NOTARY: The oath that you read is not legal and binding. Could you raise your right hand? I haven't done this very much.

Sir, if you would raise your right hand. Do you solemnly swear to tell the truth, the whole truth and nothing but the truth?

THE WITNESS: Yes.

THE NOTARY: Good. I'm satisfied.

MR. GATLIN: Excuse us. Thank you.

MS. GERVASI: Thank you. And Dr. Ahmadi, can I

ask you to adopt your answers to all of the previous questions that you just asked me and to tell me that you still -- your answers are still the same even though you've just given your oath?

THE WITNESS: Yes.

BY MS. GERVASI:

Q. Thank you.

A. You're welcome.

Q. Going back to my last question about what EPA's involvement would have been, would the EPA have had any enforcement authority?

A. Yes, they have. They had the oversight authority on the state, I guess after the delegation. But they had the independent federal requirements authority before the delegation of the program to us.

Q. Would that have included enforcement authority over the construction of the outflow?

A. Yes. On anything that Florida Cities was doing --

THE REPORTER: I'm sorry, I can't understand you.

BY MS. GERVASI:

Q. Could you please repeat what you just said, Dr. Ahmadi?

A. Yes, I said that the federal government would have the authority on everything that Florida Cities Water Company was conducting in terms of surface water discharge.

Q. Okay. Do you know if the EPA ever required the utility to upgrade the Waterway plant to AWT, or to move its outflow line to the middle of the river?

A. No, I don't.

Q. Do you know whether the 1986 NPDES permit denial for Waterway was based primarily on a planning document, zero waste loading allocation to the river?

A. May have been. Not definitely positive, but it may have been based on that.

Q. Do you know what else it may have been based upon?

A. No, at that point of time, as I said, they were operating independent of the Florida DEP's requirement.

Q. Do you know if -- do you know what other -- let's see if somebody is trying to get on the line.

THE WITNESS: We have Nona Schaffner also from the DEP, our attorney, just joined us.

BY MS. GERVASI:

Q. Dr. Ahmadi, do you know what other criteria may have been used by the EPA to deny the NPDES permit?

A. No, I wouldn't know what criteria they used in the denial. As I said, they were independently operating from the state's requirements. We had a dual program of permitting. They were doing their permitting to meet the Clean Water Act provision and we were just doing the state

version of the permit.

Q. Okay, if you would please refer to Page 42 of your Exhibit ABA-1. And starting on Line 5, you're discussing the planning document, that the planning document also included a zero waste loading allocation for the City of Cape Coral?

A. Uh-huh.

Q. Is that right?

A. Yes.

Q. To your knowledge, did this cause any NPDES permitting problems for the city?

A. No. I believe the city acted prior to that time to go to the AWT.

Q. To go where?

A. To go to the advanced waste treatment prior to the Waterways setback.

Q. Dr. Ahmadi, did the City of Cape Coral have an NPDES permit?

A. At that point, yes.

Q. Was it influenced by the zero waste loading allocation?

A. Yes, all of the discharges to the Caloosahatchie River, including the City of Cape Coral and the Waterway Estates plant, were required to go to NPDES.

Q. Including the City of Cape Coral and including

Waterway, you said?

A. Uh-huh. We have five major discharges there to the river. Two of them are owned by the Florida Cities Water Company, and two by the City of Fort Myers, and one by the City of Cape Coral.

Q. Dr. Ahmadi, do you know why the DEP took action against -- I'm sorry, why the EPA took action against the city?

MR. GATLIN: Cape Coral, talking about?

MS. GERVASI: Correct, the City of Cape Coral.

THE WITNESS: They had the authority to take enforcement action whenever the rules are violated.

BY MS. GERVASI:

Q. Do you know what it was that they were enforcing?

A. If they had some conditions in the state permit, that those requirements and conditions were more stringent than the federal government, then the federal government is obligated to enforce our rules as well. I wouldn't know exactly what the situation was there.

Q. You don't know the specifics then?

A. Not at this time. One of the issues may have been just the AWT requirement and the extension of the line to the outflow line on the river. It's similar to the Waterway Estates plant.

Q. Did the City of Cape Coral have an outflow line

problem?

A. At one point in time, yes, I think I said earlier that there were two facilities that were not meeting the AWT standards, and those two, one of them was Cape Coral, one was the Waterway Estates plant.

Q. Was the City required to relocate the line, do you know?

A. Yes, they were.

Q. By whom?

A. By the DEP, the state.

Q. Do you know if the City encountered any construction or zoning problems that prevented it from meeting compliance deadlines?

A. No, I don't.

Q. Okay, one of the documents that we had faxed over to you just a little while ago is a letter from the DEP to -- from a Mr. Phillip Edwards of the DEP to Mr. Reeves. And attached to it is an unsigned copy of the DEP consent order. Do you have that in front of you?

A. Yes, I do.

Q. This was provided, or could you at least agree subject to check, that this was provided in response to the utility's -- in response to the Staff's request for production of documents, our first request for production of documents? And I wonder if -- do these materials look

familiar to you? Have you reviewed them before?

A. Well, that's proposed consent order. I recognize the signature of Mr. Edwards, and somebody else signed for him, but the rest of the material is just the proposed consent order.

Q. Did you say the rest of the material is a proposed consent order?

A. Yes, because it's not signed.

Q. Not finalized?

A. Yeah, not signed or certificated.

Q. Was the consent -- are you saying that the consent order was never entered into?

A. No, I am not saying that. At this point I am not aware, or I can't say without referring to the files whether there was a consent order, whether this was finalized or not.

Q. Could we ask as a late-filed exhibit for you to find that out and to provide us a copy of the signed consent order if there was one?

A. Sure.

Q. We'll go ahead and identify that as late-filed Exhibit No. 1, Signed Consent Order.

MR. GATLIN: Do you want it attached to the letter?

MS. GERVASI: Yes.

MR. GATLIN: From Phil Edwards, I guess?

MS. GERVASI: Yes.

MR. GATLIN: Dated on November 21st, 1990?

MS. GERVASI: Right, the signed consent order concerning the November 21, 1990 letter, let's say, from Mr. Edwards to Mr. Reeves. And that is if it exists. And if it doesn't exist, could you please give us that information, if you find that there was not a consent order that was entered into?

THE WITNESS: Sure.

MS. GERVASI: Thank you.

(Late-filed Exhibit No. 1 identified.)

BY MS. GERVASI:

Q. If you would please look at Page 2 of the unsigned consent order that you have a faxed copy of there, could you please read out loud Item No. 7 on Page 2?

A. Sure. "Respondent is in violation of Section 403.161 (1)(b), Florida Statutes, in that respondent failed to comply with paragraph ten of the Consent Order No. 88-0384, which required the construction of the wastewater treatment plant be complete and certified in compliance with all F.A.C. Rules and Florida Statutes regulating wastewater treatment facilities by November 1, 1990."

Q. Thank you. And if you would, please, sir, refer to Page 5 of that same document, the unsigned consent order,

and read out loud, if you would, the first sentence of Item No. 14.

A. "Respondent shall make payment of $15,000 to the Department of Environmental Regulation in order to settle the issues raised in the consent order."

Q. I'm sorry, that's all we needed you to read for that. Thank you. Do you know whether the utility paid that $15,000?

A. I would have to refer to the signed final consent order, I guess, to say for sure that they did.

Q. Okay. Do you know, or can you give us some background information as to why the DEP pursued a consent order agreement at that time and the fine?

A. Well, they had here that we had a consent order with them that required them to do certain things to the facility, and apparently they didn't do that, so we proposed another consent order to resolve the issues.

Q. Did you say there was another consent order after this one?

A. No, there was one before this. The one I read just earlier was statement no. -- Item No. 7, I believe.

Q. Okay, can we -- could you please provide us a copy of that earlier consent order?

A. I will search for it. It's Consent Order 88-0384.

Q. 0384, okay. Let's label that Late-filed Exhibit

No. 2, Copy of Consent Order No. 88-0384.

A. Uh-huh.

Q. Thank you.

(Late-filed Exhibit No. 2 identified.)

THE WITNESS: That consent order requires Florida Cities to complete all work by November 1, 1990, and apparently that wasn't the case. So then we proposed the other one, which is the unsigned copy in front of me.

BY MS. GERVASI:

Q. Do you know whether the DEP believed at that time that the construction delays -- that the construction delays at Waterway were unjustified? Hello?

A. Yes, probably, yes. I'm there.

Q. Okay, the line went dead for a second there. I wasn't sure.

A. It could be argued probably both ways. And there were some situations that were well within their capabilities to respond to requests for information, and in a timely manner, and there were, I think, others which were clearly beyond their ability to respond to it, such as zoning and other local government requirements.

Q. And what is your opinion on that, Dr. Ahmadi?

A. I have no opinion. And as I said, probably was both. You know, there were certain items that they could

have certainly expedited, the permitting process, and there were others which were beyond their control.

Q. Do you know whether the City of Cape Coral was ever fined by the DEP for missing compliance deadlines?

A. I don't know at this point. Normally if it's a noncompliance, and if they didn't do what the order -- they were ordered to do so, or agreed to do so, then we normally pursue those. But without referring to the file, I will be unable to tell you. We have several hundred facilities, and talking about ten years before this time. So it's difficult, really.

Q. I understand. In your experience with the EPA, do you know whether it's common practice for the EPA, in general, to deny permits such as these?

A. If it doesn't meet their authority and their rules, they have to have justification for issuance of permit.

Q. Do you have any knowledge of what happens when a utility challenges an EPA permit denial?

A. No, that's independent of our activity.

Q. Okay. So the DEP wouldn't get involved in an EPA permit challenge, permit denial challenge?

A. Unless you have subpoenaed or requested to do so. No, we normally don't want to get involved. That was an independent action by the federal government.

Q. Do you have any opinion as to -- as to whether if Florida Cities had challenged the EPA -- the 1986 EPA permit denial and shown that the utility did in fact have a waste load allocation, whether the EPA would have granted the NPDES permit?

A. No, that's something between the utility and EPA.

Q. Do you have an opinion as to -- well, strike that. Let me tell you and see if you'll agree that -- anyway subject to check, that Florida Cities incurred over $3 million in legal fees in litigating the EPA's complaint; and my question to you is do you have an opinion as to whether the utility would have incurred as much in legal fees had it initially challenged the 1986 permit denial?

A. I wouldn't have any idea on that, no opinion on it.

Q. Okay. Thank you. Okay, if you would, please, sir, refer to the other document that we faxed to you today, which we found in Mr. Baise's exhibits in Volume 5 of Mr. Baise's prefiled exhibits in the case, which is a copy of Connie Kagey's trial transcript from April the 3rd of 1996.

A. Which page?

Q. Page 145 of that trial transcript. Do you have that in front of you?

A. Yes.

seeing when did they request, and normally we do respond when we are requested for comment.

Q. Okay. Could you provide us that information as a late-filed exhibit?

MR. GATLIN: Which information now?

MS. GERVASI: Let me try to be real specific. As Late-filed Exhibit No. 3, what we would like to know is when did the EPA first request state certification from the DER for the Waterway NPDES -- 1986 NPDES permit renewal.

MR. GATLIN: When did the EPA first request certification?

THE WITNESS: In 1986.

MS. GERVASI: Right. We would also like to know when was it that the DER submitted its NPDES certification work sheet for that Waterway 1986 NPDES permit renewal.

MR. GATLIN: Okay.

MS. GERVASI: And if you could please provide us with a copy of the DER's NPDES certification work sheet for the Waterway Estates -- strike that -- I'm sorry, strike that.

MR. GATLIN: Okay.

MS. GERVASI: Strike that request.

MR. GATLIN: Strike the whole thing?

MS. GERVASI: No, just the last request about providing the copy of the certification work sheet.

MR. GATLIN: All right.

MS. GERVASI: But what we would like to know, as part of this request, a third thing is, regarding that Waterway 1986 NPDES permit renewal, did the DER waive state certification by not responding to the EPA within a certain time period? And if so, why?

MR. GATLIN: Is this something that can be determined? I have no idea.

THE WITNESS: I would have to, I guess, go to the file and -- for 1986 and see if that was requested from us in writing. And then if I can't locate that letter, then obviously cannot produce something which haven't been requested. Assuming they did request and we do have a copy, then normally, as I say, we do respond to those. If for some reason we failed to respond, then our agreement was that within 50 days of the request of the letter, if they don't hear from us, and after 60 days they could go ahead and take whatever action they think is appropriate, and that was considered a waiver for certification if you don't respond.

MS. GERVASI: Okay, thank you, Dr. Ahmadi. Anything you can find out in that regard would be appreciated, and if you can't find the documents,

please let us know that.

THE WITNESS: Sure.

(Late-filed Exhibit No. 3 identified.)

BY MS. GERVASI:

Q. If you would please refer now to your Exhibit ABA-2 on Page 143, at Lines 24 and 25 of Page 143, and then continuing on to Page 144, Lines 1 through 14, if you would take a moment to review those lines, please, sir?

A. Sure. (Pause)

Q. And let me know when you're completed with that.

A. Line 14, you said?

Q. Please, yes.

A. Okay, the writing is so small, I have to focus on it. Okay.

Q. Right, I have the same problem.

A. Okay.

Q. Now, evidently Waterway had a waste load allocation of 1.8 -- 1.08 million gallons per day in 1986; is that right?

A. Yes.

Q. And then on Page 152 of that same document, your Exhibit ABA-2, Lines 8 through 11, if you will just take a moment to read that. And here you're stating that the EPA's basis was -- for denying the Waterways in 1986 NPDES permit renewal was the no discharge waste load allocation developed

by the DEP on January 19th of 1981, correct?

A. Uh-huh.

Q. So assuming then that the EPA's basis for denying the Waterway 1986 NPDES permit renewal was the no discharge waste load allocation developed by the DEP?

A. Uh-huh.

Q. Why didn't the DEP, or then the DER, not take it upon itself to resolve this waste load allocation issue with the EPA in 1986? Do you know?

A. No. As I said, we had a separate permitting authority. They had their own permitting authority. And if we issue a permit to somebody, that doesn't mean that any other local or federal permits are not required. In fact, our permit is clear that this is only for this activity and it does not mean that you are exempt from other permitting jurisdictions.

Q. What we're wondering is, since the denial was evidently based on the DEP -- on DEP's -- what was it? -- January 19th, 1981 --

A. Waste load allocation.

Q. Right, thank you, waste load allocation. I guess we're wondering why the DEP wouldn't have become involved since it was based on a DEP decision.

A. Because we didn't know whether they were denied the permit or not, and even if you know, it's something

between the utility and the EPA. As I said we had two facilities that for some reason that are not -- were elected not to meet the waste allocation standards and requirements. One of them was City of Cape Coral. The other one was Florida Cities Waterway Estates. We had another plant on the southern parkway, for some reason they did do the AWT, they did extend the line, and it's an award winning plant. But for this one, again for reasons unknown to me, it looked like they were dragging their feet and not going to go ahead with the AWT process unless they were forced to.

Q. Okay. Thank you.

A. You're welcome.

Q. Now, on Page 135 of your Exhibit ABA-2, that same exhibit, Page 135, Lines 1 through 6. Are you there?

A. Yes, I am reading it.

Q. Okay, thank you.

A. We don't want to leave you there alone.

Q. Okay. Just let me know when you're ready.

A. Okay, I have a little of hard time reading some of the -- it's kind of -- I don't know the background information. It says -- it's a letter that's written by the United States. I don't know what the letter was written by them, in this one, I guess, until I get a chance to read the -- what's before that.

Q. Okay. Let's see.

A. January 22, 1980 something -- '83?

Q. 1981 it looks like.

A. 1981, and signed by William -- Conrad? -- chief of permit section.

Q. Looks like William, I don't know, Cloward, C-L-O-W-A-R-D.

A. And then who is --

Q. And then it says evidently --

A. The question is who is copied on the document?

Q. Right, looks like -- where is the copy part that was copied to Mr. -- looks like --

A. Mickey Brant of the Florida DER.

Q. Right. We're wondering if you could locate a copy of that letter and provide it to us. It looks like it was identified as Exhibit 198 at the federal trial according to Line 22 of Page 134 of the transcript.

MR. GATLIN: What would be the date on the letter? Or do we have any indication?

MS. GERVASI: Dated January 22nd of 1981.

MR. GATLIN: Okay.

THE WITNESS: That's my birthday.

MS. GERVASI: That was your birthday? You're very young then.

THE WITNESS: January 22.

MR. GATLIN: You should see him.

MS. GERVASI: Anyway, let's go ahead and label that as Late-filed Exhibit No. 4, copy of letter dated 1-22 of '81, signed by William Cloward. How is that?

THE WITNESS: That's fine. If we locate them in the file, we'll share it with you.

(Late-filed Exhibit No. 4 identified.)

BY MS. GERVASI:

Q. Now if you would please, sir, take a look at Pages 140 and 141 of that same exhibit, ABA-2.

A. The whole thing?

Q. Let's see. If you'll take a look at Line -- starting from Line 14 on Page 140 of that exhibit, and here you're discussing that DER issued Waterway a state permit to operate and discharge its effluent to the Caloosahatchie River via a canal, correct?

A. I'm reading.

Q. Okay.

A. Line 14 to where?

Q. Lines 14 through 17.

A. Through 17. Okay. It says, "What is this document?" The question was. The answer is, "This is a State permit for the Waterway Estates to operate their facility and discharge their effluent to the Caloosahatchie River."

Q. Right, and then if you'll move over to Page 141 of that exhibit, starting at Line 22 through 24.

A. The question is: "Is there anything in this document that says there is a zero discharge for this project into the canal to the Caloosahatchie River on April 2, 1980?"

Q. Looks like 1981.

A. 1981. Dr. Ahmadi answered, "No. This is their authorization to discharge to the river."

Q. Would that mean that there was a DER permit issued to Waterway dated April 2nd of 1981?

A. Yes. Not having the document in front of me, it appears that that was the case, that we have given them a permit to discharge to the Caloosahatchie River.

Q. Could we please ask for a copy of that DER permit as Late-filed Exhibit No. 5? That would be the April 2nd, 1981 DER Permit Issued to Waterway.

(Late-filed Exhibit No. 5 identified.)

BY MS. GERVASI:

Q. And then if you would look on Page 142, Lines 14 through 16 of Page 142 of the same exhibit, ABA-2.

A. Line 14 through --

Q. 14 through 16. And this concerns a letter written and signed by a Terry Cole of the DER to Mr. Charles -- is it Jeter of the EPA?

A. Uh-huh.

Q. There's no date on that letter. So it may be more difficult. But if you can locate it, could you provide us a copy of that as well?

A. The answer is: "Yes, this is a State of Florida letter that's written and signed by Terry Cole, who was the assistant secretary at the time to Mr. Charles Jeter of the EPA."

Q. Yes, please, sir.

A. What date was that?

Q. There is not a date referenced in the transcript, so I don't have one to give to you, but we'll just label it as late-filed Exhibit No. 6, Copy of Letter signed by Terry Cole of DER to Charles Jeter, J-E-T-E-R, of EPA.

MR. GATLIN: Does it refer to an exhibit number?

MS. GERVASI: Let's see, exhibit -- Defendants' Exhibit No. 2 from the federal trial.

MR. GATLIN: Let us take a crack at that and see if we can locate it.

MS. GERVASI: Thank you very much.

(Late-filed Exhibit No. 6 identified.)

BY MS. GERVASI:

Q. And then we have one final request for a document, and then I will be through, and that is, if you could, please, sir, provide us with DER's NPDES Certification Work

Sheet for the 1981 NPDES Permit for Waterway Estates, and I believe that the issuance date of that certification work sheet is July 14th of 1981?

MR. GATLIN: July 14th?

MS. GERVASI: Right. And that would be as Late-filed Exhibit No. 7.

(Late-filed Exhibit No. 7 identified.)

THE WITNESS: I'll search for those documents and see if we can locate them.

MS. GERVASI: Okay. Thank you very much. We appreciate that. And appreciate your time today and that concludes my questions for you.

Mr. Gatlin, do you have any questions?

MR. GATLIN: I have no questions.

MS. GERVASI: Do you want to read and sign?

THE WITNESS: Yes, I would like to probably read them, if possible.

MS. GERVASI: Sure. And can we establish a deadline for those late-filed exhibits? How long do you think you'll need to gather those up for us? Could you get them to us in two weeks? Is that enough time?

THE WITNESS: Probably. If we have them. But I'm going to be going tomorrow at 5:00, leaving the town actually, and come back on Monday. So this week is gone. Hopefully two weeks.

MS. GERVASI: Could you get them to us by the end of next week, two weeks from now?

THE WITNESS: Two weeks from now probably. What I'll do is, as soon as I locate them I'll give you a call and find out the method of counsel, whether he wants them mailed or faxed or --

MS. GERVASI: Okay. Thank you very much, Dr. Ahmadi. That concludes the deposition.

(Deposition concluded at 2:05 p.m.)

REPORTER'S DEPOSITION CERTIFICATE

STATE OF FLORIDA)

COUNTY OF LEON)

I, LISA GIROD JONES, Registered Professional Reporter, certify that I was authorized to and did stenographically report the above-styled deposition; that a review of the transcript WAS requested; and that the transcript is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED this 29th day of May, 1998.

LISA GIROD JONES, RPR, RMR

2

FLORIDA CITIES WATER COMPANY

RECEIVED
OCT 18 1990
SOUTH DISTRICT

October 12, 1990

Florida Department of Environmental Regulation
South District
2269 Bay Street
Ft. Myers, Florida 33901

Attention: **Philip R. Edwards**

Re: Lee County DW Waterway Estates Wastewater Treatment Plant OGC Case Number 88-0384

Dear Mr. Edwards:

I am in receipt of your correspondence dated October 1, 1990.

The file on the Waterway Estates Wastewater treatment plant project contains literally thousands of sheets of paper. I am not certain as to the extent of the "detail" that you require as justification for the circumstances beyond the control of Florida Cities Water Co. leading to the project delays.

I have had my staff, however construct the enclosed summary schedule as anticipated in the above referenced consent order and compared to the actual time of achieving the various milestones.

As you can see from this attachment, the major delays were caused by the following:

1. The engineering plans and specifications were to be completed by September 23rd, 1988. FCWC entered into a contract with Source, Inc. to provide these professional services on the project. Their proposed schedule for providing the Engineering plans and specifications, (engineering design) called for 221 days. This information was transmitted to FDER and utilized in the above referenced consent order of schedule. The actual duration of the preparation of engineering plans and specifications took 445 days from the start to the final acceptance of the documents as complete for an issuance of FDER construction permit. FCWC consistently applied pressure to Source, Inc., to deliver their services in accordance with the initial proposal. No activity under the control of FCWC could have resulted in a more timely performance on the part of our consultant.

2. The next major item of delay is the FDER review of the plans specifications and construction permit applications. The FDER review resulted in several requests for

FLORIDA CITIES WATER COMPANY
4 Swift Road, Suite 100
Sarasota, Florida 34231
P Box 21119 (34276-4119)
T Phone 813/925-3088

additional information. Each request for additional information was transmitted to the Engineer of record, Source, Inc. who indicated that they required a change order for providing this "unreasonable" additional information.

In addition to the problems associated with Source, Inc.'s provision of additional information, the FDER regulations changed during the design and permit review process. The anti-degradation rule was implemented requiring a technological and economic analysis of alternatives to surface discharge be completed on the Waterway Estates facility. This document was prepared by FCWC staff and submitted in as timely as basis as was practical. Furthermore, towards the end of the FDER review process, N. Ft. Myers Utility and Lee County both attempted to intervene in the issuance of a construction permit. After following several meetings, some of which included FDER staff and officials, both Lee County and No. Ft. Myers utility "backed off" allowing the issuance of a construction permit. The time allocated in the original consent order for the FDER construction permit review and issuance was 91 days. The actual duration was 290 days for a total delay, beyond the control of FCWC, of 199 days.

3. The final major project delay (100 days) occurred following the bid process for the Wastewater facility improvements. FCWC employed the services of Stone and Webster, Inc. (relieving the responsibility of Source, Inc.) to assist in the evaluation of the bids received by Cardinal Contractors, Inc. Extensive negotiations were required to specifically format the construction schedule and phasing resulting from the extremely tight construction [illegible]

4. Other milestones causing delays in the project schedule included a modification to the "fast track" plan of advertising for bids and a modification to the "fast track" plan of advertising for bids and opening the bids prior to he issuance of the FDER construction permit. This delay was necessitated by the uncertainty associated with the FDER review (See item No. 2 above for details.)

The final item which will cause a 26 day delay is the construction time negotiated with Cardinal Contractors for the construction of the plant facilities. 454 days were contemplated in the original consent order. The minimum construction time to substantial completion negotiated with Cardinal Contractors, Inc. is 480 days causing a 26 day delay in substantial completion of the project. Unit processes will, however, be placed in service as they are completed throughout the project. It is anticipated that water quality standards for the Waterway Estates plant will be met prior to the date of substantial completion.

FLORIDA CITIES WATER COMPANY
4[illegible] Swift Road, Suite 100
S[illegible] a, Florida 34231
P[illegible] x 21119 (34276-4119)
Te[illegible] e 813/925-3088

FLORIDA CITIES WATER COMPANY

It is FCWC's position that the total 594 day anticipated delay in the Waterway Estates Wastewater treatment project has been caused by circumstances beyond the control of FCWC. FCWC staff performed every reasonable activity that could have been anticipated to meet the consent order schedule.

I will be pleased to meet with you at your convenience to further discuss this matter. If you have any questions, please do not hesitate to contact me.

Sincerely,

A.A. Reeves III

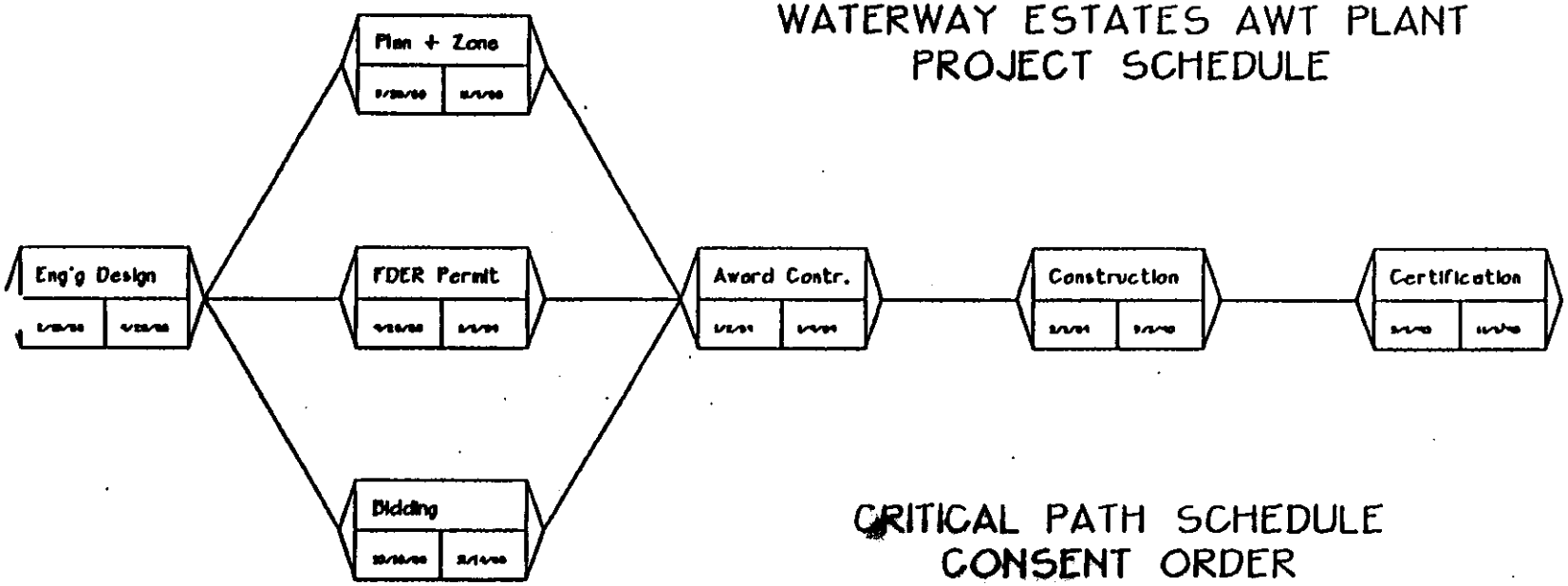
A.A. Reeves III,
Executive Vice President
& Chief Operating Officer

AAR/dj

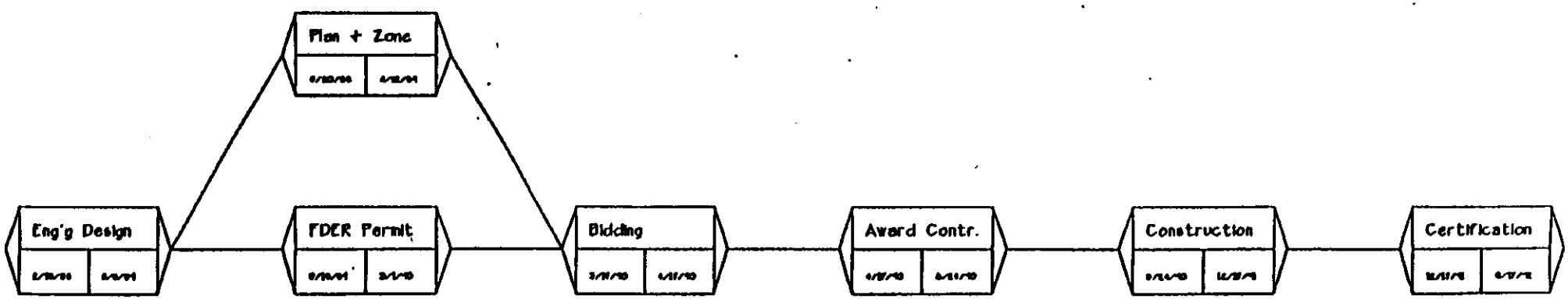
cc: Jim Grob

FLORIDA CITIES WATER COMPANY
4[illegible] Swift Road, Suite 100
S[illegible]ta, Florida 34231
P[illegible]ox 21119 (34276-4119)
T[illegible]one 813/925-3088

WATERWAY ESTATES AWT PLANT
PROJECT SCHEDULE



CRITICAL PATH SCHEDULE
CONSENT ORDER



CRITICAL PATH SCHEDULE
ACTUAL

SOURCE, INC. ENGINEERS

DESIGN, PERMITTING & CONSTRUCTION SCHEDULE

1988 | 1989

------ SCHEDULE ——— ACTUAL PROGRESS

TASK DESCRIPTION	MAR.	APR.	MAY	JUN.	JUL.	AUG.	SEP.	OCT.	NOV.	DEC.	JAN.	FEB.
SURVEYS												
SITE LOCATION & TOPO		COMPLETED 4-3-88										
OUTFALL LOCATION		COMPLETED 4-3-88										
RIVER OUTFALL & SEAWALL												
SEAWALL DESIGN				60%								
SEAWALL PERMITTING				20%								
OUTFALL STUDIES				90%								
OUTFALL DESIGN				25%								
OUTFALL PERMITTING												
OUTFALL CONSTRUCTION							B.D.	AWARD			TEST	
SOILS INVESTIGATION												
STP SITE		COMPLETED 3-23-88										
OUTFALL				95%								
PLANT & SITE ENGINEERING												
CIVIL				30%								
STRUCTURAL				0%								
ELECTRICAL & MECHANICAL				0%								
PERMITTING												
PLANT & SITE CONSTRUCTION							B.D.	AWARD				TEST

Florida Cities Water Company
Waterway Estates AWT Plant
Facility Upgrade
October 10, 1990

Milestone	Due Date	Actual Date	Description of Delay	Proposed Duration (Days)	Actual Duration (Days)	Delay (Days)
Start Date	02/15/88	02/15/88	Met Allocated Time.	60	60	0
Engineering Plans and Specifications	09/23/88	05/05/89	Florida Cities Water Company entered into a Contract with Source, Inc. in Feb. 1988 for the Professional Services on the Project. A Project Schedule was prepared by Source (copy attached) indicating the design phase would be complete for all project phases by the 1st week in Sept. 1988. This information was sent to FDER and included in the Consent Order. Source, Inc did not complete the design in accordance with their proposed schedule despite continuous pressure from FCWC.	221	445	224
Submit FDER App. for Const. Permit	10/01/88	05/15/89	Met Allocated Time.	10	10	0
Advertize for Bids	10/10/88	03/17/90	Did not Advertize for Bids until FDER Construction Permit was issued based on extensive, time consuming review by FDER and continuous Change Orders with Source, Inc.	0	16	16
Planning & Zoning Approvals Complete	11/01/88	04/12/89	Not Critical			
Open Bids	11/14/88	04/17/90	Did not Advertize for Bids until FDER Permit Issued. See Above Comment on Advertize For Bids.	0	31	31

Milestone	Due Date	Actual Date	Description of Delay	Proposed Duration (Days)	Actual Duration (Days)	Delay (Days)
FDER Construction Permit Issued	01/02/89	03/01/90	During the FDER review, numerous requests for additional information were made including new requirements not originally anticipated (Antidegradation). Source, Inc. demanded additional compensation for each response under the auspices that the FDER requests were unreasonable. Additional delays were incurred by the unreasonable intervention of local municipal governmental agencies and uninvolved private utilities with some support of FDER.	91	290	199
Award Construction Contract	01/09/89	08/02/90	Additional Time was required to negotiate a construction contract with realistic time and cost parameters.	7	107	100
Start Construction	02/01/89	08/24/90	Net Reduction in Critical Path.	23	22	-1
Substantial Comp.	05/01/90	12/17/91	Contractor could not be induced to reduce the total time for construction.	454	480	26

3

Florida Department of Environmental Regulation

South District • 2269 Bay Street • Fort Myers, Florida 33901-2896 • 813-332-6975

Bob Martinez, Governor Dale Twachtmann, Secretary John Shearer, Assistant Secretary
Philip Edwards, Deputy Assistant Secretary

October 1, 1990

CERTIFIED MAIL # P 495 918 566
RETURN RECEIPT REQUESTED

RECEIVED
OCT 4 1990
SARASOTA OFFICE

A.A. Reeves, III
Florida Cities Water Company
4837 Swift Road, Suite 100
P.O. Box 5846
Sarasota, FL 34277

Re: Lee County - DW
Waterway Estates
Wastewater Treatment Plant
OGC Case No. 88-0384

Dear Mr. Reeves:

We are in receipt of your correspondence dated August 30, 1990.

During the meeting of August 24, 1990, Florida Cities Water Company agreed to provide information detailing "circumstances beyond your control" which will cause non-compliance with Consent Order OGC Case No. 88-0384.

The information provided does not detail what circumstances were beyond your control and the compliance date of November 1, 1990 stated in paragraph 10 in OGC Case No. 88-0384 will remain the same.

Please provide the Department with a detailed explanation as to the specific circumstances and the resulting number of days that caused Florida Cities Water Company to not meet the compliance dates contained in OGC Case No. 88-0384.

Once we receive this information, we can schedule a meeting to continue discussions on a new Consent Order.

If you have any questions, please contact Jim Grob at 813/332-6975.

Sincerely,

Philip R. Edwards
Deputy Assistant Secretary

PRE/JVG/SC
cc: Harley Young

Recycled Paper

4

HAR ✓
JEL
file
cc. 206 11-19

Florida Department of Environmental Regulation

South District • 2269 Bay Street • Fort Myers, Florida 33901-2896 • 813-332-2667

Bob Martinez, Governor | Dale Twachtmann, Secretary | John Shearer, Assistant Secretary
Philip Edwards, Deputy Assistant Secretary

June 5, 1990

RECEIVED
JUN 8 1990
SARASOTA OFFICE

Robert H. French, P.E.
Florida Cities Water Company
2112 Gulf Gate Drive
Sarasota, Florida 34277

RE: Lee County - DW
Waterway Estates WWTP
OGC Case No. 88-0384

Dear Mr. French:

Following is a brief summary of the meeting attended by yourself, James Elder and Department staff on June 1, 1990 in this office. This meeting was held to discuss issues relating to the referenced Consent Order. As you indicated in this meeting, FCWC will be unable to meet the final date of compliance scheduled in this Consent Order.

As related in this meeting the stance of the Department regarding this problem is that two courses of action are open. First, the existing Consent Order would simply be enforced with the stipulated penalties assessed until the conditions of the Consent Order are satisfied. The second alternative would be for a new Consent Order to be negotiated with a monetary settlement based on the documented delays caused by FCWC and the stipulated penalty in accordance with the terms of the existing Consent Order. The amount of this proposed penalty was computed to be $26,800.

It was also suggested that any schedule of compliance agreed to should coincide with that of any administrative order issued by the USEPA.

As we discussed, we would appreciate receiving your response to these proposals within the sixty (60) day time frame agreed upon, i.e. by the second week of August.

Sincerely,

Philip R. Edwards
Deputy Assistant Secretary

PRE/HWY/jsw

cc: Agusta Posner - OGC

5

AAR ✓
BF ✓
JT ✓
JE ✓

Florida Department of Environmental Regulation

South District • 2269 Bay Street • Fort Myers, Florida 33901-2896 • 813-332-2667

Bob Martinez, Governor | Dale Twachtmann, Secretary | John Shearer, Assistant Secretary
Philip Edwards, Deputy Assistant Secretary

May 21, 1990

James A. Elder
Florida Cities Water Company
2112 Gulf Gate Drive
Sarasota, Florida 34277

Re: Lee County - DW
Waterway Estates WWTP
OGC Case No. 88-0384
Permit No. DC36-165119
Permit No. DT36-152486

Dear Mr. Elder:

Your letter dated May 14, 1990 requesting modification of the referenced Consent Order and permits has been received and carefully reviewed.

Department files indicate that delays in permit processing were a result of FCWC failure to submit a timely application which was received more than seven months after the date FCWC had agreed to in the Consent Order.

Further, FCWC required an additional ten months to respond to a subsequent request for information because the application was incomplete. Also, the schedule proposed in your letter requires a 7 month longer time interval to completion than the original schedule. Because of the reasons stated above, we request that FCWC representatives attend a meeting in this office on May 29, 1990 at 10:00 AM to reconcile these problems, resolve the stipulated penalty issue, and establish a new schedule of compliance. Consent Order No. 88-0384 will have to be modified or a new Consent Order agreed to with an appropriate settlment.

Once this schedule is established, an application and fee for a new temporary operating permit may be submitted and an extension of the construction permit may be granted. The Department seeks to be cooperative and helpful in your efforts to resolve these problems.

Please contact Harley Young at 332-2667 if you require further information or if the date and time of this meeting conflicts with your schedule.

Sincerely,

Philip R. Edwards

Philip R. Edwards
Deputy Assistant Secretary

PRE/HWY/jsw
cc: Greg O'Connell

6

Department of Environmental Protection

Lawton Chiles
Governor

Mailing Address:
P.O. Box 2549
Fort Myers, Florida 33902-2549

Virginia B. Wetherell
Secretary

July 2, 1998

RECEIVED
JUL 6 1998
Office of
B. KENNETH GATLIN

B. Kenneth Gatlin
Catlin, Schiefelbein & Cowdery, P.A.
3301 Thomasville Rd., Ste. 300
Tallahassee, Florida 32312

Re: Lee County - DW
Waterway Estates WWTP

Dear Mr. Gatlin:

Enclosed please find two documents from our file that you requested. Unfortunately, we could not locate a DER NPDES certification worksheet for Waterway Estates in our files, nor we can find a letter of certification from this agency. If the agency did not respond within a specified time to EPA, that is considered a waiver of state certification.

If you have any questions, please feel free to contact me at (941) 332-6975.

Sincerely,

Abdul B. Ahmadi, Ph.D., P.E.
Water Facilities Administrator

Attachments

ABA/isk

cc: Nona Schaffner - DEP

JUL 1 1986

4PM: Kagey

Dr. V. P. Subramani
Florida Dept. of Environmental Regulation
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32301

Re: Request for State Certification
Intent to Deny, Florida Cities Water Company
NPDES Permit No. FL0030325

Dear Dr. Subramani:

The Environmental Protection Agency (EPA) issued a notice of intent to deny the above application for a National Pollutant Discharge Elimination System (NPDES) permit. The applicant has been given until July 16, 1986, to comment on our proposed action.

We are requesting State Certification on our proposed action. We will initiate the public notice process at the end of July. Supporting materials are enclosed.

In accordance with 40 C.F.R. 124.53(c), EPA cannot issue or deny NPDES permits until the State has either granted or denied certification, or waived its right to certify. Also in accordance with the regulations, the State will be deemed to have waived its right to certify unless that right is exercised within 60 days from the date of this letter unless EPA finds that unusual circumstances require a longer time for certification. EPA anticipates that in some cases certification cannot be provided within 60 days, therefore, if longer time is needed please advise us in writing of the nature of the delay and anticipated date when certification will be completed.

For further information, please contact Connie Kagey at 404/347-2150.

Sincerely yours,

John A. Harlar, Chief
Facilities Performance Branch

Please sign & date: CKagey 6-30-86 Kagey Patrick 7/1/86 Harlar

CKAGEY:sa:6/23/86:6920X

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV
345 COURTLAND STREET
ATLANTA, GEORGIA 30365

JAN 2 2 1981

Florida Cities Water Company
Post Office Box 6459
1700 College Parkway
Ft. Myers, Florida 33901

Dear Sir:

The Environmental Protection Agency, Region IV, intends to issue a National Pollutant Discharge Elimination System (NPDES) permit in accordance with the Clean Water Act of 1977 to the above referenced facility in the near future.

The enclosed draft permit shows the proposed conditions to be incorporated as part of the NPDES permit. In order that you understand your responsibilities included in the provisions of this permit, particular attention should be given to the following sections:

1. Part I.A.: This section(s) contains listings of effluent characteristics, discharge limitations, and monitoring requirements. The effective dates for various requirements are listed.

2. Part I.B.: This section contains the schedule of compliance applicable to your facility. If your facility is presently in compliance, no schedule is included; if you have a schedule of compliance, please note Part I.B.2. which contains your responsibilities for reporting compliance requirements.

3. Part I.C.2.: This section contains your responsibilities for reporting monitoring results.

Comments relative to this draft permit are not required. If you wish to submit comments it is necessary that they be received in this office by February 12, 1981. If you have any questions concerning the enclosed conditions or the procedures associated with the permit program, please contact Ms. Jeanette Maulding of my staff at the above address.

Sincerely yours,

William H. Cloward
Chief, Permits Section
Water Enforcement Branch
Enforcement Division

Enclosure

cc: Mr. Mickey D. Bryant, FL DER

STATE OF FLORIDA 7

DEPARTMENT OF ENVIRONMENTAL REGULATION

SOUTH FLORIDA
DISTRICT

2269 BAY STREET
FORT MYERS, FLORIDA 33901

BOB GRAHAM
GOVERNOR

JACOB D. VARN
SECRETARY

PHILIP R. EDWARDS
DISTRICT MANAGER

April 2, 1981

Mr. A. A. Reeves
Florida Cities Water Company
2112 Gulf Gate Drive
P. O. Box 5846
Sarasota, Fl 33579

RE: Lee County - DW
Waterway Estates

Dear Mr. Reeves:

Enclosed is Permit Number DO36-7407, dated April 1, 1981 to operate the subject pollution source issued pursuant to Section 403, Florida Statutes.

Should you object to this permit, including any and all of the conditions contained therein, you may file an appropriate petition for administrative hearing. This petition must be filed within fourteen (14) days of the receipt of this letter. Further, the petition must conform to the requirements of Section 28-5.201, Florida Administrative Code, (see reverse side of this letter). The petition must be filed with the Office of General Counsel, Department of Environmental Regulation, Twin Towers Office Building, 2600 Blair Stone Road, Tallahassee, Florida 32301.

If no petition is filed within the prescribed time, you will be deemed to have accepted this permit and waived your right to request an administrative hearing on this matter.

Acceptance of the permit constitutes notice and agreement that the Department will periodically review this permit for compliance, including site inspections where applicable, and may initiate enforcement action for violation of the conditions and requirements thereof.

Sincerely,

Philip R. Edwards

Philip R. Edwards
District Manager

PRE/BTS/lp

Enclosure

DER Form 17-1.122(66) 1/2

RULES OF THE ADMINISTRATION COMMISSION
MODEL RULES OF PROCEDURE
CHAPTER 28-5
DECISIONS DETERMINING SUBSTANTIAL INTERESTS

PART II
FORMAL PROCEEDINGS

28-5.201 Initiation of Formal Proceedings.

(1) Initiation of formal proceedings shall be made by petition to the agency responsible for rendering final agency action. The term petition as used herein includes any application or other document which expresses a request for formal proceedings. Each petition should be printed, typewritten or otherwise duplicated in legible form on white paper of standard legal size. Unless printed, the impression shall be on one side of the paper only and lines shall be double-spaced and indented.

(2) All petitions filed under these rules should contain:

(a) The name and address of each agency affected and each agency's file or identification number, if known;

(b) The name and address of the petitioner or petitioners, and an explanation of how his/her substantial interests will be affected by the agency determination;

(c) A statement of when and how petitioner received notice of the agency decision or intent to render a decision;

(d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;

(e) A concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief;

(f) A demand for relief to which the petitioner deems himself entitled; and

(g) Other information which the petitioner contends is material.

****

A petition may be denied if the petitioner does not state adequately a material factual allegation, such as a substantial interest in the agency determination, or if the petition is untimely. (Section 28-5.201(3)(a), FAC)

cc: DER Tallahassee
Albert E. Price

SW-32
I.D. No. 36P01630

STATE OF FLORIDA
DEPARTMENT OF
ENVIRONMENTAL REGULATION

OPERATION
PERMIT

NO. DO36-7407

WATERWAY STATES

DATE OF ISSUANCE

April 1, 1981

DATE OF EXPIRATION

April 1, 1986

Philip R. Edwards

PHILIP R. EDWARDS
District Manager

DER Form 17-1.40

STATE OF FLORIDA

DEPARTMENT OF ENVIRONMENTAL REGULATION

SOUTH FLORIDA DISTRICT

2269 BAY STREET
FORT MYERS, FLORIDA 33901

BOB GRAHAM
GOVERNOR

JACOB D. VARN
SECRETARY

PHILIP R. EDWARDS
DISTRICT MANAGER

APPLICANT: A.A. Reeves
Florida Cities Water Company
2112 Gulf Gate Drive
P. O. Box 5846
Sarasota, Fl 33579

PERMIT/CERTIFICATION NO. DO36-7407

COUNTY: Lee

PROJECT: Waterway Estates

This permit is issued under the provisions of Chapter 403, Florida Statutes, and Chapter 17-4, Florida Administrative Code. The above named applicant, hereinafter called Permittee, is hereby authorized to perform the work or operate the facility shown on the approved drawing(s), plans, documents, and specifications attached hereto and made a part hereof and specifically described as follows:

To operate a 1.080 MGD contact stabilization process wastewater treatment facilities with effluent to canal to Caloosahatchee River located off project site. Location of project is in 1667 Inlet Drive, N. Ft. Myers, Lee County, Latitude 26°38'17", Longitude 81°54'36". Description of property map on file in this office. Note: Exhibit (a & b).

DER FORM 17-1.122(63) 1/4 (1/80)

PERMIT NO.: DO36-7407
APPLICANT: A.A. Reeves
Florida Cities Water Company

GENERAL CONDITIONS:

1. The terms, conditions, requirements, limitations, and restrictions set forth herein are "Permit Conditions:, and as such are binding upon the permittee and enforceable pursuant to the authority of Section 403.161(1), Florida Statutes. Permittee is hereby placed on notice that the department will review this permit periodically and may initiate court action for any violation of the "Permit Conditions" by the permittee, its agents, employees, servants or representatives.

2. This permit is valid only for the specific processes and operations indicated in the attached drawings or exhibits. Any unauthorized deviation from the approved drawings, exhibits, specifications, or conditions of this permit shall constitute grounds for revocation and enforcement action by the department.

3. If, for any reason, the permittee does not comply with or will be unable to comply with any condition or limitation specified in this permit, the permittee shall immediately notify and provide the department with the following information: (a) a description of and cause of non-compliance; and (b) the period of non-compliance, including exact dates and times; or, if not corrected, the anticipated time the non-compliance is expected to continue, and steps being taken to reduce, eliminate, and prevent recurrence of the non-compliance. The permittee shall be responsible for any and all damages which may result and may be subject to enforcement action by the department for penalties or revocation of this permit.

4. As provided in subsection 403.087(6), Florida Statutes, the issuance of this permit does not convey any vested rights or any exclusive privileges. Nor does it authorize any injury to public or private property or any invasion of personal rights, nor any infringement of federal, state or local laws or regulations.

5. This permit is required to be posted in a conspicuous location at the work site or source during the entire period of construction or operation.

6. In accepting this permit, the permittee understands and agrees that all records, notes, monitoring data and other information relating to the construction or operation of this permitted source, which are submitted to the department, may be used by the department as evidence in any enforcement case arising under the Florida Statutes or department rules, except where such use is proscribed by Section 403.111, F.S.

7. In the case of an operation permit, permittee agrees to comply with changes in department rules and Florida Statutes after a reasonable time for compliance, provided, however, the permittee does not waive any other rights granted by Florida Statutes or department rules.

8. This permit does not relieve the permittee from liability for harm or injury to human health or welfare, animal, plant, or aquatic life or property and penalities therefore caused by the construction or operation of this permitted source, nor does it allow the permittee to cause pollution in contravention of Florida Statutes and department rules, except where specifically authorized by an order from the department granting a variance or exception from department rules or state statutes.

9. This permit is not transferable. Upon sale or legal transfer of the property or facility covered by this permit, the permittee shall notify the department within thirty (30) days. The new owner must apply for a permit transfer within thirty (30) days. The permittee shall be liable for any non-compliance of the permitted source until the transferee applies for and receives a transfer of permit.

10. The permittee, by acceptance of this permit, specifically agrees to allow access to permitted source at reasonable times by department personnel presenting credentials for the purposes of inspection and testing to determine compliance with this permit and department rules.

11. This permit does not indicate a waiver of or approval of any other department permit that may be required for other aspects of the total project.

12. This permit conveys no title to land or water, nor constitutes state recognition or acknowledgement of title, and does not constitute authority for the reclamation of submerged lands unless herein provided and the necessary title or leasehold interests have been obtained from the state. Only the Trustees of the Internal Improvement Trust Fund may express state opinion as to title.

13. This permit also constitutes:

[ ] Determination of Best Available Control Technology (BACT)
[ ] Determination of Prevention of Significant Deterioration (PSD)
[ ] Certification of Compliance with State Water Quality Standards (Section 401, PL 92-500)

PERMIT NO.: DO36-7407
APPLICANT: A.A. Reeves

SPECIFIC CONDITIONS:

1. Drawings, plans, documents or specifications submitted by the Permittee, not attached hereto, but retained on file at the South.Florida District Office, are made a part hereof.

2. Pursuant to the provisions contained in Chapter 17-6, Florida Administrative Code, the permittee will maintain 90% removal of BOD and SS in the treatment process and other provision of the Chapter regarding domestic wastewater treatment.

3. Pursuant to Chapter 17-19 the Permittee will follow the sampling schedule provided for the plant described as having a capacity of 1.080 MGD flow and submission of operating reports.

4. The chlorine residual in the effluent will be maintained at 0.5 ppm after at least fifteen (15) minutes contact.

PERMIT NO.: DO36-7407
APPLICANT: A.A. Reeves
Florida Cities Water Co.

Expiration Date: July 1, 1983

Issued this 1st day of April, 19 81

_____ Pages Attached.

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL REGULATION

Philip R. Edwards
Signature

PHILIP R. EDWARDS
District Manager

8

BEFORE THE STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL REGULATION

IN THE OFFICE OF THE
SOUTH FLORIDA DISTRICT

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION Complainant, vs. FLORIDA CITIES WATER COMPANY (WATERWAYS ESTATES WASTEWATER TREATMENT PLANT) Respondent	)	OGC Case No. 88-0384

CONSENT ORDER

This Consent Order is entered into between the State of Florida, Department of Environmental Regulation (hereinafter "Department") and Florida Cities Water Company (Waterways Estates Wastewater Treatment Plant) (hereinafter "Respondent").

The Department finds but Respondent does not admit the following:

1. The Department of Environmental Regulation is the administrative agency of the State of Florida charged with the authority to administer and enforce Chapter 403, Florida Statutes (F.S.), and the rules promulgated thereunder in Florida Administrative Code (F:A.C.) Title 17.

2. Respondent is a "person" within the meaning of section 403.031(5) F.S.

3. Respondent owns, operates, and maintains a 1.08 MGD wastewater treatment plant (activated sludge process)

servicing certain portions of North Fort Myers. This plant is located off of Inlet Drive, North Fort Myers, Lee County, Florida. Latitude: 26° 38' 17" North, Longitude: 81° 54' 36" West.

4. Respondent is authorized to operate this facility under Permit Number DO36-72569, issued August 2, 1983 with expiration on August 2, 1988. This permit authorizes Respondent to discharge treated water to a canal which flows into the Caloosahatchee River.

5. On December 23, 1987 there was a major upset of the wastewater treatment plant. This unsettled condition caused the backwashable filters to clog and to be bypassed. Ultimately there was an alleged discharge of effluent exceeding total suspended solids concentration limitation from the treatment plant to the receiving surface waters. The upset condition and filter bypass continued until December 28, 1987.

6. Respondent has violated Florida Administrative Code (F.A.C.) Rules 17-4.130 and 17-6.130(1) which states that in the event the permittee is temporarily unable to comply with any permit conditions, the permittee is to notify the Department. Respondent did not provide timely notice to the Department.

7. It is the Department's position that by allowing the discharge of high levels of Total Suspended Solids Respondent has violated the established standards under F.A.C. Rule 17-7.040 which states that no solid wastes may be disposed of in any natural or artificial water body.

8. It is the Department's position that Respondent failed to comply with F.A.C. 17-19.050(1) which sets up the minimum sampling schedule for wastewater treatment plants.

Specifically Respondent did not sample the effluent from the treatment plant from December 22, 1987 through and including December 28, 1987.

9. Effluent from the treatment plant was sampled by the Department on December 24, 1987, after the upset of the wastewater treatment facility. Subsequent testing of the sample found it to be in violation of F.A.C. Rule 17-6.180(1)(b)2. Specifically, a value of 70 mg/l TSS on the sample was recorded. This exceeds the maximum allowable discharge limit of 60 mg/l.

The Department and Respondent having met to discuss the above and having reached a mutually agreeable settlement of the above referenced matters pursuant to F.A.C. Rule 17-103.110(3), it is therefore

AGREED AND ORDERED:

10. Respondent shall make modifications to the treatment plant to ensure that it will consistantly meet all applicable State standards. Respondent shall perform corrective actions within the time frames listed below:

	ACTION	DUE DATE
a.	Engineering plans and specifications completed	Sept. 23, 1988
b.	Construction permit application submitted to DER	October 3, 1988
c.	Advertising for construction bids	October 10, 1988
d.	Planning and zoning completion by all agencies	November 1, 1988
e.	Open bids	November 14, 1988
f.	Issue D.E.R. construction permit	January 2, 1989
g.	Award construction contract	January 9, 1989
h.	Start construction	February 1, 1989
i.	Complete construction	May 1, 1990
j.	Facilities certified in compliance	November 1, 1990

11. If the Department requests additional information in order to process the construction permit application, Respondent shall provide all reasonably requested information within thirty (30) days after receipt of such an information request.

12. Respondent shall within twenty-five (25) days after the effective date of this Consent Order evaluate whether or not sewage sludge is present in the canal adjacent to the wastewater treatment plant and develop a plan for its removal if sludge is found. Removal of this sludge will be done in accordance with all applicable local, state and federal rules and regulations and be completed within 120 days of the effective date of the appropriate permits.

13. If the Respondent fails to meet the compliance date of this Consent Order, the Respondent shall pay $100.00 per day until the actions required are completed. Acts of God and other delays due to circumstances beyond the control of the Respondent shall extend the completion date one day for each day of delay.

14. Respondent shall report any malfunctions which occur at its wastewater treatment facility in accordance with F.A.C. 17-4.130 and 17-6.130(1).

15. Respondent shall make payment of $20,180.00 to the Department of Environmental Regulation in settlement of the violations stated in this Consent Order. The amount shall be made payable to the "State of Florida Department of Environmental Regulation" and shall be submitted to 2269 Bay Street, Fort Myers, Florida 33901. Respondent has the option of proposing to the Department an alternative in kind service, which, if approved by

the Department, may be used to offset the monetary settlement. Any proposed in kind service must be submitted by Respondent within thirty (30) days after the effective date of this Order. The Department will notify Respondent within 20 days of whether or not a submitted proposal is acceptable. If a proposed in kind service is not approved by the Department the entire amount ($20,180.00) shall be paid within 60 days after the date of entry of this Order. For and in consideration of Respondent's complete and timely performance of the obligations agreed to in this Consent Order, the Department hereby waives its right to seek judicial imposition of additional civil penalties concerning the issues resolved by this Consent Order.

16. Persons not parties to this Consent Order whose substantial interests are affected by this Consent Order have a right, pursuant to Section 120.57, F.S., to petition for an administrative determination (hearing) on it. The petition must conform to the requirements of Chapter 17-103 and 28-5, F.A.C., and must be filed (received) in the Department's Office of General Counsel, 2600 Blair Stone Road, Tallahassee, Florida 32399-2400, within 14 days of receipt of this notice. Failure to file petition within the 14 days constitutes a waiver of any right such person has to an administrative determination (hearing) pursuant to Section 120.57, F.S.

17. Respondent waives its right to an administrative hearing on the terms of this Consent Order under Section 120.57, F.S., and its right to appeal this Consent Order pursuant to Section 120.68, F.S.

18. Entry of this Consent Order does not relieve Respondent of the need to comply with all applicable federal, state or local laws, regulations, or ordinances.

19. The terms and conditions set forth in this Consent Order may be enforced in a court of competent jurisdiction pursuant to Sections 120.69 and 403.121, F.S. Failure to comply with the terms of this Consent Order shall constitute a violation of Section 403.161(1)(b), F.S.

20. Respondent is fully aware that a violation of the terms of this Consent Order may subject Respondent to judicial imposition of damages, civil penalties up to $10,000 per offense and criminal penalties.

21. Respondent shall allow all authorized representatives of the Department access to the property at reasonable times for the purpose of determining compliance with the terms of this Consent Order and the rules of the Department.

22. The Department hereby expressly reserves the right to initiate appropriate legal action to prevent or prohibit future violations of applicable statutes or the rules promulgated thereunder not covered by the terms of this Consent Order.

23. No modification of the terms of this Consent Order shall be effective until reduced to writing and executed by both the Respondent and the Department.

24. All reports, plans, and data required by this Consent Order to be submitted to the Department should be sent to the Environmental Manager, Enforcement Section, 2269 Bay Street, Ft. Myers, Florida 33901.

25. This Consent Order is final agency action of the Department pursuant to Section 120.69, F.S., and F.A.C. Rule 17-103.110(3), and it is final and effective on the date filed with the Clerk of the Department unless a Petition for Administrative Hearing is filed in accordance with Chapter 120, F.S. Upon the timely filing of a petition this Consent Order will not be effective until further order of the Department.

FOR THE RESPONDENT:

7-11-88
Date

A.A. Reeves
Vice President, General Manager

DONE AND ORDERED this 15th day of July, 1988, in Fort Myers, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL REGULATION

FILING AND ACKNOWLEDGEMENT
FILED, on this date, pursuant to S 120.52 Florida Statutes, with the designated Department Clerk, receipt of which is hereby acknowledged.

Vanessa Oliveiro 7-15-88
CLERK DATE

Philip R. Edwards
District Manager
South Florida District
2269 Bay Street
Fort Myers, Florida 33901
Telephone: (813) 332-2667

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the following was furnished by U.S. Mail to A.A. Reeves this 15th day of July, 1988.

Philip A. Barbaccia
Environmental Manager

EXHIBIT NO. _____

DOCKET NO.: 971663-WS -- PETITION OF FLORIDA CITIES WATER COMPANY FOR LIMITED PROCEEDING TO RECOVER ENVIRONMENTAL LITIGATION COSTS FOR NORTH AND SOUTH FT. MYERS DIVISIONS IN LEE COUNTY AND BAREFOOT BAY DIVISION IN BREVARD COUNTY.

WITNESS: Hugh Larkin, Jr.

ON BEHALF OF: Office of the Public Counsel

DESCRIPTION:
1. Transcript of Deposition of Mr. Hugh Larkin, Jr. taken on May 22, 1998
2. Late-filed Exhibit No. 1 from Deposition of Hugh Larkin taken on May 22, 1998

PROFFERING PARTY: STAFF

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663WS EXHIBIT NO. 16
COMPANY/ WITNESS: Staff
DATE 8-12-98

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of FLORIDA CITIES WATER COMPANY, seeking recovery of environmental litigation costs in a Limited Proceeding for its NORTH and SOUTH Ft. Myers Divisions in Lee County and BAREFOOT BAY Division in Brevard County, Florida.

Docket No. 971663-WS

DEPOSITION OF: HUGH LARKIN, JR.

TAKEN AT THE INSTANCE OF: Florida Cities Water Company

PLACE: FPSC Conference Room 362
Gerald L. Gunter Building
2540 Shumard Oak Boulevard
Tallahassee, Florida

TIME: Commenced at 9:00 a.m.
Concluded at 10:25 a.m.

DATE: Thursday, June 11, 1998

REPORTED BY: Lisa Girod Jones, RPR, RMR

COPY

APPEARANCES:

B. KENNETH GATLIN, Attorney at Law, Gatlin, Schiefelbein & Cowdery, 3301 Thomasville Road, Tallahassee, Florida 32312; appearing on behalf of Florida Cities Water Company.

HAROLD McLEAN, Esquire, Office of the Public Counsel, 111 West Madison Street, Tallahassee, Florida 32399; appearing on behalf of the Citizens of the State of Florida.

ROSANNE GERVASI, Staff Counsel, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850; appearing on behalf of Staff.

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DEPOSITION

Whereupon,

HUGH LARKIN, JR.

Was called as a witness, having first been duly sworn to speak the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

MR. GATLIN: I think as usual we'll stipulate -- we can stipulate to the usual stipulations?

MS. GERVASI: Yes.

MR. McLEAN: We'd like to read and sign, Ken.

EXAMINATION

BY MR. GATLIN:

Q. All right, would you please state your name and address?

A. My name is Hugh Larkin, Jr. My address is 15728 Farmington Road, Livonia, Michigan 48154.

Q. And you prepared for filing in this proceeding testimony on behalf of the Office of Public Counsel consisting of 23 pages?

A. Yes.

Q. Did you bring any documents with you that were work papers or documents that you referred to in preparing your testimony?

A. Just the -- what was referred to in the testimony itself.

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Q. And that would be --
A. Exhibits or court orders or -- I can't think of anything else, deposition transcripts.
Q. Only what were --
A. Referred to.
Q. And you had no independent work papers that you had?
A. No.
Q. In what areas do you consider yourself to be an expert?
A. Utility regulation, ratemaking.
Q. Would that include, I assume, accounting?
A. Accounting.
Q. Legal?
A. As far as it is necessary to interpret for ratemaking principles.
Q. Do you have any background in legal work?
A. No, I'm not a lawyer.
Q. Not a lawyer. Have you ever practiced law?
A. No.
Q. Have you had any experience in environmental regulation?
A. Some cases we've worked on have to do with environmental -- recovery of environmental costs in utility rates, particularly coal tars in the State of Indiana and

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other states, Illinois.
Q. Have you had any direct experience with dealing with environmental regulations, either on behalf or --
A. No.
Q. Have you had any experience with the Florida Department of Environmental Protection?
A. Other than as it comes up in water rate cases, I have not.
Q. You haven't had occasion to make yourself conversant with the DEP rules and regulations, have you?
A. Just a general understanding of how they work.
Q. And that would apply also to the United States Environmental Protection Agency? Would that be the same thing?
A. That's correct.
Q. Do you consider yourself an expert in environmental compliance regulation?
A. No.
Q. Do you have any experience in water and wastewater operations?
A. Just a general knowledge of how plants operate.
Q. But you've never had any responsibility for operating one?
A. No.
Q. Do you have any experience in obtaining financing

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for water and wastewater utilities?
A. No.
Q. Have you ever been employed by water or wastewater utilities?
A. No.
Q. Looks like there are about 250 rate cases that you list as having participated in in your resume attached to your testimony. Is that about right, 250 or so?
A. It might be 300, and it might be 275. It's somewhere around there.
Q. In any of those -- I assume you testified in those cases?
A. Some were settled. Some were withdrawn. There's a key in there which indicates which ones were settled and which ones were withdrawn or stipulated or whatever.
Q. To some point you participated in them, whether they were withdrawn or settled or went to hearing?
A. Right.
Q. Are any of them on behalf of the utility?
A. There are two cases in there where the Columbia Gas System was sued, and we represented the Columbia Gas System through their lawyers.
Q. Was that a ratemaking proceeding?
A. No, that was a civil suit.
Q. Related to what?

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A. Oh, one was the Columbia Gas System sold a distribution company to another entity. And the other entity said that the Columbia Gas System didn't disclose all the facts and sued them for recovery of some of the payments they made for purchase of the system.
The other suit related to the Reynolds Aluminum Company, which claimed that the Columbia Gas System was restraining trade by not allowing them to buy gas off of a transmission system rather than through the distribution network.
Q. Are any of them -- how many of them, or approximately how many of them were you employed by ratemaking authorities, such as the Public Service Commission?
A. I don't keep track of it that way, but maybe a quarter to half.
Q. Isn't it true that most of them you're testifying or working on behalf of the Office of Public Counsel or some similar type --
A. Some state agency that was appointed to represent the public interests, yes.
Q. Do you consider yourself an expert in the design and permitting and construction of a wastewater plant or water plant?
A. No.

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Q. How about in the maintenance and operations of water or wastewater plant?
A. I have some knowledge, but I wouldn't be an expert in it.
Q. You're not a licensed operator to operate a plant?
A. No.
Q. Nor have you had any training or experience to do that?
A. No.
Q. Do you know what the CWA is?
A. Clean Water Act.
Q. Are you familiar with that act?
A. Just from my experience in this case.
Q. How about the regulations under the CWA that have been adopted by EPA?
A. No, I am not.
Q. How about the statutory regulatory requirements pertaining to the construction and operation of a wastewater utility plant or system, any experience?
A. No, I have not had any experience.
Q. So you don't consider yourself an expert in those areas then, do you?
A. No. I don't think this case is about that.
Q. How did you arrive at the positions you take -- have taken in this case?

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A. Oh, I think they're fairly obvious. That --
Q. Let me re-ask the question. Are these the positions of the Office of Public Counsel of Florida?
A. Ask the question again. Are they --
Q. You testified of certain opinions and positions. Are those the opinions and positions of the Office of Public Counsel?
A. As far as I know, yes.
Q. Did you discuss it with them?
A. No, I write the testimony. I send it to them. They read it, and if they agree with it, they file it.
Q. So apparently they approved of it?
A. Yes.
Q. And we could assume then that these are the positions of the Office of Public Counsel?
A. Yes.
Q. Do you know of any Commission order, Florida Commission order I'm talking about, that is consistent with your testimony regarding retroactive ratemaking?
A. Well, I haven't looked for it, but -- in the orders, but that is retroactive ratemaking. I don't know of any Florida Commission order that would have done what the company is asking them to do. So that's the definition of retroactive ratemaking, as I've defined it in my testimony.
Q. I understand it's your definition. Do you know of a Florida Public Service Commission order that agrees with that definition?
A. I don't know of any, but I don't think that there's been any case that's ever been like this where somebody has accumulated several years of expenses and tried to recover them.
Q. So you don't know of a case?
A. No, I don't know of any case.
Q. Do you know of any case in any other condition that is consistent with your position on retroactive rate paying?
A. I don't know of any off the top of my head, but I'm sure there are many that are.
Q. Did you look at any in preparing your system?
A. No, because what the company is asking for fits that definition.
Q. You just know it without having to look at those cases?
A. Yes.
Q. How about court cases, did you look at any of those?
A. No.
Q. And you can't cite us a court case that supports your position?
A. No, because it is obviously retroactive

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ratemaking.
Q. Don't need to look at a court case?
A. No, I know what the definition is. I know what it is.
Q. You just know what it is?
A. Right.
Q. On Page 3 of your testimony, on Line 7 you say the company did not and does not have an accounting order. Do you know of a Commission rule that requires such an order? Can you cite us to one?
A. I can't cite you to one, but that's generally the only way that you can defer expenses for consideration in a subsequent rate case, is to get an accounting order that allows you to do that.
Q. But you don't know of a rule that provides for that in Florida?
A. I don't know if there is or there isn't.
Q. You didn't look to see if there is?
A. No.
Q. You just think there ought to be an accounting order?
A. It has to be. You can't just say --
Q. Has to be why? That's what I'm asking.
A. It has to be because otherwise anybody could just accumulate any type of expense for any number of years and

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say, oh, we can go back and ask for this in a separate rate case because we want to. So there has to be some set of policies or rules that the Commission follows to ensure that they aren't constantly going back and retroactively looking at costs that have been incurred that -- and one of the ways is to have an accounting order.

Q. But you didn't look to see if there is such a rule in Florida?

A. No, I didn't.

Q. And you don't know if there is a rule?

A. I'm not sure whether there is or there isn't.

Q. But regardless of whether there's a rule or not, you think that's what ought to be done?

A. It should have been done.

Q. Is that an accounting principle?

A. That's a ratemaking principle.

Q. Can you cite me some authority? I understand you're an expert, but can you tell me Bonbright or a statute or rule?

A. I'm sure that there are rules and there may be a rule here in Florida. I don't know. But I know there are rules in other commissions at other states where you have to get accounting orders in order to treat something in a different way.

Q. What other states?

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A. I don't know off the top of my head. I would think that maybe Connecticut has one, but I'm not certain.

Q. And it's a commission rule?

A. It's a commission rule or a commission policy.

Q. Have you worked with that rule? Are you familiar with it?

A. Well, I've worked in other states where those rules apply. I just don't remember which states have those kinds of rules.

Q. As I gather from your testimony on this particular subject, what you envision is the company would come in and ask the Commission to allow the deferral of a set amount of expenses?

A. That the company would have to come before the Commission and say, we have an unusual situation that requires an unusual treatment that we think the ratepayer ought to pay for, and we want you to allow us to have an accounting rule that would allow us to defer these expenses. So that when we know what they are, we can subsequently bring it before the Commission for a decision.

Q. Would you have to know the amount of the expenses or just the proposition that you wish to defer the expenses?

A. You would have to know the type of expense and what you want to defer.

Q. But not the amount?

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A. And that's the reason why you wouldn't ask for it or have a rate case then, because you wouldn't know what it was.

Q. Do you know of a specific rule or a specific policy that was in effect when these expenses were being incurred that would require that?

A. No, I don't.

Q. On Line 21 of Page 3, there's the term "Accounting Order" in caps.

A. Yes.

Q. What do you mean by that?

A. I think we've been discussing that. It means a specific authority on the part of the Commission to allow the company to treat an expense in a different way.

Q. I take it from you capitalizing the A and the O in the order, that this is a known document of some kind, specific kind. Can you show me one or tell me about one?

A. I can tell you about one, that there are accounting orders issued by Public Service Commissions that tell utilities to treat certain things in a certain way. And those are called accounting orders.

Q. And is there -- do you know of a rule or provision that provides for an accounting order, as you describe on Line 21, in the Florida Commission?

A. I haven't looked, but I assume that there are such

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orders, authorized or issued.

Q. Do you know if there was a rule provision at anytime providing for such an accounting order since the time the company has been incurring these expenses?

A. I don't know.

Q. Can prudently incurred expense be recovered in rates?

A. If it's used and useful and prudently incurred it could be.

Q. In your testimony on Page 4, you indicate that a company ought not be allowed to recover fines and penalties.

A. Yes.

Q. You are aware that the company is not seeking to recover fines and penalties?

A. Yes.

Q. Are you saying that a company should not ever be allowed to recover its costs in defending claims of this nature even if there is no fine or penalty?

A. Well, I think you would have to look at the specific situation, but if there's a fine or penalty, and the expenditure was made in defending the company against the fine or penalty, that those expenditures related to that defense against the fine or penalty ought to file a fine or penalty, and that would be the responsibility of the

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stockholder.
Q. So even in this case, if the court had come out and said that the company is absolutely not guilty, no fine or penalty at all, and the government was wrong completely, you would not allow in this case the recovery of any of the litigation costs?
A. Well, I don't think we'd be here, because I think then you could apply to the court, as the company tried to, and get the court to say that the government --
Q. Let's assume that for some reason the court didn't agree with that position.
A. I guess I wouldn't accept that premise. I don't see how you could get the both cases, that you're completely innocent and you incurred $3 million in expenses, but then the government, or the judge said, well, we're still going to make you pay the legal fees.
Q. Now you're giving a legal opinion, aren't you?
A. No, that's my interpretation of what it is.
Q. Of what -- interpretation of what?
A. Of that factual situation that you just described.
Q. You think that if there had been no fine or penalty, that the company could have collected the litigation costs from the government?
A. Well, that's not the factual situation, but that's one of the things that the court considered, whether the

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government had maliciously prosecuted the company, and the court found that it hadn't.
Q. Well, I agree with what you're saying in part, but what I want to know is what circumstances would you allow a company to recover the litigation costs of litigation?
A. Well, I don't -- I would have to see the circumstances, but in this set of circumstances, I would not allow them to recover.
Q. And even if the court had said the company is not -- let's say the court said the company is not guilty of any violation, there's no fine and penalties, but the government did not act maliciously, would you allow the costs?
A. The government did not act maliciously.
Q. But there's no fine or penalty.
A. No fine or penalty, and we're not going to give you the legal fees?
Q. Right.
A. I can't imagine that situation occurring.
Q. Let's do imagine it. This is a hypothetical. In that situation would you --
A. I guess I would still come to the conclusion that that still was the management's responsibility because they were the ones that were brought to court for their operation of the plants. And I don't see how the ratepayer could be

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held responsible when they weren't operating the plants, aren't responsible for any proposed violation.
Q. How about if it was a car wreck and the company had litigation expenses?
A. It depends if that was an employee that the company had no control over and that the management had adequately supervised the employee and they did everything the management could do to avoid it, it might be legitimate, but I think you have to look at these things in each instance, but we're not talking about a liability that arises from an accident of a company vehicle. We're talking about a liability that arises because of an act of management.
You can't paint all of these things with a broad brush and say, okay, if one -- if they're entitled to recover legal fees for an employee that has an accident and injures somebody, then that means you paint every legal fee as legitimate recovery.
Q. Let's don't take it as though if you do it in an automobile accident you will recover in every instance. Let's just take the car accident by itself. The company has defended itself and now would you allow the recovery of litigation costs in rates in that instance?
A. If the company had legitimately managed its employees, if the accident was something that was not out of

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their control where they could have avoided it by taking some management steps, I would not allow it. But if it was a -- an accident where the brakes gave out and the truck was adequately maintained and they just gave out, went through a red light, struck somebody, that's not within the control of the management. But the violation of the Clean Water Act is within the control of the management.
Q. Now, are you going to let the court decide that, or are you going to look at it after the case as to whether the management had control or not?
A. Well I -- I think you look at these things after the fact because that's when they arise in a rate case.
Q. No, sir, I'm asking would you let -- if the court said the company is absolved, the company pays no liability, clean hands completely, do you second guess the court or would you accept the court's word in that?
A. Well, I'm -- I'm not trying to prejudge or rejudge what the court did. What I'm looking at is the expenses as they are flowing through rates. And that's what I'm concerned about.
Q. We agree on that.
A. Now, if the court rules that the company is not liable for an accident and they incurred legal fees, and it was not a liability that management could have avoided, I would have let those kinds of legal fees go through.

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Q. And recovered in rates?
A. And recovered in rates.
Q. You would have accepted the judgment of the court that there was no liability on the part of the company?
A. Given the facts you've described.
Q. Yes, I understand.
A. Which are unlike this case.
Q. I understand your position on that.
A. All right.
Q. But if we had that case, the hypothetical that we're talking about, and we were before the Commission, would you not undertake to second guess the court as to maybe the court was wrong, or maybe you know something that the company didn't have those brakes fixed, you wouldn't try to second guess the court?
A. Not unless there was evidence that showed that there was. If there was something in the records or something in the file that indicated some liability on the part of management, I wouldn't independently decide that you shouldn't recover the legal fees.
Q. But you would accept the judgment of the court?
A. If there was nothing in the files or in the judgment that indicated otherwise.
Q. You mean the court could say --
A. The court --

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Q. -- could say the brakes should have been kept better, but I still rule for the company, you would say, ought to recover that in rates?
A. I might say that, yes.
Q. So in that instance you would second guess the court?
A. In that instance I would say that that's a responsibility. I'm not second guessing the court. I'm telling the Commission, here's the principle that ought to apply for ratemaking and who ought to be responsible for these expenses. I'm not trying to reverse the judgment of the court. What I'm trying to do is say, here are the principles that ought to apply when you're setting rates.
Q. It wouldn't have mattered to you in this case, would it, if the court had said the only fine I'll levy against Florida Cities is $2, you would still say the company ought not recover the litigation expense?
A. Yes, and there's two reasons for that. The first is it's retroactive. The second is that violation of the Clean Water Act is clearly something management has control of. The ratepayer receives no benefit from the company violating it, the Clean Water Act.
Q. What if we had this case and the company was fined $1?
A. It doesn't matter the size of the fine.

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Q. All right. Okay. Doesn't matter. But let me continue my hypothetical.
A. Okay.
Q. And Florida Cities says, yeah, we violated it and we could have cured that violation. We could have invested a million dollars and we never would have violated that thing at all, they wouldn't have been in violation, but we thought it more prudent to pay the dollar fine. What do you think about that?
A. Well, I can't envision that that situation would arise, but, I mean, we can't make choices. The law is the law. You have to comply with it, and the law is there for a purpose and the purpose is to make sure the water quality stays at the level it should stay at. Regardless of whether the fine was a dollar or not, the company is required to comply with the law. And if the law said this is the quality it had to come up to, then you have to meet that quality.
Q. And there could be no controversy about the law, you don't think? It's very clear?
A. The law could be in controversy. But I don't think it was in this case. I think in this case the company was found to have violated the Clean Water Act in numerous instances, hundreds of instances.
Q. If the company were a municipal utility, who would

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pay the penalty and legal costs then, do you think?
A. Well, I don't know, but I assume that it would come out of the municipal funds.
Q. Do you have an opinion as to whether the municipality might pass those costs along in their rates?
A. They may or may not.
Q. Don't know? Could they?
A. It's possible, but it's just as likely that they would be embarrassed to tell ratepayers they're going to raise their rates because they violated a law. It's just as likely to --
Q. Raise the taxes?
A. Well, they would have to raise the water rates to get it through -- just as liable to take it out of their general fund and say nothing.
Q. What are the factors that a court must consider, a federal court must consider, in assessing the penalties for violations of the CWA?
A. Well, there are about 7 or 8 standards that the judge looked at.
Q. Do any of them provide that one of the things that ought to be considered is to -- as to how the legal expenses will be recovered?
A. No. But one of them was the ability to pay, which can be considered in conjunction with what the company has

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already incurred as legal expenses. So it isn't a direct standard, but it is an indirect consideration that I'm sure that the court takes into consideration.
Q. Why are you sure of that?
A. Because -- one of the attorneys raised it in the deposition of Mr. Allen. Why would he ask if he didn't care? The judge -- I don't know whether the judge read the deposition or not, but --
Q. Well, do you believe that deposition was before the judge?
A. It may have been. It may not have been.
Q. Do you know if it was ever introduced in court?
A. I don't know.
Q. So you don't know if the judge considered that or had it before him or not?
A. No.
Q. Your -- on Page 4, Lines 13 and 14. Let me read it. "Since the underlying principle of utility ratemaking is that the fines and penalties are the responsibility of management who work directly for the stockholders" -- and the part I want to ask you about is starting here -- "then any related expense such as legal fees should be treated in the same manner as the fine or penalty." That last part of that sentence is not consistent with the two Commission orders that you cite later on, is it?

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A. It's --
Q. They allow the legal --
A. They allowed minor amounts of legal fees, but as they pointed out, I don't think they really ever focused on the relationship between the fine and penalty and its relationship to the legal fees.
Q. They allowed the litigation expenses; did they not?
A. They allowed $453 in one case and I'm not sure what the amount was in the other case.
Q. But it was allowed, you agree?
A. Yes, but I don't agree that that sets a precedent.
Q. Because of the $453?
A. Because I don't think it was really a focused analysis by the Commission of what the disallowance of an expense is and the relationship of other related expenses are.
Q. The order that you quote on Page 10 says, "As the Commission previously concluded, the legal expenses incurred for defending fines from DEP and EPA could facilitate avoided or reduced amount of fines. Therefore, we find that no such adjustments are necessary to the test year expenses." Now that ruling was in rejection of your testimony in that case; was it not?
A. That ruling was opposite to what I recommended.

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Q. Right. And you say the Commission was not focused? What was it --
A. I don't think that they really considered $453 worthy of a lot of analysis in terms of what kind of precedent this might set or whether there should be a case where multi-million dollar decisions ought to be based on. I think the company said, well, we've got good compliance with the Clean Water Act and good relationships with the Florida Department of Pollution Control, and I think the Commission said, well, let's just give them the $453. That's my analysis of how they came to that decision.
Q. Who brought the issue up?
A. I did.
Q. If it was so small, why did you bring it up?
A. Because it's a principle.
Q. The principle involved?
A. Right.
Q. Right.
A. And I don't think they focused on the principle.
Q. I don't understand that. What do you mean by not focused. You mean they didn't understand the issue?
A. Yeah, I don't think they did understand the issue of disallowing an expense and allowing a related cost into rates.
Q. Well, you brought it up because of the principle?

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A. Right.
Q. And the Commission ruled on the principle?
A. No, they didn't.
Q. Well, they disallowed -- they did not allow your recommendation, they did not follow your recommendation?
A. Yeah, but the principle was not fully litigated nor articulated in that case.
Q. Well, you testified on it.
A. Yes, I testified.
Q. OPC filed a brief on it, didn't they?
A. Yeah.
Q. And the company disagreed with you. The company had a witness that disagreed with you, didn't they?
A. The company had a witness that disagreed.
Q. And the Commission had to look at what you said and the witness that said in opposition to you, and had to read OPC's brief and had to read the company's brief, and you say they weren't focused on it?
A. No, I don't think that they focused on the $453 expense.
Q. If it had been $5,000, would they have focused on it?
A. Probably not.
Q. How high would it have to be for them to get focused?

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A. I think it has to get into maybe a half million dollars.
Q. And then they would focus?
A. I think both they would have focused more on what issue --
Q. OPC --
A. And we would have focused more.
Q. And OPC would have filed a better brief on it, you think?
A. I'm not even sure it was mentioned in the brief.
Q. You would have given better testimony on it so they would focus on it?
A. If it was half a million dollars, we would have put several pages of testimony in it.
Q. So principles relate to how much money is involved?
A. It does in terms of the amount of litigation effort you put into it. You can't spend thousands of dollars on behalf of the ratepayer to save $453.
Q. How much can you spend to save $453?
A. I don't know, but whatever it was is the sentence or two I put in the testimony saying you ought not to allow this.
Q. And the Commission disagreed?
A. And the Commission didn't focus on it, in my

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opinion.
Q. You think intentionally they did not focus on it?
A. I think that the dollar amount was not of the magnitude that they would have thought very hard about it.
Q. They just saw the 450 and said, this is not worth fooling with?
A. I believe so.
Q. Were they careless, you think?
A. No.
Q. Was this Commission careless?
A. No.
Q. Whether they focused or not, in your opinion, you want them to change that principle that they adopted in that case?
A. I don't think they adopted a principle.
Q. The principle they followed?
A. Well, what I want them to do is to not follow that allowance and disallow these expenses.
Q. You want them to adopt a principle to disallow litigation expenses related to compliance of environmental rules and regulations?
A. No, I want them to --
Q. What's the principle you want them to follow?
A. I want them to disallow expenses, legal expenses associated with defending stockholders against fines and

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penalties. That's not compliance.
Q. So you want -- you don't want -- you want the Commission to say, we shall not allow litigation expenses in defending environmental actions for alleged violations?
A. I want the Commission to say where there's a legal expense associated with a fine or penalty that defends the stockholders against those fines or penalties, ratepayers should not be required to fund those expenses.
Q. And when you say stockholders, you're talking about in the -- like in this case where apparently DEP alleged that Florida Water Service had violated some rule, standard, statute, and if they come in and if Florida Water Service decides to litigate and oppose that allegation, you don't want that litigation expense to be recovered in rates?
A. State your question again. I'm not sure I followed.
Q. Sure. Florida Water Service, in the case that you testified in, had allegedly violated some DEP rule or statute or not meeting some standard. DEP filed litigation or some kind of claim against it. Florida Water Service decided to spend some money on legal fees to defend that, and apparently paid some fine. I don't know what.
A. $306.
Q. Now, the principle you want the Commission to

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adopt is, under those circumstances, Florida Water Service should not pass those expenses on to its ratepayers?
A. Well, I think you misstated the facts.
Q. Straighten me out then.
A. The facts are that Florida Cities Water Company did violate the Clean Water Act. It wasn't any --
Q. I'm talking about Florida Water Service.
A. Florida Water Service.
Q. Southern States Utilities.
A. Oh. Oh.
Q. I'm not talking about this case. I don't want to talk about Florida Cities. I want to talk about the $453.
MS. GERVASI: That's United Water, I believe.
MR. GATLIN: Okay. Thank you.
BY MR. GATLIN:
Q. I guess the next case is the other case you cited.
A. No, the other case was Leon.
Q. That's right.
A. Now, the question is, I don't want the Commission to allow expenses associated with defending the company against fines and penalties?
Q. Okay. Fair enough. That's the principle you want them to have?
A. Yeah.

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MR. MCLEAN: Ken, did you say that's the principal you want them to add?
MR. GATLIN: Have.
MR. MCLEAN: Which implies that, as a principle, something beyond the impact of this case?
MR. GATLIN: Impact of which case?
MR. MCLEAN: I have a minor concern here. You seem to be asking him about some policy that you -- that he would like to the Commission to adopt.
MR. GATLIN: That's exactly what my question --
MR. MCLEAN: As opposed to how he wants this case handled.
MR. GATLIN: I was talking about the principle, talking about the $453 principle.
MR. MCLEAN: I don't think the question has been put to him, and I'm not suggesting that you have to, but the record would seem to imply that he has some position about general procedures and general policies the Commission ought to have. I don't think he has any concerns outside this case, but --
MR. GATLIN: I think his testimony is contrary to that, because I think he says that this principle that was adopted in the United Water case, as I stand corrected, is not the one he agrees with.
MR. MCLEAN: I think his testimony stands for the

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way he wants this case handled. He may have some concerns outside that. I don't know. But I'm not sure that that question has been directly put, and I'm not sure it needs to, but I'm concerned that the record will -- this deposition will seem to indicate that he has some concern outside this case when I don't think that question has been fairly put.
MR. GATLIN: Well, I think the testimony clearly indicates that he does have some concern, and he thinks the principle ought to be that this Commission ought not allow litigation expenses in defending EPA litigation.
MR. MCLEAN: In this case.
MR. GATLIN: In any case. I think he wants that principle established by this commission.
MR. MCLEAN: If you think that's his position, that's what I'm doing. But I don't think your record is going to show it unless you ask the question.
MR. GATLIN: Now that you've been listening to Mr. McLean tell you what to testify to.
MR. MCLEAN: Let me respond --
BY MR. GATLIN:
Q. Do you think that ought to be the principle of the Commission -- or not the principle. The Commission ought to allow it or not allow it?

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A. The testimony focuses on this case.
Q. I know that.
A. And that's the case. But as a general rule in similar cases, in similar situations, I would say that the Commission ought to apply the principle --
Q. Same thing?
A. Same thing.
Q. Be consistent. Whether it's this case or Florida Water Service or United or --
A. That's correct.
Q. On the bottom of Page 4 of your testimony starting on Line 20, it goes over to the next page.
A. Starting on Line 20?
Q. Line 22, on Page 4. The gist of it, as I understand it, is that if a utility knows its going to be able to recover its litigation cost, it really doesn't have much incentive to comply with the Clean Water Act. Is that a fair summary?
A. No, I don't think it's a fair summary. It's dealing now in a general sense with the recovery of any legal fee for any fine or penalty, not specifically Clean Water Act.
Q. Okay.
A. If you violated the Fair Employment Act.
Q. Right.

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A. You discriminated, should you recover those legal fees if you're found guilty? And my answer would be no.
Q. Excuse me, I thought you were finished.
A. And what I am saying is that management has to be held responsible for its actions, and that includes the payment of the fine or penalty and any associated cost. And the associated cost would be the defense of those fines or penalties.
Q. And if they know they're going to recover them, as I understand your position, there's not the incentive to comply?
A. They would be less likely to comply.
Q. Do you have a court or commission opinion that reflects any kind of finding along that line?
A. No.
Q. Have you looked for one?
A. No. I think it's just the general common sense that would tell you that if I can recover my expenses, I'm -- regardless of what they are, regardless of my actions, I'm not going to be too concerned about what my actions are.
Q. If I agree to pay your legal expenses and fines, would you start running red lights?
A. Oh, I might. Who knows? I mean, you know that's not my nature. I am not in the habit of doing that. But if

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I were in a hurry going to the airport and --
Q. Old Gatlin will pay for it, I might as well run it?
A. -- and I want to make that flight, I might run it.
Q. But if it wasn't going to be paid, you would stop for the light?
A. I would think about stopping. I might be motivated enough that I would take the chance.
Q. Do you believe that if the Department of Justice or the EPA or the federal judge would have known that some of these expenses might have been passed on to the ratepayers, that they would have taken some steps to minimize the expenses?
A. They might or might not have. I don't know.
Q. You just don't know?
A. I just don't know.
Q. Do you have any court order or Commission opinion any place that indicates that that's been done before?
A. No.
Q. On Page 12, Line 18, you say it is your understanding that DEP and EPA doesn't order companies to make large system improvements.
A. Yes.
Q. What do you base your understanding on?
A. It's based on my experience here in Florida. I

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don't recall ever being in a case where water quality was an issue or that there were violations issued to a company that the violation said, you will construct such and such a plant. And I think that that's generally the way most rules and regulations work, that they state a rule and a quality and they leave it up to the company to decide how to comply with that rule or quality of water, water or wastewater.
Q. Your understanding, then, doesn't come from any study, it comes from hearing this kind of subject discussed in proceedings before the Public Service Commission?
A. Yes.
Q. On Page 15, Line 15?
A. Yes.
Q. The term there, "legally sanctioned," what do you mean by that?
A. Well, I don't think that the Florida Public Service Commission is authorized by statute or requirement to adjudicate the overzealous prosecution of the government. It's just not part of their mandate, and so they're not authorized to do that, even though this case kind of suggests that they ought to do that.
Q. When you say "legally sanctioned," you talk about, you don't believe there's a statute or rule that says they can do that?
A. Yes.

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Q. You're not talking about the Commission's authority to determine prudency, are you?
A. Well, you mean whether these expenses ought to be included within -- prudency doesn't fit my definition of whether expense ought to be included in rates.
Q. So -- but you recognize the Commission can determine prudency; do you not?
A. Well, what I'm trying to say is prudency is too narrow a term. I think it has to be used and useful and prudently incurred.
Q. Right, but you do recognize the Commission has authority to determine prudency?
A. They can look at expenses and determine whether they ought to be included in rates or not, if they're not retroactive.
Q. Have you looked at the Chapter 367 as to the authority of the Commission in determining whether to allow expenses in rates?
A. I probably have, but I didn't in this particular case.
Q. Okay. Referring now to your testimony -- back to Page 12. Your answer that starts on Line 18, I would like to call your attention to the sentence starting on Line 24, you say, "The environmental agencies either find the utility is or is not in compliance with the requirements of law. If

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these agencies are mistaken as to whether a particular wastewater treatment facility complied with the law, then normally the company's own engineers can prove the company's compliance with the requirements of law. No legal expense would be incurred since it would be a matter of testing to determine whether the utility complies or does not comply with the environmental requirements." End of quote.
Have you read the CWA?
A. Not in detail, no.
Q. You've reviewed it?
A. I've seen it, yes.
Q. Do you believe the act, the Clean Water Act, is so clear that a dispute between the EPA and a utility is rare?
A. No, I don't believe that, but I believe that there is an administrative process that those disputes can be settled through, which is -- would not require a lawsuit or --
Q. Just the engineers meeting and working it out?
A. Well, if they say that the water quality doesn't meet this standard, and you say it does, then to me that seems to be an issue of testing. And if they say you are discharging pollutants that -- into a waterway, that doesn't seem to me to be something that has to be litigated. That's something that you can test to see whether that's true or not.

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Q. Are traffic laws more complex than the CWA?
A. Probably not.
Q. Isn't there litigation under traffic laws?
A. Yes.
Q. Have you ever participated in a dispute resolution involving the CWA?
A. No.
Q. Are you saying that the act is so clear that these engineers can meet and resolve any dispute?
A. I'm saying that you get to a situation where the environmental agency says the water quality is -- doesn't meet this CWA standard and the company says the water quality does meet the CWA standard. I think that's a dispute that can be settled between engineers with testing.
Q. What about when the company's engineer comes back and says, we can't settle it. Is the company then to say, okay, you know, CWA and EPA, they're like the IRS, they're here to help us, and we know they're right, and we'll do what they say? Is that what you're suggesting?
A. What I'm suggesting is that after you get past this point, there is either a clear violation or there isn't a clear violation. And if you violate it, then that becomes the responsibility of management, and that's what I think happened in this instance.
Q. Well, do you know how many cases there have been

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under the CWA?
A. No.
Q. Do you know there have been a lot of them?
A. I'm not sure how many there have been.
Q. Did you know there's a specialty in the legal profession for handling these kind of cases?
A. Yes.
Q. What are they doing in all these other cases? What's going on?
A. Maybe they're all violations, and if they're violations, then the stockholders ought to bear the cost of those violations.
Q. The law is the law?
A. The law is the law.
Q. Always clear?
A. It's not always clear, but I don't think that this is a situation where there was a dispute about whether the company violated or not. The judgment clearly states, 269 violations at the -- this site, 1,038 violations at this site, and I think 238 at the other site. That's not a dispute about whether the company agreed to that. It seems that that was a consent judgment, that that's what the judge found, there was no trial about that. That's just what the court found was -- were the facts.
Q. And isn't one of the things the court considers

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under the CWA is whether the -- it was a violation that was harmful or extremely harmful?
A. Yes.
Q. Or not hardly harmful at all under that?
A. Yes.
Q. So there could be a dispute as to that, couldn't there?
A. Yes, and that's what the trial was about, as to how much of the penalty the company would pay. And that's what the --
Q. And in the instances where the court found that there was hardly any harm to the environment, the court lowered the fine, didn't it?
A. Yes.
Q. How about if the regulatory agency is demanding that a utility install certain facilities and the utility believes that less expensive facilities would do the job, would that be a controversy that would be litigated, you think, or could be?
A. Could be.
Q. Would you have any opposition to that?
A. It depends on what the situation was and whether it was retroactive ratemaking and whether it was -- they were found to violate the law. There were other circumstances that would have influenced that.

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Q. Hypothetical that I want to give you is a utility is -- thinks it's operating legally, and an agency, for what it thinks is good reason, says, no, we don't think you ought to have a gizmo that fills it four times, we think it ought to fill to six and a half times, and it's a pretty extremely expensive situation. Is this a situation where you think that it could be litigated to avoid that expensive cost and those costs passed on to the ratepayers?
A. It might be, but I don't know. It's not enough details and the situation is not clear from your example what a gizmo is.
Q. I'm not sure I know either.
Then is -- am I to learn that -- that legal representation is never necessary in these situations from your testimony?
A. No, I never said that.
Q. There are times then that litigation is necessary between a utility, for example, and the environmental regulatory agency?
A. It's possible.
Q. But you don't think it's very likely?
A. Well, depends on the situation. I don't think it's likely that you would incur $3.8 million of legal expenses in the run-of-the-mill compliance -- regulation and compliance --

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Q. How much can you --
A. Who knows?
Q. $453?
A. Could be $453.
Q. And -- but the principle would exclude that $453, wouldn't it?
A. If it was related to the defense of a fine or a penalty.
Q. Does a water or wastewater utility in a bankruptcy proceeding, in the midst of a bankruptcy proceeding, have the ability to raise capital?
A. It might, yeah. It probably could because --
Q. Excuse me?
A. Because like most bankrupt entities, a creditor would be looking at it from the standpoint of the discharge of all the other liabilities, or at least in abeyance. So like individual bankruptcies, you may declare an individual bankruptcy, and walk home and have 15 credit cards in the mail. People are willing to extend you credit because you're less of a risk than you were before the bankruptcy.
Q. So bankruptcy is a pretty good situation for a utility to be in?
A. Not necessarily, but your question was could they raise capital. And my answer was I think they probably could.

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Q. At the normal rate, market rate?
A. It depends on the situation of that particular bankrupt utility.
Q. Can you give me an example of where that has occurred?
A. I think that the railroad that I quote in my testimony, I think we raised -- they raised capital. They made capital improvements. They bought diesels. They repaired tracks. They did all of those things while they were in bankruptcy.
Q. How about a water or wastewater?
A. I don't see that that would make any difference.
Q. But you don't know of one?
A. I don't know of one, and that would even be a situation that would be more likely, because you have a service that is not -- that can't be curtailed, that can't be stopped. So you have a --
Q. Do you realize the EPA, or I'm sorry the DOJ in this case, did say it could be stopped, the service could be stopped?
A. I wasn't aware of that.
Q. Did you know that the DOJ informed Florida Cities just to stop the operation at Waterway Estates?
A. No, I wasn't aware of that.
MR. MCLEAN: Pardon me just for a moment. Ken,

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are you saying that that's what they said, or are you asking the witness if he knows that's what they said?
MR. GATLIN: That's a better question.
MR. MCLEAN: Then why don't we re-ask it, just assume that his answers would have been responsive to that.
MR. GATLIN: That's fine.
BY MR. GATLIN:
Q. But in the cases you've listed, or any other cases that you haven't listed that you've been involved in, you don't know of a situation where water and wastewater utilities has raised capital while in a bankruptcy?
A. I haven't any direct experience or knowledge.
Q. I kind of get the impression from what you said today and some of the stuff you said in the testimony that you don't think bankruptcy is that bad of a deal for this situation.
A. Well, it wouldn't be from the standpoint of the ratepayer. I don't think the ratepayer would have been harmed or benefited either way. I think the company stockholders and debt holders would have been.
Q. You feel the same way about bankruptcy as it relates to Larkins & Associates?
A. Well, unlikely that those guys would ever go bankrupt, but -- from the standpoint of what? Would we be

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better off?
Q. Lower rates. If you're bankrupt, according to your testimony, lower rates?
A. We don't have any assets or any liabilities, so I don't know what we would change.
Q. Is it your position or the position of OPC that maybe this ought to be the policy of this Commission, that bankruptcy would lower rates?
A. No. What I am saying is that the company has used that as a -- an argument to lay these expenses on to the ratepayer, and I am showing in my testimony that that is not -- that would not happen.
Q. You don't think it ought to be the position of this Commission that bankruptcy is good for utilities and ratepayers?
A. No, I don't think that that is -- and I didn't recommend that. What I am saying is that given the argument that your witness has made, they don't hold water, those arguments don't hold water.
Q. On Page 17, Line 23, you make the statement, "It is probable that other water and wastewater companies in the area would have taken over these facilities in a bankruptcy sale." What do you base that on?
A. Well, that's happened in other instances in Florida where there have been bankruptcies of smaller

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companies, and adjacent utilities have taken them over.
Q. Which ones do you know about?
A. There's one, and I can't think of the name of it, over by Jacksonville that occurred, and there may be others.
Q. Is there some procedure under the law that you're familiar with that that occurs?
A. No.
Q. Or how does it happen?
A. I don't know the exact circumstances. Maybe the Commission has something to do with it. I don't know.
Q. Does another utility have to take over the operation of that?
A. No.
Q. There's no requirement in law that you know of?
A. No.
Q. On Page 18, Line 15, you say, "If operators are not operating these systems to protect the public interest, this agency has the responsibility to take action to ensure that they do."
A. Right.
Q. What do you base that on?
A. It seems to me that the Florida Environmental Protection Agency does regularly monitor and test water and wastewater facilities. And it seems to me that they have the authority to go to court and take action against water

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utilities or wastewater utilities that aren't meeting the standards that should be met.
Q. You think they have the statutory authority to enforce those --
A. Regulations.
Q. That's all you're talking about there?
A. Yes.
Q. On Page 23, Line 14, there's the word "illegitimate." Do you mean illegal there, or what do you mean?
A. Well, I mean to me they're illegitimate to be included in rates. They're not --
Q. Not from a legal standpoint?
A. No.
Q. You're not expressing a legal opinion?
A. No.
Q. Thank you, Mr. Larkin. That's all I have.
A. Thank you.
MS. GERVASI: Can we take a five-minute break?
MR. GATLIN: Sure.
(Recess from 10:10 a.m. until 10:15 a.m.)
EXAMINATION
BY MS. GERVASI:
Q. Mr. Larkin, I want to give you a copy of a document that I'll refer to, and a few questions that I have

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for you. And if we could go ahead and mark that as Exhibit 1, deposition Exhibit 1.
(Exhibit No. 1 marked for identification.)
BY MS. GERVASI:
Q. Let me ask you, are you familiar with FAS 71, Financial Accounting Standard 71?
A. Yes.
Q. And this standard is entitled Accounting For The Effects of Certain Types of Regulation, correct?
A. Yes.
Q. Are statements of FAS considered Generally Accepted Accounting Principles, or GAAP, G-A-A-P?
A. Yes, for regulated utilities.
Q. Do you know whether Florida Cities Water Company is required to follow GAAP?
A. I would assume they were for their financial statements.
Q. Would you please turn to Page 4 of deposition Exhibit 1 under the heading General Standards of Accounting for the Effects of Regulation, paragraph 9.
Can you please go ahead and read this paragraph and then let us know what you think it means?
(Pause)
A. It means that a regulated company can capitalize an item which would be normally expensed in an accounting

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period based on an understanding or authority from the Commission that they can do that and that there will be revenues provided in rates equal at least to the capitalized cost.
Q. And the first sentence of paragraph 9 it says that rate actions of a regulator can provide reasonable assurance of the existence of an asset. Do you know how a regulator would provide reasonable assurance for a utility to capitalize something that would have otherwise been expensed?
A. They need to issue a rate order or an accounting order that would have allowed them to do that.
Q. Thank you. Now on Page 14 of your testimony, starting at Line 6, and here you're stating, and I'm just kind of paraphrasing, that it's your understanding that this utility was found to have violated the NPDES for unpermitted discharges at Waterway Estates, among other things, correct?
A. Uh-huh.
Q. Are you aware that the utility failed to challenge an NPDES permit denial letter issued by the EPA back in 1986?
A. Yes.
Q. Are you aware that the NPDES permit was required for the utility in order for it to be authorized under the Clean Water Act to continue to discharge into the

Caloosahatchie River?
A. Yes, that was my understanding.
Q. Are you aware that the utility continued to discharge into the Caloosahatchie even after its NPDES permit was denied?
A. Yes.
Q. If the Commission finds that the utility acted imprudently by failing to challenge that permit denial through EPA's administrative process, do you have an opinion as to whether the Commission should reduce the amount of recovery of the legal fees for that reason?
A. If they reject the real reason as retroactive, that would be another basis on which to conclude that expenses incurred after that were not appropriate.
Q. That all expenses incurred after that?
A. After that, yes, after the failure to challenge the administrative act or administrative decision.
Q. Okay. Thank you. That's all we have.
MR. GATLIN: Do you have any?
MR. McLEAN: No. I have none.

EXAMINATION

BY MR. GATLIN:

Q. What would have been the procedure if the company had challenged the proposed denial of the permit?
A. I assume that they would have gone up an

administrative decision-making process to different levels within the EPA to examine the denial of that permit.
Q. Do you know what the level of litigation expenses would have been?
A. No.
Q. You don't know if it would be less or more?
A. I have no idea.
MR. GATLIN: Thank you.
(Deposition concluded at 10:25 a.m.)

REPORTER'S DEPOSITION CERTIFICATE

STATE OF FLORIDA)
COUNTY OF LEON)

I, LISA GIROD JONES, Registered Professional Reporter, certify that I was authorized to and did stenographically report the above-styled deposition; that a review of the transcript WAS requested; and that the transcript is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED this 12th day of June 1998.

LISA GIROD JONES, RPR, RMR

CERTIFICATE OF ADMINISTERING OATH

STATE OF FLORIDA)
COUNTY OF LEON)

I, LISA GIROD JONES, Registered Professional Reporter and Notary Public for the State of Florida;

DO HEREBY CERTIFY that the witness named herein personally appeared before me at the time and place designated and was duly sworn.

WITNESS MY HAND AND SEAL this 12th day of June, 1998, in the County of Leon, State of Florida.

Lisa Girod Jones, RPR, RMR
Notary Public, State of Florida

FAS 71: Accounting for the Effects of Certain Types of Regulation

FAS 71 STATUS

Issued December 1982

Effective Date: For fiscal years beginning after December 15, 1983

Affects: Supersedes ARB 44 (Rev.), paragraphs 8 and 9
Amends ARB 51, paragraph 6
Supersedes APB 1, paragraph 7
Supersedes APB 2, paragraph 17 and Addendum
Supersedes APB 6, paragraph 20
Amends APB 11, paragraph 6
Supersedes APB 16, paragraph 6
Supersedes APB 17, paragraph 7
Amends APB 20, paragraph 3
Supersedes APB 23, paragraph 4
Supersedes APB 24, paragraph 3
Amends APB 26, paragraph 2
Amends APB 29, paragraph 4
Amends AIN-APB 11, Interpretation No. 4
Supersedes FAS 2, paragraph 14
Supersedes FAS 4, paragraph 7
Supersedes FAS 5, paragraph 13
Amends FAS 7, paragraph 5
Supersedes FAS 13, paragraph 3
Supersedes FAS 15, paragraph 9
Supersedes FAS 16, paragraph 9
Supersedes FAS 19, paragraph 9
Supersedes FAS 22, paragraph 11
Supersedes FAS 34, paragraph 5
Supersedes FAS 43, paragraph 3
Supersedes FAS 49, paragraph 7
Supersedes FAS 51, paragraph 2
Supersedes FIN 18, paragraph 4
Supersedes FIN 22, paragraph 8
Supersedes FIN 25, paragraph 9

Affected by: Paragraph 9 amended by FAS 90, FAS 92, and FAS 121
Paragraph 10 amended by FAS 90 and FAS 121
Paragraph 13 superseded by FAS 90 and FAS 92
Paragraph 14 superseded by FAS 92
Paragraph 15 amended by FAS 90
Paragraph 18 and footnote 12 superseded by FAS 96 and FAS 109

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LARKIN
EXHIBIT
1
6-11-98

Paragraph 34 amended by FAS 90
Paragraph 46 amended by FAS 96 and FAS 109
Footnote 6 superseded by FAS 90

Other Interpretive Pronouncement:FTB 87-2

Issues Discussed by FASB Emerging Issues Task Force (EITF)

Affects: No EITF Issues

Interpreted by: Paragraph 5 interpreted by EITF Issue No. 97-4
Paragraph 9 interpreted by EITF Issues No. 92-12 and 93-4
Paragraph 11 interpreted by EITF Issue No. 92-7

Related Issue: EITF Issue No. 88-21

FAS 71 Summary

This Statement provides guidance in preparing general purpose financial statements for most public utilities. Certain other companies with regulated operations that meet specified criteria are also covered.

In general, the type of regulation covered by this Statement permits rates (prices) to be set at levels intended to recover the estimated costs of providing regulated services or products, including the cost of capital (interest costs and a provision for earnings on shareholders' investments).

For a number of reasons, revenues intended to cover some costs are provided either before or after the costs are incurred. If regulation provides assurance that incurred costs will be recovered in the future, this Statement requires companies to capitalize those costs. If current recovery is provided for costs that are expected to be incurred in the future, this Statement requires companies to recognize those current receipts as liabilities.

This Statement also requires recognition, as costs of assets and increases in net income, of two types of allowable costs that include amounts not usually accepted as costs in the present accounting framework for nonregulated enterprises, as follows:

- If rates are based on allowable costs that include an allowance for the cost of funds used during construction (consisting of an equity component and a debt component), the company should capitalize and increase net income by the amount used for rate-making purposes--instead of capitalizing interest in accordance with FASB Statement No. 34, *Capitalization of Interest Cost.*
- If rates are based on allowable costs that include reasonable intercompany profits, the company should not eliminate those intercompany profits in its financial statements.

Pending completion of the Board's current project on accounting for income taxes, this Statement continues current practices of most utilities with respect to accounting for deferred income taxes. Accordingly, if the current income tax benefits (or costs) of timing differences are passed through to customers in current prices and it is probable that any resulting income taxes payable in future years will be recovered through future rates, the company should not record deferred income taxes resulting from those timing differences. However, the company should disclose the cumulative net amounts of timing differences for which deferred taxes have not been

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recorded.

This Statement may require that a cost be accounted for in a different manner from that required by another authoritative pronouncement. In that case, this Statement is to be followed because it reflects the economic effects of the rate-making process--effects not considered in other authoritative pronouncements. All other provisions of that other authoritative pronouncement apply to the regulated enterprise.

This Statement clarifies the application of certain other authoritative pronouncements, which is expected to result in at least two changes in general-purpose financial statements of certain public utilities. First, expected refunds of revenue collected in prior years will be charged to income in the period in which those refunds are first recognized. Second, leases will be classified (as capital or operating leases) in accordance with FASB Statement No. 13, *Accounting for Leases,* as amended. Because Statement 13 has not been applied by some utilities in the past, this Statement provides a four-year transition period before retroactive application of lease capitalization is required. Statement 13 provided a similar transition period for unregulated enterprises.

INTRODUCTION

FAS71, Par. 1

FAS71, Par. 1

1. Regulation of an enterprise's prices (hereinafter referred to as *rates*) is sometimes based on the enterprise's costs. Regulators use a variety of mechanisms to estimate a regulated enterprise's allowable costs,1(1) and they allow the enterprise to charge rates that are intended to produce revenue approximately equal to those allowable costs. Specific costs that are allowable for rate-making purposes result in revenue approximately equal to the costs.

FAS71, Par. 2

2. In most cases, allowable costs are used as a means of estimating costs of the period during which the rates will be in effect, and there is no intent to permit recovery of specific prior costs. The process is a way of setting prices--the results of the process are reported in general-purpose financial statements in accordance with the same accounting principles that are used by unregulated enterprises.

FAS71, Par. 3

3. Regulators sometimes include costs in allowable costs in a period other than the period in which the costs would be charged to expense by an unregulated enterprise. That procedure can create assets (future cash inflows that will result from the rate-making process), reduce assets (reductions of future cash inflows that will result from the rate-making process), or create liabilities (future cash outflows that will result from the rate-making process) for the regulated enterprise. For general-purpose financial reporting, an incurred cost for which a regulator permits recovery in a future period is accounted for like an incurred cost that is reimbursable under a cost-reimbursement-type contract.

FAS71, Par. 4

4. Accounting requirements that are not directly related to the economic effects of rate actions may be imposed on regulated businesses by orders of regulatory authorities and occasionally by court decisions or statutes. This does not necessarily mean that those accounting requirements conform with generally accepted accounting principles. For example, a regulatory authority may order an enterprise to capitalize2(2) and amortize a cost that would be charged to income currently by an unregulated enterprise. Unless capitalization of that cost is appropriate under this Statement, generally accepted accounting principles require the regulated enterprise to charge the cost to income currently.

STANDARDS OF FINANCIAL ACCOUNTING AND REPORTING

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FAS71, Par. 5

Scope

FAS71, Par. 5
FAS71, Par. 5

5. This Statement applies to general-purpose external financial statements of an enterprise that has regulated operations that meet all of the following criteria:

a. The enterprise's rates for regulated services or products provided to its customers are established by or are subject to approval by an independent, third-party regulator or by its own governing board empowered by statute or contract to establish rates that bind customers.3(3)
b. The regulated rates are designed to recover the specific enterprise's costs of providing the regulated services or products.
c. In view of the demand for the regulated services or products and the level of competition, direct and indirect, it is reasonable to assume that rates set at levels that will recover the enterprise's costs can be charged to and collected from customers. This criterion requires consideration of anticipated changes in levels of demand or competition during the recovery period for any capitalized costs.

FAS71, Par. 6

6. If some of an enterprise's operations are regulated and meet the criteria of paragraph 5, this Statement shall be applied to only that portion of the enterprise's operations.

FAS71, Par. 7

7. Authoritative accounting pronouncements that apply to enterprises in general also apply to regulated enterprises. However, enterprises subject to this Statement shall apply it instead of any conflicting provisions of standards in other authoritative pronouncements.4(4)

FAS71, Par. 8

8. This Statement does not apply to accounting for price controls that are imposed by governmental action in times of emergency, high inflation, or other unusual conditions. Nor does it cover accounting for contracts in general. However, if the terms of a contract between an enterprise and its customer are subject to regulation and the criteria of paragraph 5 are met with respect to that contract, this Statement shall apply.

General Standards of Accounting for the Effects of Regulation

FAS71, Par. 9
FAS71, Par. 9

◊◊◊9. Rate actions of a regulator can provide reasonable assurance of the existence of an asset. An enterprise shall capitalize all or part of an incurred cost5(5) that would otherwise be charged to expense if both of the following criteria are met:

a. It is probable6(6) that future revenue in an amount at least equal to the capitalized cost will result from inclusion of that cost in allowable costs for rate-making purposes.
b. Based on available evidence, the future revenue will be provided to permit recovery of the previously incurred cost rather than to provide for expected levels of similar future costs. If the revenue will be provided through an automatic rate-adjustment clause, this criterion requires that the regulator's intent clearly be to permit recovery of the previously incurred cost.

FAS71, Par. 10

◊10. Rate actions of a regulator can reduce or eliminate the value of an asset. ◊If a regulator excludes all or part of a cost from allowable costs and it is not probable that the cost will be included as an allowable cost in a future period, the cost cannot be expected to result in future

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revenue through the rate-making process. Accordingly, the carrying amount of any related asset shall be reduced to the extent that the asset has been impaired. Whether the asset has been impaired shall be judged the same as for enterprises in general.

FAS71, Par. 11

11. Rate actions of a regulator can impose a liability on a regulated enterprise. Such liabilities are usually obligations to the enterprise's customers. The following are the usual ways in which liabilities can be imposed and the resulting accounting:

a. A regulator may require refunds to customers.7(7) Refunds that meet the criteria of paragraph 8 (accrual of loss contingencies) of FASB Statement No. 5, *Accounting for Contingencies,* shall be recorded as liabilities and as reductions of revenue or as expenses of the regulated enterprise.

b. A regulator can provide current rates intended to recover costs that are expected to be incurred in the future with the understanding that if those costs are not incurred future rates will be reduced by corresponding amounts. If current rates are intended to recover such costs and the regulator requires the enterprise to remain accountable for any amounts charged pursuant to such rates and not yet expended for the intended purpose,8(8) the enterprise shall not recognize as revenues amounts charged pursuant to such rates. Those amounts shall be recognized as liabilities and taken to income only when the associated costs are incurred.

c. A regulator can require that a gain or other reduction of net allowable costs be given to customers over future periods. That would be accomplished, for rate-making purposes, by amortizing the gain or other reduction of net allowable costs over those future periods and reducing rates to reduce revenues in approximately the amount of the amortization. If a gain or other reduction of net allowable costs is to be amortized over future periods for rate-making purposes, the regulated enterprise shall not recognize that gain or other reduction of net allowable costs in income of the current period. Instead, it shall record it as a liability for future reductions of charges to customers that are expected to result.

FAS71, Par. 12

12. Actions of a regulator can eliminate a liability only if the liability was imposed by actions of the regulator.

FAS71, Par. 13

13. Appendix B illustrates the application of the general standards of accounting for the effects of regulation.

Specific Standards Derived from the General Standards

FAS71, Par. 14

FAS71, Par. 14

14. The following specific standards are derived from the general standards in paragraphs 9-12. The specific standards shall not be used as guidance for other applications of those general standards.

Allowance for Funds Used during Construction

FAS71, Par. 15

FAS71, Par. 15

15. In some cases, a regulator requires an enterprise subject to its authority to capitalize, as part of the cost of plant and equipment, the cost of financing construction as financed partially by borrowings and partially by equity. A computed interest cost and a designated cost of equity funds are capitalized, and net income for the current period is increased by a corresponding amount. After the construction is completed, the resulting capitalized cost is the basis for

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depreciation and unrecovered investment for rate-making purposes. In such cases, the amounts capitalized for rate-making purposes as part of the cost of acquiring the assets shall be capitalized for financial reporting purposes instead of the amount of interest that would be capitalized in accordance with FASB Statement No. 34, *Capitalization of Interest Cost.*9(9) The income statement shall include an item of other income, a reduction of interest expense, or both, in a manner that indicates the basis for the amount capitalized.

Intercompany Profit10(10)
FAS71, Par. 16
FAS71, Par. 16
16. Profit on sales to regulated affiliates shall not be eliminated in general-purpose financial statements11(11) if both of the following criteria are met:

a. The sales price is reasonable.
b. It is probable that, through the rate-making process, future revenue approximately equal to the sales price will result from the regulated affiliate's use of the products.

FAS71, Par. 17
17. The sales price usually shall be considered reasonable if the price is accepted or not challenged by the regulator that governs the regulated affiliate. Otherwise, reasonableness shall be considered in light of the circumstances. For example, reasonableness might be judged by the return on investment earned by the manufacturing or construction operations or by a comparison of the transfer prices with prices available from other sources.

Other Specific Standards
FAS71, Par. 18

Accounting for Income Taxes
FAS71, Par. 18
FAS71, Par. 18
18. Items of revenue and expense are sometimes taxable or deductible in periods other than the periods in which those items are recognized for financial reporting purposes. In some cases, a regulator does not include the income tax effect of certain transactions in allowable costs in the period in which the transactions are reported but includes income taxes related to those transactions in allowable costs in the period in which the taxes become payable. In such cases, if it is probable that income taxes payable in future years because of net reversal of timing differences will be recovered through rates based on taxes payable at that time, the enterprise shall record neither the deferred income taxes12(12) that result from those timing differences nor the related asset (the probable future benefits that will result from payment of the taxes). However, the enterprise shall disclose the cumulative net amount of income tax timing differences for which deferred income taxes have not been provided. That disclosure supplements the requirements of paragraph 63 of Opinion 11 for disclosure of operating loss carryforwards, significant amounts of other unused deductions or credits, and reasons for significant variations in the customary relationships between income tax expense and pretax accounting income. Except as provided in this paragraph, regulated enterprises shall apply the requirements of Opinion 11.

Other Disclosure
FAS71, Par. 19
FAS71, Par. 19
19. For refunds that are recognized in a period other than the period in which the related

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revenue was recognized and that have a material effect on net income, the enterprise shall disclose the effect on net income and indicate the years in which the related revenue was recognized. Such effect may be disclosed by including it, net of related income taxes, as a line item in the income statement. However, that item shall not be presented as an extraordinary item.

FAS71, Par. 20

20. In some cases, a regulator may permit an enterprise to include a cost that would be charged to expense by an unregulated enterprise as an allowable cost over a period of time by amortizing that cost for rate-making purposes, but the regulator does not include the unrecovered amount in the rate base. That procedure does not provide a return on investment during the recovery period. If recovery of such major costs is provided without a return on investment during the recovery period, the enterprise shall disclose the remaining amounts of such assets and the remaining recovery period applicable to them.

Amendments to Existing Pronouncements

FAS71, Par. 21

FAS71, Par. 21

21. Appendix A lists the amendments to existing pronouncements that result from this Statement.

Effective Date and Transition

FAS71, Par. 22

FAS71, Par. 22

22. This Statement shall be effective for fiscal years beginning after December 15, 1983. Earlier application is encouraged. Accounting changes adopted to conform to the provisions of this Statement shall be applied retroactively, except that:

a. Previously issued financial statements shall not be restated for changes in accounting for refunds.
b. Leases for which the inception13(13) is after December 31, 1982 shall be classified in accordance with FASB Statement No. 13, *Accounting for Leases,* in financial statements commencing with initial application of this Statement. Leases for which the inception of the lease is before January 1, 1983 may be classified as they would have been classified before this Statement was issued until fiscal years beginning after December 15, 1986. Commencing no later than the first fiscal year beginning after December 15, 1986, those leases shall be retroactively classified in accordance with Statement 13 as amended.

FAS71, Par. 23

23. If leases are not retroactively classified in accordance with Statement 13 in financial statements for fiscal years beginning after December 15, 1983 and before December 15, 1986 as permitted by paragraph 22(b), lessees shall disclose the amounts of additional capitalized leased assets and lease obligations that would be included in each balance sheet presented if Statement 13 had been applied retroactively.

FAS71, Par. 24

24. In the year that this Statement is first applied, the financial statements shall disclose the nature of any restatement and its effect on income before extraordinary items, net income, and related per-share amounts14(14) for each year restated. If retroactive restatement of all years presented is not practicable, the financial statements shall be restated for as many consecutive years as is practicable, and the cumulative effect of applying this Statement shall be included in determining net income of the earliest year restated (not necessarily the earliest year presented). If it is not practicable to restate any prior year, the cumulative effect shall be included in net

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income in the year in which this Statement is first applied. (See ◊paragraph 20 of APB Opinion No. 20, *Accounting Changes.*) The effect on income before extraordinary items, net income, and related per-share amounts15(15) of applying this Statement in a year in which the cumulative effect is included in determining that year's net income shall be disclosed for that year.

The provisions of this Statement need not be applied to immaterial items.

FAS71 Dissent

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Endnotes

1 (Popup)
Footnote 1--The term *allowable costs* is used throughout this Statement to refer to all costs for which revenue is intended to provide recovery. Those costs can be actual or estimated. In that context, allowable costs include interest cost and amounts provided for earnings on shareholders' investments.

2 (Popup)
Footnote *2--Capitalize* is used in this Statement to indicate that the cost would be recorded as the cost of an asset. That procedure is often referred to as "deferring a cost," and the resulting asset is sometimes described as a "deferred cost."

3 (Popup)
Footnote 3--The appropriate structure for setting accounting standards for state and local governmental units is currently under discussion. The FASB is proposing no change with respect to the applicability or use of its pronouncements in the governmental area until that matter is resolved.

4 (Popup)
Footnote 4--For example, a regulator might authorize a regulated enterprise to incur a major research and development cost because the cost is expected to benefit future customers. The regulator might also direct that cost to be capitalized and amortized as an allowable cost over the period of expected benefit. If the criteria of paragraph 9 of this Statement were met, the enterprise would capitalize that cost even though FASB Statement No. 2, *Accounting for Research and Development Costs,* requires such costs to be charged to income currently. Statement 2 would still apply to accounting for other research and development costs of the regulated enterprise, as would the disclosure requirements of Statement 2.

5 (Popup)
Footnote 5--An incurred cost is "a cost arising from cash paid out or obligation to pay for an acquired asset or service, a loss from any cause that has been sustained and has been or must be paid for" (Eric L. Kohler, *A Dictionary for Accountants,* 5th ed. [Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1975], p. 253).

6 (Popup)
Footnote 6-- The term *probable* is used in this Statement with its usual general meaning, rather than in a specific technical sense, and refers to that which can reasonably be expected or believed on the basis of available evidence or logic but is neither certain nor proved (*Webster's New World Dictionary of the American Language,* 2d college ed. [New York and Cleveland: World Publishing Company, 1972], p. 1132). That is the meaning referred to by FASB Concepts Statement No. 3, *Elements of Financial Statements of Business Enterprises.*

7 (Popup)
Footnote 7--Refunds can be paid to the customers who paid the amounts being refunded; however, they are usually provided to current customers by reducing current charges.

8 (Popup)

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Footnote 8--The usual mechanism used by regulators for this purpose is to require the regulated enterprise to record the anticipated cost as a liability in its regulatory accounting records.

9 (Popup)
Footnote 9--Statement 34 requires capitalization of interest cost on certain qualifying assets. The amount capitalized is the portion of the interest cost incurred during the period that theoretically could have been avoided if the expenditures had not been made.

10 (Popup)
Footnote 10--The term *intercompany profit* is used in this Statement to include both profits on sales from one company to another within a consolidated or affiliated group and profits on sales from one operation of a company to another operation of the same company.

11 (Popup)
Footnote 11--ARB No. 51, *Consolidated Financial Statements,* requires that profit on sales of assets remaining in the consolidated group be eliminated in consolidated financial statements. APB Opinion No. 18, *The Equity Method of Accounting for Investments in Common Stock,* effectively extends that requirement to affiliated entities reported on the equity method.

12 (Popup)
Footnote 12-- APB Opinion No. 11, *Accounting for Income Taxes,* requires comprehensive interperiod allocation of the income tax effect of timing differences, that is, differences between the timing of income or expense recognition in financial statements and in income tax returns.

13 (Popup)
Footnote 13--The inception of a lease is defined in FASB Statement No. 23, *Inception of the Lease.*

14 (Popup)
Footnote 14--The effect on related per-share amounts need not be disclosed if the enterprise does not disclose earnings per share.

15 (Popup)
Footnote 15--See footnote 14.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Cities Water Company for limited proceeding to recover environmental litigation costs for North and South Ft. Myers Divisions in Lee County and Barefoot Bay Division in Brevard County.	Docket No. 971663-WS

DEPOSITION OF:	PATRICIA W. MERCHANT
TAKEN AT THE INSTANCE OF:	Florida Cities Water Company
PLACE:	FPSC Conference Room 362 Gerald L. Gunter Building 2540 Shumard Oak Boulevard Tallahassee, Florida
TIME:	Commenced at 1:12 p.m. Concluded at 2:20 p.m.
DATE:	Thursday, July 9, 1998
REPORTED BY:	Lisa Girod Jones, RPR, RMR

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663-WS EXHIBIT NO. 17
COMPANY/ WITNESS: FCWC - Merchant
DATE: 8-12-98

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APPEARANCES:

B. KENNETH GATLIN, Attorney at Law, Gatlin, Schiefelbein & Cowdery, 3301 Thomasville Road, Tallahassee, Florida 32312; appearing on behalf of Florida Cities Water Company.

Also Present:
MIKE JENKINS, Office of the Public Counsel

ROSANNE GERVASI, Staff Counsel, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850; appearing on behalf of Staff.

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S T I P U L A T I O N S

IT IS STIPULATED that this deposition was taken pursuant to notice in accordance with the applicable Florida Rules of Civil Procedure; that objections, except as to the form of the question, are reserved until hearing in this causes; and that reading and signing was not waived.

IT IS ALSO STIPULATED that any off-the-record conversations are with the consent of the deponent.

DEPOSITION

Whereupon,

PATRICIA W. MERCHANT

was called as a witness, having first been duly sworn to speak the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

MR. GATLIN: And I believe we'll stipulate to the appropriate matters relative to the objections and so forth.

MS. GERVASI: That's fine.

EXAMINATION

BY MR. GATLIN:

Q. Please state your name and address.

A. Patricia W. Merchant, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850.

Q. And you've offered testimony in this proceeding consisting of ten pages, dated June 19th, 1998?

A. Yes.

Q. What did you examine to look at to prepare this testimony?

A. I looked at the orders that are addressed in my testimony. I looked at my -- the form that I had from my prior testimony. I just adapted it to this testimony. So I really didn't look at the issues, but that's about it.

Q. So the testimony, was it on this subject, the

other testimony you looked at?

A. No, just the format.

Q. You looked at the resumes?

A. Yeah, and updated that.

Q. And so the orders that you mention in your testimony is what you looked at?

A. That's correct, and I have them here.

Q. Does the Commission and the Staff seriously consider issues raised in a proceeding?

A. I believe the Commission does and Staff does.

Q. Would it make any difference if it's raised by the Office of Public Counsel or not?

A. No.

Q. Would you still consider it?

A. All parties and Staff.

Q. Is there an amount of money that makes an issue more important than another and you would give more serious consideration to?

A. In some circumstances it might.

Q. If OPC raised an issue, would you -- relative to the issue in this case about the recovery of these costs, in prior cases has the Commission seriously considered those issues?

A. I'm confused with your question.

Q. Okay, let me take another run at it. There have

been other Commission cases that considered the recovery of litigation costs in environmental enforcement or compliance proceedings; is that true?

A. That's true.

Q. And has the OPC raised those issues in other cases?

A. In some cases they have.

Q. Did the Commission and the Staff seriously consider the issues as raised by the OPC in those cases?

A. I believe the Commission -- yes.

Q. Do you know of any threshold amount where the Commission or the Staff has that it gives more consideration to an issue, like this issue in this case, the recovery of litigation costs?

A. There's not an identified threshold.

Q. Look on Page 6 of your testimony, Line 10. The line reads: "To assume that the legal fees incurred for the three wastewater systems found in violation of the CWA are the shared burden of all water and noninvolved wastewater utilities is inappropriate." Is that pronounced in any Commission order? What does that sentence --

A. That statement is not.

Q. Is it based on any rule?

A. That's my opinion.

Q. Which rule is that? Which rule? That's your

opinion, not a rule? Is that it?

A. That's my opinion.

Q. And just to make sure it's clear, I could not find a Commission order or a Commission rule that makes that statement, could I, that you know of?

A. I don't think there's any rule of the Commission that even addresses the Clean Water Act.

Q. Line 13 of that same page, the next sentence on Page 6, "These legal fees are not a cost of providing water service, nor are they a cost of wastewater service to any of the other FCWC wastewater facilities not penalized." Now does that reflect something the Commission has said in an order or any other pronouncement of Commission policy?

A. I don't -- I know that the Commission addressed some of these legal fees in prior orders.

Q. Okay. But that particular statement there about not a cost of providing service, wastewater service or other wastewater facilities, is that -- is there any policy pronouncement by the Commission on that, that you know of, either in a rule or in a case?

A. Specifically to the legal fees incurred by Florida Cities for this litigation, no, other than the order where they removed the cases in the prior -- North Fort Myers, I believe -- rate case.

Q. Now you're referring to the litigation costs that

were capitalized for a couple of years?

A. Yes, sir.

Q. And the Company removed that from the North Fort Myers' investment; is that right?

A. That's correct.

Q. Back up the page on Page 6 -- well, the sentence starts on Line 7. The sense of the sentence is that the rates between Florida Cities Water systems are not uniform, and with the exception of the Lee County water rates. What significance to this case is the "not uniform" words?

A. They have stand alone rates. They calculate rates for each of the other systems, not the Lee County water, but for Barefoot Bay water and wastewater, they set separate rate base and separate rates, and they set separate rates for South Fort Myers wastewater or North Fort Myers wastewater and Golden Gate, when we had jurisdiction.

Q. But my question is, is what relevance is that? Is there some rule or Commission order that says the rates have to be uniform throughout a system before all the costs are applied to the whole system?

A. No.

Q. Other than the cases that you cite in your testimony and some other cases that we'll discuss later -- well, that's not a fair question.

To find the Commission's policy on the recovery of

litigation expenses relating to environmental costs, what would I look to?

A. To find their policy?

Q. Uh-huh.

A. I would look to past Commission orders.

Q. Is there any other place?

A. And rules, rules and statutes.

Q. Is there any rule or statute that you know of that pertains to this, or is relevant to the recovery of litigation costs?

A. There's a statute that says that costs should be reasonable and prudent to provide service. There are some rules on allocation of costs, but they're more minimum filing requirement allocation issues as opposed to application of how to allocate. There are a lot of policies where the Commission has addressed allocation issues. So that wouldn't be in the rules. And I can't think of any -- there might be a few more, but I can't think of any.

Q. Would you agree that there is no rule that specifically addresses the recovery of litigation expenses as is sought in this case?

A. Other than rate case expense?

Q. Right.

A. No.

Q. In the litigation in this case, Florida Cities was

faced with a penalty of $104 million. Should they have defended against that claim in your opinion?

A. I'm not expressing any opinion on that.

Q. You don't know? You're just not expressing an opinion? Do you know? You have one but not expressing it or -- which is it?

A. Can you restate the question one more time?

Q. Should Florida Cities have defended against the $104 million claim?

A. I think a utility has a right to defend themselves.

Q. Okay.

A. And I'm not -- I don't know -- I think if somebody brings litigation against you, I think you should defend yourself.

Q. Would a claim of $104 million have an adverse effect on Florida Cities Water Company, in your opinion?

A. I don't know if a claim would.

Q. If it was -- if it became a judgment.

A. Would a judgment?

Q. Yes.

A. I believe that that would impact the utility.

Q. In what way?

A. Specifically, I couldn't tell you what would happen.

Q. Would it have an adverse effect on them financially?

A. It could.

Q. You're familiar with Florida Cities Water Company generally, as to the financial situation of it?

A. In terms of regulatory annual reports and rate cases. To that extent, yes.

Q. If you were president of Florida Cities Water Company and you got a complaint from the United States government saying that you owed them $104 million, would you have defended the claim?

A. Assuming that I was in that position, I would defend.

Q. And that claim for $104 million was mitigated by that defense of that claim; was it not?

A. I'm --

Q. The claim of $104 million was mitigated by the defense of that claim? It went from $104 million to 309,000.

A. I agree with that, that it went from 104 million maximum to an actual fine -- excuse me, it went from 104 million possible to a penalty of around $300,000.

Q. And that's mitigation?

A. I don't know.

Q. You don't know if that's mitigation?

A. Legally, I don't know.

Q. Nonlegally, do you know?

A. I don't know if they would have ever been assessed $104 million. So I don't know if that really mitigated it or not.

Q. Do you know of anybody that does know that?

A. Where?

Q. You have to assume when you get -- if you get a complaint that wants $104 million in the complaint, that if you don't do anything, they might get the $104 million.

A. I don't know that.

Q. You don't know that?

A. No.

Q. Do you know if Florida Cities had not filed an answer to the complaint that the United States Government might have got a default judgment against Florida Cities for $104 million?

A. I don't know that.

Q. Would it -- do you agree that it would be wise for Florida Cities Water Company to take steps to avoid getting a judgment of $104 million against it?

A. I think that they should take prudent steps to avoid litigation and penalties and maintain compliance with environmental standards.

Q. Should they defend against a claim of

$104 million?

A. I beg your pardon?

Q. Should Florida Cities defend against a claim of $104 million?

A. If the shareholders were faced with that, I believe that they should defend.

Q. No, Florida Cities is what I'm asking you about, the company. The shareholders weren't named in the complaint.

A. I think that they should have a right to defend themselves.

Q. But you don't have an opinion as to whether they should?

A. No, I don't have an opinion on that.

Q. I have here Commission orders that deal with this subject. I have the ones that you mention.

A. Okay.

Q. I have the ones that Mr. Larkin mentioned. I have a couple that neither of you mentioned.

A. Okay.

Q. And I have the book with the full order in it. I have copied what I think is the relevant page, and you certainly are welcome to look at the book if you would like, but assuming -- and please check it if you would like -- this is a page out of -- I believe it's the first order you

cite, 1547.

May we have this identified as an exhibit?

(Exhibit No. 1 marked for identification.)

BY MR. GATLIN:

Q. This is Order No. PSC-97-1547-FOF-WS issued on December 10th, 1997, and I'm looking at Page 150 out of the FPSC Reporter. Look, if you will, down under the heading Legal Costs (Consent Order). Now, this is the first case that you cite in your testimony?

A. That's correct.

Q. Would you agree that the -- that a correct -- a correct reading of this is that the Commission never made any finding of prudency, but said the utility did not document the claim?

A. The order says the Commission had some concern about allowing recovery of the legal fees.

Q. Look at the second paragraph under the heading -- you see the citation of a Florida Power Corporation case?

A. The burden, the burden of proof.

Q. Then the next sentence, "Even if the legal fees were found prudent, we find that the utility has failed to meet its burden in that it failed to file supporting documentation to justify its requested legal expenses associated with the Consent Order."

A. That's correct.

Q. They did not make a finding of prudency in that case?

A. No, but they had concerns with it.

Q. But they did not proceed to make a finding of prudency because there was not a support in their opinion to justify such a finding?

A. That's correct.

Q. May we have this next one identified as Exhibit 2, which is Order No. PSC 93-0423-FOF-WS, Page 573 out of the PSC Reporters.

(Exhibit No. 2 marked for identification.)

BY MR. GATLIN:

Q. I think this is a second case cite, on Page 8, top of the page.

A. Yes.

Q. In this case, read this paragraph and see if you agree with me, the OPC witness Dismukes said that the legal fees associated with defending itself of DER fines and violations should be allowed since the fines themselves are nonrecoverable. Would you agree with that?

A. No, sir. That should be disallowed.

Q. Disallowed, right. That's what it says, should be disallowed. Okay.

Is that the same position, as you understand it, of OPC in this Florida Cities case?

A. It sounds consistent, part of it. Part of it.

Q. And the Commission ruled against the OPC on the recovery of the fees; is that correct?

A. I believe that in this case -- I don't believe that this is a -- based on the evidence in this case, when the Commission made its decision based on this evidence, that it supported that ratepayers benefit from the utility's defending itself. And if they succeed, rate base or other expenses may be lower.

Q. Which is the same position asserted by OPC in this case, in the Florida Cities case, isn't it, that the ratepayers don't benefit from the legal fees and don't benefit from the fines, and the fines ought to be paid by the shareholders and therefore the legal expenses should be also?

A. Are you talking about the Commission's decision?

Q. I'm talking about the position of OPC, the position OPC was arguing in this case.

A. OPC's position in this SSU case was that the legal fees were associated with fines, so therefore they should be nonrecoverable.

Q. And the Commission ruled that they in this case would be recoverable; is that true?

A. Yes, because if the utility succeeds in defending itself, rate base or other expenses might be lower.

Q. Right. Now the third case I wanted to direct your attention to is the third case you cite. I would like to identify this as Exhibit 3, Order PSC-93-1070-FOF-WS. I'm looking at Page 565 from the PSC reporter.

(Exhibit No. 3 marked for identification.)

BY MR. GATLIN:

Q. I assume you're familiar with this case?

A. Yes.

Q. And here again, the issue was raised by OPC that the litigation costs should not be allowed because the fines were disallowed; is that true?

A. That's correct.

Q. And the Commission ruled against OPC?

A. No. I correct myself. That is not true. She testified that they should be disallowed, but she recommended amortizing over four years and allowing one fourth of it.

Q. Would you read out loud the first sentence under Test Year Legal Expenses?

A. "OPC witness Dismukes testified that the utility's legal expenses should be disallowed to the extent that they relate to DER fines and violations."

Q. Doesn't that indicate to you that their position was that the litigation expenses ought to be disallowed, but if -- to that point; isn't that correct?

A. She goes on further to say that they couldn't segregate them out from other legal fees so her alternative was to amortize it.

Q. But their basic position was that the legal expenses should be disallowed for litigation costs related to DER fines and violations. Isn't the order correct?

A. Yes.

Q. And the Commission, over on the next page, on 566, in the paragraph second from the bottom, the sentence starts out, "The suggestion that legal costs should be disallowed..."

A. I beg your pardon?

Q. The Commission then did not disallow the expenses, did it?

A. No, they did not.

Q. Is there any suggestion in the ruling by the Commission in this order that the legal fees had to relate to maintenance or compliance with environmental regulations?

A. Maintenance?

Q. Yes.

A. You mean like --

Q. Let me strike that. Start all over. Is there any suggestion in the Commission's ruling that a condition for the allowance of the legal fees was that they were expended to maintain compliance with DEP or other environmental

regulations?

A. No, it's not specifically in there.

Q. In fact, what the Commission said is set forth in the second from the bottom paragraph on Page 566 when it says, "The suggestion of legal costs should be disallowed because they were incurred to defend the utility against alleged violations presupposes that the utility should acquiesce in all cases, whether or not fault exists. We agree with Ms. Teasley that litigation may be appropriate even when the imposition of a fine is a possibility, when compliance with the disputed regulation will create adverse economic consequences."

That's the standard the Commission used there, was if there were adverse economic consequences?

A. They go on -- excuse me.

Q. Go ahead.

A. Was that a question?

Q. Yeah. There was a question mark there somewhere.

A. Let me back up. Can you ask the question again?

Q. Yeah. What the Commission considered in allowing the litigation costs in this case was that for the Company not to contest the litigation could result in adverse economic consequences. Is that right? Is that correct? Do you agree with that?

A. That's part of what they said.

Q. All right. Tell me what else they said.

A. They also said, "On other occasions, payment of a fine pursuant to a consent order, even when 'guilt' is not admitted, may result in avoidance of further litigation costs that would be detrimental to a utility's financial condition. An absolute prohibition against recovery... where a fine may be imposed would be impractical."

Q. That doesn't dispute -- that just adds to what I just read. That doesn't dispute what we said, did it?

A. No, but I don't believe you can just say that without the other two sentences added on. That wouldn't be the Commission's position.

Q. So what do you think is the Commission's position? Tell me.

A. The whole paragraph.

Q. So what, there are two items in this then? You don't want to have a fine that would create adverse economic consequences, which would be a reason for the Company litigating, and another reason would be that payment to a -- payment of a fine pursuant to consent order may result in further -- I guess what they're saying is, on the other hand, you could pay a fine to avoid litigation expenses and that would be okay.

A. I think that they're giving you two -- they're saying, don't acquiesce, that if a utility always acquiesces

to a fine, that's not in their -- that could create adverse economic consequences. On other occasions, paying a fine, even when guilt is not admitted --

Q. Might be the most --

A. Might be prudent --

Q. Most practical thing?

A. Might be prudent for the company to do. And I believe this is on a case-by-case basis. I don't think this is an always in every circumstance.

Q. And what's the guide to a utility company as to when you ought to file a case to recover litigation expense or ask for it in a rate case, relative to environmental costs?

A. When they think that it's prudent to recover those costs.

Q. So if the Company thinks its prudent, they're justified in filing the case?

A. The Company can file a case whenever they believe that it's necessary.

Q. What I'm saying is, the utility -- a utility wants to know what the Commission's policy is. They don't want to just file a useless case. So what do they look at to say, maybe so, this is a good -- we ought to file it?

A. They could come in and ask for a declaratory statement, or they could file a request for a certain type

of treatment.

Q. Before they filed the case, come in and file for a declaratory statement before you file the case for recovery?

A. I'm not exactly sure of all the details of filing a declaratory statement, but I'm aware that those have been done in certain circumstances to get a position from the Commission up front.

As far as an accounting treatment, I think a company can file a motion, request a docket to be opened to consider an issue. I know that they've done that in the past, in several cases in the past.

Q. Well, wouldn't the company have to show the Commission or show evidence and testimony in those proceedings just like it's doing in this case?

A. It depends on the circumstance. They would have to make some type of showing to get approval from the Commission to do it.

Q. So at what point would they file the declaratory proceeding? Before filing this case -- filing a declaratory proceeding and then file a case like you've had filed in this docket?

A. If the Company had reasonable assurance that they were going to get recovery of it, they could defer the costs, and they could come in and ask for it as soon as the

cost ceased being incurred.

Q. Which is what Florida Cities did in this case?

A. No.

Q. What did they do?

A. They expensed the items and then came in and asked for recovery after that, after --

Q. Does that make a difference?

A. It might.

Q. It might. When might it?

A. We have several companies that have deferred costs and come in for rate cases, and in the middle of the rate case they're asking for amortization. I've got one right now that has -- they've deferred costs and they want to have recovery of them.

Q. But -- excuse me, let you finish.

A. I know we've had another case before where they expensed the cost and came back after the fact in a rate case, and those were disallowed.

Q. For what reason?

A. For retroactive ratemaking.

Q. What is that case?

A. Ortega, Ortega Utility.

Q. Now is that related to environmental litigation?

A. No, that was depreciation expense.

Q. And it had to do with recovery of past lost

depreciation, didn't it?

A. It had to do with depreciation expense that they had expensed off their books and reversed it.

Q. And not recovered in rates?

A. They had had a loss, they said, and they wrote off the depreciation expense. They booked it through accumulated depreciation, and then several years after that they decreased their accumulated depreciation because they said that they didn't recover their depreciation expense.

Q. That was the Company's proposal to the Commission, wasn't it?

A. That's correct.

Q. And the Commission said that you've already expensed that?

A. That's correct.

Q. And you've lost those funds and you can't go back and get them?

A. That's correct, because you should have filed -- they should have filed a rate case if they were losing money at that point in time.

Q. That's not the situation in this case, though. When would -- what would Florida Cities have done, filed a case every year, a rate case?

A. Deferred the cost or included it in the rate case that they had.

Q. That's an accounting principle, isn't it? That's not a ratemaking principle?

A. Deferring?

Q. As that being a reason whether to allow recovery. Is there a ratemaking principle somewhere that says you can't recover under those circumstances?

A. I'm not following the question.

Q. I think you're telling me accounting information. I'm asking about ratemaking information. Is there a ratemaking principle that says that you've got to defer the cost before you ever recover it later?

A. I think that the NARUC Uniform System of Accounts outlines items that you should expense and you should capitalize, and that that makes it a regulatory principle in that.

Q. Would you show me the one that would have required Florida Cities to defer it? Is that the word you're using?

A. Defer?

Q. Defer, in this situation.

A. Show me the what?

Q. You referred to a NARUC Uniform Account. Can you get it for me? Can you show it to me?

A. I don't have it with me. I don't know if it -- I think it talks in terms of expensing and capitalizing.

Q. What difference --

A. And deferred debits and deferred credits. The new Uniform System of Accounts talks about regulatory assets, but it doesn't talk about how you get approval of regulatory assets. It basically creates the account for the regulatory assets and regulatory liabilities.

Q. And complying with that accounting principle, in your opinion, suggests how the Commission ought to act in the recovery of those expenses or those costs?

A. I think that it's similar to other expenses, not necessarily only litigation expenses. I think that if you incurred salary expenses and you expensed them off and then came in for a rate case two years later and said, I never actually -- you know, I gave a raise to my employees two years ago, never came in for a rate case, but now I want to make up for that because we didn't ever recover that raise through our rates.

Q. And you think that's a similar situation to the situation we have in the application in this docket?

A. It's somewhat similar. They've expensed it off their books.

Q. So what does that tell you that the Commission ought to do as far as the recovery of those costs in this proceeding?

A. Specifically for Florida Cities?

Q. Yes. In this case, yes.

A. I'm not providing opinion testimony on that.

Q. Do you have an opinion?

A. I believe if they -- if the company wanted to recover those expenses, that if they believe that they could, that they would have deferred it and asked for recovery of it.

(Discussion off the record)

BY MR. GATLIN:

Q. What I would like to know if you could tell us -- well, are you suggesting there's something out there that said Florida Cities -- says that Florida Cities should have done something different than it did in order to collect -- in order to recover these expenses?

A. I'm not taking an opinion on it.

Q. Who is going to make the recommendation to the Commission relative to this case?

A. Connie McCaskill's Staff.

Q. Is that under the -- I'll call it the new organization, where there's a division of Staff as to the litigation part and as to the recommendation part?

A. Yes.

Q. And who does Connie McCaskill report to in the organization?

A. Greg Shafer.

Q. She has in the past reported to you; has she not?

A. No.

Q. Never?

A. Never.

Q. Is Greg Shafer an accountant?

A. No, I don't think so. I think he's an economist, but I'm not exactly sure.

Q. Is Connie McCaskill an accountant?

A. Yes, she's CPA.

Q. Right, I meant CPA.

(Exhibit No. 4 marked for identification.)

BY MR. GATLIN:

Q. Let me show you -- let's see. I'm not sure -- I don't believe you cite this case. It's the Gulf Power case. It's Order No. 97-1047-FOF-EU issued on September 5th, 1997. And I thought -- maybe you did recite this one. Sure you did.

A. Yes, I did.

Q. It's the one on Page 9. Now, looking at Page 61 of the FPSC Reporter, I believe that what you base your statement on is in the second full paragraph, the last sentence. Is that accurate?

A. Do you mean what am I quoting in my testimony?

Q. What are you relying on to make your statement that the Commission accepted a stipulation that legal expenses directly associated with environmental compliance

costs, et cetera, et cetera?

A. That same sentence above that. I'm paraphrasing those two sentences. The one that starts with "Legal expenses directly associated" and ends with the last sentence "on a case-by-case basis."

Q. Now this proceeding was pursuant to the Environmental Recovery Cost statute that applies to electric utility; was it not?

A. Yes, to the best of my knowledge.

Q. And the last word of that paragraph, clause, probably refers, does it not, to the clause for recovery in a tariff or in a rule or statute? Which does it --

A. I don't know.

Q. Don't know. Okay.

A. Cost recovery clause. I don't know how it's -- I don't know what their statutory or rule requirements are.

Q. Now the next one is the Southern Bell order. And it's -- I would like to identify it as Exhibit 5.

(Exhibit No. 5 marked for identification.)

BY MR. GATLIN:

Q. And that is Order No. 20162 issued on October 13th, 1988. And I'm referring to the Public Service Commission Reporter, Page 321. Now, would you agree that what you're relying on in your testimony when you refer to this, and make the statement that you do, is the last four

lines of the first full paragraph, last five lines, the sentence starts, We will also reduce the intrastate expenses by the amount there?

A. Yes.

Q. And that's all the information you had about that case?

A. That's right. I am just putting that in there to provide that for the Commission.

Q. Sure. Now there are two more cases. The next one is the United Water of Florida case, and it's Order No. PSC 97-0618-FOF-WS issued on May 30th, 1997. And may we have that identified as the next number exhibit.

(Exhibit No. 6 marked for identification.)

BY MR. GATLIN:

Q. Did you exclude that case for any particular reason from the cases you cited in the testimony?

A. No, I didn't on purpose exclude it, but it was already identified.

Q. By?

A. I believe the utility. And I can't --

Q. How about Mr. Larkin? How about OPC? Well, that's not important. Don't worry about it.

In this one Mr. Larkin testified as to the OPC position, and his position in that case was the same as it is in this Florida Cities case, is it not, that the legal

expenses ought not be allowed to be recovered?

A. He said that they were -- the ratepayers shouldn't be required to finance the violations as the expenses are unrelated to the provision of Water and Wastewater Service.

Q. Do you think that means that he's talking about disallowing the litigation fees?

A. Yes.

Q. And the Commission allowed the fees; did they not?

A. Yes.

Q. And the summary of the Commission's holding is over on Page 687, the second full paragraph from the top. Is that accurate?

A. Yes. It's the second full paragraph from the top of the page.

Q. And in that paragraph the Commission pointed out specifically that defending fines from DEP and EPA could facilitate avoided or a reduced amount of fines; is that true?

A. That's true. But I do believe that since these fees were of such small magnitude, that we did not go into much more detail into the individual expenses.

Q. So what does that mean? That this is not a good statement of the Commission policy?

A. Sure, I think it is. But I think that the Commission should look at it on a case-by-case basis, and I

don't think that this is a blanket approval of all legal fees incurred associated with fines should be allowed.

Q. It doesn't say that, does it?

A. No, it doesn't say that.

Q. It just says they should be allowed in this case?

A. In this case.

Q. But I thought we agreed earlier that the amount of money involved in the cost would not mean the Commission wouldn't give serious consideration to it, to the issue; is that true?

A. We did give serious consideration to the issue.

Q. But not as serious as if it had been more money?

A. I think had it been a higher magnitude, that we would have put -- there would have been more testimony and more --

Q. Think you would have gotten it to a different result?

A. I don't know. I don't know.

Q. You don't know?

A. I don't know.

Q. So the Commission didn't seriously consider it?

A. I'm not talking about this case.

Q. I'm talking about this case. This case only.

A. This case was only $163 -- 431, excuse me. I think they made a serious consideration in this case based

on the evidence in this record and the fact that it was $431.

Q. And the Commission said what its policy was?

A. Right.

Q. Was that Exhibit 6?

THE REPORTER: Yes.

MR. GATLIN: One more. And this will be Exhibit 7.

(Exhibit No. 7 marked for identification.)

BY MR. GATLIN:

Q. And this is the Lehigh case. It's Order No. PSC-93-0301-FOF-WS. And I'm looking at Page 795 of the PSC Reporter. And there's a section entitled Test Year Legal Expenses. And under that section, would you agree that the Commission said, "We find it appropriate to allow the utility to recover its legal expenses relating to permitting and compliance"?

A. That's correct.

Q. Was there any particular reason that you left this case out?

A. I believe that it was already identified.

Q. Now, we've been through seven cases. Were there any other cases that you've found that related to this question of a recovery of litigation expenses for environmental costs?

A. I didn't look any further than these cases.

Q. You were satisfied that in these seven cases you could find out what the Commission's policy was?

A. I felt that it was a wide range of their positions on legal fees, environmental legal fees.

Q. And you think these cases correctly stated the Commission's policy relative to the recovery of litigation expenses related to environmental questions?

A. In those specific cases.

Q. In these seven cases?

A. For those --

Q. We can look to those seven cases for the correct policy and know what the Commission's policy is relative to the recovery of litigation expenses?

A. I don't think that you can find exactly what the Commission would do in every single case in those seven cases. I think that based on the evidence in those cases, the Commission made a decision, based on that evidence, and the facts in that case, and they issued their opinion on that.

Q. Where else would you find the Commission's policy, other than in those seven cases?

A. There are a lot of issues that arise in cases that the Commission has never addressed before. So that just because the way you did it based on the facts in one

circumstance in one case, or several cases, may not necessarily mean that that's the way you should do it in the next case.

Q. Does it state the Commission's policy?

A. Does --

Q. Do those seven cases state the Commission's policy, up to the -- up to today? Let's put that in there. Up to today, does that state the Commission's policy?

A. On a case-by-case basis, I think that those are the -- that's the Commission's decision based on the evidence in that record on a case-by-case basis. I don't think that the circumstances are identical in every single case, and that it might state a general philosophy that the Commission believes is appropriate, but it does not specifically tell you exactly what to do in every single case.

Q. So the Commission does not have a policy relating to the recovery of litigation expenses for environmental costs? Is that correct?

A. If you're defining a policy as what you do in every single circumstance. No, I do not believe it does.

Q. The Commission does not have a policy?

A. If the circumstances are the same in every single case -- if the circumstances are the same from this case to the next case that we're looking at, I would say that you

would look to this case to see what to do exactly. But all of these cases have different facts and circumstances that vary. So you can't say from one case to the next that they're all consistent.

Q. So since the Commission doesn't have a rule relative to this that we can look to, we can only look to the Commission orders to find out what the policy is?

A. Or the statute.

Q. Is there a statute that says something about it?

A. Prudent and reasonable expenses.

Q. I'm relating it to the specific question that's for decision by the Commission in this case, and what I want to know is, I'm a utility, and I'm trying to figure out what the policy of the Commission is. Isn't it true that I would look at those seven cases to see what the Commission policy is?

A. I would think that you would look to see what they did in those cases to see if the circumstances that you had would be similar. But if they're not exactly similar, then you might have to vary from that. These were test year expenses in each of these cases.

Q. The Commission looks at each case without a policy?

A. There is not a policy for every single issue that's going to be addressed in every single rate case.

Q. Right. So there is not a policy other than the statute that you mentioned, that the Commission has, other than is stated in these rate orders?

A. There's not a what?

Q. Not a policy, other than what's stated in these rate orders, other than these orders that we've been talking about?

A. I think the Commission has a policy based on the statutory requirement to only allow prudent and reasonable expenses, and that they have to look in every single case, and it's the Company's burden to show that those expenses are prudent and reasonable, and that's what the Commission's policy is, is to allow those expenses if the utility can make that showing.

Q. So the Commission policy is not stated in those orders?

A. I think the Commission's action in those individual cases is stated in those orders.

Q. So we cannot learn policy from Commission orders; is that true?

A. You can look at past Commission orders and see what they've done in those past cases.

Q. But you can't learn policy from them? Is that true?

A. I believe that I've already answered that, but I

think that in every given case the circumstances can be different. So a policy is not going to apply in every single case. I don't think that the circumstances are the same in each of these cases. So it's not a consistent policy between each of the cases.

Q. Is that yes or no?

A. To what?

Q. No, you cannot find a Commission policy looking at these cases, or yes, you can find Commission policy looking at these cases?

A. I don't believe that the Commission has a policy established in these rules.

Q. All right. Okay.

A. In these orders, excuse me.

Q. So there's no policy, other than the statute that you mentioned? Follow the statute?

A. I think they have past Commission practice that they have in here, but not a stated policy.

Q. The Commission has practices, but not policies?

A. If you had a situation that would recur -- occur for every single utility in every single circumstance as to what to do, then you could have a rule that you could develop.

Q. So you don't have policy until you have a rule?

A. I think that you apply a case-by-case analysis to

each of the circumstances to make sure that you have prudent and reasonable expenses recovered through rates.

Q. That's what you look for is -- that's the test?

A. Right.

Q. Is there no other Commission policy?

A. I don't think that it's spelled out specifically in a policy.

Q. Okay. Looking at the Staff's prehearing statement.

A. I don't have that with me.

Q. Anybody have one?

MS. GERVASI: No. Here, we have one. Thank you.

BY MR. GATLIN:

Q. Are you familiar with the Staff's position of Issue 5 in your -- in the Staff's prehearing statement in this case?

A. I don't know.

Q. Well, how about taking a look at it and see if you --

A. Yes.

Q. Okay. Would it make any difference to your position there if all the wastewater systems had been investigated by DOJ at one time during the proceeding?

A. If they were, and the utility could show that the costs were incurred to maintain compliance and minimize or

avoid increased plant costs.

Q. Or penalties? That's a part of the principle, isn't it, in one of these cases?

A. To avoid penalties?

Q. Avoid high penalties and civil penalties, to litigate, to avoid high penalties?

A. If they were prudent in acting to lower costs to the customer, to provide service to the customer, and they can -- and the utility can show that, then I think that those costs should be allocated to them.

Q. Now, that statement you just made, is that the Commission policy or is that your opinion?

A. I can't remember what I just said.

(Record read)

A. And the question is?

Q. Is that your opinion or are you stating Commission policy?

A. That's my opinion, because I don't believe the Commission takes any -- has any policy that says how to allocate between Florida Cities' systems, specifically direct.

Q. So that would be determined in this case as to how to allocate them?

A. That's correct.

Q. But if the evidence shows that DOJ and EPA had all

the systems in Lee County and Sarasota and Hillsborough and Brevard County under investigation, and as the process went on it dropped some of them, would that make a difference to you in this position?

A. I would think that you would have to look at it to see if there were any other costs in those other systems that the company can show that were reduced. Then possibly some of those costs should be spread to the other wastewater systems.

Q. What was reduced was the amount of penalty. Is that not sufficient?

A. I don't know if there was actually a penalty reduced.

Q. Well, a United States Marshal walked into the Florida Cities Water Company and said, United States Government wants $104 million from you, and it ended up that the judge says, no, it's only $309,000. Didn't Florida Cities make some progress there?

A. The proposed penalty was lower. I don't know if it was the final penalty, 104 million.

Q. You don't know if the final penalty was 104 million?

A. I don't know if there was a final penalty of 104 million.

Q. The penalty in the complaint, the requested

penalty was 104 million. Did you know that?

A. The requested penalty was 104 million, but that was not the final penalty.

Q. But through the litigation, would you agree that Florida Cities got it reduced to $309,000?

A. No, I would say that they were fined $309,000.

Q. As opposed to 104 million, is what the government wanted; is that not true?

A. I believe that that was the government's proposed penalty. I don't know if it was the final penalty, the 104 million.

Q. Do you know the final penalty was 309-, $310,000?

A. Yes, somewhere in that range.

Q. And you know the proceeding when the amended complaint was filed was $104 million?

A. Up to $104 million.

Q. And did you know that pursuant to legal action taken by Florida Cities Water Company, that motions filed in the court, the judge reduced the exposure to some $50 million?

A. I was aware that at some point that it was lower.

Q. And that -- did you know that that was the result of Florida Cities Water Company's motions?

A. No.

Q. Well, if it was, and if you'll accept that it was,

isn't that a step that Florida Cities should have taken to try to reduce the proposed penalties?

A. I don't know.

Q. You don't -- one of these cases we looked at said that it was okay or appropriate for a company to defend itself to try to reduce penalties.

A. There was one case that said that. There was another case that they had to show that -- excuse me, that they otherwise avoided litigation costs. There were several different circumstances out there.

Q. The first one, is that an accurate representation of what the Commission said in one of those cases, that it was appropriate for the Company to defend itself so it could reduce the penalties?

A. In that case it was.

Q. That's right. That's what I'm asking. The Commission has said that in a case, hasn't it?

A. In that case, based on the evidence in that record.

Q. Sure. Sure. The Commission wouldn't rule against the evidence, would it?

A. They shouldn't, and I don't think they did.

Q. Issue 3 in the prehearing statement, Staff takes the position that Florida Cities Water Company should have protested the EPA's permit denial. Is that an accurate

statement?

A. That's true.

Q. What would have been the litigation cost if Florida Cities had protested the EPA proposal?

A. I don't know.

Q. Do you know of anybody that does know?

A. No.

Q. Have you seen anything offered in this record yet that would indicate that it would be any different than what it is in this situation?

A. No, but I don't think that I would not respond to a permit denial that was --

Q. I'm not asking whether you would respond or not. I'm asking you what would be the difference in the dollar amount.

A. I don't know that. I haven't seen anything that would show that.

Q. And you don't have anything to compare it with?

A. No.

Q. You can't say that if they protested it would cost less than what it did the other way?

A. The Company has not shown that, no.

Q. And nobody else has?

A. No.

Q. Are you or the Staff intending to try to determine

what the litigation costs would have been if the protest had been filed?

A. I am not.

Q. Do you know of anybody on the Staff that is?

A. No.

Q. Do you know of any way to determine it?

A. No.

Q. Do you know if the DOJ would have filed its enforcement action even if -- regardless of whether Florida Cities had filed a protest? Do you have any information on that?

A. No.

Q. Do you know of anybody that does?

A. No.

Q. Did the Staff conduct a survey of other Commissions regarding this question of allowance of the litigation expenses?

A. I believe they did.

Q. Did you participate in that?

A. No.

Q. Did you ever see the survey results?

A. No.

Q. You didn't ask to see them?

A. I saw one response that came out of it that had to do with some federal program which is called the Super Fund

program, which has another name for it, which I don't know the name of it, but the Super Fund is a completely different circumstance, and I don't know much about Super Fund.

Q. I'm curious as to why you didn't see what the results were. You just didn't think they were relevant or what?

A. I didn't really look at it. I know that the Super Fund is a --

Q. Is that the only response?

A. Oh no. No, there were a lot of responses.

Q. But you didn't look at other responses?

A. I looked at that one. There was -- I can't remember what the name of the program is, but -- I glanced at them. I didn't really study them, so I can't remember exactly what they said.

Q. Why didn't you do that? You didn't think it would be helpful, or what?

A. It was the day before my testimony was due to be filed, the afternoon at 5:00.

Q. So you didn't have time to look at it?

A. Right.

Q. Was there any computation of the results from that survey that anybody made in the Staff that you know of?

A. There may have been some, but I never got a copy of it or saw it. It wasn't done in my section.

Q. What would be the use made of that, I wonder. Do you know? Of the results of that survey? You don't know?

A. If it were helpful to the Commission, if they're comparable. I don't know. That was the idea.

Q. You don't plan to introduce them into the hearing?

A. I don't.

Q. Do you know of anybody that does?

A. I don't think we will.

Q. Is it your understanding that Florida Cities contends that it was the payment of the litigation expenses and costs that was a threat to its financial well being? Is that your understanding?

A. I beg your pardon?

Q. Is it your understanding that it was -- that it is Florida Cities' contention that the payment or the threat of the payment of the litigation expenses is what was a threat to the financial well being of Florida Cities Water Company?

A. Is it my opinion that --

Q. No, no. In this case has Florida Cities contended that it was the litigation expenses that was a threat to its financial well being?

A. No.

Q. It was the threat of the civil penalties is Florida Cities' contention; is it not?

A. That's their testimony.

Q. Is a threat of bankruptcy serious to a utility and its customers?

A. It could be, depending on how real it is, how imminent it is.

Q. Well, is bankruptcy serious to a utility's customers?

A. I would think that bankruptcy is serious in general.

Q. Okay. Did I identify seven exhibits?

THE REPORTER: Yes.

MR. GATLIN: That's all I have. Thank you.

MS. GERVASI: No questions. We would like to read and sign.

(Hearing deposition concluded at 2:20 p.m.)

REPORTER'S DEPOSITION CERTIFICATE

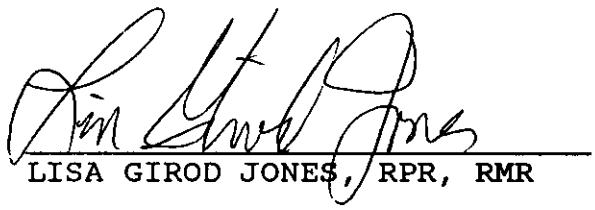
STATE OF FLORIDA)

COUNTY OF LEON)

I, LISA GIROD JONES, Registered Professional Reporter, certify that I was authorized to and did stenographically report the above-styled deposition; that a review of the transcript WAS requested; and that the transcript is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED this 13th day of July 1998.



LISA GIROD JONES, RPR, RMR

CERTIFICATE OF ADMINISTERING OATH

STATE OF FLORIDA)

COUNTY OF LEON)

I, LISA GIROD JONES, Registered Professional Reporter and Notary Public for the State of Florida;

DO HEREBY CERTIFY that the witness named herein personally appeared before me at the time and place designated and was duly sworn.

WITNESS MY HAND AND SEAL this 13th day of July, 1998, in the County of Leon, State of Florida.

Lisa Girod Jones, RPR, RMR
Notary Public, State of Florida

Lisa Girod Jones
MY COMMISSION # CC639729 EXPIRES
May 11, 2001
BONDED THRU TROY FAIN INSURANCE, INC.

not be needed. Therefore, given Betmar filed this application on May 1, 1997, we have determined that those services were not performed since the utility did not submit additional updated invoices associated with that $800. Therefore, we find it appropriate to allow $1,766 for the total engineering expenses, which is a reduction of $800 from the utility's request.

The utility has indicated in its filing that the amount for engineering expenses should be amortized over two years. However, we have determined that the amortization of these non-recurring expenses shall be in accordance with Rule 25-30.433(9), Florida Administrative Code. Rule 25-30.433(9), Florida Administrative Code, states:

> All non-recurring expenses shall be amortized over a 5-year period unless a shorter or longer period of time can be justified.

The utility did not provide justification for a shorter period of time. Therefore, the engineering expenses shall be amortized over 5 years in accordance with this rule. In addition, we find that the DEP permit application fee of $300 shall also be amortized over 5 years.

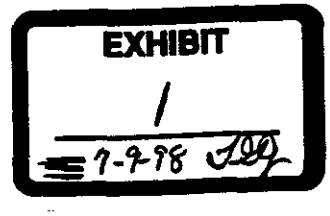
Legal Costs (Consent Order)

The utility has requested recovery of $1,245 for legal costs related to the DEP Consent Order. We have some concern allowing recovery of legal fees associated with the DEP Consent Order. Pursuant to the Consent Order, Betmar was fined in the amount of $6,900 for violations of DEP rules. The Consent Order stated Betmar had inadequate operator coverage in excess of two years, operated a corrosion control system without a permit, unapproved cross connections, several structural deficiencies and inadequate chlorine weighing devices.

Although we are approving some costs associated with the modification of the plant as required by the Consent Order, we are reluctant to allow recovery of legal fees associated with contesting the allegations of the Consent Order. The burden of proof in a Commission proceeding is always on a utility seeking a rate increase. Florida Power Corp. v. Creese, 413 So.2d, 1187, 1191 (Fla. 1982). Even if the legal fees were found prudent, we find that the utility has failed to meet its burden in that it failed to file supporting documentation to justify its requested legal expenses associated with the Consent Order. The utility's justification contained in its responses to our first data request was as follows:

> The legal costs of $1,245, shown in Section III, Pages 110-117 of the Limited Proceeding Application, are legitimate utility expenses which were incurred in connection with the Department of Environmental Protection Consent Order. As such, they are appropriate for recovery in this proceeding.

Based on the above, we find that the legal fees associated with the Consent Order were not justified. Therefore, the $1,245 for legal fees related to the DEP Consent Order are hereby denied.



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sold utilities because those expenses have become non-recurring. We disagree with OPC's proposed adjustment to reduce bad debt expense because the allowance for bad debt expense is greater than accounts receivable over 60 days. The allocation process takes into account the fact that customers may repay the utility for outstanding sums.

Since the level of bad debt expense less adjustments for the sold systems and the amount owed by CSCCA is reasonable, we do not believe that a further reduction to the allowance is necessary. Bad debt expense associated with M&N, Deltona Gas, and CSCCA totals $61,950. We adjusted this amount by 62.26%; thus, the total reduction for filed systems is $38,570.

Test Year Legal Expenses

DER/EPA Fines

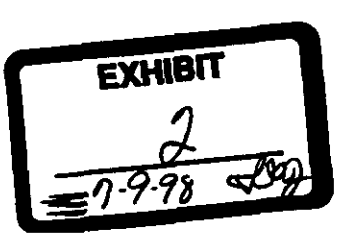
OPC witness Dismukes testified that legal fees associated with SSU's defending itself against DER fines and violations should be disallowed since the fines themselves are nonrecoverable. On cross-examination, however, Ms. Dismukes acknowledged that if the utility defends itself against DER action, the customers would benefit if rate base were lower because the utility did not have to make improvements. In its brief, OPC argues that these defense efforts accrue directly to the benefit of the stockholders just as the utility's avoidance of a fine does.

Utility witness Ludsen testified that not allowing SSU to recover expenses incurred in defending itself against the various regulatory entities would deny SSU a legitimately incurred cost of operating its systems. He further testified that knowledge of how DER operates is critical to the Commission's determination of the merit of this adjustment.

We believe that the evidence supports the contention that ratepayers benefit from the utility's defending itself in regulatory proceedings. If the utility succeeds in its efforts, rate base or other expenses may be lower. We, therefore, find it appropriate to allow the utility to recover legal fees associated with DER/EPA violations or fines.

Developer Agreements

Exhibit No. 53 contains the utility's response to OPC interrogatory no. 272. In this response, SSU asserted that legal fees regarding developer agreements should be allowed in test year



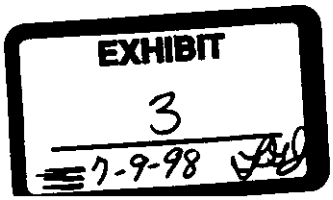
The record supports two adjustments. Accordingly, we have reduced bad debt expense by $703 to reflect the sale of the Deltona gas systems, and by $1,406 to reflect the end of the receivership of M&M Utilities. The $1,406 adjustment is Marco Island's allocated share of a $30,000 total company adjustment. We agree, however, with Ms. Kimball that the other proposed adjustments are not appropriate.

Test Year Legal Expenses

OPC witness Dismukes testified that the utility's legal expenses should be disallowed to the extent they relate to DER fines and violations. She argued that legal fees to defend the utility in such proceedings should be removed since the fines are recorded below-the-line. Because the utility could not separate legal fees to contest EPA (Environmental Protection Agency) or DER violations from other services related to the environment, she proposed eliminating all legal costs that could not be segregated. She also testified that no similar legal fees were incurred from 1988 to 1990. She, therefore, recommended eliminating $20,738 for such costs or, in the alternative, amortizing the subject payments over 4 years for a $15,554 reduction. Ms. Dismukes also recommended disallowing legal charges associated with legislation to establish the value of utilities under condemnation actions.

Utility witness Teasley rebutted Ms. Dismukes' proposed adjustments concerning these legal expenses. She testified that denying recovery of legal fees to oppose alleged violations by DER/EPA would thereby deny recovery of legitimately incurred costs of operation. She argued that denying recovery of legal fees simply because a fine was paid would have a chilling effect on the utility's willingness to dispute alleged violations, which could be detrimental to customers.

Ms. Teasley testified that Ms. Dismukes' experience did not reveal any dealings with DER/EPA or familiarity with their violation and enforcement measures. Such exposure was essential, she asserted, to evaluate the merit of Ms. Dismukes' proposed adjustment. She indicated that capitulation to all regulatory prescriptions would be costly for customers, and that denying recovery of legal fees might produce this adverse impact. In a more general sense, she testified that attorneys providing environmental-related services may also be involved in settlement of alleged violations, and legal costs in those situations are inexorably intermixed. She testified that while SSU did not admit



any violation during 1991, consent orders are sometimes accepted because further legal proceedings may be more costly, and that the Commission should not presume that such acquiescence denotes guilt.

Ms. Teasley disagreed with Ms. Dismukes' proposal that these legal costs should be amortized. She explained that while each separate legal proceeding has a certain finality, the utility will inevitably incur legal expenses every year in some other category. Ms. Teasley testified that legal expenses for the 1990 and 1991 calendar years were $116,838 and $109,057, respectively, that $240,447 was projected in 1992, and that the comparative test year provision for legal expenses was $122,701. She further testified that 1992 legal costs included substantial sums to resolve environmental issues, which she indicated should not be considered unusual given increased DER/EPA actions to enforce compliance with pertinent regulations.

Ms. Teasley also disagreed with Ms. Dismukes' proposal to remove legal expenses related to valuation of condemned utility systems. She explained that the disputed expenses were not lobbying expenses, as suggested by Ms. Dismukes, but, rather, expenses to research statutory protections that apply when local governments propose condemnation of utility facilities. She testified that such research had application to SSU in relation to discouraging condemnation of its own facilities.

Based upon evidence in the record, we have allowed the disputed legal costs. The test year provision for legal fees does not appear unusual when compared to similar expenses in other referenced periods. The suggestion that legal costs should be disallowed because they were incurred to defend the utility against alleged violations presupposes that the utility should acquiesce in all cases, whether or not fault exists. We agree with Ms. Teasley that litigation may be appropriate even when imposition of a fine is a possibility, when compliance with a disputed regulation will create adverse economic consequences. On other occasions, payment of a fine pursuant to a consent order, even when "guilt" is not admitted, may result in avoidance of further litigation costs that would be detrimental to a utility's financial condition. An absolute prohibition against recovery of legal fees in any proceeding where a fine may be imposed would be impractical.

Furthermore, we do not agree with OPC's proposal to disallow costs related to condemnation measures. We believe the utility is entitled to discover and, if necessary, promote those practical

measures that will prevent condemnation of its systems. Customers benefit from the economies of scale that are preserved when the utility protects its systems against condemnation. Accordingly, we have not reduced the utility's test year expenses.

Salaries Related to Gas Promotional Employees

OPC Witness Dismukes testified that test year expenses should be reduced to reflect wages and fringe benefits related to gas promotional activities. She testified that such removal was appropriate since other charges to promote gas sales are excluded. The utility did not rebut Ms. Dismukes' proposed adjustment. In fact, the utility agreed that a reduction of $842, or the allocated portion, was appropriate. The utility, however, did not submit any documentation that would demonstrate that the disputed expense was an allocated charge. Accordingly, since some reduction is appropriate, and no evidence was produced to show that the subject expense is allocated, we have reduced test year expenses by the $3,158 amount proposed by Ms. Dismukes.

MPL Organizational Development Charges

OPC witness Dismukes testified that SSU incurred $16,384 in expenses related to MPL's Organizational Development program during the test year. She testified that, based on what appeared to be a trend of declining monthly amounts and an absence of charges between May and August 1992, the reported expense seemed abnormal and nonrecurring. She recommended amortizing the $16,384 amount over 4 years.

Utility witness Kimball testified that the variation in monthly charges simply shows when MPL individuals are directly involved in SSU's organizational development activity. She testified that, typically, an MPL employee from Organizational Development will, upon request, visit SSU as it enters different phases of its development, that several months may pass without need for such assistance, but that this activity is an on going process. She testified that SSU's cost for calendar year 1992 was $11,363 and $11,967 was budgeted for 1993. Before 1991, the utility deferred organizational development costs for amortization over the period that presumably received a benefit, perhaps 12 to 18 months. Beginning in 1991, the utility reportedly recognized that these costs were recurring in nature and the charges were thereafter fully expensed. And, as a further reflection of that change, a $8,397 amount deferred in 1990 was expensed in 1991.

retainage on invoices from construction vendors to ensure contract performance to the extent that the company practices retainage of 10% on specific projects in the Environmental Cost Recovery Clause.

We approve as reasonable the parties' stipulation that an adjustment need not be made for the recording error made in SO_2 Allowances as reported in Audit Disclosure No. 2 of the Florida Public Service Commission's Environmental Compliance Cost Adjustment Audit Report for the Period Ended September 30, 1996. The error was due to inappropriate allocation of Plant Daniel's SO2 Allowances. The company has already made correcting entries for the error.

We approve as reasonable the parties' stipulation that Gulf Power recover legal expenses incurred to assure compliance with revisions to Clean Air Act Amendment Title V provisions through the Environmental Cost Recovery Clause. Legal expenses directly associated with environmental compliance activities approved by the Commission that are incurred in order to comply with "environmental laws or regulations," as defined by Florida Statutes, Chapter 366.8255, should be recovered through the Environmental Cost Recovery Clause. As stated in Order No. PSC-96-1171-FOF-EI dated September 18, 1996, "However, the Commission will continue to examine each such expenditure on a case-by-case basis in order to determine the prudence of its recovery through the clause."

We approve as reasonable the parties' stipulation that an adjustment need not be made for the O&M expenses reported in Audit Disclosure No. 4 of the Florida Public Service Commission's Environmental Compliance Cost Adjustment Audit Report for the Period Ended September 30, 1996. It is our understanding that the Company has made correcting entries, including any applicable interest, for these O&M expense items in June and July 1997.

In Order No PSC-95-0384-FOF-EI dated March 21, 1995, we approved "...only the meal costs incurred for an employee's own consumption while traveling on environmental cost recovery clause business" for recovery through the Environmental Cost Recovery Clause. In addition, the Company agreed in a letter dated February 2, 1995 (Staff Composite Exhibit for Gulf) to establish a policy not to recover these types of costs through the clause. Audit Disclosure No. 4 shows that meal costs were among the O&M items included for recovery and later adjusted by the Company.

Tampa Electric Company

We hereby defer the issue concerning whether an adjustment for SO_2 Allowances, if any, should be made to Tampa Electric Company's Environmental Cost Recovery Factor as a result of our decision in Docket No. 970171-EU to the August, 1998, Environmental Cost Recovery Clause hearing in order to implement our vote in that docket.

We approve as reasonable the parties' stipulation that an adjustment shall not be made for the expensing of a packing tower through the Environmental Cost Recovery Clause in 1996 which was purchased and charged to an inventory account in 1992 as reported in Audit Disclosure No. 1 of the Florida Public Service Commission's Environmental Compliance Cost Adjustment Audit Report for the period ended March 31, 1997. The packing tower is a consumable item that is held in inventory until used. It should be treated

EXHIBIT 4 1-998 DG

depreciation. This equates to $33,524,000 ($20,910,000) for 1988; $50,000,000 ($31,185,000) for 1989; and $156,000,000 ($97,297,000) for 1990.

We will reduce forecasted expenses for 1988, 1989 and 1990 by $337,000 per year ($210,187 per year on an NOI basis) to be recognized as adjustment relating to JDIC (investment tax credit) as required by Order No. 16257. We will also relieve Southern Bell of the booking of any further depreciation related to the intraLATA bill and keep surplus. Order No. 18404 puts the amount of the surplus at $5,248,000 for 1988; $7,584,000 for 1989; and $9,179,000 for 1990. Because these amounts were included in Southern Bell's budgeted revenues no additional adjustment is needed for 1988-1990 for these amounts. We will also reduce 1988 intrastate expenses by $1,733,754 ($1,081,000 on an NOI basis). These are expenses incurred in the settlement of antitrust cases. Southern Bell has not shown these expenses to be reasonable or to the benefit of Florida ratepayers.

The above adjustments require an interest and intercompany settlement adjustments to the NOI. Our totals for NOI appear as Attachment 2.

C. Capital Structure

Capital structure was a hotly-contested issue in this case. OPC and other intervenors urged that the Commission employ a hypothetical capital structure while Southern Bell argued that the Commission use the company's actual capital structure. For the reasons discussed below, we find that Southern Bell's actual capital structure with adjustments is reasonable and should be used for ratemaking purposes. This results in equity ratios of 60.5% for 1988; 60.94% for 1989 and 61.56% for 1990. Attachments 3, 4 and 5 reflect the numbers associated with these equity ratios for 1988, 1989 and 1990, respectively.

The intervenors in favor of a hypothetical capital structure argued that the actual capital structure contained too much equity, thus imposing an excessive revenue requirement on Southern Bell's ratepayers. In their view, such a capital structure subsidizes competitive ventures by Southern Bell's parent company. Despite these arguments, we do not find Southern Bell's actual capital structure unreasonable. Southern Bell's business risk has increased, requiring a higher equity ratio. A survey of other local exchange telephone companies showed equity ratios in excess of 60%. Imputing a lower equity ratio reduces the company's ability to earn on its actual capital structure. Imputing a lower equity ratio could also adversely affect the company's ability to react to changes in its operating environment and could possibly result in a lower bond rating for the company.

Southern Bell recently attained an AAA rating by Standard & Poor's and an Aaa rating by Moody's. Although we are encouraged by this move because it translates into an increased ability to secure financing at a lower cost, we intend to monitor the equity ratio closely in the future. If it later appears that the capital structure is imprudent in light of the current economic and operating environment, we have the authority to impute a capital structure.

We accept some of Southern Bell's prorata adjustments to balance the capital structure and rate base and reject others. We accept the prorata adjustments for excess plug-ins, plant under construction not in rate base, ENFIA and BellSouth

EXHIBIT
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an increase of 5.13% results. Comparing these percentage increases for salaries and wages, Ms. DeRonne testified that the utility's increase to its 401k expenses is inconsistent. Further, Ms. DeRonne provided a comparison of the percentage change in 401k expenses beginning with 1992 through projected 1997. This comparison indicated that the 27.6% increase is also inconsistent with historical cost level increases.

In addition to the identified inconsistencies, in response to a discovery request, UWF indicated that the projected 401k expenses are based on 100% employee participation, while the actual participation level was only 86%. With respect to this information, Ms. DeRonne testified that it is unreasonable to assume 100% participation in UWF's 401k plan, as well as to consistently contribute at the maximum level allowed by the plan.

As a result of the inconsistencies between the increase in salaries and wages and the increase in 401k expenses, Ms. DeRonne proposed an adjustment to the test year level of employee savings plan expenses. She testified that there is a direct correlation between the level of salary and wage expenses and the employee savings plan costs. Therefore, Ms. DeRonne proposed to reduce 401k expenses by $4,665 and $8,292 for water and wastewater, respectively, which reflect her proposed increase in test year salaries and wages over the base year level.

In response to Ms. DeRonne's adjustments, Mr. Jost provided an updated calculation for test year 1997 401k expenses. Mr. Jost testified that the revised expense levels were based on the contribution levels of the current participants, applied to the corresponding 1997 test year wages. Exhibit No. 11 indicates revised test year expenses of $28,990 and $51,538 for water and wastewater operations, respectively. The utility's revisions reflect a reduction to expenses of $4,018 and $7,144 for water and wastewater, respectively.

Based on the evidence of record, it appears that the utility has overstated its projection of the 1997 level of employee savings expenses. According to Ms. DeRonne, there is a direct correlation between salaries and employee savings. Although we agree with her assessment to some degree, such as within a specific pay period, we believe that when looking at a two-year time frame, the correlation may not be as clear. Over a period of time, it is possible that employees' contribution levels may change, or that employees who previously did not contribute to the plan would decide to participate. Therefore, we disagree with Ms. DeRonne's proposal to calculate test year 401k expenses based on the increase in salaries from the base year forward. However, we find that based on the evidence of record, an adjustment to test year expenses is warranted. We find that it is reasonable to calculate the 1997 401k expense projection based on the current level of participating employees. Accordingly, we hereby reduce test year expenses by $4,018 and $7,144 for water and wastewater, respectively.

Legal Costs for Defense of EPA or DEP Violations

OPC witness Larkin identified expenses included in the base year related to legal fees incurred to defend EPA and DEP violations. He testified that the utility's ratepayers should not be required to finance such violations, as these expenses are unrelated to the provision of water and wastewater service. As such, Mr. Larkin proposed adjustments to

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remove these expenses from the test year. By applying the 1996 and 1997 inflation factors to the base year amount of $431, he proposed to reduce water operations by $163 and wastewater operations by $290.

In its brief, UWF argued that the utility has a good record of compliance with environmental rules and regulations. In support of this statement, the utility referred to the testimony of an employee of the Department of Health and Rehabilitative Services (HRS) and two employees of DEP, who appeared on behalf of staff in this proceeding. In further support of UWF's position that these legal expenses should be allowed, in its brief, the utility referenced Order No. PSC-93-0301-FOF-WS. By that Order, the Commission determined that it was appropriate to allow legal expenses incurred for defense of DER (now DEP) and EPA fines, as these costs could serve to avoid or reduce fines, or eliminate or postpone large system improvements.

Although we find that fines associated with violations of DEP and EPA should be borne by the shareholders of the utility, we believe it is reasonable for UWF to recover the costs of defending such fines. As the Commission previously concluded, the legal expenses incurred for defending fines from DEP and EPA could facilitate avoided or a reduced amount of fines. Therefore, we find that no such adjustments are necessary to test year expenses.

Information Technology (I.T.) Project

As UWF witness Cleveland testified, and as reflected in the MFRs, UWF's Information Technology (I.T.) project provided for the development and implementation of new systems for Integrated Financial Management, Customer Service Information, and associated Technical Architecture projects. On rebuttal, utility witness Jost identified cost savings of $71,074 which represented anticipated cost savings for 1997 related to the new Customer Service Information system.

The evidence of record indicates that the savings were related to the removal of salaries and associated benefits of two customer service representative positions. Since we have found it appropriate to remove the salaries and associated benefits as addressed above, no further adjustments are necessary related to this issue.

Vehicle Leasing Expense

In the MFRs, the utility's test year level of transportation expense is indicated as $514,031. This amount represents an increase of $174,861 over the base year expense level. Utility witness Jost testified that UWF recently initiated a program of leasing vehicles. Mr. Jost indicated that the increase in transportation expenses is a reflection of the lease program being fully implemented in the test year.

On rebuttal, utility witness Sambamurthi testified that a wide variety of vehicles are required for UWF in order to operate its system. Vehicles such as dump trucks, heavy and light duty pick-up trucks, sedans, and vans are needed for the utility's various employees in order to oversee the facilities and to provide service throughout UWF's service area, which is located in three counties.

In its MFRs, the utility requested relocation expenses of $5,483. According to data contained in the utility's late-filed exhibit, SSU incurred relocation expenses of $59,167 during the test year. However, the same exhibit indicates that as of July 31, 1992, SSU's actual relocation expenses were $6,795. There is no other record evidence or testimony on the reasonableness of these expenses. OPC argues that the requested expenses are excessive in view of the actual expenses incurred in 1992.

Based on the foregoing, we find that the appropriate amount of relocation expense should be based on the actual 1992 expenses. Therefore, we have annualized the actual relocation expense incurred through July 31, 1992, averaged with the annual budgeted amount to derive an appropriate amount of relocation expense. Accordingly, we have reduced test year O&M by $1,681 and $1,316 for water and wastewater, respectively.

Test Year Legal Expenses

In the MFRs, a portion of the allocated A&G expenses included non-rate case related legal expenses. OPC offered no testimony in support of its position that this amount should be reduced by the amount allocated for defense of DER and Environmental Protection Agency (EPA) fines.

Utility witness Ludsen testified that Lehigh should pay its allocated share of legal expenses incurred in defending SSU systems from the various governmental entities that levy fines. Witness Ludsen further testified that negotiations which may avoid or reduce fines, or eliminate or postpone large improvements to systems, are included in this expense. He also testified that allocation of legal expenses maintains stable cost assignments to systems on a year-to-year basis.

Based on the foregoing, we find it appropriate to allow the utility to recover its legal expenses relating to permitting and compliance. Accordingly, no adjustment to legal expenses has been made.

Test Year Allocated Expenses

In an earlier portion of this Order, we determined the appropriate allocation method for these expenses. We also determined that no adjustment to these expenses for the utility's acquisition efforts was appropriate. Based on the foregoing, we

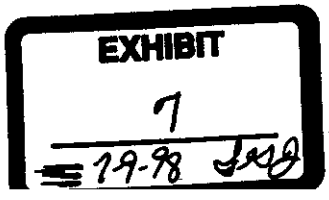

EXHIBIT NO. _____

DOCKET NO.: 971663-WS -- PETITION OF FLORIDA CITIES WATER COMPANY FOR LIMITED PROCEEDING TO RECOVER ENVIRONMENTAL LITIGATION COSTS FOR NORTH AND SOUTH FT. MYERS DIVISIONS IN LEE COUNTY AND BAREFOOT BAY DIVISION IN BREVARD COUNTY.

WITNESS: Gerald Allen
Rebuttal

ON BEHALF OF: Florida Cities Water Company

DESCRIPTION: Transcript of Deposition of Mr. Gerald Allen taken on July 30, 1998

PROFFERING PARTY: STAFF

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663-WS EXHIBIT NO. 18
COMPANY/ Staff
WITNESS:
DATE: 5-12-98

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of	:	**DOCKET NO. 971663-WS**
Petition of Florida Cities Water Company for limited proceeding to recover environmental litigation costs for North and South Ft. Myers Divisions in Lee County and Barefoot Bay Division in Brevard County.	:	

TELEPHONIC DEPOSITION OF: **GERALD ALLEN**
Located in Sarasota

TAKEN AT THE INSTANCE OF: The Staff of the Florida Public Service Commission

CONDUCTED FROM: Gerald L. Gunter Building
2540 Shumard Oak Boulevard
Room 362
Tallahassee, Florida

TIME: Commenced at 1:30 p.m.
Concluded at 2:38 p.m.

DATE: **Thursday, July 30, 1998**

REPORTED BY: JOY KELLY, CSR, RPR
Chief, Bureau of Reporting

APPEARANCES:

TIM VACCARO, Florida Public Service Commission, Division of Legal Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0870, appearing on behalf of the **Commission Staff.**

HAROLD McLEAN, Associate Public Counsel, Office of Public Counsel, 111 West Madison Street, Room 812, Tallahassee, Florida 32399-1400, on behalf of the **Citizens of the State of Florida.**

B. KENNETH GATLIN, Gatlin, Schiefelbein and Cowdery, 3301 Thomasville Road, Suite 300, Tallahassee, Florida 32312, on behalf of **Florida Cities Water Company.**

ALSO PRESENT:

TRISH MERCHANT, FPSC W&W

BART FLETCHER, FPSC W&W

ELDA QUIJANO, FPSC W&W

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S T I P U L A T I O N

IT IS STIPULATED that this deposition was taken pursuant to notice in accordance with the applicable Florida Rules of Civil Procedure; that counsel present stipulate that the witness is the person he identified himself as; that objections, except as to the form of the question, are reserved until hearing in this cause; and that reading and signing was not waived.

IT IS ALSO STIPULATED that any off-the-record conversations are with the consent of the deponent.

MR. VACCARO: We'll go ahead and take appearances. Tim Vaccaro on behalf of Florida Public Service Commission Staff.

MR. GATLIN: B. Kenneth Gatlin on behalf of Florida Cities Water Company.

MR. McLEAN: Harold McLean on behalf of the citizens of state of Florida.

MR. VACCARO: Before we get started, just one preliminary matter I want to ask Mr. Gatlin about. Normally we have the usual stipulations.

MR. GATLIN: Yes, that's fine. And we don't waive.

MR. VACCARO: Okay. We'll go ahead and get started.

- - - - -

GERALD ALLEN

was called as a witness telephonically and sworn to tell the truth by the notary present with the witness, testified as follows:

EXAMINATION

BY MR. VACCARO:

Q Mr. Allen, I want to refer you back to some prior rate cases involving Florida Cities. First of all, I'd like to look back to the application for a rate increase for the North Fort Myers division, which

was in Docket No. 910756-SU, which involved Waterway Estates. And what I'd like to ask you is Waterway Estates was required to upgrade its treatment facilities to advanced wastewater treatment, was it not?

A Yes.

Q Okay. And Florida Cities was also required to allocate its effluent outfall line; is that correct?

MR. GATLIN: Allocate it?

MR. VACCARO: I'm sorry. Relocate it.

Q **(By Mr. Vaccaro)** To relocate its effluent outfall line?

A Yes.

Q And subject to check, the amount to upgrade the AWT was approximately about $4.8 million; is that correct?

A That's in the range. I'm not certain of the number, but I believe that's in the range, yes.

Q Okay. Do you know how much it cost to relocate the effluent outfall line?

A No, I don't recall that cost.

Q Okay.

A I certainly did it but I just don't recall.

Q Okay. Subject to check, in that rate case

did the Commission determine the plant was 100% used and useful?

MR. GATLIN: When was the Order on that?

MR. VACCARO: This was July 1st, 1992, Order PSC-92-0594-FOF-SU.

MR. GATLIN: Could you just give us a reference in the Order where it says that, and maybe we can just do it that way.

MR. VACCARO: Okay. I'll go back and check myself here. Basically on Page 7 of the Order it says that "The Utility requested that its collection system be considered 100% used and useful in part because it was fully contributed --" oh, I'm sorry.

It says at the top "Based on the evidence in the record, we find that the treatment plant is 100% used and useful."

MR. GATLIN: Okay. If that's what the order says.

MR. McLEAN: Would you repeat the Order number? I'm sorry.

MR. VACCARO: That is 920594-FOF-SU. I'm sorry that I don't -- didn't get copies of these sent down to you. Things have been kind of hectic here. Our computers have been out for a couple of days and it's been a little hectic getting all of the questions

and everything put together, but I appreciate you bearing with us.

Q **(By Mr. Vaccaro)** And, subject to check, in that Order, Florida Cities was granted a 144.10% revenue increase for wastewater, and it's under the Revenue Requirement for Page 19.

A Again, I don't have the order, but if you have the Order there --

MR. GATLIN: Whatever the Order says. If you say that's what the order says --

WITNESS ALLEN: I will accept that.

Q **(By Mr. Vaccaro)** Well, assuming that that's the case, would you agree that the customers at Waterway Estates are paying the costs associated with bringing the wastewater treatment plant in compliance with the Clean Water Act?

A Well, at that particular time, yes, those improvements were -- some aspects of the improvements, at least, had to do with bringing the facility up to AWT standards and relocating the outfall.

I'm sure there were some other improvements that may not have fit that description of the purpose but -- probably some replacements and other things, but overall that is basically correct.

Q Okay. Are you aware of any reductions in

capital expenditures at Waterway Estates resulting from the EPA litigation?

A No, not as a direct result of that litigation.

Q Okay. So the EPA litigation did not reduce the amount of capital investment required by EPA and DEP for Waterway Estates then?

A Certainly not for that particular improvement, if I understand your question correctly.

Q Yes.

MR. GATLIN: That Florida Cities would have spent less, or less because of the litigation?

WITNESS ALLEN: I'm not sure I understand the question.

Q **(By Mr. Vaccaro)** Okay, I'm sorry. Basically that they would have spent less because of the litigation. That is not the case, is it? Or they did not spend less as a result of the litigation?

MR. GATLIN: On plant?

MR. VACCARO: On plant.

WITNESS ALLEN: No, because -- I don't think one could say that because the litigation actually followed the completion of those improvements.

The suit was filed in -- I believe after that case, in October or November the 1st, I believe,

1993, so the litigation didn't exist at the time.

Q (By Mr. Vaccaro) Okay. Now I'd like to refer you to another rate case which was the application for rate increase for the Barefoot Bay division, and the Order I'm looking at is PSC-961147-FOF-WS. And without having to get into too much details there, you would agree, would you not, that there were costs involved for AWT upgrades for Barefoot Bay?

A Yes.

Q And I think we're talking about close to $6 million?

A That sounds like the order of magnitude, yes.

Q Okay. And there was a rate increase in that case, correct, for wastewater?

A Yes.

Q Okay. And, again, would you say, regarding the Barefoot Bay customers, that those customers are also paying the costs associated with bringing the wastewater treatment plant into compliance with the Clean Water Act?

A Well, at least they are paying part of the cost because the entire facility was not deemed 100% used and useful, if I recall.

Q Okay. And, again, are you aware of any capital -- reductions in capital expenditures resulting from the EPA litigation for Barefoot Bay?

A No.

Q Okay. Now I'm going to change gears for a minute and talk about the facts surrounding the denial of the MPDES permit for Waterway Estates.

Is it true that Florida Cities conducted extensive discovery during that EPA litigation concerning the basis for the denial of the Waterway Estates MPDES permit?

A Florida Cities did conduct discovery. Whether I could -- perhaps it was intensive discovery.

Q Was that intensive or extensive? I said extensive. I don't know if that makes a big difference for you.

A Okay. I really don't know how to characterize it. I was not directly involved in -- I didn't visit any of the sites or assist any of the attorneys in that process, but I would say with respect to the EPA, Region 4 at least, it was probably extensive discovery.

Q Okay. Would you agree that that permit denial was an issue raised by Florida Cities during the EPA trial?

A It was an issue raised, but it's my understanding that the -- because of the Statute of Limitations that that was perhaps an issue in mitigation only. But, again, that's getting into a legal area that probably I don't have the expertise to comment on.

Q Let me refer you to your rebuttal testimony.

Actually, Mr. Allen, we've got somebody calling and I don't know if this is --

(Telephone rings in Tallahassee deposition room.)

WITNESS ALLEN: Sure.

MR. VACCARO: -- if it's related to our deposition or not.

(Discussion off the record.)

Q **(By Mr. Vaccaro)** I want to refer you to Page 9, Line 9, of your rebuttal testimony, where you basically state that "Even if Florida Cities had challenged the permit denial and prevailed, that the EPA would have required Florida Cities to immediately upgrade to AWT and relocate the outfall." Does that sound accurate to you?

A Yes.

Q Okay. If that's the case, then why did Florida Cities conduct discovery about the denial of

the permit?

A Well, again, you're asking me a question that probably should be directed toward the lawyers involved.

Q Okay.

A Because I'm not sure that it was totally understood by the lawyers exactly what went on in that regard.

Q All right. That's fine. Did Florida Cities have an operating permit from the federal DER in 19 -- I'm sorry, from the Florida DER in 1986 which permitted discharge?

A Yes.

Q Okay. And did the operating permit include any language requiring Florida Cities to upgrade the AWT and relocate the effluent outfall?

A Subject to checking the operating permit, I don't believe it did. I'm fairly confident it did not. I don't have it in front of me but I do not recollect that permit having any such requirements.

Q Okay. Thank you. That permit was issued in 1983 and expired in 1988. Does that sound correct?

A It sounds correct. I'm not sure when it was issued. I know it expired, I believe, in August of 1988.

Q Okay. Isn't it true that the Florida DER did not formally require that the Waterway treatment plant be upgraded to AWT until 1988 when the permit would expire?

A That is correct.

Q Okay. Would the EPA have required an upgrade AWT before the Florida DER formally required the upgrade in '88?

A Well, I can only respond to that by the action that the EPA ultimately took. And that was with the Second Consent Order, which was issued in, I believe, '89, did require -- actually it offered an option to cease the discharge or relocate the outfall and upgrade the plant.

Q Okay. But you said that was '89? In 1989?

A Well, subject to check, I can -- yes, 1989.

Q Okay. I want to refer you to Page 8 of your rebuttal testimony, Lines 20 through 22, I believe you basically indicate that "EPA's dissatisfaction arose over the timeliness of completing the work set forth in the action plan." Does that sound right?

A That is correct.

Q Okay. To what action plan are you referring?

A I'm referring to the -- either upgrading the

plant, relocating the outfall or otherwise ceasing the discharge.

Q Was that plan put in writing?

A I believe that in the administrative order, as well as the MPDES permit that was issued in 1989, included a schedule for completing these improvements. And that schedule called for the outfall to be relocated by August the 1st, 1991, and called for meeting the advanced wastewater treatment water quality standards by November 1st, 1991.

Q My understanding is that there were two administrative orders, a 1987 and a 1989?

A That is correct.

Q To which one are you referring?

A I'm referring to the 1989 administrative order. It's Order No. 89-109.

Q Okay. With that action plan, are we talking a time period of 1988 to 1992? I'm sorry, '89 to '92?

A Well, it had some milestones, I believe, in the schedule. I don't have that with me. That's exhibit MA-9, Mike Acosta's exhibit. I don't have that schedule in front of me. I can get it.

Q We can just look that up. Thank you.

Let's assume for the moment that EPA had granted the MPDES permit in 1986, isn't it true that

that permit would have expired in five years, or roughly 1991?

A Well, I'm not sure of the term of those permits, whether they were five years or six years, but --

Q Okay. That's fine. Let's just say assuming that permit had been granted, do you believe that DER state certification would have addressed the zero discharge requirement?

A Yes. I believe DEP's recommendations were set forth in certification worksheets that really gave the Company two options. One was to cease the discharge and go to a total reuse system for disposal or upgrade the plant to AWT standards and relocate the outfall.

Q That worksheet was prepared as a result of EPA's denial of the permit, wasn't it?

A There's some confusion regarding that worksheet. We can't -- the date on it is not -- the date on it is not legible. Again, one can presume that that worksheet was submitted in response to the proposed denial. At least based on the documents we have, we're uncertain of that. That's an assumption.

Q Okay. Would DER require treatment upgrade through this type of document as opposed to, say, a

permit renewal or a consent order?

MR. GATLIN: The document would be in the worksheet?

MR. VACCARO: I'm sorry, yes, the worksheet.

WITNESS ALLEN: Well, the DEP would have required that upon expiration, I believe, of the operating permit.

Q Okay.

A But again if we make the assumption that the worksheet was filed by the DEP with the EPA in response to the notice of tentative denial of the MPDES permit, then that would be the recommendation that the DEP was making to the EPA regarding the denial.

Q Okay. Assuming that the permit had been granted, okay, and we're looking at that permit not expiring for few years, whether it be '91 or '92, isn't it true that that would have given the utility additional time to evaluate land disposal options before the upgrade was required by DER?

A First, I don't believe that the EPA would have issued a permit unless it had those conditions that were requested by the DER, and that is to either cease the discharge or upgrade and relocate the outfall by September -- or by the expiration of the

DEP operating permit, which was August 19th, '88. I don't believe that the EPA would have overuled the DER in that regard.

Q But the DER, though, that was in response to the denial, was it not?

A Yes.

Q So don't we sort of have a Catch-22 going on there?

A Well, I'm not sure it's a Catch-22 because, again, if we make the assumption that the worksheet was filed in a timely fashion in response to the tentative denial, then I think we have to conclude that the DEP was supporting the denial, but with the caveat that the Company have two options with regard to the discharge -- well, either eliminate the discharge or upgrade and relocate the outfall.

Q Okay.

A So, continuing, had the MPDES permit been issued, I believe it would have contained those provisions.

Q Okay. Thank you. I'd like to talk a little about one of the topics that's come up in this case. It has to do with the Utility's position regarding potential bankruptcy that might have resulted from deteriorating service to the customers. That is the

Utility's position, isn't it?

MR. GATLIN: Well, I think that this witness hasn't testified to it.

MR. VACCARO: Okay.

MR. McLEAN: Did the witness say that?

MR. GATLIN: No, I said that.

MR. McLEAN: Is there an objection to the question?

MR. GATLIN: No. I was trying to be helpful. I think that this witness has not testified to bankruptcy, unless I'm wrong -- and, Mr. Allen, please correct me if I'm wrong about that.

WITNESS ALLEN: Counsel is correct in that regard. I don't believe I stated that the Company has gone into bankruptcy. I believe I stated that the Company would have been in financial peril.

Q **(By Mr. Vaccaro)** Okay. Even if you didn't testify to this, let me go ahead and pursue this questioning. If we have a problem we'll deal with it.

Being you operate the Utility, do you believe that bankruptcy would have resulted in deteriorating service to the customers?

A I believe it would have.

Q Okay. Could you provide some examples of that?

A Well, it's my understanding that in the case of bankruptcies, that first a utility's, or a company for that matter, credit line is -- drys up. It can no longer borrow funds, or it's extremely difficult to borrow funds. In order to be able to operate, its under the supervision of a bankruptcy court. And it constantly has to go to that court in order to determine who is going to get paid, how its revenues are going to be -- that are coming in, are going to be used. And I believe that because of the strangulation with respect to funding, that services would have suffered.

Q Do you think service would have been interrupted?

A I think that's possible. I wouldn't suggest that service would necessarily have been interrupted on a long term basis, but I think that it's possible that service could have been interrupted if something had occurred which could have caused an interruption of service, and large sums of money was required to remedy that situation, yes -- and the company could not get the funds, yes, I think there could have been interruption of service. I'm not suggesting over time that there would have been a long-term interruption, but certainly there could have been shorter term

interruptions.

Q Okay. Would the utility have deferred maintenance on its equipment under that scenario, under the bankruptcy scenario?

A Absolutely. But, again, assuming that it would be a simple case where it had to seek authority from the court to expend the revenues that were coming in.

Q And you think this would have immediately caused a problem?

A Well, I'm not suggesting it would have been a problem the next day, but I think that in a period of time it could have been a problem, a relatively short period of time.

Q Would the utility also have deferred its scheduled capital projects?

A Yes.

Q Okay.

A Unless it had the funds. Typically, again, the use of the funds are severely restricted under those proceedings. Furthermore, it certainly would not have the ability, except under extraordinary circumstances, to have borrowed funds.

Q Do you think that would have caused service problems then?

A Sure.

Q Okay. Are you aware of any method, or do you have any ideas on a method to quantify the benefit to the customers for the Utility not going into bankruptcy?

A Well, I'm not sure I can quantify it -- but, again, I'm not certain I know how to quantify it except to say I believe service, quality service would have suffered.

Q Okay. I'd like to ask you some questions. I realize these actually go to Mr. Baise's prefiled testimony but I'll ask you to bear with me for a moment.

Subject to check, in Mr. Baise's prefiled testimony he indicates that Florida Cities personnel handled a lot of the work required in response to the DOJ production of documents request from July and August of 1994 for the EPA litigation, including production of significant amounts of financial data from Florida Cities computer database. Does that sound correct to you?

A Yes.

Q Okay. And were all of the Florida Cities employees who performed this work compensated through their respective salaries?

A Yes.

Q Okay. Was this the case for all of the DOJ production of document requests?

A I'm not sure I understand the question, but, yes, all Florida Cities employees, to the best of my knowledge, were compensated whenever they were engaged in these activities.

Q Okay. That's fine. Was this -- were the salaries -- let me try it again. I'm getting a little tongue-tied here. Was the salary expense recovered by Florida Cities through its customers' rates?

A Well, I'm not certain. Again, it depends on whether or not the salaries were included in the test year for the previous rate case.

Q Okay.

A So I don't think you could really say that all of the salaries were recovered, and perhaps you could say they weren't. But you just wouldn't know. In addition, there could have been some overtime involved, which was extraordinary overtime that in all probability would not have been included in a test year for previous rate case.

Furthermore, because of the number of rate entities that we have, it would just be very difficult to judge that because we would be dealing with

multiple test years from the standpoint of those employees' expenses.

Q Okay.

A I might add that there was a lot of exempt employee time involved here and there would not have been overtime in those instances.

Q Excuse me for just one second. I'm conferring with a Staff member which is why you don't hear anything coming back across to you on the phone. (Pause)

Was there a specific account or accounting code that was used or designated in order to keep track of the time that was spent by the -- on the work performed by the Florida Cities' employees in connection with that case?

A Not to my knowledge.

Q Okay. I want to refer you back to your rebuttal testimony, Page 2, Lines 8 through 13. Where you state before the Court issued its judgment, memorandum, order, and the appeals process was final, that Florida Cities had no basis of predicting the outcome of the litigation, and, therefore, did not have a basis for seeking recovery prior to that time. Is that correct?

A That is correct.

Q Okay. Are you saying that before you knew the outcome of the litigation that it was not prudent or reasonable to recover any of these costs?

A No.

Q Okay. Is it your belief that you always have to know the exact amount when you come in for a rate relief?

A No, I don't necessarily believe that, but there are two factors related to the outcome. One is we didn't know what the total legal expenses would have been until the case was finally decided; all of the appeals had run. And furthermore, we did not know what the outcome would be from the standpoint of the Court's findings and rulings.

Q Let me ask you this: Isn't it correct that the Commission allows projections of expenses for rate proceedings?

A I believe in certain circumstances, yes.

Q Okay. Do you believe this would have been one of those circumstances?

A I don't know.

Q Well, did you have any doubt prior to filing the current application for the recovery of the litigation costs? Did you have any doubt that it would have been appropriate to seek recovery of those

fees?

A Would you restate the question?

Q Okay. Did you have any doubt prior to filing the current application that it would be appropriate to seek recovery of the legal fees?

A Well, I have no doubt based on, you know, advice from counsel and the other rate experts we had consulted.

Q Okay.

MR. McLEAN: I'm terribly sorry. Did the gentlemen say he had doubt or did not have doubt?

MR. VACCARO: You said you did not have doubt based on counsel; is that correct?

WITNESS ALLEN: That is correct. I did not have doubt after those consultations.

Q **(By Mr. Vaccaro)** Okay. If you didn't have a basis to seek recovery before the appeals process was final, what changed that made the cost prudent after the process was final?

A Well, I think the most important factor was the actual ruling of the court.

Q Okay. Is it correct that Florida Cities has filed regular rate cases for all but one of its water and wastewater systems since 1991?

A I'm not sure about that.

Q Okay.

A We have filed a number of rate cases.

Q Let me ask you this: Was the only system that you -- do you recall the Fort Myers system being the only one that has not come in for a rate case?

MR. GATLIN: Since?

MR. VACCARO: I'm sorry. Let me look at this again. I'm sorry about that. (Pause)

I'm talking about the Fort Myers water system. The only system you did not bring in for a rate case since 1991 was the Fort Myers water system that had been overearning for several years. Does that sound correct?

A That sounds correct, subject to check.

Q Okay.

A It sounds correct.

Q Is it correct that Florida Cities only asked for rate relief for its Golden Gate systems from 1986 until 1991?

A I'm not certain about that.

Q Okay. Let me ask you this: If Florida Cities had contested the EPA's denial of the Waterway MPDES permit in 1986, and incurred legal fees which the Company believed were reasonable and prudent, couldn't Florida Cities have asked for a recovery of

those legal fees either in a rate case or in a limited proceeding around that time?

A Well, I would have to consult with counsel in that regard. I presume under certain circumstances we could have, but, again, there are too many factors here for me to make a judgment without consulting with someone.

Q Okay.

A With an expert.

Q All right. I'm going to just change gears here and just ask you some general recovery questions.

Florida Cities was found in violation of the Clean Water Act. That's correct, isn't it?

A That is correct.

Q And the Court ruled that Florida Cities was not a prevailing party?

A Well, I believe that's correct under the federal rules and federal court cases regarding prevailing parties. But I think that in the context of, I guess, common sense, I think clearly the Company was a prevailing party.

Q Despite the wording of the Order, because --

A Again, the Order is based on the federal rules and federal law with respect to prevailing parties.

Q Okay. Assuming the federal rules and the federal law, do you believe that regardless of the circumstances, that all legal fees incurred by utilities associated with penalities are prudent and reasonable?

A Well, I think that's a hypothetical. I think it would depend on the circumstances involved.

Q Okay. I'm going to hit you up with a hypothetical here. Let's just assume for the moment that Florida Cities were to book nonutility income below the line for North Fort Myers' wastewater system from 1990 to 1997, okay? Now let's say there's a current rate case pending with a test year ended December 31st, 1998. And let's say that within that rate case the Commission has not -- let's say the Commission has not audited the utility's books between 1989 and 1997 until the current proceeding. And that the Commission now believes that this income should be recorded above the line as utility operating income. Are you following me?

A Well, I think so.

Q Okay. You think so or do you want me to repeat that or try and simplify it?

A Perhaps simplify it a bit.

Q We'll say the utility comes in for a rate

case in '98, and that until that rate case, the Commission hasn't audited the books for 1989 through '97, and they find some income in there that they believe should have been recorded above the line as utility operating income. And let's say it was nonutility income -- the company booked it as nonutility income below the line. Okay?

A Okay.

Q Would it be appropriate for the Commission to accumulate this income for those prior years and reduce rates to the customers in the current proceeding?

A I'm afraid I couldn't answer that. This is getting into an accounting area that I would need some expert advice before I could respond.

Q Okay. I'm going to scratch that then.

But I would like to ask you, referring back to your rebuttal testimony, this is in regards to some comments about one of the Staff witnesses, Tricia Merchant, and I'm referring to Page 3 -- I'm sorry, Page 10, Page 10 and 11, starting at the bottom of the page of Page 10, Line 21, and going over to Line 3 of the next page you talk about Ms. Merchant presenting her personal opinion regarding the criteria which the Commission should apply in arriving at its decision

regarding recovery. You indicate this is her personal opinion.

Are you aware that in past Commission proceedings that Ms. Merchant has been accepted as an expert in regulatory accounting?

A According to her resume, yes.

Q And subject to that, could you explain what you mean when you say that you believe that her opinion is her personal opinion as opposed to, say, expert opinion?

A Well, I asked counsel regarding the rules in which one would have to rely on to express those opinions, and I was advised that there were no rules of the Commission; no statutes which would support those opinions.

Q Okay. So that wouldn't then take into account possible prior experience on the part of Ms. Merchant? You're just talking, strictly referring to -- what did you say, I guess, rules and statutes?

A Yes.

Q Okay.

MR. VACCARO: Okay. I think I'm coming down the stretch here. One last set of questions.

And I'd like to refer you to your May 6th deposition taken by the Commission, and in particular

on Page 27, Lines 8 through 14.

MR. GATLIN: Do you have that with you, Gerald?

WITNESS ALLEN: Yes.

Q **(By Mr. Vaccaro)** I believe you state in there that the reasons shareholders are responsible for some of the litigation costs is because the court did assess penalties; is that correct?

A That's correct.

Q And you state, do you not, that another reason the shareholders were responsible for some of the cost is that the Company's $500,000 settlement offer would have been the burden of the shareholders?

A Yes.

Q If the Company settled to the DOJ's request for $5 million, would that also have been the shareholder's burden?

A I think that's a hypothetical question that can't be answered because the Company wouldn't have settled for $5 million.

Q Okay. Let's just assume that the Company did have to pay that $5 million, or for that matter for whatever reason had to pay the $104 million, the effect of that would be felt by the shareholders, would it not?

A That's correct.

Q Do you think it would have been fair for the ratepayers to pay the litigation costs that might have accompanied $104 million if the Company had been fined $104 million?

A Well, under those circumstances no one would have gotten paid.

Q Okay. Let me take you over to your direct testimony. Do you have that?

A Yes.

Q Okay. Please look at Page 42?

A Pardon me?

Q Please look at Page 42, Line 17, where, I believe, you state the rational basis for determining the amount that Florida Cities has justified in recovering is -- you set forth a comparison there. You compare the $5 million presented by the U. S. DOJ and the -- with the final judgment of $309,710 by the Court?

A Yes.

Q Okay. Now it's true, is it not, that neither of those penalties -- well, the 309,710 or the proposed $5 million would be recoverable by ratepayers; is that correct?

A That is correct.

Q Okay. That being the case, why is it rational or appropriate to use the ratio of two nonrecoverable amounts to determine how much to pass on to the ratepayers?

A The three important factors here are the offer the Company made to settle this case before suit was ever filed, the $500,000 that it offered to settle, and the firm offer of the DOJ of $5 million, and the finding of the Court in an amount that was less than the Company offered to settle before the suit was ever filed, before any substantial expenses had been sustained, and before the matter went any further. And I think that's significant, the fact that the Company offered to settle for an amount significantly greater than the finding of the Court. And I think that's what makes this a very special situation where the Company is due recovery of some of its expenses.

Q Okay. Let's look at this. The penalty was -- you came up with a 6% figure, did you not, for what the -- what should be attributed to the shareholders?

A Yes.

Q By comparing the 5 million and the 309,710; that's correct?

A Yes.

Q That's 6%?

A Yes.

Q That leaves 94% to contend with?

A Yes.

Q Do you think it's fair and reasonable for the ratepayers to bear 94% of the cost?

A Under the circumstances, yes.

Q Looking back to the requested penalty, and even the settlement offer, the shareholders would have been substantially harmed by the Company paying either of those amounts, wouldn't they?

A Certainly if the Company had been willing to pay those amounts.

Q And the Company defended itself in this case in order to lessen or eliminate the penalties, correct?

A Yes.

Q Okay. Otherwise, the penalties would have been absorbed by the shareholders?

A It depends on which penalties we're talking about. If we're talking about $104 million, it couldn't have been absorbed by the shareholders.

Q Okay. That would have pretty much wiped out their investment, correct?

A And then some.

Q Okay. So that's a -- a pretty heinous outcome, wouldn't it be?

A Yes.

Q So I guess what I'm getting at here is given the harm that could have fallen upon the shareholders, wouldn't some other allocation of the recovery be more appropriate, say 50/50?

A There's no rational basis for 50/50.

Q Okay. Could you elaborate on that?

A Well, I can't think of a rational basis for 50/50.

Q Well, considering that the litigation amounts kept the shareholders from basically having their investment wiped out, wouldn't that be rationale for splitting that?

A I don't know how.

Q Okay. Can you pardon me just one moment?

(Pause)

Q **(By Mr. Vaccaro)** Let me ask you one final question. You're basically saying you don't think there's a rational basis for a split of 50/50 here.

What if the Commission comes back, after reviewing all of the evidence in this case, and believes that the Company was not necessarily

reasonable and prudent with all of its actions in the litigation. And the Company decides that -- I'm sorry, the Commission decides that perhaps all of the recovery that the utility is seeking is not appropriate based on a potential finding that the Company did not act 100% prudently in this case.

Can you think of any other allocation method that would be appropriate under the circumstances?

A Well, I can't think, you know, of a rational basis. I know there are an infinite number of arbitrary bases but I can't think of a rational basis.

Q Okay. All right. Let me check real quick.

(Pause)

Yeah, that's all the questions I've got. Thank you.

MR. McLEAN: I have just a couple. I didn't clear that with you. Is that all right?

MR. GATLIN: Let me tell you, that's fine. The way we scheduled this, we've got John McClellan sitting by a phone and they are fixed with a court reporter out there to swear him in.

MR. McLEAN: I have no more than five minutes. I should have cleared it with you.

MR. GATLIN: That's all right. Go ahead.

EXAMINATION

BY MR. McLEAN:

Q Mr. Allen, Harold McLean representing the Citizens of the State of Florida.

A Hi.

Q How do you do, sir?

I understand that this petition deals with the system, Barefoot Bay and North Fort Myers and South Fort Myers, and that there is consideration about spreading some of these litigation costs over to the customers at Carrollwood; is that right?

A That is correct. In fact, this petition only seeks recovery of a part of the total amount the Company thinks that it should recover.

Q Yes, sir, understood. Are there other water and sewer systems owned in the state by Florida Cities?

A Yes.

Q Why are they not in the case?

A Because those systems are not under the jurisdiction of the Public Service Commission.

Q I see. And that's the reason why Hillsborough is not in as well?

A That's correct.

Q Now your spreading of the total cost which

you identified that you intend to spread, or recover, I should say, are to be recovered from the Hillsborough County residents as well, right?

A No. The amount that Florida Cities is seeking to recover does not include those amounts from Carrollwood, which is Hillsborough County, the Sarasota division, or the Golden Gate division in Collier County.

Q The total amount of litigation expenses is in the neighborhood of 3.8 million. Do I recall that correctly? Ball park figure?

A I'm referring to my direct testimony on Page 42.

Q Yes, sir.

A Line 14. The total amount that the Company is seeking to recover from all ratepayers and all jurisdictions is $3,589,386, plus rate case expense.

Q And about 2.5 million from regulated customers, so to speak; regulated by the PSC.

A Actually $2,265,000.

Q Okay. And that the balance of that, the rest, is all of that to be collected from Carrollwood, if you're successful, or is some of it to be collected from Golden Gate and the Sarasota division?

A It would be collected from all three:

Carrollwood, Golden Gate, and the Sarasota divisions.

Q I want to shift focus considerably and ask you referring -- focussing on Barefoot Bay, has Brevard County or any other governmental entity expressed any interest at any time, to the best of your knowledge, in acquiring Barefoot Bay either through condemnation, purchase or any other means?

A Well, recently there's been some expressions of interest in that regard.

Q How recently?

A Within the last -- well, since the very latter part of May.

Q Of this year?

A Of this year.

Q Was there any before that, to the best of your knowledge?

A Well -- and I don't remember exactly when, but it was following our rate case in Barefoot Bay, I was contacted by representatives from Brevard County regarding the potential acquisition of that system, the Barefoot Bay water and wastewater system. That's the only specific recollection I have of any one making such contacts.

Now, I might add, from time to time in recent years we have had correspondence from various

investment groups or companies. Basically, some of them are form letters inquiring if we were interested in selling utility systems. I have had from time to time general contacts, like a telephone call from someone making those kinds of inquiries. But as far as any specific inquiry regarding a specific system, that's the only recollection I have with respect to Barefoot Bay.

Q Is there any generic reason to which you can point that Florida Cities has not been interested in selling to any of these potential suitors?

A Well, it's just never been part of our long-term business plan to dispose of our utility properties.

Q And as you well know, this is associated -- this utility is associated with Avatar Development?

A Associated with Avatar Holdings.

Q Yes. Now, with respect to any of those entities that have made inquires to which you just referred, do you have any reason to doubt the credit worthiness of any of those entities or can you express any opinion as to their ability to raise money in the money market?

A No. I have no opinion.

Q Sure. You have no reason to doubt that

Brevard County could raise money to either buy or improve or operate your utility if it came to that?

A I don't have a opinion one way or the other. I would presume that if the County so chose, they could -- they could -- they would have the financial resources -- or could acquire the financial resources to buy the system.

Q Let's turn then to Lee County. That's the county in which both North and South Fort Myers are located -- the North Fort Myers and South Fort Myers divisions of your company are located?

A Yes.

Q Okay. Have you received any inquiry -- let me just ask you generically or generally the same question I asked with respect to Barefoot Bay. Have you had suitors in Lee County? Would your answer be about the same?

A It would be about the same. No one has come in and said, you know, here's an offer for these facilities -- Lee County or any other system for that matter -- and said we're prepared to acquire this at this price.

Q And the same question with respect to the credit worthiness or the ability of those companies or private entities or government entities to raise money

in the marketplace, you don't have a opinion --

A I don't have a opinion.

Q But you have no reason to doubt that they could raise money?

A Well, I would say that with respect to counties. I'm not sure I could say that with respect to, perhaps, some non-governmental entities that has made inquiries before.

Q If Lee County happened to get some utility out of bankruptcy court, you don't have any reason to believe they couldn't acquire the financing it would take to both operate, improve and accommodate growth in the utility, do you?

A I have no opinion regarding their financial resources. But on the other hand, I would believe that if they wanted to, they could.

Q I understand. I want to ask -- change focus again, if you please. This litigation began -- I think I heard you say in your response to Mr. Vaccaro -- began in 1992; is that correct?

A Actually the suit was filed in '93. Now we had contacts with the DOJ earlier than that and the EPA.

Q With respect to the $2.265 million that you wanted to recover from the regulated ratepayers, if

you'll permit that term, when did you begin to spend that money? What year?

A Well, I'm not certain, but -- I would have to see a schedule, but several years ago.

Q Do you know whether there is such a schedule presented by the Utility in their evidence?

A I believe that in Mr. Murphy's testimony there are some schedules. I'd have to get a copy of his testimony to verify. I know there are some schedules there and I believe that they are in date order.

Q Okay. I don't want to quiz you about a schedule you don't have. But I would like to know your general impression about that schedule. And we can all check it when the time comes.

But let's say during the year '93, '94, '95, '96, were those amounts spent on litigation somewhat similar for each year? In other words, were there like $200,000 each year, or whatever the number was -- I guess it would have to be more than that. But my question is, was it a varying amount, was it somewhat constant or do you recall?

A I don't recall.

Q Okay. Mr. Murphy would be the correct witness for such question, I suppose?

A That is correct.

Q Okay. Give me two seconds and I think that's about it. (Pause)

Oh. You referred -- you and Mr. Vaccaro discussed two terms that caught my attention: financial peril on the one hand and bankruptcy on the other. And I have the impression that financial peril could become -- if the fine from the EPA -- let's just say the federal government -- had become severe enough, obviously financial peril might have ripened into bankruptcy; is that correct?

A Yes.

Q And you're not taking -- there's probably a scale beginning with zero at which, of course, there would have been no consequences for the quality of service received by the customers, going all the way to something like $104 million where I think you and I agree that Florida Cities, as an entity, would probably not exist if they had to pay that $104 million, correct?

A Yes.

Q And that bankruptcy would probably occur somewhere along that scale, correct?

A That is correct.

Q Okay. Now, you said to Mr. Vaccaro that you

perceived that you never said that service would be terminated, although I think you did say that it might be very temporarily terminated, but that there would be a deterioration of service over some period of time; is that correct?

A That's correct.

Q And the deterioration of service, its severity would be determined by probably the amount of the fine or whether bankruptcy were involved and so forth, correct?

A Yes.

Q But you also said that you did not believe -- and correct me if I have the wrong impression -- that you did not believe that that would be a long-term deterioration. Do you recall that?

A Yes.

Q Did I state that correctly?

A Yes.

Q Okay. What sort of term could you predict that there would be deterioration of service?

A Well, I think the -- when I was referring to long term versus short term, I think that in a situation where there's a bankruptcy, you know, ultimately the issue -- the bankruptcy is resolved through some form or fashion, and I believe at that

point then normal full quality service could be restored.

Q Okay. And if in my earlier question if someone like Brevard County, for example, acquired Barefoot Bay, you have no reason to believe that that deterioration of service, if any, would continue beyond that date of acquisition, do you?

A I wouldn't say that it would necessarily cease on the day of acquisition. If we assumed that the purchaser, that the County, for example, had the appropriate financial resources, then I think that quality service would be restored, not instantly but over a period of time.

Q Okay. Just one last thought. You're seeking to collect this surcharge over a period of ten years, correct? Or whenever it's paid?

A Yes.

Q Was there any attempt to corrolate the length of time over which customers would suffer a deterioration of service with that ten years? Perhaps I asked that question backwards.

Does the time over which you expect the service to deteriorate drive the request to spread the costs over ten years?

A No, I didn't think there's any such

relationship.

Q The ten years is, in fact, an arbitrary number not based on any sort of rational basis; is that correct?

A Well, there is some rationale for the ten years. It was not exclusively arbitrary.

Q What were the considerations?

A Well, the normal -- as I understand it, the normal recovery of an expense like this would be over a shorter period of time. On the other hand, if we compared this to the recovery of depreciation on plant facilities which, you know, is a much longer period of time, ten years falls someplace in the middle.

Q Mr. McClellan says that this is a nonrecurring expense. Do you agree with that?

A I have no opinion from a ratemaking standpoint.

Q I see.

MR. McLEAN: Okay. I have no further questions. Thank you, Mr. Allen.

MR. GATLIN: I have no questions. We'll read.

MR. VACCARO: Okay.

MR. GATLIN: I think that's it.

WITNESS ALLEN: Thank you very much.

(Deposition concluded at 2:38 p.m.)

- - - - -

ERRATA SHEET

DOCKET NO. 971663-Ws
NAME: GERALD ALLEN
DATE: JULY 30, 1998

Page	Line	

CERTIFICATE OF DEPONENT

This is to certify that I, GERALD ALLEN have read the foregoing transcription of my testimony, Page 4 through 48, given telephonically on July 30, 1998 in Docket No. 971663-WS, and find the same to be true and correct, with the exceptions, and/or corrections, if any, as shown on the errata sheet attached hereto.

_____
GERALD ALLEN

Sworn to and subscribed before me
this_____ day of _____, 19_____

by GERALD ALLEN.

NOTARY PUBLIC
State of _____

Personally known ___ OR produced identification___.
Type of identification produced_____.

STATE OF FLORIDA)
: CERTIFICATE OF REPORTER
COUNTY OF LEON)

I, JOY KELLY, Official Commission Reporter, Certified Shorthand Reporter and Registered Professional Reporter.

DO HEREBY CERTIFY that I was authorized to and did stenographically report the foregoing telephonic deposition of GERALD ALLEN.

I FURTHER CERTIFY that this transcript, consisting of 50 pages, constitutes a true record of the testimony given by the witness over the telephone.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED this 3rd day of AUGUST, 1998.

JOY KELLY, CSR, RPR
Chief, Bureau of Reporting
(904) 413-6732

EXHIBIT NO. _____

DOCKET NO.: 971663-WS -- PETITION OF FLORIDA CITIES WATER COMPANY FOR LIMITED PROCEEDING TO RECOVER ENVIRONMENTAL LITIGATION COSTS FOR NORTH AND SOUTH FT. MYERS DIVISIONS IN LEE COUNTY AND BAREFOOT BAY DIVISION IN BREVARD COUNTY.

WITNESS: Gary Baise - Rebuttal

ON BEHALF OF: Florida Cities Water Company

DESCRIPTION: Transcript of Deposition of Mr. Gary Baise taken on August 5, 1998

PROFFERING PARTY: STAFF

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663-WS EXHIBIT NO. 19
COMPANY/ WITNESS: Baise
DATE: 8-12-98

CONDENSED

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Florida Cities Water Company for limited proceeding to recover environmental litigation costs for North and South Ft. Myers Divisions in Lee County and Barefoot Bay Division in Brevard County

DOCKET NO. 971663-WS

TELEPHONIC DEPOSITION OF: GARY H. BAISE

TAKEN AT THE INSTANCE OF: FPSC Staff

DATE: Wednesday, August 5, 1998

TIME: Commenced at 1:30 p.m.
Concluded at 3:00 p.m.

PLACE: 2540 Shumard Oak Boulevard
Room 309
Tallahassee, Florida

REPORTED BY: NANCY S. METZKE, RPR, CCR

C & N REPORTERS
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B. KENNETH GATLIN, ESQUIRE, Florida Cities, Gatlin, Schiefelbein & Cowdery, P.A., 3301 Thomasville Road, Suite 300, Tallahassee, Florida 32312.

ALSO PRESENT:

TRICIA MERCHANT, FPSC Staff.
BART FLETCHER, FPSC Staff.
SALLY MONIZ, FPSC Staff.
JOHN MANN, FPSC Staff.
CONNIE McCASKILL, FPSC Staff.
NEIL BETHEA, FPSC Staff.
JOHN STARLING, FPSC Staff.
ALEX BULLOCK (by phone), Florida Cities.

* * * *

STIPULATION

IT IS STIPULATED that this deposition was taken pursuant to notice in accordance with the applicable Florida Rules of Civil Procedure; that objections, except as to the form of the question, are reserved until hearing in this cause; and that reading and signing was not waived.

IT IS ALSO STIPULATED that any off-the-record conversations are with the consent of the deponent.

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WITNESS

GARY H. BAISE
Examination by Ms. Gervasi 6

PROCEEDINGS

WITNESS BAISE: Mary Mitchell is here. She is the notary in the Langrock, Sperry law firm here in Middlebury, Vermont. So what is it you need her to do for me?

MS. GERVASI: Ms. Mitchell, could you please give me a fax number where I can fax the certificate of service -- certificate of oath rather to you so that you can fax it back to us?

MS. MITCHELL: Certainly. The number is area code 802-388-6149.

MS. GERVASI: 802 area code?

MS. MITCHELL: Yes.

MS. GERVASI: And then what are the next three digits?

MS. MITCHELL: 388-6149.

MS. GERVASI: Okay. Thank you. We'll send that to you, or fax that to you and give you, provide the fax number where you can fax it back if you would please.

MS. MITCHELL: Okay, sure.

MS. GERVASI: Thanks. And if you would just please go ahead and swear in the witness.

WITNESS BAISE: She doesn't have a form in front of her. Just swear to tell the truth, the whole truth

and nothing but the truth?

MS. GERVASI: Yeah, if she'll ask you to raise your right hand and swear to tell the truth, the whole truth and nothing but the truth, and that will do it.

WITNESS BAISE: I do.

MS. GERVASI: Great.

WITNESS BAISE: And she and I will sign it here in a second.

MS. GERVASI: Okay. That works.

Whereupon,

GARY H. BAISE

was called as a witness by the FPSC and, after being first duly sworn, was examined and testified as follows:

EXAMINATION

BY MS. GERVASI:

Q You're sworn now, Mr. Baise?

A I beg your pardon?

Q You are sworn now?

A Yes.

Q Okay. Could you please state your full name and business address for the record?

A Yes, my name is Gary H. Baise. I am a partner in the law firm of Baise, Miller and Freer. The address is 815 Connecticut Avenue, Suite 620, Washington, DC, 20006-4004.

Q Thank you.

MS. GERVASI: And before we go any further, I just want to make sure, can we stipulate to the usual --

MR. GATLIN: We can stipulate.

MS. GERVASI: Thank you.

BY MS. GERVASI (Continuing):

Q Mr. Baise, if you would please take a look at your direct, prefiled direct testimony and look on pages 11 and 12 if you would please, sir.

A Yes.

Q And here you're talking about, generally about the beginning of the discovery phase of the federal case, and you state that your team reviewed an enormous number of documents at the Florida DEP offices in an effort to prove that Waterway did have a wasteload allocation to discharge into the Caloosahatchee River; is that right?

A That's correct.

Q And on page 12 you state that you filed Freedom of Information Act inquiries with at least four of the EPA regional offices in order to obtain records to demonstrate

how rare it was to deny an NPDES permit?

A Correct.

Q This discovery process began, was it in 1993; is that right?

A It would have been in, say, July, August, I would recall, because I was retained in June of '93; so it would have been sometime in the summer of 1993.

Q Okay. Thank you.

And on page 14, this is also your direct testimony that I'm referring to.

A I'm at page 14.

Q You state that during March and April of 1994 your team filed additional requests to EPA regional offices regarding other NPDES permit denials, right?

A Correct.

Q Then on page 21 of your direct testimony --

A Yes.

Q -- you stated that during the months of May, June and July of '94 your team reviewed the documents produced by EPA in response to your requests for information on permit denials, right?

A Well, we had discovery as well as FOIA materials, so there are really two points made at the top of page 21.

Q Okay. From looking at this testimony it appears to us that a substantial amount of time was involved in

requesting and reviewing these documents. Is that a fair statement?

A That's correct.

Q How many people from your team were involved in requesting and reviewing these documents, EPA and DEP documents?

A Well, I was the one, of course, that requested them; but because we had substantial amounts of paperwork, there would have been myself, Mr. Scroggin, and I'd have to go back to the bills to see if there were other associates involved. It's my recollection that there would have been one or two associates involved, at least on a part-time basis.

Q Okay. Thank you.

Now also based on your direct testimony, and I can refer you to specific pages if you need me to, but you may be able to answer this question without referring to it, and you can let me know either way; but what we gleaned from it is that the primary purpose of Florida Cities Water Company's taking depositions of certain witnesses was to address the EPA's NPDES permitting process, including denials of such permits and the EPA's wasteload allocation process regarding NPDES permits; is that right?

A In part, yes.

Q And would that be true of, for witness John

Marlar?

A Yes, Mr. Marlar was the first person I deposed because I wanted to get a clear understanding of where EPA was coming from. As you will note, earlier in my testimony we had had meetings to try to settle this case before the complaint was filed with the Department of Justice counsel. We felt we were correct with regard to a number of assumptions we were making based on the documents we were seeing.

We felt if we could go to the most credible or one of the most credible sources in EPA with regard to permitting, wasteload allocations, water quality standards, the rareness of denial of a permit under the Clean Water Act program we might be able to convince Mr. Jacobs that he should settle the case for a much smaller sum than he was willing, obviously, to settle for at the time we were discussing settlement in June, July, August of '93.

Q Okay. Was that also a primary purpose of the taking of Mr. Peter McGarry's deposition?

A No, the purpose for taking Mr. McGarry's deposition was to determine why he had been so antagonistic towards employees of Florida Cities Water Company. Number 2, we had found documents in the EPA files suggesting that Mr. McGarry was the primary force in requesting an enforcement action be taken against Florida Cities.

Thirdly, I wanted to find out how much he knew about Ms. Kagey's egregious error in taking the permit away from Florida Cities illegally, which we clearly established that they did. I also wanted to see what he knew about that, and he didn't know very much, frankly. I had to go to other witnesses like Mr. Childress, Mr. Greenfield and others to show that Ms. Kagey had, indeed, violated EPA's own regulations; and you've probably seen that in some of our documents or in their depositions if you have them.

Q These types of areas that you are describing, don't they go to the issue of the permit denial?

A Yes, they do.

Q Okay. How about with Ms. Connie Kagey, is that also true for her, for the deposition that you took of her?

A Well, I wanted to show through Ms. Kagey that she had violated the law, and we did that. We also wanted to show how reckless her conduct had been in terms of denying this permit. I also wanted to show how little supervision had been undertaken with regard to the denial of this permit; and at the same time, of course, I'm trying to show how rare a permit denial is and how little supervision she had when undertaking such a momentous action.

Q Okay. And how about Mr. Bruce Barrett, did your questions also go to the issue of the permit denial?

A Absolutely permit denial, and I haven't looked at

his deposition in a long time, but I believe he is the gentleman who said, and I think we quote him in my testimony some place, that he saw no reason based on the records we had accumulated at the time we took his deposition as to why this permit should have been denied and taken away from Florida Cities Water Company.

Q Okay. Thank you.

And Mr. Roosevelt Childress?

A Roosevelt Childress was either Barrett's boss or worked immediately under Barrett; I just don't recall. He, too, had the possibility to have stopped this terrible mistake; and I believe his testimony too was Ms. Kagey exceeded EPA's guidelines, regulations, did not utilize proper procedures. And, of course, what I was trying to show is that she didn't have proper supervision; and I think Childress may have been her immediate supervisor, but I just cannot recall.

Q Okay. Thank you.

And then, finally, Mr. James Greenfield, were the questions directed to him also --

A Roughly the same. Again, all of these then would have had the opportunity had they been paying any attention to the switches at EPA what was going on. I believe I had documents at the time that had their signatures on the documents in addition to Ms. Kagey's, and none of them ever

said. Wait a minute, what's going on here? None of them ever made a call to Doctor Ahmadi or to any of the Florida, then DER people, I think they were called, to see whether there was a wasteload allocation because, at this time, we are, I believe, in possession of a document which shows that EPA had been notified maybe one month before Ms. Kagey acts that this facility has a wasteload allocation.

Q Okay. Thank you.

A And those gentlemen would have been the ones who should have been aware of this and have caught this mistake, this illegality, whatever you want to call it. Obviously I claim that EPA acted illegally, and I could prove that because there are only four reasons that the agency can take a permit away from a permitee, and those are set forth very clearly. The facts didn't justify taking this permit away in any way, shape or form, and these gentlemen after our -- through the deposition agreed with that.

Q Okay. Mr. Baise, you also state in your direct testimony that the utility took 22 depositions of 17 witnesses. Do you recall that?

A It was roughly that. I will rely on your characterization.

Q Okay. Do you know roughly how many other depositions address that issue of the EPA's NPDES

permitting process above and beyond the ones that I mentioned to you?

A Not without going back and looking at them. I don't think that many of the others did because there was a block of depositions I had to take to lock this up.

As I've stated, I think in my direct testimony, I was convinced based on the law and the regulations and then the testimony that once I had this nailed down we could go back to Mr. Jacobs and show that the agency had broken the law and that this case would settle virtually immediately. That's how I set up the deposition schedule, was to, one, go to Mr. Marler who, as I said earlier, is considered one of the experts on the Clean Water Act in the agency; and then after getting that framework set in place, go to these other people to show did the agency indeed violate its own regulations.

I thought after doing that -- in any other case I've ever been involved in, when you show that the agency has done something incorrect or illegal, generally the Justice Department will say, excuse me, and either withdraw the case -- I've had them withdraw cases in open court where I have proven error on their part. But after we took these depositions, we sat down with the EPA and Department of Justice counsel. They said they would certainly take the results of these depositions back. I remember speaking

to one EPA lawyer saying it seems to me the case is over. You can see that you violated the law. Give me a call when you are ready to sit down, and we will wrap this up and finish the settlement discussions. I never heard anything more from Ms. Henley.

Q Okay. So at least seven of the 17 witnesses that you deposed, and those being the ones that I mentioned earlier, were deposed on that line of questioning then, correct, and possibly others?

A I don't know what the number would be. I would have to go back and look at each one of those depositions to come to your conclusion that there were seven. With regard to some of these folks, there were other issues that I was attempting to get information on from them; but primarily, it was to show that the process operated in a certain fashion.

I know another point I was trying to establish with those folks, and that is, that the region had contracts with states on how the wasteload allocation process was to work; and I used one of these persons to get that contract exhibit into play and to bring that to their attention as well. The contract between the region and the state indicates that if you are going to have a wasteload allocation it must go through a very rigorous administrative procedure act proceeding, and I was able to

demonstrate that that had not occurred as well. That was very important. And I can't tell you, frankly, which witness or witnesses I used for that particular point, but that was a key point.

Q Okay. How about Doctor Ahmadi, did you depose him regarding the wasteload allocation and the Waterway permit?

A Actually we had numerous conversations with Doctor Ahmadi, and I'd have to go back and look at his deposition. Principally what I wanted from Doctor Ahmadi was his interaction with the Department of Justice lawyer, and I believe -- and I would ask for Mr. Bullock to be able to participate here -- I believe Doctor Ahmadi was called as a witness to be deposed by the Department of Justice, not us. He was our witness, but I don't think we moved to depose him.

Q Okay. Thank you.

MR. BULLOCK: That's correct.

MR. GATLIN: The deposition is part of Doctor Ahmadi's testimony.

MS. GERVASI: Okay. Thank you.

BY MS. GERVASI (Continuing):

Q Mr. Baise, isn't it correct, and this is from looking at your exhibits and the trial transcript, that in your opening statement at trial you stated that this whole

case was started on the basis of a mistake made by an EPA employee in 1986?

A That's correct. That's what we had established. Actually I wanted to use a little stronger terms, but I felt that I shouldn't do that with the judge at that point because I was reaching a conclusion that the conduct was unlawful; but at the time I characterized it as an egregious mistake.

Q And you also made that statement in a motion for summary judgment, correct?

A I think I made stronger assertions in the motion for summary judgment than that, but you have that in front of you. You know what I said. I just don't recall that. I certainly made strong assertions about EPA's conduct.

Q And the mistake you are referring to here is that the EPA improperly denied the Waterway Estates 1986 NPDES permit renewal, right?

A Clearly at the time it was more than a mistake; it was unlawful, period. They had no grounds upon which to deny the reissuance of an NPDES permit.

And I would correct that. In, I think it's one or more of your depositions, it comes across as M as in Mary permit. It's N as in Nancy or national.

Q Okay. Is it correct to say that a substantial amount of the utilities trial preparation was to prove that

the EPA improperly denied that Waterway permit in 1986?

A I don't know how to define substantial. Certainly we proved that early on, and that's one reason why the Department of Justice then started looking to justify its case. Early on, of course, they were looking at all of the facilities, but it became clear after they did hear about the depositions we had taken -- they were made aware because I felt I had nothing to hide on the company's part -- that the company was correct. It had been treated unlawfully here.

The Department of Justice decided to expand the focus of the case. Then they started focusing substantial efforts on discovery involving Barefoot Way, Carollwood, Fiesta Village, Golden Gate, South Gate, et cetera. So I want to say at some point the substantial effort was dealing with the other facilities rather than Waterway.

Q Can you give us an idea roughly what percentage of the trial preparation went to prove that the EPA improperly denied that Waterway NPDES permit?

A That I cannot do. I would have to go back and look at the bills, and even after looking at all the statements I'm not sure that I could carve out an exact percentage. I might be able to give a rough estimate, but certainly at this moment I could not give you even close characterization of the amount.

Q You couldn't tell me if it was closer to 50/50 than --

A No, I could not. I would have to -- as I said, I would have to go back and look at and examine three or four notebooks of billing statements to Florida Cities Water Company.

Q Okay. Would you say the substantial amount of the company's direct and cross examination went to prove that EPA improperly denied that Waterway permit in '86?

A No, I wouldn't say a substantial amount. I would say certainly a portion went to show that point in terms of mitigation. What we tried to put on as a positive case for the company was to show how well this company had performed, how unique and unusual it was to take away a permit when water quality standards are being met and the NPDES requirements are being met, the fact that there was no environmental harm caused by the operation of these facilities. In fact, I believe there was testimony from one witness -- it may have been Doctor Ahmadi -- that they wished that all of the discharges into the waters of the State of Florida came from secondary treatment plants rather than just runoff because the water quality, frankly, would be so much better.

So we spent a lot of time on water quality issues and educating the judge on, one, on how the Clean Water Act

works, how important water quality standards are, how you implement those water quality standards, and the fact that we were virtually nil or nonexistent in terms of our violations of water quality standards and virtually had no violations of our permits other than what you would call technical violations.

Q Okay. You did say, though, that [redacted] portion of the direct and cross examination time was spent to prove that that permit was denied improperly. Can you give us any idea of the size of that portion?

A Again, you would have to go back and look at the witnesses. For example, Doctor Ahmadi's time was certainly spent on explaining Florida's role, what he had done. He had told Mr. Jacobs that his theory of the case basically was wrong and the fact that this company was not violating water quality standards and the fact that the company could still be discharging in the same point, or at the same point if it had not decided to upgrade or increase the size of the discharge. Also, we wanted Doctor Ahmadi to point out the differences between the two permitting programs and to show the court that, frankly, this company was having to serve two masters here, a federal master and a state master; and you just have to start from Doctor Ahmadi and go backwards, I guess, to all of the other witnesses.

Mr. Bullock, for example, handled

Mr. Klingenstein who was the Department of Justice's lead witness, and our main effort there was to show that he had not done his homework, number 1; number 2, was not credible; and number 3, could not state with a reasonable degree of certainty that his views were correct. And I can't recall the other points, but certainly Mr. Klingenstein was on for, I think, a day or a day and a half out of the eight days. So that was not to show anything about the violation of the permit per se or the violation of water quality standards per se.

Q Well, you were the lead counsel though at trial, right?

A That's correct.

Q But you can't give us any idea at all of the percentage of time that was spent in direct and cross on litigating that issue of the permit denial?

A Oh, I could if I went back and looked at billing statements.

Q But you don't recall just off the top of your head?

A It would have to be an estimate because the bills are not broken out in that fashion. You would have to look at the hours, and it would be very difficult to do; but certainly some estimate, I suppose, could be put together.

Q But not today off the top of your head?

A Not today, no, I would not attempt to characterize a percentage off the top of my head today. For example, you have to go back and look at the number of witnesses that we had to bring on to demonstrate that the Department of Justice was just palpably wrong with regard to Barefoot Bay and Carollwood. We had a witness from Hillsborough County and several other witnesses just to deal with Barefoot Bay and Carollwood's factual situation. I cannot tell you just again right at this moment what the percentage of time would be with respect to those witnesses, but they took a certain amount of time; and that had nothing really to do with the permit at Waterway Estates.

Q Okay. Thank you.

Mr. Baise, if you will assume for a moment that the company had successfully challenged the EPA's denial of the Waterway Estates '86 NPDES permit and received an NPDES permit through an administrative challenge. Sometime in the latter part of 1986 or 1987, let's say, that the company received the permit after successfully challenging the denial. In your opinion, do you believe that the EPA or the DOJ would have still filed a complaint against the company with regard to Barefoot Bay and Carollwood?

A You would have to ask EPA about that. The only thing I can tell you where I have challenged permits after

they have been issued, the agency has vigorously fought the challenge. I did that for two paper companies, and I would say the expense there was roughly equivalent to what the expense was here in this case.

When EPA makes one of these decisions, you have to realize this, that so many people are involved initially in just sort of passing on the decision. Then they do not want it known that they made a mistake, and as a result, there is a momentum that gets started in the agency that allows these unlawful actions to occur. As a result, no one wants to make a decision; and frankly, they feel much more confortable, is my experience, in letting a court tell them that they were wrong because, if it really comes out that they made a mistake, obviously that hurts them in their promotion activities at the agency. So, therefore, once one of these decisions is made, it's virtually impossible to get it reversed without going through either an adjudicatory hearing, is what you're talking about initially here, if the permit had been initially challenged, and then you have to take it up to an appeals level if you lose.

Q Okay. Thank you.

Let me direct your attention to your rebuttal testimony for a moment. If you will take a look at page 11. Starting on line 14 you're stating that, "The fact

that the government's action was unreasonable, without merit or unwise is not in itself adequate to demonstrate bad faith as defined by the law."

A I'm still trying to find my --

Q I'm sorry. Take your time. Let me know when you get there.

A I've got Mike Murphy's. I've got Tim Allen's, and I know mine is here.

Okay. Now I've found it. What page, please?

Q Page 11.

A Yes. Line?

Q Starting at line 14.

A Correct.

Q You state that, "The fact that the government's action was unreasonable, without merit or unwise is not in itself adequate to demonstrate bad faith as defined by the law," right?

A Right.

Q Do you happen to have a copy of the court opinion that was rendered in that case?

A No, I do not.

Q Okay. That was attached as Exhibit GHB-101, and I have a copy of it here if you will permit me to read from that court opinion.

A Sure.

Q On page 10 of the court opinion, the court states: "Although the Defendants herein may have been greatly frustrated by being forced to mount a defense to claims that were later found to be barred by res judicata, the court notes that such a reaction by the Defendant does not compel the conclusion that the United States litigated in bad faith."

And then the court goes on to say that, "Even when federal courts have determined that a party's prosecution of a claim was unreasonable," and then there is a footnote there citing you to a separate case, "or unwise and without great concern for his adversary so as to greatly frustrate him," and there again, another footnote to another case, "they have still found that such behavior is not bad faith and is not litigation undertaken vexatiously, wantonly or for oppressive reasons," and then another citation to a case.

And what we are trying to determine, based on a reading of the language of the court order and a reading of your testimony, you're saying that it's a fact that the government's action was unreasonable, in your case, without merit or unwise, and we --

A I am saying that, and what the court did not have the advantage of here is having us go into a hearing and discovery to show how oppressive that the action was by the

Department of Justice. My view is if you had -- if we had brought a Bivins Action, for example, against Mr. Jacobs and others in the Department of Justice and EPA, we would have brought out the kind of data to show that their actions were unreasonable and vexatious.

Q Okay. So you would agree then that that fact is actually your opinion and not a factual finding made by the court in that case, right?

A Well, without having the court's language in front of me -- Clearly it did not find that the action undertaken by the Department of Justice was in bad faith because we clearly had argued that. But my only point to you, just as a trial lawyer, is that the facts were never discovered and no actions were taken pursuant to a Bivins Action to really demonstrate the bad faith and vexatiousness of the government's action here. I mean clearly when you have a situation where there is not a scintilla of a doubt as proven by the lady herself and her supervisors that she broke the law, that she broke EPA's regulations, she didn't follow EPA's regulations, and you have her supervisors saying that he can find no reason why this action was taken and the government proceeds with its case, something is wrong.

Q Okay. But it's not your legal opinion, is it, that the court found, made a factual finding that the

government's action was unreasonable, without merit or unwise?

A Oh, no, the government -- Certainly the court didn't find that, no.

Q Okay. Thank you.

Now I want to direct your attention to your earlier deposition, your May 20th deposition. I think you said you have the transcript there?

A Yes, I do.

Q On page 10.

A Yes, I'm at page 10.

Q Starting at line 6 you're stating that you believe that even if the company had brought the improper denial to the EPA's attention that they would not have changed their position, right?

A I brought this matter to EPA's and the Department of Justice's attention in general terms as early as July or August or September of '93, I think. If you go back and look at my billing statements, my prefiled testimony, it states there that Mr. Berz and I have these meetings with Mr. Jacobs and are telling him, one, it's extremely rare to take a permit away. Now at that point we didn't have all of the facts, but we clearly put the agency on notice and its counsel early on that this case was unusual and that they should not be pursuing it with the vigor that they

were pursuing it at the time.

Q What about at the time that the permit denial was issued, if the company had brought that to the EPA's attention by way of challenging the tentative denial, do you think that the EPA wouldn't have changed their position anyway, it wouldn't have mattered?

A It wouldn't have mattered. You've got the facts in front of you. We brought this material to EPA's attention, albeit later. They would not change their mind. What on earth would give one any confidence that had you brought it to their attention in January of 1987 that they would have done anything differently.

Q So you think then that the EPA would have demanded that the company relocate the outflow line and meet the nitrogen and toxicity limits anyway, right?

A Well, that's a lot of speculation. All I can tell you is that we begged, we pleaded, we laid documents before the agency's counsel, before its Department of Justice lawyer, and you can read these as well as I can, and any reasonable person with an ounce of common sense would have said an egregious error has been undertaken here, and let's stop this action now, these folks have been wronged; and even when we did that, they would not act.

For example, let me just tell you a little

story. We brought to the agency's attention that one part of its complaint was just dead wrong, number 1; number 2, that the agency had failed to turn over in discovery a document to us, which we probably should have proceeded but, again, being sensitive to costs here, we didn't go after them for violating discovery rules. But one of our people found, I think in our own files, a memorandum that said we were using the correct toxicity measuring device. We brought that to the agency's attention, and for the longest time they would not take that particular count out of their complaint. It was their own document. These people were so hardheaded that it was impossible to get them to deal with facts. That's why this company was forced into the position it was forced into.

I don't know how you deal with a mule without crushing its skull when it refuses to go the right direction. Frankly, that's what we had to do, is crush this mule's skull because these folks would not listen to reason. They would not even pay attention to their own documents.

Q Well, if you think or if the company thinks that the challenge would have been futile anyway had they gone the administrative route, wouldn't it follow then that the alternative -- really the only other alternative other than to challenge the denial would have been to comply with the

EPA requirements, no?

A I don't know what you're talking about EPA requirements. At this point EPA requirements would be to shut the whole facility down, cease and desist. Mr. Jacobs made that very clear. Shut it down. He told Mr. Berz and me that on several occasions. Your mistake was not shutting this facility down immediately. That just showed the level of intelligence that we were dealing with.

Q To shut down entirely, not to relocate the outflow line or to make the advanced --

A Shut it down. Very clear. Shut it down in light of the Tyson's food case. That was the case cited to us.

Q Okay. Mr. Baise, can we take a moment or two to go off the record. I would like to confer with the staff just for a few minutes.

A Sure. You bet.

(BRIEF RECESS)

BY MS. GERVASI (Continuing):

Q Mr. Baise.

A Yes, ma'am.

Q Thank you for your patience. Are you ready to go back on the record?

A I am.

Q Okay. Getting back to what we were discussing about the permit denial and after the permit was denied.

At that point the company was faced with having to find some way to satisfy EPA, right, without shutting down the plant? Obviously it didn't want to shut down the plant, right?

A Obviously it did not want to shut down the plant. I think EPA didn't care what they did other than stop discharging upon the ending of the permit, so primarily the company's interest, since it dealt with the State of Florida as its primary permit holder, was to deal with the State of Florida rather than EPA.

Q So then in response to the EPA denial, the company proceeded to correct the situation by meeting the DEP's requirements?

A Not requirements. They went, as I recall, virtually immediately, within a month or two, to start talking to people at DEP about what was going on and how to resolve their dilemma.

Q And what they came up with was a decision to relocate the outflow line and upgrade to AWT?

A That's correct, and then resubmit later on, when they had all of their state requirements in place, an application for a new NPDES permit to be granted by EPA.

Q And the company expected that by making those upgrades and improvements that that would have satisfied the EPA as well as the DEP?

A I assume that that was their conclusion. I'd have to go back and look at the documents and see whether they were able to reach that conclusion at that point.

Q Now on page 6 of your rebuttal, starting at line 15.

A Yes, I'm on page 6.

Q Starting at line 16, you say an example -- I guess an example of this type of activity is an EPA administrative order, Number 89-109 and NPDES certification worksheets that are exhibits MA-9 and MA-77

A Correct.

Q Which directed the company to construct the treatment and other facilities necessary to relocate the effluent outfall and meet specific water quality standards?

A Correct.

Q Okay. Now one of the allegations of the complaint filed by the DOJ was that Waterway was discharging without an NPDES permit, right?

A Correct.

Q And EPA issued an administrative order in 1987, it was May 11th of 1987, if you'll bear with me, subject to check, setting a deadline of November 30th of 1988 -- excuse me, September 30th of 1988, to meet all the final requirements?

A Or cease discharging.

Q Okay. Isn't --
A At the point where they had been discharging, as I --
Q Correct.
A As I recall the language.
Q Okay. Isn't it true that the EPA issued the company an NPDES permit with an effective date of November 1 of 1989? Subject to check, does that sound right?
A I think that is correct. I know they applied for an NPDES permit to discharge in the new location and it eventually was granted.
Q Okay. But the penalties for discharging without a permit were set for the period beginning October 1st of '88, which was the day after the company missed the deadline of the administrative order and ending through October 31st of '89, which was the day prior to the effective date of that NPDES permit, correct?
A I believe that is correct.
Q And the amount of the penalties for discharging without a permit came to $15,525; does that sound right?
A No, you must be talking about a state matter there. 15 thousand does not ring a bell in the context of EPA.
MR. GATLIN: You know, whatever the court order says. I think it spells it out.

Q Okay.
A Yeah, I just --
Q Okay. But the company wasn't fined for discharging without a permit between the time the permit was denied at the end of 1986 and the September 30th '88 EPA deadline to meet all the final requirements; is that right?
A Well, they thought about doing that, but they ran into something called the statute of limitations.
Q Okay. So it didn't happen?
A Didn't happen. In fact, a case came down, I think, while we were still discussing this matter because Mr. Jacobs, as I recall, wanted to go back to January, whatever the date was, 1987, to start the counting; and we pointed out that there had been a new case saying that you can only go back five years.
Q So did EPA actually attempt to assess penalties for that period?
A I don't think so, but I -- No, I don't think so.
Q Okay.
A Because, again, the statute of limitations was in play.
Q Okay. Now the bulk of the penalties in the case related to Waterway for failure to meet the nitrogen and

toxicity limits -- excuse me, the bulk of the penalties related to Waterway, right, and that was for failure to meet the nitrogen and toxicity limits set forth in the new permit?
A When you are talking about the bulk of the penalties, I'm not sure where you are starting from. The bulk of the penalties related to, one, discharging without a permit and discharging in the wrong location. Now that's one penalty. The second one is the actual penalty applied by the court where I think you may be correct. Are you talking about the court's imposition of a penalty?
MR. GATLIN: Of the 309 thousand dollars; is that what we're talking about?
MS. GERVASI: Right.
A You're starting with the 309 thousand rather then the 32 million?
BY MS. GERVASI (Continuing):
Q Right.
A Okay.
Q And we are saying 264 thousand of that it appears related to Waterway for failure to meet the nitrogen and toxicity limits.
A The vast majority of that, as I recall, was, yes, nitrogen and toxicity; but even that is broken down because on some of those penalties, rather than to spend the

enormous amount of legal time it was going to take to blow those out of the water, we stipulated that we would accept, I think it was the thousand dollar penalty per charge.
Q Isn't it true that the failure to meet those limits was related to insufficient treatment of the wastewater, do you know?
A With regard to toxicity, the answer to that is no, because what we found out, and I believe Ms. Harless can testify to this effect, that the -- one, when you are dealing with toxicity, you are dealing with testing of undiluted effluent. That undiluted effluent often times has runoff from pesticides in it, and it would appear that when there was mosquito spraying in the area the facility would fail to meet its toxicity limits. And the effort it would have taken to have proven that would have been enormous, and we just felt that it was not worth the effort.
Q Okay. How about --
A The fact is that there were these exceedences of the permit both from toxicity and nitrogen.
Q Well, tell me about the nitrogen. Was that --
A With regard to the nitrogen, again, you had a secondary treatment plant that actually was operating virtually at what the experts call, I think, tertiary level. It was removing something on the neighborhood of

70% of the nitrogen. To get to an AWT facility you must be removing roughly, I think it's 93 to 95% of the nitrogen. A secondary or tertiary plant will not do that.

But again, we demonstrate to the court how well Florida Cities was operating this facility. And there was a period of time after the permit was issued that we were not through with construction to get to the AWT status. It was that period of time that the court fined us for, and my recollection is that we accepted the government's proposed penalty on that.

Q Isn't it true that most, if not all, of the nitrogen and toxicity violations occurred before Waterway completed the upgrade to AWT?

A I would say that's roughly correct.

Q Wasn't it the DEP's remedy for meeting the nitrogen and toxicity limits, the upgrade to AWT? Was that the DEP's remedy for meeting those limits?

A I wouldn't say it's a remedy. The company had decided for the plant to continue operating we would have to go to AWT limits. It was doing extraordinarily well under its present operation, but it couldn't get to this 90 some odd percent removal which is the requirement, I believe, under Florida statute that you must meet if you are going to have an AWT facility and discharge into a water of the State of Florida.

Q *Do you believe that the -- is it your opinion* that the erroneous denial of the 1986 NPDES permit is a mitigating factor for the violations which occurred several years after the permit was denied?

A Absolutely. They would not have had to have gone to AWT if they had not sought to expand the size of the plant, so there would have been no AWT violations nor any AWT requirement. In fact, Doctor Ahmadi testified to that fact in trial, that had they not moved to increase the size of the facility they could still be there discharging, let's say, a million 80 thousand gallons to this day without AWT requirements.

That's what this mistake caused. This goes back to your question to me earlier about the millions and millions of dollars that were wastefully expended here. In fact if there is a problem, it should be -- the problem should be leveled against EPA for causing this particular issue and the Department of Justice.

Q Mr. Baise, it's our understanding that the DEP was requiring relocation of outflow and upgrade to AWT for *all companies that were discharging into surface waters; is* that right?

A No, that is not correct. It was a policy -- and if you talk to Doctor Ahmadi about it, I think he will tell you, and I have read his deposition, but I can't say that

I've read it closely enough to quote him with respect to your question. It clearly was the policy to move the dischargers from canals out into the river. You have to, again, remember where this facility was discharging. It virtually is on the edge of the Caloosahatchee River.

Doctor Ahmadi told us initially that he presumed that this was what I would call part and parcel of the Caloosahatchee, and he did say that as a policy in 1988 they would like to move everybody out to the middle of the river. But in terms of being able to have required these people to have moved out in the middle of the river, as I looked at the Florida Statutes and regulations at the time, they could not have required Florida Cities to have done so. Whether they would have done so just as a matter of good policy and being a good neighbor, I can't answer. I would assume that they would have done so.

And to add one other point to that, you have to go back and look at what the facts were with regard to water quality standards of the Caloosahatchee River. It was assumed that there were water quality standards problems. We asked Doctor Ahmadi to go review along with our expert, Mr. Randy Armstrong, who used to be with DEP, and examine the data from the river and the canal to the extent that they had -- or that inlet I would call it rather than a canal -- examine the data over the last, I

believe it was ten years. They could not find any water quality violations created by this facility, and I believe Doctor Ahmadi's testimony at trial was they couldn't tell any difference in water quality standards improvement or disimprovement from the moving of this pipe 26 hundred feet out into the river or had it remained right where it was. They would not have been able to detect any lowering of water quality standards or improvement of water quality standards.

Q Okay. If you'll look, again, at page 6 of your rebuttal testimony.

A Yes.

Q That same sentence that I read to you a few minutes ago starting on line 15, that exhibit MA-7 which directed the company to construct the treatment and other facilities necessary to relocate the effluent outfall and *to meet the water quality standards*?

A Correct.

Q Is it your opinion that that particular certification worksheet was a DEP requirement that the Waterway treatment facility be upgraded to AWT?

A Particularly this document is a requirement, but had you not had the mistake made by Ms. Kagey and EPA, this would not have been required.

Q Do you happen to know when that document was

prepared?
A The NPDES certification worksheet?
Q Correct.
A No, I don't think I would know that.
Q Do you know why it was prepared?
A Generally NPDES certification worksheets are prepared to show that the activity in question is not going to harm water quality standards and fit within the wasteload allocation or the TMDL, total maximum daily load, allowed into the stream because you have a stream that can absorb so many pollutants. EPA wants to know that whatever action it's taking will not harm the state's water quality standard. The state is responsible for enforcing the water quality standards, even though that standard has been approved by EPA; so both parties have to work here in harmony to make sure the water quality is protected so that is what that certification worksheet is all about as I recall it. It certifies that the activity you have approved certainly is not going to hurt water quality and hopefully will help it.
Q Mr. Baise, are you pretty familiar with the Florida DEP policies and procedures with regard to requiring utilities to upgrade their wastewater treatment facilities?
A Let's say I am familiar. I wouldn't say I'm

pretty familiar with it.
Q Are you aware that DEP, the Florida DEP typically requires wastewater treatment upgrades through a consent order?
A I am familiar with that, yes.
Q Do you know whether it's true that the DEP can also require a treatment upgrade when a wastewater operating permit is renewed?
A They certainly could require it if water quality standards were being violated or permit conditions were being violated. Part of it would depend on what the TMDL study showed and the wasteload allocations granted in the area showed as to whether or not they could require an upgrade to a particular facility. I mean the agency cannot act arbitrarily and capriciously and just say we want you to upgrade without showing mathematically why that is required and what result is going to be achieved as a result of that upgrade. Now what happens practically is, as you describe it, they issue an order; and most people wanting to get along with the state agency go ahead and do what they want.
Q Isn't it unusual for the DEP to require a treatment upgrade through an NPDES certification worksheet?
A I wouldn't know whether it is or not.
Q Do you know whether the EPA typically requires a

more restrictive limitation on effluent discharges than the states would generally require?
A No. The State of Florida is much more stringent than EPA. Let me give you an example. With regard to these facilities, EPA only requires in secondary treatment what is called the 85% removal standard. Florida, I believe, is 90 or 95% removal standard, that's number 1. Number 2, most NPDES permits issued by EPA do not have a limitation in there for P&N, or phosphorous and nitrogen, at the levels Florida has.
You have in Florida something called the Grizzle Fig Act, which basically wants to get the discharges of phosphorous and nitrogen out of all Florida water. That was becoming so prohibitively expensive the state had to amend its statute to allow these facilities to do what are called minimum negative impact studies. If you could do a minimum negative impact study and show that you would not impact the stream, then you could discharge into a water of the State of Florida. If you could not get a successful MNI study completed, then you had to stop your discharging into a water of the State of Florida. So Florida's rules are much more stringent than the federal EPA's rules.
Q Okay. Well, isn't it true that even if the state does require a more restrictive limitation on effluent discharges than what EPA requires minimally that the EPA

will follow the state's lead on that and require the state's more restrictive effluent limitation?
A If the state has put an end to their permit, EPA wants to make sure the state enforces its permits, if that's what you're saying.
Q Okay.
A And often times EPA will just mimic the state permit where it has dual permitting authority as you have here in Florida.
Q But you said that the EPA's requirement was 85%?
A Their secondary treatment standard is 85% removal.
Q Wouldn't that percentage have required an upgrade to AWT anyway?
A No. No, this facility was doing actually much better than 85% removal of its BOD and TSS material, and as I said earlier with regard to P&N, it was something in the 70% range. And with regard to some of the pollutants being discharged from Waterway Estates, I believe the testimony was that this facility was getting upward of 92, 93% removal of the pollutants.
Q Okay. Thank you.
Mr. Baise, approximately how many cases have you worked on concerning violations of the Clean Water Act by a wastewater utility?

A You mean utility cases or how many water cases have I worked on?
Q By a wastewater utility.
A Well, I'm working on one right now. City of New Albany, Indiana. I've worked on one for the City of Ft. Wayne, Indiana. Wastewater utility questions were raised in something called the West Side Highway Project, but that went more to inadequate EIS than it did violations of the permit per se.
Q Did any of those cases go to trial?
A West Way went to trial. Ft. Wayne did not go to trial. New Albany is about to go to trial.
Q Ft. Wayne settled before trial?
A Ft. Wayne settled, yeah.
Q For the EPA's southern region, are you aware of any other cases which have gone to trial which involve violations of the Clean Water Act by a wastewater utility?
A I would not be aware of -- Oh, in the southern region?
Q In the southern region.
A Yes, the Smithfield Hams case we talked about the other day involved a wastewater treatment facility.
Q Is that the only other one that you know of that has gone to trial in --
A No, the Dean Dairy case involves a wastewater

treatment facility. That's another case I'm involved in. I'd forgotten about that one.
Q What case is that again?
A Dean Dairy.
Q Could you spell that, please?
A Yes. Just United States versus D-e-a-n Dairy Company, or it may be Fairmont Foods. I forget just how the caption is titled.
Q Okay. Thank you.
A That's in Pennsylvania. But the Smithfield Foods case is in Virginia which would be, obviously, considered part of the southern part of the country.
Q Is that in EPA's region 4, do you know?
A No, that's in region 3.
Q Do you know if there have been any other cases in EPA region 4 that have gone to trial concerning the Clean Water Act and the --
A I do not know personally of that, but I know that there are a couple of cities in Georgia where the same sorts of cases have been filed. I think Columbus, Georgia, is one. There is another community in Florida where a similar action has been filed. The City of Palmetto has been sued by EPA. I think it went to motions practice, but I don't know whether it went to trial. I don't think it did. I think it was settled on a motion.

Q Okay. Thank you.
When did it first become clear to you, Mr. Baise, that many of the DOJ's actions in this particular federal case that's at issue here was without merit?
A Well, I'd have to rephrase your question. It certainly was without merit from the very beginning when I looked at the memoranda that had been prepared by the Vile, Gotchall (phonetics) law firm and saw that EPA was seeking a five-million-dollar fine, so that was virtually immediately.
Q Okay.
A Secondly, you look at the discussions Mr. Berz and I had with Mr. Jacobs. In essence we were saying almost from the beginning this case is without merit and should be settled for roughly a couple hundred -- or 250 thousand dollars, whatever the amount was at that time.
Q So you informed the company that you believed that the DOJ's prosecution was not justified from the very beginning of your involvement?
A Well, almost from the very beginning. I kept asking the executives to produce documents for me which would deal with this zero wasteload allocation issue. I had a meeting with the executives, which should show up in my billing statement fairly early on where I asked them if they were aware of whether the company had violated any one

of the four requirements in the EPA federal regulations which would allow EPA to take the permit away, and to a person -- Both the executives and the operating people could not answer that question. They felt they had not violated the regulations as I read them to them, and that's what started us off on the wasteload allocation hunt because I was aware that EPA had been cutting corners with regard to how it dealt with wasteload allocations, but my feelings didn't make any difference. I had to prove, and my team put together the case that proved that EPA had never had a zero wasteload allocation approved for this particular facility.
Ms. Kagey, as you see from my testimony, relied on a two-page document which was a regional study conducted back in 1980 or '81, which had as its purpose to build a huge regional facility in that area. Once that facility was built, all of the smaller facilities, of course, would feed into that; and quite naturally, all of them would have zero wasteload allocations. As Doctor Ahmadi pointed out, as other EPA officials pointed out, this was nothing more than a planning study which was called for by section 201, I think it was, of the Clean Water Act, which I had been intimately involved in when I was in the agency.
So once I got it figured out that there was no zero wasteload allocation, then we started down the trail

of finding was there a wasteload allocation given to this facility? And as you know from your reviewing the record, and Doctor Ahmadi helped us considerably, we were able to prove that this facility had a wasteload allocation from, I want to say 1975 forward, because if you look at my questioning of Doctor Ahmadi when he was on the witness stand, I think I asked him every year from the time this facility first was authorized to operate, if it had had a wasteload allocation, and he repeated yes, just to drive the point home to the court that this facility had always had a wasteload allocation and it was authorized by the State of Florida. And of course the coup de grace was EPA had this facility's wasteload allocation in its own file and never looked at it.

Q When did you first inform the company or advise the company that it was your opinion that the DOJ's prosecution was not justified?

A I would have to say it was sometime in late '93 that I would have said I thought that probably was the case. I'm conservative enough I probably would not have said I can assure you that this is the case, but Berz and I would not have been making the statements to Jacobs that we were making unless I felt pretty strongly about my ability to prove these points. But clearly in 1994 we went off on this extraordinary effort to prove the theory I had of the

case. So I had to have told them, I would say, sometime late '93. But certainly at the very beginning I made it clear that I could not find any evidence that they were in violation of those four requirements.

Q Okay. Thank you. Sir.

MS. GERVASI: We have no further questions and appreciate your time.

Mr. Gatlin, do you have questions?

MR. GATLIN: I don't have any questions, and we would like to read.

MS. GERVASI: Okay. That should conclude the deposition then.

Thank you very much, Mr. Baise.

(WHEREUPON, THE DEPOSITION WAS CONCLUDED)

* * * *

ERRATA SHEET

DOCKET NUMBER 971663-WS
GARY H. BAISE
AUGUST 5, 1998

CERTIFICATE OF DEPONENT

This is to certify that I, GARY H. BAISE, have read the foregoing transcription of my testimony, Page 1 through 50, given on August 5, 1998 in Docket Number 971663-WS, and find the same to be true and correct, with the exceptions, and/or corrections, if any, as shown on the errata sheet attached hereto.

_____

GARY H. BAISE

Sworn to and subscribed before me this _____ day of _____, 19____

_____
NOTARY PUBLIC
State of _____
My Commission Expires:

REPORTER'S DEPOSITION CERTIFICATE

STATE OF FLORIDA)
COUNTY OF LEON)

I, NANCY S. METZKE, Certified Shorthand Reporter and Registered Professional Reporter, certify that I was authorized to and did stenographically report the deposition of GARY H. BAISE; that a review of the transcript was requested; and that the transcript is a true and complete record of my stenographic notes.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED this 6th day of August, 1998.

NANCY S. METZKE, RPR, CCR

EXHIBIT NO. _____

DOCKET NO.: 971663-WS -- PETITION OF FLORIDA CITIES WATER COMPANY FOR LIMITED PROCEEDING TO RECOVER ENVIRONMENTAL LITIGATION COSTS FOR NORTH AND SOUTH FT. MYERS DIVISIONS IN LEE COUNTY AND BAREFOOT BAY DIVISION IN BREVARD COUNTY.

WITNESS: Michael Acosta - Rebuttal

ON BEHALF OF: Florida Cities Water Company

DESCRIPTION:
Responses to Staff's 2nd request for interrogatories - No.44.

PROFFERING PARTY: STAFF

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663-WS EXHIBIT NO. 30
COMPANY/ WITNESS: Staff
DATE:

44. With regard to Waterway Estates' 1986 NPDES permit application, is it not correct that the Florida Department of Environmental Regulation waived state certification per 40 CFR 124.53(c)?

Response: (MA)

Unknown. However. A certification worksheet was found during discovery in the case, U.S. vs. FCWC, in either the EPA or DEP files (date illegible). See Exhibit _____(MA-7).

EXHIBIT NO. _____

DOCKET NO.: 971663-WS -- PETITION OF FLORIDA CITIES WATER COMPANY FOR LIMITED PROCEEDING TO RECOVER ENVIRONMENTAL LITIGATION COSTS FOR NORTH AND SOUTH FT. MYERS DIVISIONS IN LEE COUNTY AND BAREFOOT BAY DIVISION IN BREVARD COUNTY.

WITNESS: John D. McClellan - Rebuttal

ON BEHALF OF: Florida Cities Water Company

DESCRIPTION:
1. Transcript of Deposition of John D. McClellan taken on July 30, 1998.

PROFFERING PARTY: STAFF

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663-WS EXHIBIT NO 21
COMPANY/
WITNESS: McClellan
DATE: 8-12-98

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Cities Water Company for limited proceeding to recover environmental litigation costs for North and South Ft. Myers Divisions in Lee County and Barefoot Bay Division in Brevard County.	DOCKET NO. 971663-WS

TELEPHONIC DEPOSITION OF JOHN D. McCLELLAN

Cave Creek, Arizona
July 30, 1998

Prepared For:

TIMOTHY VACCARO, ESQ.

(Copy)

COASH & COASH, INC.
1802 North Seventh Street
Phoenix, Arizona 85006
(602) 258-1440

By: Jennifer Smith

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No. Description Marked

(No exhibits were marked for identification.)

TELEPHONIC DEPOSITION OF JOHN D. McCLELLAN, taken at 11:35 a.m., on July 30, 1998, at 38065 North Cave Creek Road, Unit 43, Cave Creek, Arizona, before JENNIFER SMITH, a Notary Public in and for the County of Maricopa, State of Arizona.

APPEARANCES:

For Florida Cities Water Company:

GATLIN, SCHIEFELBEIN AND COWDERY
By: Kenneth Gatlin, Esq.
3301 Thomasville Road, Suite 300
Tallahassee, Florida 32312

For Citizens of The State of Florida:

ASSOCIATE PUBLIC COUNSEL, OFFICE OF PUBLIC COUNSEL
By: Harold McLean, Esq.
111 West Madison Street, Room 812
Tallahassee, Florida 32399

For Commission Staff:

FLORIDA PUBLIC SERVICE COMMISION, DIVISION OF LEGAL SERVICES
By: Timtothy Vaccaro, Esq.
Gerald L. Gunter Building
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

JOHN D. McCLELLAN,

called as a witness herein, having been duly sworn by the Notary Public, was examined and testified as follows:

MR. VACCARO: Okay. Mr. Gatlin, do you agree to the usual stipulations?

MR. GATLIN: Yes, I do.

EXAMINATION

BY MR. VACCARO:

Q. Okay. Mr. McClellan, I want to refer you to your rebuttal testimony.

A. All right. I have it.

Q. All right. Go to page 2 beginning at line 25, and go over to page 3, line 6. I believe you discuss what retroactive ratemaking refers to, correct?

A. Correct.

Q. What's the basis of your opinion there?

A. A lot of years of experience, in looking at the question, is about the only answer I can give you. In fact, I don't think I've ever seen a formal definition of it.

Q. So it's basically your opinion?

A. Yes.

Q. And you referred to no court orders or legal

opinions or anything of that nature?

A. That's correct.

Q. Okay. Let me take you to a hypothetical here. If Mr. Allen comes in in 1998 for a rate case for North Ft. Myers' wastewater system, let's say the books show the income reported below the line for 1990 to 1997, and that during the rate proceeding the Commission takes the utility books and discovers this income should be recorded above the line as operating income. Do you think it's appropriate for the Commission to accumulate that income for those eight years and reduce rates to the customer in the current proceedings?

A. Well, that's a tough question. I'll qualify my answer. Let's assume that the company had been running substandard returns all those years and adding this money back that would leave them in a more or less substandard return, then I believe the answer is, no, you shouldn't bother.

If you reverse the situation, my answer might be different. Assume, then, the submarginal result for that entire period is due to the below-the-line treatment of revenues in which the operating revenues were misclassified or misassigned or misrecorded. These revenues, had they been recorded properly, would have put the company into an excess earning position. Now I think

you're making a pretty good case for going back and looking at them.

Q. Can you repeat that?

A. Given those conditions where the company's earnings were actually excessive and whether the recording was deferred or not, I think that would be indifferent. If the recording hid that fact, I don't think that's important. I think the Commission would certainly have a rational basis for looking at that as something to be corrected, not being retroactive ratemaking because of the nature of the event. Now, obviously that's not an absolute. It is an off-the-cuff opinion given the right circumstances.

Q. Okay.

A. It's not one that's going to be popular with my client, I suspect. I think that certainly it's a rational thing to look at and I would not consider that. That's my first reaction to that, given the circumstances of those revenues having produced excess earnings that would have gone back presumably in reduced rates to the customers. For the Commission to go in and correct the past, I probably could not argue that to be retroactive ratemaking. I think I have to bow out of that one.

Q. Let me take you over to FASB 71, which you reference in your testimony. Is it correct that that has

no bearing, that FASB 71 has no bearing on regulatory assets relating to retroactive ratemaking or not?

A. That's absolutely correct.

Q. All it says is that the Commission allows the cost to be regulatory assets and they can be booked as such?

A. Yes.

Q. How can the utility system be reasonably assured a future recovery?

A. That requires a lot of judgment and looking at various conditions, and sometimes it's very elusive.

Let me give you an example where it would be questionable. Assume that the State of Florida has for the last 50 years -- no, that's too long -- the last 25 years has been allowing companies to defer and recover damages from a major catastrophic event, such as a hurricane, and there were no storm damage reserves. Okay? Assume a hurricane comes through and knocks out a big piece of downtown Miami. The company incurs a ton of costs in restoring the system which have to be expensed under normal accounting procedures, but because of the way the Commission has dealt with storm damages in the past, I think the company can make a very strong case for deferring those costs on the presumption of recoverability under the Commission's normal regulatory

process. I think that would be an easy case to sustain for accounting purposes.

Q. What if those expenses were not deferred? Do you think they would be able to handle coming in and asking for recovery like Florida Cities has done?

A. Right. To do that, I was talking about the accounting process on the front side. Adding a deferral treatment when it happens wouldn't convince me one way or the other as to recoverability. Now, if they could get an accounting order in advance, I think that would give you another factor to support the accounting process.

Q. Okay.

A. I'm not sure it would do you that much good from the ratemaking process, because all the accounting orders I've seen have been qualified as to the subsequent ratemaking treatment.

Q. Let me take you over to page 10 of your testimony. I may have something else for you after this. Hold on.

Florida Cities had written off its litigation costs above the line?

A. Yes.

Q. Do you think that made any difference as far as this proceeding is concerned?

A. I don't see it as having any impact. It

would not affect my opinion one way or the other.

Q. I'd like to take you over to page 10 of your testimony where you talk about the cost of service standards.

A. Yes. I have Page 10.

Q. Page 10. Could you please explain what the cost-of-service standard is?

A. Well, in fairly simple terms, it's to provide or to measure the cost of the prudently incurred cost of doing business and setting rates that would produce revenues that would give you a reasonable opportunity of recovering such costs. It's basically -- A cost-of-service standard is a measure of prudently incurred costs.

Q. Where can cost of service standards be found?

A. I'm not sure I could give you an authoritative definition out of textbooks. A lot that I've seen have been applied for the last 40 years.

Q. Have you seen any reference to that in either Florida statutes or Florida administrative codes?

A. I don't recall having seen it. I don't know whether it's there or not. I think the Commission Orders are probably full of it. I know they used to be. I know I've seen it in plenty of Commission Orders in years

past, in terms of cost of service it was using.

Q. Anything you can put your finger on at the moment?

A. No. I haven't seen Commission Orders now in a number of years. It's general regulatory standards. Cost of service is a term that's been coined to measure the process by which regulators have traditionally set rates.

Q. Let's talk about the Florida statutes again. Are you aware of anywhere in the Florida statutes where it indicates that regulated utilities allowed the opportunity to recover costs in maintaining a financially healthy system?

A. I'm not sure it's in the statutes. I think it's been a standard process for many, many years.

Q. Let me take you over to -- Bear with me for one second. I want to make sure I've got this right.

A. Okay.

Q. Let's go over to page 10 of your rebuttal testimony at the very bottom.

A. I have page 10.

Q. Go over to the next page where you say that "The regulated utility is entitled to an opportunity to recover all costs prudently and legitimately incurred in providing efficient, reliable service to maintain a

financially healthy system"; does that sound about right?

A. That's precisely what I said, yes.

Q. Despite my garbling of it.

A. You got the words right.

Q. Okay. In your preparation for this case, did you consider whether Florida Cities Management acted prudently in avoiding its exposure to litigation prior to the DOJ's initiation of its litigation?

A. Based on my understanding of the development and the conditions, I think it was absolutely necessary that they do so, and prudent, yes.

Q. You think that they did avoid that exposure?

A. Well, I have to assume so. I don't know the legal process. If you sue me for $100 million and I choose not to oppose you, I assume I'm giving up a fight and you're going to get $100 million from my pocket.

Q. What you're saying is, you believe it was prudent for them to litigate the matter or avoid being hit with that fine and --

A. As a layman, they had no real choice.

Q. Let me back up to before the DOJ initiated litigation to where we're still at the NPDES permit denial.

A. Go ahead. I'm shaky with that area, but I'll try and stay with you.

Q. Okay. Do you think that the management acted prudently by not challenging that permit development?

A. I'm not sure what the circumstances were. I don't know the details.

Q. Prior to the DOJ litigation, did you investigate anything regarding the action of management?

A. I've read a good bit of material that other people have discussed, but I didn't really focus on it. I focused mainly on the facts relating to the litigation.

Q. Okay. Let me ask you this. With the DOJ litigation, the EPA litigation, basically Florida Cities paid roughly a $309,000 penalty, did it not?

A. That's correct.

Q. That was a penalty dealing with the Clean Water Act?

A. I think that's correct. CWA stands out as part of the language, and I think that stands for Clean Water Act.

Q. I realize you're not a lawyer, but technically paying for that penalty, the penalty of the Clean Water Act, essentially that is paying for a violation of law, is it not?

A. I think that technically that's true. I'm speaking from my understanding, and that's the way I

understand it, in any event.

Q. Do you believe that Florida Cities cost of defending itself for violation of law is a legitimate cost incurred in providing reasonable financial service?

A. I think it depends upon the circumstances. Although, I understand the Commission rule has been pretty much where you have to defend yourself against something you're convicted of, it's pretty hard to get reimbursed for. I think that's a standard Commission position, but I'm not sure of it.

Q. Do you believe it's fair for the ratepayers to pay the company's cost of defending itself when it violates the law?

A. I think it depends on the circumstances. I don't think there's a blanket. No, there is not. I can certainly tell you the circumstances where there should not be.

Let me give it to you this way as a layman and not from a legal point of view. I think that it is a circumstantial condition and has to be measured by the circumstances. If the people running the company are stealing money from the company and they get put in jail and that's illegal, then I would have one answer. If the company was found guilty of technical violations of an abstract, obscure something that doesn't make any sense,

but the courts may say, "Yeah, technically you're wrong. Therefore, you pay $2," I don't see that being imposed as an improper or bad act. Even so, I think the Commission would disallow that also.

I've given you my understanding. Of course, I'm not an authority on this.

Q. Do you have a copy of your deposition from May 15th when the Commission staff deposed you?

A. Yes. I'll have to go through some of my papers to find it. I know it's here.

Q. I'll be happy to give you --

A. Yes, I have it.

Q. Look at page 16.

A. Page 16?

Q. Page 16, line 7. It's a few lines before that where --

A. Okay. I have it.

Q. I guess basically what your testimony here is, is that you agree that had the company been financing the original amount requested by the DOJ and gone into bankruptcy, that the shareholders would have lost their entire benefits. Is that a correct, reasonable assumption?

A. Correct, yes.

Q. Given that fact, would it be fair to say

that the shareholders would have been harmed as much or more than the ratepayers under that scenario?

A. I will admit that, without question, the shareholders would have been harmed.

Q. Isn't the basis of the company's request to recover litigation costs is the fact that the ratepayers would have been harmed because of the financial consequences would have cost --

A. Can you repeat the question?

Q. The basis of the company's request to recover the litigation costs is the fact that the ratepayers would be harmed because of the financial consequences, correct?

A. Yes, sir, but that's only part of it and there may even be a secondary part. It's a legitimate cost of doing business. It's legitimatized by the fact it avoids ratepayer damages.

Q. Okay. So it's legitimatized by the fact that it would avoid ratepayer damages?

A. It's necessary to maintain the system provided for a lot of reasons, but I think ultimately the issue is, is this a prudently incurred cost and is it a legitimate cost for recovery in the cost of service process? As to that qualification, that characterizes my answer, absolutely.

Q. Well, let me back up a couple questions. I believe you agreed that if the company had been forced to pay the original requested fine, that the company would have gone into bankruptcy and that would have terribly affected the shareholders.

A. I'm not sure I said that it would go into bankruptcy. If it did, it certainly would have had a deep financial impact, and that would hurt people, yes.

Q. We'll drop the word "bankruptcy" and we'll go with "deep financial impact."

A. Yes, I'll certainly go with that.

Q. All right. Given the potential for harm to the shareholders, do you think that it's fair for the ratepayers to pay approximately 94 percent of the litigation costs?

A. Yes, sir, because it's a cost of service. I think who benefits the most or least is a secondary issue.

It's like if I chose to have an extra meter reader or safety inspector. I have to incur a cost, but I can produce a legitimate argument that I should incur that cost to avoid problems on the system. I would agree that the shareholder benefits from all the expenditures, but that's not the reason I should recover the cost of providing that safety inspector. It's because of the

cost of doing business. Whether the shareholder benefits, I think, is totally indifferent. I think the shareholder does, but I don't think it has any impact on whether or not the customer's cost recovery is appropriate.

Q. Other than the reduction of penalties, what other costs were reduced to the customers?

A. Well, the costs that would have been reduced to the customers are whatever costs that would have been incurred. I don't know what the costs would have been. I think you have a combination of imposed or higher costs to do business. Pressure on maintaining system quality of doing business would permeate the system both financially, I think, and operationally. I can't give you an absolute on it.

Q. Well, let me ask you this. Is it your understanding that utility commissions do not typically allow recovery of fines and penalties?

A. I think that's generally true, but I don't really have -- I don't recall a lot of instances, but I would not be at all surprised if that's the case.

Q. If neither the penalty of $309,000 or a potential $5 million settlement is recoverable from ratepayers, is it rational or appropriate to use a nonrecoverable amount to determine how much the

ratepayers should absorb?

A. I think that's perfectly appropriate. If you read my prior deposition, I didn't agree with that process. That's what the company did, but if you're trying to share the cost to carve out the cost of litigation which might be tagged along with a fine itself -- I think there may be several ways to do it and that's certainly one way -- you take the non-allowable and the allowable and you get the ratio of the two and work from there. There are various mechanical ways to do it. What you are trying to do is carve out some relationship between the fine that they ultimately had to pay and the cost that might be related to that fine and conclude, as the company did, that we will not seek to recover the fine and, therefore, we will carve out costs.

I presume this is what they did, and that could be related to the fine itself. The cost we avoided was the $100 million or whatever the fine was. We avoided substantial penalties. We maintained our system. Those were necessary costs. They were incurred in the process of doing business, and the company is seeking that they should be recovered, and I agree with that.

Q. Let me ask you this. Florida Cities comes in and requests a recovery of roughly $3.8 million in litigation costs.

A. All right. I think it's 3.6, but you're close.

Q. Okay. It's been a long day.

A. Actually, it's less than that. It's 2.2, I think. Go ahead.

Q. That's right. Don't mind me. Let's just say that when we go to hearing on this, the Commission decides that not all of the actions on the part of the company were prudent and reasonable. Okay?

A. All right.

Q. If that were the case, let's say the Commission decides, for example, that the fact that the company did not challenge the NPDES permit as not prudent and reasonable, do you think under that circumstance that the shareholders should bear some of the burden of the costs being recovered? Is there another way to allocate this other than all or nothing at all?

A. The answer to the question is, yes, I think I can make a good case for that. I think what you have here is a two-tiered thing. First, you allocate the costs that relate to fighting the battle and the 2.2 or 3.6 million, whatever reference you want to use to determine that that's the cost related to the recoverable cost. Now you look at the prudency of that cost and for some reason it's determined only half was prudently

incurred, for whatever reason, I think you just made a case for not allowing half of it. Now we're in a prudency measure, and I think it's perfectly legitimate as a basis for disallowance once that condition is established.

Q. Okay. Give me one second to recap and look at these questions I've got here and see if there's anything else I want to ask you.

A. Sure. No problem.

MR. VACCARO: Well, I've got no other questions. Thank you.

MR. McLEAN: This is Harold McClean, M-c-L-e-a-n, representing Citizens of The State of Florida.

EXAMINATION

BY MR. McLEAN:

Q. Mr. McClellan, you kind of set up a hypothetical with an extra meter reader or an additional meter reader, wasn't that what you said?

A. Well, I started with that and shifted over to an additional safety inspector, but it's the same principle.

Q. Let's go with that additional safety inspector. You stated that that service would be in the

best interest of the ratepayers and of the stockholders, presumably, correct?

A. I think that would be true, yes.

Q. The fundamental issue is whether that additional safety inspector is an expense prudently incurred in the production of the utility service, correct?

A. Yes, sir, I think that's a valid measure. Let me make one qualification which you might not have picked up.

When I said the key is that that is secondary, I wasn't talking about the customer benefits. I was talking about the stockholder benefits. The system functioning well does benefit the customer. There's no question about that, but it also benefits the stockholder. Now, the key is to make a system function most efficiently. I don't look at who benefits the most, whether it's the customer or shareholder. Although, I typically would think the customer would benefit the most. That's secondary, but to me it's a matter of whether or not the cost was prudently incurred and was reasonable to maintain the quality of service, et cetera.

Q. I want to get my fingers around exactly what it is you bring to this case. Let me ask it this way. When Florida Cities Water Company declined to challenge

the administrative permit, was that prudent or imprudent?

A. -- I don't know enough about the circumstances to even guess.

Q. What you bring to the case is, they tell you that it is prudent and you believe that, correct?

A. Well, that's part of it. Now, I've also looked at a lot of actions involving the litigation itself. I've seen the claim, the challenge. It was explained to me what was involved, what they did to oppose it. I have concluded that you didn't have any choice. I may be dead wrong, but that's my conclusion.

Q. The NPDES permit, you don't make an opinion to the Commission as to whether that was prudent or imprudent, correct?

A. That's correct. I don't really know what went on there.

Q. In order for you to recommend whether the expenses which flowed from failure to make that challenge, if any, in order for you to make any recommendations to the Commission about that limited issue, then you have to rely on what other people at FCWC tell you?

A. I'm not making any recommendation that that may have been a good move or a bad move by the company. I don't know if that was imprudent or --

Q. You can make a mistake that's entirely prudent given the circumstances under which you had to make the decision, right?

A. You got it.

Q. What I want to get to is, are there issues, are there behaviors of the utility, are there actions taken, actions foregone, that you personally advised the Commission were prudently done?

A. Yes. The litigation and defending itself against the lawsuit brought by the DOJ. To me, the company's action and defending itself against that claim was not just prudent, it was critical. It was absolutely necessary.

Q. You could look at an individual pleading filed by Mr. Baise and tell the Commission that, indeed, expenses associated with that particular invoice were prudently taken?

A. Quite easily by avoiding a heavy fine or attempting to avoid a heavy fine.

Q. Every document in every action taken by Mr. Baise was apparently prudent, in your opinion?

A. I'm talking about the scope of the case. I can't go into any particulars.

Q. You have to rely on what Florida Cities Water Company's employees tell you on the specific issue

of prudence before you can draw any conclusion about whether the act is prudent; is that correct?

A. No.

Q. So you have entered into an independent judgment that the actions taken, each of them which resulted in 2.265 million dollars, were prudently undertaken?

A. You qualified farther than I told you. I can't tell you each of them. I don't know what each of them were. I can tell you that the action was necessary. If you tell me that you can prove that only 2.1 million was necessary and disprove .1 million, I can't quarrel with you. I don't know whether that .1 is prudent or not. I don't know what you're talking about.

Q. Although you don't know what the individual constituents are, you know that when added up, they amount to a prudent activity undertaken, correct?

A. The action was prudent. I presume the costs reported for that action are correct. Therefore, I concluded that the costs were correct. I think if you wanted to have an absolute on this, that you would have to have a detailed audit just like you would of a plant addition. If you ask me if some facility added was prudent, I would tell you yes, unless I do an audit of every dollar. But going into that facility, I can't

defend every dollar. That does not change my conclusion on the facility. This litigation is exactly the same way.

Q. I would like you to criticize an impression which I have come by or disagree with, if you care to. My impression is that Florida Cities Water Company has told you that they undertook a prudent defense and that you plugged "prudent" into your judgment and say if it's prudent then it should be allowed. You do nothing else; is that correct?

A. That's not correct.

Q. Let me make sure I'm clear on this. What else is it that you do?

A. What do you mean, what else do I do? I don't understand that.

Q. Well, the company says it's prudent. Did you say to them, for example, "I'm going to set that aside and determine on my own whether it's prudent before I bring a sworn opinion to the Commission"? Did you do that?

A. I'm not -- You got me in an awkward position. I'm not sure what you're asking. Let me tell you what I did.

The company called me and told me what they did. I did not ask them if it was prudent. They did not

tell me that it was prudent. The word never came up. I looked at the documentation of the things they did and the costs and the totals that they incurred. I accepted the total figure as being the right figure. I don't know that it is or is not. Whether or not it is or isn't -- My conclusion is that "These are the conditions that you faced. These are the costs that you spent. I'm accepting your measure of the costs as being accurate." Given these circumstances, I concluded that this is not only prudent, but it's absolutely necessary. If you want to build more into my word "prudent," then that's where I come down.

Q. Okay. Thanks. I want to go to the hurricane fund. You told Mr. Vaccaro that if a catastrophic hurricane hit Florida and if the utility came forward to recover its expenses from that period, from a prior period -- Do you understand that question so far?

A. Yes.

Q. You said that you could make a pretty good case for recovery. My question is this. Upon what would you rely on for that opinion? Let me change the question a bit. I don't think that's what you said. I think you said that a pretty good case could be made under FASB 71, but there was some probability of recovery?

A. That was my point, yes.

Q. I would like to know upon what you base that measure of probability, putting the storm damage reserve fund aside.

A. What do you mean by "putting the storm damage reserve fund aside"?

Q. Well, in your answer to Mr. Vaccaro, you were the one who said, "Let's forget about the storm damage reserve for the moment."

A. I recreated the conditions. I think they probably still exist in Florida Power & Light. For a long time they had separate reserves they provided in advance rather than recoveries in arrears.

Now let's move to Florida Power Corporation. I don't think they have storm damage reserves. I assume they don't. I may be wrong. If they had some storm that knocked out half of St. Pete that incurred major costs in doing that that were all applied to getting that system back up and running, they were normally being expensed under FASB 71. If we can make the case that there is reasonable probability of recovery, we can defer those costs for accounting purposes. Now we can go to the Commission and try to get them recovered.

If we don't defer them for accounting purposes, for whatever reason, let's assume that

accounting decides that there's not enough probability to record it, so under accounting procedures you can't do so. I don't think that affects the company's right to an opportunity to recover the costs. That's an accounting measure.

Q. Yes. There was another question that Mr. Vaccaro asked you, and I think the spirit of the question was: Do accounting procedures and the method of recording things dictate whether particular expenses are allowable and/or non-allowable, and I think you said it does not, the circumstances control that, right?

A. I need to correct the way you phrased that. I think you were trying to say it right, but you said it wrong.

Accounting procedures are dictated independently. If it's a capitalizable item that has benefits over future periods, then you can make a case for it under the accounting principles. If an expense is attributable to the period for accounting purposes, and that would be going out and repairing half your system, if you had to repair half the system and there were no capital additions for accounting purposes, there would be an expense for ratemaking purposes. You may conclude that you need to recover that expense over time for a variety of reasons.

As to big impact rates, you don't know what they are until you finish and on and on and on. For ratemaking purposes, you spread it over time.

Q. You also concluded that if not undertaken prudently, it was not to be recovered at all, right?

A. Certainly.

Q. How you make that determination is not determined by accounting procedures, how the company booked expenses or capital expenditures, whatever, but the circumstances would suggest to the Commission a judgment of whether it was prudently incurred in the production of electrical service to the public, right?

A. I think we agree on that, yes.

Q. Good.

A. Let's simplify the facts. Accounting does not set ratemaking, even if it's a uniform system of cost accounting. Accounting does not set ratemaking. Ratemaking does set the accounting.

Q. We hope so. With that in mind, I want to return to FASB 71. I thought I heard you say Florida Power Corporation does not have storm damage reserves if a catastrophic hurricane occurs. I thought I heard you say something along the lines that you can make a case for booking the expenses above the line because you can point to some probability of recovery. Did I say that

correctly?

A. No. No. I can make a case for deferring the expenses, capitalizing expenses for future recovery based upon the conditions in Florida where storm damage costs have been allowed for recovery. I can make a real good case for that, I think. In fact, I don't have to produce an argument on that one. It's so common.

Q. From that experience, can you support other instances where the Commission has permitted it?

A. I think, yes, that would be an easy one under the accounting rules to support. There may be others which would be less easy.

Q. The question that you're trying to determine is how to book it and not whether it was permissible; is that correct?

A. Absolutely. FASB 71 is only an accounting measure. It has nothing to do with the ratemaking recoverability. Well, let me say that differently. It does not establish ratemaking treatment. It will only establish accounting treatment, and accepted ratemaking treatment is one of the factors going into the establishing of the accounting treatment. It's like one of those one-way streets. Accounting does not fix a ratemaker. It's a prime example of -- Let me broaden this just a little.

There have been a number of instances in the state where under the accounting rules in the state that the companies have capitalized major costs. Nuclear plants, for example, are capitalized. The accounting system doesn't give you an alternative to cost recording. The Commission disallowed a lot of investment costs, and things like nuclear plants are deemed to be imprudent. The accounting did not assure the ratemaking on the front side. There was a presumption of recovery; therefore, it was capitalized. That's a primary example of generally accepted accounting principles, not FASB 71.

Q. Are you done, Mr. McClellan?

A. Yes, I think so.

Q. Thank you, sir. In those instances where the company capitalized nuclear plants, did they not have to figure to the penny how much nuclear plants would have cost?

A. Absolutely. They capitalized as they incurred. They would capitalize them and the accounting system provided for treatment as contrasted to expensing as they incurred the cost.

Q. It takes about 10 to 15 years to build a nuclear plant, doesn't it?

A. It takes a good 10 years.

Q. Do you know how much exactly it cost when

they began that process of capitalizing it?

A. No. The uniform system didn't give them an option.

Q. The question is this. Did they know how much it was going to be to the penny when they began to capitalize it 10 years before it came on line?

A. They did not know, and it made no difference if they knew or not. They could not capitalize the future cost. They could only capitalize the incurred cost. That's precisely what the accounting rules dictated; that's not what they chose.

Q. Did they go to the Commission and ask for AFUDC a full 10 years before they knew exactly how much the nuclear plant was going to cost?

A. I don't know of any such occasion. The uniform system required them to capitalize, and they did not have to get permission.

Q. My question is: Do you know whether they ever asked for AFUDC from the Commission a full 10 years before they knew exactly how much the nuclear plant was going to cost them?

A. The answer is, no, they did not ask for it. I think that's what I told you.

Q. Why is it that they did not ask for it?

A. Because they didn't know how much the

nuclear plant was going to exactly cost. It had nothing to do with the AFUDC. The AFUDC is accumulated on incurred costs to date. Under the Commission rules, when a company builds a plant for $100 or builds a plant and spends $100 this year and $100 the next year, during the time of the expenditures, the costs are incurred and they then capitalize another cost. The company does not go to the Commission and request authority to do that any more than they go to the Commission and ask for authority to capitalize the labor and materials. It's part of the cost of building the plant. It's based on known costs, not anticipated costs.

Q. According to your testimony, Florida Cities Water Company could not have come to the Commission and asked for recovery of these expenses because they did not know how much help they were going to need?

A. That's right. You can't ask for something if you don't know what or how much you need.

Q. Could they have asked for what they expected to incur in the future on the projected costs?

A. I don't know about the projected expenditures. Now, asking for what you're going to incur as a matter of deferring the cost, I'm not sure I've ever seen anybody do that.

Q. That's not my question. In 1993, if they

came in and said, "We would like to recover $300,000 a year to offset this legal expense which we are now incurring and anticipate we will incur for the next five years. We would like to have that money be held subject to bond when this case is eventually concluded," could they have done that?

A. I assume they could have.

Q. Thank you, sir. I have one last question. I'm going to set up a hypothetical for you.

If we were going to file a petition that asks for new rates to be set such that the excess monies collected during 10 years will be refunded to customers, do you have any problem with?

A. Yeah. You can't go back and reset earning levels in the past, I don't think. My definition of a retroactive rate is when you apply rates, current projected rates, to obtain or to return, in your case, revenues to offset prior period excess earnings, to me that is retroactive ratemaking. That's as clear a case as I can make for it.

Q. Your answer was no?

A. I think the answer is, I don't think you can claim that. I think that would be retroactive ratemaking. I don't recall how your question was phrased. I don't know whether it was a yes or no.

MR. McLEAN: I have no further questions.

MR. VACCARO: I have no questions.

MR. GATLIN: We would like to read.

(The telephonic deposition concluded at 12:30 p.m.)

JOHN D. McCLELLAN

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

I, JENNIFER SMITH, a Notary Public in and for the County of Maricopa, State of Arizona, do hereby certify that the foregoing witness was duly sworn to tell the truth; that the foregoing 35 pages constitute a full, true, and accurate transcript of all proceedings had in the foregoing matter, all done to the best of my skill and ability.

I FURTHER CERTIFY that I am not related to nor employed by any of the parties hereto, and have no interest in the outcome hereof.

WITNESS my hand and seal this 4th day of August, 1998.

JENNIFER SMITH
Notary Public

My Commission Expires:
May 17, 2001

EXHIBIT NO. _____

DOCKET NO.: 971663-WS -- PETITION OF FLORIDA CITIES WATER COMPANY FOR LIMITED PROCEEDING TO RECOVER ENVIRONMENTAL LITIGATION COSTS FOR NORTH AND SOUTH FT. MYERS DIVISIONS IN LEE COUNTY AND BAREFOOT BAY DIVISION IN BREVARD COUNTY.

WITNESS: MICHAEL MURPHY-REBUTTAL

ON BEHALF OF: Florida Cities Water Company

DESCRIPTION:
1. Responses to staff's 2nd request for Production of Documents, No. 9.
2. Responses to staff's 2nd request for interrogatories, Nos. 40 and 47.

PROFFERING PARTY: STAFF

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 971663-WS EXHIBIT NO. 22
COMPANY/ WITNESS: Staff
DATE: 8-12-98

COMMISSION STAFF'S SECOND SET OF PRODUCTION OF DOCUMENTS
TO FLORIDA CITIES WATER COMPANY
DOCKET NO. 971663-WS

9. According to PAA Order NO. PSC-95-1360-FOF-SU, issued on November 2, 1995, and Final Order No. PSC-96-1133-FOF-SU, issued on September 10, 1996, the United States Department of Justice (DOJ), on behalf of the United States Environmental Protection Agency (EPA), filed a civil action against the utility. Legal expenses relating to this lawsuit were incurred during 1992, 1993, and part of 1994. The legal fees were capitalized as part of an expansion project on the North Fort Myers wastewater treatment plant. During 1994, the utility began expensing all additional legal fees pertaining to this lawsuit and reporting them below-the-line. The Commission found that the legal fees should be consistently treated as a below-the-line expense item and removed from plant in service.

   a. Please provide us with all of the accounting entries in 1992, 1993, and part of 1994, when the utility capitalized the legal fees.

   b. Please provide us with all of the accounting (or reverse) entries in 1994, when the utility removed the legal fees that were capitalized in 1992, 1993 and part of 1994.

   Response: (MM)

   a. Legal costs capitalized in 1992, 1993 and 1994 were initially recorded in Construction Work in Progress (CWIP) (NARUC account 105) for North Fort Myers Wastewater when incurred; Cash (NARUC account 131) was credited. These costs were transferred from Construction Work in Progress to Utility Plant in Service (UPIS) (NARUC account 101) for North Fort Myers Wastewater. A summary of the accounting entries booked each year is as follows:

COMMISSION STAFF'S SECOND SET OF PRODUCTION OF DOCUMENTS
TO FLORIDA CITIES WATER COMPANY
DOCKET NO. 971663-WS

	DEBIT	CREDIT
1992:		
CWIP (105)	$16,643	
Cash (131)		$16,643
UPIS (101)	$16,643	
CWIP (105)		$16,643

	DEBIT	CREDIT
1993:		
CWIP (105)	$91,628	
Cash (131)		$91,628
UPIS (101)	$91,628	
CWIP (105)		$91,628

	DEBIT	CREDIT
1994:		
CWIP (105)	$102,463	
Cash (131)		$102,463
UPIS (101)	$102,463	
CWIP (105)		$102,463

b. In December 1995, FCWC removed the legal costs that were capitalized in 1992, 1993 and 1994 from UPIS for North Fort Myers wastewater and reclassified them to Miscellaneous Nonutility Expenses (NARUC account 426)as follows:

	DEBIT	CREDIT
DECEMBER 1995:		
UPIS (101)	$210,734	
Misc. Expenses (426)		$210,734

COMMISSION STAFF'S SECOND SET OF INTERROGATORIES TO
FLORIDA CITIES WATER COMPANY
DOCKET NO. 971663-WS

INTERROGATORIES

40. According to PAA Order No. PSC-95-1360-FOF-SU, issued November 2, 1995, and Final Order No. PSC-96-1133-FOF-SU, issued September 10, 1996, the United States Department of Justice (DOJ), on behalf of the United States Environmental Protection Agency (EPA), filed a civil action against the utility. Legal expenses relating to this lawsuit were incurred during 1992, 1993, and part of 1994. The legal fees were capitalized as part of an expansion project on the North Fort Myers wastewater treatment plant. During 1994, the utility began expensing all additional legal fees pertaining to this lawsuit and reporting them below-the-line. The Commission found that the legal fees should be consistently treated as a below-the-line expense item and removed from plant in service.

a. Why did FCWC capitalize the litigation costs incurred in 1992, 1993 and part of 1994, as part of the expansion project on the North Fort Myers wastewater treatment plant?

b. Referring to interrogatory No. 40a, above, why did FCWC cease capitalizing these litigation costs and begin expensing them below-the-line in 1994?

c. Referring to interrogatory NO. 40a, above, were the amounts capitalized subsequently written off below-the-line or are they still recorded in plant?

d. Referring to interrogatory No. 40a, above, if the amounts were written off, when did FCWC write them off?

Response: (MM)

a. At the time legal costs incurred were capitalized, FCWC was not aware that the actions would lead to a lawsuit. Therefore these costs were viewed as costs associated with expansion of the North Fort Myers wastewater treatment plant and capitalized as part of the cost of expansion much as the Company capitalizes legal costs associated with permitting.

b. When FCWC became aware that the civil action filed by the DOJ resulted in a lawsuit, litigation costs incurred thereafter were considered costs incurred relative to the suit and were therefore expensed beginning in 1994. These costs were expensed because the Company did not know the magnitude or the ultimate outcome of the litigation.

c. As a result of Audit Disclosure No. 2 by PSC Auditors and findings noted in Docket No. 950387-SU, Order No. PSC-95-1360-FOF-SU issued November 2, 1995, all of the litigation costs capitalized in 1992, 1993 and 1994 aggregating $210,734 were adjusted out of utility plant in service (NARUC account 101) to expenses below-the-line (NARUC account 426) in December 1995.

d. As noted in the answer to interrogatory question 40 c. above, the litigation costs capitalized of $210,734 were adjusted below-the-line in December 1995.

COMMISSION STAFF'S SECOND SET OF INTERROGATORIES TO
FLORIDA CITIES WATER COMPANY
DOCKET NO. 971663-WS

47. With regard to John D. McClellan's Deposition Exhibit No.2, in 1993 and 1994, FCWC expensed the same amount of the legal expenses incurred in Case Number 93-281-CIV-FTM-21 for both book and tax purposes. In 1995, why did FCWC begin expensing different amounts of these legal expense for book and tax purposes?

Response: (MM)

In 1993 and 1994 FCWC treated legal expenses for both book and tax purposes on an accrual basis. In 1995 the Company believed it was more appropriate to deduct legal expense on a cash basis for tax purposes rather than on an accrual basis, thus creating a book / tax difference.